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Unsecured Claims

8 UNITED STATES BANKRUPTCY COURT
9 CENTRAL DISTRICT OF CALIFORNIA
10 LOS ANGELES DIVISION

11
12 In re:
13 PLEASANT CARE CORPORATION, *et al.*,
14 Debtors.

- 15 Affects All Debtors
16 Affects Pleasant Care Corporation Only
17 Affects SNF Properties Incorporated Only
18 Affects PCC Health Services, Inc. only
19 Affects Atlas Care Enterprises, Inc. only
20 Affects Ember Care Corporation only

Case No.: LA 07-12312-EC

Chapter 11

Jointly Administered with Case Nos.:

Case No. LA 07-12316-EC
Case No. LA 07-12319-EC
Case No. LA 07-12322-EC
Case No. LA 07-12326-EC

**THE COMMITTEE OF CREDITORS
HOLDING UNSECURED CLAIMS'
OPPOSITION TO THE MOTION OF
THE UNITED STATES TRUSTEE FOR
APPOINTMENT OF A CHAPTER 11
TRUSTEE**

Hearing:

Date: May 2, 2007
Time: 1:30 p.m.
Place: Courtroom 1639
Edward R. Roybal Fed. Bldg.
255 East Temple Street
Los Angeles, CA 90012

1 **TO THE HONORABLE ELLEN CARROLL, UNITED STATES BANKRUPTCY JUDGE,**
2 **THE OFFICE OF THE UNITED STATES TRUSTEE, THE UNITED STATES, AND THE**
3 **STATE OF CALIFORNIA:**

4 The Committee of Creditors Holding Unsecured Creditors (the “Committee”) hereby files
5 this opposition to the United States Trustee’s Motion seeking the appointment of a chapter 11
6 trustee (the “Motion”). The appointment of a chapter 11 trustee is an extraordinary remedy and
7 the Motion needs to be supported by clear and convincing evidence. Because the Motion is not
8 supported by any evidence showing any mismanagement by the **current** management, nor is the
9 corporate arrangement whereby the prior management was replaced by highly competent,
10 experienced operators of skilled nursing facilities improper under the circumstances, the Motion
11 should be denied.

12 **I.**
13 **FACTS**

14 On March 22, 2007, Pleasant Care Corporation; Ember Care Corporation; PCC Healthcare
15 Services, Inc.; SNF Properties, Inc.; and Atlas Care Enterprises, Inc. (collectively, the “Debtors”),
16 filed voluntary petitions under chapter 11 of the Bankruptcy Code, in the United States
17 Bankruptcy Court for the Central District of California, Los Angeles Division (the “Bankruptcy
18 Court”), which cases are jointly administered under the title *In re Pleasant Care Corporation*,
19 Case No. 07-12312-EC (the “Case”).

20 On March 29, 2007 the United States Trustee appointed the Committee of Creditors
21 Holding Unsecured Claims (the “Committee”), which is composed of the following members:
22 Comprehensive Therapy; Dairy King; Healthcare Services Group, Inc.; Twin Med LLC; and
23 SEIU, United Healthcare Workers West. The Committee subsequently retained Pachulski Stang
24 Ziehl Young Jones & Weintraub LLP (“PSZYJ&W”) as their counsel; an application to employ
25 PSZYJ&W is pending.

26 On April 1, 2007 the Debtors entered into an agreement with (1) Joseph C. Tintera to serve
27 as the Debtors’ President and Chief Operating Officer, (2) Carol Van Horst to serve as Chief
28 Clinical Officer, and (3) LTC Services, LLC, to provide support and staff as needed. This

1 employment was at the request of and with the full approval of the Committee and Bridge
2 Healthcare Finance, LLC, and Bridge Opportunity Finance, LLC (collectively, "Bridge"). LTC
3 Services is an affiliate of The Tintera Group, which through its various affiliates and related
4 entities is a nationally recognized skilled nursing home owner and operator. The Tintera Group
5 currently owns, operates or manages more than 40 skilled nursing, assisted living, or retirement
6 facilities in 10 states and has operated as many as more than 90 facilities at any given time over
7 the past several years. Tintera is one of the largest privately owned healthcare management
8 companies in the United States.

