IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
	)	Case No. 21-11336 (KBO)
GULF COAST HEALTH CARE, LLC, *et al.*,[1]	)	
	)	(Jointly Administered)
	)	
Debtors.	)	**Related to Docket No. 166**
	)	

OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO THE DEBTORS' MOTA MOTION

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 objection (this "Objection") to the *Motion of Debtors for Entry of an Order (I) Authorizing Transfer of the Management, Operations, and Related Assets of the Omega Facilities Free and Clear of All Liens, Claims, Encumbrances, and Interests; (II) Approving Procedures for the Debtors' Future Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; (III) Approving Rejection and Termination of the Master Lease, and the Allowance of the Omega Rejection Damages Claim in Connection Therewith; (IV) Approving Form of Management and Operations Transfer Agreement; and (V) Granting Related Relief* (Docket No. 166) (the "MOTA Motion"),[2] and respectfully states as follows:

[1] There are 62 Debtors in these chapter 11 cases (the "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 used herein but otherwise not defined shall have the same meaning ascribed to them in the MOTA Motion.

PRELIMINARY STATEMENT

1. As the Committee detailed in the *Omnibus Objection of the Official Committee of Unsecured Creditors to the Debtors' DIP Financing and RSA Motions* (Docket No. 226) (the "DIP/RSA Objection"), the Debtors and their insiders seek to rush the approval of a series of transactions that (a) transfer substantially all of the Debtors' operations for the benefit of Omega (one of the Debtors' landlords and the Debtors' DIP lender), (b) secure releases for insiders, and (c) provide no recovery for unsecured creditors. The MOTA Motion is the third and final step in this plan that all but seals the fate of these cases. The Debtors ask this Court to grant this extraordinary, case-determinative relief approximately less than 30 days after the Committee's appointment.

2. As set forth herein, the MOTA Motion fails for the following reasons. ***First***, the Debtors seek to transfer substantially all of their assets under the MOTA without any market test on an expedited time frame. ***Second***, the requested relief benefits Omega, not the Debtors' estates. ***Third***, the proposed MOTA transaction does not deliver on the promise of relieving the estates of the administrative costs of operating Omega's facilities, which increases the risk to the unsecured creditors that the estates will be administratively insolvent.[3]

The MOTA Has Not Been Market Tested

3. If the MOTA is approved, the Debtors will transfer substantially all of their assets to an operator of Omega's choice. The Debtors will receive no cash under the MOTA. The

[3] The Debtors sent a revised MOTA last evening, November 16, 2021. The proposed revisions, which the Committee understands have not yet been agreed to by Omega and the New Manager, may address some of the concerns related to payment of operational expenses. The Committee will continue to work with the Debtors and other parties to attempt to narrow the scope of issues related to the MOTA Motion.

Debtors will receive a loose promise to assume or pay certain liabilities. This is woefully short of establishing that the Debtors are receiving fair value under the MOTA.

4. In addition, the Debtors have chosen not to subject the MOTA to a market test. Although most debtors conduct ***both*** pre- and post-petition marketing processes, including via court-approved bidding procedures, the Debtors have done ***neither***.

5. The Debtors' first day declaration details months of discussions among the Debtors, the insiders, and Omega that resulted in the DIP Facility, RSA, and proposed sale.[4] Yet neither that declaration nor the MOTA Motion suggests that the Debtors retained an investment banker to conduct a sale process or otherwise conducted a sale process of any substance during that period. The MOTA Motion simply states that "the Debtors have been in contact with parties who expressed interest in the Assets and have informed these parties of the proposed Transfer Transaction" and that "[t]he Debtors believe that a more extended process would yield no higher or better offers for the management, operations, and Assets and would put the health and safety of their residents at risk."[5] Because the Debtors have chosen to transfer their assets without the typical Court-approved bidding process to provide a market check on value, the Debtors' conclusory statement is insufficient to establish that the proposed transaction does, in fact, reflect the value of the Debtors' assets, including nursing home licenses (or the rights to transfer such licenses), provider numbers, accounts receivable, contracts, inventory, and resident contracts, records, and trust funds.

