IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

IN RE:	)	Chapter 11
	)	
VENCOR, INC., et al.,	)	Case Nos. 99-3199 (MFW) to
	)	99-3327 (MFW)
Debtor.	)	
	)	(Jointly Administered Under
	)	Case No. 99-3199 (MFW))

MEMORANDUM OPINION[1]

This matter is before the Court on the Motion for an Order Authorizing the Debtor to Assume a Contract with Hyperbaric Management Systems, Inc. ("HMS"). For the reasons set forth below, we grant the Motion.

I. FACTUAL BACKGROUND

On January 10, 1997, Transitional Hospital Corporation of Nevada d/b/a THC Las Vegas ("THC") entered into an agreement ("the Agreement") with HMS. The Agreement provides that HMS will supply hyperbaric services to inpatients and outpatients at THC's Las Vegas medical facility. Under the Agreement, HMS is required to provide a nurse to market the hyperbaric program. In addition, the Agreement required HMS to develop a marketing and wound education program to recruit outpatient referral programs to utilize the Las Vegas medical facility. THC was required to

[1] This Opinion constitutes the findings of fact and conclusions of law of the Court pursuant to Federal Rule of Bankruptcy Procedure 7052, which is made applicable to contested matters by Federal Rule of Bankruptcy Procedure 9014.

provide space and utilities for the hyperbaric facility within its Las Vegas medical center, and billing and collection services. In addition, THC agreed to "cooperate [in the marketing of the hyperbaric services] . . . by means available . . . including joint negotiation of special rates managed care contracts [third-party payor contracts]." Under the Agreement THC was to pay HMS the greater of $20,000 per month or the amount actually collected for services rendered by HMS to THC's patients. THC has not failed in its obligation to pay HMS.

On September 13, 1999, THC and its affiliates (including its parent, Vencor, Inc.) filed voluntary petitions for relief under chapter 11. The Debtors operated their businesses and managed their properties as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. On March 16, 2002, an order was entered confirming Vencor's Fourth Amended Joint Plan of Reorganization of Vencor, Inc. and Affiliated Debtors under Chapter 11 of the Bankruptcy Code ("the Plan"). The Plan became effective on April 20, 2002 ("the Effective Date"). Pursuant to the Plan, each of the Debtors' estates were consolidated as of the Effective Date.

On May 1, 2001, Vencor filed a Motion for Authority to Assume the Agreement with HMS. HMS filed an objection to the Motion, alleging that Vencor has breached the Agreement by

failing to market the hyperbaric services to third-party payors. HMS asserts this breach cannot be cured.

A hearing was held on the Motion on September 12, 2001. At that time, we concluded that Vencor was not obligated under the Agreement to market HMS' services. However, we directed Vencor to designate a representative to cooperate with HMS in acquiring additional third-party payor contracts. We reserved decision on the Motion until further evidence could be presented on the parties' joint efforts to market the hyperbaric services.

A continued hearing was held on March 21, 2002. At that hearing, Vencor presented evidence that it had signed seven new contracts with third-party payors for hyperbaric services. A decision on the Motion was reserved, however, to allow the parties to complete discovery. A final hearing was held on November 21, 2002. At that hearing, evidence was presented that Vencor had signed three additional third-party payor contracts. HMS continues to object to the assumption of the Agreement.

II. JURISDICTION

This Court has jurisdiction over this proceeding pursuant to 28 U.S.C. §§ 1334 and 157(b)(2)(A), (M) & (O).

III. DISCUSSION

The assumption by a debtor of an executory contract is governed by section 365 which provides:

> (a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.
>
> (b)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee -
>
> > (A) cures, or provides adequate assurance that the trustee will promptly cure, such default;
> >
> > (B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and
> >
> > (C) provides adequate assurance of future performance under such contract or lease.

11 U.S.C. § 365.

HMS makes the following arguments: (1) Vencor has breached the contract and cannot cure that breach, thereby making it impossible for Vencor to assume the contract, and (2) Vencor lacks a proper business reason to assume the contract.

