IN THE UNITED STATES BANKRUPTCY COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

IN RE:	§	CASE NO. 23-90086-11
	§	HOUSTON, TEXAS
TEHUM CARE SERVICES, INC.,	§	THURSDAY,
	§	APRIL 11, 2024
DEBTOR.	§	2:01 P.M. TO 2:49 P.M.

ORAL RULING ON MOTION TO APPROVE THE SETTLEMENT AGREEMENT (VIRTUAL ONLY)

BEFORE THE HONORABLE CHRISTOPHER M. LOPEZ
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:	SEE ELECTRONIC APPEARANCES
ELECTRONIC RECORDING OFFICER:	ZILDE COMPEAN
CASE MANAGER:	ROSARIO SALDANA

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HOUSTON, TEXAS; THURSDAY, APRIL 11, 2024; 2:01 P.M.

THE COURT: Okay. Good afternoon, everyone. This is Judge Lopez. Today is April the 11th. I'm going to call Case No. 23-90086 here in the Tehum case. I'm going to ask everyone to please make your appearances electronically.

I'm just going to read a decision into the Record with respect to the motions filed at Docket No. 1259 and 1260. So that's all I'll be doing today. And so, let me just do one thing.

Mr. Kaufman, I see you there. Could you just give me a thumbs up that you can hear me?

Perfect. Okay.

All righty, folks. Here we go:

Tehum and the Official Committee of Unsecured Creditors, who I'll refer to as the "UCC," filed a joint motion seeking approval of a Settlement Agreement under Federal Rule of Bankruptcy Procedure 9019.

A 9019 motion is supported by several parties who assert tort claims against Tehum, the Official Committee of Tort Claimants, who I will refer to as the "Tort Committee," along with some individual tort claimants oppose the Settlement Agreement. So does the Office of the United States Trustee.

The Tort Committee also filed a separate motion to dismiss this Chapter 11 case. Tehum and the UCC opposed

dismissal.

The Court has jurisdiction under 28 U.S.C. 1334, and this is a core proceeding under 28 U.S.C. 157(b). After providing some background, I will address the 9019 motion first. Then I'll turn to the motion to dismiss.

The history of Tehum and how it was formed are well documented. Pre-petition, Corizon Health, Inc. conducted a divisional merger under Texas law that created two companies.

Tehum, the Debtor here, took on lots of pre-divisional merger legacy tort liabilities. The other, CHS TX, Inc., took on Corizon operating assets and related liabilities, and operated as a going concern. CHS operates under the name YesCare.

Tehum's Chapter 11 case started in February of 2023. In March of 2023, the United States Trustee appointed the UCC. In May of 2023, this Court entered a stipulation and agreed order appointing a mediator.

Tehum participated in three separate mediations under this Order. The first mediation was conducted in July of 2023, and it involved some insurance issues.

The second mediation was in August of 2023. It lasted three days and involved Tehum, UCC, YesCare, its wholly owned subsidiaries, Geneva, Perigrove 1018, Perigrove, M2 Hold Co, M2 Loan Co, and Pharmacore.

This mediation focused on resolving the estate's claims against Tehum's affiliate entities and certain related parties and individuals, and included claims relating to the divisional merger. This mediation led to a proposed global settlement of claims.

The third mediation occurred in September of '23, involved Tehum, the UCC, and another insurance company. In that month in September of '23, Tehum and the UCC also filed a Chapter 11 Plan incorporating the deal reached in mediation and a Disclosure Statement in support of the Plan.

The documents were later amended in October of 2023. To date, this Court has not considered that Disclosure Statement or the related Plan.

November of 2023, the Court entered an order approving appointment of a second mediator. That same month, the United States Trustee appointed the Tort Committee.

Parties from the first global mediation, this time with the Tort Committee, participated in another mediation. Tehum, the UCC, and the settlement parties reached the terms of a revised Settlement Agreement. The Tort Committee didn't sign onto the deal.

The Debtor and the UCC are the Movants of the 9019 seeking approval of the settlement. They believe the settlement is reasonable; and if granted, the Movants intend

to file another amended joint Chapter 11 Plan incorporating the settlement.

The settlement reached in mediation, and it's attached to the 9019 motion, is not necessarily the one Movants want the Court to approve. It's actually unclear. That's because the goal posts moved during the hearings on the 9019 motion.

But the key terms of the Settlement Agreement attached to the 9019 motion are the settlement parties agree to advance 5 million to Tehum under a fifth interim DIP financing order that would be entered with the order approving the Settlement Agreement.

Tehum would propose this new Chapter 11 Plan incorporating the Settlement Agreement. On the plan effective date, the settlement parties would release and waive all claims against Tehum's estate, including M2 Loan Co's claims under DIP financing orders, and proofs of claim filed by Geneva Consulting and M2 Loan Co, LLC.

On the plan effective date, the settlement parties would also pay or cause to be paid to Tehum or its successor-in-interest an additional 40 million.

