

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TEXAS
MIDLAND DIVISION

IN RE: §
§
TRINITY HAVEN HEALTHCARE § CASE NO. 07-70013-RBK
CENTER, INC., §
§
DEBTOR-IN-POSSESSION. §

MOTION IN AID OF APPOINTMENT AS PATIENT CARE OMBUDSMAN

Comes now the duly appointed Patient Care Ombudsman in this case, Patty Ducayet, LMSW, State Long Term Care Ombudsman (the “Ombudsman”) and respectfully files this Motion in aid of the Notice appointing her to serve as Patient Care Ombudsman. (Docket No. 40). This motion seeks assistance to address some of the challenges the Ombudsman has encountered in other cases in which she is serving as the BAPCPA Section 333(b) Patient Care Ombudsman.¹ In support of her Motion, the Ombudsman would respectfully show the Court as follows:

I. Background

1. The State Long Term Care Ombudsman² was appointed the Patient Care Ombudsman

¹The Texas State Long Term Care Ombudsman has been appointed, and is presently serving as, the Patient Care Ombudsman in three cases (involving a total of 11 facilities) pending in the Northern District of Texas: *In re* Sunflower Park Healthcare, Inc., Case No. 06-41404; *In re* Conifer Care, Inc., Case No. 06-50224; and *In re* Honor Services, Inc., Case No. 06-50223.

The Texas State Long Term Care Ombudsman also previously served as an ombudsman in a pre-BAPCPA bankruptcy case upon motion of [then] Texas Attorney General John Cornyn for the Appointment of an Ombudsman to serve as an advocate for Patients and Residents in a case involving 80 long term health care facilities. (*In re* Senior Living Properties, LLC, Case No. 02-34243, United States Bankruptcy Court for the Northern District of Texas, Dallas Division).

²The concept of a patient care ombudsman, as provided for in the Bankruptcy Abuse and Consumer Protection Act of 2005 (“BAPCPA”), is not an entirely original legislative creation.

pursuant to Section 333 of the Bankruptcy Code by Notice of the United States Trustee on February 15, 2007. (Docket No. 40); 11 U.S.C. § 333(a)(2)(A).

2. Though the Notice of Appointment contains a provision allowing the Ombudsman to receive reasonable compensation for actual, necessary services rendered as well as reimbursement for actual, necessary expenses incurred (Notice at p. 3), the State Long Term Care Ombudsman would not anticipate requesting compensation for service as the Patient Care Ombudsman in a routine bankruptcy case, and in fact has not yet requested compensation in this case or any of the other bankruptcy cases in which she serves as Patient Care Ombudsman. In addition, as the Ombudsman is represented by the Office of the Attorney General of Texas, her legal fees are not charged to the estate. The net effect is that in most cases (and to date in this case) the State Long Term Care Ombudsman is able to serve as the Patient Care Ombudsman at no fee to the estate.

3. The Ombudsman has a limited staff, including deputy ombudsman, regional ombudsman and trained volunteers. To date, the Ombudsman has not retained any additional staff to assist her with her duties in this case.³

BAPCPA incorporates references to the Older Americans Act of 1965 (42 U.S.C. § 3001, et. seq.) to provide guidance on the role of the patient care ombudsman. *See* 11 U.S.C. § 333(c)(2). The Older Americans Act of 1965 requires states to establish Long-Term Care Ombudsman programs to monitor and improve care in nursing facilities and to protect the health, safety and welfare of nursing facility patients. The State Long-Term Care Ombudsman's duties include identifying, investigating and resolving complaints made by or on behalf of residents. *See* 42 U.S.C. § 3058. The State Long-Term Care Ombudsman is also obligated to recommend needed changes in the laws affecting such facilities and to promote the development of citizen organizations to protect the well-being of residents. *Id.* The duties of the Patient Care Ombudsman under BAPCPA are more limited than those of the State Long-Term Care Ombudsman, but Patient Care Ombudsman under BAPCPA are responsible for a wider range of health care facilities.

³Some of the situations in which the Ombudsman might seek compensation or reimbursement in a bankruptcy case include: if the Ombudsman needed to hire additional staff to

4. The duties of the Patient Care Ombudsman are set forth in Section 333(b) of the Bankruptcy Code. The Ombudsman is required to monitor the quality of patient care at the Debtor-in-Possession's facility (including interviewing patients and physicians); to report on the quality of patient care to the Court after notice to parties in interest; and to notify the Court immediately, via written motion or report, if the quality of patient care is declining significantly or otherwise being materially compromised. 11 U.S.C. § 333(b)(1),(2),(3).

5. The notice requirements for the Ombudsman's report are governed by Bankruptcy Rule 2015.1(a), which provides in pertinent part as follows:

[A]t least 10 days before making a report . . . [the Ombudsman] shall give notice that the report will be made to the court. The notice shall be transmitted to the United States trustee, ***posted conspicuously at the health care facility that is the subject of the report***, and served on the debtor, the trustee, ***all patients***, and any committee elected under § 705 or appointed under § 1102 of the Code . . . or if . . . no committee of unsecured creditors has been appointed under § 1102, on the creditors included on the list filed under Rule 1007(d), and such other entities as the court may direct.

FED. R. BANKR. P. 2015.1(a) (emphasis added). The Committee Note to the rule states that the rule permits a notice to relate to a single report or to periodic reports to be given during the case. The Note further states that the location of the posted notice needs to be tailored to the specific facility and may require posting in common areas and patient rooms.

