IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
CONNECTIONS COMMUNITY SUPPORT PROGRAMS, INC.,	Case No. 21-10723 (MFW)
Debtor.	**Hearing Date: June 8, 2021 at 2 p.m. (ET)** **Obj. Deadline: June 4, 2021 at 10 a.m. (ET)[1]**
	Related Docket Nos. 54, 71, 154, 155, 158, 159, 171 & 172

AMERIHEALTH CARITAS DELAWARE, INC.'S OBJECTION (A) TO ASSUMPTION AND ASSIGNMENT OF CONTRACT AND (B) TO SALE

AmeriHealth Caritas Delaware, Inc. ("AmeriHealth Caritas" or "ACDE") hereby objects (the "Objection") (A) to the assumption and assignment of the Agreement (defined below) pursuant to various assumption notices [D.I. 154, 155, 158, 159, 171, 172] (the "Cure Notices"), and (B) to the above-captioned debtor's (the "Debtor") proposed sale (the "Sale") of assets pursuant to the motions [D.I. 54, 71] (the "Sale Motions") filed by the Debtor.

PRELIMINARY STATEMENT[2]

1. The Agreement between the Debtor and AmeriHealth Caritas is not assignable. The Agreement is one for professional services, where the Debtor provides services to AmeriHealth Caritas' Members, the type of duties that were not assignable under common law, and are not assignable under section 365(c) of the Bankruptcy Code. AmeriHealth Caritas does not consent to an assignment.

[1] AmeriHealth Caritas' deadline was extended by agreement of the Debtor.

[2] Any capitalized term not otherwise defined in this Preliminary Statement shall have the same meaning as that ascribed to it elsewhere in the Objection.

2. In the alternative, to the extent that the Court finds that the Agreement is assignable, the Sale and the assumption and assignment of the Agreement cannot be approved as proposed. AmeriHealth Caritas, postpetition, prepaid $150,000, which is not referenced in any Cure Notice. Additionally, the Agreement may only be assumed upon the Debtor honoring all obligations outstanding at the time of assumption and assignment (even those unknown and unknowable), or clarification that the Buyer will (and can) honor such obligations, including indemnification obligations.

3. Finally, the Debtor proposes to assume and assign part of the Agreement, yet retain its contractual claims against AmeriHealth Caritas. This is improper. Assuming arguendo that the Agreement is assignable, the Debtor can either (a) convey the Debtor's alleged claims against AmeriHealth Caritas to a buyer along with the Agreement, fully subject to AmeriHealth Caritas' setoff rights, recoupment rights, and defenses or (b) leave the alleged claims and the Agreement out of the Sale, and have them both remain with the estate. It cannot "split" its contractual rights in two, as proposed in the Sale Motions.

BACKGROUND REGARDING AMERIHEALTH CARITAS

4. AmeriHealth Caritas is a managed care organization ("MCO") that is responsible for providing and/or arranging healthcare services to certain Delaware individuals (each individually, a "Member") who are Medicaid or Delaware Healthy Children Program clients who are enrolled in AmeriHealth Caritas' MCO.

5. As an MCO, AmeriHealth Caritas contracts with various healthcare providers (each, a "Provider") that agree to render or provide certain healthcare services or supplies to Members.

6. In turn, AmeriHealth Caritas agrees to compensate the Provider pursuant to certain terms and conditions governed by the respective provider agreement.

BACKGROUND REGARDING DEBTOR'S BANKRUPTCY CASE AND DEBTOR'S RELATIONSHIP WITH AMERIHEALTH CARITAS

7. AmeriHealth Caritas and the Debtor are parties to that certain *Ancillary Services Agreement* (together with all amendments, the "Agreement")[3] pursuant to which the Debtor provides certain healthcare services to AmeriHealth Caritas Members, and AmeriHealth Caritas, as an MCO, compensates the Debtor for such services.

8. The Debtor's first-day declaration discloses that the Debtor is the subject of an investigation by the United States Department of Justice (the "DOJ") and remains in litigation with the DOJ as well as numerous other parties. The Debtor asserts that it has claims against AmeriHealth Caritas related to the Debtor's billing practices and AmeriHealth Caritas' compensation practices. Katz Decl. ¶¶ 37–42.[4] See also D.I. 167 (listing litigation, including litigation with the United States, the State of Delaware, and relators). By letter dated May 5, 2021, the Debtor sent a demand letter, asserting a claim in excess of $700,000 relating to alleged billing issues.

