IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
GULF COAST HEALTH CARE, LLC, *et al.*,[1]	Case No. 21-11336 (KBO)
Debtors.	Jointly Administered

OMNIBUS OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO THE DEBTORS' DIP FINANCING AND RSA MOTIONS

The Official Committee of Unsecured Creditors (the "Committee") of Gulf Coast Health Care, LLC and its affiliated debtors and debtors-in-possession (the "Debtors") files this omnibus objection to the *Motion of Debtors for Entry of Interim and Final Orders (I) Authorizing the Debtors to (A) Obtain Postpetition Financing and (B) Utilize Cash Collateral, (II) Granting Adequate Protection to Prepetition Secured Parties, (III) Modifying the Automatic Stay, (IV) Scheduling a Final Hearing, and (V) Granting Related Relief* (Docket No. 14) (the "DIP Motion") and *Motion of Debtors for Entry of Order Approving Assumption of Restructuring Support Agreement* (Docket No. 107) (the "RSA Motion")[2] and respectfully states as follows:

PRELIMINARY STATEMENT

1. The Debtors have orchestrated these cases to appease their landlord, Omega, and secure a release for conflicted insiders, all on the backs of unsecured creditors. Taken together,[3]

[1] There are 62 Debtors in these chapter 11 cases. A complete list of the Debtors and the last four digits of their federal tax identification numbers can be found on the website of the Debtors' claims and noticing agent at https://dm.epiq11.com/GulfCoastHealthCare. The Debtors' corporate headquarters and service address is 9511 Holsberry Lane, Suite B11, Pensacola, FL 32534.

[2] Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the DIP Motion, the RSA Motion, and Interim DIP Order (as defined below).

[3] The Debtors admit that the purpose of the DIP Facility is to "effectuate the broader restructuring transactions contemplated by the RSA." *See Declaration of M. Benjamin Jones in Support of Motion of Debtors for Entry of Interim and Final Orders (I) Authorizing the Debtors to (A) Obtain Postpetition Financing and (B) Utilize Cash Collateral, (II) Granting Adequate Protection to Prepetition Secured Parties, (III) Modifying the Automatic Stay, (IV)*

the proposed DIP Facility and RSA irreversibly commit the Debtors to a truncated process that advances the interests of the Debtors' insiders at the expense of unsecured creditors, who are projected to receive no recovery. The Debtors negotiated their insider-friendly DIP Facility and RSA before appointing an independent director and chief restructuring officer. The insider releases were agreed upon by the Debtors without any monetary consideration obtained for unsecured creditors and appear to have been negotiated without any investigation into the existence and value of claims against the insiders and other released parties that could be used to generate a distribution to unsecured creditors. The inability of unsecured creditors to obtain any meaningful recovery is baked into the proposed DIP Facility, which is complex,[4] incorporates the RSA, and insulates the insiders from claims related to the insiders' extensive and pervasive prepetition transactions. Those insider transactions include payments from the Debtors to the insiders of tens of millions of dollars each year. Moreover, these same insiders who are being released from any claims arising out of their prepetition conduct are set to receive more than $5.8 million from the Debtors in these cases, while unsecured creditors receive nothing.

2. To justify this insider-friendly DIP Facility and RSA, the Debtors use the typical argument that financing is necessary to protect the health and welfare of residents at the Debtors' facilities and that liquidity is tight, necessitating a quick process. There is no doubt that the health and welfare of residents should always be the top priority and that operations cannot suddenly cease. However, the reality of the situation is that the landlords cannot permit operations to cease,

---

Scheduling a Final Hearing, and (V) Granting Related Relief [Docket No. 15] (the "DIP Declaration") ¶ 16. Thus, approval of the DIP Facility cannot be de-coupled from those restructuring transactions. For that reason, and to help streamline its position for the Court, the Committee has combined its objections to each of the DIP Motion and RSA Motion into this one omnibus Objection.

[4] The Debtors note the "complexity of the financing structures." *See Declaration of M. Benjamin Jones in Support of Chapter 11 Petitions and First Day Pleadings* [Docket No. 16] (the "First Day Declaration") ¶ 61.

as the value of their respective real estate would significantly decline. In addition, securing insider releases – apparently a key objective of the Debtors – has ***nothing*** to do with the health and welfare of residents. The Debtors' insiders should not be permitted to use the residents' health and welfare to lock the Debtors into a series of transactions for their own benefit.

Insiders Are Obtaining Releases Without Adequate Investigation or Consideration

3. The DIP Facility and RSA contemplate transition of substantially all of the Debtors' operations by December 1, 2021. In exchange for agreeing to the transfers requested by Omega, the Debtors obtained releases for the individuals and entities that own and control the Debtors and their affiliated entities (collectively the "Equity Parties"). To ensure that the Equity Parties got their releases, the DIP Facility and RSA are structured, among other things, (a) to give insiders unwarranted control in these cases, (b) to jam the Committee and other creditors with a timeline that essentially provides only 30 days to analyze and investigate claims and liens, including the Debtors' complex financing structures and insider transactions, and (c) as the *fait accompli*, to obtain extraordinary relief for insiders ***before*** the Committee or other creditors even have a chance to challenge the proposed plan.

4. In exchange for barring unsecured creditors from prosecuting unencumbered claims against the insiders, the Debtors secured no recovery for the unsecured creditors. Instead, the Debtors have a "blank" in the "Unsecured Claims Cash Amount" in the Plan Term Sheet and the proposed plan, which is the unsecured creditors' only source of recovery under the plan. The Debtors also allocated only $262,500 in the DIP budget for payment of the Committee's professionals, an amount roughly ***22 times less*** than the $5.9 million allocated to pay the Debtors' professionals. The amount is completely insufficient to review, investigate, negotiate, and, if

needed, litigate the issues before the Court to allow the Committee to fulfill its statutory and fiduciary duties.

Insiders Are Using the DIP Facility and RSA to Control These Cases and Obtain Immediate Benefits

5. The Debtors likely will urge the Court to separate consideration of the insider releases from the Debtors' need for financing on the grounds that the releases can be addressed at plan confirmation. Unfortunately, the structure of the DIP Facility and RSA moots that argument. The insider releases are a "today issue" that are controlled by the DIP Facility and RSA for three main reasons: (1) the insiders retain too much control over the cases, including the Committee's ability to function without an adequate budget; (2) the timeline is compressed unnecessarily in violation of the Committee's due process rights; and (3) the insiders obtain rights to control and release causes of action against themselves.

6. **Control.** The DIP Facility contains numerous restrictions that favor New Ark and other insiders. Dense, complex, and overly broad provisions in the Interim DIP Order arguably block the Committee from conducting an effective investigation of the Equity Parties. Among other things, the Committee is precluded from using its full budget to investigate the wide array of potential claims against the Equity Parties and is forced to investigate and assert claims against the Equity Parties within the 60-day challenge period. It is inappropriate for debtor-in-possession financing to place any restrictions on the investigation of, or the ability to assert claims against, the Debtors' insiders. In addition, insider New Ark controls the budget for the Committee's professional fees; as noted above, the Debtors allocated a paltry amount for the Committee's professionals. Ultimately, the Debtors' insiders seek to use the DIP Facility to control these cases and restrict the Committee's ability to perform its statutory and fiduciary duties to preserve value for unsecured creditors.

7. **Timeline.** As the Debtors admit, the purpose of the DIP Facility is to "effectuate the broader restructuring transactions contemplated by the RSA."[5] The timeline for those transactions is so short and the restrictions on the Debtors are so tight that the DIP Facility, once approved, leaves the Debtors no alternative but to proceed with the plan contemplated by the RSA.

8. For example, the proposed milestones require disclosure statement approval by December 3, at which time the plan would be sent out for vote.[6] This leaves the Committee with a mere thirty days, including over the Thanksgiving holiday, to fulfill its duties to, among other things, investigate the insider transactions and other sources for creditor recoveries. This is compared to the 4-5 months that the Debtors and their insiders had to negotiate with various parties, analyze various options, and develop the proposed DIP Facility and RSA. Unlike the newly-appointed Committee with its recently engaged professionals, the Debtors and their insiders had the enormous benefit of designing their aggressive plan proposal with intimate institutional knowledge of the Debtors' finances, operations, capital structure, and insider transactions.

