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 Nos. 14, 166, 187, 226, 262, 263, 264, 266, 269, 273, 274, 276, 281**

DEBTORS' OMNIBUS REPLY TO OBJECTIONS OF VARIOUS PARTIES TO (I) THE DIP MOTION AND (II) THE MOTA APPROVAL MOTION

Gulf Coast Health Care, LLC ("**Gulf Coast**") and certain of its affiliates and subsidiaries, as debtors and debtors-in-possession in the above-captioned chapter 11 cases (collectively, the "**Debtors**"), hereby reply (the "**Reply**") to the following objections filed by various parties-in-interest with respect to (i) 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 (ii) 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*

[1] 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' 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 9511 Holsberry Lane, Suite B11, Pensacola, FL 32534.

Management and Operations Transfer Agreement; and (V) Granting Related Relief [Docket No. 166] (the "**MOTA Approval Motion**" and, together with the DIP Motion, the "**Motions**"),[2] including:

The DIP Objections

1. *Objection of the Noteholder Claimants 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. 187] (the "**Omega Noteholders' DIP Objection**");[3]

2. *Omnibus Objection of the Official Committee of Unsecured Creditors to the Debtors' DIP Facility and RSA Motions* [Docket No. 226] (the "**Committee DIP Objection**");

3. *Medline Industries, Inc.'s Objection to the Debtors' RSA Motion and Joinder to the Committee's Omnibus Objection* [Docket No. 262] (the "**Medline Joinder**");

4. *Limited Objection of Housing & Healthcare Finance, LLC to (1) Debtors' Motion Regarding Postpetition Financing and Use of Cash Collateral and (2) Debtors' Motion for Entry of Order Approving Assumption of Restructuring Support Agreement* [Docket No. 263] (the "**HUD Lender DIP Objection**");

5. *Limited Objection by the United States to the Debtors' Motion for Entry of Final Order Authorizing Debtor to Incur Debtor-in-Possession Financing and Granting Related Relief* [Docket No. 264] (the "**CMS DIP Objection**");

6. *BME Landlords' Omnibus Objection to (1) Final Relief Pursuant to the Motion of Debtors for Entry of Interim and Final Orders 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* [Docket No. 266] (the "**BME DIP Objection**"); and

7. *Limited Objection of Daniel T. McMurray, Patient Care Ombudsman, to the Debtors' Motion to Utilize Cash Collateral and for DIP Facility* [Docket No.

[2] Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the respective Motions.

[3] The "**Omega Noteholders**" are REIT Solutions II, LLC (f/k/a REIT Solutions, Inc.), SJB No. 2, LLC, JJT No. 1, LLC, Wet One, LLC, and DLF No. 3, LLC.

269] (the "**PCO DIP Objection**" and, collectively with the Omega Noteholders' DIP Objection, the Committee DIP Objection, the Medline Joinder, the HUD Lender DIP Objection, the CMS DIP Objection, and the BME DIP Objection, the "**DIP Objections**"); and

The MOTA Objections

1. *Objection of the Official Committee of Unsecured Creditors to the Debtors' MOTA Motion* [Docket No. 273] (the "**Committee MOTA Objection**");

2. *United States' Objection and Reservation of Rights to the Debtors' Motion for Order Authorizing Transfer of Management, Operations, and Related Assets Free and Clear of Liens, Claims, Encumbrances and Interests and Seeking Related Relief* [Docket No. 274] (the "**CMS MOTA Objection**");

3. *Objection of the United States Trustee 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. 276] (the "**UST MOTA Objection**"); and

4. *Objection of the Noteholder Claimants to 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. 281] (the "**Omega Noteholder MOTA Objection**" and, collectively with the Committee MOTA Objection, the CMS MOTA Objection, and the UST MOTA Objection, the "**MOTA Objections**" and, together with the DIP Objections, the "**Objections**", and the various parties submitting Objections, the "**Objectors**").

In support of the Reply, the Debtors rely on the Motions, the *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) Scheduling a Final Hearing, and (V) Granting Related Relief [Docket No. 15] (the "**DIP Declaration**"), and the *Declaration of M. Benjamin Jones in Support of Chapter 11 Petitions and First Day Pleadings* [Docket No. 16] (the "**First Day Declaration**"), both of which are incorporated herein by reference.[4] In further support of this Reply, the Debtors respectfully represent as follows:

PRELIMINARY STATEMENT

1. A principal goal of chapter 11 is to facilitate the negotiation and consensus building required to ultimately maximize value for the estate. In the Debtors' Chapter 11 Cases, this purpose is undoubtedly complicated by the stark reality that nearly 2,250 people reside in the Debtors' 28 skilled nursing facilities, and that this restructuring is occurring amidst a global pandemic that has disproportionately impacted the elderly and frail, including those which are residents in the Debtors' facilities. And yet, prior to, and following the commencement of the Chapter 11 Cases, the Debtors have remained (and will continue to remain) laser focused on: (i) securing sufficient funding to provide for a smooth transition of *all* of the Debtors' residents, and (ii) maximizing value for their stakeholders. In doing so, prior to the Petition Date, the Debtors, the Omega Entities, and the Debtors' senior secured lender, New Ark (as defined below), all worked collaboratively and constructively to not only provide new money and use of cash collateral in the tens of millions of dollars, but also to preserve the rights of unsecured creditors. Without the support from these critical stakeholders, the Debtors would not have been able to pursue these goals, to the detriment of all of the Debtors' stakeholders, including unsecured

[4] In further support of the Reply and approval of the Motions, the Debtors intend to provide the direct testimony of M. Benjamin Jones at the November 23, 2021 hearing.

creditors. The result is a carefully calibrated, highly negotiated proposed form of final DIP order that satisfies the applicable legal standard under Bankruptcy Code section 363(c)(2).

2. A central component of this financing is approval of the MOTA (as defined below), which would allow the Debtors to limit their additional liquidity needs and attempt to stop the hemorrhaging of cash at the Debtors' financially distressed facilities. Through the MOTA, the Omega Facilities will be transitioned to the New Manager (and ultimately new operators) who will, in turn, be responsible for the operating expenses and losses incurred at the Omega Facilities beginning on December 1, 2021. Importantly, through good-faith and arms' length negotiations, the Debtors demanded—and ultimately New Manager agreed—to fund ***all*** facility operating expenses during this period, as well as to assume very significant liabilities of the Debtors. And despite the desperate attempt by many of the objecting parties to blemish these negotiations with "insider" taint, these negotiations occurred amongst true third-parties with absolutely no affiliation with the Debtors.

3. Taken together, the DIP Motion and the MOTA Motion represent critical aspects of the global resolution of the myriad legal and financial obstacles facing the Debtors while simultaneously minimizing risk to their operations and residents. As is the case in any negotiation, no party received the benefit of *all* of their potential bargains, but this fact alone does not alter the undeniable truth that the DIP Motion and MOTA Motion represent a necessary, reasonable, and appropriate (and the only available) path forward, that allows the Debtors to seamlessly transition the management of their facilities, and subsequently proceed toward an efficient wind-down of their operations.

4. Several of the objecting parties, particularly the Committee (as defined below) and the Omega Noteholders, attempt to craft a false narrative focused almost exclusively on the

Debtors' affiliated entities and equity sponsors and their purported scheme to deprive general unsecured creditors any recovery while, at the same time, obtaining self-serving releases for one another. These vague and baseless assertions do not pass muster, as the facts plainly demonstrate that this purposefully myopic view of the Chapter 11 Cases and the hard-fought negotiations amongst the parties that preceded the Petition Date is far from the truth.

5. Among other things, certain of the Objections take a "kitchen sink" approach to ask the Court to deny the relief requested so they can bargain for more time, more money, and more freedom to litigate. However, notably absent from the Objections are real solutions or alternatives to the DIP Facility or the MOTA. Importantly, the Debtors' significant need for liquidity will only be further exacerbated if (a) the relief sought through the DIP Motion is denied on a final basis and (b) the MOTA is not approved. The proposed DIP Facility provides sufficient operational funding of the Omega Facilities through December 1, 2021 only—and if the DIP Motion is denied on a final basis and the MOTA is not approved, the Debtors will be unable to operate. Notwithstanding these apparent risks, the Committee and other objecting parties continue to lament the expediency at which the Debtors' Chapter 11 Cases and proposed transactions are proceeding. And while the Debtors must recognize the urgency of the situation and the reality of their financial condition, the Debtors have also agreed—in the interest of assuaging many of the Committee's concerns—to modify certain of the critical milestones in the Chapter 11 Cases by more than a month. In addition, the Debtors have agreed to adjourn the November 23, 2021 hearing on assumption of the Restructuring Support Agreement in order to squarely focus the Court and the parties on the critical relief required under the DIP Motion and MOTA Motion.

6. The Debtors continue to remain steadfast on the urgency of *these* Motions, notwithstanding the Objectors' incorrect assertions of, among other things, the lack of a marketing process of the DIP Facility and the MOTA, the purported involvement of "insiders" in the negotiations of each transaction, and the "rushed" timeline of the Debtors' proposed transactions. Instead of recognizing the urgency of the situation and providing real solutions or alternatives to the currently proposed transactions, the Objectors, including the Committee,[5] fall back on baseless allegations that the Debtors, in connection with certain of their affiliated entities, have concocted a scheme to benefit so-called "insiders" to grant themselves "*de facto* releases" to the detriment of unsecured creditors. This could not be further from the truth. In fact, in a desperate attempt to shift the focus from the Debtors' significant liquidity needs to these purported releases, the Committee seizes on the terms "*or otherwise*" in connection with the Debtors' stipulations, thereby concluding that "the terms of the DIP Facility improperly insulate the Equity Parties *before* confirmation of a plan." Committee DIP Obj., ¶¶ 9, 50. Despite this strained reading being plainly incorrect, the Debtors have provided additional clarity in the proposed terms of a Final DIP Order to clarify that such releases are not provided under the DIP Facility.

7. The proposed Final DIP Order affords the Committee with sufficient resources (*i.e.*, time and money) to review whether the Prepetition Secured Parties' liens are properly perfected and whether such transactions could be subject to avoidance. In fact, the proposed form of Final DIP Order provides additional time and budget increases to, hopefully, assuage the

[5] While many of the objections made in the Omega Noteholders' Objections overlap with the Committee's Objections, this Reply largely focuses on the Committee's assertions. For the reasons stated in the *Motion of Debtors to Quash Notices of Deposition and Production Requests* [Docket No. 223], the Debtors maintain that the Omega Noteholders do not have standing in the Chapter 11 Cases, and reserve all rights in connection with these issues, including without limitation, the right to object to any proofs of claim filed by the Omega Noteholders.

Committee's concerns. But the Committee wants *more* money, *more* time, and *more* legal standing than it is entitled to under Third Circuit law. To provide the Committee *carte blanche* to litigate such claims now—without having to carry its burden on the issue of standing and otherwise comply with applicable law and bankruptcy process—would substitute the Committee's judgment for that of the Debtors' independent manager, Mr. Scott Vogel, whose analysis of claims proposed to be released under the Plan is well underway. Ultimately, if the Committee believes there are colorable claims that the Debtors are unjustifiably refusing to pursue, the Committee must file a motion, on proper notice to all affected parties, and satisfy the evidentiary burden at hand to obtain standing from this Court. Under the proposed final order, the Committee would have 82 days from the Committee's formation date to do so—*i.e.*, January 15, 2022. And to be abundantly clear, this extended challenge deadline relates *solely* to the Debtors' stipulations in the Final DIP Order. In contrast, the releases proposed in the Restructuring Support Agreement are undoubtedly subject to confirmation of the Plan, with all parties' rights relating to those objections fully preserved.

8. Much ado is also made in the Objections about the Debtors' purported lack of engagement of an investment banker, lack of consideration of alternatives, and lack of a pre- or post-petition marketing process. Again, these assertions fail to tell the whole story and inexplicably reflect the objecting parties' continued attempts to shoehorn the unique aspects of the DIP Facility, New Ark Financing, and, particularly, the MOTA into traditional boxes that the contemplated transactions do not, and should not be required to fit. Contrary to the assertions raised in several of the Objections, the Debtors and their advisors (which at one point included Houlihan Lokey) spent the months leading up to the Petition Date evaluating ***all*** reasonably available alternatives, including a sale and marketing process, state receivership, chapter 7

liquidation, and reorganizing around certain of the Debtors' facilities. At the end of the day, however, the stark reality for the Debtors was that the Debtors' primary (and only) marketable asset besides the Debtors' cash and accounts receivable was the Omega Master Lease, a lease that was significantly in arrears and could not be marketed on a facility-by-facility basis, under which the operations were hemorrhaging cash, and located in geographies that provided minimal or no state stimulus relief. As such, the Debtors determined, in their reasonable business judgment, that embarking on a full-blown marketing and sale process of the Omega Master Lease would have been an exercise in futility. As a result, the Debtors narrowed their prepetition focus on feasible alternatives that would allow for the seamless transition of their residents to new operators and would provide an appropriate forum and process for all parties-in-interest to participate, including general unsecured creditors. Despite the Committee's continued assertions to the contrary, the transactions contemplated by the DIP and MOTA were designed to benefit both the Debtors and their creditors and pave the way for recovery for general unsecured creditors. And so, the Committee simply misses the point in its scattershot objection. It either fails to understand—or wantonly disregards—the careful bargains struck to form the basis of the Debtors' chosen path forward.

9. As for the MOTA, while the objecting parties (and particularly the Committee) may not agree with all of the terms contained in the MOTA, this Court should reject any attempts by such parties to re-write terms that were heavily negotiated on an arms'-length basis and cherry-pick provisions they prefer while casting aside others they do not, regardless of the bargained-for nature of those terms. The objecting parties seek to focus the Court on the Debtors' concessions without consideration of the benefits of the MOTA and, most critically, fail to propose any realistic alternative other than the DIP Lenders contributing millions of dollars of

additional capital into a process where they already will receive a minimal recovery on the DIP Facility.

10. Since the hearing on November 12, 2021, the Debtors have worked tirelessly with each of the Objectors, in a good-faith effort to narrow the outstanding issues raised in the Objections. And these efforts have borne significant fruit. Contemporaneously herewith, the Debtors have filed a revised proposed Final DIP Order, and a revised proposed MOTA and form of MOTA Order, which memorialize many of these agreed resolutions. As of the time of filing of this Reply, the Debtors believe that they have largely, if not entirely, resolved the HUD Lender DIP Objection, the CMS DIP Objection, and the CMS MOTA Objection. Perhaps most significantly, the Debtors have reached an agreement in principal with the landlords at the Blue Mountain Facilities (the "**BME Landlords**"), and the parties are working diligently to document this agreement and incorporate it into the Final DIP Order.[6] Further, the Debtors believe that, through the revised forms of order, numerous specific objections of the Committee, the Omega Noteholders, and other Objectors are addressed and, hopefully, resolved. These revisions and/or proposals made by the Debtors in response to the Objections, including certain resolved issues, are reflected in the summary chart attached hereto as **Exhibit A**. The Debtors will continue to narrow the outstanding issues in advance of the November 23, 2021 hearing.

11. For the reasons stated above and in greater detail below, the Debtors respectfully request that the Court (i) overrule the DIP Objections and MOTA Objections that remain unresolved and outstanding; (ii) grant the relief requested in the DIP Motion and MOTA Motion on a final basis; and (iii) enter the revised proposed Final DIP Order and the revised proposed MOTA Order.

[6] To the extent final documentation cannot be reached, the Debtors reserve all rights in connection with the Blue Mountain Landlord Objection.

RELEVANT BACKGROUND

I. The Chapter 11 Cases

12. On October 14, 2021 (the "**Petition Date**"), each Debtor commenced a case by filing a petition for relief under chapter 11 of the Bankruptcy Code (collectively, the "**Chapter 11 Cases**"). The Chapter 11 Cases are being jointly administered for procedural purposes only.

13. The Debtors continue to operate their businesses and manage their properties as debtors and debtors-in-possession pursuant to Bankruptcy Code sections 1107(a) and 1108.

14. Additional information regarding the Debtors and these Chapter 11 Cases, including the Debtors' business operations, capital structure, financial condition, and the reasons for and objectives of these Chapter 11 Cases, is set forth in the First Day Declaration.

15. On October 20, 2021, the Court entered an order, pursuant to Bankruptcy Code section 333 and Bankruptcy Rule 2007.2, directing the Office of the United States Trustee for the District of Delaware (the "**U.S. Trustee**") to appointment a patient care ombudsman (the "**PCO**") in the Chapter 11 Cases [Docket No. 91]. On October 25, 2021, the U.S. Trustee filed a notice of the appointment of Daniel McMurray of Focus Management Group, U.S.A., to serve as PCO in the Chapter 11 Cases [Docket No. 112].

16. On October 25, 2021, the U.S. Trustee appointed an Official Committee of Unsecured Creditors in the Chapter 11 Cases (the "**Committee**") pursuant to Bankruptcy Code section 1102(a) [Docket No. 111]. No trustee or examiner has been appointed in the Chapter 11 Cases.

II. Events Leading up to the Chapter 11 Cases

17. As set forth in the First Day Declaration, the Debtors are licensed operators of 28 skilled nursing facilities (the "**Facilities**" and, each, a "**Facility**") comprising nearly 3,350

licensed beds across Florida, Georgia, and Mississippi. The Debtors are leaders among skilled nursing facility operators in the Southeastern United States and provide short-term rehabilitation, comprehensive post-acute skilled care, long-term care, assisted living, and therapy services in each of their Facilities and have earned a reputation for excellence in resident care.

18. The Debtors do not own the underlying real property at the Facilities, but rather lease or sublease their respective facilities from two landlords. The Debtors lease 24 Facilities (the "**Omega Facilities**") from certain indirect affiliates and subsidiaries of Omega Healthcare Investors, Inc. ("**Omega**" and, collectively, the "**Omega Landlords**") and four Facilities (the "**BME Facilities**") from the BME Landlords.

19. Over the year and a half prior to the Petition Date, the Debtors faced significant fiscal challenges emanating from the unprecedented and still ongoing COVID-19 pandemic, as they grappled with caring for their residents and maintaining sufficient operational liquidity amidst constantly changing conditions. Among other things, the Debtors, as a result of COVID-19, experienced decreased resident occupancy levels, crippling staffing and employee retention issues, and increased operating expenses associated with personal protective equipment, labor pressures, and other associated costs, all of which have impacted the healthcare sector generally and operators of skilled nursing facilities in particular.

20. In light of these developments, the Debtors engaged financial and legal advisors earlier this year to explore potential paths forward, including in- and out-of-court strategic alternatives and restructuring initiatives. Following months of financial and operational analysis with their restructuring advisors, as well as an accelerated period of intense, confidential restructuring negotiations with certain of the Debtors' key stakeholders, including the landlords Omega Landlords and the Debtors' senior secured lender, New Ark Capital, LLC ("**New Ark**"),

the Debtors determined that the most appropriate course of action would be to transfer the operations of all of the Debtors' Facilities to new operators and subsequently wind down the Debtors' operations.

21. Prior to the Petition Date, the Debtors provided various proposals to the Omega Landlords regarding restructuring options to ensure sufficient funding for the Debtors' Facilities during the pendency of the Chapter 11 Cases. To that end, the Debtors and the Omega Landlords agreed on a transition process and timeline that would allow the financial burdens of the Omega Facilities to be assumed by an interim manager during the regulatory waiting periods and would allow the Omega Facilities to be transitioned to new licensed operators. To that end, the Debtors and the Omega Landlords, along with New Ark, OHI Asset Funding (DE), LLC (the "**DIP Lender**"), the Omega Landlords (together with the DIP Lender, the "**Omega Entities**"), direct and indirect equity holders of the Debtors (the "**Equity Sponsors**"), and certain affiliated entities that provide services to the Debtors (the "**Service Providers**" and, collectively with the Debtors, the Omega Entities, New Ark, and the Equity Sponsors, the "**RSA Parties**") executed the Restructuring Support Agreement (the "**RSA**"),[7] dated October 14, 2021, which reflects a global resolution of the claims of the Omega Landlords and New Ark and contemplates the transition of the Omega Facilities to be implemented through the MOTA.

III. The DIP Motion

22. On the Petition Date, the Debtors filed the DIP Motion, seeking authority to enter into the $25 million DIP Facility, $15.75 million of which would be available on an interim

[7] The Debtors previously filed a motion seeking the Court's approval of the Debtors' assumption of the RSA. *See Motion of Debtors for Entry of Order Approving Assumption of Restructuring Support Agreement* [Docket No. 107] (the "**RSA Motion**"). As reflected in the *Notice of Adjournment of Hearing with Respect to (I) Motion for Approval of Restructuring Support Agreement and (II) Motion for Extension of Automatic Stay* [Docket No. 289], the RSA Motion has been adjourned to the December 2, 2021 hearing in the Chapter 11 Cases.

basis, and the New Ark Financing, through which New Ark would provide up to $7 million of an operational advance as well as permitted use of existing cash collateral to fund process costs and professional fees and expenses during the Chapter 11 Cases. On October 15, 2021, the Court entered the *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 Order**").

23. On November 5, 2021, November 11, 2021, and November 16, 2021, the DIP Objections were filed. *See* Docket Nos. 187, 226, 262, 263, 264, 266, 269.

IV. MOTA Approval Motion

24. On November 3, 2021, the Debtors filed the MOTA Approval Motion. As set forth in the MOTA Approval Motion, the Debtors are seeking Court approval to transfer the operations of the Omega Facilities to NSPRMC II, LLC, which will serve as an interim manager (the "**New Manager**") beginning on December 1, 2021 (the "**Management Transfer Date**"), pursuant to certain management and operations transfer agreements (collectively, the "**MOTA**").

25. The New Manager will then either (i) elect to become the new operator for some or all of the Omega Facilities or (ii) select one or more new, licensed operators (collectively, "**New Operator**") and subsequently assign the MOTA to New Operator on the date that New Operator has obtained all requisite approval and licenses to operate the applicable Facility (the "**License Transfer Date**").[8] Under the MOTA, the facility operating expenses of the Omega

[8] Because one of the Omega Facilities, Panama City Health and Rehabilitation Center, is not currently operational, New Manager will not be required to assume operations at such facility prior to the License Transfer Date. Rather, the current operators of such facility may transfer the assets and provider numbers and agreements associated with such facility to New Operator on the License Transfer Date.

Facilities will no longer be borne by the Debtors as of December 1, 2021, but at that time will be borne by the New Manager, which will allow the Debtors to focus their efforts on reaching a similar resolution with the Blue Mountain Landlords, and otherwise progressing the wind down of their affairs through the Plan (as defined herein). *See* MOTA Approval Motion, ¶ 4.

26. On November 17, 2021, the MOTA Objections were filed. *See* Docket Nos. 273, 274, 276, 281.

OMNIBUS REPLY

I. The DIP Objections Should Be Overruled and the DIP Motion Should Be Granted on a Final Basis.

27. As discussed above and as further reflected on **Exhibit A**, attached hereto, prior to and following the filing of the DIP Objections, the Debtors worked extensively to seek to resolve issues raised by the objecting parties through (i) the addition or revision of language to the proposed Final DIP Order; (ii) modifications to the DIP Milestones, and (iii) revisions to the Omega DIP Budget and the New Ark Budget. To the extent not otherwise resolved, the remaining DIP Objections, including those filed by the Committee and the Omega Noteholders, should be overruled.

A. The Debtors Have Satisfied the Appropriate Standard for Approval of the DIP Facility.

28. The Debtors propose to obtain financing pursuant to Bankruptcy Code section 364(c). The statutory requirement for obtaining postpetition credit under Bankruptcy Code section 364(c) is a finding, made after notice and hearing, that a debtor is "unable to obtain unsecured credit allowable under section 503(b)(1) of [the Bankruptcy Code]." 11 U.S.C. § 364(c); *see also In re Crouse Grp., Inc.*, 71 B.R. 544, 549 (Bankr. E.D. Pa. 1987) (secured credit under Bankruptcy Code section 364(c) is authorized, after notice and hearing, upon

showing that unsecured credit cannot be obtained). Courts have articulated a three-part test to determine whether a debtor is entitled to financing under Bankruptcy Code section 364(c), including whether (a) the debtor is unable to obtain unsecured credit under Bankruptcy Code section 364(b) by allowing a lender only an administrative claim; (b) the credit transaction is necessary to preserve the assets of the estate; and (c) the terms of the transaction are fair, reasonable, and adequate, given the circumstances of the debtor-borrower and proposed lenders. *See In re Ames Dept. Stores*, 115 B.R. 34, 37-40 (Bankr. S.D.N.Y. 1990); *Norris Square Civic Assocs. v. St. Mary Hosp. (In re St. Mary Hosp.)*, 86 B.R. 393, 401-02 (Bankr. E.D. Pa. 1988); *In re Crouse Grp., Inc.*, 71 B.R. at 549.

29. Here, the Debtors clearly have met the governing standard for approval of the DIP Facility. *First*, the Debtors were unable to obtain unsecured credit under Bankruptcy Code section 364(b) from its existing secured creditors or any other lender. Indeed, as discussed in the DIP Declaration, a significant injection of new money in addition to the use of existing cash collateral was necessary to fund the Debtors' operations. *See* DIP Decl., ¶ 12. *Second*, the DIP Facility is critical and necessary in order to preserve the assets of the Debtors' estates, continue operations of the Debtors' facilities, and protect the health and safety of the Debtors' residents. The DIP Facility and New Ark Financing, which include $25 million of new money in addition to the significant use of existing cash collateral, will facilitate the Debtors' continued operations by satisfying the Debtors' postpetition obligations to their residents, vendors, suppliers, and employees and reassuring these parties that the Debtors have the funding necessary to continue operating in the ordinary course of business. *See* DIP Decl., ¶ 14. Without the DIP Facility and New Ark Financing, the Debtors would be unable to fund their ongoing operations and the

process costs of the Chapter 11 Cases, which would substantially reduce the value of their estates and leave the Debtors with no choice but to empty their facilities and relocate their residents.

30. *Third*, as further described herein, the terms of the DIP Facility and New Ark Financing are fair, reasonable, and adequate, given the circumstances in the Chapter 11 Cases and were subject to arms'-length and good faith negotiations between the parties after the Debtors considered all other viable financing alternatives, including competing DIP proposals from New Ark and Omega. During these negotiations, the Debtors, the DIP Lender, and New Ark were represented by sophisticated counsel. This negotiation process supports a finding that the Debtors exercised due care, good faith, and their reasonable business judgment in deciding to enter into the DIP Facility and the New Ark Financing. The relief contemplated by the DIP Motion represents the best (and only) financing option available to the Debtors. *See* DIP Decl., ¶¶ 15-16. Without access to the DIP Facility and the use of cash collateral, the Debtors would have no choice but to relocate their residents to other facilities and convert their cases to chapter 7.

31. The Committee and the Omega Noteholders argue that heightened scrutiny should apply to the Debtors' DIP Facility because New Ark (and perhaps the Omega Entities, according to the Omega Noteholders) is an "insider." *See* Committee DIP Obj., ¶¶ 36-39; Omega Noteholder DIP Obj., at ¶ 3 (incorporating arguments from Docket No. 186). As discussed below, the fact that New Ark shares common indirect beneficial ownership with the Debtors is not remarkable, and does not by itself justify heightened scrutiny. Of course, the Committee purposefully omits that the DIP Lender—the Omega Entities, which are affiliated with a publicly-traded real estate investment trust and are *not* affiliated or related to the Debtors in any way—was a primary constituent in these intense negotiations. Although the Committee and the

Omega Noteholders spill much ink on the fact that New Ark and the Debtors maintain common indirect beneficial ownership, neither the Committee nor the Omega Noteholders point to any evidence of self-dealing, bad faith, or gross negligence that would justify heightened scrutiny of the Debtors. However, even if the Court were to apply a heightened standard of review, the Debtors submit that such standard would be met here.

32. In applying heightened scrutiny, courts typically look to the integrity and entire fairness of the transaction at issue, generally examining whether the process and terms of a proposed transaction not only appear fair but are fair and whether fiduciary duties were taken into consideration. *See In re Innkeepers USA Trust*, 442 B.R. 227, 231 (Bankr. S.D.N.Y. 2010); *In re L.A. Dodgers, LLC*, 457 B.R. 308, 313 (Bankr. D. Del. 2011) (indicating that the entire fairness standard "requires proof of fair dealing and fair price and terms"); *In re Green Field Energy Servs., Inc.*, 594 B.R. 239, 297 (Bankr. D. Del. 2018) (stating that entire fairness requires "(i) fair dealing and (ii) fair price, examined together as a whole"). The analysis of "fair dealing" involves the consideration of "elements such as (a) when the transaction was timed, (b) how it was initiated, (c) how it was structured, (d) how it was negotiated, (e) how it was disclosed to the directors, and (f) how the approvals of the directors and the stockholders were obtained," while the analysis of "fair price" involves "economic and financial considerations of the proposed merger, including . . . assets, market value, earnings, future prospects, and any other elements that affect the intrinsic or inherent value of a company's stock." *In re Green Field Energy Servs., Inc.*, 594 B.R. at 297; *see also In re LATAM Airlines Group S.A.*, 620 B.R. 722, 773-74 (Bankr. S.D.N.Y. 2020) ("Fair dealing focuses on the actual conduct of corporate fiduciaries in effecting a transaction, such as its initiation, structure, and negotiation."). However, "the test for fairness is not a bifurcated one as between fair dealing and price," but

rather "all aspects of the issue must be examined as a whole since the question is one of entire fairness." *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710 (Del. 1983).

33. At bottom, entire fairness essentially asks a simple question: given the totality of the circumstances, were the deal terms reasonable and reflective of what would otherwise have been bargained for in a third-party, arms-length transaction? Here, the answer is unequivocally yes. As discussed above, the Debtors, the Omega Entities, and New Ark—each a sophisticated party represented by separate counsel—negotiated the DIP Facility and New Ark Financing for several weeks at arms'-length and in good faith. The terms of the DIP Facility and New Ark Financing were bargained-for and provided in exchange for significant concessions by the Debtors, the Omega Entities, and New Ark and include terms that are commercially reasonable and customary in similar financing arrangements. The DIP Facility and New Ark Financing also were approved by the Debtors' independent manager.[9]

34. Notably, the Committee relies in part on *In re L.A. Dodgers LLC* for the proposition that entire fairness applies. However, the *L.A. Dodgers* case has limited application here, insofar as the Court focused on the conduct of Frank McCourt, the principal and dominant figure of the debtor, in his determination to move forward with a secured DIP facility that would eliminate a personal liability of $5.25 million rather than accept an unsecured DIP facility that offered better terms across the board. *See* 457 B.R. at 312. The court ultimately found that, pursuant to the plain language of Bankruptcy Code section 364(b), the Dodgers were not permitted to obtain secured financing in light of the availability of unsecured financing. *Id.* at 313-14. Here, the decision faced by the Debtors is not one of choosing between two alternative

[9] The Committee takes issue with the timing of Mr. Vogel's appointment. *See* Committee DIP Obj., ¶ 14. However, the Committee ignores the fact that Mr. Vogel was engaged by the Debtors as a consultant in July 2021, and remained fully engaged and informed with respect to all material developments concerning the Debtors and their restructuring efforts from that point forward.

financings, but rather one of whether to accept the only offer on the table. To be clear, no other alternative financing offers exist for the Debtors.

35. Rather than examining the nuances of Delaware law on this question or offering particularized facts, the Committee and Omega Noteholders merely allege that the involvement of New Ark, an entity that shares common indirect beneficial ownership with the Debtors, subjects the DIP Facility to heightened scrutiny and that the Debtors have failed to satisfy the standard. The entire fairness standard of review, properly understood under Delaware law, requires, at a minimum, an explanation of why the financing terms here are not market given the totality of the circumstances—circumstances which include the lack of financing alternatives available to the Debtors, the Debtors' lack of unencumbered assets to offer as collateral, and the projected lack of recovery for the DIP Lender. Merely asserting, as both the Committee and the Omega Noteholders do, that unsecured creditors may receive nothing—clearly a plan confirmation issue and a mischaracterization of the "blank" currently provided for the unsecured claims cash pool—does not make the DIP Facility "unfair," much less satisfy the exacting standards of an entire fairness allegation.

36. Moreover, the attempts of both the Committee and the Omega Noteholders to purposefully malign the Debtors' business judgment through allegations of implied misdeeds or self-dealing on behalf of purported "insiders" are unsupported innuendo or derive from mischaracterizations of the actual facts. Both the Committee and the Omega Noteholders attempt to impugn the Debtors' business judgment by insinuating (without *any* factual support) that the DIP Facility and New Ark Financing were negotiated in part "for the Equity Parties' primary benefit" in order "to shield their prepetition dealings with the Debtors." Such assertions simply rewrite history to the Debtors' detriment. In actuality, the DIP Facility and New Ark

Financing were heavily negotiated at arms'-length by the Debtors, New Ark, and the Omega Entities, each sophisticated parties represented by separate counsel. The DIP Facility and New Ark Financing were considered in light of all of the circumstances facing the Debtors at the time and were approved by the Debtors' independent manager.

37. Based on the foregoing, even if the Court were to apply a heightened standard of scrutiny, the Debtors submit that such standard is satisfied.

B. Despite the Vague Assertions to the Contrary, the Debtors Marketed the DIP Facility to Other Potentially Interested Parties.

38. The Omega Noteholder DIP Objection argues that the DIP Motion should be denied on a final basis because it is "unclear what marketing efforts the Debtors undertook to obtain DIP Facility." *See* Omega Noteholder DIP Obj., at ¶ 3. This vague and baseless assertion simply does not merit denying the relief requested in the DIP Motion, particularly because the Omega Noteholders fail to provide any evidence that the Debtors failed to explore other available sources of financing or that the Debtors' efforts were insufficient to provide a market check on the process. To the contrary, as set forth in the DIP Declaration, the Debtors contacted five potential financing sources in addition to New Ark and the Omega Entities (who submitted multiple competing financing proposals) to solicit competing DIP proposals, one of which executed an NDA. *See* DIP Decl., ¶ 10. The feedback from these parties was conclusive—no party was willing to provide postpetition DIP Facility based upon the lack of collateral and likelihood of repayment. *Id.* Additionally, the Omega Landlords and New Ark submitted competing DIP term sheets in the weeks leading up to the Petition Date, creating a competitive process even amongst the Debtors' existing secured creditors that occurred as a part of arms'-length, good faith negotiations between sophisticated parties represented by separate counsel.

See id., ¶¶ 11-12. Therefore, any suggestion of "unclear marketing efforts" falls short of merit based on the evidence already in the record.

C. The DIP Budgets Provide for Payment of Administrative Expenses and Accounts for "Reasonable Compensation" for the PCO.

39. The Committee argues that it is "unclear whether the DIP Facility actually funds the Debtors' operations and wind-down and provides a path for administrative solvency." Committee DIP Obj., ¶¶ 52-54. The Debtors disagree—the Debtors, with the assistance of their CRO and their other advisors, have developed revised budgets (each of which is filed contemporaneously herewith) that are projected to enable them to continue their operations, transfer their facilities, and administer the Chapter 11 Cases, culminating in a winddown of their operations. The mere inclusion of payments to Halcyon, HCN, and HMS—each of which provide much-needed services to the Debtors—in the DIP Budget does not mean that the Debtors will be administratively insolvent, as the Committee suggests. *See* Committee DIP Obj., ¶ 53. The development of a DIP budget is a task that belongs to the Debtors, whose management and advisors can most appropriately assess the business, evaluate assumptions, and craft a budget in line with the Debtors' needs and objectives. The current budget provides a realistic assessment of the Debtors' needs and provides a solid financial framework through which the Debtors can operate their facilities in chapter 11 and does not suggest administrative insolvency.

40. The PCO objects to the DIP Motion on a limited basis because "the budget only includes vague and inadequate, if any funding for the Ombudsman and his professionals . . ." PCO DIP Obj., ¶ 29. The Debtors are currently in the process of revising the DIP Budgets to incorporate "reasonable compensation" for the PCO and his professionals, subject to ongoing negotiations of the appropriate budgeted amount.

D. The Committee's Other DIP Objections Are Either Addressed in the Final DIP Order or Should Be Overruled.

41. While the Committee at least acknowledges and does not dispute the Debtors' need for postpetition financing, the Committee effectively seeks to rewrite the economic terms of the DIP Facility and New Ark Financing by raising a myriad of objections to individual provisions, all of which are reasonable and customary under the circumstances. It is unrealistic (and indeed dangerous) to expect that the DIP Lender and New Ark will continue to fund and/or provide ongoing access to cash collateral (particularly where, as here, such amounts are unlikely to be repaid) if essential protections that were specifically bargained-for in exchange for significant consideration are stripped based upon unsupported and largely irrelevant allegations by the Committee. With those considerations in mind, the Debtors now turn to the Committee's other DIP objections, each of which have no merit and should be overruled.

i. The Provisions Governing the Committee Challenge Period and Related Budget, as Increased, Are More Than Sufficient for the Committee to Fulfill its Fiduciary Duties.

42. The Committee has requested additional time to investigate the validity and extent of the prepetition and adequate protection liens and claims against New Ark, as well as an increase in the related investigation budget, arguing that the current terms are "woefully inadequate" to fulfill the Committee's fiduciary duties. Committee DIP Obj., ¶ 46. In doing so, the Committee asserts that its allocated investigation budget should have "no limitation" and should be with "no time restriction." *Id.* at ¶ 51.

43. Although the Committee and other Objectors argue that DIP Facility restricts the Committee with respect to *all* of the Debtors pre-petition transactions, this is simply not the case. The Committee identifies two words—"or otherwise"—in a 72-page DIP order, hoping to persuade other parties that the DIP financing is simply "another 'back door' provision to protect

conflicted insiders." Committee DIP Obj., ¶ 50. Although the Debtors simply disagree that the Committee's strained reading withstands any scrutiny, in an effort to clarify what the Debtors believe was already crystal clear, that provision of the proposed form of Final DIP Order makes clear that the challenge period and investigation budget relate solely to the Debtors' stipulations related to the Prepetition Loan Documents, the Omega Master Lease Documents, the Prepetition Secured Obligations, the Prepetition Liens and the DIP Documents. In hopefully narrowing and otherwise putting to bed the Committee's theories regarding these supposed "back door" provisions, the Debtors submit that the previous investigation budget ($50,000) and challenge deadline (January 1, 2022) should be more than sufficient. Moreover, because the Committee's professionals have advised creditors' committees in numerous healthcare restructurings, and in light of the resources made available immediately following their appointment by the Debtors and their advisors, the Debtors are confident that the Committee can accomplish its investigation in line with the proposed budget. Nevertheless, in a further effort to narrow the issues, the proposed form of Final DIP Order provides for an increase in the investigation budget to $100,000, and an extension of the Committee's challenge deadline to January 15, 2022.

44. Not only is the challenge period nearly a month longer than provided under the Local Rules, but the investigation budget is commensurate with, if not significantly higher than, investigation budgets included in other DIP facilities approved in this District. *See, e.g.*, *In re TECT Aerospace Grp. Holdings*, Case No. 21-10670 (KBO) (May 13, 2021) (providing for a $75,000 investigation budget with respect to a $60 million DIP facility); *In re Wardman Hotel Owner, L.L.C.*, Case No. 21-10023 (JTD) (Bankr. D. Del. Feb. 9, 2021) (providing for a $10,000 investigation budget with respect to an $8 million DIP facility); *In re Quorum Health Corp.*, Case No. 20-10766 (KBO) (Bankr. D. Del. May 6, 2020) (providing for a $50,000 investigation

budget with respect to a $100 million DIP facility); *In re 24 Hour Fitness Worldwide, Inc.*, Case No. 20-11662 (KBO) (Bankr. D. Del. July 21, 2020) (providing for a $100,000 investigation budget with respect to a $500 million DIP facility).

45. Relatedly, the Committee asserts that its professional fee budget, which is currently $262,500, is "wholly inadequate." Committee DIP Obj., ¶ 65. Although not specified in the Committee's Objection, the Committee has sought to increase its line-item budget by more than **ten-fold**. While the Committee has every right to demand a substantial budget, the Debtors' senior secured lender has no obligation to consent to a blanket carve-out of its liens and claims to fund a war chest of millions of dollars for the Committee to litigate with that secured creditor and its affiliated entities. This is particularly true where, as here, the cash collateral provided by New Ark to fund the carve-out is not projected to be repaid.

46. The decision *In re Molycorp, Inc.*, 562 B.R. 67 (Bankr. D. Del. 2017) is instructive. There, Judge Sontchi determined that "experienced bankruptcy practitioners, such as the attorneys for the Committee in this case may "run the risk of non-payment or partial payment whenever there is an adequate protection shortfall under section 507(b), super-priority borrowing under section 364, or conversion of the case and subordination of Chapter 11 administrative expenses under section 726(b) of the Bankruptcy Code." *In re Molycorp, Inc.*, 562 B.R. at 76 (internal citations omitted). In ruling on the creditors' committee fee applications for more than $8 million, despite a carve-out of $250,000, the Delaware bankruptcy court held that "the dollar-amount cap was going to come into play if the attempts to confirm a reorganization plan had failed; it was not intended to come into play if a Chapter 11 plan was confirmed" and allowed administrative expenses are paid in full. *Id.* at 80.

47. Parties may not always agree on a Debtors' DIP budget, and in that case the Committee cannot hold the secured lender hostage by seeking unreasonable amounts to fund endless litigation. Indeed, "[i]n every case there is the uncertainty that the estate will have sufficient property to pay administrative expenses in full." *In re Molycorp, Inc.*, 562 B.R. at 76. The Committee's professionals—just like the Debtors' professionals—will be required to submit fee applications, and seek allowance of such fees as reasonable under section 330 of the Bankruptcy Code. And to the extent that such fees exceed the budgeted carve-out amounts agreed-upon and in accordance with the Final DIP Order, will be allowed as administrative expenses and paid in full to the extent a chapter 11 plan is confirmed in the Chapter 11 Cases. Of course, the Debtors are sensitive to the Committee's concerns, and as a result, provided a substantial increase in the budgeted fees for the Committee professionals. Further, the Final DIP Order provides for the ability of the Debtors to modify and increase budgeted amounts as the Chapter 11 Cases progress. The Debtors have worked with the Committee and the RSA Parties to adjourn the hearing on the Disclosure Statement by more than a month, and believe that this "breathing room" will help the parties navigate a consensual path forward. Based upon these considerations, the Debtors submit that the proposed increased budget is more than adequate and certainly allows the Committee more than sufficient amounts to fulfill its statutory and fiduciary duties.

ii. Contrary to the Committee's Assertions, Granting Liens on Unencumbered Assets, Including Proceeds of Avoidance Actions, is Appropriate.

48. The Committee objects to the Debtors' grant 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, arguing that "[a]ll unencumbered assets and their products and

proceeds should remain unencumbered and available to fund distributions to general unsecured creditors." Committee DIP Obj., ¶¶ 62-64. Of note, as of the Petition Date, substantially all of the Debtors' prepetition assets were encumbered and subject to liens and/or security interests. As a result, the Debtors have few, if any, unencumbered assets aside from avoidance actions and other causes of action. As discussed herein and in the DIP Declaration, the Debtors have no other means of obtaining financing—whether from their own operations or from another lender—and the DIP Lender will not lend (and could not reasonably be expected to lend) without some type of security. As a result, the Debtors made the determination, in their reasonable business judgment, to encumber the Debtors' previously unencumbered assets in order to obtain vital financing to fund the Debtors' operations.

49. In any case, the Committee's DIP Objection on this issue is legally deficient. Liens and superpriority claims on unencumbered assets, which include avoidance actions, are not only permissible, but expressly included in the type of security a bankruptcy court may approve under Bankruptcy Code section 364. *See* 11 U.S.C. § 364(c)(2). Further, despite the Committee's assertions to the contrary, unencumbered assets, including proceeds from avoidance actions, commercial tort claims, and other claims are not solely reserved for the benefit of unsecured creditors (as the Committee suggests), but rather more broadly inure to the benefit of the estate. *See* 11 U.S.C. § 550(a) (preserving avoidance action recoveries "for the benefit of the estate"); *In re Physiotherapy Holdings, Inc.*, Case No. 13-12965 (KG), 2017 WL 5054309, at *8 (Bankr. D. Del. Nov. 1, 2017) (holding that "the estate is more than the interest of creditors" and that "'for the benefit of the estate' does not mean for the benefit of creditors" but rather "'all legal or equitable interests of the debtor in property as of the commencement of the case'") (citations omitted).

50. In enacting Bankruptcy Code section 364, Congress recognized the natural reluctance of lenders to extend credit to a company in bankruptcy and, therefore, designed the statute to provide "incentives to the creditor to extend post-petition credit." *Unsecured Creditors' Comm. v. First Nat'l Bank & Trust Co. of Escanaba (In re Ellingsen MacClean Oil Co.)*, 834 F.2d 599, 603 (6th Cir. 1987), *cert denied*, 488 U.S. 817 (1988). Specifically, the language of Bankruptcy Code section 364 was formulated to encourage postpetition financing by providing postpetition lenders with security in a debtor's assets and priority over administrative costs. In particular, courts have maintained that limiting the protections offered by section 364 undercuts the goals of bankruptcy and would cause a chilling effect on postpetition lending. *See In re Florida West Gateway, Inc.*, 147 B.R. 817 (Bankr. S.D. Fla. 1992).

51. Undoubtedly, proceeds of avoidance actions are property of a debtor's estate under Bankruptcy Code section 541(a)(3), which provides that any interest in property that a trustee recovers in an avoidance action under Bankruptcy Code section 550 is property of the estate. *See* 11 U.S.C. § 541(a)(3). Accordingly, like all other property of the estate, proceeds of avoidance actions may be pledged to secure the claims of secured creditors. *See In re Applied Theory Corp.*, Case No. 02-11868, 2008 WL 1869770, at *1 (Bankr. S.D.N.Y. Apr. 24, 2008) ("Of course those assets started out unencumbered. But those assets can thereafter be encumbered (or made available to satisfy superpriority claims), if necessary to provide adequate protection. That's expressly authorized under section 361(2)."). In fact, none of the authorities that the Committee cites in its Objection provide that avoidance actions are for the *exclusive* benefit of unsecured creditors. Rather, each case stands for the proposition that avoidance actions are meant to benefit all creditors, secured and unsecured alike.

52. Ultimately, the proceeds of avoidance actions are unencumbered assets like any other and, as such, can be pledged as collateral to adequately protect secured creditors. Adequate protection liens on unencumbered assets are expressly contemplated by Bankruptcy Code section 361. *See* 11 U.S.C. § 361(2) ("[A]dequate protection may be provided by . . . providing to such entity an additional or replacement lien."). Therefore, nothing in the Bankruptcy Code prohibits the grant of such liens on proceeds of avoidance actions or mandates consideration of the nature of unencumbered assets before they can be pledged as collateral for DIP Facility or as adequate protection.

53. Against this backdrop and in a sound exercise of their reasonable business judgment, the Debtors have negotiated and agreed to the DIP Facility from the DIP Lender including an all-asset DIP Lien (subject to certain collateral exclusions) and superpriority claims for the DIP Lender and New Ark. Inexplicably, the Committee argues that this amounts to "a *de facto* release of claims against the Equity Parties." Committee DIP Obj., ¶ 64. What the Committee fails to recognize is that the DIP Facility (and the New Ark Funding) is unlikely to be repaid, and contemplates use of cash collateral that will not be replenished—and the shortfall likely will be in the ***tens of millions of dollars***. Where courts rule that DIP lenders and secured lenders are not entitled to a lien on unencumbered assets, they invariably determine that the pre-petition secured parties either have a substantial equity cushion, or otherwise would not be able to show any diminution in the value of their pre-petition collateral, to conclude that such parties are not entitled to a DIP lien or adequate protection lien on unencumbered assets. The facts in the Chapter 11 Cases could not be more different. The DIP Lender and New Ark are facing substantial diminution in value on account of their prepetition claims, and the recovery on the DIP obligations and New Ark Funding are, at best, uncertain.

54. And, of course, as detailed at length in this Reply and otherwise clarified in the proposed Final DIP Order, only New Ark's Prepetition Loan Omega's Master Lease, and superpriority claims and adequate protections under the DIP Facility are subject to the challenge deadlines and investigation budgets; all other transactions may continue to be assessed by the Debtors and the Committee. Releases, if they are to be granted at all, would be provided in connection with Plan confirmation, with all parties-in-interest reserving the right to raise objections to those and any other provisions of the Plan, in accordance with Bankruptcy Code section 1129. Those issues are not before the Court and clearly should not prevent final approval of the relief requested in the DIP Motion.

55. The Committee has not offered any persuasive reason why proceeds of avoidance actions cannot be used to secure critical financing where no better financing or cash collateral option is available. Moreover, liens on unencumbered avoidance action proceeds and other claims are consistently approved in this District. *See, e.g.*, *In re TECT Aerospace Grp. Holdings*, Case No. 21-10670 (KBO) (May 13, 2021) [Docket No. 174] (approving liens on proceeds of avoidance actions); *In re smarTours, LLC*, Case No. 20-12625 (KBO) (Nov. 6, 2020) [Docket No. 108] (same); *In re Muji U.S.A. Limited*, Case No. 20-11805 (MFW) (Aug. 11, 2020) [Docket No. 105] (same); *In re GNC Holdings, Inc.*, Case No. 20-11662 (KBO) (July 21, 2020) [Docket No. 502] (same); *In re AAC Holdings Inc.*, Case No. 20-11648 (JTD) (July 15, 2020) [Docket No. 159] (same); *In re Quorum Health Corp.*, Case No. 20-10766 (KBO) (May 6, 2020) [Docket No. 286] (same); *In re Southland Royalty Company LLC*, Case No. 20-10158 (KBO) (Feb. 26, 2020) [Docket No. 188] (same). Therefore, for these reasons, the Debtors respectfully submit that the grant of liens on proceeds of avoidance actions is appropriate here.

iii. The Proposed Waivers of Bankruptcy Code Sections 506(c) and 552(b) and the Equitable Doctrine of Marshaling Are Appropriate.

1. Waiver of Rights Under Bankruptcy Code Section 506(c)

56. The Committee objects to the Debtors' proposed waiver of rights under Bankruptcy Code section 506(c) relating to surcharges on the DIP Collateral, Omega Landlord Collateral, and Prepetition Working Capital Collateral, arguing that "there is no justification for a preemptive waiver" of these rights and that they "should not be waived in a blanket fashion." Committee DIP Obj., ¶ 57. The Committee's arguments are misplaced. Bankruptcy Code section 506(c) allows a debtor to "recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property." 11 U.S.C. § 506(c). Such claims are an asset of the debtor and are not available to any creditor or other party-in-interest. *See Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) ("[T]he trustee is the only party empowered to invoke [section 506(c)]."); *In re Redden*, Case No. 04-12335 (PJW), 2013 WL 5436368, at *2 (Bankr. D. Del. Sept. 30, 2013) (holding that the trustee is the only party empowered to invoke section 506(c)). The decision to grant a Bankruptcy Code section 506(c) waiver thus belongs to the Debtors and is appropriate here, particularly because such waiver was part of arm's-length negotiated arrangement in which the DIP Lender has incurred significant risk in lending $25 million and New Ark has agreed to pay, from its existing cash collateral, estate administrative costs and subordinate its liens to the Carve-Out. *See, e.g.*, Hr'g Tr. 43:10-12, *In re Mineral Park, Inc.*, Case No. 14-11996 (Bankr. D. Del. Sept. 23, 2014) (overruling committee's objection and stating "given what [the secured lenders are] funding, I think [they've] paid for a 506(c) waiver and I would be willing to grant it"); Hr'g Tr. 58:11-12, 93:12-20, *In re Exide Holdings, Inc.*, Case No. 20-11157 (CSS) (Bankr. D. Del. June 18, 2020) ("[Y]es, certain things are being waived like 506(c) and 552(a) . . .

[b]ut . . . this is part of a global package, a not unusual global package at all for a combination of new money from an existing lender and a new lender in a borderline administratively insolvent case. I think they would be insane and commercially unreasonable if they were to lend under different terms."). Accordingly, because the DIP Lender and New Ark have "paid to play" and have very limited likelihood of recovery, it is entirely appropriate for the Debtors to grant a section 506(c) waiver in exchange for valuable consideration (namely, access to the DIP Facility and the New Ark Financing).

57. Furthermore, the primary rationale for Bankruptcy Code section 506(c) is to allow for a surcharge of secured creditors' collateral to the extent that unencumbered assets are used during the cases for the secured creditors' benefit. *See, e.g.*, *C.S. Assocs. v. Miller*, 29 F.3d 903, 907 (3d Cir. 1994) ("Courts have narrowly construed § 506(c) to encompass only those expenses that are specifically incurred for the express purpose of ensuring that the property is preserved and disposed of in a manner that provides the secured creditor with a maximum return on the debt and also apportions those costs to the secured creditor who, realistically, is assuming the asset.") (internal citation omitted). In this case, the Debtors believe that there are few, if any, unencumbered assets that will yield value or will appreciate during the duration of the administration of the Chapter 11 Cases, meaning that the surcharge rights under Bankruptcy Code section 506(c) are likely inapplicable here.

58. Here, this waiver is customary and appropriate in postpetition financing arrangements and is especially appropriate here where the DIP Facility being provided is the only such financing available to the Debtors and where New Ark is funding the Debtors' postpetition expenses. The Debtors are paying postpetition expenses on a current basis and Debtors reasonably believe that the DIP Budgets cover all of the contemplated expenses during

the Chapter 11 Cases, including reasonable professional fees. The section 506(c) wavier provided in the proposed Final Order is, therefore, appropriate in these cases as a result of arms'-length negotiations between the Debtors, the DIP Lender, and New Ark.

59. Moreover, waivers of Bankruptcy Code section 506(c) are routinely granted in this District. *See, e.g.*, *In re Youfit Health Clubs, LLC*, Case No. 20-12841 (MFW) (Bankr. D. Del. Dec. 4, 2020) [Docket No. 231] (approving waiver of section 506(c) surcharge rights); *In re Rubio's Restaurants, Inc.*, Case No. 20-12688 (MFW) (Bankr. D. Del. Dec. 1, 2020) [Docket No. 225] (same); *In re The Hertz Corp.*, Case No. 20-11218 (MFW) (Bankr. D. Del. Oct. 29, 2020) [Docket No. 1661] (same); *In re MUJI U.S.A. Limited*, Case No. 20-11085 (MFW) (Bankr. D. Del. Aug. 11, 2020) [Docket No. 105] (same); *In re AAC Holdings, Inc.*, Case No. 20-11648 (JTD) (Bankr. D. Del. July 15, 2020) [Docket No. 159] (same); *In re Quorum Health Corp.*, Case No. 20-10766 (KBO) (Bankr. D. Del. May 6, 2020) [Docket No. 286] (same); *In re RentPath Holdings, Inc.*, Case No. 20-10312 (BLS) (Bankr. D. Del. Mar. 10, 2020) [Docket No. 171] (same). Therefore, the Debtors respectfully submit that the waiver of Bankruptcy Code section 506(c) is appropriate.

2. Waiver of Rights Under Bankruptcy Code Section 552

60. The Committee similarly expresses concern over the waiver of the "equities of the case" exception under Bankruptcy Code section 552(b), arguing that "[g]ranting a section 552(b) waiver at the outset of these proceedings would unfairly prejudice unsecured creditors . . ." Committee DIP Obj., ¶ 59. Bankruptcy Code section 552(b) provides that if the debtor entered into a prepetition security agreement and the security agreement extends to property acquired prepetition and to proceeds of such property, the security agreement also extends to postpetition proceeds of such property as provided under nonbankruptcy law unless the court orders

otherwise "based on the equities of the case." 11 U.S.C. § 552(b). As a condition for postpetition financing and the use of cash collateral, lenders often require that debtors will not seek to strip liens on postpetition proceeds of prepetition collateral.

61. Like the section 506(c) waiver discussed above, waivers of Bankruptcy Code section 552(b) are typical in postpetition financing facilities, particularly where, as here, the prepetition secured parties have agreed to a carve-out from their collateral to fund the Debtors' operations and fees and expenses of other parties. Indeed, courts in this District have regularly authorized section 552(b) waivers in light of the overall benefits provided by a particular financing package. *See, e.g.*, *In re Youfit Health Clubs, LLC*, Case No. 20-12841 (MFW) (Bankr. D. Del. Dec. 4, 2020) [Docket No. 231] (approving waiver of section 552(b) rights); *In re Rubio's Restaurants, Inc.*, Case No. 20-12688 (MFW) (Bankr. D. Del. Dec. 1, 2020) [Docket No. 225] (same); *In re The Hertz Corp.*, Case No. 20-11218 (MFW) (Bankr. D. Del. Oct. 29, 2020) [Docket No. 1661] (same); *In re MUJI U.S.A. Limited*, Case No. 20-11085 (MFW) (Bankr. D. Del. Aug. 11, 2020) [Docket No. 105] (same); *In re AAC Holdings, Inc.*, Case No. 20-11648 (JTD) (Bankr. D. Del. July 15, 2020) [Docket No. 159] (same); *In re Quorum Health Corp.*, Case No. 20-10766 (KBO) (Bankr. D. Del. May 6, 2020) [Docket No. 286] (same). Indeed, it would be an extraordinary case where such a waiver was *not* granted. Furthermore, a section 552(b) waiver, being typical in cash collateral orders, was also part of the negotiations between the Debtors and New Ark for consensual use of cash collateral in the Chapter 11 Cases. The Debtors submit that such a concession was reasonable in light of the critical need for the DIP Facility and New Ark Financing.

3. Waiver of Marshaling Doctrine

62. Finally, the Committee also objects to the waiver of the equitable doctrine of "marshaling" with respect to the DIP Collateral and the Prepetition Working Capital Collateral, arguing that "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." Committee DIP Obj., ¶ 61. However, "unsecured creditors cannot invoke the equitable doctrine of marshaling," which is a remedy applicable between secured creditors. *In re Advanced Mktg. Servs., Inc.*, 360 B.R. 421, 429 n.8 (Bankr. D. Del. 2007) (holding that unsecured creditors could not direct secured lenders to satisfy their claim using different collateral); *but see 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."). The purpose of the marshaling doctrine is to protect the interests of junior senior creditors, not unsecured creditors. The marshaling waiver was a negotiated aspect of the DIP Facility between the Debtors, the DIP Lender, and New Ark and there is nothing unreasonable about granting such a customary waiver that is routinely approved in this District. *See, e.g.*, *In re Youfit Health Clubs, LLC*, Case No. 20-12841 (MFW) (Bankr. D. Del. Dec. 4, 2020) [Docket No. 231] (approving waiver of equitable doctrine of marshaling); *In re Rubio's Restaurants, Inc.*, Case No. 20-12688 (MFW) (Bankr. D. Del. Dec. 1, 2020) [Docket No. 225] (same); *In re The Hertz Corp.*, Case No. 20-11218 (MFW) (Bankr. D. Del. Oct. 29, 2020) [Docket No. 1661] (same); *In re MUJI U.S.A. Limited*, Case No. 20-11085 (MFW) (Bankr. D. Del. Aug. 11, 2020) [Docket No. 105] (same); *In re AAC Holdings, Inc.*, Case No. 20-11648

(JTD) (Bankr. D. Del. July 15, 2020) [Docket No. 159] (same); *In re Quorum Health Corp.*, Case No. 20-10766 (KBO) (Bankr. D. Del. May 6, 2020) [Docket No. 286] (same).

63. Accordingly, the Debtors' waiver of its rights under Bankruptcy Code sections 506(c) and 552(b) as well as its rights under the equitable doctrine of "marshaling" are not only standard in debtor-in-possession financing and cash collateral orders, but are also particularly appropriate under the facts and circumstances of the Chapter 11 Cases. The Committee's Objection to these standard and negotiated-for waivers should be overruled.

iv. The Committee Should Not Be Granted Automatic Standing.

64. The Committee's assertion that it should be granted automatic standing to assert challenges to any prepetition secured liens (*see* Committee DIP Obj., ¶ 66) ignores long-standing authority otherwise. It is well established in the Third Circuit "that entitlement to derivative standing requires (1) a colorable claim, (2) that the trustee unjustifiably refused to pursue the claim, and (3) permission of the bankruptcy court to initiate the action." *In re Centaur, LLC*, No. 10-10799, 2010 WL 4624910, at *4 (Bankr. D. Del. Nov. 5, 2010) (citing *In re Yes! Entm't Corp.*, 316 B.R. 141, 145 (D. Del. 2004)); *see also In re Optim Energy, LLC*, 527 B.R. 169, 173 (D. Del. 2015) (same). It is the creditor's burden to demonstrate that it has satisfied these prerequisites for derivative standing. *See In re Yes! Entm't Corp.*, 316 B.R. at 145. In analyzing these requirements, the court must act as a gatekeeper to prevent the waste of estate assets for pursuit of meritless claims as well as claims that are not likely to benefit the estate in light of the cost of the litigation. *See In re Centaur, LLC*, 2010 WL 4624910, at *15.

65. Here, the Committee's request for immediate standing is wholly inappropriate and should be denied, as it has not met its burden or even attempted to allege that it has complied with the Third Circuit's express requirements to permit derivative standing. Despite its assertion

that "conferring automatic standing will conserve estate resources," the Committee should not be granted automatic standing merely as a consequence of filing its DIP Objection. Committee DIP Obj., ¶ 66. The manifest danger of granting automatic standing to the Committee to sue and/or challenge the liens of any of the parties supporting the Debtors' restructuring efforts should be apparent, particularly where they have not even alleged (because they could not) that the Debtors' independent manager is somehow unable to fulfill his fiduciary duties. Mr. Vogel, the Debtors' independent manager, began his analysis of claims proposed to be released under the Plan prior to the Petition Date, and that analysis should proceed uninterrupted. The Committee's request should be denied.

v. The Committee's Request for Consultation Rights for DIP-Related Amendments is Unnecessary.

66. The Committee objects to any amendment, modification, or supplementation of the DIP Documents without advance notice or consultation rights. *See* Committee DIP Obj., ¶ 66. While seemingly harmless on the face of its objection, a closer review indicates that the Committee simply misreads or otherwise mischaracterizes the provision. Seemingly indicative of its blatant misreading of various provisions of the DIP Order, the Committee suggests that the Debtors may make amendments, modifications or supplementations only if "not adverse or prejudicial." Yet, they inappropriately omit the fact that the lead-in to that provision, which makes abundantly clear that such modifications or amendments must also not be material; in contrast, all material changes (whether or not they are adverse or prejudicial) require notice and a hearing. *See* Proposed Final DIP Order, ¶ 37. Put simply, for any changes to the DIP Documents to be made without notice and a hearing, the changes must be (1) immaterial, (2) consistent with DIP Documents, *and* (3) not adverse or prejudicial to the Debtors. *Id.* Further, all amendments of any DIP Documents must be filed with the court and served on the

U.S. Trustee and the Committee, meaning that the Committee's (and all parties' rights) to object or assert that the above conditions are not met are preserved by the current language in the proposed DIP Order. Therefore, the Debtors submit that the Committee's request for additional consultation rights should be denied.

vi. The Remainder of the Committee's DIP Objections Have Been Addressed in the Proposed Final DIP Order.

67. The Committee and other Objectors have raised certain other objections to the DIP Facility in addition to those addressed above. These, along with the Debtors' responses, are further detailed in the chart attached hereto as **Exhibit A**.

68. For the reasons set forth above, in the DIP Motion, and in **Exhibit A** attached hereto, the Debtors respectfully request that the outstanding DIP Objections be overruled and that the relief requested in the DIP Motion be approved on a final basis.

II. The MOTA Objections Should Be Overruled and the MOTA Approval Motion Should Be Granted.

69. As with the DIP Motion, the Debtors engaged in discussions with various parties-in-interest in advance of and following the objection deadline to try to resolve issues through the addition or revision of language to the proposed form MOTA or the proposed form of MOTA Order. The revisions and/or proposals made by the Debtors in response to the MOTA Objections, including certain resolved issues, are reflected in the summary chart attached hereto as **Exhibit A**. As reflected therein, the Debtors believe that the CMS MOTA Objection is fully resolved, and certain objections raised by the Committee MOTA Objection and the U.S. Trustee MOTA Objection have been resolved with changes to the proposed MOTA Order. The outstanding issues that remain disputed with respect to the MOTA Motion, including several

raised by the Committee, the Omega Noteholders, and the U.S. Trustee are discussed in detail below.

A. Because New Ark, the Affiliated Service Providers, and the Equity Sponsors Were Not Involved in the MOTA Negotiations, Heightened Scrutiny Does Not Apply to the Transfer Transaction Contemplated by the MOTA.

70. Several of the MOTA Objections reference the involvement of "insiders" and suggest that heightened scrutiny should apply to the Debtors' entry into the MOTA. *See, e.g.*, Committee MOTA Obj., ¶ 24 (arguing that heighted scrutiny applies due to the fact that the DIP/RSA transaction is "with the Debtors' insiders"); Omega Noteholder MOTA Obj., ¶ 18 (arguing that heightened scrutiny applies "because this transaction primarily benefits the Omega Entities and the Debtors' insiders"). To be clear, the affiliated entities—New Ark, HCN, HMS, and Halcyon—*were not involved* in the negotiations of the MOTA, other than tangential discussions with the New Manager relating to transition services under the proposed Transition Services Agreement (which negotiations the Debtors were not directly involved in). Rather, the negotiations of the MOTA and Corporate Oversight Agreement occurred in good faith and at arms'-length between the Debtors, the New Manager, and the Omega Landlords. Neither the New Manager nor the Omega Landlords are affiliated with the Debtors, making them true third parties with interests separate and apart from the Debtors. Implying otherwise, as the Committee and other objecting parties allege, simply distorts the truth. Therefore, the business judgment standard, rather than heightened scrutiny, applies to the Transfer Transaction.

71. In determining whether a proposed section 363(b)(1) sale or use of property satisfies the "business judgment standard," courts consider the following: (i) whether a sound business justification exists for the transaction; (ii) whether adequate and reasonable notice of the transaction was given to the interested parties; (iii) whether the price is fair and reasonable; and

(iv) whether the parties have acted in good faith. *See, e.g.*, *In re Delaware & Hudson Ry. Co.*, 124 B.R. at 176; *In re Phoenix Steel Corp.*, 82 B.R. at 335–36. As set forth in the MOTA Motion, the Debtors satisfy the business judgment standard because, among other things, (i) the Debtors are entering into the MOTA after thorough consideration of all viable alternatives; (ii) the Debtors have and will continue to provide notice of the Transfer Transaction to all interested parties; (iii) the consideration to be received by the Debtors, particularly in the form of substantial assumed liabilities under the MOTA, provides significant benefit to the Debtors' estates; and (iv) the proposed transfers and the terms of the MOTA were negotiated extensively between the parties, each of which acted in good faith and at arms'-length while represented by counsel.

B. The Debtors, as Lessees of the Facilities, Ultimately Determined that a Marketing Process Was Unnecessary.

72. Several of the MOTA Objections lament the purported lack of a "market check" of the MOTA. *See, e.g.*, Committee MOTA Obj., ¶¶ 3-8, 28-29; UST MOTA Obj., ¶ 4; Omega Noteholder MOTA Obj., ¶ 24. The Committee also complains about the Debtors' purported failure to hire an investment banker. *See* Committee MOTA Obj., ¶ 5. As discussed above and will be shown at the November 23 hearing, the Debtors did initially engage Houlihan Lokey as investment banker and closely analyzed the need for a marketing process of the Omega Master Lease at length through the summer of 2021. However, because (among other things) the Debtors had defaulted under the Omega Master Lease, owed upwards of $13 million in unpaid rent, caused the Omega Landlords to deplete the security deposits (replenishment of which would have been required for any new lessee), and were lessees on operating leases that generated substantial operating shortfalls—and such marketing would occur in the midst of a pandemic that had ravaged similar operators—the Debtors, in conjunction with its professional

advisors (including Houlihan Lokey) ultimately determined that such efforts would be futile and ultimately waste necessary estate resources.

73. In its MOTA Objection, the Committee points to various types of assets that purportedly have value, "including nursing home licenses (or the rights to transfer such licenses), provider numbers, accounts receivable, contracts, inventory, and resident contracts, records, and trust funds." *See* Committee MOTA Obj., ¶ 5. Not only does the Committee mischaracterize the Debtors' existing and marketable assets, but the Committee's contention that these assets have any value, let alone value that could be transferred to a new operator, is misplaced. *First*, the "trust funds" are not property of the Debtors' estates,[10] so any value being arbitrarily assigned by the Committee to those assets is misleading. *Second*, even if the "nursing home licenses" and "provider numbers" are transferable (which they are), any such value is diluted by the millions of dollars of MAAP Liabilities associated with the provider agreements. Indeed, the MOTA specifically requires New Operator to assume the MAAP Liabilities associated with the provider agreements, providing yet another benefit to the Debtors and their estates as part of the contemplated transaction.

74. Without explanation, the Omega Noteholders also brazenly assert that the "Debtors should be required to demonstrate they market checked the Facilities *and* the Omega Master Lease." Omega Noteholder MOTA Obj., ¶ 25. As an initial matter, the Facilities are not the Debtors' property—they are merely a lessee of the Omega Landlords who own the underlying real estate. Therefore, the Debtors are not (and never were) in a position to run a

[10] *See 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* [Docket No. 8], at 9 ("The funds in the Resident Trust Accounts are not property of the Debtors' estates, but rather are property of the Debtors' residents.").

marketing process for the Facilities themselves. Moreover, as discussed *supra*, while the Omega Master Lease was really the Debtors' only potentially marketable asset, any new lessee would have been required to pay millions of dollars to cure the Debtors' outstanding defaults and take on all 24 Omega Facilities rather than leasing Facilities on an individual basis, making the likelihood of finding a new operator willing to step into the Omega Master Lease increasingly unlikely. Thus, after months of analysis and discussions with their professional advisors, including Houlihan Lokey, the Debtors ultimately determined that any marketing effort of the Omega Master Lease would have been an exercise in futility and narrowed their focus toward consideration of other available alternatives.

C. The Committee's Remaining Objections Should be Overruled.

75. The other issues raised in the Committee MOTA Objection demonstrate that the Committee has completely missed the bigger picture of the Transfer Transaction and should be overruled.

i. The Transfer Transaction is Not Highly Unusual, Nor is it Rushed.

76. In its MOTA Objection, the Committee attempts to argue that "[t]he 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*." Committee MOTA Obj., ¶ 30 (emphasis added). This statement alone makes clear that the Committee has completely misunderstood the proposed Transfer Transaction. *First*, the Debtors are not seeking to transfer substantially all of their assets on December 1, 2021. As the proposed MOTA clearly states, the only transfer of assets that is occurring on December 1, 2021 to New Manager is the transfer of inventory and post-transition accounts receivable. *See* MOTA, ¶ 1(a). The Debtors' remaining assets, including, among others, assumed contracts, resident records, and various transferable

authorizations, will not be transferred until the License Transfer Date, which is set for March 1, 2022. *See* MOTA, ¶ 1(b). *Second*, the proposed timing of the transition of assets is not "highly unusual" as the Committee suggests nor is it "rushed". While the management transition is set to occur on December 1, 2021, the transition of the operations of the Debtors' facilities is not set to occur until March 1, 2022, which is more than four months from the Petition Date. This projected transition timeframe of the facility operations more than doubles the length between the petition date and the operations transition date that occurred in certain of the cases cited by the Committee. *See* Committee MOTA Obj., ¶ 30. *Third*, the New Manager is stepping in on December 1, 2021 on an interim basis to cover the operating expenses of the Omega Facilities and assist the Debtors in curtailing continued operational losses. This interim managerial phase will provide respite to the Debtors and will allow for the DIP Facility to be significantly less than it would have been without the transition of operating losses of the Omega Facilities to New Manager. As discussed above, without the approval of the MOTA, the DIP Facility would need to be substantially increased to provide for continued operational funding of the Omega Facilities for the foreseeable future, a risk that the DIP Lender is unwilling to take. Moreover, even if the Debtors were able to continue funding their operating losses after December 1, 2021 through additional DIP financing (which of course is not available), that would simply put unsecured creditors further "under water" as the amount of secured debt above them would grow—so the Committee is arguing for relief that would significantly disadvantage unsecured creditors.

ii. Omega is Not the Only Beneficiary of the Debtors' Requested Relief.

77. The Committee and the Omega Noteholders make another generic (and erroneous) assertion that the MOTA Motion solely benefits the Omega Landlords and not the Debtors' estates. *See* Committee MOTA Obj., ¶ 32; Omega Noteholder MOTA Obj., ¶ 18.

Again, the Committee misses the mark—as discussed above, as of December 1, 2021, the operating expenses of the Omega Facilities will no longer be borne by the Debtors. To imply that the Transfer Transaction does not benefit the estates and only benefits the Omega Landlords is a blatant mischaracterization. As set forth in the MOTA Motion, the Transfer Transaction will, among other things, allow the Debtors to (i) reach agreement with New Operator to assume substantial liabilities, including those associated with the applicable provider agreements and associated MAAP Liabilities and (ii) avoid significant administrative claims, future administrative rent obligations, sizable potential claims from residents, and significant unsecured claims from the Omega Landlords. *See* MOTA Motion, ¶ 22. What's more, the Debtors are not on the hook for administrative rent claims owing to the Omega Landlords, which would total more than $2.4 million *per month*. To say that these bargained-for aspects of the Transfer Transaction do not constitute sufficient benefits to the estates defies common sense.

iii. The Transfer Transaction Will Help Prevent, Rather Than Cause, Administrative Insolvency.

78. The Committee argues that the Transfer Transaction "may leave the Debtors administratively insolvent." Committee MOTA Obj., at 14. As noted above and in the MOTA Motion, the Transfer Transaction, among other things, helps the Debtors to avoid significant administrative claims and future administrative rent obligations. *See* MOTA Motion, ¶ 22. Thus, the Transfer Transaction will assist the Debtors' in maintaining their administrative solvency by decreasing the universe of administrative claims that may have been filed against the Debtors. Moreover, in part to assuage the Committee's concerns regarding potential ambiguities in the MOTA, certain provisions of the MOTA have been revised to clearly state that the New Manager will be obligated to pay *all* facility operational expenses during the Management Period. *See* MOTA, ¶ 5(a)(iii)-(v) (enumerating operational expenses to be paid at New

Manager's "sole cost and expense"); ¶ 5(b)(iv) ("New Manager shall be responsible for the Facility Operating Expenses during the Management Period to be paid by New Manager on a timetable to be determined in New Manager's reasonable judgment and in accordance with the New Manager's credit line and anticipated disbursements."); *id.* (". . . revenues and expenses will be prorated . . . with the intent that . . . all revenue and expenses that relate to the period during the Management Period" will be allocated to New Manager).

79. Finally, the Committee points to various obligations retained by the Debtors in the Management Oversight Agreement, including insurance, employee benefits, and payment of a management fee to New Manager, and argues that "it is not clear why the Debtors would fund these costs after transferring their assets, including all revenue generated by the Omega Facilities." Committee MOTA Obj., ¶ 43. The Committee again misconstrues both the Transfer Transaction and the intention of the Management Oversight Agreement. As discussed above, the Debtors are not transferring substantially all of their assets on December 1, 2021, but on March 1, 2022. Additionally, the Management Oversight Agreement applies solely during the Management Period and only with respect to the Debtors' corporate employees who are not covered by the MOTA, which governs the management and operation of the underlying Omega Facilities and requires employment of the facility-level employees only. The corporate level employees are handled separately through the Management Oversight Agreement, but the New Manager has agreed to pay the wages, compensation, and benefits of those employees (which were previously contemplated to be paid by the Debtors and provided for in the Interim Omega DIP Budget). Therefore, the Transfer Transaction as implemented through the MOTA helps to prevent, rather than cause, the Debtors' administrative insolvency.

D. The Debtors Believe That the Remaining MOTA Objections Have Been Resolved Through Revisions to the MOTA Order.

80. The U.S. Trustee, CMS, and the Committee have raised certain other objections to the MOTA in addition to those addressed above. These, along with the Debtors' responses, are further detailed in the chart attached hereto as **Exhibit A**.

81. For the reasons discussed above, in the MOTA Motion, and in **Exhibit A** hereto, the MOTA Objections should be overruled and the MOTA Approval Motion should be granted.

[Remainder of Page Intentionally Left Blank]

WHEREFORE, the Debtors respectfully request that the Court (i) overrule the Objections, (ii) grant the relief requested in the DIP Motion on a final basis, (iii) grant the MOTA Approval Motion, and (iv) grant such other relief as may be deemed just and proper.

Dated: Wilmington, Delaware
November 21, 2021

MCDERMOTT WILL & EMERY LLP

/s/ David R. Hurst

David R. Hurst (I.D. No. 3743)
1007 North Orange Street, 10th Floor
Wilmington, Delaware 19801
Telephone: (302) 485-3900
Facsimile: (302) 351-8711
Email: dhurst@mwe.com

- and -

Daniel M. Simon (admitted *pro hac vice*)
Emily C. Keil (admitted *pro hac vice*)
444 West Lake Street, Suite 4000
Chicago, Illinois 60606
Telephone: (312) 372-2000
Facsimile: (312) 984-7700
Email: dmsimon@mwe.com
ekeil@mwe.com

Counsel for Debtors and Debtors-in-Possession