9 Mr. Tintera has been given complete control over the Debtors' business operations, with
10 exclusive control over, and decision making power with respect to, the Debtors' day to day
11 operations. In addition, Mr. Tintera has been authorized to, and has, brought to the Debtors
12 numerous highly qualified nurses, accounting staff, and supervisors, to effectively remodel the
13 Debtors' entire operations. For example, The Tintera Group has hired six new nurses for the
14 Debtors' operations and has brought in two of its own corporate nurses who are directly
15 responsible for overseeing the quality of patient care at the facilities.

16 The Tintera Group has retained Carol Von Horst, a highly respected nursing home
17 administrator, trained nurse and a former owner of some of the Debtors' facilities to serve as the
18 Chief Clinical Officer for the Debtors. In this role, Ms. Horst supervises the quality of patient
19 care throughout the Debtors' operations. Moreover, Ms. Horst has brought with her to this
20 engagement two other highly qualified nurses to assist her in providing the supervision necessary
21 to achieve a complete turnaround in the quality of healthcare provided by the Debtors.

22 The Debtor is subject to an Independent Monitor (which monitor also retained the services
23 of additional personnel to assist them) imposed pursuant to a Corporate Integrity Agreement
24 ("CIA") with the Office of Inspector General of the U.S. Department of Health and Human
25 Services (the "OIG") and appointed by the OIG, under which the Debtors are closely monitored
26 for the quality of patient care. The Monitor regularly inspects the Debtors' facilities, and reviews
27 its records, to review and report on the Debtors' internal quality control systems, response to
28 quality of care issues, the Debtors' development and implementation of corrective action plans

1 and the timeliness of such actions, the Debtors’ proactive steps to ensure that each patient and
2 resident receives an acceptable standard of care, and the Debtors’ compliance with the State of
3 California’s staffing requirements under state law. CIA, at 13-14, ¶D.1. The Monitor has access
4 to all the Debtors’ facilities, at any time and without prior notice, immediate access to the
5 Debtors’ records, reports, patient records, and any other documents the Monitor thinks necessary
6 to fulfilling his responsibilities. CIA, at 14-15, ¶D.2. Moreover, the Monitor has the right to
7 immediate access to any patient or staff of the Debtors’ facilities. Id., at 15, ¶ D.2.c.

8 The Debtors have established a toll free compliance telephone “hot” line to enable people
9 to report issues related to, among other things, patient care. CIA, at 19, ¶ E.

10 The Debtors are regularly subject to inspections by the California State Long Term Care
11 Ombudsman (the “SLTC Ombudsman”). The SLTC Ombudsman is authorized by the federal
12 Older Americans Act and its State companion, the Older Californians Act. The primary
13 responsibility of the program is to investigate and endeavor to resolve complaints made by, or on
14 behalf of, individual residents in long-term care facilities, including nursing homes, residential
15 care facilities for the elderly, and assisted living facilities. The SLTC Ombudsman investigates
16 elder abuse complaints in long-term care facilities and in residential care facilities for the elderly,
17 including receiving and resolving individual complaints and issues by, or on behalf of, these
18 residents. Residents of the Debtors’ facilities or their family members can file a complaint
19 directly to the local SLTC Ombudsman or by calling a “hot line” maintained by the SLTC
20 Ombudsman. All long-term care facilities are required to post, in a conspicuous location, the
21 phone number for the local SLTC Ombudsman office and its hot line, which is available 24 hours
22 a day, 7 days a week to receive complaints from residents. See
23 www.aging.ca.gov/html/programs/ombudsman.html.

24 Bridge has agreed to continue to provide postpetition financing and to allow the use of
25 cash collateral until at least late April, and will likely agree to continue funding, in amounts up to
26 \$7 million, over an additional ten weeks. Moreover, Bridge is well aware of its obligations to
27 continue funding, at least to the extent that patient care is not jeopardized. In addition, those
28 unsecured creditors providing goods and services to the Debtors have agreed to provide 30 day

1 terms to the Debtors, to assist in their financial recovery, in some cases at great hardship to those
2 creditors. However, the creditors have had prior bad experiences with trustees and have
3 expressed an unwillingness to provide those generous financing terms in the event a chapter 11
4 trustee is appointed. Bridge is, in part, relying on the creditors providing 30 day terms to the
5 Debtors as part of the basis for its own willingness to work with the Debtors and provide
6 postpetition funding. Thus, the appointment of a chapter 11 trustee may well result in a
7 devastating impact on the Debtors' postpetition financing.