9. **Insider Causes of Action**. As if the insiders' retained control and the compressed timeline were not enough, the terms of the DIP Facility improperly insulate the Equity Parties ***before*** confirmation of a plan. The proposed DIP Facility grants DIP liens on the Debtors' unencumbered assets, including avoidance actions and other causes of action owned by the Debtors' estates against the Equity Parties. This not only grants to the DIP Lenders what is likely the only source of value for unsecured creditors, but also results in the effective release of causes of action against insiders. The Court need not look any further than paragraph 30(b)(1) of the

[5] *See* DIP Declaration ¶ 16.

[6] Given the tight (and possibly insufficient) liquidity, these cases likely could not support re-solicitation of an initially deficient plan.

interim DIP financing order, which contains a covenant by Omega, the DIP Agent, and the DIP Lenders not to sue "individually, derivatively, or with any person in any way, directly or indirectly," New Ark and all of its related parties (i.e., the Equity Parties) and to turnover to the Equity Parties the proceeds of any such claims.[7] Although the Debtors will argue, incorrectly, that the lenders are entitled to a DIP lien on avoidance and other causes of action in exchange for providing new money financing under the DIP Facility, that new money is being loaned solely to effectuate the operation transfers that benefit only Omega.

10. Moreover, the Debtors cannot use valuable unencumbered claims against insiders that are currently available to unsecured creditors to (a) appease Omega for following through on a process it designed and (b) insulate conflicted insiders from substantial claims. In short, granting DIP liens on the causes of actions is not about providing collateral to the DIP Lenders to secure the repayment of the DIP Facility but, instead, is a ploy to protect the Debtors' insiders.

11. Against the backdrop of the protections granted to the Equity Parties in the DIP Facility, it is perhaps not surprising that they left blank the "Unsecured Claims Cash Amount" in the Plan Term Sheet and plan. To the extent the DIP Facility, as currently proposed, is approved on a final basis, the Equity Parties will have what they need from these cases without filling in the blank for unsecured creditors' distribution with anything more than a nominal sum. Of course, if the proposed financing is denied, the Equity Parties would have to pay for the releases they are getting, as the Bankruptcy Code contemplates.

---

[7] *See Interim Order (I) Authorizing the Debtors to (A) Obtain Postpetition Financing and (B) Utilize Cash Collateral, (II) Granting Adequate Protection to Prepetition Secured Parties, (III) Modifying the Automatic Stay, (IV) Scheduling a Final Hearing, and (V) Granting Related Relief* [Docket No. 72] (the "Interim DIP Order") ¶ 30(b)(1).

The Committee Must Have the Right to Investigate the Myriad Insider Transactions

12. Based on the little information it has, the Committee is confident that a reasonable investigation of the Debtors' claims against insiders will result in viable funds and causes of action to be used for recovery for unsecured creditors. The facts set forth in the Debtors' first day declaration discloses a wide variety of insider transactions that could give rise to avoidance actions. For example:

- The Debtors pay Health Care Navigator LLC ("HCN") $1,380,000 per month under a "Consulting and Advisory Services Agreement,"[8] i.e., more than $16.5 million per year.
- The Debtors estimate payments to HMS Purchasing, LLC ("HMS") of $45,630 per month under a "Membership Agreement."[9]
- The Debtors are party to a "Therapy and Administrative Services Agreement" with Halcyon Rehabilitation, LLC ("Halcyon"),[10] but do not disclose the amount of the payments to Halcyon. However, Halcyon's asserted claim of $3.7 million indicates that these payments were significant. Moreover, as noted below, the DIP Facility contemplates approximately $3.6 million in budgeted postpetition payments to Halcyon.
- In November 2020, the Debtors closed a series of transactions (which the Debtors define collectively as the "Argent Transaction") involving 20 facilities that the Debtors leased from one of the Equity Parties – Argent Properties 2012, LLC – and its subsidiaries.[11] It appears the Argent Transaction allowed the Equity Parties to sell the underlying real estate. The Argent Transaction resulted in the lease of the four Blue Mountain facilities, for which the Debtors have stated they are not going to pay rent. Finally, although the Debtors state that they received approximately $13 million from the Argent Transaction, they do not disclose how those proceeds were distributed.

---

[8] *See* First Day Declaration ¶ 19.

[9] *Id.* ¶ 21.

[10] *Id.* ¶ 20.

[11] *Id.* ¶ 25.

- At or near the time of the Argent Transaction, New Ark acquired the Debtors' secured debt.[12] Less than one year later, New Ark put the Debtors in default.[13]
- In a footnote to the First Day Declaration, the Debtors disclose, without further description or explanation, that in the weeks leading up to the Debtors' chapter 11 filings Argent "provided an additional $3,250,000 in additional (sic) cash liquidity to the Debtors."[14]
- The "Operating Debtors" pay an annual management fee to Debtor Gulf Coast Health Care, LLC ("Gulf Coast") of 5% of the adjusted gross revenue of the Debtors' facilities.[15] But the Debtors have not disclosed the services provided by Gulf Coast or the amount of distributions to Gulf Coast and/or the other Equity Parties.[16]

13. The Committee should be provided sufficient time, resources, and access to information to conduct a thorough investigation of these and all other transactions involving the Equity Parties, Omega, and their related entities and individuals, without a predetermined outcome and extraordinarily truncated timeline that hamstrings such an investigation.

The Attempt to Legitimize the DIP Facility and RSA Fails

14. Recognizing the insider-nature of the proposed transactions, the insiders tried to shield the Debtors' agreements with the last-minute appointment of an "independent" manager, Scott Vogel, who also signed the Debtors' petitions. Mr. Vogel previously advised the Debtors as a consultant and was appointed only six days before the Petition Date. Despite the Debtors'

---

[12] *Id.* ¶ 31.

[13] *Id.* ¶ 34.

[14] *Id.* ¶ 61 n.19.

[15] *Id.* ¶ 17.

[16] Tellingly, the Debtors have requested that they have until November 30, 2021 to file their schedules and statements, which would list, among other things, certain insider payments. *See Motion of Debtors for Entry of Order (I) Extending Time to File Schedules of Assets and Liabilities and statements of Financial Affairs and (II) Granting Related Relief* [Docket No. 106]. This is one day before the date on which the Debtors propose to transition all of their operations to the operator of Omega's choosing, not to mention more than two weeks ***after*** the date (November 12, 2021) on which the Debtors seek final approval of the DIP Facility and the RSA. Thus, the Debtors ask for orders effectively releasing the Equity Parties well before they even disclose transfers made to these parties.

admission that the DIP Facility and RSA were complicated transactions that took 4 to 5 months of "extensive diligence and . . . consultation with their advisors and key stakeholders,"[17] the Debtors gave Mr. Vogel less than a week to review the deal before signing the operative agreements. Indeed, the First Day Declaration details the extensive discussions the Debtors had with Omega and New Ark – which apparently involved several proposals from the parties – throughout September 2021, which led to the DIP Facility and RSA. Because Mr. Vogel had not been appointed yet as the independent manager, he could not have been involved, as a fiduciary, in those negotiations. Thus, the only individuals acting in any type of fiduciary capacity on behalf of the Debtors during their key negotiations with Omega and the Equity Parties were conflicted.

