UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re:	Chapter 11
GULF COAST HEALTH CARE, LLC, *et al.*,	Case No. 21-11336 (KBO)
Debtors.	(Jointly Administered)

OBJECTION OF THE NOTEHOLDER CLAIMANTS TO THE MOTION OF DEBTORS FOR ENTRY OF ORDER APPROVING ASSUMPTION OF RESTRUCTURING SUPPORT AGREEMENT

REIT Solutions II, LLC (f/k/a REIT Solutions, Inc.), SJB No. 2, LLC, JJT No. 1, LLC, Wet One, LLC and DLF No. 3, LLC (collectively, the "***Noteholder Claimants***") object (this "***Objection***") to the *Motion of Debtors for Entry of Order Approving Assumption of Restructuring Support Agreement* [D.I. 107] (the "***RSA Motion***").[1] In support of their Objection, the Noteholder Claimants respectfully state:

I. INTRODUCTION

1. Through a series of filings made at the outset of this proceeding, the Debtors and the Omega Entities (defined herein) seek to accomplish the core elements of a comprehensive restructuring—well before this Court has an opportunity to consider whether that restructuring complies with the requirements of 11 U.S.C. § 1129. While giving lip service to the need for a plan confirmation hearing, the Debtors and the Omega Entities have engineered a series of transactions that tilt the table in favor of their preferred restructuring outcome, and severely limit the possibility of an alternative, value maximizing transaction. By assuming the pre-petition Restructuring Support Agreement they entered into with the Omega Entities and other related

[1] Capitalized terms used but not defined herein are intended to have the meanings ascribed to them in the RSA Motion.

parties (the "***RSA***"), the Debtors commit themselves to handoff their facilities to a new operator or operators selected by the Omega Entities.

2. This preordained outcome contains numerous benefits for the Debtors' equity sponsors and affiliates as well as for the Omega Entities (all of whom presumably have an opportunity to continue leasing real estate, providing services, or otherwise doing business with the facilities). But the proposed transaction offers little, if any, hope of a meaningful recovery for unsecured creditors. From the perspective of this Chapter 11 proceeding, the Debtors are essentially liquidating, with only the hint of some undefined "Cash Consideration" to be awarded to unsecured creditors at a later date—with additional benefits *if* they support the restructuring.

3. The Debtors can and should do better. None of the Debtors' filings to date reflect that any kind of market check has been conducted with respect to these operating assets. If the Debtors are determined to proceed to confirmation on an expedited basis, they should be required to conduct a simultaneous sale process geared toward identifying value maximizing alternative transactions. The proposed restructuring should be tested in the context of this market check, and only approved in the context of a full confirmation hearing that occurs after a reasonable opportunity for the market check to occur. Because the RSA interferes with the opportunity for a reasonable market check and essentially eliminates the possibility of an alternative, value-maximizing transaction, the Court should deny the RSA Motion.

II. BACKGROUND FACTS

A. The Issuance of the Omega Notes

4. The Noteholder Claimants hold five subordinated promissory notes—each in the amount of $4,000,000 (the "***Omega Notes***")—executed by CSE Mortgage LLC ("***CSE****")* and assumed by OHI Asset HUD Delta, LLC (the "***Omega Obligor***").

5. The Omega Notes were executed and delivered to the Noteholder Claimants on or about November 30, 2006 in the aggregate principal amount of $20,000,000.

6. The Omega Notes were executed and delivered to the Noteholder Claimants as part of the consideration for the sale of certain healthcare facilities located in Florida—previously owned by the Noteholder Claimants' affiliates: Delta Health Group, LLC, Cordova Rehab, LLC and Pensacola Health Trust, LLC (collectively, the "***Delta Group***"). The Delta Group transferred these facilities to CSE, which is an affiliate and predecessor of the Omega Obligor (the "***Florida Transaction***").

7. The Omega Obligor alleges that it assumed the obligations under the Omega Notes by an Assumption and Assignment Agreement dated June 29, 2010.

