UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF KENTUCKY
Lexington Division

IN RE:	:	
	:	**Chapter 11**
SAMARITAN ALLIANCE, LLC	:	**Case Nos. 07-50735**
	:	**Judge Joseph M. Scott**
Debtors	:	
_____	:	

ORDER OVERRULING OBJECTION TO CLAIM OF RELIANT HEALTHCARE, LLC

This matter is before the Court on the Omnibus Objection to Claims ("Objection to Claim") (Doc. 938) filed on September 20, 2010, by the Debtors. The Objection to Claim included an objection to Proof of Claim No. 292 filed by Reliant Healthcare, LLC ("Reliant"). Reliant filed its Proof of Claim for damages in the form of lost profits and expenses it alleges were caused by Debtor, Samaritan Alliance, LLC's ("Samaritan"), breach of a limited liability company agreement ("LLC Agreement") entered into between Reliant and Samaritan to form Samaritan Reliant Geriatric Services, LLC ("Joint Venture").

Samaritan's Objection to Reliant's claim asserts that Samaritan has no contractual liability to pay Reliant's alleged lost profits or expenses and that the LLC Agreement prohibits Reliant's claim against Samaritan. Samaritan states that the Joint Venture was a business venture that simply failed and both parties incurred expenses. Reliant filed its Response (Doc. 942) to the Objection to Claim disputing Samaritan's interpretation of the LLC Agreement.

A hearing was held on October 29, 2010, at which the Court instructed the parties to file an agreed order scheduling briefing deadlines in this matter. The agreed order (Doc. 953) was entered and amended (Doc. 971). Pursuant to the agreed order, the parties submitted Joint Stipulations of Fact ("J.S.") (Doc. 976); briefs (Docs. 980 and 984) and reply briefs (Docs. 985 and 986). In addition, the Deposition of James T. Harper ("Harper"), President of Reliant, ("Harper Depo.") (Doc. 983) and the Deposition of Frank T. Beirne ("Beirne"), Chief Executive Officer of Samaritan, ("Beirne

Depo.") (Doc. 982) were filed in the record. On February 21, 2011, this matter was submitted to the Court for a determination on the documents filed by the parties.

Jurisdiction

This Court has jurisdiction of this matter pursuant to 28 U.S.C. § 1334(b) and this is a core proceeding pursuant to 28 U.S.C. 157(b)(2)(B). Having reviewed all the documents filed in this matter, including the exhibits and depositions, the Court **OVERRULES**, the Objection to Claim to the extent stated below and will schedule a separate evidentiary hearing on the issue of damages.

Issues

A. Is the LLC Agreement an executory contract that was rejected pursuant to § 365(a) of the Bankruptcy Code[1] so that Reliant is entitled to damages for breach of the LLC Agreement pursuant to § 365(g) of the Bankruptcy Code?

B. Whether Samaritan breached the plain language of the LLC Agreement?

C. Whether the LLC Agreement prevents Reliant's claims against Samaritan for breach of fiduciary duties?

D. Whether Samaritan violated an implied covenant of good faith and fair dealing?

E. Whether Samaritan intentionally interfered with Reliant's contractual relationship with the Joint Venture thereby causing the loss of income to Reliant under the Facility Management Agreement?

F. What are Reliant's damages?
   a. Lost profits.
   b. Start-up costs.
   c. Attorney fees and costs.

Background Facts and Relationship of the Parties

1. Reliant and Samaritan are each 50 percent members in the Joint Venture which is a Delaware limited liability company authorized to do business in the Commonwealth of Kentucky. The Joint Venture was organized to own and operate a psychological/behavioral health unit

[1]The Bankruptcy Code is codified at 11 U.S.C. § 101, *et seq.*

("Geri/Psych Unit") for the elderly on the fourth floor of a hospital owned by Samaritan located in Lexington, Kentucky ("Hospital"). (J.S. at ¶ 14).

2. Associated Healthcare Systems of Lexington, LLC ("Associated of Lexington") was the parent company of Samaritan. (J.S. at ¶ 2).

3. Associated of Lexington was a wholly-owned subsidiary of Associated Healthcare Systems, Inc. ("Associated"). (J.S. at ¶ 3).

4. Initial discussions to form the Joint Venture began in June 2006. (J.S. at ¶ 1).

5. On September 27, 2006, Samaritan filed an application for a Certificate of Need ("CON") with the Kentucky Cabinet for Health and Family Services, Office of Health Policy, Division of Certificate of Need ("CON Office") to obtain authority to convert twenty-four acute care beds to geriatric psychiatric beds on the fourth floor of the Hospital. (J.S. at ¶ 9).

6. On October 23, 2006, Reliant and Samaritan entered into a letter of intent dated as of October 20, 2006, to jointly develop and operate a psychological/behavioral health unit for the elderly on the fourth floor of the Hospital. (J.S. at ¶ 11).

7. The original plan was to open the Geri/Psych Unit in January 2008. (Beirne Depo. 10:12-19).

8. On November 27, 2006, Samaritan and Reliant entered into the LLC Agreement creating the Joint Venture. (J.S. at ¶ 12). The LLC Agreement was signed on behalf of Samaritan by Beirne and was signed on behalf of Reliant by Harper. Provisions of the LLC Agreement relevant to this matter provide:

> 1.38 "Lease" means the lease in the form attached hereto . . . which (i) the Company[2] shall lease the Leased Premises . . . from Samaritan for the operation of the Facility,[3] and (ii) Samaritan *shall* grant to the Company the right to operate under all governmental approvals, licenses and permits necessary for the operation of the Facility, subject to the Company's right to purchase such governmental approvals, licenses and permits as provided in the Lease.

[2]"Company" as used in the LLC Agreement refers to the Joint Venture.

[3]"Facility" as used in the LLC Agreement refers to the Geri/Psych Unit.

2.9 Non-competition; Other Business Ventures and Activities; Fiduciary Duties.

. . .

(b) Except for the duties and obligations expressly set forth in this Agreement, including, without limitation, in this Section 2.9 and in Article VI hereof, the Members hereby agree that no Member or person serving on the Governance Committee[4] shall owe any other fiduciary duties to the Company, the other Members or other persons serving on the Governance Committee and all such other duties are hereby waived to the fullest extent permitted by applicable law.

2.10 Limitation of Liability. Except as otherwise expressly provided herein, no Member, as such, shall be bound by, or be personally liable for, the liabilities or obligations of the Company or other Members, or be required to lend any funds (or provide any guarantees on behalf of) the Company, without the prior written consent of such Member. . . .

6.4 Management and Control. Subject to the terms and conditions of this Agreement, the Governance Committee shall have complete authority over and the exclusive control and management of the business and affairs of the Company. . . . Not in limitation of the foregoing, without Action by the Governance Committee, neither the Facility Manager *nor any Member*, agent, Officer, or employee of the Company shall:

. . .

(g) amend, modify, alter, change, . . . or cancel the Facility Management Agreement . . . ;

(n) cause the suspension or termination of the operation of the Facility as a psychiatric facility;

. . .

Notwithstanding anything to the contrary contained elsewhere in this Agreement, the Facility Management Agreement, the Ancillary Services Agreement, or the Lease:

. . .

(b) Reliant shall exercise the sole power on behalf of the Company to make and prosecute a claim against Samaritan or its Affiliates arising out of alleged breaches of any agreements for goods or services between the Company and Samaritan or its Affiliates.