Previous Bankruptcy Cases of Debtors Controlled by the Schwartzberg Family

15. This is not the first time that the Debtors' insiders have implemented a similar strategy to strip value from skilled nursing homes at the expense of unsecured creditors. Rather, this is the ***third*** time that certain of the Equity Parties—*i.e.*, the Schwartzberg family—used the bankruptcy process for their own benefit. As disclosed in the First Day Declaration, the Schwartzberg family "maintain[s] 50% of the indirect beneficial ownership of each of the Debtors."[18] The Committee understands that the Schwartzberg family also owns and controls New Ark and the "Affiliated Services Providers"—HCN, Halcyon, and HMS—which provide "services" to the Debtors in exchange for millions of dollars in annual payments.[19]

16. In 2014, fourteen entities owned by the Schwartzberg family, which operated or formerly operated skilled nursing and assisted care facilities, filed for chapter 11 protection in the

---

[17] First Day Declaration ¶ 62. The Debtors' CRO also testified in the First Day Declaration that, in relevant part, "[g]iven the complexity of the financing structures, numerous competing interests, and dwindling liquidity . . . these negotiations [with Omega and New Ark] proved lengthy, intense, delicate, and complex." *Id.* ¶ 61.

[18] *Id.* ¶ 27.

[19] *Id.* ¶¶ 9, 17-21.

Western District of Louisiana. *See New Louisiana Holdings, LLC et al.*, Case No. 14-50756 (Bankr. W.D. La.) (the "Louisiana Holdings Case"). As here, entities controlled by the Schwartzberg family, including HCN and Halcyon, provided services to the debtors and charged substantial amounts.

17. During the Louisiana Holdings Case, the unsecured creditors committee and the tort claimants committee raised numerous questions and allegations about the Schwartzberg family, including that (a) the DIP financing was an insider transaction with overreaching terms structured to benefit the Schwartzberg family; (b) the debtors made at least 35 prepetition transfers to insiders warranting investigation; and (c) the debtors made almost $1 million of postpetition transfers to Halcyon and another Schwartzberg entity, which warranted investigation. Ultimately, the Debtors confirmed a plan of liquidation in which the Schwartzberg family received broad releases from the debtors and their estates, while unsecured creditors got pennies on the dollar.

18. Again, in 2018, the operators of 42 skilled nursing facilities owned by the Schwartzberg family filed for chapter 11 protection in the Northern District of Texas. *See In re 4 West Holdings, Inc. et al.*, Case No. 18-30777 (HDH) (Bankr. N.D. Texas) (the "4 West Case"). As played out in the Louisiana Holdings Case and as is unfolding here, HCN, Halcyon, and HMS provided services to the debtors for substantial (and potentially avoidable) payments and Omega owned the underlying real estate.

19. During the 4 West Case, the unsecured creditors committee raised allegations that the Schwartzberg family and Omega acquired the debtors in a pre-bankruptcy leveraged buyout in which (a) Omega received title to the facilities and liens on related assets and then "leased" the facilities to the Schwartzberg family through disguised financings; (b) the Schwartzberg family received all stock in the debtors without putting in any capital; (c) Schwartzberg entities, including

HCN, Halcyon, and HMS, were retained to provide services to the debtors in exchange for millions of dollars in payments; and (d) the debtors were left with insufficient capital, including $0 in stockholders' equity, all but ensuring an eventual bankruptcy filing that left unsecured creditors holding the bag.

20. In the end, the debtors (a) sold a portion of their facilities to a buyer whose ownership/investment group included a member of the Schwartzberg family; (b) transferred another portion of their facilities to operators designated by Omega; and (c) confirmed a plan of liquidation in which unsecured creditors again received a *de minimis* recovery while the Schwartzberg family and their affiliated entities received broad releases, including third party releases.

21. As these prior cases illustrate, the Schwartzberg family is well-versed in using the chapter 11 process to benefit themselves at the expense of unsecured creditors.

It Is Not Clear that the DIP Facility Is Sufficient to Fund These Cases

22. Although the Committee has only begun analyzing the Debtors' operational budget, questions have arisen as to whether it provides sufficient liquidity to fund operations, pay administrative claims, including 503(b)(9) claims, and fund winddown costs. For example, the Committee understands that the Debtors do not yet have a handle on the likely scope of 503(b)(9) claims. Yet, and perhaps not surprisingly, the DIP budget includes more than $5.8 million of payments to insiders Halcyon, HCN, and HMS.[20] Until the Debtors can establish that the DIP Facility is sufficient to fund these cases, section 506(c) surcharge rights, section 552(b) equities of

[20] The Committee reserves all rights with respect to the propriety of any payments to the Debtors' insiders, including Halcyon, HCN, and HMS.

the case exception, and marshalling rights should not be waived, particularly in the light of significant proposed payments to insiders.

23. While the issues addressed above alone warrant the Court's rejection of the DIP Facility and RSA, they are not the only problems. As addressed in more detail above and below, the DIP Facility and RSA contain the following additional problems:

DIP Facility

- Compressed Milestones: The DIP Milestones force a short case timeline that constrains the Committee. If approved, the milestones predetermine the outcome of the cases, solely to insulate the Equity Parties from claims and advance Omega's goal of quickly transferring operations at its facilities, while prejudicing the Committee's ability investigate claims against the Equity Parties and evaluate alternatives to maximize value for unsecured creditors.

- Inadequate Challenge Budget and Period: The proposed DIP order would allow the Committee to use only $50,000 to investigate the prepetition liens and claims of Omega and New Ark, and the Committee would have only 60 days to lodge a challenge, each of which is woefully inadequate and constrains any meaningful investigation.

- Investigation and Challenge Provisions Improperly Shield the Equity Parties: The investigation and challenge provisions are improper because they bar the Committee from investigating certain prepetition conduct of the Equity Parties and appear to subject ***all*** claims against the Equity Parties to the 60-day Challenge Period. The Committee must have the ability to fully investigate all insider transactions for the benefit of unsecured creditors, without any scope or time limitations.

- Serious Risk of Administrative Solvency: The Equity Parties and Omega seek to reap all benefits from these cases without clearly ensuring that all administrative claims and wind-down costs will be paid in full and without clearly funding all the Debtors' operating needs.

- No Waivers to Ensure Administrative Solvency: The Debtors' section 506(c) surcharge rights, section 552(b) equities of the case exception, and marshalling rights should not be waived without assurance that all administrative claims will be paid in full. At this early stage of the cases, the requested waivers are inappropriate and harmful to the estates given the possibility of administrative insolvency.

- No Liens on Unencumbered Assets: The DIP Lender and New Ark should not receive liens on or superpriority claims against previously unencumbered assets,

including avoidance actions (which are typically reserved for unsecured creditors), commercial tort claims, the unencumbered Blue Mountain receivables, and stimulus proceeds. Moreover, the granting of liens on and claims against avoidance actions and commercial tort claims improperly operates as a *de facto* release of claims against the Equity Parties.

- Insufficient Budget for Committee Professional Fees: The DIP budget includes only $262,500 for the Committee's professional fees, compared to $5.9 million for the Debtors' professionals. This is wholly inadequate and impairs the Committee's ability to fulfill its statutory and fiduciary duties.

- Other DIP Objections: Because the Debtors are conflicted and the timeframe of this case is very short, the Committee should have automatic standing to assert challenges, the Debtors' indemnification obligation should not extend to third parties, the Committee should receive copies of all notices and reports, and the Committee should have notice and consultation rights for all amendments to the DIP Loan Documents.

RSA Motion

- The RSA is One-Sided: The RSA commits the Debtors to an outcome that benefits the Equity Parties and Omega. Yet the Unsecured Claims Cash Amount is blank, which means the Equity Parties have committed to nothing.

- The RSA is a *Sub Rosa* Plan: The RSA is more than a "building block" for these cases. Instead, it is a carefully crafted device that predetermines the outcome of the cases, solely to advance Omega's goal of quickly transferring operations at its facilities and to insulate the Equity Parties—all to the detriment of the unsecured creditors.

- The Debtors Cede Control Over the Restructuring to Omega and Insiders: The RSA will allow the Equity Parties and Omega to dictate and control the Chapter 11 process by strong-arming the Debtors into accepting what is in their own best interest and preventing the Debtors from actively soliciting or creating alternative plans or other material terms or conditions. And although there is a "fiduciary out," it is illusory.