Upon payment in full of the 5 million additional financing, and the 40 million settlement payment, the M2 parties would provide releases, including to Tehum, Russell Perry, Tehum's Chief Restructuring Officer, the UCC and its

members, any Trustees appointed under the Chapter 11 Plan.

And Tehum, its estate, and the UCC release a larger group of what are defined as the "Release Parties," as well as each released party's current and former directors, managers, employees, agents, attorneys, and other professional advisers.

The broader group defined as the Released Parties are what is defined as the M2 parties -- M2 Equity Co LLC; Valitas Intermediate Holding Inc.; Valitas Health Services Inc.; M2 Pharmacore Equity Holdings, LLC; Pharmacore, M2 LLC; Pharmacore Holdings, LLC; and Dever Distribution, LLC; YesCare Holdings, LLC; Sigma RM, LLC; DG Realty Management, LLC; Scarcore or Scorsore, LLC; Mr. Isaac Lefkowitz; Ms. Sarah Tirschwell (phonetic); Ayodeji Olawale Ladele, spelled A-Y-O-D-E-J-I, O-L-A-W-A-L-E, L-A-D-E-L-E; Beverly Rice; Jeffrey King; Jennifer Finger; Frank Sholey, S-H-O-L-E-Y; FTI Capital Advisors, LLC.

And for each of those parties that I mentioned above, each of their current and former officers, directors, employees, managers, attorneys, professional advisers, and agents, but excluding a few folks -- James Gassenheimer, G-A-S-S-E-N-H-E-I-M-E-R; Charles Gassenheimer; James Hyman, H-Y-M-A-N; and Michael Flacks, F-L-A-C-K-S.

So, the Released Parties get released, but only the M2 parties, which is a subset of the Released Parties,

are releasing on the Creditor side so far.

But upon confirmation and the occurrence of the Plan effective date, and upon payment in full of the settlement payment, there would also be deemed mutual releases by and among the Released Parties and Creditors that do not opt out of the third-party releases in the original-filed Plan.

The settlement added some more flavor in paragraph 9, and it says that effectiveness of the Settlement Agreement was conditioned upon entry of a Court Order in form and substance acceptable to the M2 parties approving the agreement and the entry of a Court Order confirming a Chapter 11 Plan that would contain as much as the law allows these provisions.

All Creditors would be enjoined from pursuing any claims or causes of action against the Released Parties in accordance with the scope of the releases.

Parties who opt out of the settlement of the Plan would not be authorized to receive distributions from the settlement payments or pursue claims or causes of action against the Released Parties unless they first seek authority from the Court and get an Order from the Court finding that their claims and cause of action were not released or otherwise enjoined under the Plan.

There had to be approval of releases substantially

like the ones in the current Plan for the Released Parties by all Creditors that don't opt out of the settlement. Then there'd have to be exculpation planning junctions and required gatekeeping provisions substantially like those that are on the currently filed Plan to ensure the finality of the Plan and the Confirmation Order.

There's also a finding that contracts that were not allocated to YesCare Corp and its wholly owned subsidiaries under the May 2022 divisional merger, but under which YesCare is still operating post-divisional merger are not executory contracts of Tehum or that, to the extent that they are determined to be executory by a Final Order of the Court, the contract counterparty must file a proof of claim within 30 days of the later of the effective date or the entry of the Final Order.

Thus, the effectiveness of the settlement was also conditioned on the Court approving a Chapter 11 Plan with each of the requirements in paragraph 9.

As I mentioned a few moments ago, things got interesting during the hearings. Because one day, after some questions no doubt from me and some Creditors opposing the motion, Movants filed a revised proposed Order approving the Settlement Agreement.

This new order changed paragraph 9 in the Settlement Agreement, and that's the one with all the

requirements that had to be in a Plan.

Paragraph 9 would now provide that the effectiveness of the settlement was conditioned on entry of a Court Order approving the 9019 settlement and entry of a final Court Order not subject to appeal confirming a Chapter 11 Plan, including provisions that:

One, every Creditor would be enjoined from pursuing all claims and causes of action against the Released Parties that are property of Tehum's estate that were released; and if there's a dispute about that, then the Creditor is prohibited from pursuing the claim or cause of action unless the Creditor first seeks authority from the Court and secures a Final Order that's not subject to appeal.

And then it also says that nothing was intended to preclude or affect any direct claims against third parties arising on or after the May 2022 divisional merger, or claims that were allocated to CHS TX through the divisional merger and as to which as a result, Tehum no longer has any liability -- Tehum no longer has any liability.

There are two important changes proposed by Movants in the proposed Order.

First, the effectiveness of the agreement was conditioned on confirmation of a Plan. Now it's final, non-appealable Order confirming the Plan. It was argued by a

witness for the Movant that these terms are functionally the same. But now, it means that the 40 million settlement is not required until all potential appeals are resolved.

The second change was the removal of the Plan term requirements like the opt out. I would note for the Record that an Order confirming a Plan is certainly different on the textual basis from a final non-appealable Order, but the parties may have understood that functionally, that was the same.

During the hearing, the Court still had questions about the settlement payment hinging on a Final Order approving confirmation of a Plan that had not been filed yet, and whether the Court was being asked to actually or implicitly preapprove Chapter 11 terms now.

The Court asked questions like whether the settlement was more like a Restructuring Support Agreement where a Debtor and a creditor agree on the terms of a proposed Chapter 11 Plan.

For the Record, this Court generally does not approve Restructuring Support Agreements. I have not done so yet to date. But Debtors are certainly encouraged to resolve disputes through entry into an RSA, which is often good.

RSA's solidify a deal and parties to a deal, right? And it focuses parties on a consensual resolution.

I just think it's best to approve Chapter 11 Plan terms in connection with Plan Confirmation. Movants told me it wasn't like an RSA. And we'll just agree to disagree on that point.

Later, things even got more interesting. Counsel for the M2 parties orally informed the Court that they would be okay paying the 40 million settlement payment upon entry of a Final Order approving the 9019 motion that wasn't subject to any further appeal.

The Tort Committee and the US Trustee filed oppositions to the 9019 motion. The Tort Committee argues that the settlement is unfair, fails to meet the requirements for approval under 9019, and strips tort claimants of their rights through the release it contemplates.

The U.S. Trustee argues that the settlement is not in the best interest of the estate and its Creditors, and that it constitutes an impermissible sub rosa Plan.

Bankruptcy Rule 9019 governs the procedural requirements to be followed before a settlement may be approved. Bankruptcy Rule 9019 provides that on motion by the Trustee, and after a notice and a hearing, the Court may approve a compromise and a settlement.

In deciding whether a settlement of litigation, potential litigation, is fair and equitable, a judge in

bankruptcy must make a well-informed decision comparing the terms of the compromise with the likely rewards of litigation.

And for that, I am citing the *In Re Cajun Electric Power Co-Op*, case 119 F.3d 349, pincite 356 (5th Cir. 1997) case. I'm not citing internal citations.

The standard for approval of a bankruptcy 9019 settlement Order is whether the proposed settlement is fair, equitable, and in the best interests of the estate. I'm citing now *Official Committee of Unsecured Creditors v. Moeller*, otherwise known as *In Re Age Ref, Inc.*, 801 F.3d 530, 540 (5th Cir. 2015) case.

In determining whether a settlement is fair and equitable, this Court should consider the probability of success in litigating the claim subject to the settlement with due consideration for the uncertainty and fact in law; the complexity and the likely duration of litigation and any attendant expense; inconvenience and delay; all other factors bearing on the wisdom of the compromise, including the best interest of creditors with proper deference to their reasonable views, and to the extent to which the settlement is truly the product of an arm's length bargaining and not a fraud or collusion. Same case.

The Movants conducted in-depth investigations of claims and causes of action belonging to Tehum's bankruptcy

estate. Both stressed their negotiations and investigations were independent and tenuous.

Movants' investigations included independent review of many documents, many third-party subpoenas, multiple depositions, and witness interviews. The record, including testimony from representatives from Tehum and the UCC supports this contention.

Witnesses testified that the investigations reveal that the estate may have meritorious claims against Perigrove 18, LLC, M2 Loan Co, LLC, Geneva Consulting, LLC, directors or officers and other transferees or beneficiaries of avoidable, fraudulent transfers in connection with the divisional merger.

They also testified that avoiding the divisional merger as a fraudulent transfer presents a significant impediment. Other than the cash removed from certain of Tehum's bank accounts, their research concluded that Tehum's value as of the May 5, 2022 divisional merger date was limited.

The company's financials didn't improve by the time the divisional merger was effective. Movants recognize that the entity that emerged with the active contracts -- which that's CHS TX, YesCare -- benefitted from removing liability off its books, but they say it also had limited or low value or no value, excuse me, based on low margins on

many of those contracts.

UCC and Tehum also evaluate the viability of potential claims against CHS TX, YesCare based on the divisional merger under theories based on or derivative of successor liability.

They believe recovery under successor liability would present additional challenges beyond those the estate would encounter by simply challenging the divisional merger as a fraudulent transfer.

Tehum, the M2 parties, and the UCC and some of the parties that support it, claimed this deal was also the best opportunity to get money in the hands of tort claimants soon. There could be a meaningful distribution with over 40 million cash plus additional tax refunds.

And Movants highlight that one half of tort claimants who filed proofs of claim in this case are pro se parties, many of whom are incarcerated. Remember, Tehum's predecessor pre-divisional merger was in the prison healthcare business.

Curators for the University of Missouri who have been litigating in State Court moved to appoint a receiver against Tehum before it filed for bankruptcy. And they support the settlement.

The settlement is also supported by incarcerated tort claimants who claim to be the victim of horrible attack

in prison.

Neither like Tehum or the divisional merger, to be clear, but both believe that this deal is worth taking. Both want to end the litigation and get money in the hands of claimants, including pro se claimants, who likely won't fair well being represented outside of court, or I should say outside of bankruptcy and unrepresented in State Court.

The Court takes these positions and concerns of the parties very seriously, but the Court also considers the procedure and other terms of the settlement.

And after carefully considering the settlement, it is denied. There are several material reasons to do so.

First, it's unclear which settlement is before the Court. The original Settlement Agreement is signed by the settlement parties. But then Movants filed an amended proposed Order.

The UCC rep who testified was the head of the UCC. He had not seen it or voted on it. He was also unaware of its terms. And I was told it was because the witness started testimony on one day, and the proposed Order was filed before he finished his testimony, and they didn't want to -- took my words seriously to not talk to anyone about your testimony.

But it doesn't change the fact that the head of the UCC testifying witness could not make a credible case to

support a pleading he had not seen before.

Making matters worse, Mr. Lefkowitz, Isaac Lefkowitz, who testified on behalf of the M2 settling parties, testified he hadn't seen it either. So the UCC and the settling party witnesses had not seen or approved the Amended Order.

And if they didn't consider the amendment, they also didn't consider M2 counsel's oral representation about paying only upon a Final 9019 Order. Lefkowitz testified that he hadn't seen it, and he represents the M2 parties. Right?

So it's one thing that the Debtors still approve it, and maybe they didn't need the approval of the UCC to go along with it. But certainly, Mr. Lefkowitz, who is a significant party in all of the M2 entities, had not seen it.

I note no party interestingly amended the original signed Settlement Agreement either. So which one does the Court consider? I think the only one actually before the Court supported by the evidence is the signed Settlement Agreement attached to the motion, and not the Amended Order, or the oral agreement during trial.

It turns out, however, it doesn't matter if the others are operative anyway. Each fails to meet the standards set by the Fifth Circuit.

This is a settlement purporting to sell estate causes of action to a purchaser, but it functions like a Restructuring Support Agreement. Forty million doesn't come into the estate until there's an Order either confirming a Plan, if it's the original settlement; or a non-appealable order approving the 9019 and the Plan if it's the Amended Order; or a final non-appealable approving the 9019 if it's the oral representation.

In the original signed Settlement Agreement, the Plan must include certain terms concerning things like distribution under a Plan that go beyond a simple settlement payment in exchange for a release.

Think about this, too. If approved, what would a 9019 Order require the settlement parties to do?

First, the estate would receive an additional 5 million in financing it appears. But 40 million either requires Plan Confirmation or a final non-appealable Order approving the Settlement Agreement.

Based on the evidence, whether it's a change to the original settlement or not, Mr. Lefkowitz was clear in his testimony that the 40 million payment is for finality. And that 40 million will not be funded at Plan Confirmation without finality.

That means no estate causes of action until a Plan effective date, not subject to any further appeal.

The original Settlement Agreement also contained many provisions that would be required in a Plan. Implicating Section 1129 on the Bankruptcy Code, including opt-out requirements in a Plan that, if exercised, would preclude a tort claimant from receiving anything under the Settlement Agreement.

So a Bankruptcy Court, me, would be approving in a 9019 deal that a tort claimant won't receive any portion of a settlement payment under a Chapter 11 Plan by opting out, and I would do that under a 9019 Order.

All of this approved, and I suppose the Debtor would draft a Plan arguably confident that it would satisfy the 1129 standards. If Lopez approved the 9019 Order, likely going to have to approve the Plan Confirmation standards.

The original settlement was in substance a Restructuring Support Agreement where parties agree on a proposed Chapter 11 Plan.

A 9019 Order I sign today, for example, would not prevent a third party from starting or continuing a State Court lawsuit against a proposed released party. That's because the releases and payments depend on confirmation of a Chapter 11 Plan with all the terms of the settlement in it.

And if the Court found that a proposed settlement

term violated a section of the plan, there's no obligation to fund the 40 million.

Mr. Lefkowitz' testimony also concerned the Court because it left unclear which released party would be putting up the money or where the money was coming from. He didn't either know the answer or was intent on not revealing the source of the funds.

So basically, the 9019 sets the parameters of a Chapter 11 Plan, and an Order approving the settlement binds the parties to pursue their settlement by proposing a 9019 that reflects the deal.

It's not in the best interest of the estate in a highly contentious case to agree to a settlement payment that may not occur for years or that's based on the Court blessing the terms of a Plan in a 9019 motion.

If I approve the Amended Order, it would also require the Court to enjoin parties from litigating in State Court against third parties, and potentially for some time if there are appeals.

That doesn't mean that the threat of appeals controls. Parties assess risk, real or threatened, whether it's hold-up value or if it's real, all the time. But in a highly litigious case, you can't act like it doesn't exist.