A. Breach of Contract

HMS alleges that Vencor breached the Agreement because it failed to market its hyperbaric services to third-party payors. The Agreement, however, merely requires Vencor to "cooperate" with HMS in its marketing efforts and to "jointly negotiate" such contracts with HMS. The Agreement does not expressly require Vencor to find third-party payors who are willing to reimburse patients for hyperbaric services.

The Agreement provides that Nevada law is the choice of law. In Nevada, "when a contract is ambiguous, it will be construed against the drafter." Dickenson v. State, Dep't of Wildlife, 877 P.2d 1059, 1061 (Nev. 1994). Because HMS drafted the Agreement, we conclude that Vencor had no duty to market the hyperbaric services since HMS failed to explicitly require Vencor to do so.

Similarly, HMS' argument that Vencor "has failed to support the program" does not rely on any specific obligation in the Agreement that Vencor has breached. HMS' assertion that Vencor failed to provide the Wound Care Facility with at least twenty-five hundred square feet of space is without support in the record. Finally, HMS' argument that Vencor has not billed or collected money for services rendered is not supported by the record. The record reflects that Vencor has generally billed and collected accounts receivable owed to HMS. Although a de minimus amount of receivables were not billed properly to the third-party

payors, that is not unusual in this industry. Vencor's witness testified that those bills are being corrected.

Consequently, we conclude that Vencor has not committed a breach of the Agreement that it cannot cure. Further, Vencor has provided adequate assurance to the Court that it will promptly cure the defaults that it has committed (namely, the billing errors). 11 U.S.C. § 365(b)(1)(A).

B. Business Judgment

HMS argues that there is no legitimate business reason for Vencor to assume the Agreement. Under the Agreement, Vencor derives no income from the hyperbaric services; and, in fact, may have to pay HMS if income from those services is less than $20,000 per month. However, Vencor notes that its ability to offer hyperbaric services results in additional patients who may need other services from Vencor. Further, if the Agreement is rejected, HMS asserts it has a significant claim for rejection damages.[2] 11 U.S.C. § 365(g). Vencor's assumption of the Agreement will avoid the large unsecured claim flowing from the breach caused by the rejection of the Agreement.

[2] The amount of the rejection damages claim is, of course, disputed by Vencor. It is unnecessary to decide this issue, however, since the rejection damages would be at least $20,000 per month for the life of the Agreement.

The Court's role in the assumption/rejection process is one of an "overseer of the wisdom with which the bankruptcy estate's property is being managed by the trustee or debtor-in-possession." In re Orion Pictures Corp., 4 F.3d 1095, 1099 (2d Cir. 1992). "[A] bankruptcy court reviewing a trustee's or debtor-in-possession's decision to assume or reject an executory contract should examine [the] contract and the surrounding circumstances and apply its best 'business judgment' to determine if it would be beneficial or burdensome to the estate to assume it." Id. 1098. The business judgment rule requires the Court to determine whether a reasonable business person would make a similar decision under similar circumstances.

In this case, we conclude that even if Vencor derived no direct economic benefit from the Agreement, the avoidance of a large claim is a factor which would cause a reasonable business person to assume this contract. See, e.g., In re Sun City Investments, Inc., 89 B.R. 245, 249 (Bankr. M.D. Fla. 1988)(cited in In re Riodizo, Inc., 204 B.R. 417, 425 (Bankr. S.D.N.Y. 1997)(concluding debtor had not exercised good business judgment in rejecting a contract because rejection created a large claim against the estate).

IV. CONCLUSION

For the foregoing reasons, we grant the Motion of Vencor and authorize it to assume the Agreement with Hyperbaric Management Systems, Inc.

An appropriate Order is attached.

BY THE COURT:

Dated: April 30, 2003

Mary F. Walrath
United States Bankruptcy Judge

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O R D E R

AND NOW, this **30TH** day of **APRIL, 2003**, upon consideration of the Motion for an Order Authorizing Vencor, Inc. to Assume a Contract with Hyperbaric Management Systems, Inc. ("the Motion"), for the reasons set forth in the accompanying Memorandum Opinion, it is hereby

ORDERED that the Motion is **GRANTED.**

BY THE COURT:

Mary F. Walrath
United States Bankruptcy Judge

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