This opinion is not intended for publication.

Dated: November 15, 2013
The following is SO ORDERED:

Jimmy L. Croom
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

In re	)	
	)	
RIVERSIDE MEDICAL, INC.	)	**Case No. 13-11802**
	)	
Debtors .	)	**Chapter 11**
	)	

ORDER RE: UNITED STATES TRUSTEE'S MOTION FOR DETERMINATION OF THE NEED FOR A PATIENT CARE OMBUDSMAN

This matter is before the Court on the United States Trustee's Motion for Determination of Need for a Patient Care Ombudsman. The Court conducted a hearing on the United States Trustee's motion on September 5, 2013.

This proceeding arises in a case referred to this Court by the Standing Order of Reference, Misc. Order No. 84-30 in the United States District Court for the Western District of Tennessee, Western and Eastern Divisions, and is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A). This Court has jurisdiction over core proceedings pursuant to 28 U.S.C. §§ 157(b)(1) and 1334 and, thus, may enter a final order in this matter. This

memorandum opinion shall serve as the Court's findings of fact and conclusions of law. Fed. R. Bankr. P. 7052.

I. FACTS

The facts in this proceeding are undisputed. The Debtor, Riverside Medical, Inc. ("Debtor"), filed a voluntary Chapter 11 petition for bankruptcy relief on July 15, 2013. Under "Nature of Business" on page 1 of the petition, the Debtor checked "Other."[1] In Item 18 of its Statement of Financial Affairs ("SOFA"), the Debtor indicated that its Nature of Business is "Home respirtory [sic] care & home medical equipment."

On August 13, 2013, the United States Trustee for Region 8 ("Trustee") filed a motion for a determination as to whether the debtor is a health care business pursuant to Federal Rule of Bankruptcy Procedure 1021(b). The Trustee premised its motion on the Debtor's statement that it provides home respiratory care and home medical equipment. In his motion, the Trustee stated that "[u]pon information and belief, the Debtor provides, *inter alia*, breathing treatments to individual patients in their homes." (Mot. for Determination as to Whether the Debtor is a Health Care Business at 1, Bankr. Case No. 13-11802, ECF No. 53.) The Trustee urged that if the Debtor is in fact a health care business the appointment of a patient care ombudsman ("PCO") was mandatory under 11 U.S.C. § 333 and Federal Rule of Bankruptcy Procedure 2007.2.

The Debtor filed a response to the Trustee's motion on August 20, 2013. The Debtor argued that it is not a health care business as that term is defined in the Bankruptcy Code. The Debtor stated that it "does not monitor, evaluate or physically come in contact with the patients and is not considered a home health agency . . . ." (Debtor's Resp. At 1, Bankr. Case No. 13-11802, ECF No. 60.) For that reason, the Debtor asked the Court to determine that it was not engaged in the health care business and that the appointment of a PCO was not necessary.

---

[1]The choices under "Nature of Business" are (1) Health Care Business, (2) Single Asset Real Estate as defined in 11 U.S.C. § 101(51B), (3) Railroad, (4) Stockbroker, (5) Commodity Broker, (6) Clearing Bank, or (7) Other.

At the hearing on the Trustee's motion, the Debtor's president James Dave Boroughs ("Boroughs") testified that the Debtor is in the business of supplying medical equipment to individuals. After receiving a referral from a physician or a nurse practitioner and verifying insurance, the Debtor delivers breathing equipment to the patient's home. This equipment consists of oxygen concentrators and nebulizers. The Debtor sets the equipment up and shows the patients how to operate and clean the equipment. It is not present in the home when the patient administers the breathing treatments nor does it have any physical contact with the patient. Bouroughs testified that the Debtor does not make any independent decision as to what type of equipment the patient will need or use or what type of therapy the patient needs. All of those decisions are made by the referring physician or medical practitioner and the Debtor merely supplies the patient with the necessary equipment. The Debtor does not offer its services to the general public.

At the conclusion of Bouroughs' testimony, the parties submitted the matter to the Court.

II. ANALYSIS

When Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act in October 2005, it added §§ 101(27A) and 333 to the Bankruptcy Code. Section 333(a)(1) provides that "[i]f the debtor in a case under chapter 7, 9, or 11 is a health care business" a court "shall order" the appointment of a PCO within 30 days of the commencement of the case. 11 U.S.C. § 333(a)(1). The Bankruptcy Code requires the PCO "to monitor the quality of patient care and to represent the interests of the patients of the health care business . . . ." *Id.* If, however, "the court finds that the appointment of such ombudsman is not necessary for the protection of patients under the specific facts of the case," the court may forgo the appointment. 11 U.S.C. § 333(a)(1); *see also In re Alternate Family Care*, 377 B.R. 754, 756 (Bankr. E.D.N.Y. 2008).

For purposes of § 333, the Bankruptcy Code provides the following definition of a "health care business."

> The term "health care business"–
>
> (A) means any public or private entity (without regard to whether that entity is organized for profit or not for profit) that is primarily engaged in offering to the general public facilities and services for--
>
> (i) the diagnosis or treatment of injury, deformity, or disease; and
>
> (ii) surgical, drug treatment, psychiatric, or obstetric care; and
>
> (B) includes--
>
> (i) any–
>
> (I) general or specialized hospital;
>
> (II) ancillary ambulatory, emergency, or surgical treatment facility;
>
> (III) hospice;
>
> (IV) home health agency; and
>
> (V) other health care institution that is similar to an entity referred to in subclause (I), (II), (III), or (IV); and
>
> (ii) any long-term care facility, ...

11 U.S.C. 101(27A). Pursuant to this definition, there are two basic categories of "health care businesses." Subsection (B) identifies specific types of entities that are considered "health care businesses," while subsection (A) identifies a broad category of entities which qualify. In order to meet the definition set forth in subsection (A) of § 101(27A),

> (1) The a debtor must be a public or private entity;
>
> (2) The debtor must be primarily engaged in offering to the general public facilities and services;
>
> (3) The facilities and services must be offered to the public for the diagnosis or treatment of injury, deformity or disease; *and*
>
> (4) The facilities and services must be offered to the public for surgical care, drug treatment, psychiatric care or obstetric care.

In re Med. Assocs. of Pinellas, 360 B.R. 356, 359 (Bankr. M.D. Fla. 2007) (emphasis added). Clearly, the Debtor in the case at bar does not meet the definition of a "health care business" as set forth in § 101(27A)(A). It does not provide surgical care, drug treatment,

psychiatric care or obstetric care. The Debtor merely supplies equipment to help patients with breathing difficulties.

Because § 333 is a relatively recent addition to the Bankruptcy Code, there is not an abundance of case law which has dealt with the issue of determining whether a debtor qualifies as a "health care business." However, the existing case law leads this Court to conclude that the Debtor in the case at bar is not a "health care business."

In *In re 7-Hills Radiology, LLC*, 350 B.R. 902 (Bankr. D. Nev. 2006), the court determined that a radiology clinic was not a "health care business" within the meaning of the Bankruptcy Code because (1) the debtor did not perform radiological tests or procedures on a walk-in basis, but instead only performed the tests on patients who were referred to the clinic by a physician; and (2) the debtor did not advise the patients of their test results. *Id.* at 904. The *7-Hills Radiology* court concluded that the "limitation of its business to referring physicians takes [the debtor] out of the definition of health care business." *Id.* In so ruling, the court reasoned that the language of § 101(27A)

> indicates that the type of health care businesses that were the primary targets of the definition were businesses that had some form of direct and ongoing contact with patients to the point of providing them shelter and sustenance in addition to medical treatment.

Id. at 905.

In *Medical Associates of Pinellas*, 360 B.R. at 360-61, the court determined that a debtor that "was established to provide administrative support" and "laboratory support" to a group of doctors did not qualify as a "health care business." *Id.* The *Pinellas* court based its decision on two facts. First, "[t]he Debtor did not advertise or procure patients on behalf of the member doctors nor were the doctors doing business under the" debtor's name. Second, "the Debtor did not provide any facilities and services for the 'diagnosis or treatment of injury, deformity or disease' and 'surgical, drug treatment, psychiatric or obstetric care.' " *Id.* at 361.

In *In re Starmark Clinics, LP*, 388 B.R. 729 (Bankr. S.D. Tex. 2008), the court determined that a private entity which offered outpatient cosmetic surgery to the general public qualified as a "health care business." *Id.* at 734 ("Debtor is a private entity which offers to the general public facilities and services for the diagnosis and treatment of physical injury, deformity, or disease, by *inter alia*, the injection of foreign substances into the body.").

In *In re Alternate Family Care*, 377 B.R. 754 (Bankr. S.D. Fla. 2007), the court concluded that the debtor was a "health care business" under § 101(27A). In that case, the debtor was a state-licensed agency that provided child placement and caring services, as well as residential psychiatric treatment for emotionally disturbed children. Although a large part of its client base was referred from physicians, the debtor also maintained a website that provided an avenue for parents to contact the debtor directly and request treatment for their children without a referral. For this reason, the court concluded that the debtor offered services to the general public and, therefore, qualified as a health care business. *Id*. at 758.

In *In re William L. Saber, M.D., P.C.*, 369 B.R. 631 (Bankr. D. Col. 2007), the court determined that a for-profit plastic surgery facility which offered services to cancer patients qualified as a health care business under § 101(27A). The debtor offered its services to the general public "for the purpose of the diagnosis or treatment of injury, deformity, or disease" and therefore met the definition of a "health care business." *Id.* at 636. *See also In re Plaza de Retiro, Inc.*, 417 B.R. 632 (Bankr. D.N.M. 2009) (concluding that debtor which had "a Home Health Care License and [was] licensed as a Skilled Nursing Facility" was a "health care business."); *In re Valley Health Sys.* 381 B.R. 756, 760-61 (Bankr. C.D. Cal. 2008) (recognizing that the parties did not dispute that the debtor which was a local health care district that operated three hospitals and a skilled nursing facility was a "health care business" under the Code.); *In re North Shore Hematology-Oncology Assocs., P.C.*, 400 B.R. 7 (Bankr. E.D.N.Y. 2008) (holding that "physician owned healthcare practice" which "operates as a 'For Profit' professional corporation . . . and is engaged in the

business of furnishing various health care services in the areas of cancer treatment and blood disorders" was a "health care business" under § 101(27A)).

In the case at bar, Boroughs testified that the Debtor is not a home health agency and does not provide any services other than the delivery of breathing equipment prescribed by a referring physician. The only interaction the Debtor has with patients occurs when the Debtor drops the equipment off and shows the patient how to clean the machine. The Debtor does not instruct the patients on how to administer the breathing treatments nor is the Debtor present when the treatments are administered. The Debtor has no physical contact with the patients. Additionally, the Debtor does not provide services to the general public. The only way a patient may order equipment from the Debtor is if his physician gives him a referral. As the court recognized in *7-Hills Radiology, LLC*, the "limitation of its business to referring physicians takes [a debtor] out of the definition of health care business." *Id.*, 350 B.R. at 904.

Based on Boroughs' testimony at the hearing in this matter, the Court determines that the Debtor does not qualify as a "health care business" under 11 U.S.C. § 101(27A) and, as such, the appointment of a Patient Care Ombudsman pursuant to 11 U.S.C. § 333 is unnecessary. The Court therefore **DENIES** the United States Trustee's Motion for a Determination as to Whether the Debtor is a Health Care Business Pursuant to Federal Rule of Bankruptcy Procedure 1021(b).

IT IS SO ORDERED.

Mailing List:
Samuel K. Crocker, United States Trustee
Karen P. Dennis, United States Trustee's Office
Michael Tabor, attorney for Debtor
Debtor