6.8 Exculpation and Indemnification.

(a) Generally. No Member . . . who perform[s] services on behalf of the Company, . . . (hereinafter . . . referred to as the "indemnitees"), shall have any liability, responsibility or accountability for, or to any other Member(s), [or] the Company, . . . for, . . . any liabilities, obligations, losses, damages, penalties, actions, claims, judgments, settlements, proceedings, costs, expenses and disbursements of any kind or nature whatsoever, including all reasonable attorney's fees, costs and expenses of defense, appeal and settlement of any suits, actions or proceedings instituted against such indemnitee or the Company and all costs of investigation in connection therewith . . . that may be imposed on, incurred by or asserted against an indemnitee or the company that is in any way relating to or

[4]The Governance Committee is formed in Article VI of the LLC Agreement and basically functions as the equivalent of a "Board of Directors" for the Joint Venture.

arising out of, or alleged to relate to or arise out of, any action or inaction on the part of the Company or any Person (including the indemnitee) acting on behalf of the Company. *Notwithstanding the foregoing, each indemnitee shall be liable, responsible and accountable,* and neither the Company nor its receiver or trustee shall be liable to any such indemnitee, *for any portion of such liabilities that resulted from (i) such indemnitee's unauthorized action on behalf of the Company*, (ii) such indemnitee's own intentional fraud, bad faith, willful misconduct or gross negligence, (iii) transaction from which such indemnitee derived an improper personal benefit, (iv) *a material breach of this Agreement by the indemnitee*, or (v) other acts or failure to act for which the Act or other applicable law does not permit such indemnitee to be exculpated or indemnified.

. . .

6.10 Lease of Property. Concurrently with the execution of this Agreement, the Company shall enter into the Lease and diligently pursue making the improvements to the Facility.

6.11 Facility Manager. The Company shall initially engage Reliant as the Facility Manager and pay compensation to Reliant for its services as such, all pursuant to the terms and conditions of the Facility Management Agreement.

6.12 Ancillary Services. The Company shall engage Samaritan to provide the ancillary services described in the Ancillary Services Agreement.

. . .

13.1 Events of Default.

(a) The term "Events of Default" shall mean the following:

(i) a Transfer or attempted Transfer of an Interest other than as permitted in Article IX or XII hereof;

(ii) the failure of any Member to perform or act in accordance with, as applicable, any material obligation or covenant to be performed or observed by such Member pursuant to this Agreement;

. . .

(vii) as to Samaritan and its Affiliates, any default by Samaritan as Lessor under the Lease.

. . .

14.4 References to this Agreement; Headings; Scope. . . . This Agreement constitutes the entire understanding of the Members with respect to the subject matter hereof and supersedes all prior understandings and agreements in regard thereto. All exhibits, schedules, instruments *and other documents* referred to herein, and as the same may be amended from time to time, are by this reference made a part hereof as though fully set forth herein.

. . .

14.7 Governing Law. The laws of the State of Delaware shall govern the validity, construction and interpretation of this Agreement, without reference to conflict of laws principles. All parties hereto consent to personal jurisdiction and venue in Fayette County, Kentucky, and any action in law or in equity shall be brought in any court having competent jurisdiction located in said county.

(LLC Agreement, Harper Depo. Ex. 9 (emphasis added)).

9. On November 27, 2006, Samaritan and the Joint Venture entered into an Ancillary Services Agreement under which Samaritan agreed to provide certain services to the Joint Venture.

(J.S. at ¶ 16).

10. On November 27, 2006, Reliant and the Joint Venture entered into a Facility Management Agreement for operation of the Geri/Psych Unit. Samaritan is not a direct party to the Facility Management Agreement. (J.S. at ¶ 18). Under the Facility Management Agreement, the Joint Venture hired Reliant as the exclusive provider of management services for the Geri/Psych Unit.

Pursuant to paragraph 1.5 of the Facility Management Agreement, the "Effective Date" of the Facility Management Agreement was "the date on which Samaritan obtains all Licenses necessary to operate the [Geri/Psych Unit]. In the event Samaritan fails to obtain the Licenses, this Agreement shall be null and void." (Facility Management Agreement, Harper Depo. Ex. 11 at ¶ 1.5). "'Licenses' means all governmental approvals, licenses and consents necessary for operation of the [Geri/Psych Unit]." (*Id.* at ¶ 1.8).

The initial term of the Facility Management Agreement was five years and Reliant was to be paid an initial management fee of $25,000[5] per month from the "Opening Date" which is defined as "that date on which the [Geri/Psych Unit] begins operations as a patient care treatment facility." (*Id.* at ¶ 1.9 & Art. VI).

Pursuant to paragraph 4.2 of the Facility Management Agreement, Reliant was not to be paid a management fee during the pre-opening period but was to be reimbursed by the Joint Venture for certain expenses incurred during the pre-opening "including, without limitation the full cost of salary, benefits, relocation . . . , and other expenses *associated with* the employment of the Program Administrator, Community Education Director, Outreach RN and Secretary." (*Id.* at ¶ 4.2 (emphasis added)).

Pursuant to paragraph 8.8 of the Facility Management Agreement, the laws of the Commonwealth of Kentucky govern its terms. (*Id.* at ¶ 8.8; J.S. at ¶¶ 18 & 19).

[5]The management fee was to increase to $33,333 per month when twenty-four beds were operational in the Geri/Psych Unit. (Harper Depo., Ex. 11 at Art. VI).

Pursuant to paragraph 8.14 of the Facility Management Agreement, no member of the Joint Venture, "shall be personally liable for the performance of the [Joint Venture's] obligations under this Agreement." (*Id.* at ¶ 8.14).

11. Samaritan and Reliant had also contemplated that the Joint Venture would enter into a lease agreement ("Lease") with Samaritan for the Joint Venture to lease the fourth floor of the Hospital. However, the Lease was never executed by Samaritan or the Joint Venture. (J.S. at ¶¶ 21 & 22).

12. On November 28, 2006, the Internal Revenue Service issued an employer identification number to the Joint Venture. (J.S. at ¶ 23).

13. At a point in late 2006, Samaritan and Reliant decided to try to expedite the licensing process so that the Joint Venture might be able to start business in early 2007 rather than in 2008. (Beirne Depo. 13:11-14:3). According to Harper, the change in start up dates was because "Frank Beirne wanted the program opened sooner rather than later." (Harper Depo. 32:3-4).

14. On December 14, 2006, Samaritan submitted a notification of emergency circumstances to the CON Office for approval. (J.S. at ¶ 25).

15. By a letter dated December 18, 2006, the CON Office gave Samaritan notice of approval of the CON which had been requested on an emergency basis. The CON authorized the Geri/Psych Unit to open. (J.S. at ¶ 28).

16. On December 18, 2006, the Kentucky Cabinet for Health and Family Services, Office of the Inspector General issued a license to Samaritan authorizing the conversion of twelve acute care beds to geriatric psychiatric beds. (J.S. at ¶ 29).

17. Between December 21, 2006, and December 31, 2006, the Geri/Psych Unit admitted between two and four patients to allow the Kentucky Cabinet for Health and Family Services to conduct a license survey and to submit a certification of the conditions of participation for Medicare. (J.S. at ¶ 32).