6. In the instant case, the Ombudsman intends to timely file a notice (on or before April 6, 2007, which is 10 days in advance of the first reporting deadline of April 16, 2007) that she will make reports at regular 60-day intervals during the pendency of this bankruptcy case (absent the immediate report which would be made if she determines that the quality of patient care is declining

assist her with some of the administrative functions of her job (including service of Notices) and/or if travel expenses were significant.

significantly or otherwise being materially compromised). In the event that the Court has not ruled on the relief requested below prior to the April 6, 2007 notice date, the Ombudsman will serve copies of the notice upon the United States Trustee, the Debtor-in-Possession, and all creditors included on the Debtor-in-Possession's Amended Limited Creditor Matrix (Docket No. 62).

7. In the other bankruptcy cases in which the State Long Term Care Ombudsman is serving as the Patient Care Ombudsman, she has encountered some challenges in fulfilling her obligation to interview physicians (i.e., the Medical Director of the facility). In addition, the Ombudsman believes that service of notice of forthcoming report pursuant to Bankruptcy Rule 2015.1(a) on *all patients* at a facility is not only burdensome on her limited staff but further has, at times, caused alarm among the individuals who receive the notice with no additional explanation about its meaning.

8. In light of her limited resources and staff, and in an effort to best protect the interests of the residents of the facility, the Ombudsman respectfully requests the following relief in order to assist her with the execution of her duties in this bankruptcy case.

II. Relief Requested

9. In order to prevent some of the difficulties she has encountered in other cases in completing physician interviews as required by 11 U.S.C. § 333(b)(1), the Ombudsman respectfully requests that the Court expressly order the Debtor-in-Possession to cooperate with her in all respects, including making its Medical Director and/or other physicians under the Debtor-in-Possession's control available for interviews as requested by the Ombudsman.

10. In order to relieve both the burden and the difficulties associated with service of Notice on "all patients" pursuant to Bankruptcy Rule 2015.1(a), the Ombudsman respectfully requests that

notice of the Report be provided to the facility administrator to distribute in his or her discretion to patients and/or their representatives. In making this request, the Ombudsman does not suggest that all patients should not be given notice of the forthcoming reports or how to go about obtaining copies of the report, but rather that serving each resident with a physical copy of the notice may be confusing and/or alarming, especially if the resident either does not know about the bankruptcy or does not understand how or whether the making of a report to the Court affects them. The Ombudsman respectfully suggests that the facility administrator would be in the best position to determine the most effective manner to notify each individual patient (or his or her representative) of the forthcoming reports. The Ombudsman would further suggest that a meeting between the facility's staff, the Ombudsman or her representative, the Residents Council and the Family Council to discuss this issue, as well as the Ombudsman's function as Patient Care Ombudsman in the bankruptcy case, might be very productive.

11. Alternatively, if the Court would prefer that each patient physically receive a copy of the Notice, the Ombudsman respectfully suggests that a cover letter (which generally explains that the Debtor-in-Possession is in bankruptcy and that a Patient Care Ombudsman has been appointed to monitor the quality of patient care and make reports to the Court) might be useful to attach to the notices served to patients. If the Court prefers this method, the Ombudsman respectfully seeks direction from the Court regarding the specific contents of such a cover letter and would be pleased to work with the Office of the United States Trustee to draft an appropriate letter.

12. The Ombudsman also seeks clarification from the Court regarding the posting requirement contained in Bankruptcy Rule 2015.1(a). The rule states that the notice of the report "shall be posted conspicuously at the health care facility." FED. R. BANKR. P. 2015.1(a). As the

Committee Note indicates, the location of the posted notice should be tailored to the specific facility. In the instant case, as the Ombudsman intends to file an initial blanket notice that she will make reports at regular 60-day intervals during the pendency of this case, the Ombudsman respectfully suggests that the notice should remain posted for the duration of the bankruptcy case; however the Ombudsman respectfully requests direction from the Court, with input from the Debtor-in-Possession, regarding the appropriate location of the posting and whether multiple postings are appropriate at this facility.

13. Finally, although Rule 2015.1(a) does not require that a copy of the written Report itself be posted at the facility, the Ombudsman believes that it would be in the interests of the residents for a copy of the Report to also be posted at the facility. Accordingly, the Ombudsman respectfully requests that the Court order the facility administrator to post a copy of the written report in the same manner and at the same location(s) where the Notice is posted. The Ombudsman would suggest that the Report remain posted until the next Report is filed, at which time it may be removed and replaced with the most recent Report.

WHEREFORE, the Ombudsman respectfully requests: (1) that the Court order the Debtor-in-Possession cooperate with her in all respects, including making its Medical Director and/or other physicians under the Debtor-in-Possession's control available for interviews as requested; (2) that the Court order that the Ombudsman's obligation to serve notice of her reports on "all patients" pursuant to Bankruptcy Rule 2015.1(a) will be satisfied by service of the notice on the Facility Administrator to distribute in his or her discretion to patients and/or their representatives and further that the Facility Administrator shall determine the most effective method to provide notice of the forthcoming reports to each individual or his or her representative; (3) that the Court enter an order

tailoring the location of the posted notice to this specific facility; and (4) that the Court order the Facility Administrator to post a copy of the Report itself in the same manner and at the same location(s) where the Notice is posted.

Respectfully submitted,

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing motion was served on all parties listed below on March 29, 2007, via regular U.S. Mail, postage prepaid, or by the Court's Electronic Filing System, as noted.

/s/ Hal F. Morris
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