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[4] *See Declaration of M. Benjamin Jones in Support of Chapter 11 Petitions and First Day Pleadings* (Docket No. 16) (the "First Day Declaration") ¶¶ 56-62.

[5] MOTA Motion ¶ 27(b).

6. Knowing that the MOTA does not provide fair value for the Debtors' assets, the Debtors state that the MOTA is "part of the larger transactions under the RSA" and, incredibly, that the RSA "provid[es] recoveries for general unsecured creditors that would otherwise not be available."[6] As detailed in the DIP/RSA Objection, the second part of this statement – that the plan contemplated by the RSA provides a recovery to unsecured creditors – is untrue since the creditors receive nothing. And the first part of the statement reveals the Debtors' true intentions. They do not seek to maximize the value of their operating assets but, instead, seek to implement a broader transaction that benefits Omega and insiders.

7. Finally, although the Debtors have rushed for approval of the MOTA less than 30 days after the Committee's appointment, the proposed transaction includes a built-in 90-day interim management period (from December 1, 2021 to March 1, 2022) that effectively gives the New Manger a "free look" at the facilities, a period that should, instead, be used for the benefit of the Debtors' estates. During that period, the New Manager can conduct diligence to determine whether it wishes to be the New Operator and can shop the facilities to identify one or more other operators. Yet the Debtors would remain the holders of the operational licenses, parties to existing agreements, and obligated for expenses relating to the facilities. As discussed below, the New Manager is not required to pay all these expenses. Thus, the New Manager benefits from any upside obtained from the interim period marketing process, without clearly paying the costs incurred during the interim period.

8. By delaying the transfer of the facilities by 30 days (to January 1, 2022), the Debtors and the Committee would have the opportunity to explore other options and market test the MOTA. The Committee understands that Omega has agreed to indemnify or finance the New Manager

[6] *Id.* ¶ 27(c).

with respect to certain costs during the interim period. If Omega has already agreed to fund costs, this should be done for the benefit of the estates while the Debtors and the Committee seek to obtain higher offers.

The Proposed Transaction Benefits Omega –
Not the Debtors and Their Estates and Creditors

9. Omega benefits from the MOTA, not the Debtors or their estates and creditors. By allowing Omega to select the New Manager and New Operator(s), Omega is maximizing the value of its real estate for the benefit of itself and its investors. Omega's hand-selected New Manager will ensure a smooth transition of operations from the Debtors to the New Operator(s) over a 90-day time period in order to maximize the value of Omega's real estate. The Debtors' unsecured creditors, on the other hand, receive nothing.

10. In addition, as part of the MOTA Motion, the Debtors seek to allow Omega's alleged rejection damages claim. Omega's asserted rejection damages claim should not be allowed now, but should be subject to the Committee's 60-day investigation period under the proposed final DIP financing order. Under the Debtors' proposed plan, Omega's unsecured claim is separately classified from other unsecured creditors. If Omega's rejection damage claim is allowed, the Debtors will be able to argue that they have an impaired accepting class that can be used to cram down the plan over the unsecured creditors' objections (assuming the plan is approved in its current form) – the same unsecured creditors who currently get nothing under the proposed plan.

The Proposed Transaction Increases the Risk that the Debtors Will Be Administratively Insolvent

11. As set forth in the DIP/RSA Objection, the Committee questions whether the Debtors have sufficient liquidity to fund operations, pay administrative claims, including 503(b)(9) claims, and fund winddown costs.[7] The MOTA Motion raises serious additional questions.

12. Although the Debtors state that the MOTA will "allow the financial burdens of the Omega Facilities to be assumed by an interim manager,"[8] the terms of the MOTA are not clear on this point. As discussed in more detail below, the MOTA provides that all accounts receivable generated after the Transition Time – which is the time the New Manager begins managing operations at the Omega Facilities – are transferred to the New Manager, but the New Manager is not clearly assuming all operational expenses as of the Transition Time.