9. Under both Sale Motions, "any and all claims and causes of action of" the Debtor are "Excluded Assets" as defined by Section 2.2 of the Sale Motions and "are not a part of the sale

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[3] The Agreement contains commercially sensitive information and is not attached to this Objection. The Debtor is in possession of the Agreement. Subject to the confidentiality provisions of the Agreement and adequate assurances that all appropriate protections will be maintained, copies of the Agreement will be made available to a proper party with a legitimate purpose for requesting this information by contacting Lucian B. Murley, Esq., Saul Ewing Arnstein & Lehr LLP, 1201 North Market Street, Suite 2300, Wilmington, DE 19801.

[4] AmeriHealth Caritas disputes that the Debtor has any valid claim against AmeriHealth Caritas, and reserves any and all rights.

and purchase contemplated" by the Sale Motions. Accordingly, the Debtor's purported claim against AmeriHealth Caritas is not being sold.

10. On or about May 12, 2021, AmeriHealth Caritas sent the Debtor $150,000 (the "Prepayment") as advance on future services. In making the Prepayment, AmeriHealth Caritas explicitly referenced its right to offset or recoup the Prepayment.

11. From May 19, 2021 through May 26, 2021, the Debtor filed various Cure Notices, which all propose a $0 cure amount to be paid to AmeriHealth Caritas in connection with any assumption or assumption and assignment of the Agreement.

OBJECTION

A. The Agreement Is Not Assignable.

12. Section 365(c)(1) of the Bankruptcy Code prohibits the Debtor from assuming and assigning an agreement that is not assignable under applicable law. See 11 U.S.C. § 365(c)(1). This Bankruptcy Code section incorporates the common law rule that duties under contract to perform personal services could not be assigned. See generally 3 Collier on Bankruptcy ¶ 365.07[b] (Richard Levin & Henry J. Sommer eds., 16th ed.). "[W]hether a contract is personal in nature depends upon the nature of the subject of the contract, the circumstances of the case and the intent of the parties." Headquarters Dodge, Inc. v. Leonard, 13 F.3d 674, 682–83 (3d Cir. 1994).

13. The Debtor bears the burden of demonstrating that the Agreement is an executory contract subject to assumption and assignment. See In re GlycoGenesys, Inc., 352 B.R. 568, 570 (Bankr. D. Mass. 2006) (providing that the trustee has the burden to demonstrate that an executory contract may be assumed and assigned under section 365(c)); cf. In re Exide Techs., 607 F.3d 957,

962 (3d Cir. 2010) ("The party seeking to reject a contract bears the burden of demonstrating that it is executory.").

14. Here, the parties agreed that the Agreement is for professional services and that written consent is required for an assignment: "This Agreement, being for the purpose of retaining the professional services of Provider [the Debtor], shall not be assigned, subcontracted, or delegated by Provider [the Debtor] without the express written consent of ACDE." Agreement § 10.2. Especially because AmeriHealth Caritas contracted with the Debtor to provide its unique professional skills and medical services to AmeriHealth Caritas' Members, AmeriHealth Caritas submits that the Agreement is not assignable under section 365(c)(1) of the Bankruptcy Code, and the Debtor cannot meet its burden. See generally In re Rooster, Inc., 100 B.R. 228, 232 (Bankr. E.D. Pa. 1989) ("A contract for 'personal services' contemplates performance of contracted-for duties involving the exercise of special knowledge, judgment, taste, skill, or ability. These services are not assignable by the party under obligation to perform without the consent of the other contracting party."). AmeriHealth Caritas does not know whether there are any quality or access concerns with respect to the yet to be finalized purchaser and whether it would pass muster under AmeriHealth Caritas' credentialing process. See generally 42 C.F.R. § 438.206(b) (requirements for delivery network); 42 C.F.R. § 438.214(b) (credentialing requirements). AmeriHealth Caritas also does not know whether the purchaser is excluded from participation in federal health care programs. See 42 C.F.R. § 438.214(d)(1).

B. **In the Alternative, to the Extent the Court Finds the Agreement Assignable, AmeriHealth Caritas Objects to the Assumption and Assignment of the Agreement.**

15. To the extent that the Court finds that the Agreement is assignable, AmeriHealth Caritas hereby objects on the following bases.

(a) The Cure Amount Is Not $0.

16. The Debtor proposes to assume the Agreement for a $0 cure. Under the express terms of section 365 of the Bankruptcy Code, in connection with an assumption, all defaults must be cured and all other obligations arising under such agreement must be assumed in their entirety and must be performed as and when provided under the contract and applicable non-bankruptcy law. The Debtor's obligations therefore include curing all defaults existing as of the time of assumption and the satisfaction of all other obligations as they arise under the Agreement. See In re Liljeberg Eners., Inc., 304 F.3d 410, 438 (5th Cir. 2002); In re Building Block Child Care Ctrs., Inc., 234 B.R. 762, 765 (9th Cir. BAP 1999).

17. The parties have continued to perform under the Agreement. Accordingly, additional obligations to AmeriHealth Caritas could be accruing under the Agreement until the closing of the Sale. Thus, if the Debtor fails to honor such obligations in the ordinary course of business arising prior to the assumption and assignment of the Agreement, such amounts must be paid as additional cure amounts. Any order approving the assumption and assignment of the Agreement should reflect this obligation to cure. At the very least, the Debtor should be subject to any cure amount relating to the $150,000 Prepayment.

(b) The Agreement May Not Be Assumed and Assigned Free and Clear of Indemnification Obligations.

18. Section 5.3 of the Agreement sets forth various indemnification obligations of the Debtor, including but not limited to, defending and indemnifying AmeriHealth Caritas (i) in the event of liabilities incurred by negligent or willful misconduct by the Debtor and/or any of the Debtor's employees or (ii) in the event of death, personal injury, or malpractice in connection with the Debtor's performance of its services in connection with the Agreement.

19. Such indemnification obligations—that the Debtor or future buyer must indemnify AmeriHealth Caritas—may have arisen or may arise before the Sale and closing, but are unknown. The Debtor and the buyer must provide assurance that such obligations will be satisfied and not extinguished through the Sale. See 11 U.S.C. § 365(b)(1)(C) (providing that the debtor may not assume an executory contract unless, at the time of assumption, the debtor provides adequate assurance of future performance); 11 U.S.C. § 365(f)(2)(B); see generally In re Great Atl. & Pac. Tea Co., Inc., 472 B.R. 666, 674–75 (S.D.N.Y. 2012) (noting that the phrase "adequate assurance of future performance" is not defined under the Bankruptcy Code, and holding that the phrase means that it must appear to the court that obligations under the executory contract or lease will be met, based on the facts and circumstances of the case).

20. To the extent that assumption and assignment is granted over AmeriHealth Caritas' Objection, any sale order should specify (a) that the buyer does not take the Agreement free and clear of such indemnification obligations and (b) that the buyer is assigned the Agreement subject to any and all such obligations under the Agreement.

(c) The Agreement May Not Be Assumed and Assigned Separate from Debtor's Alleged Claim Against AmeriHealth Caritas.

21. Finally, the Debtor cannot properly split its alleged claims against AmeriHealth Caritas from the Agreement, assuming and assigning the Agreement to a buyer (presumably free and clear of all of the Debtor's pre-assignment obligations, including AmeriHealth Caritas' counterclaims and defenses) and retain a putative contractual cause of action against AmeriHealth Caritas. Rather, if the Agreement (subject to AmeriHealth Caritas' right of adequate assurance and cure) is assumed and assigned, the purchaser takes everything under the Agreement—the burdens and the benefits. See, e.g., University Med. Ctr. v. Sullivan (In re University Med. Ctr.), 973 F.2d 1065, 1075 (holding, in the context of a provider agreement, that "[a]ssumption of the

executory contract requires the debtor to accept its burdens as well as permitting the debtor to profit from its benefits."). This proposed "splitting" of the Agreement and the putative contractual claim would prejudice AmeriHealth Caritas in innumerable ways.

22. Importantly, splitting the claim from the Agreement may lead to the argument that such an act extinguishes AmeriHealth Caritas' setoff rights. AmeriHealth Caritas has an explicit contractual right of offset. See Agreement § 3.1 ("ACDE shall pay Provider for Covered Services provided to Members pursuant to the terms of this Agreement. ACDE shall have the right to offset claims payments to Provider by any amount owed by Provider to ACDE, following at least thirty (30) days' written notice."). The Debtor could owe (and likely does owe) AmeriHealth Caritas any number of obligations under the Agreement, including over-billings or mis-billings under the Agreement, indemnification obligations, or other breaches, unknown (and unknowable) as of the date hereof. Under the Agreement and the Bankruptcy Code, AmeriHealth Caritas would be entitled to offset the Debtor's obligations against the Debtor's claims against AmeriHealth Caritas. See Agreement § 3.1; 11 U.S.C. § 553(a) ("[T]his title does not affect any right of a creditor to offset a mutual debt . . . ."); see generally Citizens Bank of Md. v. Strumpf, 516 U.S. 16, 18 (1995) ("Although no federal right of setoff is created by the Bankruptcy Code, 11 U.S.C. § 553(a) provides that, with certain exceptions, whatever right of setoff otherwise exists is preserved in bankruptcy.").

23. However, under the Debtor's fast-track sale and assumption process, AmeriHealth Caritas is untenably forced to assert these unknown and unknowable Debtor obligations as a "cure," otherwise the Debtor will presumably argue that they are waived and not able to be offset against the Debtor's alleged claims against AmeriHealth Caritas. Similarly, the buyer will presumably assert that it takes an assignment of the Agreement free and clear of such amounts.

See MBNA Am. Bank v. Trans World Airlines, Inc. (In re Trans World Airlines, Inc.), 275 B.R. 712, 718 (Bankr. D. Del. 2002) ("Section 363 . . . eliminate[s] setoff rights vis-à-vis the buyer by permitting a sale free of such interests."). As such, simply as a matter of adequate protection, the Debtor's proposed "splitting" is objectionable, and the Court should condition the Sale as is necessary to provide adequate protection of AmeriHealth Caritas' setoff interests. See 11 U.S.C. § 363(e) ("[O]n request of an entity that has an interest in property used, sold, or leased . . . by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest.").

24. Adequate protection of AmeriHealth Caritas' setoff interests, in the context of the proposed Sale, would be either (a) that any of Debtor's claims related to the Agreement against AmeriHealth Caritas are conveyed to a buyer along with the Agreement, fully subject to AmeriHealth Caritas' setoff interests or (b) that the any claims related to the Agreement and the Agreement itself are carved out of the Sale and remain with the estate. AmeriHealth Caritas respectfully submits that under no circumstance should the Court enter an order approving the Sale free and clear of AmeriHealth Caritas' rights of recoupment or other defenses to any claim under the Agreement. In re Revel AC Inc., 909 F.3d 597, 604 (3d Cir. 2018) ("[T]he doctrine of equitable recoupment is an affirmative defense, and the sale of assets 'free and clear' of liens, encumbrances, and interests 'does not include defenses to claims.'") (quoting Folger Adam Sec., Inc. v. DeMatteis/MacGregor, JV, 209 F.3d 252, 257 (3d Cir. 2000)).

RESERVATION OF RIGHTS

25. AmeriHealth Caritas reserves the right to supplement this Objection and reserves the right to alter, modify, and/or assert additional cure amounts to the Agreement.

WHEREFORE, AmeriHealth Caritas respectfully requests that the Court enter an order denying the assumption and assignment of the Agreement or, in the alternative, conditioning assumption and assignment of the Agreement consistent with this Objection.

Dated: June 4, 2021

SAUL EWING ARNSTEIN & LEHR LLP

/s/ Lucian B. Murley

Lucian B. Murley (DE No. 4892-)
1201 N. Market Street, Suite 2300
P.O. Box 1266
Wilmington, DE 19899
Telephone: (302) 421-6898
E-mail: luke.murley@saul.com

Attorney for AmeriHealth Caritas Delaware, Inc.

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FOR THE DISTRICT OF DELAWARE

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Debtor.	)	

CERTIFICATE OF SERVICE

I, Lucian B. Murley, hereby certify that on June 4, 2021, I caused a copy of *AmeriHealth Caritas Delaware, Inc.'s Objection (A) to Assumption and Assignment of Contracts and (B) to Sale* to be served electronically with the Court and served through the Court's CM/ECF system upon all registered electronic filers appearing in this case and via Electronic Mail on the parties on the attached service list.

SAUL EWING ARNSTEIN & LEHR LLP

By: */s/ Lucian B. Murley*
Lucian B. Murley
1201 N. Market Street, Suite 2300
P. O. Box 1266
Wilmington, DE 19899
(302) 421-6898

Dated: June 4, 2021

Service List

William E. Chipman, Jr., Esquire
Mark L. Desgrosseilliers, Esquire
Mark D. Olivere, Esquire
Chipman Brown Cicero & Cole, LLP
Hercules Plaza
1313 North Market Street, Suite 5400
Wilmington, DE 19801
chipman@chipmanbrown.com
desgross@chipmanbrown.com
olivere@chipmanbrown.com

Christopher A. Ward, Esquire
Shanti M. Katona, Esquire
Brenna A. Dolphin, Esquire
Polsinelli PC
222 Delaware Avenue, Suite 1101
Wilmington, DE 19801
cward@polsinelli.com
skatona@polsinelli.com
bdolphin@polsinelli.com

Rosa Sierra, Esquire
Office of the United States Trustee
J. Caleb Boggs Federal Building
844 King Street, Suite 2207, Lockbox 35
Wilmington, DE 19801
rosa.sierra@usdoj.gov

Joseph H. Huston, Jr., Esquire
David W. Giattino, Esquire
Stevens & Lee, P.C.
919 North Market Street, Suite 1300
Wilmington, DE 19801
jhh@stevenslee.com
dwg@stevenslee.com