IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

IN RE: VENCOR, INC, et al.,	)	Chapter 11
	)	
Reorganized Debtors.	)	Case Nos. 99-3199 through 99-3327 (MFW)
	)	
CHARLES L. ABRAHAMS and ELI-ANE PHILLIPS-MINKS,	)	
	)	Civil Action No. 03-4-GMS
Appellants,	)	
	)	
v.	)	
	)	
KINDRED HEALTHCARE, INC. f/k/a VENCOR, INC., et al.,	)	
	)	
Appellees.	)	
	)	

MEMORANDUM AND ORDER

I. INTRODUCTION

Charles L. Abrahams and Eli-Ane Phillips-Minks (collectively, "the Appellants"), seek to vacate the order entered by the United States Bankruptcy Court for the District of Delaware which disallowed each of the two proofs of claim filed in Vencor, Inc.'s ("Vencor") bankruptcy proceeding. These proofs of claim each relate to, and are based entirely upon, a qui tam action that was filed in the United States District Court for the District of California by the Appellants, on behalf of the United States.

Presently before the court is Vencor's motion to dismiss, or in the alternative, to strike the Appellants' corrected designation of record and clarification of issues on appeal. Vencor requests dismissal because it argues that the Appellants are barred from collaterally attacking both the Confirmation Order and the California District Court's order approving the settlement and

dismissing the claims. For the following reasons, the court agrees and will grant Vencor's motion to dismiss.

II. BACKGROUND

A. The Phillips-Minks Qui Tam Action

On July 23, 1998, certain relators, including Eli-Ane Phillips-Minks ("Phillips-Minks") filed their first amended complaint in the United States District Court for the Southern District of California. In their complaint, they asserted claims under the False Claims Act's qui tam provisions against Vencor and the Behavioral HealthCare Corporation ("BHC"). The qui tam action alleged, among other things, that Vencor knowingly submitted false Medicare claims to the government.

On June 6, 2000, the United States notified the court of its intent to intervene in the action as to Vencor for the limited purpose of protecting its interests in Vencor's Delaware bankruptcy proceedings. However, on June 23, 2000, the United States withdrew its intervention as to Vencor. On the same day, the United States partially intervened with regard to certain claims against the BHC defendants. The United States subsequently continued to pursue settlement discussions with both Vencor and BHC. In late February 2001, the United States, Vencor, and BHC reached a final settlement agreement. Phillips-Minks did not accede to the settlement agreement.

B. The Debtor's Bankruptcy Proceedings

On September 13, 1999, Vencor filed its petition for relief under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware.

On January 6, 2000, the Appellants filed proof of claim number 5636 on behalf of Phillips-Minks in the amount of $500,000,000. Claim 5636 relates to allegations which were the subject of Phillips-Minks qui tam action. Also on that date, the Appellants filed proof of claim number 5637

in the amount of $129,000. This claim requests "pre-petition attorneys' fees incurred by Abrahams relating to his representation of Eli-Ane Phillips-Minks, as Relator, the plaintiff on behalf of the United States" in the qui tam action.

C. Confirmation Order

On December 14, 2000, Vencor filed its Fourth Amended Joint Plan of Reorganization of Vencor, Inc. and Affiliated Debtors Under Chapter 11 of the Bankruptcy Code ("the Plan"). Article 6.12 of the Plan sets forth the terms of Vencor's settlement of certain claims filed by or on behalf of the United States, including the qui tam actions identified in Exhibit 5 to the Plan ("the Government Settlement"). The Government Settlement provides that "[t]he Debtors shall pay the United States $25.9 million" in settlement of certain claims filed by or on behalf of the United States - including the Phillips-Minks qui tam action - and that such payments "shall be made to the United States Department of Justice via electronic transfer."[1]

The Government Settlement further provides that "the United States agrees to pay 15 percent of the proceeds paid by the Debtor and Ventas Entities to resolve all claims for the Covered Conduct as to relators in the Qui Tams Actions, as listed on Exhibit 5 to the Plan, and in accordance with the allocations set forth in Schedule E . . . ." Plan at ¶ 6.12(d)25. Schedule E of the Plan, entitled "Schedule of Allocation of Government Settlement" provides that $14,660.77 of the amount of money received by the United States from Vencor and the Ventas Entities pursuant to the Government Settlement shall be paid to Phillips-Minks.

Section 6.12(d)27 of the Plan provides that "[t]he Debtors and Ventas Entities agree to pay the attorney's fees and expenses of relators who filed Qui Tam actions, as listed on Exhibit 5 to the

[1]The Phillips-Minks qui tam action is the eighth case listed in Exhibit 5 to the Plan.

Plan, in accordance with Schedule A." Schedule A to the Plan, entitled "Schedule of Attorneys' Fees," provides that Charles Abrahams and Robert McCord shall be paid an aggregate amount of $15,000 in attorneys' fees in connection with the Phillips-Minks qui tam action.

The Plan provides that:

> the Government Settlement as set forth in this Section 6.12, and each of the specific settlement amounts enumerated in Schedule E attached [t]hereto, shall constitute a good faith compromise and full and final monetary settlement of the United States Claims, which compromise and settlement is in the best interests of creditors and the Debtors' estates and the Government Settlement and each enumerated settlement amount are fair, adequate and reasonable under all the circumstances. Confirmation of the Plan by the Bankruptcy Court shall constitute approval of the Government Settlement.

Plan at ¶ 6.12(d)26.

On February 15, 2001, Abrahams filed Phillips-Minks' objection to the confirmation of Vencor's Fourth Amended Joint Plan of Reorganization. Specifically, the objection was based upon the argument "that the [Phillips-Minks] Qui Tam Action should not be a part of the government settlement with the Debtors in that the United States lacked authority to settle claims and to bind the Relator to the proposed settlement with the Debtors and Ventas entities."

The Bankruptcy Court held a confirmation hearing on March 1, 2001. Counsel for the Appellants attended the confirmation hearing and presented oral argument to the court in support of the objections. On March 19, 2001, the Bankruptcy Court confirmed the plan. In its confirmation order, the Bankruptcy Court stated that:

> [a]s of the Effective Date, the Government Settlement and the allowance and settlement of the Class 6 Claims and the payment of such claims, as set forth in the Sections 5.05 and 6.12 of the Fourth Amended Joint Plan of Reorganization of Vencor, Inc. and Affiliated Debtors Under Chapter 11 of the Bankruptcy Code ("the Plan"), is approved as a good faith compromise and settlement pursuant to

> Bankruptcy Rule 9019, and the Government Settlement, including the settlement amount allocated to each of the Qui Tam Actions as enumerated in Schedule E of the Plan, is fair, adequate and reasonable under the circumstances. As to United States, et al. Ex Rel. Phillips-Minks, et al. v. Behavioral Healthcare Corp., et al. referenced on Schedule E and Exhibit 5 to the Plan, the government's settlement of this Qui Tam Action is effective only to the extent that United States has authority to compromise and settle this Qui Tam Action pursuant to the Federal [False] Claims Act ("FCA"). The District Court in that action may determine, on motion of any party to that action, whether the government had authority to settle that action.

Confirmation Order at ¶ 10.

D. Approval of the Qui Tam Action

On July 27, 2001, the California District Court held that "the government demonstrated 'good cause' sufficient to permit its intervention" in that case. It thus granted the United States' motion to intervene. On December 20, 2001, the California District Court found that "the United States had the authority to settle and dismiss the qui tam action as Vencor, subject to Court approval." It further found that "the settlement as to the Vencor defendants is wholly unobjectionable." In a footnote, the California District Court elaborated that:

> [a]s to the merits of the Vencor settlement, the Court defers to, and concurs with, the Delaware bankruptcy court's determination that the settlement is fair, reasonable, and adequate. The Court has carefully reviewed the Settlement Agreement, relator Phillips-Minks' objection thereto, and all briefs, declarations, and affidavits pertaining to the Vencor settlement. As a result of this review, the Court finds that the agreement furthers rational governmental purposes and is without any indication of arbitrariness, capriciousness, bad faith, or improper motive.

Order Approving Settlement and Dismissal of Claims, n.4.

On February 27, 2002, the California District Court denied Phillips-Minks' motion to reconsider the Order Approving Settlement and Dismissal of Claims.

E. Subsequent Bankruptcy Proceedings

On June 20, 2002, Vencor filed supplemental omnibus objections to claims filed on behalf of Abrahams requesting that Claim Numbers 5636 and 5637 be disallowed. On October 24, 2002, the Bankruptcy Court signed the Order Disallowing Certain Claims Filed on Behalf of Charles L. Abrahams and Eli-Ane Phillips-Minks. This order disallowed in full, and expunged, both claims. The Bankruptcy Court entered the Order Disallowing Proofs of Claim on October 30, 2002.

On November 8, 2002, the Appellants filed the Notice of Appeal of the Order Disallowing Proofs of Claim. On November 22, 2002, they filed their Designation of Record and Issues on Appeal. Vencor filed its Counter Designation of Record and Counter Designation of Issues on Appeal on December 2, 2002. On December 22, 2002, the Appellants filed their Corrected Designation of Record and Clarification of Issues on Appeal. This corrected designation identified sixty additional issues on appeal that had been omitted from the original designation of seven issues. The appeal was docketed in the present court on January 2, 2003.

III. DISCUSSION

In order to prevail on this appeal, the Appellants must demonstrate that: (1) the Bankruptcy Court erred in entering the Confirmation Order; and (2) the California District Court committed error when it held that the United States had the authority to settle the qui tam action. Thus, the Appellants implicitly seek to challenge the Bankruptcy Court's Confirmation Order. They also seek review of orders entered by the California District Court. For the following reasons, the court concludes that the Appellants are barred from bringing this appeal.

A. Confirmation Order

Section 1144 of the Bankruptcy Code provides that, "[o]n request of a party in interest at any time before 180 days after the date of the entry of the order of confirmation, and after notice and a hearing, the court may revoke such an order if and only if such order was procured by fraud." Furthermore, "[t]he 180 day deadline for seeking revocation of an order of confirmation is absolute and may not be extended by the court." COLLIER ON BANKRUPTCY ¶ 1144.04 (15th ed. 2002); *see also In re Vencor, Inc.*, 284 B.R. 79, 83 (D. Del. Bankr. 2002).

In the present case, the Bankruptcy Court entered the Confirmation Order on March 19, 2001. The Appellants did not move the Bankruptcy Court to revoke the Confirmation Order with respect to this ruling within 180 days of its entry. Consequently, they are barred from seeking a modification of the Confirmation Order with respect to their claims.

Moreover, even if the Appellants could overcome the procedural bar of 11 U.S.C. § 1144, they are nevertheless time-barred from appealing the Confirmation Order in the present court with respect to the treatment of their claims under that order. Federal Rule of Bankruptcy Procedure 8002 states that, "[t]he notice of appeal shall be filed with the clerk within 10 days of the date of the entry of the judgment, order, or decree appealed from." As the Confirmation Order constituted a final order on the merits that the Bankruptcy Court was leaving to the California District Court the issue of the government's authority to settle the Phillips-Minks qui tam action, the Appellants were required to file a notice of appeal with respect to the Confirmation Order on or before March 29, 2001. *See e.g. Eastern Metals & Chem. Co. v. Maham*, 225 F.3d 330, 336 (3d Cir. 2000) (holding that "an order confirming a Chapter 11 plan is a final order "on the merits."). There can be no dispute that the Appellants failed to file this appeal on or before March 29, 2001.