13. Moreover, ancillary agreements – a Management Oversight Agreement and a Transition Services Agreement (the "TSA")[9] – require the Debtors to fund costs (including payments to an insider) that benefit the New Manager.

14. The Management Oversight Agreement between the New Manager and Debtor Gulf Coast Health Care, LLC would require the Debtors to "procure, ***at its own expense***, and maintain during the Management Period, all insurance necessary and appropriate to the operation and maintenance of the . . . [Omega] Facilities . . . with the New Manager named as an additional

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7 *See* DIP/RSA Objection ¶¶ 22, 52-54.

8 MOTA Motion ¶ 17.

9 The Management Oversight Agreement and TSA are attached as Exhibits C and D, respectively, to the MOTA, which itself is attached as Exhibit 2 to the MOTA Motion.

named insured/loss payee, applicable."[10] It would also require the Debtors to "maintain employee benefits, workers' compensation insurance and any other insurance."[11]

15. The proposed TSA would be entered into by the New Manager and Health Care Navigator LLC ("HCN"), which is one of the Debtors' ***insider*** "service providers." The New Manager would pay $188,000 per month to HCN for transition services. This is compared to the $1,380,000 per month that the Debtors pay HCN.[12] Oddly, in addition to requiring HCN to provide direct services to the New Manager, the TSA requires the Debtors to continue to obtain "services" from HCN under their existing agreement "at no cost to" the New Manager, despite the fact that the Debtors will have transitioned operations to the New Manager.[13] The Debtors' DIP budget, however, does not cover any payments to HCN after the transition to the New Manager.

16. The Debtors should not obligate themselves to expend funds, including for the benefit of insiders, that, if necessary at all, solely benefit transferred facilities, particularly where the Debtors do not have the necessary liquidity under Omega's DIP budget.

17. Finally, while the Debtors make much about the health and welfare of the residents at the Omega Facilities, the MOTA Motion does not address, and does nothing to stabilize operations at, the Debtors' four facilities that are leased from Blue Mountain. Once operations are transitioned at the Omega Facilities, Omega will have little incentive to fund the administrative costs necessary to protect the health and welfare of the Blue Mountain facilities' residents. This,

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10 *See* Management Oversight Agreement § 2(a)(iv) (emphasis added).

11 *Id.* § 2(a)(v).

12 *See* First Day Declaration ¶ 19.

13 *See* TSA at Recital F ("Manager is entering into this [TSA] and the MOTAs with a full expectation that HCN will continue to provide Debtors with such Other Services, ***at no cost to the Manager***, consistent with past practice and in accordance with the 'HCN-Debtor Agreement' . . . .") (emphasis added).

again, shifts the significant risks that these cases will not have adequate liquidity to fund administrative expenses.

BACKGROUND

I. The Debtors' Chapter 11 Cases

18. On October 14, 2021 (the "Petition Date"), the Debtors each filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"). 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.

19. On October 25, 2021, the United States Trustee for Region 3 appointed the Committee (Docket No. 111). 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.

20. On November 11, 2021, the Committee filed the DIP/RSA Objection.

II. The Debtors and the Omega Landlords

21. The Debtors assert that 24 of their facilities (the "Omega Facilities") are subject to that certain Second Consolidated Amended and Restated Master Lease agreement dated July 18, 2013 (as amended, modified, renewed, or restated from time to time, the "Omega Master Lease"), by and among Debtor Gulf Coast Master Tenant I, LLC ("GC Master Tenant I") and certain indirect affiliates and subsidiaries of Omega Healthcare Investors, Inc. that serve as landlords under the Omega Master Lease (collectively, the "Omega Landlords").[14] In turn, GC Master Tenant I subleases the Omega Facilities to certain Debtors (the "Omega Facility Debtors").

[14] Notwithstanding the use of terms such as "landlord" and "lease," the Committee reserves all rights with respect to arguments and claims related to the characterization of Omega's transactions with the Debtors.