18. The Geri/Psych Unit had no patients after December 31, 2006. (J.S. at ¶ 33).

19. Effective January 1, 2007, the members of the Joint Venture agreed to suspend the operation of the Geri/Psych Unit. (J.S. at ¶ 34). The reason for the suspension was the lack of capital and the need for additional paperwork to obtain reimbursements from Medicare. "[W]e couldn't have opened without . . . the access to the line of credit and the . . . funding." (Beirne Depo. 30:2-5; Harper Depo. 37:12-39:5; 60:11-61:25 & 84:18-85:2). According to Harper, the original plan was for Samaritan or Associated to loan the Joint Venture working capital, but Reliant was advised in late December 2006, or early January 2007, that Samaritan would not fund the working capital. (Harper Depo. 81:16-84:5).

20. Beginning in mid- to late-January 2007, discussions began between Associated and University of Kentucky ("UK") for the acquisition of the Hospital by UK. (Beirne Depo. 27:11-23).

21. Beginning in January 2007, and continuing through at least February 16, 2007, Samaritan and Reliant, each acting on behalf of the Joint Venture, contacted or met with various banks to obtain working capital for the Geri/Psych Unit to operate in the short term until the Medicare reimbursement procedures were established. (J.S. at ¶ 35).

22. During January and February 2007, Harper states that he made several trips to Lexington, Kentucky, "to plan and develop the Geri/Psych Unit for a scheduled March 19, 2007, reopening, met with several candidates for positions in the Geri/Psych Unit and solicited local banks for necessary financing." (Aff. of Harper at ¶ 19, Ex. 1 to Br. of Reliant (Doc. 980)).

23. Effective February 1, 2007, Samaritan and Reliant entered into an Interim Management Agreement dated on or about March 1, 2007. (J.S. at ¶ 36). The purpose of the agreement was for Reliant to provide a manager for Samaritan's adult behavioral health unit. The Interim Management Agreement was not related to and did not take the place of the Facility Management Agreement for the Geri/Psych Unit. (Harper Depo. 71:16-72:9).

24. By letter dated February 6, 2007, Medicare issued Samaritan a sub-provider identification number effective January 1, 2007, for twelve psychiatric beds. (J.S. at ¶ 38).

25. On February 13, 2007, the University of Kentucky ("UK"), Associated, Associated of Lexington, and Samaritan executed a letter of intent for UK to acquire Samaritan's Hospital ("UK LOI"). (J.S. at ¶ 39). According to Beirne, the decision to sell the Hospital to UK was not made at the Samaritan level but rather by Associated and/or Associated of Lexington. "[A]ll of the negotiations were handled directly by Ron Turner[6] with The University of Kentucky Healthcare System." (Depo. of Beirne 28:2-5).

26. On February 14, 2007, the CON Office approved the original CON application filed by Samaritan on September 27, 2006, for conversion of acute care beds to geriatric psychiatric beds. (J.S. at ¶ 41).

27. On February 15, 2007, UK issued a press release announcing the UK LOI. (J.S. ¶ 42).

28. By an email dated February 16, 2007, Beirne emailed a copy of the UK press release to Harper. (J.S. at ¶ 43; Beirne Depo. 39:18-40:13).

29. With respect to when Reliant was made aware of the potential sale of the Hospital to UK, the parties are basically in agreement. However, regarding discussions of the effect that such a sale would have on the Joint Venture, the parties are in disagreement as to what Reliant was told. Beirne testified in his deposition that:

> Q. And was this [the February 16, 2007, email referred to above] the first time that you had informed Jim [Harper] of the Letter of Intent and the potential sale to UK?
>
> A. Yes. As I indicated, there was a confidentiality agreement that everyone was bound by while these discussions were going on; so there was no discussion or release that – that there was a negotiation in process or that there was a Letter of Intent until it was publicly announced.
>
> Q. And did you have subsequent discussions after the email about what would – how this would effect [sic] the JV going forward?

[6]At the time, Ron Turner was the President and CEO of Associated and Associated of Lexington, the parent company of Samaritan. Beirne reported to Turner when Associated of Lexington was the parent company of Samaritan. (J.S. ¶ 6).

A. We didn't know how it would effect [sic] the JV going forward. I mean, effectively, what we knew was, we had a different variable that we didn't have before and so the – you know, the equation and the decision process was now different. There were other people involved. There were decisions to be made. So while we were interested, supportive, liked the project, were in favor of moving forward, that was not a decision for us to make.

Q. But I believe you testified earlier that you were to continue with the opening of the joint venture during this time?

A. We were to continue conducting normal course of business. This was determined by University of Kentucky not to be normal course of business.

Q. And how – how were you informed that this was not normal course of business?

A. There was a letter sent to Ron Turner, Associated Healthcare in March that specifically instructed Associated not to proceed with the gero-psych project further until the University had time to do its due diligence on the acquisition and to evaluate the service and make a decision on it.

Q. So between the Letter of Intent, February 16th, and the March letter you just referenced, did you in fact, continue on with the opening of the –

A. (Interrupting) No.

Q. – joint venture?

A. No.

Q. Did you cease all activities that related to the joint venture at that time?

A. We kept it alive. We put it on hold. We didn't do anything to detrimentally impact it to allow – you know, or to – to disable it in any way, shape or form, but we didn't move it forward.

Q. What does that mean, you put it on hold, the joint venture?

A. Well, we didn't open the unit. We didn't accept patients.

Q. And you decided that in February?

A. It was decided for us when the hospital was sold. We didn't have the ability to do that. We couldn't make a commitment in terms of what Samaritan Hospital was going to do, how it operated, what services it would offer while we were operating under a change of ownership. That would have been irresponsible. It would have also been inappropriate given the Letter of Intent.

Q. And you informed Reliant of this?

A. *We informed Jim [Harper] that we had a change of ownership that was proposed and that that could potentially change our relationship and our ability to move forward. We weren't sure. We didn't know, but clearly there was someone else in the process that was going to be involved in the process and was going to be making the decision if the process did, in fact, end up in an acquisition.*

Q. *Now, would you be surprised if I told you that Reliant believes they did not have any notice that the joint venture was not going forward in February?*

A. *Yes.*

(Beirne Depo. 40:10 to 43:23 (emphasis added)). Harper testified that he was advised of the potential sale of the Hospital to UK in February 2007. However, contrary to Beirne's testimony that Harper knew the Joint Venture was not going forward in February, Harper testified:

A. [February 2007] [w]as when I was told that UK was going to [potentially purchase the Hospital]. *Now, at the same time, Frank Beirne told me that he thought that the [Geri/Psych] unit was going to be opened and that UK was wanting the unit*. In fact, if you read the article in the newspaper – I recall that much – UK's VP or whomever it was cited programs at Samaritan Hospital that they liked, and one of them was the geriatric psych program, because there wasn't one in Lexington.

(Harper Depo. 29:19-30:1 (emphasis added)).

30. By email dated February 22, 2007, Mark Armstrong ("Armstrong"), the Chief Operating Officer and Chief Financial Officer of Samaritan, sent correspondence to Harper with copy to Beirne confirming that "Samaritan Hospital will, upon acquisition by UK, change from a calendar year fiscal period to a 6/30 fiscal period." (Beirne Depo. Ex. 7).