8. Certain of the Omega Obligor's affiliates are landlords (the "***Omega Landlords***" and, together with the Omega Obligor and their respective affiliates, including OHI Asset Funding (DE), LLC, the "***Omega Entities***") to Debtor Gulf Coast Master Tenant I, LLC (the "***Gulf Coast Tenant***") under an Amended and Consolidated Master Lease (as amended, consolidated and restated, the "***Omega Master Lease***").

9. Under Section 2.10 of the Purchase Agreement executed in connection with the Florida Transaction, and subject to the terms and conditions in that Agreement, CSE was given the right to offset certain rent defaults under the Omega Master Lease against amounts owing under the Omega Notes.

10. The Gulf Coast Tenant has not made all of the rent payments owing under the Omega Master Lease. Based on these rent defaults, the Omega Obligor has invoked Section 2.10 of the Purchase Agreement to attempt to exercise rights of setoff under the Omega Notes from July 2019 through December 2019, and from June 2021 forward. Stated simply, the Omega

Obligor contends it can reduce its obligations under the Omega Notes by the amount that the Gulf Coast Tenant has failed to pay under the Omega Master Lease.[2]

11. To the extent the Omega Obligor has exercised setoff rights under the Omega Notes, the Noteholder Claimants have become unsecured creditors in this proceeding. Each time the Omega Obligor sets off, the Noteholder Claimants become subrogated to the rights and claims against the Gulf Coast Tenant that gave rise to such setoff. The Noteholder Claimants' unsecured claim will increase as and when the Omega Obligor tries to exercise further rights of setoff with respect to future amounts due under the Omega Notes.

12. On August 11, 2021, the Omega Obligor filed suit against the Noteholder Claimants in the Circuit Court for Baltimore County, Maryland, seeking declaratory relief as to the amounts owing under the Omega Notes (the "***Omega Maryland Litigation***"). *See* Baltimore County Circuit Court Case No. C-03-CV-21-002602, styled *OHI Asset HUD Delta, LLC v. REIT Solutions II, LLC, et al.* The Noteholder Claimants have filed a Motion to Dismiss for Lack of Personal Jurisdiction, and that motion and the Omega Maryland Litigation are presently pending.

B. The Circumstances Surrounding the RSA, the RSA Motion, and Related Filings

13. The Debtors claim to have faced "significant fiscal challenges" over *the last year and a half*. *See* Declaration of M. Benjamin Jones in Support of Chapter 11 Petitions and First Day Pleadings (the "***Jones Declaration***" or "***Jones Dec.***"), D.I. 16, ¶ 8 at 4 (emphasis added).

14. While not specifying an exact date of retention, the Debtors acknowledge engaging financial and legal advisors "earlier this year to explore potential paths forward,

[2] The Noteholder Claimants and the Omega Obligor have pending disputes as to the scope, terms and conditions of the Omega Obligor's asserted setoff rights. The Noteholder Claimants reserve all rights, remedies, claims, defenses and positions with respect to those disputes.

including in- and out-of-court strategic alternatives and restructuring initiatives." Jones Dec., ¶ 9 at 5.

15. The Debtors further acknowledge having conducted "months of financial and operational analysis with their restructuring advisors." *Id.*

16. The RSA Motion does not mention retaining an investment banker, discussions with possible strategic acquirers, or initiating any kind of sale or recapitalization process. *See generally* RSA Motion.

17. The Debtors instead claim to have conducted "an accelerated period of intense, confidential restructuring negotiations" with their affiliated lender, New Ark Capital, LLC ("***New Ark***") and with the Omega Entities. Jones Dec., ¶ 9 at 5.

18. The Debtors further claim that these negotiations culminated in an agreement between the Debtors, their affiliated service providers, equity sponsors, their affiliated lender New Ark, and the Omega Entities. Jones Dec., ¶ 61 at 29-30. That agreement—stated by the Debtors to have been memorialized in the RSA—contemplates the transfer of the Debtors' facilities through management and operations transfer agreements ("***MOTAs***") and a Chapter 11 plan. *Id*., ¶ 62 at 30.

19. The RSA sets forth milestones governing the timetable for accomplishing the proposed transfer of the Debtors' operations and related restructuring transactions (the "***Milestones")***. Those Milestones include: (i) approval of an interim DIP financing order within three (3) business days after the Petition Date; (ii) approval of a final DIP financing order within thirty-five (35) days after the Petition Date; (iii) entry of an order approving the assumption of the RSA within thirty-five (35) days after the Petition Date; (iv) entry of an order approving the MOTAs within thirty-five (35) days after the Petition Date (subject to certain potential

extensions); (v) filing of a Plan and Disclosure Statement within ten (10) business days after the Petition Date; (vi) entry of an order approving the Disclosure Statement and solicitation procedures for the Plan within fifty (50) days after the Petition Date; and (vii) entry of a Confirmation Order with respect to the Plan within one hundred (100) days after the Petition Date. *See* RSA Motion, Ex. 1, ¶ 6 at 13-14.

20. Consistent with the Milestones, the Debtors filed their RSA Motion on October 22, 2021.

21. On October 28, 2021—six days later—the Debtors filed their Joint Plan of Liquidation under Chapter 11 of the Bankruptcy Code (D.I. 124) and Supporting Disclosure Statement (D.I. 129).

22. On November 2, 2021—five days later—the Debtors filed a Motion for Entry of Order Extending Automatic Stay to Certain Non-Debtor Co-Defendants (D.I. 155).

23. On November 3, 2021—one day later—the Debtors filed their motion to approve MOTAs transferring the majority of their facilities to a new manager approved by the Omega Entities. *See* Motion of Debtors for Entry of an Order (I) Authorizing Transfer of the Management, Operations, and Related Assets of the Omega Facilities Free and Clear of All Liens, Claims and Encumbrances, and Interests; (II) Approving Procedures for the Debtors' Future Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; (III) Approving Rejection and Termination of the Master Lease, and the Allowance of the Omega Rejection Damages Claim in Connection Therewith; (IV) Approving Form of Management and Operations Transfer Agreement; and (V) Granting Related Relief (the "***MOTA Motion***") (D.I. 166, ¶ 4 at 3-4).

III. OBJECTION TO PROPOSED ASSUMPTION OF THE RSA

A. Applicable Authorities.

24. Before approving assumption of the RSA, this Court should evaluate whether the Debtors have adequately demonstrated that the proposed assumption reflects a proper exercise of their business judgment. *See In re Genco Shipping & Trading Ltd.,* 509 B.R. 455, 462-64 (Bankr. S.D.N.Y. 2014); *see also In re Decora Indus.,* No. 00-4459, 2002 Bankr. LEXIS 27031, at *22-23 (D. Del. May 20, 2002). In particular, the Court's review should consider whether assumption of the RSA will benefit the estate. *See Genco,* 509 B.R. at 463. Although the business judgment rule is traditionally deferential, and courts applying it have often approved restructuring support agreements, the rule is not without limits. *See, e.g., In re Innkeepers USA Trust,* 442 B.R. 227, 236 (Bankr. S.D.N.Y. 2010) (finding debtors had not articulated a sufficient business justification for a plan support agreement).

25. Moreover, in cases where there is a concern about the disinterestedness of parties to a restructuring support agreement—as with New Ark[3] (and perhaps even Omega here)—courts will apply a heightened standard of scrutiny. *See, e.g., Genco,* 509 B.R. at 464; *Innkeepers,* 442 B.R. at 231; *Official Comm. of Subordinated Bondholders v. In re Integrated Resources,* 147 B.R. 650, 656 (S.D.N.Y. 1992). A heightened standard is appropriate in such circumstances because, "[b]y definition, the business judgment rule is not applicable to transactions among a debtor and an insider of the debtor." *In re Latam Airlines Grp. S.A.*, 620 B.R. 722, 769 (Bankr. S.D.N.Y. 2020). "In applying heightened scrutiny, courts are concerned with the integrity and entire fairness of the transaction at issue, typically examining whether the process and price of a proposed transaction not only appear fair but are fair and whether

[3] In the RSA Motion, the Debtors note that their senior secured lender, New Ark, "is an affiliated entity with some common indirect beneficial ownership with the Debtors." D.I. 107, ¶ 3 at p. 3.

fiduciary duties were properly taken into consideration." *In re Innkeepers USA Tr.*, 442 B.R. at 231.[4]

B. The RSA is a *Sub Rosa* Plan that Dictates the Terms of the Debtors' Plan of Reorganization to the Detriment of Creditors.

26. The RSA is not simply an agreement pursuant to which the Debtors will pursue, and consenting creditors will support, a common goal of emerging from Chapter 11 and a general restructuring plan. Instead, the RSA is a carefully crafted device (largely appearing to benefit the Omega Entities and their affiliates) through which the Debtors have locked themselves into all the terms of their proposed restructuring, with onerous consequences attached to the failure to implement those terms—all without the protections and procedures of Chapter 11 of the Bankruptcy Code. In particular, if the Debtors default following assumption of the RSA, they face the termination of their DIP financing and potential administrative claims by the Omega Entities—all well before the legitimacy and lawfulness of the proposed restructuring has been tested at a confirmation hearing.

27. The Debtors may not circumvent the requirements of section 1129 of the Bankruptcy Code by entering into an agreement like the RSA here that "has the practical effect of dictating the terms of a prospective Chapter 11 plan," *In re Nortel Networks, Inc.,* 522 B.R. 491, 508 (Bankr. D. Del. 2014), although they may enter into "building block[s]" or agreements that are "necessary step[s]" toward plans. *Id.* An agreement that dictates the terms of any future

[4] In contrast, if the Court concludes that it need not utilize a heightened standard of review to justify the assumption of the RSA, the Debtors must still show that such assumption is supported by their sound business judgment, which judgment must be exercised fairly, and without prejudice to parties in interest. *See In re Nortel Networks, Inc.,* No. 09-10138, 2011 Bankr. LEXIS 3971, at *21 (Bankr. D. Del. July 11, 2011) (decision must be "in the best interests of the Debtors, their estates, their creditors, and all parties in interest"); *In re Trak Auto Corp.,* No. 01-72167, 2002 WL 32129975, at *2 (Bankr. E.D. Va. Jan. 9, 2002) (court must "evaluate debtor's business judgment by considering the impact of the debtor's decision on a variety of parties as well as the impact on debtor's estate"); *In re Grayhall Res., Inc.*, 63 B.R. 382, 384 (Bankr. D. Colo. 1986) (debtor may assume contracts under section 365 where "assumption represents a sound business judgment on the part of the Debtor and will not be prejudicial to the interest of the creditors").

plan is an impermissible *sub rosa* plan. *Id.* Here, the RSA is a *de facto* Chapter 11 plan—at least with respect to the 24 of the Debtors' 28 facilities that are subject to the Omega Master Lease.

28. The prohibition on *sub rosa* plans is designed to stop a debtor from short-circuiting the protections of the Bankruptcy Code and the requirements of Chapter 11 for confirmation of a reorganization plan. *SCH Corp. v. CFI Class Action Claimants,* No. 14-2888, 2015 U.S. App. LEXIS 2674, at *18 (3d Cir. Feb. 24, 2015); *see also In re Braniff Airways, Inc.,* 700 F.2d 935, 940 (5th Cir. 1983) ("The debtor and the Bankruptcy Court should not be able to short circuit the requirements of Chapter 11 for confirmation of a reorganization plan by establishing the terms of the plan *sub rosa* . . . ."). If a debtor proposes the disposition of a substantial portion of the estate's assets prior to plan confirmation, such disposition should provide an "expeditious avenue for the transfer of property in exchange for a reasonable consideration if in the best interests of the estate *and the prospects of confirming a plan to serve as the vehicle to do so appear dim or far in the future*." *In re Copy Crafters Quickprint, Inc.*, 92 B.R. 973, 983 (Bankr. N.D.N.Y. 1988) (emphasis added) (citing Hurley, *Chapter 11 Alternative: Section 363 Sale of all of the Debtor's Assets Outside a Plan of Reorganization*, 58 AM. BANKR. L.J. 233 (1984)).

29. While case law considering the prohibition on *sub rosa* plans often focuses on sales pursuant to section 363(b) of the Bankruptcy Code, *e.g.*, *Id.*, plan support agreements raise the same issues and problems. *See In re Latam Airlines Grp. S.A.*, 620 B.R. 722, 813 (Bankr. S.D.N.Y. 2020) ("[c]oncerns about sub rosa plans are not limited to transactions involving section 363 asset sales. They are germane to any transaction by a debtor that adversely impacts on interested parties' rights to participate in the restructuring process."). In both

contexts, there exists the "fear that one class of creditors may strong-arm the debtor-in-possession and bypass the requirements of Chapter 11 to cash out quickly at the expense of other stakeholders, in a proceeding that amounts to a reorganization in all but name, achieved by stealth and momentum." *In re Chrysler LLC,* 576 F.3d 108, 116 (2d Cir. 2009), *cert. granted, judgment vacated sub nom. Indian State Police Pension Trust v. Chrysler LLC,* 558 U.S. 1087 (2009), *judgment vacated,* 592 F.3d 370 (2d. Cir. 2010).

30. "A non-exhaustive list of factors to consider in determining if there is a sound business purpose for the [pre-confirmation disposition of substantially all of the Debtors' assets] include: the proportionate value of the asset to the estate as a whole; the amount of elapsed time since the filing; the likelihood that a plan of reorganization will be proposed and confirmed in the near future; the effect of the proposed disposition of the future plan of reorganization; the amount of proceeds to be obtained from the sale versus appraised values of the property; and whether the asset is decreasing or increasing in value." *In re Del. & Hudson Ry. Co.*, 124 B.R. 169, 176 (D. Del. 1991) (citing *In re Lionel*, 722 F.2d 1063, 1071 (2d Cir. 1983)). All of the above elements militating against *sub rosa* plans are either present here or the Debtors have not provided sufficient information for the Court and parties to rule out such factors:

- The proportional value of the RSA transactions is substantial in comparison to the Debtors' operational footprint as the RSA proposes to transfer 24 of the Debtors' 28 facilities to entities designated by an Omega Entity, *see* D.I. 107, ¶ 14 at 6;
- Precious little time has passed since the Petition Date of October 14, 2021, as the Debtors filed the RSA Motion on October 22, 2021;
- This is not an instance where a plan is unlikely to be proposed as the Debtors already filed their proposed plan on October 28, 2021, *see* D.I. 124, a mere two weeks following the Petition Date. Indeed, under the timeline proposed by the

Debtors, *the RSA transactions will be closed virtually contemporaneously with the Plan solicitation and confirmation process*;[5]

- The Debtors have failed to present any evidence as to the valuation of the assets to be transferred to an Omega Entity's designated manager, and the benefits and burdens of alternative market transactions; and

- While the Debtors have presented some cursory evidence of liquidity constraints leading to the commencement of these cases, they have not presented any evidence as to whether the operating performance at the Facilities is improving or worsening—especially with Covid-19 cases recently diminishing in numbers across the country.

31. Moreover, the RSA enables the Omega Entities to choose the new operators that will take over transition of the Debtors' facilities subject to the Omega Master Lease. This essentially places the Omega Entities at the helm of steering the outcome of these chapter 11 cases, but without the Omega Entities having the same fiduciary duties as the Debtors to maximize value for the estates with the parties they select as new operators.

32. For the foregoing reasons the RSA represents an impermissible attempt to short circuit the chapter 11 process and lock up the terms of a *sub rosa* plan. The assumption of the RSA should therefore not be approved.

C. The Debtors Cannot Demonstrate that the Restructuring Transactions Proposed by the RSA are Fair and Reasonable Because the Debtors have Not Market Tested the Transactions and the RSA Prevents them from Doing so Going Forward.

33. Even if the Debtors are able to demonstrate "there is a sound business reason or an emergency justifying the pre-confirmation sale, the court must also determine that the trustee has provided the interested parties with adequate and reasonable notice, *that the sale price is fair and reasonable* and that the purchaser is proceeding in good faith." *In re Del. & Hudson Ry. Co.*, 124 B.R. at 176 (emphasis added) (citing *Valley Refrigeration*, 77 B.R. 15, 21 (Bankr. E.D.

[5] The Noteholder Claimants reserve all rights, remedies, claims, and positions with respect to the Debtors' Plan and Disclosure Statement.

Pa. 1987)).[6] "Fair price 'relates to the economic and financial considerations of the proposed merger, including all relevant factors: assets, market value, earnings, future prospects, and any other elements that affect the intrinsic or inherent value of a company's stock.'" *In re Latam Airlines Grp. S.A.*, 620 B.R. 722, 790 (Bankr. S.D.N.Y. 2020) (quoting *Owen v. Cannon*, No. 8860 C.A. (CB), 2015 WL 3819204, at *31 (Del. Ch. June 17, 2015)). Here the Debtors have not presented any evidence that the prices at which the RSA requires them to transfer their operations and assets to an Omega Entity's designees are fair and reasonable under the circumstances.

34. More specifically, there is no evidence that, prior to the Petition Date the Debtors tested the market for competing higher proposals to acquire the operations for the facilities subject to the Omega Master Lease. Moreover, the plain terms of the RSA prohibit the Debtors from market testing the value of the transactions proposed under the RSA:

> Between the date hereof and the Termination Date, the [Debtors] agree[] to take any and all reasonably necessary and appropriate actions, and make all commercially reasonable efforts, to: not (i) ***directly or indirectly seek, solicit, support, propose, assist, encourage, vote for, consent to, enter, or participate in any discussion regarding the negotiation or formulation of an Alternative Transaction***, (ii) publicly announce its intention not to pursue the Restructuring Transactions, or (iii) object to, impede, delay, or take any other action that is inconsistent with, or that would prevent, interfere with, impede, or delay the proposal, solicitation, confirmation, or consummation of the Restructuring Transactions as soon as reasonably practicable.

RSA at ¶ 6(h) (emphasis added). Similarly, the Debtors' Equity Sponsors agreed in the RSA to "***not*** vote against the Plan or otherwise agree to, consent to, or ***provide any support to any other chapter 11 plan or other restructuring, Alternative Transaction, sale, or liquidation of assets***

[6] As mentioned, the actual fairness of the proposed price is also a consideration in applying a heightened, rigorous scrutiny standard to the overall fairness of the RSA transaction. *See In re Innkeepers USA Tr.*, 442 B.R. at 231.

concerning either the Company or its assets other than the transactions contemplated under this Agreement." *Id.* at ¶ 2(d) (emphasis added).

35. Not only did the Debtors fail to market test the transactions proposed under the RSA prior to entering into it, but the RSA also proposes to prohibit the Debtors or their Equity Sponsors from undertaking any effort to market test the RSA transactions after the Petition Date.[7] In essence, by approving the assumption of the RSA, the Court will be authorizing the Debtors to stop looking for an alternative, value-maximizing transaction—all in the context of a case where unsecured creditors face a prospect of negligible recoveries on their claims.

36. The present circumstances are similar to those in *In re Innkeepers* where the bankruptcy court refused to approve a restructuring support agreement. There the debtors sought to assume a plan support agreement ("PSA") that would give an existing shareholder equity in the reorganized debtors. *In re Innkeepers USA Tr.*, 442 B.R. at 231. The Bankruptcy Court denied the relief because (i) the debtors failed to shop the PSA (either before or after its execution), (ii) evidence showed that the debtors never intended to shop it, (iii) the investment banker was specifically told not to seek any other investors, and (iv) the PSA expressly prohibited the debtors from discussions with other parties. *Id.* at 231-32. The reasons justifying disapproval of the support agreement in *Innkeepers* are present in the instant case.

37. Unlike in *Innkeepers*, however, the Debtors did not even bother to hire an investment banker to assist them in valuing (much less market testing) the transactions proposed in the RSA. As one court has remarked in the context of debtors' willingness to engage in a material transaction that involved interested parties, "[i]t is astounding that the debtors have not

[7] The Debtors' failure to market the transactions contemplated under the RSA prior to the Petition Date and waiver of any ability to market those transactions following the Petition Date render the so-called "fiduciary out" contained in the RSA a nullity.

hired an investment banker to test the marketplace for other expressions of interest." *In re Bidermann Indus. U.S.A., Inc.*, 203 B.R. 547, 551 (Bankr. S.D.N.Y. 1997).

38. While a robust post-bankruptcy marketing process can salvage a Debtors' failure to engage in pre-bankruptcy market testing, *see, e.g.*, *In re Latam Airlines Grp. S.A.*, 620 B.R. at 780, the RSA expressly prohibits the Debtors from actively exploring any Alternative Transactions if the RSA is approved, *see* RSA at 6(h). Because the Debtors have demonstrably failed to engage in any value maximizing activities prior to their entry into the RSA, and have signed that ability away in the RSA, they cannot possibly satisfy their burden to show that the price of the proposed RSA transactions, which ostensibly only seem to benefit the Omega Entities and New Ark, is "*fair and reasonable.*" *In re Del. & Hudson Ry. Co.*, 124 B.R. at 176. Nor can the Debtors demonstrate that the proposed price of the RSA transactions is "actually fair" under the rigorous scrutiny standard of review. *See In re Innkeepers USA Tr.*, 442 B.R. at 231.

39. At this juncture, the Court and the parties are without any measuring stick to determine whether the price of the transactions proposed under the RSA is fair to the Debtors and their estates. Worse, the RSA, if approved, would prevent the Debtors from exploring alternative transactions that could generate superior recoveries for creditors and other stakeholders. For these reasons the Court should not approve assumption of the RSA because the Debtors cannot demonstrate that the transactions it proposes are entirely fair.

D. The Record is Insufficiently Developed for the Court to make a Finding that the RSA was Negotiated in Good Faith

40. The proposed order approving the RSA requests a finding that "[t]he RSA was negotiated in good faith and at arm's length among the RSA Parties and their respective professional advisors." D.I. 107-2, ¶ 1 at p. 3. The existing record raises numerous questions as

to the process by which the Debtors, the Omega Entities, and their affiliates reached the terms of the RSA. The Noteholder Claimants object to any finding in the proposed order relating to the good faith negotiation or proposal of the RSA, especially as it pertains to the Debtors' proposed plan under section 1129, or any such finding otherwise relating to the confirmation of the plan. The Debtors' (and other parties in interests') good faith in negotiating locked-in components of the plan are confirmation issues that should not be decided in the context of the RSA Motion and without the benefit of a full and complete record. The Noteholder Claimants intend to take discovery on the good faith of the RSA Parties (and their advisors, to the extent necessary) in negotiating the RSA.

41. The proposed order and any finding made thereunder should have no preclusive effect in connection with the Debtors' ability to satisfy confirmation standards under the Bankruptcy Code. The Noteholder Claimants reserve all rights, remedies, claims, and positions as to the formulation, solicitation, and confirmation of the proposed Plan.

IV. RESERVATION OF RIGHTS

42. Nothing in this Objection is intended to be, or should be construed as, a waiver by Noteholder Claimants (including all such affiliates of Noteholder Claimants) of any of their rights under the Omega Notes and other agreements related to the Florida Transactions, the Bankruptcy Code, or any other applicable law. The Noteholder Claimants reserve the right to further amend, modify, or supplement this Objection at any time and to request the postponement and/or adjournment of any hearing to consider the assumption, assignment, or rejection of the RSA. Finally, the Noteholder Claimants also reserve all their rights as creditors in these bankruptcy cases, including in connection with any proof of claim the Noteholder Claimants file in these cases.

V. CONCLUSION

WHEREFORE, the Noteholder Claimants respectfully request that this Court enter an order (i) sustaining this Objection; (ii) denying the relief requested in the RSA Motion; and (iii) granting Noteholder Claimants such other and further relief as this Court deems just and appropriate under the circumstances.

Dated: November 5, 2021
Wilmington, Delaware

/s/ Paul N. Heath

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