

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON DIVISION**

IN RE:

**NURSES' REGISTRY AND HOME
HEALTH CORPORATION**

CASE NO. 15-51278

DEBTOR

**NURSES' REGISTRY AND HOME
HEALTH CORPORATION**

PLAINTIFF

V.

ADV. NO. 15-5074

**SYLVIA MATHEWS BURWELL, in her
capacity as Secretary of the United States
Department of Health & Human Services;
CENTERS FOR MEDICARE AND
MEDICAID SERVICES; and
ADVANCEMED CORPORATION**

DEFENDANTS

ORDER

This matter is before the Court on the Plaintiff's Emergency Motion for a Preliminary Injunction or Temporary Restraining Order [Doc. 2] and the Defendants' Response [Doc. 3] in opposition. The Court held an evidentiary hearing on July 1, 2015 and issued oral findings of fact and conclusions of law on the record, which the Court further supplements with the following:

During closing argument on Plaintiff's Emergency Motion, the Defendants cited a newly decided case not included in their briefs, *Florida Agency for Health Care Administration v. Bayou Shores SNF, LLC (In re Bayou Shores SNF, LLC)*, No. 8:14-bk-9521-MGW, 2015 WL 3935491 (M.D. Fla. June 26, 2015). The *Bayou Shores* case, however, only points to another reason that this Court's exercise of jurisdiction is proper. In *Bayou Shores*, the District Court for the Middle District of Florida reversed a decision of the Bankruptcy Court for the Middle

District of Florida, *In re Bayou Shores SNF, LLC*, 525 B.R. 160 (Bankr. M.D. Fla. 2014), that held it had jurisdiction over a Medicare dispute under 28 U.S.C. § 1334 because 42 U.S.C. § 405(h) only expressly prohibits unexhausted Medicare disputes from being filed in federal court under 28 U.S.C. §§ 1331 and 1346.

The Bankruptcy Court's decision was consistent with the holdings of two circuits and several bankruptcy courts. *See Univ. Med. Ctr. v. Sullivan (In re Univ. Med. Ctr.)*, 973 F.2d 1065, 1073-74 (3d. Cir. 1992); *Sullivan v. Town & Country Home Nursing Servs., Inc. (In re Town & Country Home Nursing Servs., Inc.)*, 963 F.2d 1146, 1155 (9th Cir. 1991) (holding that "Section 405(h) only bars actions under 28 U.S.C. §§ 1331 and 1346; it in no way prohibits an assertion of jurisdiction under section 1334."); *In re Healthback, LLC*, 226 B.R. 464, 472-74 (Bankr. W.D. Okla. 1998), *vacated on other grounds*, 1999 WL 35012949 (Bankr. W.D. Okla. May 28, 1999); *First Am. Health Care of Ga. Inc. v. Dep't of Health and Human Servs.*, 208 B.R. 985, 988-89 (Bankr. S.D. Ga. 1996), *vacated on other grounds*, 1996 WL 282149 (Bankr. S.D. Ga. Mar. 11, 1996) (consent order under which a temporary restraining order against HHS was dissolved, on the condition that HHS followed the order's terms). The District Court's decision, by contrast, followed several courts that have treated § 405(h)'s express limitation to actions brought under Sections 1331 and 1346 as a scrivener's error, introduced in a technical amendment to § 405(h). *See, e.g., Bodimetric Health Servs., Inc. v. Aetna Life & Cas.*, 903 F.2d 480, 488-89 (7th Cir. 1990).

This Court is more persuaded by the decisions that follow the plain language of § 405(h). The Sixth Circuit has expressly left this issue open and acknowledged that the plain-language argument is a viable one. *See BP Care, Inc. v. Thompson*, 398 F.3d 503, 514 n.11 (6th Cir. 2005) (noting that mandamus jurisdiction under 28 U.S.C. § 1361 may be available over

Medicare Act claims despite § 405(h) because § 405(h) does not reference § 1361). The District Court's decision in *Bayou Shores*, which reads § 405(h)'s reference to two jurisdictional provisions of title 28 to extend to all grants of federal subject-matter jurisdiction, is an extreme deviation from the text of § 405(h), which the District Court's reliance on an ambiguous interpretive note in the bill amending § 405(h) fails to support.

Therefore, consistent with the Court's oral findings of fact and conclusions of law as stated on the record and supplemented herein, it is ORDERED:

(1) The Plaintiff's Emergency Motion for a Preliminary Injunction is GRANTED and the Defendants are enjoined from suspending payments of the Plaintiff's Medicare Receivables (as defined in the briefs and testimony) until conclusion of a final hearing at 9:00 a.m. on July 30, 2015 (the "Injunction Period");

(2) The Defendants shall wire transfer \$500,000.00 of the Medicare Receivables to the Plaintiff's operating account and/or payroll account, per instructions provided by the Plaintiff, by 2:00 p.m. (EST) on July 2, 2015;

(3) The Defendants shall continue to hold the balance of the Medicare Receivables recently suspended pending further orders of this Court;

(4) The Defendants shall make future payments as and when due without further suspension during the duration of the Injunction Period; and

(5) The Court shall conduct a final hearing **at 9:00 a.m. on July 30, 2015, in the United States Bankruptcy Court, Second Floor Courtroom, 100 E. Vine Street, Lexington, Kentucky.**

The affixing of this Court's electronic seal below is proof this document has been signed by the Judge and electronically entered by the Clerk in the official record of this case.



Signed By:
Gregory R. Schaaf
Bankruptcy Judge
Dated: Wednesday, July 01, 2015
(grs)