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|--------------------|---|--------------------------------|
|                    | : | UNITED STATES BANKRUPTCY COURT |
| In the Matter of:  | : | FOR THE DISTRICT OF NEW JERSEY |
|                    | : | NEWARK VICINAGE                |
| ALLIED HEALTH CARE | : |                                |
| SERVICES, INC.,    | : | Chapter 7                      |
| Debtor.            | : | Case No. 10-35561(MS)          |

Hearing Date: September 7, 2010

**MEMORANDUM OF LAW IN OPPOSITION TO MOTION FOR  
APPOINTMENT OF AN INTERIM TRUSTEE**

Allied Health Care Services, Inc., through its counsel Stern, Lavinthal, Frankenberg & Norgaard, LLC, submits the following Memorandum of Law in Opposition to the Motion of Key Equipment Finance, Kingsbridge Holdings, LLC, and Republic Bank of Chicago (collectively, the "Petitioners"), for Appointment of an Interim Trustee.

**MEMORANDUM OF LAW**

**I. SUMMARY**

1. Under 11 U.S.C. § 303(g), a trustee may be appointed "if necessary to preserve the property of the estate or to prevent loss to the estate."

2. Motions for appointment of trustees under 11 U.S.C. Sec. 303(g) are governed by Fed. R. Bankr. P. 2001. Fed. R. Bankr. P.

2001(b) forbids the appointment of a trustee under Code Sec. 303(g) "unless the movant furnishes a bond in an amount approved by the Court, conditioned to indemnify the debtor for costs, attorney's fee, expenses and damages allowable under sec. 303(i) of the Code."

The movants herein have not offered to furnish any bond pursuant to this rule.

3. A trustee may be appointed under Code Sec. 303 only if such relief is "necessary to preserve property of the estate or to prevent loss to the estate." 11 U.S.C. Sec. 303(g). Due to the potentially devastating effect that the appointment of a trustee may have on a debtor's business, the movant must demonstrate an "exceptionally strong need" for a trustee. In re Rush, 10 B.R. 518, 524 (Bkrtcy. N.D. Ala. 1980); 9 *Collier on Bankruptcy* Sec. 2001.02[2] (15th Ed. Rev. 2007). A party requesting the appointment of a trustee to operate a debtor's business must demonstrate the need for a trustee under the "clear and convincing evidence" standard. See *In re Sharon Steel Corp.*, 871 F.2d 1217, 1226 (3rd Cir. 1989); 7 *Collier On Bankruptcy* § 11.04[2][b] (15th ed. Rev. 2007).

4. The Petitioners castigate Allied with unsupported assertions of mismanagement and malfeasance in their stark statement in support of the Trustee Motion. However, they offer no evidence to support their assertions.

5. There is no legal or factual basis warranting the appointment of a trustee under Code Sec. 303(g). The Petitioners do not even suggest that the Debtor is presently dissipating property of the estate, or that its property is otherwise in jeopardy. Similarly, they do not attempt to establish any cause for appointment of a trustee, or try to explain how such appointment would serve the interests of the estate. The Petitioners simply spew specious allegations based on "information and belief." Therefore, their Motion for Appointment of a Trustee must be denied.

## **II. ARGUMENT**

### **A. A Strong Presumption Exists Against Appointment of a Trustee**

6. The Third Circuit has held that the party seeking appointment of a trustee has the burden of establishing the need for a trustee by clear and convincing evidence. *Sharon Steel* at 1226. For these reasons it is well settled that the appointment of a trustee is the exception, not the rule. *In re G-I Holdings, Inc.*, 295 B.R. 502, 508 (Bankr. N.J. 2003).

7. There is no one more knowledgeable and practiced at the debtor's business than the debtor itself. This is the entire basis of the concept of "debtor-in-possession" as implemented in 1978. Upon appointment, the trustee must find replacement management who is often less adept at running the debtor's business. In addition, the appointment of a trustee will add another layer of

administrative expenses to the costs which will be imposed upon the estate assets. The Court must therefore balance the harm of such appointment against the benefit to the estate. *Schuster v. Dragone*, 266 B.R. 268, 271 (D. Conn. 2001) (citing *General Oil*, 42 B.R. at 409; *In re North Star Contracting Corp.*, 128 B.R. 66, 70 (Bankr. S.D.N.Y. 1991)).

8. Further, when determining a motion to appoint a trustee under Code Sec. 303(g), prior to the entry of an order for relief and prior to the Debtor's response to the involuntary petition, the Court must be particularly aware of the damage that a trustee's appointment may cause to an involuntary Debtor's business. *Rush* at 524. Further, the movants must furnish a bond to protect the involuntary debtor from legal fees, expense or other loss that it may suffer due to the appointment of a trustee. Fed. R. Bankr. P. 2001(b). As the Petitioners do not propose to furnish any bond, their motion must be denied.

**B. The Petitioners Fail to Meet the Burden of Proof**

9. The Petitioners argue that a trustee should be appointed because they suspect Allied of having engaged in improper lease transactions prior to their commencement of the case. But they do not offer anything beyond cryptic allegations based on "information and belief." These allegations, unsupported by evidence, are not sufficient to justify the appointment of a trustee. The