The amended Form of Order conditions payment upon the conclusion of that process.

Even more troubling to the Court are the proposed releases in the settlement. Releases in 9019s are often provided in exchange for finality, but there's usually agreement between two or more parties to resolve a specific dispute.

And typically, a settlement requires a payment to be made shortly after entry of an Order in exchange for mutual releases for claims and causes of action related to the settled matter, and not usually for some uncertain date into the future.

Here parties agree to provide broad releases for multiple related parties and there's little to no evidence supporting the release. Take, for example, the M2 parties which is comprised of a group of related entities.

M2 parties and their current and former directors and officers would be released. Mr. Lefkowitz is the director of all the M2 parties except Perigrove LLC, which he apparently stopped serving as a director not too long ago.

Again, Mr. Lefkowitz testified on behalf of the settling parties, but he couldn't identify directors of YesCare, Perigrove, or any other M2 party. Why not seek releases from claims for non-Debtors like this in a Plan that's subject to a Disclosure Statement, and every creditor gets to read about the deal, and then they get to vote on

it.

Not every creditor will know about this settlement or the proposed release of potential claims and causes of action which they may or may not hold, or which they may have to come into court to argue about.

This Court is particularly concerned about the YesCare/CHS release, too. Movants certainly investigated the claims against Yes in the divisional merger for sure, and they got some financial information from YesCare.

But there was some testimony in hearings that CHS TX was awarded a substantial -- upwards towards of a billion dollar contract in Alabama. Parties requested financial information, but it really wasn't provided.

It doesn't appear not even to the Movants. No financials for the period after the divisional merger were provided to the Tort Committee, nor audited financial either.

So let me get this straight. CHS is going to get a broad release under a settlement, but didn't provide very meaningful information about a large contract obtained post-divisional merger? Not today, and certainly not by this Court.

This Court cannot make a well-informed judgment whether the proposed settlement is in the best interests of the estate.

To be clear, today's ruling doesn't require future settling parties to reveal all information. But here, there was a divisional merger that gave this Debtor significant tort liabilities, and later CHS gets all the operating contracts and recently approved for a significant deal.

And if that's what Movants want to get approved in a Plan, then put it in a Plan, and let creditors vote on it. Or rework the settlement to work on a one-off basis with those who are willing to settle all of their claims now.

Some are definitely interested in a settlement, including some pro se parties. Some parties are interested. But this Court finds itself with a lack of clarity about whether the proposed settlement amount is sufficient because of the decision to withhold key information coupled with uncertainty on timing of the 40 million and preapproval of the Chapter 11 Plan terms and release conditions.

And recall if the original settlement is the operative deal, then the Court would be potentially pre-approving terms of a Plan providing that creditors who vote on a plan will receive no distribution without considering Bankruptcy Code sections dealing with Plan Confirmations.

And arguably, the Court would have to then later enter another Order binding third parties from pursuing anything while the Debtors pursue this Plan.

All of this is a bridge too far. The Court

cannot, based on these facts, find that the Settlement Agreement is in the best interests of the estate, and that this settlement could stand on its own without pre-Court approval of key Plan terms today. The motion is denied.

Now let's turn to the motion filed by the Tort Committee and certain tort claimants to dismiss the case. The Tort Committee and the tort claimants consider the pre-petition divisional merger to be a tactic designed to suppress tort claim values and facilitate a transfer of millions of dollars from victims to equity.

Tehum and the UCC disagree strongly. The motion, and quite frankly, this case highlights a feature of mass tort-type cases. When these types of cases are filed, battle lines are drawn.

The honest but unfortunate Debtor that's so often referenced in bankruptcy cases in my experience usually lies in the eye of the beholder. In mass tort cases, victims and family members who may have been affected don't like the Debtor.

I don't see them too honest but unfortunate. And sometimes, that's for good reasons. Same goes for mass fraud cases. These are all tough cases, but the Bankruptcy Code says they can be Debtors, right?

Bankruptcy Code 301 says that a voluntary Chapter 11 case may be commenced by the filing of a petition

filed by an entity that may be a Debtor. So who can be a Debtor? Bankruptcy Code says that a Debtor is a person, and person, the definition of person includes corporations, is a person who resides or has a domicile, principal place of business or property in the United States.

Tehum's domicile is the state of incorporation, and that's Texas. So that means it's eligible to seek relief as a Chapter 11 Debtor. And as a Debtor, it's entitled to all the protections under the Bankruptcy Code. But once a Debtor files, parties-in-interests have their right to seek dismissal of the case, and that's what we have here.

The Tort Committee in its pleadings says that in a traditional scenario, a Debtor seeking to reorganize has the incentive to negotiate in good faith and reach settlements with victims that will result in a Plan acceptable to them.

The Tort Committee also says that in a Texas two-step -- that's the catchy phrase used for divisional mergers -- the incentives are far different and indeed perverse. GoodCo, as it called it, can operate its business, conduct further corporate transactions, and upstream profits to shareholders without Court oversight while claimants are stuck in bankruptcy anchored by a Debtor that has no need to exit bankruptcy and cannot liquidate or obtain compensation for their claims.

By contrast, they identify that there's a TortCo. Primary objective is to stay in bankruptcy for as long as possible and to prevent claimants from liquidating their claims to judgment.

Tort Committee wants this claim dismissed because it's a divisional merger case. That's the reason. They think all divisional merger cases should be dismissed as bad-faith filings.

The Tort Committee's members, if not the constituents they represent, are mostly represented by Plaintiff's lawyers who want to be in State Court where they can pursue litigation, cut deals, and potentially achieve their contingency fees.

The Tort Committee's witness made that abundantly clear. The Tort Committee wants the Court to dismiss the case, but to do it structurally, which involves granting the Tort Committee standing to pursue estate causes of action that constitute remedies that Creditors could bring outside of bankruptcy in aid of their efforts to hold YesCare and non-Debtors and insiders responsible for their conduct.

So in essence, dismiss the case. But before you do so, Lopez, give us the right under an Order that can be only done in bankruptcy to sue these folks.

Now let's turn to bankruptcy law on the case dismissal. Section 1112(b) requires a Bankruptcy Court to

convert a case to one under Chapter 7 or to dismiss the case for cause unless the Court determines that appointment of a Trustee or Examiner is in the best interests of creditors and the estate.

The Bankruptcy Code provides a non-exclusive list of examples that constitute cause under Section 1112. The Fifth Circuit has held that the term "cause" -- and I'm using cause in quotes if you can imagine that -- affords flexibilities to Bankruptcy Courts and can include a finding that the Debtors filing for relief is not in good faith.

For that, we turn to the infamous *In Re Little Creek Development Company*, 779 F.2d 1068, pincite 1072, 1073 (5th Cir. 1986). Lack of good faith is one of -- is not -- excuse me. Lack of good faith is not one of the enumerated examples in Section 1112(b).

Little Creek says that many Courts have held that the lack of good faith is appropriate cause for dismissal under that section. Indeed, Judge Edith Jones wrote, "Every bankruptcy statute since 1898 has incorporated literally or by judicial interpretation a standard of good faith for the commencement, prosecution, and confirmation of bankruptcy proceedings."

The Court is instructed to consider the good faith of Tehum's filings based on the totality of the circumstances requiring a, quote, "On-the-spot evaluation of

the Debtors' financial condition, motives, and the local financial realities." That's Little Creek.

Little Creek was a single-asset real estate, so all the factors considered in that case don't exactly fit in this fact pattern, but some do. For example, the Debtor has no employees and little to no cash flow. But there are factors that the Debtor in Little Creek lacked that this Debtor has, such as cash to fund a potential Chapter 11 Plan and many Creditors.

And one should focus too much on Little Creek -- I think people focus too much on Little Creek as a single-asset real estate. To me, the Fifth Circuit's guidance there is to focus on the -- to conduct an on-the-spot evaluation.

I should also note that the United States Supreme Court in the famous *Bank of America v. 203 North LaSalle*, 526 U.S. 434 (1999) case said that preserving going concerns and maximizing property available to creditors for valid bankruptcy purpose.

I agree with courts holding that a good-faith Debtor tries to preserve or create some value using tools of bankruptcy as a good-faith Debtor. It's not bad faith to use the tools of bankruptcy afforded by Congress in bankruptcy.

For example, rejection of executory contracts and

unexpired leasing under Section 365 were using Section 506 of the Bankruptcy Code to value secured claims or proposing Chapter 11 Plans that are crammed down on dissenting classes.

You may not find the folks who are on the other side of that to be too happy, but Congress afforded Debtors those tools, and that's what Congress wrote, and Debtors are not in bad faith for using those kinds of tools or seeking settlements in bankruptcy.

Further, I'd note that there's no insolvency requirement for Chapter 11 Debtors. Again, liquidating, I'd also note, through a Chapter 11 Plan, through a Court-approved plan, is also expressly contemplated by the statute. So not every Chapter 11 Debtor rehabilitates. Many liquidate and create trusts to benefit creditors.

In LTL, the Third Circuit dismissed the first Chapter 11 case of LTL Management, LLC, which was a divisional merger of the pharmaceutical giant Johnson and Johnson. That case is 58 F.4th 738 (3rd Cir. 2023). The Third Circuit said the theme is clear. Absent financial distress, there's no reason for Chapter 11 and no valid bankruptcy purpose.

The financial distress standard is not binding on this Court. And again, insolvency's not a requirement to be a Chapter 11 Debtor. I do think it could be a factor to

consider as part of the Little Creek, on-the-spot evaluation though. It just depends on the facts and circumstances of the case.

The text of the statute itself sets up a burden-shifting framework to establish cause. On the request of a party at interest, the Bankruptcy Court must dismiss for cause, unless the Debtor shows to the Court that there are unusual circumstances warranting denying the relief sought.

So party-in-interest has to establish cause, and the Debtor or another party-in-interest has to show, if you can get over the cause hump, then the other party has to show that there are unusual circumstances warranting denying the relief sought.

And then 1112(b)(2) states that the Court may dismiss, and specifically, if the Court finds and specifically identifies unusual circumstances establishing that dismissing the case is not in the best interests of creditors in the estate and the Debtor and of the other parties and interests established that there's a reasonable likelihood that a Plan will be confirmed within the timeframes established in Sections 1121(e) and 1129 of the Bankruptcy Code.

And the grounds for dismissing the case include an act or omission for which the Debtor -- there's a reasonable justification for the act of omission, and that will likely

be cured.

Let me just note for the start, a motion to dismiss this case was filed at a far different stage than any other divisional merger cases. I'm not going to sit here and recount all of the divisional merger cases that have certainly garnered much press.

This Chapter 11 case was filed in February of 2023. The Tort Committee was appointed in November of 2023. Right? About nine months into the case. A motion to dismiss was filed in January of 2024.

So why did Tehum actually file for bankruptcy? For that, we turn to Mr. Lefkowitz' testimony. Tehum's divisional merger occurred over a year before the bankruptcy case was filed.

Mr. Lefkowitz testified that Tehum filed because there was a receivership motion filed by a hospital in Missouri. That testimony is uncontroverted.

Mr. Lefkowitz also testified that he tried to get some contracts for Tehum post-divisional merger. According to him, the goal was to have CHS serve prisons and Tehum to serve jails.

Tehum filed Chapter 11 because there was a threat of a receivership, not because of the tort liability, which Lefkowitz' testimony, according to him, he views as part and parcel of the business expenses of operating a prison

healthcare system. In other words, you're going to be sued in a prison healthcare system type of business.

On the other hand, there are facts that support dismissal. Tehum at the filing had no employees or operating business. Lefkowitz also testified that Tehum has enough resources to pay all Creditors and that Tehum is not in financial distress.

He also testified that he's the one who can tell which claims are legitimate or not just by looking at them. The prisoners write claims on the back of paper and consider them legitimate. And some of the Plaintiffs' lawyers are crooks, and that even one of them held by a party who actually supported the settlement is not a legitimate claim.

Lefkowitz believed Tehum has all the money to pay all the claims in full because he thinks these claims are illegitimate and their lawyer is a crook who just want to settle and make money.

But his jaded view doesn't mean that this Court should discount the validity of properly-filed claims alleging serious matters.

A better testimony to rely on is from Tehum's CRO and the UCC witness who actually tried to value these claims based on the strength of the legal arguments. The Tort Committee's witness was a Plaintiff's lawyer who represented a tort claimant.

He said that he had actually spoken with several pro se parties or tort claimants. He never mentioned to them that there was a proposed settlement. The Tort Committee produced no evidence that pro se tort claimants who represent over one-half of the filed claims were informed about a potential settlement.

No meaningful evidence for that case, or that a Tort Committee seriously considered the uniquely-positioned views of incarcerated pro se claimants. The Tort Committee formed and its members dug their trenches with a mindset on dismissal.

The witnesses testified that the pro se claimants will not fare better outside of bankruptcy, but they can hire lawyers and settle, too. It's interesting what people actually say on the stand compared to the arguments that are in academia and pleadings about mass tort cases.

I'm not saying it's all the case; I'm just saying what was interesting what was said in this case.

This case is also different than others than cases that people mentioned in court. Those cases involved motion to dismiss raised early in the proceedings. Here we have the opposite.

Parties waited over nine months -- months -- to bring the motion to dismiss. To be clear, parties have a right under the Bankruptcy Code to raise that issue at any

time. But it doesn't mean that the Court has to turn a blind eye to the work of Tehum and the UCC.

I also note that the members of the Tort Committee have independent counsel. And many other tort claimants received notice about this case and filed proofs of claim before the Tort Committee was formed. None of them wanted this filed motion seeking dismissal of the case.

And it doesn't matter that they're not bankruptcy lawyers. That isn't an excuse in any other Chapter 11 case. In fact, in this case, if the cause is the divisional merger, the Plaintiff's lawyers are in a fine position to know the facts pertaining to it.

And one can't overlook that an active UCC has worked hard in this case pushing where appropriate. We aren't going to act here like the UCC doesn't care about tort claimants and didn't consider their views.

A tort claim is on the UCC, and counsel stressed to me they've spoken many times to pro se parties. In any case, let's actually see what's taken place during the case.

Tehum obtained Debtor in possession financing with active involvement from the UCC who fought to preserve many claims on behalf of the estate. Right. Tehum participated in four mediations. Tehum and the UCC have filed an original and amended joint Chapter 11 Plans.