31. By a string of emails dated February 22-23, 2007 (Beirne Depo. Ex. 8), Joseph Miller, an attorney for the Joint Venture assisting with the certificate of need and licensing procedures for the Geri/Psych Unit corresponded with Harper and Beirne regarding licensing and renovations for the second set of twelve beds. When questioned about why Beirne would be having discussions with Harper and Joseph Miller about getting the certificate of need and license to open the other twelve beds, Beirne testified:

A. Again, we're . . . planning, we're keeping all of our options open with . . . an idea that we want to and hope we will have an opportunity to . . . move into the service that we . . . sought. We didn't invest in a unit. We didn't invest in a partnership. We didn't commit our staff, our capital resources to a

> project we didn't believe in. So we're doing all of the things that we need to do to . . . take appropriate steps to move . . . this service line forward when and if we got the opportunity to do so. I think we're taking a responsible position in making sure that we don't damage the asset, because the Certificate of Need was and is an asset. And one of our charges is to do nothing to harm the franchise and the asset, and we were doing that.

(Beirne Depo. 51:6-25).

32. On March 5, 2007 ("March 5, 2007 Letter"), UK gave Samaritan written notice that entering into any agreements involving consideration in excess of $10,000 relating to the Geri/Psych Unit without UK's consent would be a violation of the UK LOI. (J.S. at ¶ 44). The March 5, 2007 Letter specifically stated that: "Entering into the proposed lease for the gero psych beds or any other agreement with respect to [the recently approved gero psych certificate of need] without UK's consent would violate [the UK LOI]." (Beirne Depo. Ex. 10).

33. Harper states that in early March 2007:

> [P]ursuant to the duties and responsibilities prescribed by the Facility Management Agreement and the LLC Agreement, Reliant, in preparation for the Joint Venture's opening, was drafting documents for orientation, planning the open house event, completing recruitment for a medical director, drafting of medical director agreement, conducting training sessions for billing Medicare . . . and working with the business office and medical records staff to establish administrative and compliance procedures and codes for the [Joint Venture].

(Aff. of Harper at ¶ 21).

34. By email dated March 7, 2007, Armstrong sent correspondence to Dianna Knight, a Samaritan employee, with a copy to Beirne and Harper. In that email, Armstrong discussed the "Geri-Psych program" and transfer of another employee from the Behavioral Health Unit to the "Geri-Psych" program" as follows:

> I have spoken with Jim Harper and he of course is going to help us coordinate the many moving parts related to our overall psychiatry service offerings – all of which are significant. These moving parts include . . . , *the upstart of the Geri-Psych program, Wendy's transition from BH to the Geri-Psych program, etc.*
>
> 1. In the short term, upon the *completion of her orientation of our Geri-Psych personnel*, Ms. Vicki Smith will serve as the Interim Program Director of the Behavioral Health Unit.
> . . .

> 3. Jim and I will talk with Wendy . . . *about the coordination of her transfer to the Geri program. Under the circumstances, it does not appear that her absolute transfer will be immediate, but will not be delayed unduly.*
>
> . . .
>
> Certainly, the short-term plan outlined above is intended to continue the provision of the direction and management of the Behavioral Health program that it needs, *but at the same time avoid impeding progress of our new Geri program*.

(Beirne Depo. Ex. 11 (emphasis added)). From this email it appears that Armstrong, the COO and CFO of Samaritan, was continuing efforts to reopen the Geri/Psych Unit and keeping both Beirne and Harper advised of the status of what was happening with the Hospital personnel.

35. By email dated March 12, 2007 (the "March 12, 2007 Email"), Beirne emailed Harper a copy of a letter from Mutual of Omaha advising of Mutual of Omaha's receipt of the Medicare certification and provider number for Samaritan on behalf of the Joint Venture. The email states:

> Jim: Today seems to be our "lucky day" related to CMS [Centers for Medicare & Medicaid Services] paperwork. Please find more of the same attached. After review, please identify which of us needs to complete which sections, etc[.] *so we can coordinate our efforts and timely complete the work product necessary to keep the process moving forward*. Thanks. FTB

(Beirne Depo. Ex. 12 (emphasis added)). Again the email seems to indicate that the process for reopening the Geri/Psych Unit was moving forward. The letter from Mutual of Omaha requested additional information to establish the Medicare reimbursement rates for the Geri/Psych Unit. (J.S. at ¶ 48).

36. By letter dated March 13, 2007, Harper requested that Beirne execute an "Application for Certificate of Authority" to transact business in Kentucky on behalf of the Joint Venture. Beirne executed the application, and it was filed and recorded in the Office of the Secretary of State of Kentucky on March 22, 2007. (J.S. at ¶ 50; Harper Depo. Ex. 13).

37. By an email transmission on March 14, 2007, from Vicki Smith, the Director of Program Support, Ms. Smith informed Harper "that during the end of February and the first week of March her progress toward the opening of the Geri/Psych Unit included ordering supplies, interviewing for a nurse manager, complet[ing] a walk-through of the fourth floor, [meetings] with drug representatives and [] with an office personnel to discuss payroll." (Aff. of Harper at ¶ 20).

38. On March 16, 2007, Harper was verbally advised by Beirne that Samaritan was not going forward with the reopening of the Geri/Psych Unit. (Aff. of Harper at ¶ 25).[7] When questioned about whether he had any indication that the Joint Venture project was not going forward prior to this time, Harper testified:

> Q. The timeline between the UK announcement that it would take over the facility and this date, this Friday in March, what steps did you take – did you have any indication at any point that the university was considering not going forward or was weighing its option as to whether to go forward with having the joint venture as part of a Samaritan facility?
>
> A. No, I had no – no warning whatsoever they weren't considering it. In fact, I was being told the opposite.
>
> Q. By whom?
>
> A. Frank Beirne, Mark Armstrong. I again refer to the newspaper article that Frank would continually refer to that Kentucky was very interested in having an geropsychiatric program here. The numbers were compelling. I will stand that I was led to believe we were going to open.
>
> Q. . . .
>
> I guess my question would be, what specific events did Samaritan do to amend, modify, alter, change, extend, waive the termination or cancel the facility management agreement.
>
> A. They wouldn't allow the opening of the facility. I mean, I don't even know why you would ask that question. Samaritan wouldn't allow the unit to be opened. We had staff hired. We had a license. We had a Medicare certification number, but they wouldn't allow the unit to be opened.
>
> . . . everything was in place ready to open and operate that – reopen, I'll say, that unit on that Monday in March, and he called me in his office on that Friday and he told me they were terminating the operation.
>
> Q. Did you receive any written notification?
>
> A. No, I did not.
>
> Q. Okay. At any time did you receive any written notification that the facility management agreement was being terminated?
>
> A. No, I did not.

[7] In his deposition, Harper only recalled that he was told that the Geri/Psych Unit was not going to be reopened on a Friday in March 2007 before the Monday that the unit was to be opened. (Harper Depo. 46:16-47:10).

(Harper Depo. 47:11-49:8). At another point when questioned about Samaritan's conduct in interfering with a business or contractual relationship, Harper testified:

> I'll tell you as a businessman I think, even though you [Samaritan's attorney] did not present them in evidence, emails, conversations were held in which Samaritan's representatives led Reliant's representatives to believe that we were going to open the program and then summarily we were dismissed and told to leave the building. I think that's pretty good evidence.

(Harper Depo. 75:25-76:6).

39. By letter dated March 21, 2007, Beirne submitted an application to Mutual of Omaha for approval as a fiscal intermediary with Medicare related to the new psychiatric sub-provider number from Medicare for the Geri/Psych Unit. (J.S. at ¶ 52).

40. On April 16, 2007, Samaritan filed its voluntary petition for relief under Chapter 11 of the Bankruptcy Code.

41. On June 29, 2007, the Court entered an order (Doc. 319) rejecting certain executory contracts.

42. On September 19, 2007, Reliant filed its Proof of Claim No. 292. The Proof of Claim is for an unsecured, non-priority claim in the amount of $1,690,923.75. Reliant's claim is comprised of three parts (a) $168,671.75 for "development fees through 5/10/07," (b) $1,500,000.00 for "management fees," and (c) $22,252.00 for "attorneys' fees/costs."

43. On September 20, 2010, the Debtors filed the Objection to Claim.

44. On October 1, 2007, the Debtors filed an Amended Chapter 11 Plan (Doc. 480) which was confirmed by Order (Doc. 512) entered on November 1, 2007.

Issues and Discussion

A. Is the LLC Agreement an executory contract that was rejected pursuant to 11 U.S.C. § 365(a) so that Reliant is entitled to damages for breach of the LLC Agreement pursuant to 11 U.S.C. § 365(g)?

The phrase "executory contract" is not defined in the Bankruptcy Code.

> The Sixth Circuit Court of Appeals has defined the term "executory contract" on two occasions. . . . After citing the definition set forth in the legislative history, the . . .

> [Sixth Circuit] adopted the so-called Countryman definition of an executory contract. According to Professor Vern Countryman, an executory contract is "a contract under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other." *In re Terrell,* 892 F.2d at 471 n. 2 (quoting Vern Countryman, *Executory Contracts in Bankruptcy: Part I,* 57 Minn. L. Rev. 439, 460 (1973)).

O'Brien v. Ravenswood Apts., Ltd. (In re Ravenswood Apts., Ltd.), 338 B.R. 307, 311 (B.A.P. 6th Cir. 2006).

> The Sixth Circuit also has applied a "functional" approach when determining whether a contract is executory. *See Rieser v. Dayton Country Club Co. (In re Magness),* 972 F.2d 689, 694 (6th Cir. 1992); *Structurlite,* 86 B.R. at 926. Under the functional approach, courts "work backward, proceeding from an examination of the purposes rejection is expected to accomplish. If those objectives have already been accomplished, or if they can't be accomplished through rejection, then the contract is not executory. . . ." *Structurlite,* 86 B.R. at 926 (quoting *Chattanooga Memorial Park v. Still (In re Jolly),* 574 F.2d 349, 351 (6th Cir. 1978)).

Simmons Capital Advisors, Ltd. v. Bachinski (In re Bachinski), 393 B.R. 522, 543 n.11 (Bankr. S.D. Ohio 2008). Although the LLC Agreement is executory under the Countryman definition,[8] we find that it is not an executory contract under the "functional" approach. In *Chattanooga Memorial Park v. Still (In re Jolly)*, the Sixth Circuit stated:

> A leading bankruptcy authority, interpreting . . . provisions under Chapter XI, points out that the rejection provisions have no applicability to a contract which has already been breached, and that "if there was an actual or anticipatory breach of an executory contract by the debtor prior to the commencement of a case under the Act . . . a claim for damages based thereon is provable, and the holder of the claim is an actual creditor." 9 Collier on Bankruptcy § 7.15(4.2) at 79. Since this is true,

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[8]Some case law reflects that a limited liability company operating agreement is not an executory contract. *Endeka Enters., LLC v. Meiburger (In re Tsiaoushis)*, No. 1:07cv436, 2007 WL 2156162 (E.D. Va. July 19, 2007) (district court agreed with the bankruptcy court that limited liability company operating agreement was not executory where debtor had no unperformed duties); *In re Capital Acquisitions & Mgmt Corp.*, 341 B.R. 632, 636-57 (Bankr. N.D. Ill. 2006) (operating agreement was not executory as the debtor-member was not the manager of the LLC); *but see In re Allentown Ambassadors, Inc.*, 361 B.R. 422, 444 (Bankr. E.D. Pa. 2007) (operating agreement was executory because members of the limited liability company had ongoing, material, unperformed obligations to one another, including the duty to manage the LLC). Citing these cases, Samaritan argues that the LLC Agreement is not an executory contract, and therefore, Reliant is not entitled to rejection damages pursuant to 11 U.S.C. § 365.

From our review of the LLC Agreement, we find that it contains material unperformed obligations on the part of both Samaritan and Reliant. For example, Samaritan has not signed the Lease which it was expected to sign pursuant to the intent and purpose of the LLC Agreement. Reliant had the obligation to manage the Joint Venture. Both members had the obligation not to "cause the suspension or termination of the operation of the [Geri/Psych Unit] as a psychiatric facility" (LLC Agreement ¶ 6.4(n)) or "amend, modify, alter, change, extend, waive the termination of, or cancel the Facility Management Agreement" (LLC Agreement ¶ 6.4(g)).

> there is no need for the rejection procedures, which create a breach and make the other party a creditor.

Chattanooga Memorial Park v. Still (In re Jolly), 574 F.2d 349, 351 (6th Cir. 1978)). As was the case in *In re Jolly*, Samaritan breached the LLC Agreement prepetition and under this Sixth Circuit precedent, the LLC Agreement is not an executory contract. Reliant already had a claim for breach of contract before Samaritan filed its Chapter 11 Petition.

B. Whether Samaritan breached the plain language of the LLC Agreement?

The LLC Agreement is governed by the laws of Delaware. Elements for a breach of contract claim under Delaware law are: the existence of a contract, the breach of an obligation imposed by that contract, and resulting damages to the plaintiff. *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 612 (Del. 2003).

The elements of the existence of a contract and resulting damages are met. The LLC Agreement is between Samaritan and Reliant and incorporates the Facility Management Agreement. Reliant has asserted it damages. The LLC Agreement specifically prohibits the members from terminating the operation of the Geri/Psych Unit as a psychiatric facility and prohibits the members from cancelling the Facility Management Agreement. Samaritan breached both of these provisions first by unilaterally terminating the operation of the Geri/Psych Unit and second by not entering into the Lease. There is not a specific provision in the LLC Agreement that states that Samaritan shall enter into the Lease with the Joint Venture, but it is implied throughout the LLC Agreement.[9] Further, "the failure of any Member to perform or act in accordance with, as applicable, any material obligation or covenant to be performed or observed by such Member pursuant to this Agreement" is an Event of Default. (LLC Agreement ¶ 13.1(a)(ii)). By not entering into the Lease, Samaritan failed to act in accordance with a material obligation to be performed by Samaritan. As a result, Samaritan had the ability to and did effectively cancel the Facility Management Agreement because the Geri/Psych Unit could not operate without the location that

[9] *See, infra*, ¶ D discussion regarding implied covenant of good faith and fair dealing.

was to be leased and was, therefore, not in need of Reliant as a manager. Samaritan breached the LLC Agreement.

C. Whether the LLC Agreement prevents Reliant's claims against Samaritan for breach of fiduciary duty?

West's Delaware Code Annotated provides with respect to limited liability companies:

> (a) The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this chapter.
> (b) It is the policy of this chapter to give the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements.
> . . .
> (e) A limited liability company agreement may provide for the limitation or elimination of any and all liabilities for breach of contract and breach of duties (including fiduciary duties) of a member, . . . to a limited liability company or to another member . . . ; *provided, that a limited liability company agreement may not limit or eliminate liability for any act or omission that constitutes a bad faith violation of the implied contractual covenant of good faith and fair dealing*.

DEL. CODE ANN. tit. 6, § 18-1101 (West 2011) (emphasis added). Section 2.9 of the LLC Agreement provides that except for duties and obligations set forth in section 2.9 or article VI of the LLC Agreement, all fiduciary duties between Reliant and Samaritan are eliminated to the "fullest extent permitted by applicable law." There are no fiduciary duties set forth in those provisions of the LLC Agreement. Therefore, consistent with the Delaware Code quoted above, all fiduciary duties, except for the implied contractual covenant of good faith and fair dealing have been eliminated between the members of the Joint Venture.

D. Whether Samaritan violated an implied covenant of good faith and fair dealing?

Under Delaware law:

> *The elements of a claim for breach of an implied covenant of good faith and fair dealing are [1] a specific implied contractual obligation, [2] a breach of that obligation by the defendant, and [3] resulting damage to the plaintiff*. With regard to what constitutes an implied contractual obligation, the Delaware Supreme Court has explained that there is an "occasional necessity of implying contract terms to ensure the parties' reasonable expectations are fulfilled. *Dunlap v. State Farm Fire & Cas. Co.,* 878 A.2d 434, 442 (Del. 2005) (citations omitted). The Delaware Supreme Court elaborated that this is *a "rare and fact intensive exercise" that should be done "only when it is clear from the writing that the contracting parties would have agreed to proscribe the act later complained of . . . had they thought to negotiate with respect to that matter*. . . . *Id*. The Delaware Court of Chancery has

> similarly explained that "[u]nder the implied covenant of fair dealing, courts will read terms into contracts that clearly would have been included had the parties negotiated with respect to them." *Price Org. v. Universal Computer Servs.*, No. 12505, 1993 WL 400152, at *6, 1993 Del. Ch. LEXIS 216, at *16 (Del. Ch. Oct. 1, 1993).

Dow Chem. Canada Inc. v. HRD Corp., 656 F. Supp. 2d 427, 445 (D. Del. 2009) (emphasis added) (some citations and internal quotations omitted).

> [T]he role of the implied covenant of good faith and fair dealing, . . . is a limited and extraordinary legal remedy that addresses only events that could not reasonably have been anticipated at the time the parties contracted. The covenant does not, therefore, dictate to parties the terms they must or must not include in a contract, but instead *protects a party from arbitrary conduct that was objectively unanticipated by the terms of the contract and that frustrates the fruits of the bargain that the asserting party reasonably expected*.

In re Atlas Energy Res., LLC, No. 4589-VCN, 2010 WL 4273122, at *13 (Del. Ch. Oct. 28, 2010) (emphasis added) (internal quotations and citations omitted).

> Contracts under Delaware law contain an implied covenant among and between the parties to act fairly and in good faith. This covenant restrains a contracting party from engaging in arbitrary or unreasonable conduct that has the effect of frustrating the contract's overarching purpose and denying the other party the benefit of its bargain. The Court, however, may not substitute its own notions of fairness for the terms of the agreement reached by the parties, and will therefore only invoke the implied covenant when the contract does not expressly address the subject at issue. Instead, the Court will impose obligations upon the contracting parties under the implied covenant only when the contract is silent to the disputed topic, and where it is clear from the contract that the parties would have agreed to that term had they thought to negotiate the matter.

Lola Cars Int'l Ltd. v. Krohn Racing, LLC, C.A. Nos. 4479-VCN, 4886-VCN, 2009 WL 4052681, at *8 (Del. Ch. Nov. 12, 2009) (internal quotations and citations omitted).

Reliant alleges that Samaritan breached its duties of good faith and fair dealing by refusing to sign the Lease and by leading Reliant to believe that the Geri/Psych Unit was going to reopen after Samaritan entered into the UK LOI. Samaritan, on the other hand, states that it did not violate any duties of good faith and fair dealing.

With respect to the failure to sign the Lease, as noted above, the LLC Agreement does not specifically state that Samaritan *shall* sign a Lease. It is strongly implied and anticipated, however, that Samaritan will sign the Lease. Otherwise, the Joint Venture has no location at which to

operate. The Joint Venture is obligated by paragraphs 1.38 and 6.10 of the LLC Agreement to sign the Lease and any default by Samaritan as lessor under the Lease is an Event of Default under paragraph 13.1(a)(vii) of the LLC Agreement. In our opinion, had the parties contemplated that Samaritan would not sign the Lease, it would have been a negotiated term and stated as a material obligation on the part of Samaritan. Samaritan states that it never refused to sign the Lease. Nor was it asked to sign the Lease by Reliant. This argument is without merit since it was Samaritan's obligation to sign the Lease, not Reliant's responsibility to ask Samaritan to sign the Lease. The fact of the matter is that after Samaritan received the March 5, 2007 Letter from UK regarding the signing of the Lease being a violation of the UK LOI, Samaritan would have refused to sign the Lease had it been asked. Based on the foregoing, Samaritan violated the implied covenant of good faith and fair dealing by not signing the Lease.

The harder question is whether Samaritan's violated the implied covenant of good faith and fair dealing by leading Reliant to believe that the Geri/Psych Unit was going to be reopened. Beirne states in his deposition that he advised Harper of the possibility that the unit might not reopen. However, Harper is adamant that he was led to believe by both Beirne and Armstrong that the Geri/Psych Unit was going to reopen and that he, Harper, was unaware until March 16, 2007, that the Geri/Psych Unit was not going to reopen. From our review of the Harper and Beirne depositions and emails attached to those depositions, the actions between Beirne and Armstrong with Harper, and all the steps outlined above which Harper continued to take on behalf of the Joint Venture, we conclude that Harper was being misled as to UK's intentions. Samaritan states that both parties were acting to preserve the Joint Venture after the initial closure of the Geri/Psych Unit to allow UK sufficient time to determine whether UK wanted to participate in the Joint Venture. Harper's actions were those of someone who was working towards a definitive reopening date. Samaritan argues in its brief that:

> The filing of Samaritan's bankruptcy did not foreclose forever on the Geri-Psych Unit. UK could have participated in the Joint Venture and considered doing so, but UK – not Samaritan – ultimately decided that continuing the Joint Venture was not in its best interests. From early January through June 2007, Beirne took multiple

> steps to ensure that the Joint Venture would be viable if UK decided to continue with it. Samaritan cannot be held liable or at fault for something outside of its control.

(Br. of Samaritan at 8 (Doc. 984)). However, from Reliant's perspective, it was misled into believing that the Joint Venture *would* reopen not that the Joint Venture *might* reopen if UK decided to acquire the Joint Venture.

The problem in analyzing this issue under the elements of an implied covenant of good faith and fair dealing is the question of whether the parties would have written into the LLC Agreement an obligation on the part of one of them to fully disclose negotiations with a potential purchaser. Beirne was between a rock and a hard place in what he told Harper because Harper may have stopped working to keep the Joint Venture viable had he known that the chance that UK was going to keep the Joint Venture was more in the range of perhaps 50/50 rather than as positive as Beirne and Armstrong led him to believe. We cannot conclude from the language of the LLC Agreement that Samaritan and Reliant would have agreed to insert a provision in the LLC Agreement to require full disclosure of relations with third parties that would impact the Joint Venture. Samaritan's actions are more in the nature of violations of the fiduciary duties which have been eliminated by the parties.

Samaritan has, however, breached the implied covenant of good faith and fair dealing by failing to enter into the Lease.

E. Whether Samaritan intentionally interfered with Reliant's contractual relationship with the Joint Venture thereby causing the loss of income to Reliant under the Facility Management Agreement?

> In essence, to recover under this specific theory [the tort of intentional interference with contractual relations], [Reliant] must prove the following elements: (1) the existence of a contract; (2) [Samaritan's] knowledge of this contract; (3) that [Samaritan] intended to cause its breach; (4) [Samaritan's] conduct caused the breach; (5) this breach resulted in damages to [Reliant]; and (6) [Samaritan] had no privilege or justification to excuse its conduct.

CMI, Inc. v. Intoximeters, Inc., 918 F. Supp. 1068, 1079 (W.D. Ky. 1995). "[T]he party whose interference is alleged to have been improper may escape liability by showing that he acted in good

faith to assert a legally protected interest of his own. While the party seeking recovery bears the burden of proving that the interference was improper, the party asserting a right to protect his own interest bears the burden of proving his defense." *National Collegiate Athletic Ass'n v. Hornung*, 754 S.W.2d 855, 858 (Ky. 1988).

Here, the contract was the Facility Management Agreement of which Samaritan had knowledge since that agreement was incorporated into the LLC Agreement, and it was the parties' intent to have Reliant act as the manager of the Joint Venture. Further, Samaritan would have been aware that its conduct in terminating the reopening of the Geri/Psych Unit and in failing to sign the Lease, would effectively cancel the Facility Management Agreement between Reliant and the Joint Venture. Samaritan's actions were not malicious. However, Reliant still incurred damages in the form of lost fees under the Facility Management Agreement. The question is whether Samaritan had justification for not entering into the Lease and not going forward with the Geri/Psych Unit. If Samaritan went forward with entering into the Lease, it violated the UK LOI and would have put the deal with UK to purchase of the Samaritan Hospital in danger of collapsing.[10] Given these facts, we believe that Samaritan made a justified business decision to go forward with the UK business relationship. Therefore, while Samaritan is liable for its decision to breach the contract with Reliant on the other bases discussed above, Samaritan is not liable to Reliant on the basis of an intentional interference with a contractual relationship.

F. Calculation of damages.

Based on our findings set forth above, Reliant is entitled to damages for Samaritan's breach of the LLC Agreement. As such and as ordered below, the parties shall be given an opportunity to supplement the record to assist us in calculating Reliant's damages.

> Because the bankruptcy code does not address how to calculate damages for . . . a rejection/breach, *In re Highland Superstores, Inc.*, 154 F.3d 573, 579 (6th Cir.

[10]According to Beirne, Samaritan's participation in the UK LOI was brought about by Associated and Associated of Lexington, not Samaritan. Samaritan does not, however, expand on this statement to suggest that it is excused from liability because of the actions of Associated or Associated of Lexington or support such an argument with any authority or facts. We will not make that argument for Samaritan.

> 1998), the bankruptcy court looks to state law, to the extent that it does not conflict with the bankruptcy code, *Butner v. United States*, 440 U.S. 48, 55, 99 S. Ct. 914, 59 L. Ed. 2d 136 (1979).

Giant Eagle, Inc. v. Phar-Mor, Inc., 528 F.3d 455, 459 (6th Cir. 2008). The LLC Agreement is governed by Delaware law and the Facility Management Agreement is governed by Kentucky law. In our opinion, we calculate damages under Delaware law because Samaritan breached the LLC Agreement and Samaritan is not a party to the Facility Management Agreement.[11]

a. Lost profits. Reliant asserts that Samaritan is liable to Reliant for lost profits which Reliant would have earned from the Facility Management Agreement. Reliant calculates that it lost $1,500,000 based on Article VI of the Facility Management Agreement which provides that Reliant would be paid $25,000 per month for the initial five-year-term of the Facility Management Agreement. Samaritan counters that the damages calculated by Reliant are speculative in nature and should not be awarded because there is no evidence to show that the Joint Venture would have remained in business for five years.

> It is well-settled law that "a recovery for lost profits will be allowed only if their loss is capable of being proved, with a reasonable degree of certainty. No recovery can be had for loss of profits which are determined to be uncertain, contingent, conjectural, or speculative." 22 Am. Jur. 2d *Damages* § 625 (1988).

Callahan v. Rafail, No. Civ. A. 99C-02-024, 2001 WL 283012, *1 (Del. Super. Ct. Mar. 16, 2001).

> [I]f the business is a new one or if it is a speculative one that is subject to great fluctuations in volume, costs or prices, proof will be more difficult. *Nevertheless, damages may be established with reasonable certainty with the aid of expert testimony, economic and financial data, market surveys and analyses, business records of similar enterprises, and the like*.

RESTATEMENT (SECOND) OF CONTRACTS § 352 cmt. b (2010) (emphasis added).

> *Doubts are generally resolved against the party in breach*. A party who has, by his breach, forced the injured party to seek compensation in damages should not be allowed to profit from his breach where it is established that a significant loss has occurred. A court may take into account all the circumstances of the breach,

[11]Delaware law and Kentucky law are substantially similar as to damages relevant to this case. *See Pauline's Chicken Villa, Inc. v. KFC Corp.*, 701 S.W.2d 399, 401 (Ky. 1986) ("lost profits in an unestablished business as damages for breach of contract . . . may be awarded if such lost profits may be proved with reasonable certainty."); *Fields v. Womack*, 294 S.W.2d 470, 473-74 (Ky. App. 2009) ("Kentucky follows the American Rule . . . [which] provides "in the absence of a statute or contract expressly providing therefor, attorneys fees are not allowable as costs, nor recoverable as an item of damages.") (citation omitted).

> including willfulness, in deciding whether to require a lesser degree of certainty, giving greater discretion to the trier of fact.

RESTATEMENT (SECOND) OF CONTRACTS § 352 cmt. a (2010) (emphasis added). Harper testified in his deposition as to the anticipated profitability of the Joint Venture:

> MR. BUNCH: . . . one of the objections was that the damages are speculative, that there's no evidence attached to the proof of claim to substantiate that the joint venture would last five years. It could die or become defunct or bankrupt or just simply run out of business and not have enough beds filled to pay the tab.
>
> So as a claimant you have filed a claim and it's the creditor's burden to prove that its damages are reasonable and sufficient, and my question is, what evidence or document do you have to substantiate that it would have been in existence for five years?
>
> MS. ARBUCKLE: I'm going to object. Again, I mean, I believe we went through this when we walked through the claim.
>
> MR. BUNCH: Okay. Well, then I missed the answer.
>
> THE WITNESS: Well, a certificate of need was issued by the State of Kentucky's Cabinet for Health. They obviously looked at the certificate of need application, and you did not.
>
> Following the issuance of the certificate of need, a bank financing proposal that we did on the market for this area, and obviously between a number of healthcare executives at Samaritan and myself and others, a decision was made that there was a sufficient market for this service.
>
> There wasn't one here. There isn't one here in Lexington today, four years after this. Probably the most compelling piece of evidence is that there is an absence of such a program. The mere absence of such a program is a pretty compelling reason why, if this had been allowed to open and start serving patients, it would still be serving patients today.

(Harper Depo. 67:20-69:4). Pursuant to the order set forth below, Reliant shall be given an opportunity to supplement the record with the marketing and financial data and such other information as it determines is necessary to support its position that an award of lost profits is not speculative.

b. Start-up costs. Reliant asserts that the start-up costs it incurred were to be reimbursed by the Joint Venture. According to Reliant, those costs amount to $168,671.75 for "development fees through 5/10/07."

Paragraph 4.2 of the Facility Management Agreement provides that the Joint Venture was to reimburse Reliant for certain expenses incurred during the pre-opening period as follows:

> 4.2 Pre-Opening Services. Within ninety (90) days after the Effective Date, the Facility Manager shall hire, at its own expense, the following trained and experienced personnel for the Facility initially for 12 beds: a Program Administrator, a Community Education Director; then for twenty-four (24) beds: an Outreach RN and a Secretary shall be added. . . . The Facility Manager shall not receive a management fee under Article VI for the provision of these pre-opening services, but the Company shall reimburse the Facility Manager for *all of the expenses incurred by the Facility Manager in providing such services*, including without limitations the full cost of salary, benefits, relocation and recruitment fees, insurance coverage required under Article VII hereof, and other expenses associated with the employment of the Program Administrator, Community Education Director, Outreach RN and Secretary.

(Facility Management Agreement ¶ 4.2). As noted above, the agreement provides for reimbursement to Reliant of those specific services related to hiring and training the four employees specified above. The Facility Management Agreement also provides that the Joint Venture is not responsible for Reliant's overhead costs:

> 4.16 Facility Manager Responsible for Facility Manager's Overhead. Notwithstanding anything to the contrary set forth in this Agreement, in no event shall the Company be responsible for any cost or expense of any office of the Facility Manager that is not located on the Facility Property or any of the Facility Manager's employees generally whose services do not *directly and permanently* relate to the Facility *or any overhead or other general expenses* of the Facility Manager's office or officers and under no circumstances shall such costs and expenses constitute costs and expenses of the Facility.

(Facility Management Agreement ¶ 4.16). Finally, paragraph 2.11 of the LLC Agreement provides:

> 2.11 Expenses. The Company shall pay all costs and expenses arising from or related to the organization of the Company and the commencement and continuation of its operation including all costs of acquiring, owning, developing, financing and operating the Company and LLC Property, and all management fees, leasing commissions and fees of legal counsel, accountants, engineers and other professionals or agents. . . .

Based on the above contractual provisions, Reliant is entitled to and would have been reimbursed for a significant portion of the start-up and development expenses it incurred on behalf of the Joint Venture. The exceptions to reimbursement were Reliant's own overhead expenses such as secretarial expenses. We also find that any expenses incurred after March 16, 2007, the date on which Reliant became aware that the Joint Venture was not going forward, should not be

reimbursed. Attached to Reliant's Proof of Claim No 292, is a list of start-up and development costs incurred by Reliant from June 2006 through April 2007, which total $168,671.75. After deducting secretarial expenses and expenses for the months of March and April 2007, we find that Reliant incurred and is entitled to receive a total of $151,681.50 in start-up and development expenses through February 2007. In arriving at this figure, we deducted the total expenses of $11,800.00 incurred by Reliant in March 2007. We realize that a portion of these March 2007, expenses was likely incurred prior to March 16, 2007. However, from the data presented, we are unable to determine that amount. Pursuant to the order set forth below, Reliant shall be given an opportunity to supplement the record with that information.

c. Attorney fees and expenses. Reliant asserts a claim for $22,252.00 for attorney fees and expenses. The LLC Agreement provides that:

> In the event any Member initiates litigation to enforce or protect its rights under this Agreement, the materially prevailing party shall be entitled to recover from the unsuccessful party, in addition to any other damages or relief awarded or obtained, all court costs, discovery expenses and reasonable attorney's fees incurred in connection with such litigation.

(LLC Agreement at ¶ 14.18). Delaware cases normally follow the American Rule that requires litigants to pay their own attorney's fees and expenses. However, "the determination of an award of attorney's fees is within the discretion of the trial judge." *Reserves Dev. LLC v. Crystal Props.*, LLC, 986 A.2d 362, 369 (Del. 2009). Further, Delaware law provides an exception to the American Rule and permits recovery of attorney fees and expenses by the prevailing party where the contract between the parties specifically provides for attorney fees and expenses to the prevailing party. *King v. Ron's Mobile Homes Sales, Inc.*, C.A. No. 00-12-027, 2009 WL 2243967, *3 (Del. Com. Pl. July 23, 2009) ("In Delaware, both courts of law and equity routinely enforce provisions of a contract allocating costs of legal actions arising from the breach of a contract.") (internal quotation and citation omitted); *Dittrick v. Chalfant*, No. Civ. A. 2156-S, 2007 WL 1378346, *1 (Del. Ch. May 8, 2007) ("A recognized exception to [following the American Rule] applies when a contractual

agreement exists between the parties regarding payment of attorneys' fees."). Further, the Sixth Circuit has stated with respect to awarding attorney fees in bankruptcy cases:

> We . . . choose to join the body of cases holding that unsecured creditors may recover their attorneys' fees, costs and expenses from the estate of a solvent debtor where they are permitted to do so by the terms of their contract and applicable non-bankruptcy law.

Official Comm. of Unsecured Creditors v. Dow Corning Corp. (In re Dow Corning Corp.), 456 F.3d 668, 683 (6th Cir. 2006).

Reliant is the "materially prevailing party" in this case and is entitled to recover attorney fees and expenses incurred in this litigation in a sum to be determined. Pursuant to the order set forth below, Reliant shall be given an opportunity to supplement the record with the detailed time and expense records of the attorney fees it incurred.

Conclusion

Based on the foregoing, we find:

A. The LLC Agreement is not an executory contract.

B. Samaritan breached the plain language of the LLC Agreement.

C. The plain language of the LLC Agreement prevents Reliant's claim against Samaritan for breach of fiduciary duties.

D. Samaritan breach the implied covenant of good faith and fair dealing.

E. Samaritan is not liable to Reliant on the basis of an intentional interference with a contractual relationship.

F. Reliant is entitled to damages in a final amount to be determined.

IT IS, THEREFORE, ORDERED that:

1. The Objection to Claim be and it hereby is **OVERRULED** to the extent stated above.

2. On or before **Noon on Monday, June 27, 2011,** Reliant shall supplement the record with:

a. Such marketing and financial data and other information Reliant determines is necessary to support its position that an award to it of lost profits is not speculative.

b. A breakdown of the $11,800.00 incurred by Reliant for start-up or development expenses in March 2007, reflecting the amount that was incurred on or before March 16, 2007.

c. Detailed time and expense records of the attorney fees and expenses Reliant incurred.

3. On or before **Noon on Tuesday, July 5, 2011,** the parties shall submit a joint scheduling order for submitting briefs limited to the issue of damages to which Reliant is entitled for the breach of the LLC Agreement by Samaritan.

COPIES TO:
Matthew B. Bunch, Esq.
Peter J. W. Brackney, Esq.
Allison F. Arbuckle, Esq.
Dean A. Langdon, Esq.

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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:
Joseph M. Scott, Jr.
Bankruptcy Judge
Dated: Friday, June 10, 2011
(jms)
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