

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

In re:

GULF COAST HEALTH CARE, LLC, *et al.*,<sup>1</sup>

Debtors.

Chapter 11

Case No. 21-11336 (KBO)

(Jointly Administered)

**RE: D.I. 14, 40, 107**

**BME LANDLORDS' OMNIBUS OBJECTION TO (1) FINAL RELIEF PURSUANT 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 AND (2) MOTION OF DEBTORS FOR ENTRY OF ORDER  
APPROVING ASSUMPTION OF RESTRUCTURING SUPPORT AGREEMENT**

BME Gulf Coast LLC; 1108 Church Street MS LLC; 101 Cobblestone Trace GA LLC; 3401 Main Street MS LLC; and 191 Highway 511 East MS LLC (together, the “BME Landlords”), by and through their undersigned counsel, hereby file this Omnibus Objection to (i) final relief pursuant 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* (D.I. 14) (the “DIP

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<sup>1</sup> The last four digits of Gulf Coast Health Care, LLC’s federal tax identification number are 9281. There are 62 Debtors in these chapter 11 cases, which cases are being jointly administered for procedural purposes only. A complete list of the Debtors and the last four digits of their federal tax identification numbers are not provided herein. A complete list of such information may be obtained on the website of the Debtors’ proposed claims and noticing agent at <https://dm.epiq11.com/GulfCoastHealthCare>. The location of Gulf Coast Health Care, LLC’s corporate headquarters and the Debtors’ service address is 40 South Palafox Place, Suite 400, Pensacola, FL 32502.

Motion”)<sup>2</sup>, and (ii) the *Motion of Debtors for Entry of Order Approving Assumption of Restructuring Support Agreement* (D.I. 107) (the “RSA Motion”), and in support hereof, respectfully state as follows:

**PRELIMINARY STATEMENT**

1. The BME Landlords initially filed their Preliminary Response shortly after the Debtors entered into chapter 11. In the ensuing weeks, the BME Landlords have undertaken a rigorous process to identify a potential new operator for the Blue Mountain Facilities and initiate the steps necessary to ensure a safe and effective transition of operations from the Blue Mountain Facility Debtors. The BME Landlords have also conveyed to the Debtors their commitment to a smooth transition in accordance with applicable state and federal regulations and the Bankruptcy Code.

2. The Debtors, on the other hand, have made clear through the RSA Motion reflecting the same terms as the DIP, that they remain steadfast to the current process, have exhibited little desire to aid the BME Landlords in this critical transition, and fail to fully appreciate the position they are creating for the BME Landlords. The Debtors’ posture is incredible given that nearly 300 people depend on the continued operations of the Blue Mountain Facilities, and that the Debtors inexcusably waited until the 11th hour to inform the BME Landlords that they have, as a practical matter, less than two months to locate replacement operators.

3. The Debtors cannot escape the fact that the RSA and DIP, which lock in the Omega-driven process, are fundamentally flawed, and cannot be approved absent modification. First, the RSA and DIP improperly bind the BME Landlords to a dangerously short timeline

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<sup>2</sup> Capitalized terms used but not otherwise defined herein will have the meaning ascribed to such terms in the DIP Motion or the *BME Landlords’ Preliminary Response to Debtors’ First Day Pleadings* (D.I. 40) (the “Preliminary Response”).

designed by Omega for the benefit only of the Omega Facilities. The timeline provides the BME Landlords just 47 days (Petition Date through December 1, 2021) to execute a MOTA like the one Omega has had months to negotiate. Forcing a deficient timeline on the BME Landlords and Blue Mountain Facility Debtors is inequitable and unnecessary.

4. Second, the DIP and RSA leave the Blue Mountain Facility Debtors inadequately funded and administratively insolvent. The DIP and RSA provide that Omega will receive first liens on unencumbered property, second liens on encumbered property of the Blue Mountain Facility Debtors, and administrative claims for the full amount of their \$17.5 million contribution to the DIP at each of the Blue Mountain Facility Debtors. It is not clear whether the Blue Mountain Facility Debtors are giving up more collateral than funds they are receiving from the DIP to fund losses. And yet, come December 1, 2021, the Debtors will have drawn down upon all funds under the DIP, and the BME Landlords will be reliant upon the Debtors' use of cash receipts and accounts receivable to fund losses. In addition, the Blue Mountain Facility Debtors will continue to accrue administrative expenses for postpetition rent which must be paid during these cases but are not provided for under the Debtors' DIP Budget or under the proposed Plan.

5. Third, the DIP and RSA require the Debtors to reject the BME Landlords' leases by no later than January 12, 2022, unless extended 30 days for licensing purposes. The Debtors seem to ignore that these are not typical leases where the tenant can simply clear out and return the keys. Omega cannot impose, nor can the Debtors agree to such a requirement.

6. Fourth, upon approval of the Omega MOTAs by December 1, 2021, the DIP and RSA contain no assurances that the Debtors' infrastructure will remain in place to service the Blue Mountain Facility Debtors while they remain in transition. From a regulatory perspective, the Debtors, as licensees for the Blue Mountain Facilities, are responsible for the operation of those

facilities, are solely responsible for ensuring compliance with applicable state and federal statutes and regulations, and are solely responsible for the health and safety of the people at those facilities. The Debtors need to make a firm commitment that the infrastructure will remain in place from December 1 through the time the BME Landlords can close a transaction for the Blue Mountain Facilities and obtain the necessary regulatory approvals.

7. Fifth, the DIP and RSA foreclose the BME Landlords' ability to propose alternative solutions, as well as the Debtors' flexibility to consider them, because the DIP and RSA outright preclude the BME Landlords from extending the timeline and/or providing their own financing necessary to fund the operations of the Blue Mountain Facility Debtors through a transition. For example, even if the BME Landlords wanted to provide postpetition financing to address the financing shortfall, the Debtors will have already incurred significant losses and granted liens on all of the Debtors' assets (including unencumbered assets). The result is that the BME Landlords and the almost 300 people will be trapped in a pre-determined process designed by non-Blue Mountain Facility Debtors and Omega for the benefit of the non-Blue Mountain Facility Debtors and Omega. Based on the supplemental supporting schedules and information originally provided by the Debtors, the Blue Mountain Facilities are giving up valuable collateral in order to fund the operations of the non-Blue Mountain Facility Debtors.<sup>3</sup> The restrictions imposed by those documents upon the BME Landlords are especially problematic given that the disinterestedness of New Ark, whom the Debtors identify as "an affiliated entity with some common indirect beneficial ownership with the Debtors," can be called into question, and yet New Ark stands to receive broad releases under the RSA. *See* First Day Declaration at 5.

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<sup>3</sup> The Debtors have not provided any revised schedules with additional costs and shared services amounts.

8. The BME Landlords object to the approval of the DIP and RSA until they are modified to address these issues and concerns. The Debtors must include line items in their DIP Budget providing for funding of the Blue Mountain Facility Debtors, including confirmation of their continued funding following the Operations Transfer Date.

**RELEVANT BACKGROUND**

**A. The DIP and RSA Impose Milestones that In Effect Require the BME Landlords to Transition on the Same Timeline as the Omega Landlords or Face Significant Uncertainty.**

9. The DIP requires a quick turnaround to approve the MOTA for the Omega Facilities (the “Omega MOTA”). The Debtors have until November 18, 2021 (thirty-five days after the Petition Date), or, if extended by the Borrowers, by no later than December 1, 2021, to obtain Court approval of the MOTA.

10. Specifically, the proposed DIP provides as a milestone that

The Bankruptcy Court shall have entered the MOTA Order within thirty-five (35) days after the Petition Date; provided that the deadline to obtain entry of the MOTA Order may be extended by the Borrowers until the earlier of (i) an additional fifteen (15) days or (ii) December 1, 2021 if the Loan Parties are diligently pursuing the MOTA Order and the Loan Parties’ failure to obtain the MOTA Order within the first thirty-five (35) Days after the Petition Date is primarily attributable to the Omega Entities (as defined in the RSA) or the New Operator(s); and

No later than the first day of the first month following entry of the MOTA Order, the MOTA(s) shall have been consummated and gone into effect...

DIP Motion at 22.

11. Once the order is entered approving the Omega MOTA, the Debtors will begin transitioning operations of the Omega Facilities to the New Operators. The Debtors must consummate the Omega MOTA no later than the first day of the first month following court approval of the Omega MOTA—at latest by January 1, 2022.

12. The DIP terms technically provide additional time for the BME Landlords to locate a replacement operator in the sense that the DIP Milestones mandate the transition of the Blue Mountain Facilities by no later than 90 days after the Petition Date. Specifically, the Milestones proposed in the DIP Motion provide that “no later than 90 days after the Petition Date (*provided that the deadline may be extended by the Loan Parties by up to an additional thirty (30) days solely to comply with licensing requirements*),” the Bankruptcy Court shall have approved the Debtors’ rejection of the BM Eagle Master Leases, and “the Loan Parties shall have transitioned the properties subject to the BM Eagle Master Leases...” DIP Motion at 22. Based on the October 14, 2021 Petition Date, this means the Debtors must reject the BM Eagle Master Leases by January 12, 2022 (February 11, 2022 if extended for licensing requirements), and the Blue Mountain Facilities must be transitioned by that date.

13. Unfortunately though, the DIP structure makes that limited timeframe inherently uncertain because it is not clear (i) whether cash and accounts receivable will be sufficient to fund the cases through February and (ii) whether the Debtors will maintain the infrastructure and resources to service the Blue Mountain Facilities once the Omega MOTA is approved and the Omega-related operations are transitioned to the New Operator. If the Blue Mountain Facilities are not adequately financed and operational, the purported additional time is meaningless.

**B. The Debtors’ Initial DIP Budget Does Not Clarify the Funding for the BME Landlords, and the New Ark Cash Collateral Will Only Be Used Until the Omega Transition.**

14. The Debtors have not demonstrated that their Initial DIP Budget and the terms of the use of the New Ark Cash Collateral will provide sufficient financial resources to maintain operations at the Blue Mountain Facilities once the Omega Facilities have been transferred. According to the Initial DIP Budget, attached as Exhibit 2 to the Debtors’ Interim DIP

Order, the Debtors have budgeted no DIP Draw after Week 9 (December 4 through December 10). Every dollar of the Debtors' \$25 million DIP will have been drawn by Week 9. *See* Initial DIP Budget. Meanwhile, starting at Week 9, many of the Debtors' projected expenses—for food, pharmacy, medical supplies, laboratory and x-ray, and utilities—drop precipitously. Nowhere in the Initial DIP Budget does it explain what amount, if any, of these expenses are attributable to maintaining operations at the Blue Mountain Facilities.

15. The DIP Term Sheet does not explain how, nor what, amounts will go to operations at the Omega Facilities versus the Blue Mountain Facilities following the Omega transition:

The Debtors will be permitted to use the proceeds of the DIP Facility to fund the operational, employee, wind-down, and other costs of the Loan Parties, including, without limitation, payments authorized to be made under “first day” or “second day” orders, post-MOTA transition and employee costs, and costs associated with providing shared services to New Operator or plan administrator post-transition, and, in each case, consistent with, subject to, and within the limitations contained in, the DIP Budget depicting on a 13-week basis cash revenue, receipts, expenses, and disbursements, taking into account Permitted Variances (as defined in Annex F of the DIP Term Sheet) and Permitted Carrybacks/Carryforwards (as defined in Annex F of the DIP Term Sheet). Except as expressly set forth in the DIP Budget, proceeds of the DIP Facility shall not be used to pay the costs and expenses (including professional fees) of administering the Chapter 11 Cases.

DIP Motion at 14 (emphasis added). This language covers both the Omega and Blue Mountain Facilities, but specifically identifies costs arising “post-MOTA transition.” The language of the DIP Term Sheet makes no reference to any MOTA other than the Omega MOTA. While the DIP Term Sheet language is permissive, it does not provide comfort that the Debtors *will* use DIP Facility proceeds to pay for operations at the Blue Mountain Facilities after the Omega MOTA is approved.

16. The Initial Budget for the New Ark Cash Collateral similarly excludes any detail of expenses to be paid to maintain operations at the Blue Mountain Facilities. Further, the

terms of the usage of proceeds from the New Ark Cash Collateral are drafted so that, upon the approval of the Omega MOTA and the transition of the Omega Facilities, the New Ark Cash Collateral will no longer be used. Except for the Debtors' professional fees, the New Ark Cash Collateral will only be used for expenses "for the period of time prior to the Operations Transfer Date." DIP Motion at 8. The Debtors are required to repay the New Ark Operating Advance in full and in cash on the Operations Transfer Date. DIP Motion at 12. In short, there is nothing in the Debtors' Initial DIP Budget to suggest that operations for the Blue Mountain Facilities—which, again, house nearly 300 people—will be funded at all after this point.

**C. The RSA Leaves Uncertain Whether the Debtors' Operational Infrastructure Will Remain Funded Following the Omega Transition.**

17. The Loan Parties' Commitments under the RSA do not require the Debtors to sustain their business once the Omega Facilities have been transitioned. Nor do they require any cooperation by the Debtors to help with the transition of the Blue Mountain Facilities.

The Debtors are only committed to:

f) prosecute, expeditiously seek approval of on a timeline consistent with the Milestones, support (and not directly or indirectly, seek, support, solicit, or encourage the efforts of any other Person to oppose or object to) and in good faith take all actions necessary or reasonably requested by the Omega Entities to obtain entry of the MOTA Order and the implementation and consummation of the MOTA(s)...

k) cooperate in good faith with, and take all commercial reasonable actions reasonably requested by the Omega Entities and any potential New Landlord(s) during the marketing and sale of the Facilities to one or more potential New Landlord(s);

m) until the Operations Transfer Date, preserve its businesses and assets, maintain its operating assets in their present condition (ordinary wear and tear expected), and maintain its existing insurance coverage, all in a manner consistent with past practices;

n) until the Operations Transfer Date, operate its business in the ordinary course in a manner consistent with past practice in all material respects... and confer with the



Omega Entities and their respective representatives, as reasonably requested, to report on operational matters and the general status of ongoing operations...

RSA at ¶¶ 6(f), (k), (m), (n). The RSA defines the Operations Transfer Date as “the earliest date upon which a MOTA between the Existing Operators and the New Operator(s) becomes effective.”

RSA at 6. “Existing Operators,” as listed in Exhibit A to the RSA, excludes the Blue Mountain Facility Debtors.

**D. The RSA and the DIP Prevent the Debtors from Engaging in Alternative Financing With the BME Landlords.**

18. Pursuant to the proposed RSA, each of the Equity Sponsors, the Service Providers, New Ark, the Omega Entities, and the Company enter into a series of commitments (together, the “Commitments”), certain of which prevent any of the Loan Parties from negotiating an alternative transaction with the BME Landlords. Under the RSA, the Debtors commit to:

Not pursue or seek entry of any other debtor-in-possession financing or cash collateral order (other than the DIP Financing Orders) not acceptable to the Omega Entities and New Ark, respectively, in their sole discretion...

RSA at ¶ 6(d). If the BME Landlords were to present to the Debtors an option to finance the continued operation of the Blue Mountain Facilities after the Debtors’ DIP facility and cash collateral run out, the Omega Entities and New Ark would have “sole discretion” to deny or permit that arrangement. The BME Landlords are not provided the agency to help themselves here.

19. In addition, the proposed DIP essentially forecloses any financing alternatives that could be negotiated between the BME Landlords and the Debtors to ensure operations continue at the Blue Mountain Facilities until a replacement operator is located. The proposed DIP requires the mandatory repayment of the full amount of any “Indebtedness incurred in violation of covenants under the DIP Facility.” DIP Motion at 23. “Permitted Indebtedness” is, as applicable to the BME Landlords, restricted to unsecured debt not to exceed \$25,000. *See* Annex C to DIP Term Sheet at 3.

**E. The RSA Imposes Major Obstacles to the BME Landlords' Entering into Any Agreement with the Debtors to Manage Transition of the Blue Mountain Facilities, and Gives Omega and New Ark the Power to Effectuate Transition of the Blue Mountain Facilities.**

20. The terms of the RSA Commitments also forbid the Debtors and the other Loan Parties from collaborating with the BME Landlords to reach a non-DIP alternative. The Debtors in particular commit 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...” RSA at ¶ 6(h). An “Alternative Transaction” is defined to include, as relevant, “any new money investment,” “transaction, debt investment, equity investment,” “or similar transaction involving any one or more entities of the Company or the debt, equity, or other interests in any one or more entities of the Company that is inconsistent with the Plan or other Restructuring Transactions.” The Debtors are prevented from even discussing a financing with the BME Landlords that would enable a smooth transition of the Blue Mountain Facilities.

21. The Commitments put the reins for transitioning the Blue Mountain Facilities not to the BME Landlords, or to the Debtors, but to Omega and New Ark, providing that the Debtors commit to:

(y) support (and not directly or indirectly, seek, support, solicit, or encourage the efforts of any other Person to oppose or object to) and in good faith take all actions necessary or reasonably requested by Omega or New Ark to transition the BM Eagle Facilities to new operator(s) and/or new landlord(s).

RSA at ¶ 6(y). The other Loan Parties are also required to consent to, and not object to, the actions of Omega or the Company—*not* the BME Landlords themselves—to transition the Blue Mountain

Facilities. *See* RSA ¶¶ 2(h) (Equity Sponsors); 3(i) (Service Providers); 4(n) (New Ark); 5(o) (Omega)<sup>4</sup>.

22. Certain of the other Loan Parties' Commitments, listed in the table below, are similarly restrictive:

Loan Party	RSA Provisions
Equity Sponsors	¶¶ 2(d), (h).
Service Providers	¶¶ 3(e), (i).
New Ark	¶¶ 4(j), (n).
Omega	¶¶ 5(k), (o).

**F. The Debtors' Budget Shows No Payment of Postpetition Rent Obligations, But Provides for Payment of Prepetition General Unsecured and Priority Claims Above the BME Landlords' Postpetition Administrative Claims.**

23. In their Preliminary Response, the BME Landlords argued that the DIP does not make clear whether the Debtors, or at least the Blue Mountain Facility Debtors, will be administratively solvent under the DIP Facility. This remains the case.<sup>5</sup> However, the Debtors have demonstrated that they are able to find funds to pay collateralized prepetition amounts—for example, and as requested in the Cash Management Motion,<sup>6</sup> the Debtors were able to and sought to pay approximately \$90,000 in accrued and unpaid prepetition amounts for its Purchasing Card Program (as defined in the Cash Management Motion) from the DIP Proceeds, even though the

<sup>4</sup> Omega is required to consent to the actions of the Company or New Ark.

<sup>5</sup> November 2021 rent has not been paid to the BME Landlords for any Blue Mountain Facilities.

<sup>6</sup> The "Cash Management Motion" is the *Motion of Debtors for Entry of Interim and Final Orders (I) Authorizing the Debtors to (A) Continue to Operate Their Existing Cash Management System, (B) Maintain Existing Bank Accounts and Business Forms and Honor Certain Prepetition Obligations Related to the Use Thereof, (C) Maintain Purchasing Card Program and Honor Prepetition Obligations Related Thereto, and (D) Continue to Perform Intercompany Transactions; (II) Extending the Time for the Debtors to Comply with 11 U.S.C. § 345(b) Deposit and Investment Requirements, and (III) Granting Related Relief* (D.I. 8). Final relief on the Cash Management Motion was approved on November 12, 2021 (D.I. 242).

Debtors have a more than \$300,000 deposit for the Purchasing Card Program. *See* Cash Management Motion at 13.<sup>7</sup>

**G. While the DIP and RSA Force Major Restrictions Upon the BME Landlords, the RSA Incorporates Releases for Potential Insider New Ark.**

24. As noted above, the Debtors have disclosed in multiple pleadings that New Ark is an “affiliated entity with some common indirect beneficial ownership with the Debtors.” First Day Declaration at 5. The extent of that affiliation has not been disclosed. However, the Debtors’ Plan Term Sheet includes mutual releases by and among the Debtors, New Ark, Omega, and other parties, and purportedly “customary” third party release provisions. *See* Plan Term Sheet at 11. The Plan Term Sheet is an Exhibit to the RSA and is incorporated into it. *See* RSA at ¶ 1(a) (“Each of the exhibits attached hereto and any schedules or exhibits to such exhibits... are expressly incorporated herein and made a part of this Agreement, and all references to this Agreement shall include the Exhibits and Schedules.”) The Debtors are currently seeking approval of these releases without demonstrating that New Ark is not an insider.

**OBJECTIONS**

25. The BME Landlords object to the Debtors’ DIP and RSA as currently drafted because they present unreasonable, inequitable restraints on the BME Landlords to transition the operations of the Blue Mountain Facilities to a replacement operator. The BME Landlords need more time to search for a replacement operator than the Debtors are providing, and assurance that the operations of the Blue Mountain Facilities are maintained through their transition. This is the bare minimum needed to ensure that the health and well-being of nearly 300 people of the Blue Mountain Facilities will not be compromised. But as it stands, the DIP and

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<sup>7</sup> For the avoidance of doubt, the BME Landlords have not and are not objecting to the Debtors’ Cash Management Motion.

RSA foreclose any opportunity to meet even this bare minimum. The Debtors object to the DIP Motion and the RSA Motion pending the removal or amendment of their terms in order to guarantee the continued operation of the Blue Mountain Facilities.

**I. The DIP Milestones Cannot Mandate Rejection of the BM Eagle Master Leases Prior to Transition of the Blue Mountain Facilities.**

26. The BME Landlords object to the Debtors' proposed DIP Milestones related to the BM Eagle Master Leases, first insofar as (i) they require rejection of the BM Eagle Master Leases before the Blue Mountain Facilities have been transitioned, and (ii) they preclude any extension of the proposed deadline except to comply with licensing requirements. *See* DIP Motion at 22. The DIP Milestones should require that the transition of the Blue Mountain Facilities must have begun before the Debtors' rejection of the BM Eagle Master Leases can be made effective. Additionally, the Milestones should provide that the deadline to transition the Blue Mountain Facilities may be extended upon agreement between the Debtors and the BME Landlords. The Debtors should revise the DIP Milestones accordingly.

**II. The DIP Budget Must Expressly Set Aside Funds for the Continued Operation of the Blue Mountain Facilities.**

27. The Debtors' Initial DIP Budget is in summary form and does not detail what, if any, cash will be used to pay for the operation of the Blue Mountain Facilities. Although the Debtors have provided detailed supplemental supporting schedules explaining the use of the DIP Budget by landlord group through Week 13, the Debtors appear free to allocate disbursements at their discretion under the Initial DIP Budget filed with the Court. Additional funding available from Omega under the DIP effectively disappears in Week 9 of the DIP Budget, once the Omega MOTA has been approved and the Omega Facilities have begun their transition. The BME Landlords object to the Initial DIP Budget insofar as it does not establish with certainty whether cash receipts and accounts receivable collected through the confirmation of the Debtors' plan will

be sufficient to maintain operations at the Blue Mountain Facilities. Additionally, although the Debtors have provided supplemental detail demonstrating the distribution of funds between the Omega Facilities and the Blue Mountain Facilities, the Debtors have not provided detail regarding shared services costs following the Omega MOTA Date. The Debtors must present a revised DIP Budget that details funding for all line items for the Blue Mountain Facility Debtors throughout these cases, and must provide for (i) sufficient funding of the Blue Mountain Facility Debtors on and after Week 9 and (ii) sufficient funding to maintain the Debtors' operations infrastructure on and after Week 9.

**III. The DIP Must Clearly Provide that the Cost of Operation of the Blue Mountain Facilities will be Covered by the Proceeds of the DIP Facility.**

28. The BME Landlords object to the DIP insofar as it limits the use of the proceeds of the DIP Facility to fund the operation costs and "post-MOTA" transition and employee costs of the Loan Parties only. *See* DIP Motion at 14. The DIP must provide that the proceeds of the DIP Facility will be used to fund the "operational, employee, wind-down, and other costs" of the Blue Mountain Facility Debtors specifically until the confirmation of the Debtors' plan, and must make clear that until that time the permitted use of proceeds will include post-Blue Mountain MOTA transition and employee costs, and costs associated with providing shared services to a new operator of the Blue Mountain Facilities post-transition. *Id.*

**IV. The RSA Commitments and the DIP Must be Amended to Permit Negotiation and Approval of an Alternative Process for the Blue Mountain Facilities.**

29. The BME Landlords object to the RSA Motion insofar as it seeks to approve the Commitments which foreclose any alternative arrangement with the Debtors. Specifically, the BME Landlords object to:

- a. RSA ¶ 6(d). The BME Landlords object to the provision requiring the Debtors to not pursue or seek to enter into any other debtor-in-possession financing or cash

collateral order without the approval of the Omega Entities and New Ark. The RSA must permit the Debtors in their discretion, if necessary, to negotiate, enter into, and seek court approval of a postpetition financing or cash collateral agreement to support continued operation of the Blue Mountain Facilities until a replacement operator is located. The Debtors must revise RSA ¶ 6(d) to carve out a potential arrangement with the BME Landlords or remove the language entirely.

- b. RSA ¶¶ 2(d), 3(e), 4(j), 5(k), 6(h). The BME Landlords object to provisions requiring the Loan Parties to not agree to, consent to, or provide any support to any Alternative Transaction. The RSA must permit the Loan Parties to participate, if necessary, in an alternative process with the BME Landlords to ensure that operations for the Blue Mountain Facilities will be funded through the transition to a replacement operator. The Debtors must revise RSA ¶¶ 2(d), 3(e), 4(j), 5(k), 6(h) to carve out participation of the Loan Parties in an alternative process with the BME Landlords, or remove the language entirely.
- c. RSA ¶¶ 2(h), 3(i), 4(n), 5(o), 6(y). The BME Landlords object to provisions that permit only the Debtors, Omega, or New Ark to transition the Blue Mountain Facilities or request any actions necessary to transition the Blue Mountain Facilities, or permit the Loan Parties to consent to such actions taken only by the Debtors, Omega, or New Ark. The RSA must permit the BME Landlords to take consensual action to transition the Blue Mountain Facilities to new operator(s) and/or new landlord(s). The Debtors must revise RSA ¶¶ 2(h), 3(i), 4(n), 5(o), and 6(y) to permit the BME Landlords to transition the Blue Mountain Facilities,

request any actions of the Loan Parties to transition the Blue Mountain Facilities, or seek and obtain consent of the Loan Parties to take any such actions.

- d. RSA ¶¶ 6(f), (k), (m), (n). The BME Landlords object to provisions that do not provide for support for the transition of the Blue Mountain Facilities, or do not provide for the continued preservation of the Debtors' businesses and assets and operations in the ordinary course to support the Blue Mountain Facilities. The RSA must provide that the Debtors will take all such actions to support the transition of the Blue Mountain Facilities and preserve the Debtors' businesses and assets and operations in the ordinary course, as currently provided for the Omega Entities, for the continued operation of the Blue Mountain Facilities until the date of transfer to new operator(s) and/or new landlord(s). The Debtors must revise RSA ¶¶ 6(f), (k), (m), and (n) to provide support for the transition of the Blue Mountain Facilities and preserve the Debtors' businesses, assets and operations in the ordinary course.

30. Similarly, the BME Landlords object to the DIP insofar as it restricts the "Permitted Indebtedness" to exclude a potential alternative arrangement between the BME Landlords and the Debtors to ensure the funding of operations at the Blue Mountain Facilities following the Operations Transfer Date. The DIP must be amended to expressly include any potential BME Landlord arrangement as "Permitted Indebtedness" and ensure that the Debtors and the BME Landlords may negotiate, enter into, and seek court approval of an alternative arrangement, if any, to guarantee the continued funding of operations at the Blue Mountain Facilities.

#### **V. The DIP Must Provide for Payment of Rent Obligations to the BME Landlords.**

31. The Debtors have still not demonstrated how accrued and unpaid postpetition rent and the costs to transition or wind down the Blue Mountain Facilities will be paid



by the proceeds of the DIP Facility. The Debtors are obligated, pursuant to section 365 of the Bankruptcy Code, to pay those required rent payments as an administrative expense:

The trustee shall timely perform all the obligations of the debtor, except those specified in section 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title. The court may extend, for cause, the time for performance of any such obligation that arises within 60 days after the date of the order for relief, but the time for performance shall not be extended beyond such 60-day period, except as provided in subparagraph (B). This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f) of this section. Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

11 U.S.C. § 365(d)(3). Nor have the Debtors sought relief for cause to postpone the required rent payments for the first 60 days of these chapter 11 cases pursuant to section 365. Even if the Debtors submitted such a motion and were able to demonstrate cause, there is no expectation that the Debtors will pay the rent accrued upon expiration of the 60-day period because the DIP Budget does not provide for rent on account of the Blue Mountain Facilities to be paid at any time during these chapter 11 cases. *See In re Valley Media, Inc.*, 290 B.R. 73, 74 (Bankr. D. Del. 2003) (“With regard to rent, courts generally agree that § 365(d)(3) requires debtors to pay rent obligations in full and without proration as they come due in the pre-rejection period.”).

32. The Debtors propose rent can be paid from the Debtors' two month remaining security deposit with the BME Landlords. Applicable law requires otherwise. The security deposit must be applied to any prepetition rejection damages claim, not accrued administrative claims. *See In re PPI Enterprises (U.S.), Inc.*, 324 F.3d 197, 208 (3d Cir. 2003) (“Once the § 502(b)(6) calculation is complete, the prevailing view, and the view adopted by the Bankruptcy Court here, favors deduction of a security deposit from the § 502(b)(6) cap of a landlord's claim). Thus, the Debtors are obligated to provide sufficient funds to cover the postpetition rent as an administrative expense. But even if the BME Landlords permitted the use

of the Debtors' security deposit, following the BME Landlords' application of the security deposit to pay October rent arrears on October 13, 2021, there remains less than two months' rent in the Debtors' security deposit. The Debtors' security deposit will be insufficient to pay rent through December, much less through the Debtors' proposed timeline for transition of the Blue Mountain Facilities. The BME Landlords object to the lack of rent payments under the Debtors' DIP.

### **RESERVATION OF RIGHTS**

33. The BME Landlords reserve all rights to supplement and/or amend this Objection prior to or at any hearing thereon, in the event the BME Landlords' objections raised herein are not resolved or in the event that any further changes to the Final DIP Order or the RSA Order are proposed; or to further address the DIP Motion, the RSA Motion, the other first day motions, and any other ancillary issues.

### **CONCLUSION**

**WHEREFORE**, the BME Landlords respectfully request that the Court deny the DIP Motion and the RSA Motion unless the modifications described herein are made, and grant other and further relief as is just and proper.

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Dated: November 16, 2021  
Wilmington, Delaware

**ASHBY & GEDDES, P.A.**

/s/ Ricardo Palacio

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