

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

IN RE:)
)
Craig County Hospital Authority,) **Case No. 15-10277-M**
an Oklahoma Public Trust,) **Chapter 9**
)
)
Debtor.)

**DEBTOR’S MOTION FOR DETERMINATION CONCERNING THE NEED TO
APPOINT AN OMBUDSMAN PURSUANT TO § 333 OF THE BANKRUPTCY CODE**

Craig County Hospital Authority, an Oklahoma Public Trust, the Debtor herein ("Debtor") moves this Court for an order pursuant to §§ 105(a) and 333 of the Bankruptcy Code determining the need for the appointment of a patient care ombudsman in Debtor’s Chapter 9 case. In support of this motion, Debtor incorporates the Declarations of Herbert Crum and J. Bill Koehler filed on March 4, 2015 [Doc. 10 & 11] and will show the Court as follows:

Jurisdiction and Venue

1. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.¹

Background

2. On February 16, 2015 (“Commencement Date”), Debtor commenced a voluntary case under Chapter 9 of title 11 of the United States Code (“Bankruptcy Code”) in this Court. The Debtor is a public trust that operates Craig General Hospital (the "Hospital"). The Hospital has 62 licensed hospital beds and admits approximately 2,354 patients annually. Its annual payroll is approximately \$10,000,000.00 for the approximately 330 people it employs. The

¹ All references to sections or codes, unless otherwise noted, are made to the United States Bankruptcy Code, 11 U.S.C. §§ 101 *et seq.* and referred to herein as the "Bankruptcy Code." All references to the "Bankruptcy Rule(s)" are to the Federal Rules of Bankruptcy Procedure.

Hospital has 10 doctors on regular medical staff and is served by more than 20 visiting physicians representing a number of specialties. Debtor operates the Hospital and associated clinics and facilities in Vinita, Oklahoma as well as clinics located at Monkey Island and Welch, Oklahoma plus a medical office building in Miami, Oklahoma. The Debtor's pre-petition liabilities are approximately \$9,500,000 in the aggregate. There is no question that the Debtor is a health care business as that term is defined in 11 U.S.C. § 101(27)(A).

3. Debtor's bankruptcy filing was precipitated by the general economic downturn plus the fact that rural hospitals in Oklahoma and elsewhere in the Midwest have experienced increasing economic challenges throughout the last two decades. Rural hospital patients, more often than not, have no commercial insurance and are dependent on Medicare, Medicaid or self-pay. Medicare/Medicaid reimbursement margins have fallen significantly in recent years, and the financial crisis of 2008 left many patients without job-associated insurance and without any income enabling them to self-pay for medical services. The Debtor, like every other rural provider in the country, suffered from these developments.

4. Moreover, in September 2013, the Debtor was surveyed and inspected by the Oklahoma State Department of Health which resulted in an unanticipated closure and suspension of the Hospital's operating room, surgical services and obstetric services pending an extensive remodel which cost the Hospital in excess of \$700,000.00 and necessitated a 4-month suspension of surgeries resulting in a revenue loss of approximately \$825,000.00. These issues have been resolved and the facility is fully certified and functional.

5. As the Debtor undertook to deal with these unexpected revenue crises, it faced an ever increasing, payroll cost burden by reason of its participation in the Oklahoma Public Employees Retirement System. The OPERS retirement system, for all employees who began

service on or before December 5, 2014, is a defined benefit program that has become ruinously expensive with ever increasing employer contributions mandated over the past two decades. Presently, the Debtor's obligation to OPERS equals 9.0 percent of total payroll, a figure approximately three times the cost of an equivalent defined contribution (e.g. 401K) type program. Unlike cities and municipalities that can raise taxes to meet such costs, the Debtor receives no tax revenue whatever. (The Debtor is the only Oklahoma hospital authority that still participates in OPERS.) Simply stated, the cost of continuing participation in OPERS would force the Debtor to close its doors in the near future. A key component of the adjustment plan that the Debtor intends to propose will be its withdrawal from OPERS. Based on the best information presently available, the Debtor owes approximately \$3,000,000.00 to OPERS, and does not have the ability to pay the present value of its debt to OPERS within a reasonable time period. The actual amount of the claim held by OPERS requires an actuarial analysis for which OPERS has demanded the Debtor pay approximately \$25,000 in advance. The Debtor declined to pay OPERS to determine the amount of its unsecured, non-priority claim. As such, the actual amount of OPERS' claim is believed to be unliquidated and disputed as of the Commencement Date.

6. The health care services provided by Debtor are critical to the community of Vinita, Oklahoma, and the surrounding area. The closest hospitals providing similar services are located in Tulsa, Oklahoma, and Joplin, Missouri, both of which are approximately 100 miles from Vinita, Oklahoma.

7. Debtor commenced this Chapter 9 bankruptcy case to ensure that such health care services are not interrupted and to obtain a breathing space so that it can negotiate with creditors, manage its issues with OPERS, review uneconomical contracts and leases, and ultimately

emerge from bankruptcy with a confirmed plan of adjustment.

Relief Requested

8. Section 333 of the Bankruptcy Code provides that within 30 days of the filing of a bankruptcy case a bankruptcy court order the appointment of an “ombudsman to monitor the quality of patient care and to represent the interests of the patients” of a healthcare business. 11 U.S.C. § 333(a)(1) (the “Ombudsman”). However, within 21 days of the filing of a bankruptcy the United States Trustee or a party-in-interest may file a motion with the bankruptcy court seeking a determination that no Ombudsman need be appointed in the case. *See* Fed. R. Bankr. P. 2007.2. Such a determination is made “under the specific circumstances of the case for the protection of patients.” *Id.*

9. Pursuant to §§ 105(a) and 333 of the Bankruptcy Code, Debtor seeks entry of an order determining the need for the appointment of an Ombudsman in Debtor’s Chapter 9 case.

The Duties of an Ombudsman

10. Section 333(b) of the Bankruptcy Code sets forth the general duties of an Ombudsman. Those duties include (i) monitoring the quality of patient care, including interviewing patients and physicians; (ii) filing reports with the bankruptcy court every 60 days regarding the quality of patient care provided to patients; and (iii) alerting the bankruptcy court if the quality of patient care is “declining significantly or is otherwise being materially compromised.”

The Necessity of Appointing an Ombudsman

11. Pursuant to § 333(a) of the Bankruptcy Code and Bankruptcy Rule 2007.2, a bankruptcy court is required to appoint an Ombudsman in a case involving a “health care business” as that term is defined within 30 days of the petition date unless the United States

Trustee or a party-in-interest files a motion with the bankruptcy court within 21 days seeking a determination that no Ombudsman need be appointed. The bankruptcy court is required to make such a determination by looking at the specific circumstances of the case for the protection of patients. *See* Fed. R. Bankr. P. 2007.2(a). If the bankruptcy court determines that appointment of an Ombudsman is not necessary, the court is not precluded from ordering the appointment at a later date upon request of the United States Trustee or a party-in-interest. *Id.* at 2007.2(b). Section 333 of the Bankruptcy Code is made applicable to this Chapter 9 case pursuant to 11 U.S.C. § 901(a).

12. Quality patient care is of the highest priority to Debtor and Debtor intends to comply with regulatory and ethical obligations regarding patient care notwithstanding the filing of this Chapter 9 case. Debtor submits that the appointment of an Ombudsman is not necessary for the protection of its patients.

13. Bankruptcy courts generally determine whether to appoint an Ombudsman pursuant to § 333 of the Bankruptcy Code by looking at the following factors: (i) the cause of the bankruptcy filing; (ii) the presence and role of licensing or supervising entities; (iii) debtor's past history of patient care; (iv) the ability of patients to protect their rights; (v) the level of dependency of the patients on the facility; (vi) the likelihood of tension between the interests of the patients and the debtor; (vii) the potential injury to the patients if the debtor drastically reduced its level of patient care; (viii) the presence and sufficiency of internal safeguards to ensure the appropriate level of care; and (ix) the effect of the cost of an Ombudsman on the likelihood of a successful reorganization. *See, e.g., In re North Short Hematology-Oncology Assocs.*, 400 B.R. 7 (Bankr. E.D.N.Y. 2008); *In re Alternative Family Care*, 377 B.R. 754 (Bankr. S.D. Fla. 2007).

14. Debtor submits that many of these factors weigh in favor of not appointing an Ombudsman in this Chapter 9 case at the present moment:

a. *Cause of the Bankruptcy Case.* As noted above, the cause of Debtor's bankruptcy case is largely attributable to the economic downturn, issues with OPERS, and other typical debtor-creditor issues. Debtor's case was not caused by inadequate patient care or to avoid a multitude of medical malpractice claims of patients. Moreover, this case was not caused by a precipitous loss of medical staff or qualified individuals who provide health care services to Debtor's patients.

b. *Presence and Role of Licensing and Supervising Entities.* Debtor is fully licensed by the State of Oklahoma. As part of the licensing procedure, Debtor is subject to stringent guidelines, strict oversight, and frequent inspections. Debtor has been and will continue to be in full compliance with the requirements set forth by the State of Oklahoma and all other regulatory agencies. Debtor complies with the Oklahoma licensure of hospitals as required by Okla. Stat. tit. 63, § 1-701 et seq., the Medicare Certification of Hospitals required by the Social Security Act and Code of Federal Regulations, among other regulations.

c. *Debtor's Past History of Patient Care.* Debtor has no history of providing substandard care to its patients or being reviewed or inspected by the appropriate governmental agencies overseeing Debtor. As noted above, Debtor has been in compliance with all applicable regulations and has not been cited for any material deficiencies. Indeed, the Oklahoma State Department of Health has for the last two years recognized the Debtor as a Certified Healthy Business and this year honored the Debtor with the highest level of recognition with an Excellence Certification.

d. *Internal Safeguards to Ensure Appropriate Level of Care.* The Debtor's management team ensures patient complaints are being heard and acted upon, if necessary. In addition, the Debtor maintains staff personnel specifically tasked with implementing and monitoring Debtor's health care services to patients and who will be tasked with dealing with and remedying all patient complaints. Finally, the Debtor participates in the Press Ganey² patient satisfaction survey process. Its Press Ganey patient satisfaction scores for the past three years show that the Debtor has consistently ranked with the very best hospitals in the country with regard to patient satisfaction.

e. *Effect and Cost of Appointing Ombudsman.* Debtor operates a rural hospital in a town with approximately 5,000 residents. Many of these residents have little, if any, familiarity with what an Ombudsman does in relation to his or her appointment in a bankruptcy case. While § 333 contemplates that such an appointment is a prophylactic measure to prevent substandard health care

²The Press Ganey evaluation process is unrivalled as the gold standard in the healthcare industry, and has been recognized as such for three decades. (See, pressgainey.com, "About Us").

services, the perception from the community will no doubt be that an Ombudsman has been appointed because of substandard health care services. Debtor's revenue is derived in large part on its reputation in the community and unnecessarily appointing an Ombudsman could have dire financial consequences for Debtor. In addition, the cost of an Ombudsman is a concern in this case.

15. There is no doubt § 333 of the Bankruptcy Code is applicable in Chapter 9 case, however it is an open question whether Debtor could be required to pay for the services rendered by an Ombudsman appointed pursuant to that provision. Section 904 of the Bankruptcy Code prohibits entry of any order interfering with a Chapter 9 debtor's property, revenue, and use and enjoyment of income producing property. In addition, § 330 of the Bankruptcy Code, the specific statutory provision for the payment of an Ombudsman, is expressly excluded from Chapter 9 cases pursuant to §901(a). As such, there is no statutory basis to require the Debtor to pay for an Ombudsman.

16. Accordingly, Debtor respectfully requests that sufficient cause has been shown that there is no need to appoint an Ombudsman at this time. Debtor is fully licensed by the State of Oklahoma and is subject to stringent guidelines, strict oversight, and frequent inspections. Debtor has been and will continue to be in full compliance with the regulations and requirements set forth by the State of Oklahoma and other regulatory authorities. Since the Commencement Date, Debtor has suffered minimal loss in staffing and patient care has not diminished in any material respect. Lastly, Debtor recently put in place its own quality assurance program with a dedicated employee monitoring the level of health care services Debtor provides to patients. Debtor submits that under the facts of this case any further oversight would be redundant and unnecessary.

17. The relief requested herein by Debtor will not preclude the Court from reconsidering the appointment of an Ombudsman in the future.

Role of the United States Trustee

18. Prior to the filing of this Motion, the Debtor was solicited by the Office of the United States Trustee (the “UST”) to consent to the immediate appointment of an Ombudsman. Counsel for the Debtor met and conferred extensively with the Debtor’s management and Board of Directors, whereupon it was decided that the Debtor would not consent to the UST’s request and indeed would actively oppose the same.

19. Thereafter, the Debtor provided all information requested by the UST to demonstrate that the appointment of an Ombudsman was not appropriate in this case. As of the filing of this Motion, the Debtor does not know whether or not the UST will resist the relief requested herein.

20. Pursuant to 11 U.S.C. § 103 and § 901(a), only Chapters 1 and 9 and those provisions set forth in Section 901(a) apply to a Chapter 9. *See* 11 U.S.C.A. § 103. Therefore, if a provision is not in Chapter 1, Chapter 9 or Section 901(a), it does not apply to a Chapter 9 bankruptcy. *See In re City of Detroit, Michigan*, 519 B.R. 673 (Bankr. E.D. Mich. 2014) wherein the Court cited the following: *In re Mount Carbon Metro. Dist.*, No. 97-20215MSK, 1999 WL 34995477, at *3 (Bankr. D. Colo. July 20, 1999) (holding only those “certain provisions of other chapters of the Code” incorporated by reference in 11 U.S.C. § 901(a) are applicable to Chapter 9.); *In re City of Colorado Springs Spring Creek Gen. Imp. Dist.*, 187 B.R. 683, 687 (Bankr. D. Colo. 1995) (Section 901(a) incorporates by reference Code provisions from other Chapters and applies them to a Chapter 9); *In re Mendocino Coast Recreational & Park Dist.*, No. 11-14625, 2012 WL 1431219, at *2 (Bankr. N.D. Cal. Apr. 22, 2012) (“Section 901 of the Bankruptcy Code specifies those sections of the Code applicable to other chapters which also apply to Chapter 9.”); *In re JZ L.L.C.*, 371 B.R. 412, 419 (B.A.P. 9th Cir. 2007) (holding § 554

does not apply in a chapter 9, because it is not incorporated by 11 U.S.C. § 901(a)); and *In re E. Shoshone Hosp. Dist.*, 226 B.R. 430, 431 (Bankr. D. Idaho 1998) (holding § 327 and § 1107 do not apply in a Chapter 9, because they are not incorporated in Section 901(a)). There is no basis for any implied, inferred or otherwise manufactured application for any provision of the Bankruptcy Code to Chapter 9 if the same is not found in § 103 or § 901(a).

21. The UST has standing only because the “language, legislative history, and judicial interpretation of § 307 reveal that Congress intended to enhance the role of the United States Trustee by permitting direct involvement in bankruptcy proceedings.” *Hayes and Son Body Shop, Inc. v. U.S. Trustee*, 124 B.R. 66, 68 (W.D.Tenn. 1990). It is, however, equally clear that § 307 is not included in § 901(a) and therefore does not apply to a Chapter 9 as discussed by the court in *In re City of Detroit, Michigan*:

The Court concludes that § 307 is not incorporated into chapter 9. It is not on the list of sections in the bankruptcy code that § 901(a) incorporates into chapter 9. Moreover, 11 U.S.C. § 103(f) specifically states, “Except as provided in section 901 of this title, only chapters 1 and 9 of this title apply in a case under such chapter 9.” 11 U.S.C. § 103(f). Thus, despite the sweeping language of § 307, the Court concludes that §§ 103(f) and 901(a) establish that the U.S. Trustee has no statutory standing in chapter 9 cases.

519 B.R. at 677.

22. In that case the Court went on to state that a “U.S. Trustee has a substantial interest in defending its own actions in this case when parties to the case challenge those actions” and, therefore, the UST had “standing to object to the City’s motion.” *Id.* (emphasis added). It is essential to note that in *City of Detroit*, the UST had appointed the Official Committee of Unsecured Creditors. *Id.* at 675. The City of Detroit then filed a motion for entry of an order vacating the appointment of the official committee of unsecured creditors. *Id.* Therefore, the UST had standing *only to defend its prior statutorily authorized actions* – the appointment of the

committee – when it normally would have no standing in a Chapter 9 case. *City of Detroit* is distinguishable from the case at hand. In this case, the UST has taken no action which it must defend and the Debtor is not challenging any actions of the UST. Instead, the Debtor merely requests that a patient care ombudsman not be appointed.

23. The Bankruptcy Code creates the basis and parameters for the appointment of the Ombudsman in § 333. Specifically, § 333(a)(1) addresses the timing and basis for the decision of the court to either appoint an Ombudsman or refrain therefrom, yet this provision makes no mention of the UST. It is only after the “Court orders the appointment of an ombudsman under paragraph (1)” that § 333(a)(2)(A) creates a role for the UST and that role is limited to the designation of the individual to serve as Ombudsman. This role is consistent with one of the primary reasons that the UST was created as part of the enactment of the Bankruptcy Code in 1978 to replace the long standing Bankruptcy Act, *i.e.* the designation of individuals to fill positions as directed by the Bankruptcy Code or the court such as a consumer privacy ombudsman (§ 332(a)); an interim Chapter 7 Trustee (§ 701(a)(1)); a successor Chapter 7 Trustee (§ 703(c)(1)); a Chapter 11 Trustee or Examiner (§ 1104(d)); a creditors’ or equity holders’ committee (§ 1102(a)); a Chapter 12 Trustee (§ 1202(a)); a Chapter 13 Trustee (§ 1302(a)); or as in this case, a patient care ombudsman. Under the Bankruptcy Act, the Bankruptcy Referee was responsible for designating the person to fill such roles, but under the “new” Bankruptcy Code, there is a change in this concept. The legislative history behind 28 U.S.C. §581 makes this clear:

[T]he bankruptcy judge, because of the duties imposed upon him under the Bankruptcy Act, must take an active role in supervising and administering a bankruptcy case. No matter how fair a bankruptcy judge is, his statutory duties give him a certain bias in a case, and the bankruptcy court as a result has been viewed by many as an unfair forum. The bill removes many of the supervisory functions from the judge in the first instance, transfers most of them to the trustee and to the United States trustee, and

involves the judge only when a dispute arises. Because the judge no longer will have to take an active role in managing bankruptcy cases, the bankruptcy court should become a forum that is fair in fact and in appearance as well.

Some of the supervisory functions removed from the judge will be transferred to a new system of United States trustees who will act as bankruptcy watchdogs, overseeing the qualifications and appointments of private trustees in bankruptcy cases, supervising their performance, monitoring their fees, and serving as trustees in cases where a private trustee cannot be found to serve. (HR Rep No. 595, 95th Cong, 1st Sess. 4 (1977)) (footnote omitted).

24. The provisions of § 333 do not confer standing to the UST in the court's proceedings related to the determination of whether or not an Ombudsman is to be appointed. Rather it is only after the court makes a decision that an Ombudsman is to be appointed that the UST has any authority to do anything. Therefore, the UST has no standing to participate in any proceedings related to the relief requested in this Motion.

Conclusion

25. Debtor believes that the specific facts and circumstances of this case show that there is no need for the appointment of an Ombudsman in this case pursuant to § 333 of the Bankruptcy Code.

26. Based on the foregoing, Debtor submits that the relief requested by this Motion is necessary and appropriate, is in the best interests of Debtor and its creditors, and should be granted in all respects.

27. No creditors' committee has been appointed in this Chapter 9 case. Debtor has served notice of this motion on the U.S. Trustee for the Northern District of Oklahoma and those creditors listed on the attached service list. Debtor submits that no other or further notice need be provided. Such notice is consistent with Federal Rule of Bankruptcy Procedure 2007.2(e).

WHEREFORE, Debtor respectfully requests entry of an order granting the relief requested herein, and such other and further relief as the Court may deem just.

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CERTIFICATE OF SERVICE

This is to certify that on the 5th day of March, 2015, I electronically transmitted the above and foregoing instrument for filing and for transmittal of a Notice of Electronic Filing to all ECF registrants in this case. This further certifies that on the 5th day of March, 2015, the foregoing was sent via first class mail to those parties listed on the attached notice list who are not registered for ECF notice.

s/ Michael R. Pacewicz

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