- The Plan is Unconfirmable: In addition to the improper releases, the plan contains other problems that make it unconfirmable. Among other things, the plan, (a) allocates all value, other than a currently blank cash amount, to Omega without any mechanism to share that value with other creditors, (b) sets the amount of the claims of Omega and the insider service providers, and (c) gerrymanders voting by separately classifying the claims of Omega and the service providers and coercing the vote of other unsecured creditors with a deathtrap provision.

- Other RSA Objections: Like the DIP Milestones, the RSA milestones are too tight and constrain the Committee. Additionally, the Committee should have notice and consultation rights for all RSA amendments. Finally, the Court should not make a finding that the insider RSA was negotiated in good faith.

24. The Committee does not dispute the Debtors' need for postpetition financing. However, the Committee cannot support a proposed DIP financing and RSA that, when taken together, predetermine the outcome of these cases for the sole benefit of the Equity Parties and Omega. Accordingly, the Court should deny the motions.

BACKGROUND

I. The Debtors' Chapter 11 Cases

25. On October 14, 2021 (the "Petition Date"), the Debtors filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code in this Case. Pursuant to sections 1107 and 1108 of the Bankruptcy Code, the Debtors continue to operate their businesses as debtors-in-possession. No trustee or examiner has been appointed in these cases.

26. The Debtors filed the DIP Motion on the Petition Date, seeking interim and final orders (i) authorizing the Debtors to obtain postpetition financing, (ii) authorizing the Debtors to use cash collateral, (iii) granting liens and providing superpriority administrative expense claims, and (iv) granting adequate protection to the Debtors' Prepetition Secured Lenders, among other relief.

27. The Debtors filed the RSA Motion on October 22, 2021, seeking authority to assume the RSA.

28. On October 25, 2021, the United States Trustee for Region 3 appointed the Committee, which consists of the following five members: (i) Omnicare, Inc.; (ii) Medline Industries LP; (iii) Gordon Food Service; (iv) Elite Medical Staffing; and (v) Vista Clinical Diagnostics, LLC. *See Notice of Appointment of Creditors Committee* (Docket No. 111).

29. On October 27, 2021, the Committee selected Greenberg Traurig, LLP as proposed counsel. On October 28, 2021, the Committee selected FTI Consulting as its proposed financial advisor.

II. **Summary of DIP Motion**

30. Pursuant to the DIP Motion, the Debtors seek approval of a $25 million postpetition secured facility provided by affiliates of Omega. The Debtors lease 24 of their 28 facilities from certain indirect affiliates and subsidiaries of Omega, and the lease obligations are purportedly secured by second priority liens on cash and accounts receivable attributable to the 24 Omega facilities.[21]

31. $15.75 million of the DIP Facility is already available to the Debtors under the Court's Interim DIP Order (as defined below), with the remaining to be available following entry of a final DIP order. The Debtors are permitted to use proceeds of the DIP Facility for various operational expenses in accordance with an approved DIP Budget. As security, the DIP Lenders would receive, among other things, (i) a first-priority lien on all unencumbered assets of the Debtors (including avoidance action proceeds, commercial tort claims, federal stimulus money, and receivables from the two unencumbered Blue Mountain facilities); (ii) a second-priority lien on all assets subject to the liens purportedly securing the Debtors' prepetition obligations to the Prepetition Working Capital Secured Parties, and (iii) adequate protections liens and superpriority administrative claims.

[21] The Interim DIP Order provides that the Omega Landlords are owed $237,711,978 in principal amount of unpaid Rent as of the Petition Date. *See* Interim DIP Order ¶ E(ii). The Committee reserves all rights to review and challenge Omega's asserted claims and liens, and seek recharacterization of its lease(s).

32. In connection with the DIP Facility, insider New Ark, agent for the Prepetition Working Capital Secured Parties, would also allow the Debtors to continue to use cash collateral.[22] The cash collateral proceeds would be used to provide the Debtors (a) up to $7 million in funding for an operational advance, which the Debtors call the "New Ark Operating Advance", and (b) funding for amounts set forth in a cash collateral budget, including all professional fees in these cases, which the Debtors call the "New Ark Funding." All amounts advanced would be secured by liens on the DIP Collateral and superpriority administrative claims, in each case junior to the liens and claims under the DIP Facility. New Ark would also receive adequate protection in the form of, among other things, liens and payment of its postpetition professional fees. Critically, on or before December 1, 2021, the Debtors must use proceeds from the DIP Facility to repay in full the New Ark Operating Advance.

33. The DIP Facility and New Ark Financing are contingent upon compliance with numerous expedited milestones and deadlines, including the following:

DATE	DEADLINE
November 18, 2021	The Bankruptcy Court shall have entered an order authorizing the assumption of the RSA.
December 1, 2021	The Bankruptcy Court shall have entered an order approving MOTAs for the Omega facilities.
December 3, 2021	The Debtors shall repay in full the New Ark Operating Advance using proceeds from the DIP Facility.
December 3, 2021	The Bankruptcy Court shall have entered an order approving the Disclosure Statement.

[22] The Interim DIP Order provides that the Prepetition Working Capital Secured Parties are owed $14,343,316.85 in principal amount of loans outstanding as of the Petition Date. *See* Interim DIP Order ¶ E(i). The Committee reserves all rights to review and challenge the Prepetition Working Capital Secured Parties' asserted claims and liens.

December 24, 2021	The Challenge Period expires.
January 1, 2022	MOTAs shall have been consummated and gone into effect.
January 22, 2022	The Bankruptcy Court shall have entered an order confirming the Plan.
February 21, 2022	The effective date of the Plan shall have occurred.

34. On October 18, 2021, the Court entered the Interim DIP Order and set a final hearing for November 12, 2021, which has been rescheduled for November 23, 2021.

III. Summary of RSA Motion

35. Pursuant to the RSA Motion, the Debtors seek approval of the assumption of the RSA, which the Debtors, Omega, New Ark, the Equity Sponsors, and the Service Providers executed on October 14, 2021. Among other things, the RSA would obligate the Debtors to support and pursue a predetermined restructuring transaction on a predetermined and expedited timeline.

OBJECTION TO DIP MOTION

I. The DIP Financing Is an Insider Transaction that Cannot Survive Heightened Scrutiny.

36. Transactions between a debtor and its insiders are subject to heightened scrutiny. *See, e.g.*, *Pepper v. Litton*, 308 U.S. 295, 306 (1939) (controlling shareholder's "dealings with the corporation are subjected to rigorous scrutiny"); *Schubert v. Lucent Techs Inc. (In re Winstar Commc'ns, Inc.)*, 554 F.3d 382, 412 (3d Cir. 2009) ("A claim arising from the dealings between a debtor and an insider is to be rigorously scrutinized by the courts."). In such circumstance, the court does not simply give deference to the debtor's purported business judgment. Instead, the debtor and insider "bear[] the burden of showing the 'entire fairness' of the transaction at issue." *In re LATAM Airlines Grp. S.A.*, 620 B.R. 722, 769 (Bankr. S.D.N.Y. 2020). Entire fairness

"requires proof of fair dealing and fair price and terms." *In re L.A. Dodgers LLC*, 457 B.R. 308, 313 (Bankr. D. Del. 2011).

37. Here, the DIP financing is an insider transaction subject to heightened scrutiny. New Ark, an insider entity owned and controlled by the Equity Parties, is a party. Moreover, the financing has been negotiated and structured for the Equity Parties' primary benefit—to shield their prepetition dealings with the Debtors through releases and various other terms that constrain the Committee's ability to conduct a meaningful investigation. Accordingly, the Debtors must establish that the DIP Facility is entirely fair, which they have not and cannot do for all the reasons set forth in the Preliminary Statement and below.

38. The Debtors have attempted to insulate their decision-making process and lower the level of scrutiny through the appointments of an independent manager and chief restructuring officer. But this is unavailing. The "independent" manager previously advised the Debtors as a consultant, and he was appointed as manager ***less than one week*** before the cases were filed. First Day Declaration ¶ 29. The chief restructuring officer was appointed ***one day*** before the cases were filed. *Id.* ¶ 3. By contrast, the Debtors' First Day Declaration describes the DIP financing and RSA as the product of "***months*** of extensive" "lengthy, intense, delicate, and complex" negotiations. *See id.* ¶¶ 61, 62 (emphasis added). Given this timing, neither the "independent" manager nor the chief restructuring officer could have been involved, in their respective capacities as manager and officer, in the Debtors' self-described extensive, lengthy, intense, delicate, and complex negotiations spanning multiple months. Last-minute appointments after the negotiations are complete do not cleanse the self-interested involvement of the Equity Parties on all sides of the transactions.

39. Accordingly, the Court should deny the DIP Motion as not entirely fair. Alternatively, and at a minimum, the Court should allow reasonable time to investigate so that it may closely scrutinize the transaction without giving deference to the Debtors' purported business judgment—particularly with respect to the terms favoring the Equity Parties.

II. Even If Heightened Scrutiny Does Not Apply, the DIP Financing Cannot Be Approved Without Substantial Modifications.

40. Even if the entire fairness standard does not apply, the DIP Facility cannot withstand regular scrutiny and should be denied.

41. A court should approve a proposed DIP financing only if it "is in the best interest of creditors generally." *In re Roblin Indus., Inc.*, 52 B.R. 241, 244 (Bankr. W.D.N.Y. 1985) (citing *In re Texlon Corp.*, 596 F.2d 1092, 1098-99 (2d Cir. 1979)). The debtor bears the burden to prove that the proposed financing is fair and reasonable and inures to the benefit of the estate and its creditors. *See In re Aqua Assocs.*, 123 B.R. 192, 196 (Bankr. E.D. Pa. 1991); *In re Ames Dep't Stores, Inc.*, 115 B.R. 34, 37-40 (Bankr. S.D.N.Y. 1990); *In re Crouse Grp., Inc.*, 71 B.R. 544, 549 (Bankr. E.D. Pa. 1987). Courts routinely recognize that the terms of a proposed financing cannot be so favorable to the lender and insiders as to cause Bankruptcy Code protections to serve only those parties, contrary to the intent of Congress. *See, e.g.*, *In re Mid-State Raceway, Inc.*, 323 B.R. 40, 59 (Bankr. N.D.N.Y. 2005) ("[B]ankruptcy courts do not allow terms in financing arrangements that convert the bankruptcy process from one designed to benefit all creditors to one designed for the unwarranted benefit of the postpetition lender" (quoting *In re Defender Drug Stores, Inc.*, 145 B.R. 312, 317 (B.A.P. 9th Cir. 1992))); *In re Tenney Vill. Co., Inc.*, 104 B.R. 562, 568 (Bankr. D. N.H. 1989) (characterizing proposed financing facility as one that would "pervert the reorganizational process from one designed to accommodate all classes of creditors and equity

interests to one specially crafted for the benefit of the Bank and the Debtor's principals who guaranteed its debt").

42. Here, the Debtors cannot meet their burden of proof. Rather than being fair, reasonable, and beneficial for the Debtors' estates and creditors generally, the DIP Facility predetermines the outcome of these cases for the sole benefit of Omega and the Equity Parties. Accordingly, the DIP Motion should be denied. If the Court is inclined to grant the motion—and the Committee does not dispute the Debtors' need for postpetition financing—then the following modifications must be made.

A. The Expedited DIP Milestones Only Benefit the Equity Parties and Constrain the Committee.

43. The DIP Milestones force a short case timeline that fails to maximize value for the estates and *all* parties-in-interest. Instead, the expedited Milestones serve the purposes of allowing the Equity Parties to receive full releases before the Committee can investigate their value and protects Omega's investment in its 24 facilities without bringing any value to unsecured creditors.

44. Omega seeks an accelerated process so that it may quickly transfer operations at its facilities to its chosen operator, halt its cash burn and effect a sale of the underlying real estate. Rather than evaluate whether this schedule is in the best interests of the Debtors' estates, the Equity Parties capitalized on Omega's desire for speed to extract releases for themselves without getting any recovery for unsecured creditors. The Milestones prejudice unsecured creditors in myriad ways. Most significantly, they lock the Debtors into a process that predetermines the case outcomes for the benefit of the Equity Parties and Omega (a) before the Committee has a meaningful opportunity to investigate claims against the Equity Parties, (b) without disclosing the proposed cash pool for unsecured creditors to be provided the Equity Parties in exchange for the

releases, and (c) before the Committee has a meaningful opportunity to explore other value maximizing options.

45. The Milestones imposed on the Debtors must provide for a fair and efficient resolution of the Debtors' bankruptcies that is fair and reasonable for ***all*** parties—not just the Equity Parties and Omega. *See, e.g.*, *In re Ames*, 115 B.R. at 39 ("[A] proposed financing will not be approved where it is apparent that the purpose of the financing is to benefit a creditor rather than the estate.").

B. The Challenge Period and Budget Are Inadequate.

46. The budget restricts the Committee to only $50,000 in professional fees on its investigation into the prepetition and adequate protection liens and claims against New Ark, as well as Omega's leases. In addition, the Committee must complete the investigation within the 60-day Challenge Period. These limitations are woefully inadequate. By imposing an arbitrarily low cap and expedited deadline, the Debtors seek to impermissibly shield New Ark and other insiders from potential claims at the expense of the Committee's ability to carry out its statutory and fiduciary duties to represent the interests of the entire unsecured creditor constituency. The integrity of the bankruptcy process requires that the Committee's professionals be afforded a meaningful opportunity to advocate on behalf of all unsecured creditors without being subject to the control of third parties—including potential litigation targets—whose interests may be adverse to the Debtors' estates.

47. Increasing funding and timing will allow the Committee to (a) complete its investigation, (b) assert meaningful challenges, if appropriate, and (c) ensure that the interests of insiders like New Ark are not impermissibly protected and favored at the expense of the fair and equitable treatment of all creditors.

C. The Investigation and Challenge Provisions Impermissibly Shield the Equity Parties

48. The investigation and challenge provisions are improper because they arguably bar the Committee from investigating the prepetition conduct of the Equity Parties and bringing claims against the Equity Parties within the 60-day Challenge Period.

49. Under paragraph 22 of the Interim DIP Order, no "DIP Collateral, Prepetition Collateral, DIP Loans, Cash Collateral, proceeds of any of the foregoing, any portion of the Carve-Out, or any other cash or funds" may be used to investigate or assert a wide range of claims against the "Subject Parties," which is a sweepingly broad defined term that covers all Equity Parties. Indeed, "Subject Parties" includes New Ark and all of its "affiliates," "parents," "partners," "controlling persons," "officers," "directors," "members," "managers," and "shareholders"—*i.e.*, the full universe of Equity Parties. The Committee does not dispute the general principal that there may be reasonable limitations on the use of postpetition financing to investigate, for example, the prepetition liens of and claims against the specific postpetition lenders. However, there is no basis to extend these limitations for the benefit of all the Equity Parties—who have not provided any consideration for that limitation in connection with the DIP Facility.

50. The Interim DIP Order also appears to subject claims against the Equity Parties to the Challenge Period, another inappropriate limitation. As just one example, the Stipulation in paragraph E(v) of the Interim DIP Order—which becomes binding unless challenged within the 60-day period[23]—provides as follows:

> ***The Debtors and their estates have no valid Claims*** (as such term is defined in section 101(5) of the Bankruptcy Code), objections, challenges, causes of action, and/or choses in action or basis for any equitable relief ***against any of the Prepetition Secured Parties*** or DIP Lenders ***or any of their respective*** predecessors, ***affiliates***, agents, attorneys, advisors, professionals, ***officers***,

[23] *See* Interim DIP Order ¶ 23(a).

> ***directors***, and employees ***with respect to*** the Prepetition Loan Documents, the Omega Master Lease Documents, the Prepetition Secured Obligations, the Prepetition Liens, DIP Loan Documents, ***or otherwise*** . . . .

Interim DIP Order ¶ E(v) (emphasis added). The Equity Parties have not provided any consideration for this Stipulation, and the phrase "or otherwise" arguably sweeps in all claims against the Equity Parties. This is yet another "back door" provision to protect conflicted insiders.

51. The Committee has identified numerous prepetition insider transactions between the Debtors and the Equity Parties warranting investigation into potential sources of substantial recovery for the estates, including those listed above in the Preliminary Statement. Given the extensive insider transactions between the Debtors and the Equity Parties, as well as the control the Equity Parties exert over the Debtors, the Committee must have the ability to fully investigate these transactions and any other that come to light. Accordingly, there should be no limitation on the Committee's use of its allocated budget and no time restriction on the Committee's ability to investigate and assert claims against the Equity Parties.

D. It Is Unclear Whether the DIP Facility Actually Funds the Debtors' Operations and Winddown and Provides a Path for Administrative Solvency.

52. The Equity Parties and Omega seek to reap all benefits from these cases without clearly ensuring that all administrative claims and wind-down costs will be paid in full and without clearly funding all the Debtors' operating expenses.

53. At the same time, the Debtors' budget includes ***more than $5.8 million*** in payments to insiders Halcyon, HCN, and HMS. The DIP financing also only funds the Debtors' operations through December 1, which is the date Omega intends for its new operator to be in place. This plan works for the 24 Omega facilities, because the new operator will cover all operating costs. But there is no contingency for the four Blue Mountain facilities. Indeed, with Omega having already achieved a transition of its facilities, and the Equity Parties having already locked in

releases and other self-serving terms, neither will have any incentive to fund operations at the Blue Mountain facilities after December 1. Even more troubling is that the DIP Facility prohibits the Debtors from obtaining financing to fill the gap. Under the DIP Term Sheet, the Debtors may not incur any "Indebtedness" or liens except for "Permitted Indebtedness" and "Permitted Liens"—which do not include carve outs for the Blue Mountain facilities.[24] The Interim DIP Order further provides that "all of the cash proceeds" of any subsequent financing must be immediately turned over to the DIP Agent until the DIP Facility Obligations are paid in full and then turned over to the Prepetition Agent, unless such requirement is waived "by the requisite DIP Lenders in their sole discretion."[25]

54. The Equity Parties, in essence, have negotiated a transaction for the Debtors where they receive releases, entities they control will receive more than $5.8 million in payments, and Omega receives a swift transition of its facilities, but the Debtors are otherwise left with a serious risk of administrative insolvency. The DIP Facility should not be approved under these circumstances.

E. The Proposed Waivers of Sections 105, 506(c), 552(b), and Marshalling Rights Are Inappropriate.

55. The Debtors propose to waive several critical rights, including (i) the estates' right to surcharge Prepetition Collateral and DIP Collateral under section 506(c) of the Bankruptcy Code, (ii) the statutory right to apply the "equities of the case" exception under section 552(b) of the Bankruptcy Code, and (iii) the marshaling doctrine. These waivers are inappropriate and harmful to the estates given the potential that administrative claims will not be paid.

---

[24] *See* DIP Term Sheet, Annex C, F.

[25] *See* Interim DIP Order ¶ 13.

i. The Debtors' Section 105 and 506(c) Rights Must Be Preserved

56. Congress' intent in enacting section 506(c) was to ensure that the debtor-in-possession would be entitled to recover expenses from its secured lender to the extent that those expenses are necessary and reasonably associated with preserving or disposing of the lender's collateral. *Precision Steel Shearing, Inc. v. Fremont Fin. Corp. (In re Visual Industries, Inc).*, 57 F.3d 321, 325-26 (3d Cir. 1995) (discussing Congressional Record, 124 Cong.Rec. 32,398 (Sept. 28, 1978) (statement of Rep. Edwards)). Section 506(c) is thus designed to prevent "a windfall to the secured creditor at the expense of the claimant." *Id.* (citing *IRS v. Boatmen's First Nat'l Bank of Kansas City*, 5 F.3d 1157, 1159 (8th Cir. 1993)).

57. Here, there is no justification for a preemptive waiver of the Debtors' surcharge rights under sections 105 or 506(c) given legitimate concerns regarding administrative solvency, as discussed above. If such rights are not retained, the estates may be without recourse to recoup the necessary expenses incurred to enhance and improve the returns for Omega and New Ark. Instead, such expenses would be borne by unsecured creditors alone—even if unsecured creditors receive little or no value in the end. Accordingly, the estates' right to surcharge collateral under sections 105 or 506(c) should be decided on a case-by-case basis and should not be waived in a blanket fashion at the inception of these cases.

ii. Waiver of the Section 552(b) Equities of the Case Exception Is Inappropriate

58. Section 552(b) of the Bankruptcy Code allows a court to refuse, based on the equities of a case, to extend a prepetition lien to postpetition "proceeds, products, offspring or profits" of prepetition collateral. 11 U.S.C. § 552(b)(1). "The purpose of the equity exception is to prevent a secured creditor from reaping benefits from collateral that has appreciated in value as a result of the trustees/debtor-in-possessions use of other assets of the estate (which normally

would go to general creditors) to cause the appreciated value." *In re Muma Servs.*, 322 B.R. 541, 558-59 (Bankr. D. Del. 2005) (citation omitted); *see also Nanuet Nat'l Bank v. Photo Promotion Assocs., Inc. (In re Photo Promotion Assocs., Inc.)*, 61 B.R. 936, 939 (Bankr. S.D.N.Y. 2000).

59. For the same reasons that a section 506(c) waiver is inappropriate, the Debtors should not be permitted to waive their rights under section 552(b) given the uncertainty that all administrative claims will be paid. Granting a section 552(b) waiver at the outset of these proceedings would unfairly prejudice unsecured creditors and deprive the estates of important statutory rights that could yield value for all stakeholders.

iii. The Estate's Marshalling Rights Should Not Be Waived

60. Marshalling requires a "senior secured creditor to first collect its debt against the collateral other than that in which the junior secured creditor holds an interest, thereby leaving that collateral for the junior secured creditor's benefit." *Simon & Schuster, Inc. v. Advanced Mktg. Servs., Inc. (In re Advanced Marketing Servs., Inc.)*, 360 B.R. 421, 427 n.8 (Bankr. D. Del. 2007). Marshaling "prevent[s] the arbitrary action of a senior lienor from destroying the rights of a junior lienor or a creditor having less security." *Meyer v. United States*, 375 U.S. 233, 237 (1963). Marshaling can be pursued by the Committee for the benefit of unsecured creditors. *See, e.g., Official Comm. of Unsecured Creditors of America's Hobby Ctr., Inc. v. Hudson United Bank (In re America's Hobby Ctr., Inc.)*, 223 B.R. 275, 287 (Bankr. S.D.N.Y. 1998) ("Because a debtor in possession has all the rights and powers of a trustee . . . [the Committee] standing in the shoes of the debtor in possession . . . can assert this [marshaling] claim.").

61. The existence of legitimate questions regarding administrative solvency and the prospect that unsecured creditors will receive no meaningful recovery are sound bases for the Court to reject any limit on the marshalling doctrine. At a minimum, the Court should require the DIP

Lenders and New Ark to satisfy their liens and claims, if any, from the proceeds of assets subject to prepetition liens before they can look to the proceeds of assets upon which they did not possess a security interest as of the Petition Date.

F. The DIP Collateral Should Not Include Liens on Previously Unencumbered Assets, Nor Should Superpriority Claims Be Paid from Any Proceeds Thereof

62. The Committee objects to the granting of any DIP liens on, and payment of superpriority claims from, previously unencumbered assets of the Debtors and their estates, and the products or proceeds thereof, including, without limitation, proceeds of avoidance actions, commercial tort claims, cash and receivables from the two unencumbered Blue Mountain facilities, and stimulus funds. All unencumbered assets and their products and proceeds should remain unencumbered and available to fund distributions to general unsecured creditors.

63. Avoidance actions, in particular, are distinct creatures of bankruptcy law designed to benefit and ensure equality of distribution among general unsecured creditors. *See Official Comm. Of Unsecured Creditors of Cybergenics Corp. v. Chinery (In re Cybergenics Corp.)*, 226 F.3d 237, 244 (3d Cir. 2000), *rev'd en banc*, 330 F.3d 548 (3d Cir. 2003) (identifying underlying intent of avoidance powers to recover valuable assets for the estate's benefit); *In re Tribune Co.*, 464 B.R. 126, 171 (Bankr. D. Del. 2011) (noting "that case law permits all unsecured creditors to benefit from avoidance action recoveries."); *see also Buncher Co. v. Official Comm. of Unsecured Creditors of GenFarm L.P. IV*, 229 F.3d 245, 250 (3d Cir. 2000) (stating that "any recovery [under avoidance powers] is for the benefit of all unsecured creditors, including those who individually had no right to avoid the transfer"). The Debtors have not provided any justification for encumbering avoidance actions proceeds. In a case being run for the sole benefit of the secured lenders and equity, it would add insult to injury if unsecured creditors receive little or no recovery *and* are the subject of avoidance actions.

64. The granting of liens on and superpriority claims against avoidance actions and commercial tort claims also operates as a *de facto* release of claims against the Equity Parties, as described above, which is entirely improper. *See supra* ¶ 7. By taking liens on avoidance actions and commercial tort claims but also granting full releases to each other with a turnover requirement, the Equity Parties, with cooperation from the DIP Lenders, have all but ensured that avoidance actions and commercial tort claims belonging to the estates will never be asserted against the Equity Parties. This type of *de facto* release—which solely benefits equity—should not be an element of DIP financing. The mutual releases also reveal that neither Omega nor New Ark actually view the avoidance actions and commercial tort claims as security for repayment of the DIP financing. The Equity Parties and the DIP Lenders are free to release one another. But they cannot use liens and mutual releases to effectively release claims of the estates and wall off potential sources of value for unsecured creditors, particularly at this early stage of the cases.

G. The Budget for the Committee's Professional Fees Is Inadequate and Curtails the Committee's Ability to Fulfill its Statutory and Fiduciary Duties

65. The DIP budget includes only $262,500 for the Committee's professional fees, compared to $5.9 million for the Debtors' professionals. This is wholly inadequate. The amount budgeted for the Committee's professionals must be proportionate to the amount budgeted for the Debtors' professionals to ensure the Committee is adequately equipped to fulfill its fiduciary role. *See In re Channel Master Holdings, Inc.*, 2004 Bankr. LEXIS 576, at *8–9 (Bankr. D. Del. Apr. 26, 2004) (holding cap on official committee's professional fees under DIP facility was unreasonable relative to larger budgets for other professionals in case and determining cap on the committee's fees provided for inadequate compensation). The enormous disparity in compensation between the Committee's professionals and the Debtors' professionals contemplated in the proposed professional fees budget would not only limit the Committee's ability to fulfill its statutory and

fiduciary duties, but also materially impair the Debtors' unsecured creditors in their ability to protect and exercise their rights in these cases.

H. Other Issues with DIP Financing

66. The following issues should also be addressed:

- Automatic Standing to Assert Challenge: The Final Order should contain language granting the Committee automatic standing to commence a Challenge, including against any Equity Party. First, the Debtors are conflicted. Second, standing is necessary to fulfill the Committee's statutory and fiduciary duties to general unsecured creditors because a Challenge may result in recoveries for general unsecured creditors. Finally, the time and cost required to brief and argue a standing motion is significant, and conferring automatic standing will conserve estate resources, remove unnecessary obstacles, and promote a full investigation of potential claims – especially in light of the expedited deadlines sought in these cases.

- Indemnification Should Not Extend to Third Parties: Pursuant to paragraph 19 of the Interim Order, the DIP Loan Parties are required to indemnify the DIP Agent, each DIP Secured Party, and New Ark and each of their respective directors, officers, employees, agents, attorneys, accountants, advisors, controlling persons, equity holders, partners, members, and other representatives and each of their respective successors and permitted assigns. The scope of the proposed indemnification is overly broad and would improperly extend to numerous, unidentified third parties, including Equity Parties. The Debtors' estates may have colorable claims and causes of action against one or more of those third parties that could yield recoveries for creditors and, therefore, any right of indemnification should not extend to them at this early stage of the case when the Committee has yet to complete, let alone begin, its investigation of estate claims and causes of action. Accordingly, the final DIP order should strike any indemnification obligations that would extend to third parties.

- Reporting Requirements: All notices and reports provided for in the DIP Loan Documents, including, but not limited to, any financial updates and analyses required to be provided by, or to, the Debtors, the DIP Lender, or New Ark should be contemporaneously provided to the Committee.

- Consultation Rights for Amendments: The Committee objects to any amendment, modification, or supplementation of the DIP Loan Documents without advance notice to and consultation with the Committee. As currently set forth in the Interim DIP Order, the Debtors may make amendments, modifications or supplementations to the DIP Loan Documents (with consent of the applicable DIP Lenders) without further order of the Court or having to provide notice to other parties, including the Committee, so long as they are "in accordance with the DIP [Loan] Documents" and "not adverse or prejudicial." *See* Interim DIP Order ¶ 37. The Committee

should have notice and consultation rights for all proposed amendments, modifications, or supplementations to ensure compliance with this provision.

OBJECTION TO RSA MOTION

67. The Debtors' decision to assume the RSA is subject to heightened scrutiny for the same reasons discussed above with respect to the DIP Facility. But regardless of the applicable standard, assumption of the RSA is not a sound decision. It (1) is one-sided, (2) constitutes a *sub rosa* plan, (3) cedes too much control to Omega and the insiders, and (4) contains numerous other problematic provisions. As a result, the Court should deny the RSA Motion.

I. The RSA is One-Sided

68. Prior to assumption or rejection, debtors can enforce executory contracts but counterparties cannot. *In re Univ. Med. Ctr.*, 973 F.2d 1065, 1075 (3d Cir. 1992) ("[T]he terms of an executory contract are temporarily unenforceable against the debtor" (citing *NLRB v. Bildisco & Bildisco,* 465 U.S. 513, 532, 104 S. Ct. 1188, 1199, 79 L. Ed. 2d 482 (1984)). It is unclear, then, why the Debtors seek to assume the RSA, other than to satisfy an unnecessary DIP financing condition created Omega and the insiders. Being compelled to accept a one-sided agreement is not the same as exercising sound judgment.

69. Indeed, the RSA commits the Debtors to transactions that include releases for, among others, the Debtors' insiders despite the fact that the insiders left blank the Unsecured Claims Cash Amount. In other words, the Debtors seek to bind themselves to a contract that predetermines the outcome of these cases (and seek findings that prepetition negotiations related to that contract were done in good faith) even though certain counterparties (who are insiders) have not committed to one of the contract's material terms.

II. The RSA is a *Sub Rosa* Plan

70. Although the Debtors may enter into an agreement that is a "necessary step toward, or building block of, a plan of reorganization," the Debtors may not circumvent the requirements of section 1129 of the Bankruptcy Code by entering into an agreement 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) (citing *In re Capmark Fin. Grp. Inc.*, 438 B.R. 471, 513 (Bankr. D. Del. 2010)). An agreement that dictates the terms of a reorganization plan is an impermissible *sub rosa* plan. *Id.* The prohibition on *sub rosa* plans is designed to stop a debtor from short-circuiting the protections of the Bankruptcy Code and requirements of chapter 11 for confirmation of a reorganization plan. *SCH Corp. v. CFI Class Action Claimants*, 597 F. App'x 143, 149 (3d Cir. 2015); *In re Energy Future Holdings Corp.*, 648 F. App'x 277, 13 (3d Cir. 2016). Moreover, the prohibition prevents "one class of creditors [from] strong-arm[ing] the debtor-in-possession, and bypass[ing] 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).

