IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re:	)	Chapter 11
TEHUM CARE SERVICES, INC.,[1]	)	Case No. 23-90086 (CML)
Debtor.	)	

DEBTOR'S INITIAL OBJECTION TO
VARIOUS CREDITORS' MOTION TO APPOINT A CHAPTER 11 TRUSTEE
[Relates to Docket No. 731]

The above-captioned debtor and debtor in possession (the "Debtor"), for its omnibus objection (this "Objection") to *Various Creditors' Motion to Appoint a Chapter 11 Trustee* [Docket No. 731] (together with all joinders, supplements, and amendments thereto, the "Motion"), respectfully represents as follows:

Initial Objection

1. The Motion contains a colorful, albeit misguided, retelling of the last two years of the Debtor's operational history, before the divisional merger and bankruptcy filing. To the extent such historical allegations are relevant here, the Debtor disputes the implications or the specific allegations and reserves the right to present a more detailed and factually accurate response at the appropriate time. Because the Debtor is in the middle of Mediation (as defined below), the Debtor files this initial Objection as a placeholder and reserves the right to supplement this Objection following the completion of Mediation, in advance of any hearing on the Motion.

[1] The last four digits of the Debtor's federal tax identification number is 8853. The Debtor's service address is: 205 Powell Place, Suite 104, Brentwood, Tennessee 37027.

23900862307280000000000007

2. Among the many defects in the Motion is the failure to acknowledge the very high, "clear and convincing"—the highest standard of proof in a civil case[2]—burden applicable to motions to appoint chapter 11 trustees. *See Cajun Elec. Power Coop., Inc. v. Cent. La. Elec. Co. (In re Cajun Elec. Power Coop, Inc.)*, 69 F.3d 746, 749 (5th Cir. 1995), *withdrawn in part on rehearing*, 74 F.3d 599 (5th Cir. 1996).[3] In general, there is a presumption ***against*** the appointment of a chapter 11 trustee. *See, e.g.*, *Official Comm. of Asbestos Claimants, v. G–I Holdings, Inc. (In re G-I Holdings, Inc.*), 385 F.3d 313, 319 (3d Cir. 2004) (Alito, J.); *In re Sharon Steel Corp.*, 871 F.2d 1217, 1225–26 (3d Cir. 1989) ("It is settled that appointment of a trustee should be the exception, rather than the rule."); *In re Patman Drilling Int'l., Inc.*, No. 07-34622-SGJ, 2008 WL 724086, at *6 (Bankr. N.D. Tex. March 14, 2008) (Jernigan, J.); *In re The 1031 Tax Grp., LLC*, 374 B.R. 78, 85 (Bankr. S.D.N.Y. 2007) (citing 7 Collier on Bankruptcy ¶ 1104.02[3][b] (15th ed. 2006)). This is because the appointment of a chapter 11 trustee is a "draconian remedy." *Patman Drilling*, 2008 WL 724086, at *6.

3. For evidence to be clear and convincing, it must be "highly probable or reasonably certain." EVIDENCE, Black's Law Dictionary (11th ed. 2019); *see also, e.g.*, *Travelhost v. Blanford*, 68 F.3d 958, 961 (5th Cir. 1995) (stating that clear and convincing evidence is "that weight of proof which 'produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, ***evidence so clear, direct and weighty and convincing as to enable the fact finder to come to a clear conviction, without hesitancy, of the truth of the precise facts' of the case***" (emphasis added; citations omitted)).

---

[2] *Turner v. Tex. Instruments, Inc.*, 555 F.2d 1251, 1255 (5th Cir. 1977), *overruled on other grounds*, *Burdine v. Tex. Dep't of Comm. Affairs*, 647 F.2d 513 (5th Cir. 1981).

[3] While the movants acknowledge this "usual presumption," they argue—without any authorities in support of said argument—that the presumption simply should not apply here, because no business is being managed or reorganized. *See* Motion, ¶ 8.

4. The presentation in the Motion falls well short of what is necessary to prove the allegations by "clear and convincing" fact. Most of the allegations concern prepetition activities, some even occurring before the current ownership group took over the Debtor's operations, and all of the allegations contain a certain amount of "information and belief." Another critical flaw in the Motion is the absence of any mention of the Debtor's independent Chief Restructuring Officer, who was appointed to manage the Debtor's affairs through this chapter 11 case. Likewise, the movants have utterly failed to articulate anything a chapter 11 trustee would have done, or would do, differently than the Debtor has done through its independent Chief Restructuring Officer and bankruptcy professionals. In short, the Motion lacks merit, and the appointment of a chapter 11 trustee would only serve to increase administrative costs without providing any benefit to the estate.

5. Not only does the Motion fail on its merits, but the Motion fails to consider the settlement negotiations currently in process. As the Court is aware, the parties have been mediating pursuant to the *Stipulation and Agreed Order Regarding Appointment of a Mediator and Governing Related Mediation Procedures* [Docket No. 603] (the "Mediation Order").[4] In the Mediation Order, among other things, the Court appointed The Honorable David R. Jones to serve as mediator over certain specified Mediation Topics, as well as any other topics that the Mediator determines to be in the best interests of the Debtor, its estate, and creditors (the "Mediation"). *See* Mediation Order ¶ 5.

6. Since the entry of the Mediation Order, the Debtor and its professionals have worked closely with the Committee's professionals to, among other things, share information

[4] All capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Mediation Order.

concerning the Adversary Proceeding, analyze insurance policy information, and facilitate the production of hundreds of thousands of e-mails, bank records, and other key information requested by the Committee.

7. The first Mediation session occurred on July 12–14, 2023. As a result of the first Mediation session, the Debtor filed a rule 9019(b) motion on July 17, 2023.[5]

8. During a status conference held on July 18, 2023, the Debtor announced that further Mediation dates have been scheduled for August 20–22, 2023. The Debtor and its professionals have made substantial progress in this case to bring recoveries to creditors. Under the circumstances, the Motion must be denied.

Conclusion and Reservation of Rights

9. The Debtor reserves the right to supplement or modify its Objection any time prior to any hearing on the Motion. The Debtor further reserves the right to present further evidence at any hearing or status conference on the Motion. The Debtor respectfully requests that the Court deny the Motion and grant the Debtor such other and further relief as may be just and proper.

[5] *See* Docket No. 802.

Respectfully submitted this 28th day of July, 2023.

GRAY REED

By: */s/ Jason S. Brookner*

Jason S. Brookner
Texas Bar No. 24033684
Aaron M. Kaufman
Texas Bar No. 24060067
Lydia R. Webb
Texas Bar No. 24083758
Amber M. Carson
Texas Bar No. 24075610
1300 Post Oak Boulevard, Suite 2000
Houston, Texas 77056
Telephone: (713) 986-7127
Facsimile: (713) 986-5966
Email: jbrookner@grayreed.com
akaufman@grayreed.com
lwebb@grayreed.com
acarson@grayreed.com

Counsel to the Debtor
and Debtor in Possession

Certificate of Service

I certify that on July 28, 2023, I caused a copy of the foregoing document to be served by the Electronic Case Filing System for the United States Bankruptcy Court for the Southern District of Texas to all parties authorized to receive electronic notice in this case.

/s/ Jason S. Brookner
Jason S. Brookner