During the case, Tehum and its professionals have

been acting like any other Debtor in trying to work on a plan. Tehum, its CRO, professionals have worked with the UCC for months. And again, the UCC has tort claimants on its committee.

Tehum also filed a Chapter 11 Plan and a 9019 motion supported by an Official Committee of Unsecured Creditor. This is evidence of valid bankruptcy purposes. This is far from the TortCo described by the Tort Committee in its pleadings that is motivated to stay in bankruptcy as long as possible.

This Debtor has been trying to cut deals for months. This is not a case that should be dismissed as a bad-faith filing. How does a Debtor working with a UCC in good faith get dismissed on facts like these?

To be clear, I've got no issues with professionals who worked on this case, on any of them, including the CRO. They've all worked hard to fulfill their duties faithfully. I'm making no policy statement about whether all divisional mergers and those Debtors are fraudulent transfers are good or bad-faith debts, or whether the bankruptcy is better than other forms of litigation like State Court individual cases, class actions, MDLs.

My job today is to decide cases before me based on the facts and the law. The question before me right now is whether to dismiss this case under Section 1112(b). Little

Creek tells me to conduct an on-the-spot evaluation of the Debtor's financial condition and motives.

Here, my on-the-spot evaluation comes about a year into the case. Based upon the Record before this Court, this case should not be dismissed for cause under Section 1112(b).

I'm also going to find that there are unique circumstances because of the state in which we find ourselves, and a reasonable likelihood of confirming a Chapter 11 Plan. It's just not the one currently on file.

I'm not approving the settlement. We can't act like there wasn't over 40 million in real money on the table to settle claims. The settling parties wanted finality. The Settlement Agreement as proposed didn't work for the reasons I've already stated. Tehum still has millions to potentially distribute. Some tort claimants may want a deal to get paid now.

So where does this leave everything? I don't know. The stay I imposed earlier in this case stopped litigation involving some third parties. That expired on its own.

And it's obvious that this case needs to end really soon. My sincere hope is that the Tort Committee, the UCC, and Tehum talk constructively now to find a way to bring finality to this case in the most cost-effective way.

Don't leave it in my hands to potentially take action without considering the work done by everyone. There could be an Agreed Plan or potential settlements if they're willing, pro se and other represented tort claimants, and if the YesCare/M2 parties want some finality for some litigation along the way. Maybe they want that. Maybe they don't want that. I don't know.

It's not for me to ask today. I want to give the parties some time to talk in good faith. I'm going to set a status conference soon, maybe in two to three weeks. I know that you-all have filed other motions. I'm not taking up any of them. It's time to stop fighting about those kinds of things, and I want you to focus on talking about motions that were denied today and where this case goes.

I'm going to set a status conference in the next two to three weeks. I thank everyone for their time. That's my ruling. I'm not taking any comments. I will enter two very short Orders denying both motions for the reliefs, the reasons I've stated on the Record. I thank everyone.

I'm going to pick up on my 1:00 p.m. case in about five minutes. Everyone in Tehum is dismissed.

Thank you.

(Proceeding adjourned at 2:49 p.m.)

* * * * *

I certify that the foregoing is a correct transcript to the best of my ability produced from the electronic sound recording of the ZOOM/telephonic proceedings in the above-entitled matter.

/S/ MARY D. HENRY

*CERTIFIED BY THE AMERICAN ASSOCIATION OF ELECTRONIC REPORTERS AND TRANSCRIBERS, CET**337*

JUDICIAL TRANSCRIBERS OF TEXAS, LLC

JTT TRANSCRIPT #68529

DATE FILED: April 15, 2024

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS

In Re: Tehum Care Services, Inc.
Debtor

Case No.: 23−90086

Chapter: 11

NOTICE OF FILING OF OFFICIAL TRANSCRIPT

An official transcript has been filed in this case and it may contain information protected under the E-Government Act of 2002, and Fed. R. Bank. P. 9037.

Transcripts will be electronically available on PACER to the public 90 days after their filing with the court. To comply with privacy requirements of Fed. R. Bank. P. 9037, the parties must ensure that certain protected information is redacted from transcripts prior to their availability on PACER.

If redaction is necessary, the parties must file a statement of redaction listing the items to be redacted, citing the transcript's docket number, the item's location by page and line, and including only the following portions of the protected information. This statement must be filed within 21 days of the transcript being filed. A suggested form for the statement of redaction is available at https://www.txs.uscourts.gov/.

- the last four digits of the social security number or taxpayer identification number;
- the year of the individual's birth;
- the minor's initials;
- the last four digits of the financial account number; and
- the city and state of the home address.

Any additional redaction requires a separate motion and Court approval.

A party may review the transcript at the Clerk's Office public terminals or purchase it by following the instruction on our website at https://www.txs.uscourts.gov/ or by calling (713) 250−5500 . A party is only responsible for reviewing the:

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Nathan Ochsner
Clerk of Court