71. Here, the RSA is more than a building block; it is effectively a plan of liquidation. It predetermines the outcome of the cases, solely to insulate the Equity Parties from claims through plan releases and to advance Omega's goal of quickly transferring operations at its facilities to its chosen operator—all to the detriment of the unsecured creditors. Omega and the Equity Parties have exploited their situational leverage to bypass confirmation requirements and dictate the terms of the plan. And because of the expedited milestones, the Committee and other parties-in-interest will have insufficient time or opportunity to fully evaluate the terms of the proposed restructuring, let alone explore and consider alternatives. The scheme memorialized in the RSA locks in a *fait*

accompli, assuring that in a matter of weeks, there will be no meaningful alternative. Under these circumstances, the Court should not approve the RSA's assumption.

III. The Debtors Impermissibly Cede Control Over Their Bankruptcy Cases to Omega and the Equity Parties

72. The RSA will also allow Omega and the Equity Parties to dictate and control the chapter 11 process by strong-arming the Debtors into accepting what is in their own best interests and preventing the Debtors from soliciting alternatives or seeking other material terms. For example, the RSA gives the following control to Omega and the Equity Parties:

a. The Debtors must obtain final approval of the DIP Facility within 35 days of the Petition Date. RSA § 6(a)(ii). As discussed above, the DIP Facility would lock in numerous plan-like provisions in favor of the Equity Parties, including *de facto* releases.

b. The Debtors must obtain confirmation of the "Plan" within 100 days of the Petition Date. RSA § 6(a)(vi), (viii), (ix). The "Plan," in turn, "must contain all substantive terms and conditions set forth on the Plan Term Sheet." RSA (definition of "Plan"). The "Plan Term Sheet," in turn, mandates full releases in favor of the Equity Parties. RSA, Ex. C.

c. The Debtors cannot seek additional funding without approval from Omega. RSA § 6(d).

d. Omega has sole and absolute discretion to designate the New Operator. *Id.* (definition of "New Operator").

e. The Debtors cannot hinder the transfer to the New Operator. RSA § 6(g).

f. The Debtors cannot seek or propose an Alternative Transaction. RSA ¶ 6(h).

g. The Debtors cannot sell any assets outside of ordinary course of business without approval from Omega. RSA § 6(q).

h. The Debtors cannot reduce New Ark DIP budget without approval from Omega. RSA § 6(u).

i. The Debtors cannot dispute Omega's master lease. RSA § 6(u).

73. Although Section 8 of the RSA contains a "fiduciary out," it is illusory at best. If the Debtors deviate in any way from the terms of the RSA—even to fulfill their fiduciary duties—

this would constitute a "New Ark Event of Default" under the DIP financing. The definition of "New Ark Event of Default" includes any action by the Debtors to "pursue, negotiate, solicit interest in, or agree to any sale or liquidation of the Debtors' assets or any restructuring, reorganization, refinancing, or other transaction other than on the terms provided for in the RSA." *See* DIP Term Sheet, Annex G. The occurrence of a New Ark Event of Default, in turn, would allow New Ark to terminate the New Ark Funding[26] and could allow the DIP Lenders to terminate the DIP Facility[27]—events that would throw these cases into a tailspin. Thus, while the Debtors retain a "fiduciary out," practically speaking, they will never use it.

IV. The Plan is Unconfirmable

74. The Committee has only just begun its analysis of the Debtors' proposed plan. But even without a complete investigation and analysis, it is clear that the plan contains provisions that render it patently unconfirmable.[28] The Debtors should not assume an RSA for a plan that cannot be confirmed.

75. In addition to the improper releases, the plan includes the following issues:

- All Value Allocated to Omega: Other than the currently illusory Unsecured Claims Cash Amount (which is blank), the plan allocates all value, after payment of administrative and priority claims, to Omega. This includes all avoidance actions and other causes of action, including causes of action against insiders, which are unencumbered assets. However, all value after payment of administrative and priority claims must be shared with all creditors.

---

[26] Under paragraph 17(b) of the Interim DIP Order, the occurrence and continuation of a New Ark Event of Default is a "New Ark Termination Event," which entitles New Ark to exercise the remedies outlined in paragraph 18(b) of the Interim DIP Order, including terminating use of cash collateral.

[27] The DIP Term Sheet defines "Event of Default" under the DIP Facility as "prior to entry of the MOTA Order, the occurrence of a New Ark Event of Default that results in any limitation, suspension or termination of funding under the New Ark Funding." The occurrence and continuation of such Event of Default, in turn, constitutes a "DIP Termination Event" under paragraph 17(a) of the Interim DIP Order, which entitles the DIP Lenders to exercise the remedies outlined in paragraph 18(a) of the Interim DIP Order, including terminating the DIP Facility.

[28] The issues raised by the Committee with respect to the proposed plan are illustrious in nature and in no way limit the right of the Committee to raise any and all objections to any proposed plan and/or disclosure statement.

- Allowed Amount of Omega and Insider Claims: The plan sets the allowed amount of the claims of Omega and the insider service providers. The Committee has not yet had a chance to investigate those alleged claims. It is improper, therefore, to set those claim amounts. The Debtors do not even attempt to establish a legitimate basis for doing so.

- Votes are Gerrymandered. The plan seeks to silence the votes of the general unsecured creditors. Not only does it give Omega and the insider service providers large allowed claims, but it separately classifies them, presumably so that it has an impaired accepting class if the general unsecured creditors vote to reject. Moreover, the plan contains a deathtrap provision meant to coerce the unsecured creditors to vote in favor of the plan.

V. Other RSA Issues

76. The RSA suffers from other issues. Like the DIP Facility, it mandates a lightening-speed timeline that constrains the Committee and attempts to pre-approve transactions designed to insulate insiders.

77. Additionally, the proposed order attached to the RSA Motion permits the Debtors to amend the RSA without further Court approval, so long as the Debtors determine, in their sole discretion, that the amendment "does not have a material adverse effect on the Debtors' estates." The Committee must have notice and consultation rights for all proposed amendments.

78. Finally, there is no basis for the Court to make findings that the RSA was negotiated in good faith, as requested in the proposed order approving the RSA Motion. *See* RSA Motion, Ex. A, ¶ 1. As set forth in detail in this Objection, the Committee has raised substantial doubts about the prepetition negotiations surrounding the DIP Facility and the RSA. It would be inappropriate at this stage for the Court to make a finding that prejudices the Committee or any other parties with respect to findings that could relate to plan confirmation, including whether the plan is proposed in good faith.

RESERVATION OF RIGHTS

79. The Committee reserves all rights with respect to the proposed DIP Financing, DIP Loan Documents (including, without limitation, any final order), and the RSA, and expressly reserves and preserves all rights to raise any additional objections to the relief requested in the DIP Motion, the RSA Motion, or in connection with the proposed DIP Financing, at or prior to any final hearing. The Committee further reserves and preserves all rights with respect to the Disclosure Statement, Plan, and any proposed sale(s) or sale procedures proposed in these cases (including the contemplated sale timeline).

CONCLUSION

WHEREFORE, for the reasons set forth herein, the Committee respectfully requests that this Court (i) deny the relief requested in the DIP Motion, (ii) deny the relief requested in the RSA Motion, and (ii) grant such other and further relief as the Court deems just and equitable.

(*Remainder of Page Blank*)

Dated: November 11, 2021

GREENBERG TRAURIG, LLP

/s/ Dennis A. Meloro
Dennis A. Meloro (No. 4435)
The Nemours Building
1007 North Orange Street, Suite 1200
Wilmington, DE 19801
Telephone: (302) 661-7000
Facsimile: (302) 661-7360
Email: MeloroD@gtlaw.com

- and -

Nancy A. Peterman (admitted *pro hac vice*)
Eric J. Howe (admitted *pro hac vice*)
Danny Duerdoth (admitted *pro hac vice*)
77 West Wacker Drive, Suite 3100
Chicago, IL 60601
Telephone: (312) 456-8400
Facsimile: (312) 456-8435
Emails: PetermanN@gtlaw.com
HoweE@gtlaw.com
Duerdothd@gtlaw.com

PROPOSED COUNSEL FOR THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS