

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE: §
§ Case No. 12-33299
SBMC HEALTHCARE, LLC, § (Chapter 11)
§
DEBTOR. §

**THE TEXAS DEPARTMENT OF STATE HEALTH SERVICES’
OBJECTION TO THE DEBTOR’S NOTICE OF INTENT TO
ABANDON PROPERTY INCLUDING MEDICAL RECORDS**
(Relates to Dkt. No. 352)

TO THE HONORABLE JEFF BOHM,
UNITED STATES BANKRUPTCY JUDGE:

The TEXAS DEPARTMENT OF STATE HEALTH SERVICES (“DSHS”), through the Texas Attorney General’s Office, respectfully files this Objection to the Debtor’s Notice of Intent to Abandon Property Including Medical Records (the “Objection”)¹ and in support thereof would show:

I. Background

1. SBMC Healthcare, LLC (“SBMC” or the “Debtor”) is a hospital facility located in Houston, Texas. On or about April 30, 2012, SBMC filed a voluntary petition under Chapter 11 of the Bankruptcy Code. Presently, SBMC is acting as debtor-in-possession operating its business and controlling its assets pursuant to 11 U.S.C. §§ 1107 and 1108 of the Bankruptcy Code. However, SBMC is no longer rendering medical services to patients.

¹ DSHS files this Objection to put the Debtor and other parties on notice that it is opposed to the proposed abandonment of medical records, and to give the Debtor an opportunity to reconsider its position and withdraw the notice. If the Debtor chooses to pursue abandonment of the subject records, DSHS reserves the right to file a comprehensive memorandum of law in support of its objection within the time period set forth in FED. R. BANKR. P. 6007, and further reserves the right to seek attorneys’ fees and costs if representative(s) of the Texas Attorney General’s Office travel to Houston to participate in a contested hearing on the issue of abandonment of medical records.

2. On August 9, 2012, the Debtor filed its Notice of Intent to Abandon Property Including Medical Records (Dkt. No. 352) (the “Notice”), which seeks to “abandon the Medical Records and all other documents located at Iron Mountain 3643 Willowbend, Suite 630, Houston, TX 77054.” Because the proposed abandonment would plainly be in violation of applicable state and federal law regarding the retention of medical records, DSHS requests that the Court enter an order denying the proposed abandonment.²

II. Objection to the Proposed Abandonment of Medical Records

3. In *Midlantic Nat'l Bank v. N.J. Dept. of Env'tl. Prot.*, 474 U.S. 494 (1986), the U.S. Supreme Court held that “[n]either the Court nor Congress has granted a trustee in bankruptcy powers that would lend support to a right to abandon property in contravention of state or local laws designed to protect public health or safety,” 474 U.S. at 502, and that 28 U.S.C. § 959(b) “provides additional evidence that Congress did not intend for the Bankruptcy Code to pre-empt all state laws.” 474 U.S. at 505. Ultimately, the Court held “that a trustee may not abandon property in contravention of a state statute or regulation that is reasonably designed to protect the public health or safety from identified hazards.” *Id.* at 507. Further, as noted in *Midlantic*, the estate must be managed and operated in accordance with Texas law, pursuant to 28 U.S.C. § 959(b), which also precludes wholesale abandonment.³

² The Notice states that “upon information and belief, the medical records located at Iron Mountain are essentially duplicative of the electronic records that are in possession of Spring Branch Medical Center, Inc. with the exception of hand-written doctors’ notes.” Applicable state law requires the Debtor to retain records in their “original or legally reproduced form.” See 25 T.A.C. § 133.41(j)(8), *infra*. DSHS submits that unless the Debtor can establish that electronic records are “legally reproduced” duplicates, and include the doctors’ handwritten notes, abandonment as proposed under the Notice would violate applicable state law.

³ “[A] Trustee ...including a debtor in possession, shall manage and operate the property in his possession as such trustee...according to the requirements of the valid laws of the state in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.” *Midlantic*, 474 U.S. at 505.

4. United States Bankruptcy Judge Marvin Isgur subsequently interpreted *Midlantic* as follows:

The Court reads the Supreme Court's *Midlantic* opinion to require the Court to determine whether the debtor is violating a statute "reasonably designed to protect the public health or safety from identified hazards," not the extent to which particular conduct imposes actual and imminent threats. *Midlantic*, 474 U.S. at 507, 106 S.Ct. 755 ("we hold that a trustee may not abandon property in contravention of a state statute or regulation that is reasonably designed to protect the public health or safety from identified hazards"). This Court need not make a determination whether the environmental hazard presents an imminent or identifiable harm. It is enough that the Commission's claim arises from a state law designed to protect the public from an identified hazard. It is not the Court's prerogative to replace the legislature's judgment with its own judgment as to what conduct constitutes a sufficient threat to the public.

In re American Coastal Energy, Inc., 399 B.R. 805, 813 (Bankr. S.D. Tex. 2009). Plainly, the proposed abandonment of medical records would violate the Debtor's duty under applicable state law to maintain such records. *See, e.g.*, 25 T.A.C. § 133.41(j)(8) (requiring that medical records be retained by the hospital in their original or legally reproduced form for a period of at least ten years). Upon information and belief, most of the records would be subject to this provision. And the proposed abandonment would just as plainly constitute a threat to the welfare of the individuals whose patient records are at risk of abandonment if such individuals can no longer access the records.

5. Further, allowing the proposed abandonment would render Section 351 of the Bankruptcy Code a nullity. That section sets forth the minimum requirements for notice and maintenance of patient records before such records can be disposed, if the debtor or trustee does not have sufficient funds to pay for storage of such records in compliance with applicable Federal or State law. Section 351 states that the requirements set forth therein disposal of patient records "shall apply", so compliance with that provision is not voluntary. Indeed, it would completely frustrate Congress' intent in enacting Section 351 if a debtor or trustee could

circumvent its duty thereunder simply by abandoning medical records rather than maintain them in accordance with applicable nonbankruptcy law, or disposing the records pursuant to Section 351 of the Bankruptcy Code. Accordingly, DSHS respectfully requests that the Court enter an order prohibiting the abandonment of medical records as contemplated under the Notice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 13, 2012, a true and correct copy of the foregoing pleading was served on the parties reflected below via email, and on those parties entitled to notice via the court's electronic filing system.

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