

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION**

IN RE:	§	
EL PASO CHILDREN’S HOSPITAL	§	
CORPORATION	§	CASE NO. 15-30784
DEBTOR.	§	CHAPTER 11
	§	
EIN: 26-3075429	§	
	§	
4845 ALAMEDA AVENUE	§	
EL PASO, TEXAS 79905	§	
	§	
<hr/>	§	
EL PASO CHILDREN’S HOSPITAL	§	
CORPORATION	§	
PLAINTIFF,	§	
	§	ADV. PRO. NO. 15- _____
V.	§	
	§	
EL PASO FIRST HEALTH PLANS,	§	
INC.,	§	
	§	
DEFENDANT.	§	

COMPLAINT

TO THE HONORABLE UNITED STATES BANKRUPTCY JUDGE:

COMES NOW, El Paso Children’s Hospital Corporation (“Debtor” and/or “Plaintiff”), and files its Complaint against El Paso First Health Plans, Inc. (“Complaint”) and would show the Court as follows:

JURISDICTION AND VENUE

1. This is an adversary proceeding brought by the Debtor as Plaintiff, pursuant to Bankruptcy Rule 7001(1) and 11 U.S.C. §§ 548 and 550. This Court has jurisdiction over the subject matter of this action under 28 U.S.C. § 157 and § 1334 in that this is a core proceeding arising under Title 11 of the United States Code (the “Bankruptcy Code”) or arising in or related to a case under the Bankruptcy Code and Rules 7001(7) and 7065 of the Federal Rules of

Bankruptcy Procedure (“Bankruptcy Rules”). Venue in this district is proper pursuant to 28 U.S.C. § 1409.

THE PARTIES

1. The Plaintiff may be served in this adversary proceeding through the undersigned counsel.

2. Defendant, El Paso First Health Plans, Inc. (“El Paso First” or “Defendant”), is a Texas non-profit corporation with its principle place of business at 1145 Westmoreland Drive, El Paso, Texas 79925. Defendant may be served by delivering a copy of the summons and the complaint to its agent for service Bruce Yetter, 1145 Westmoreland Drive, El Paso, Texas 79925, or pursuant to Federal Rule of Civil Procedure 4(h) by serving any director, officer or agent authorized by law to accept service.

FACTUAL BACKGROUND

A. The Plaintiff’s Bankruptcy

3. On May 19, 2015 (“Petition Date”), the Plaintiff filed its petition for relief under Chapter 11 of the Bankruptcy Code. The Debtor is a debtor-in-possession pursuant to §§ 1107(a) and 1108 of the Bankruptcy Code. No request for the appointment of a trustee or examiner has been made in this bankruptcy case, and no committee has been appointed or designated.

B. Relevant History of the Plaintiff’s Creation and UMC’s Connection with the Defendant

4. When the Plaintiff opened its doors on February 14, 2012, it opened the door for the children of El Paso and the surrounding communities to have unprecedented access to high-caliber pediatric care in their own backyard. The Plaintiff’s opening accomplished the largest expansion of pediatric medical care in recent West Texas history, thus filling a void in pediatric

care in El Paso that had historically caused infants and children in need of specialized pediatric care to travel to Albuquerque or San Antonio or Dallas or even across the state to Houston to receive treatment from pediatric specialists and sub-specialists. In fact, until the Plaintiff opened its doors, El Paso was the largest city in the United States without a separately licensed children's hospital. Through the present, the Plaintiff is the only separately licensed, non-taxing, independent, not-for-profit children's hospital in the El Paso region and the only dedicated pediatric hospital within a 250-mile radius of El Paso. As an independent, non-profit 501(c)(3) corporation that is governed by a board of directors ("Board"), the Debtor's sole mission is to provide pediatric care to the children of El Paso and surrounding communities.

5. Because of the desperate need for quality pediatric care in El Paso, between 1993 and 2007, five separate feasibility studies were performed to assess the feasibility of a children's hospital in El Paso. In March of 2007, Thomason Hospital (the former d/b/a of the El Paso Hospital District) engaged Kurt Salmon Associates to prepare one such feasibility study (the "2007 Feasibility Study"), the results of which were used to garner the support of the community for the establishment of a children's hospital in El Paso.

6. The 2007 Feasibility Study evaluated potential alternatives for the location of the children's hospital and among these options, University Medical Center ("UMC") selected the option under which the children's hospital would be built on its campus. The 2007 Feasibility Study was presented to the County Commissioners' Court, the Chamber of Commerce, other stakeholders and the public, and served as the touchstone to generate support necessary to obtain voter approval of general revenue obligation bonds in the amount of \$120.1 million, the proceeds of which were to be used to construct and equip a children's hospital (the "Bonds").

7. The voters of El Paso approved the concept of a children’s hospital for the community and the issuance of the Bonds in 2008, as direct obligations of UMC, payable from the levy and collection of an ad valorem tax by the taxpayers.

8. The Plaintiff operates on four floors of a 10-story tower on the campus of UMC.

9. On or about February 10, 2012—four days prior to the Plaintiff’s opening its doors to patients — UMC and the Plaintiff entered into a multitude of agreements that document and govern the relationship between UMC and the Plaintiff.¹

10. By design, the agreements cover nearly every aspect of the Plaintiff’s operations.

11. The agreements include a master agreement, a lease for the space on which Plaintiff operates on the UMC campus, several development series and repayment agreements that cover the provision and repayment of working capital, administrative services agreements for the provision of services necessary for the Debtor to operate, ranging from housekeeping and dietary to payroll, accounting, revenue cycle, human resources, equipment lease agreements, and labor service agreements (collectively, the “Agreements”). The Agreements were entered into at the behest of UMC and have provided the platform from which UMC has exercised control over the Plaintiff.

12. Inexplicably, many of the terms of the Agreements vary considerably from the structure contemplated by the 2007 Feasibility Study, including (i) assumptions that working capital loans would be repaid over a 5-year period, instead of 18 months, resulting in severe undercapitalization in the startup phase of operations of the Plaintiff; (ii) a portion of the property tax appropriations attributable to pediatrics (estimated at \$3.9 million in 2007 based on 2005 data) would be annually to the Plaintiff by UMC for relieving UMC of its obligation to

¹ The Plaintiff filed its Complaint and Request for Injunctive Relief against UMC (“UMC Complaint”) on the Petition Date, presently pending as Adversary No. 15-3005.

provide care for the pediatric indigent population of El Paso County; and (iii) the Plaintiff would benefit from the efficiencies created by its location on the campus of UMC and sharing services, which was not reflected in the Agreements. The variances from the 2007 Feasibility Study operate to the Plaintiff's detriment, but to UMC's benefit.

13. Despite the structure contemplated in the 2007 Feasibility Study, UMC has charged the Plaintiff multiples of its actual costs for myriad services, rent, and ancillary items. These UMC charges were not only above its own cost but far more than what the Plaintiff would pay third-party vendors for equivalent services. Moreover, UMC has also mandated that the management of certain indigent care programs be through the Defendant.

14. This mandate from UMC thrust the Plaintiff into an economically unhealthy relationship with the Defendant.

15. The Defendant is UMC's wholly-owned subsidiary managed care company.

16. The Defendant entered into a Provider Agreement with the Plaintiff on March 9, 2012, whereby the Defendant agreed to provide healthcare services to enrollees of UMC's health plan ("Provider Agreement").

17. UMC exerted undue influence in the preparation and negotiation of the Provider Agreement, resulting in significant underpayment to Defendant for its provision of healthcare services to enrollees of Defendant.

18. From 2012 through the April 1, 2015, the Plaintiff made transfers of services to enrollees of Defendant for which it received inadequate consideration in the form of undermarket reimbursement ("EPF Transfers").

19. The Defendant has underpaid the Plaintiff for services provided by Plaintiff by paying undermarket, below-cost rates to the Plaintiff for the EPF Transfers.

20. The Plaintiff has provided services to enrollees of Defendant's health plan at rates as low as 11% of billed charges.

21. The services provided by Plaintiff paid by the Defendant via the EPF Transfers should have been paid at a higher, industry-standard rate to Plaintiff.

22. The rates paid by the Defendant were so low that the Plaintiff lost money in providing the services to enrollees of the Defendant.

**COUNT 1: FRAUDULENT TRANSFER UNDER 11 U.S.C. § 548(A)
AGAINST DEFENDANT EL PASO FIRST**

23. The Plaintiff hereby incorporates all preceding paragraphs as if fully re-alleged herein.

24. The Plaintiff asserts its claims under 11 U.S.C. § 548 against the Defendant El Paso First.

25. From 2012 through the Petition Date, the Plaintiff made or incurred the obligation of the EPF Transfers.

26. The EPF Transfers were a transfer of an interest or an obligation of the Plaintiff in property made within two years of the Petition Date.

27. Pursuant to § 548(a)(1)(A), the EPF Transfers were made with actual intent to hinder, delay, or defraud an entity to which the Plaintiff was indebted or became indebted on the date of each of the EPF Transfers.

28. The Plaintiff received inadequate consideration in the form of undermarket reimbursements with respect to the EPF Transfers.

29. The Plaintiff was insolvent on the dates of the EPF Transfers, or became insolvent as a result of the EPF Transfers.

30. Alternatively, the Plaintiff received less than a reasonably equivalent value in exchange for the EPF Transfers and was insolvent on the date that the EPF Transfers were made, or became insolvent as a result of the EPF Transfers, or was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the Plaintiff was an unreasonably small capital; or intended to incur, or believed that the Plaintiff would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

COUNT 2: RECOVERY OF AVOIDED TRANSFERS-11 U.S.C. § 550

31. The Plaintiff hereby incorporates all preceding paragraphs as if fully re-alleged herein.

32. Section 550 of the Bankruptcy Code allows the Plaintiff, as debtor-in-possession to recover, for the benefit of the estate, the property transferred and avoided under § 548 from the initial transferee of such transfer or the entity for whose benefit such transfer was made. *See* 11 U.S.C. § 550(a).

33. The Plaintiff is entitled to avoid the EPF Transfers pursuant to § 548 as set forth herein. Pursuant to § 550(a), the Plaintiff is entitled to recover from the Defendant El Paso First the value of the services or obligations represented by the EPF Transfers, plus interest thereon to the date of payment and the costs of this action.

COUNT 3: UNJUST ENRICHMENT

34. The Plaintiff hereby incorporates all preceding paragraphs as if fully re-alleged herein.

35. Under Texas law, unjust enrichment is an equitable principle pursuant to which one who receives benefits unjustly should be held to make restitution for such benefits. *See, e.g., Villarreal v. Grant Geophysical, Inc.*, 136 S.W.3d 265, 270 (Tex. App.—San Antonio, pet. denied). In addition, unjust enrichment occurs when the defendant has wrongfully obtained a

benefit or even has passively received a benefit, for which it would be unconscionable to retain.

Id.

36. The Defendant obtained from the Plaintiff medical care and related services provided to the Defendant's enrollees for which the Defendant did not adequately compensate the Plaintiff.

37. The Plaintiff's provision of medical care and related services to the Defendant's enrollees benefited the Defendant.

38. The Defendant underpaid the Plaintiff in the form of undermarket, below-cost reimbursement to the Plaintiff in exchange for the Plaintiff's provision of medical care and related services to its enrollees.

39. It would be unconscionable to permit the Defendant to retain the benefits of the Plaintiff's provision of medical care and related services to the Defendant's enrollees for inadequate consideration in the form of undermarket, below-cost reimbursement.

40. The Defendant has been unjustly enriched at the expense of the Plaintiff.

41. The Defendant's underpayment to the Plaintiff constitutes an unjust retention of a benefit, which is fundamentally inequitable. The inequality of the undermarket, below-cost reimbursements from the Defendant is particularly unjust considering the Plaintiffs mission of providing pediatric care as of a non-profit hospital.

COUNT 4: QUANTUM MERUIT

42. The Plaintiff hereby incorporates all preceding paragraphs as if fully re-alleged herein.

43. Under Texas law, *quantum meruit* is an equitable remedy based upon an implied promise to pay for benefits received. *Wohlfahrt v. Holloway*, 172 S.W.3d 630 (Tex. 2005). The

elements of a *quantum meruit* claim include the following: (1) valuable services were rendered or materials furnished; (2) for the person sought to be charged; (3) which services and materials were accepted by the person sought to be charged and used and enjoyed by him; (4) under such circumstances as reasonably notified the person sought to be charged that the plaintiff in performing such services was expecting to be paid sought to be charged. *Id.* (citing *Vortt Exploration Co. v. Chevron U.S.A., Inc.*, 787 S.W.2d 942, 944 (Tex. 1990)).

44. The Plaintiff rendered valuable services in the form of its provision of medical care and services to enrollees of the Defendant.

45. The Defendant accepted the Plaintiff's provision of medical care and services to its enrollees.

46. The Defendant failed to reimburse the Plaintiff for its provision of medical care and services to the Defendant's enrollees at market rates. Instead, the Defendant reimbursed the Plaintiff at undermarket, below-cost reimbursement rates for such services.

47. The Plaintiff's provision of medical care and services to the Defendant's enrollees was under such circumstances that reasonably notified the Defendant that the Plaintiff was expecting reimbursement at market rates, not underpayment at below-cost levels.

PRAYER

WHEREFORE, PREMISES CONSIDERED the Plaintiff requests that the Court enter judgment against the Defendant El Paso First in an amount necessary to fully compensate Plaintiff for the fair market value of its services, as requested herein; (b) declare that the EPF Transfers and the obligations represented thereby are avoided pursuant to § 548 of the Bankruptcy Code and that Plaintiff recover the value of the EPF Transfers; (c) award Plaintiff its reasonable fees' and costs in bringing this action and the interest that has accrued since

Plaintiff's first demand; and (d) grant the Plaintiff such additional relief as the Court deems just and appropriate.

Dated: May19, 2015.

Respectfully submitted,

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