B. The California District Court's Orders

Vencor next argues that the Appellants are barred from collaterally attacking the California District Court's Order Approving Settlement and Dismissal of Claims. For the following reasons, the court must agree.

"[A] judgment by a court of competent jurisdiction bears a presumption of regularity and is not thereafter subject to collateral attack." *Kalb v. Feuerstein*, 308 U.S. 433, 438 (1940). In the present case, upon entry of the Confirmation Order, the only remaining issue of potential dispute relating to Claims 5636 and 5637 was whether the government did, in fact, have the authority to settle the Phillips-Minks qui tam action. The Bankruptcy Court permitted the parties to raise this issue before the California District Court.

On July 27, 2001, the California District Court held that "the government demonstrated 'good cause' sufficient to permit its intervention" in that case. It thus granted the United States Government's motion to intervene. On December 20, 2001, over the objections of the Appellants, the California District Court held that "the United States had the authority to settle and dismiss this qui tam case as to Vencor, subject to Court approval," and "that settlement as to the Vencor defendants is wholly unobjectionable." Order Approving Settlement and Dismissal of Claims at 4.

On February 27, 2002, the California District Court denied Phillips-Minks' motion to reconsider its order. The Appellants concede that they have not appealed either the original order, or the order denying reconsideration, to the United States Court of Appeals for the Ninth Circuit.

Title 28 of the United States Code Section 1291 provides that, "the court of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ." *See also* 28 U.S.C. § 1294 (requiring that appeals from reviewable decisions of the district courts shall be taken to the court of appeals embracing the district court's district). Accordingly, the

present court does not have appellate jurisdiction to review the findings entered by the California District Court, including the finding that the government had the authority to settle the Phillips-Minks qui tam action. Thus, as the Appellants seek to have this court act in an appellate capacity over the California District Court, the appeal must be dismissed.

C. The Corrected Designation

On November 22, 2002, the Appellants filed their Designation of the Contents for Inclusion in the Record. Vencor filed its Counter Designations on December 2, 2002. It did not file a cross-appeal. On December 22, 2002, the Appellants then filed a Corrected Designation of Record and Clarification of Issues on Appeal.

Federal Rule of Bankruptcy Procedure 8006 permits an appellant to designate additional items to be included in the record after submitting its initial designations only in response to a cross-appeal. As Vencor did not file a cross-appeal in this matter, the Appellants have no basis for filing their Supplemental Designations.

Additionally, even if Rule 8006 permitted the Appellants to file their Supplemental Designations, they are nevertheless time-barred from doing so. An appellant must file its additional items to be included in the record, if any, "within 10 days of service of the cross appellants' statement." FED. R. BANKR. P. 8006. Thus, the Appellants would have been required to file their Supplemental Designations on or before December 12, 2002. The Appellants did not, however, file their Supplemental Designations until December 22, 2002.

Finally, the Appellants do not point to any legitimate basis for extending the time in which to designate their issues on appeal. Rather, they state that:

> Mr. Charles L. Abrahams, the attorney for Appellants is a sole practitioner and was out of the country within the [ ] 30 days [prior

> to the filing of the Supplemental Designations] for a period of 11 days. Mr. Charles L. Abrahams had a number of deadlines and his temporary secretary did not follow the office procedure and failed to calendar the ten day deadline to respond to the Appellees' Designation pursuant to Rule 8006.

Motion for Leave to File Corrected Designation at 1. None of these reasons constitute excusable neglect. Accordingly, to the extent that any of the sixty newly designated issues on appeal would survive the court's rulings in Sections III A and B, *supra*, the court will strike the Appellants' Corrected Designations and Clarification of Issues on Appeal as being untimely filed.

IV. CONCLUSION

For the foregoing reasons, IT IS HEREBY ORDERED that:

1. Kindred Healthcare's Motion to Dismiss (D.I. 14) is GRANTED.

Dated: April 28, 2003

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE