

**UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION**

IN RE:	§	
	§	CASE NO. 15-41684-BTR
FOREST PARK MEDICAL CENTER	§	Complex Chapter 11
AT FRISCO, LLC,	§	
	§	
DEBTOR.	§	

**RESPONSE TO DEBTOR’S EMERGENCY MOTIONS: (1) FOR AN ORDER
COMPELLING TURNOVER OF BOOKS, RECORDS, AND BANK STATEMENTS OF
FPMC SERVICES, LLC RELATING TO DEBTOR’S PROPERTY OR FINANCIAL
AFFAIRS AND (2) TO ENFORCE THE AUTOMATIC STAY**

Vibrant Healthcare Frisco, LLC (“Vibrant”) and FPMC Services, LLC (“FPMC Services”) file this Response to Debtor’s Emergency Motion to Compel Turnover of Books, Records, and Bank Statements of FPMC Services, LLC Relating to Debtor’s Property or Financial Affairs [Docket No. 397] (the “Turnover Motion”) and Debtor’s Emergency Motion to Enforce the Automatic Stay [Docket No. 405] (the “Enforcement Motion”), as follows:

I.

PRELIMINARY STATEMENT

1. The Turnover Motion is procedurally improper because the relief it requests can be obtained only through an adversary proceeding and not by motion.
2. Pursuant to 11 U.S.C. §§ 542(a) and 362, debtor Forest Park Medical Center at Frisco, LLC (“Debtor”) has the burden of demonstrating that the requested information in the possession of FPMC Services is, in fact, property of the estate. Debtor cannot make that showing.

3. Pursuant to 11 U.S.C. § 542(e), Debtor must prove that the requested information is related to its property or financial affairs. Debtor also cannot make that showing. In any event, even if Debtor could meet its burden, Vibrant and FPMC Services are entitled to adequate protection of their trade secrets and confidential information prior to the turnover of that information. Moreover, Vibrant and FPMC should be awarded an administrative expense priority for the costs it incurs in making documents available.

4. Accordingly, the Court should deny Debtor's Turnover and Enforcement Motions.

II.

ARGUMENT AND AUTHORITIES

A. The Turnover Motion Is Procedurally Improper Because The Relief That Debtor Seeks Can Be Obtained Only Through An Adversary Proceeding.

5. Rule 7001(a) of the Federal Rules of Bankruptcy Procedure provides that "a proceeding to recover money or property" is an adversary proceeding. Rule 7003 of the Federal Rules of Bankruptcy Procedure requires that an adversary proceeding be commenced by the filing of a complaint. A request for turnover of property of, or relating to, the estate is subject to Rules 7001(a) and 7003.¹ Accordingly, because Debtor must, but failed to, initiate an adversary

¹ See *In re Hinsley*, No. 97-20967, 149 F.3d 1179, at *11 (5th Cir. July 15, 1998) ("[E]ven if the Bankruptcy Turnover Order could be construed as ordering a turnover of property by Mrs. Hinsley, the order is invalid in this regard. Section 542 of Title 11 of the United States Code provides for turnover of property of the bankruptcy estate to the bankruptcy trustee. Rule 7001 of the Bankruptcy Rules provides that an action by the Trustee against a third party for turnover relief pursuant to § 542 constitutes an adversary proceeding. Adversary proceedings are governed by Part VII of the Bankruptcy Rules, Bankruptcy Rule 7001, and the rules in Part VII generally 'either incorporate or are adaptations of most of the Federal Rules of Civil Procedure. As such, a request for turnover relief against someone other than the debtor must be commenced by complaint rather than by motion.") (internal citations and quotations omitted); *In re Richardson*, 135 B.R. 256, 259 (Bankr. E.D. Tex. 1992) ("A proceeding to recover money or property is governed by the rules relating to adversary proceedings. However, prior to a turnover of property, the rights of a creditor must be adequately protected.") (internal citations omitted).

proceeding to obtain the relief it seeks in the Turnover Motion, the Court should deny the Turnover Motion as procedurally improper and ineffective.²

B. The Turnover And Enforcement Motions Fail Because The Requested Property Is Not Property Of The Estate.

6. Debtor does not dispute – nor could it – that sections 542(a) and 362 of the Bankruptcy Code apply only as to property of the estate.³ Debtor has the burden to prove that the property in question is property of the estate under section 541 of the Bankruptcy Code.⁴

7. Debtor cannot show that the requested information is property of the estate. The governing documents demonstrate that FPMC Services and Vibrant are independent contractors and not agents or partners of Debtor,⁵ and that the property in the possession of FPMC Services is owned by it and not Debtor.⁶ In addition, the governing documents provide that Vibrant, with

² See *In re Hinsley*, No. 97-20967, 149 F.3d 1179, at *11 (“[T]he district court entered the Bankruptcy Turnover Order pursuant to a motion seeking turnover relief. Because the Trustee may only seek turnover relief from Mrs. Hinsley via a properly filed and served complaint in an adversary proceeding, the Bankruptcy Turnover Order is in no way binding upon her.”).

³ See generally Docket Nos. 397, 405; *In re Crescent Res., LLC*, 457 B.R. 506, 514 (Bankr. W.D. Tex. 2011) (“[F]or Section 542(a) purposes, the Trust must show that the files at issue are property of the estate in order for the Court to order a turnover.”); *In re Heritage Org., L.L.C. (Faulkner v. Kornman)*, 350 B.R. 733, 737 (Bankr. N.D. Tex. 2006) (“If the Documents are not property of the estate, then there exists no basis under Section 542(a) for their turnover.”); *In re Chestnut (Brown v. Chestnut)*, 422 F.3d 298, 302 (5th Cir. 2005) (“Section 362(a)(3) bars any act to obtain possession of property of the estate and, by negative implication, allows ‘any act to obtain possession’ of property that is not ‘property of the estate.’ Thus, seizing a debtor’s bank account would violate the stay, while foreclosing on the home of some unrelated individual’s property, to which the debtor neither had nor asserted a claim of interest, would not.”) (emphasis in original).

⁴ See *Faulkner*, 350 B.R. at 738 (“[T]he Court notes that in an action to compel turnover of property of the estate under Section 542(a), the Trustee has the initial burden of proving that the property at issue is property of the estate under Section 541.”).

⁵ See Second Amended and Restated Hospital Development and Management Services Agreement between Forest Park Medical Center at Frisco LLC, Vibrant Healthcare Frisco, LLC, an FPMC Services, LLC, ¶¶ 9.05, 9.06.

⁶ See Company Agreement of FPMC Services, LLC, ¶ 2.8

the assistance of FPMC Services, controls the management and operations of Debtor.⁷ Thus, Debtor cannot prevail on the Turnover and Enforcement Motions because the requested information is not property of the estate subject to turnover or the automatic stay.

C. The Turnover Motion Is Subject To Adequate Protection For Vibrant's And FPMC Services' Trade Secrets And Confidential Information.

8. To the extent that the Turnover Motion is based on section 542(e), Debtor has the burden of demonstrating that the requested information relates to its property and financial affairs.⁸ Debtor cannot make that showing.

9. Even if Debtor makes that showing, Vibrant and FPMC Services are not required to turnover the requested information if they demonstrate that it is subject to an applicable privilege.⁹ Vibrant and FPMC Services are also entitled to adequate protection prior to the turnover of any such information.¹⁰

10. Information requested by Debtor includes trade secrets and other confidential information of Vibrant and FPMC. Thus, prior to an order of turnover, they are entitled to adequate protection for their proprietary information. Debtor has not offered such adequate protection in its Turnover Motion.

⁷ See Second Amended and Restated Hospital Development and Management Services Agreement between Forest Park Medical Center at Frisco LLC, Vibrant Healthcare Frisco, LLC, an FPMC Services, LLC, ¶¶ 1.01, 1.02, 1.04, 1.06, 1.08, 2.01.

⁸ See *Fulkner*, 350 B.R. at 739-40 (“[D]ocuments which are not property of the estate may still be subject to turnover under Section 542(e) if they relate to the debtor’s property or financial affairs, subject to any claim of privilege. . . . [T]he language of Section 542(e) suggests that the Trustee must carry an initial burden to establish that the Documents ‘relat[e] ... to the debtor’s property or financial affairs.’ If the Trustee satisfies his initial burden, then the party asserting a privilege must establish each of its elements”); *In re Crescent Res., LLC*, 457 B.R. at 514 (same).

⁹ See *Faulkner*, 350 B.R. at 739-40; *In re Crescent Res., LLC*, 457 B.R. at 514.

¹⁰ See *In re Richardson*, 135 B.R. at 259 (“[P]rior to a turnover of property, the rights of a creditor must be adequately protected.”).

11. Moreover, Vibrant and FPMC should be awarded an administrative expense for the costs incurred in producing documents.¹¹

III.

CONCLUSION AND REQUEST FOR RELIEF

12. For all the foregoing reasons, the Court should deny Debtor's Turnover and Enforcement Motions and grant such other and further relief to Vibrant and FPMC Services to which they are justly entitled.

¹¹ See *In re Life Imaging Corp.*, 31 B.R. 101, 103 (Bankr. D. Colo. 1983) ("FURTHER ORDERED that Gorsuch-Kirgis will be granted an administrative expense priority for the costs it incurs in making the files available to the Debtor for inspection."). See also *In re Rapid Freight Sys., Inc.*, No. 09-34047 GMB, 2011 WL 1300441, at *10 (Bankr. D.N.J. Mar. 31, 2011) ("The majority of courts to have considered the issue conclude that an attorney who turns over the documents to a trustee, as required under 11 U.S.C. § 542(e), 'may be entitled to a replacement lien or administrative expense measured by the value the documents provide, if any, in revealing assets or assisting in the administration of the estate.'") (citation omitted).

Date: January 27, 2016

Respectfully submitted,

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**ATTORNEYS FOR MARY HATCHER,
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this the 27th day of January, 2016, a true and correct copy of this document was electronically served by the Court's ECF system on parties entitled to notice thereof, including counsel for the debtor.

By: /s/ Michael J. Collins
Michael J. Collins