8 The Debtors' current working plan, to be executed by the current management, involves
9 the prompt divestiture of the 5 facilities which cause the vast majority of the Debtors' operating
10 losses, improvement in the quality of patient care, stabilization of operations, and the review then
11 of the options of either reorganizing with all of the remaining facilities, selling some facilities and
12 reorganizing as a smaller business, or simply liquidating under chapter 11.

13 II.

14 ARGUMENT

15 The Motion rests on primarily three points: (1) there were issues prepetition with regard
16 to patient care; (2) the Debtors may need additional financing; and (3) the current management
17 arrangement violates California corporate law. However, it is clear none of these contentions
18 support the appointment of a chapter 11 trustee in the current circumstances.

19 **A. A Strong Presumption Favors A Debtor Retaining Possession Which**
20 **The Party Seeking The Appointment Of A Trustee Can Overcome**
21 **Only By Proving "Extraordinary Circumstances" By Clear And**
22 **Convincing Evidence**

23 Section 1104(a) of the Bankruptcy Code¹ provides for the appointment of a trustee "for
24 cause, including . . . incompetence, or gross mismanagement of the affairs of the debtor by
25 **current** management, either before or after the commencement of the case, or similar cause . . . ;
26 or . . . if such appointment is in the interests of creditors, any equity security holders, and other
27 interests of the estate. . . ." 11 U.S.C. § 1104(a) (emphasis added).

28 ¹ All references to "sections" herein are to sections of the Bankruptcy Code, 11 U.S.C. §§101-1530, unless otherwise noted herein.

1 The party seeking appointment of a trustee has the burden of establishing the need for
2 such appointment by clear and convincing evidence. *In re Marvel Entertainment Group, Inc.*,
3 140 F.3d 463, 471 (3d Cir. 1998); *In re Sharon Steel Corp.*, 871 F.2d 1217, 1226 (3d Cir. 1989);
4 *In re PRS Insurance Group, Inc.*, 274 B.R. 381, 384 (Bankr. D. Del. 2001); 7 *Collier on*
5 *Bankruptcy*, ¶ 1104.02[4][b], at 1104-24 (15th ed. Rev. 2006) (evidentiary standard should be
6 clear and convincing).

7 “It is settled that the appointment of a trustee should be the exception, rather than the
8 rule.” *Sharon Steel*, 871 F.2d at 1225. “Case law on this subject supports the view that the
9 appointment of a trustee in a Chapter 11 case is an extraordinary remedy and that interpretation is
10 consistent with the design of Chapter 11 which mandates management by the debtor unless a
11 party in interest is able to prove that the appointment of a trustee is warranted.” *In re BAJ Corp.*,
12 42 B.R. 595, 597 (Bankr. D. Conn. 1984); 7 *Collier on Bankruptcy*, ¶ 1104.02[3][b][i], at 1104-
13 10 (15th ed. Rev. 2006) (“The appointment of a trustee in a chapter 11 case is an extraordinary
14 remedy.”).

15 Accordingly, there is a “strong presumption” that a debtor’s current management should
16 not be displaced by a chapter 11 trustee. *Marvel Entertainment Group*, 140 F.3d at 471; *In re*
17 *Clinton Centrifuge, Inc.*, 85 B.R. 980, 984 (Bankr. E.D. Pa. 1988) (“I note, as have many other
18 courts, that there is a strong presumption in chapter 11 that the debtor is to continue in control and
19 possession of its business”). *See also In re Justus Hosp. Props. Inc.*, 86 B.R. 261, 267 (Bankr.
20 M.D. Fla. 1988) (“there is a strong presumption in favor of leaving a reorganizing debtor in
21 possession in charge of its operations”); *In re Macon Prestressed Concrete Co.*, 61 B.R. 432, 439
22 (Bankr. M.D. Ga. 1986) (same); *In re Sea Queen Kontaratos Lines. Ltd.*, 10 B.R. 609, 609
23 (Bankr. D. Me. 1981) (same).

24 Finally, “a court considering a motion to appoint a trustee should generally balance the
25 benefit to be gained . . . against the detriment to the reorganization effort and the rights of the
26 debtor 7 *Collier on Bankruptcy*, ¶ 1104.02[3][a], at 1104-10 (15th ed. Rev. 2006). Where no
27 ongoing danger to the estate persists, no justification for the burden and expense of the
28 appointment of a trustee exists.

1 **B. The Patient Care Issues Are Being Resolved and the Appointment of a**
2 **Chapter 11 Trustee Does Not Address Patient Care Issues**

3 By its express terms, Section 1104(a)(1) limits the Court’s inquiry to the actions of
4 “current management” in assessing whether cause exists for the appointment of a trustee. “[T]he
5 fact that prior management of the debtor is guilty of . . . incompetence, or gross mismanagement
6 does not necessarily provide grounds for the appointment of a trustee under section 1104(a)(1), as
7 long as the court is satisfied that current management is free from the taint of prior management.”
8 *In re Microwave Products of America, Inc.*, 102 B.R. 666, 671 (Bankr. W.D. Tenn. 1989); accord
9 *Sharon Steel*, 871 F.2d at 1227 (“current management must be free from previous management’s
10 taint”); *In re V. Savino Oil & Heating Co., Inc.*, 99 B.R. 518 (Bankr. E.D.N.Y. 1989) (“sole
11 question . . . is whether the acts or omissions of current management . . . supply the ‘cause’”);
12 *7 Collier on Bankruptcy*, ¶ 1104.02[3][b][ii], at 1104-11 (15th ed. Rev. 2006).

13 The Motion, which was filed only a few days after the appointment of the Mr. Tutera is,
14 perforce, devoid of any reference to or analysis of the dramatic and comprehensive changes in the
15 Debtors’ management, and accordingly in the oversight and delivery of patient care since the
16 filing of the Debtors’ petition. Although well aware of the Debtors’ efforts to retain completely
17 new management, which by the time of the filing of the Motion had already resulted in the
18 addition of new oversight personnel, including a new, highly competent Chief Clinical Officer,
19 the Motion seeks to appoint a chapter 11 trustee without giving the new management a chance to
20 show that it could improve the quality of patient care. Instead of reviewing the current status of
21 the Debtors’ management – after all, the Motion relies on a provision of the Bankruptcy Code that
22 refers to the incompetence or mismanagement of the affairs of the debtor **by current**
23 **management** – the Motion ignores the Debtors’ current management and asks the Court to rely
24 on reports filed months ago that discusses the prior management team. Because the Motion offers
25 no evidence with regard to or criticism of the Debtors’ **current** management, while relying on a
26 Bankruptcy Code provision that requires discussion of a debtor’s current management, the
27 Motion provides no basis for the appointment of a chapter 11 trustee and should be denied.

28 At bottom, the Motion seeks to shock the Court, hoping the Court will be appalled by the
prepetition quality of patient care. It urges the appointment of a chapter 11 trustee because prior

1 management, now displaced completely, failed to ensure adequate patient care was provided.
2 The Committee cannot dispute that. However, the Motion is, effectively asking the Court to turn
3 a blind eye to the unavoidable evidence that the Debtors are now well managed and on their way
4 to providing adequate patient care. The Motion asks the Court to ignore that the Debtors (1) are
5 now managed by highly respected and competent nursing home operators that can only be
6 replaced or fired with the Court's approval, (2) have retained a highly respected and experienced
7 nurse and former nursing home operator to serve as the Debtors' Chief Clinical Officer
8 overseeing the delivery of quality patient care, (3) have added more than a half dozen highly
9 trained clinical nurses to oversee the delivery of patient care in the Debtors' facilities, and (4) are
10 fully committed to improving on the prepetition quality of patient care delivered by the Debtors.

11 Moreover, the Movant fails to explain how a chapter 11 trustee (whom the Motion refuses
12 to name in advance so that the Court or the Committee can review his or her qualifications) will
13 be better able to address patient care issues than the resources already applied to correct patient
14 care deficiencies -- which include new management, new Clinical supervisors, the existing
15 federal Monitor, and the SLTC Ombudsman. In all likelihood, with regard to patient care, a
16 chapter 11 trustee will do nothing more than add additional administrative expenses without
17 contributing any positive input.

18 In truth, the Motion's entire discussion of the quality of patient care prepetition is a "red
19 herring," seeking to engage the Court's valid concern for patient care to support its desire for a
20 remedy which will not affect the quality of patient care and is unnecessary given the quality of
21 patient care now being delivered by the Debtors' current management.

22 **C. The Appointment of a Chapter 11 Trustee**
23 **Provides No Additional Financing**

24 The Motion argues that the patient care cannot be "further jeopardized" by the risk of no
25 further financing. Motion, at 7.

26 Once again, this argument is a total red herring. The appointment of a chapter 11 trustee
27 will do nothing to provide more access to capital than the current management provides. Unless
28 the chapter 11 trustee is going to provide financing, which is highly unlikely, all the appointment