III. Summary of the MOTA Motion

22. The Debtors filed the MOTA Motion on November 3, 2021 seeking entry of an order (i) authorizing the transfer of the management, operations, and assets of the Omega Facilities (collectively, the "Assets") from the Omega Facility Debtors to New Manager or New Operator, as applicable, pursuant to certain Management and Operations Transfer Agreements (collectively, the "MOTA"), free and clear of all claims and encumbrances (the "Transfer Transaction"); (ii) approving the Assumption and Assignment Procedures (as defined and detailed therein) related to the Omega Facility Debtors' future assumption and assignment of the Assumed Contracts; (iii) approving the Omega Facility Debtors' rejection and termination of the Omega Master Lease, effective *nunc pro tunc* to the Petition Date, and allowing a rejection damages claim held by the Omega Landlords in the aggregate amount of $35,904,343; (iv) approving the MOTA by and between the Omega Facility Debtors and New Manager; and (v) granting related relief.

OBJECTION

I. Standards Applicable to the MOTA Motion

23. Any transfers of assets pursuant to section 363 of the Bankruptcy Code outside a chapter 11 plan "requires a bankruptcy court's careful review." *In re Exaeris, Inc.*, 380 B.R. 741, 744 (Bankr. D. Del. 2008); *see In re Braniff Airways, Inc.*, 700 F.2d 935, 940 (5th Cir. 1983) ("The debtor . . . should not be able to short circuit the requirements of Chapter 11 for confirmation of a reorganization plan by establishing the terms of the plan *sub rosa* in connection with a sale of assets."); 3 *Collier on Bankruptcy* ¶ 363.02[3] (16th 2021) ("A sale of the major part of the estate under section 363 may have the practical effect of resolving issues . . . ordinarily . . . addressed in connection with confirmation of a plan. Thus, there is some danger that a section 363 sale might deprive parties of substantial rights inherent in the plan confirmation process.").

24. Here, that careful review should be heightened. The Debtors acknowledge that the proposed Transfer Transaction is part of the larger transaction contemplated by the RSA. As noted in the DIP/RSA Objection, that larger transaction is with the Debtors' insiders, which subjects it 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.'" (quoting *Matter of Fabricators, Inc.*, 926 F.2d 1458, 1465 (5th Cir. 1991)). In such circumstances, the court does not simply give deference to the debtor's purported business judgment. Instead, the debtor and insiders "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).

25. Even if heightened scrutiny does not apply, a court will approve a sale or transfer of assets outside the ordinary course of business only if: (i) a valid business justification exists for such sale or transfer; (ii) the price represents fair value; and (iii) the parties negotiated and entered into the sale or transfer transaction in good faith. *See In re Abbotts Dairies of Pa., Inc*., 788 F.2d 143, 149-50 (3d Cir. 1986); *see also In re Montgomery Ward Holding Corp.*, 242 B.R. 147, 153 (D. Del. 1999). The first prong – the "sound business purpose" test – requires a debtor to establish four elements: (i) adequate notice to interested parties; (ii) that an adequate price is being paid for the assets; (iii) good faith by the parties; and (iv) a sound business judgment for the sale or transfer. *See e.g.*, *Abbotts Dairies*, 788 F.2d at 149-50; *Delaware & Hudson Ry.*, 124 B.R. 169, 176 (D. Del. 1991) (citing *In re Indus. Valley Refrigeration and Air Conditioning Supplies, Inc.*, 77 B.R.

15, 21 (Bankr. E.D. Pa. 1987)). Moreover, a debtor has the burden of establishing a sound business purpose. *See Montgomery Ward*, 242 B.R. at 153.

26. The Debtors cannot even meet this lesser standard for the reasons set forth below.

II. The Debtors Cannot Prove that the Proposed Sale Price is Fair and Adequate

27. As noted above, one of the elements that the Debtors must prove is that the value they will obtain for the Transfer Transaction is fair. *See Exaeris, Inc.*, 380 B.R. at 744–45 ("[T]here is no evidence upon which the Court can make an informed decision on the relationship of the sale price to the value of the assets being sold."). Although the Debtors state that the Assets being transferred have *de minimis* value,[15] they offer no evidence to support this conclusory statement.

A. The Debtors Failed to Properly Market Their Assets

28. The Debtors' conclusory statements about value are particularly unavailing given the lack of a typical marketing and bidding process. Courts have held that failure to properly market assets can prevent a finding that the debtor properly exercised its business judgment. *See In re Blixseth*, No. BKR. 09-60452-7, 2010 WL 716198, at *10 (Bankr. D. Mont. Feb. 23, 2010) (denying trustee's section 363 sale motion on basis that trustee did not market the subject assets); *In re Psychrometric Sys., Inc.*, 367 B.R. 670, 677 (Bankr. D. Colo. 2007) (finding that the trustee did not properly exercise his business judgment by failing to "adequately market[] the Assets"); *see also* 10 *Collier on Bankruptcy* ¶ 6004.09 (16th 2021) ("[S]ome courts favor public auctions over private sales and thus may require stricter proof as to fair value in private sales."). Indeed, debtors that operate skilled nursing facilities routinely seek to transfer operations in connection with court-approved bidding procedures to ensure the highest and best value. *See, e.g.*, *In re CMC*

[15] MOTA Motion ¶ 6.

II, LLC et al., Case No. 21-10461 (JTD) (Bankr. D. Del. Mar. 11, 2021) (Docket No. 54); *In re Plaza Healthcare Ctr. LLC*, Case No. 14-11335 (Bankr. C.D. Cal. Apr. 18, 2014) (Docket No. 187); *In re Senior Care Grp., Inc.*, Case No. 17-6562 (Bankr. M.D. Fla. Feb. 26, 2020) (Docket No. 1117).

29. As noted above, the MOTA Motion makes no mention of a marketing process nor of appraisals or valuations. Instead, the New Manager is given the opportunity to market the facilities to new operators. Without market testing, valuations, or appraisals, it is impossible to know whether the terms of the Transfer Transaction are fair and reasonable, including whether the Debtors are obtaining fair value. The estates, and not the New Manager, should be given the opportunity to obtain the highest and best value for the Debtors' assets.

B. The Debtors' Rushed Private Sale is Highly Unusual

30. The lack of a marketing process is especially troubling given the speed by which the Debtors seek to rush through the bankruptcy process. The Debtors' request to transfer substantially all of their assets less than 30 days after the Committee's appointment without a competitive bidding process is highly unusual. The Debtors cite cases that do not support this extraordinary relief:

- *In re Preferred Care Inc.*, Case No. 17-44642 (MXM) (Bankr. N.D. Tex. Nov. 20, 2018) (Docket No. 1323). The debtors operated roughly 33 facilities, and the order cited by the Debtors approved the transfer of operations for only one facility. Further, the cases involved a marketing process for the sale of the equity interests in the debtors [Docket No. 656], and this particular transfer occurred one year into the cases.

- *In re Senior Care Centers, LLC*, Case No. 18-33967 (BJH) (Bankr. N.D. Tex. Mar. 29, 2019) (Docket No. 777). The debtors operated over 100 healthcare facilities. The debtors engaged in a robust marketing process for the sale of the equity interests in the debtors and sale of each facility and each lease on a standalone basis.

- *In re 4 West Holdings, Inc.*, Case No. 18-30777 (HDH) (Bankr. N.D. Tex. May 14, 2018) (Docket No. 375). The debtors sought approval of the transfer of operations through a

motion pursuant to Bankruptcy Rule 9019, and the transfer occurred approximately 70 days into the cases.

- *In re Wachusett Ventures, LLC*, et al., Case No. 18-11053 (FJB) (Bankr. D. Mass. May 30, 2018) (Docket No. 405). The debtors sought approval of the transfer of operations through a motion pursuant to Bankruptcy Rule 9019, and the transfer occurred approximately 65 days into the cases.

- *In re Nexion Health at Lancaster, Inc.*, Case No. 17-34025 (HDH) (Bankr. N.D. Tex. Apr. 27, 2018) (Docket No. 219). While the transfers encompassed of all operations of the debtors (four total facilities), the transfers occurred approximately six months into the cases.

- *In re Bethel Healthcare, Inc.*, Case No. 1:13-BK-12220-GM, 2013 WL 2293519, at *2 (Bankr. C.D. Cal. Apr. 30, 2013). The transfer involved only one facility.

31. The Transfer Transaction should not be approved unless and until: (a) more time has passed in these Chapter 11 Cases to allow the Committee to properly review and assess the Transfer Transaction; (b) the Assets are properly marketed; and (c) customary safeguards are implemented into the MOTA Motion to ensure that the Debtors are in fact transferring the Assets to a party that is offering the highest and best offer.

III. Omega is the Beneficiary of the Debtors' Requested Relief

32. The MOTA Motion benefits Omega (and as part of the broader RSA transaction, insiders) while forcing unsecured creditors to shoulder the burden of the Chapter 11 Cases. As noted above, it allows Omega to pick an interim manager for its facilities so that it can maximize the value of its underlying real estate. Yet the estates obtain almost none of the significant value enhancements provided by the Debtors' assets. The Debtors must establish that the Transfer Transaction benefits the estates and not just Omega. *See In re Dura Auto. Sys*., 2007 Bankr. LEXIS 2764, at *253-54 (Bankr. D. Del. Aug. 15, 2007) (providing that debtor "had a fiduciary duty to protect and maximize the estate's assets") (internal quotations omitted) (citing *In re Mushroom Transp. Co., Inc.*, 382 F.3d 325, 339 (3d Cir. 2004)); *Official Comm. of Unsecured Creditors of*

Cybergenics Corp., v. Chinery, 330 F.3d 548, 573 (3rd Cir. 2003) (same); *Four B. Corp. v. Food Barn Stores, Inc.* (*In re Food Barn Stores, Inc.*), 107 F.3d 558, 564-65 (8th Cir. 1997) (stating that in bankruptcy sales, "a primary objective of the Code is to enhance the value of the estate at hand").

IV. It is Premature to Allow a Rejection Damage Claim

33. The requested treatment of Omega's alleged rejection damages claims is an example of the inappropriate benefits the Debtors seek to provide Omega. Although logically unconnected to the proposed Transfer Transaction, the MOTA Motion also seeks to allow Omega's claim in the aggregate amount of $35,904,343. This request should be denied. It is unusual, arbitrary, and unfair to allow a rejection damages claim at this stage in these cases. More importantly, the allowance of this claim would prejudice the Committee and other creditors with respect to plan confirmation issues, as it would potentially create an impaired accepting class, allowing the Debtors to seek confirmation regardless of the vote of general unsecured creditors. Omega should be subject to the same claims allowance process as other unsecured creditors and the Committee should be allowed to investigate all claims against and of Omega during the 60-day investigation period provided for under the proposed final DIP financing order.

V. The Transfer Transaction May Leave the Debtors Administratively Insolvent

34. Transfers under Section 363 of the Bankruptcy Code should not be used to circumvent the protections for creditors mandated in the Bankruptcy Code. *See Abbotts Dairies*, 788 F.2d at 150 (stating that requirement of good faith is paramount in ensuring that section 363 will not be employed to circumvent usual creditor protections of chapter 11); *In re Westpoint Stevens, Inc.*, 333 B.R. 30, 52 (S.D.N.Y. 2005) (stating that "it is well established that section 363(b) is not to be utilized as a means of avoiding chapter 11's plan confirmation procedures") *aff'd in part*, *rev'd in part on other grounds*, 600 F.3d 231 (2d Cir. 2010) (citing *In re The Babcock*

& Wilcox Co., 250 F.3d 955, 960 (5th Cir. 2001) ("[T]he provisions of § 363 . . . do not allow a debtor to gut the bankruptcy estate before reorganization or to change the fundamental nature of the estate's assets in such a way that limits a future reorganization plan.")).

35. In evaluating whether a debtor has met its burden of establishing that a sound business purpose exists for a proposed sale or transfer under Section 363, courts will consider the impact the sale has on a debtor's ability to confirm a plan. *See Delaware & Hudson Ry.*, 124 B.R. at 175-76 ("A non-exhaustive list of factors to consider in determining if there is a sound business purpose for the sale include . . . the likelihood that a plan of reorganization will be proposed and confirmed in the near future; [and] the effect of the proposed disposition of the future plan of reorganization . . . .") (citing *Stephens Indus., Inc. v. McClung*, 789 F.2d 386, 390 (6th Cir. 1986); *In re Lionel Corp.*, 722 F.2d 1063, 1068-69 (2nd Cir. 1983)).

36. A court should not confirm a chapter 11 plan unless the plan provides for payment in full, in cash, of all administrative expense claims on the plan's effective date. *See* 11 U.S.C. §1129(a)(9)(A); *In re Hechinger Inv. Co. of Delaware*, 298 F.3d 219, 224 (3d Cir. 2002). The same is generally true for priority claims under section 507(a) of the Bankruptcy Code. *See* 11 U.S.C. §1129(a)(9)(B); *In re Armstrong World Industries, Inc.*, 348 B.R. 136, 166 (D. Del. 2006).

37. For a number of reasons, the Committee has serious doubts about the Debtors' ability to confirm a chapter 11 plan after consummation of the Transfer Transaction.

A. It is Not Clear that the New Manager Will Pay Operational Expenses

38. Although the Debtors state that the MOTA transaction will "allow the financial burdens of the Omega Facilities to be assumed by an interim manager,"[16] the terms of the MOTA are not clear on this point. The MOTA provides that all accounts receivable generated after the

[16] *See* MOTA Motion ¶ 17.

Transition Time – which is the time the New Manager begins managing operations at the Omega Facilities – are transferred to the New Manager.[17] Yet the New Manager is not clearly assuming all operational expenses as of the Transition Time.

39. The definition of Assumed Liabilities under the MOTA is limited—providing that the New Operator will only assume (1) the liabilities associated with the Omega Facility Debtors' provider agreements, including any funds received from CMS pursuant to the Medicare Accelerated and Advance Payment Program, and (2) all the Omega Facility Debtors' obligations under the Assumed Contracts after the License Transfer Date.[18] The definition of Assumed Liabilities makes no reference to operational expenses that the Debtors will incur during the "Management Period," which is the period (which may be as long as three months) during which the New Manager would operate the Omega Facilities on the Debtors' behalf.

40. Indeed, although the MOTA is not clear on this point, at least one provision suggests that the Debtors would be obligated to pay the operational expenses incurred during the Management Period. Section 4(b) of the MOTA states that the Debtors and the New Operator will prorate all utility and similar service charges "and any other items of revenue or expense" as of the License Transfer Date.[19] The stated purpose of this provision is to "charge the [Debtors] and reimburse the New Operator for expenses that are accrued but unpaid as of the License Transfer Date."[20] This is contrary to what the Committee understands were the Debtors' intentions with the MOTA.

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17 MOTA § 1(a)(i).

18 *Id.* § 1(d).

19 *Id.* at § 4(b).

20 *Id.*

41. In addition, the provision that arguably requires the New Manager to fund certain expenses is significantly qualified: "New Manager shall fund Facility Operating Expenses ***in its reasonable judgment on an as-needed basis and in accordance with the New Manager's credit line and anticipated disbursements***."[21] For one thing, the Committee has no insight into the sufficiency of the New Manager's "credit line." For another, the New Manager should not only pay expenses that it finds reasonable. Instead, the MOTA should make clear that the New Manager is responsible for ***all*** operational expenses incurred during the Management Period, particularly since the Debtors' DIP budget does not include these expenses.

42. In addition, the MOTA includes certain obligations that the Omega Facility Debtors will have to honor for upwards of a year after the License Transfer Date. Following the License Transfer Date, the Omega Facility Debtors are required to timely provide to the applicable regulatory agency any additional existing information pertaining to final cost reports upon request[22] and must also maintain cash receipts and other books and records to provide the New Operator with the ability to inspect such materials.[23] It is unclear how the Omega Facility Debtors intend to honor such obligations.

B. The MOTA's Ancillary Agreements Require the Debtors to Expend Estate Resources for the Benefit of the New Manager and an Insider

43. The Management Oversight Agreement and the TSA require the Debtors to fund costs the estates should not have to (and cannot) bear. Under the Management Oversight Agreement, the Debtors are required to: (i) procure, at their own expense, all insurance necessary

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21 *Id.* at § 5(b)(iv) (emphasis added). This provision is also qualified in its entirety by the following statement at the end of the provision: "it being understood and agreed that revenues and expenses will be prorated in the manner set forth in Section 4 and Section 6 hereof." *Id.* As noted above, Section 4 prorates expenses as of the License Transfer Date, not the Transition Time.

22 *Id.* at §§ 2(a), 9(e).

23 *Id.* at § 6(e).

to operate the Debtors' facilities;[24] (ii) maintain all employee benefits, workers' compensation insurance and any other insurance that was in effect prior to the Petition Date;[25] and (iii) pay to the New Manager a 5% management fee received from the non-Omega Facilities.[26] It is not clear why the Debtors would fund these costs after transferring their assets, including all revenue generated by the Omega Facilities.

44. In addition, under the TSA, not only would the New Manager pay $188,000 per month to HCN for certain transition services, the Debtors would be required to continue to obtain services from HCN under their existing agreement "at no cost to" the New Manager.[27] Indeed, the MOTA is clear that the New Manager and New Operator will not assume "any liabilities under any contract or agreement between [the Debtors] and [HCN] or any its (sic) non-Debtor affiliates."[28] Moreover, these are costs that are not covered in Omega's DIP budget. If the New Manager is adamant that it will not pay the amounts that the Debtors currently pay to their insiders, there is no reason that the Debtors should have to continue to make such payments.

45. Ultimately, and as noted in the DIP/RSA Objection, the Committee questions whether the Debtors' DIP budget is sufficient to fund these cases. The costs associated with the MOTA that are not paid or assumed by the New Manager or New Operator only increase those concerns. Accordingly, without a reasonable path to administrative solvency, the Debtors cannot

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24 Management Oversight Agreement § 2(a)(iv).

25 *Id.* at § 2(a)(v).

26 *Id.* at § 2(b).

27 *See* TSA at Recital F ("Manager is entering into this [TSA] and the MOTAs with a full expectation that HCN will continue to provide Debtors with such Other Services, ***at no cost to the Manager***, consistent with past practice and in accordance with the 'HCN-Debtor Agreement' . . . .") (emphasis added).

28 MOTA § 1(e)(xi).

meet their burden of establishing that a sound business justification exists for the Transfer Transaction.

RESERVATION OF RIGHTS

46. The Committee reserves all rights to supplement and/or amend this Objection prior to or at any hearing thereon, in the event the Committee's objections raised herein are not resolved; or to further address the MOTA Motion. In addition, nothing set forth in this Objection, or in any resolution(s) with respect to such objection, should be deemed a waiver of any objections or arguments that the Committee may have with respect to any other motion filed by the Debtors.

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CONCLUSION

WHEREFORE, for the reasons set forth herein, the Committee respectfully requests that this Court (i) sustain this Objection and (ii) grant such other and further relief as the Court deems just and equitable.

Dated: November 17, 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*)
77 West Wacker Drive, Suite 3100
Chicago, IL 60601
Telephone: (312) 456-8400
Facsimile: (312) 456-8435
Emails: PetermanN@gtlaw.com
HoweE@gtlaw.com

PROPOSED COUNSEL FOR THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS