IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: CMC II, LLC *et al.*[1], Debtors.	Chapter: 11 Case No. 21-10461 (JTD) (Jointly Administered)

OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO MOTION OF DEBTORS FOR ENTRY OF ORDERS (I)(A) ESTABLISHING BIDDING PROCEDURES FOR THE SALES OF THE SNF ASSETS AND MANAGER AND REMAINING ASSETS; (B) ESTABLISHING PROCEDURES RELATING TO ASSUMPTION AND ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES, INCLUDING NOTICE OF PROPOSED CURE AMOUNTS; (C) APPROVING FORM AND MANNER OF NOTICE; (D) SCHEDULING A HEARING TO CONSIDER ANY PROPOSED SALE; AND (E) GRANTING CERTAIN RELATED RELIEF; AND (II)(A) APPROVING SALES OF THE SNF ASSETS AND MANAGER AND REMAINING ASSETS; (B) AUTHORIZING ASSUMPTION AND ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES IN CONNECTION THEREWITH; AND (C) GRANTING RELATED RELIEF

The Official Committee of Unsecured Creditors (the "Committee") appointed in the above-captioned cases of CMC II, LLC ("CMC II") and its affiliated debtors and debtors-in-possession (collectively, the "Debtors"), by and through its proposed undersigned counsel, Porzio, Bromberg & Newman, P.C., submits this objection (the "Objection") to the Debtors' motion for entry of an order (the "Bidding Procedures Order"), (i) authorizing and approving (a) certain proposed bidding and sale procedures (the "Bidding Procedures") in connection with the sales of (i) substantially all of the assets of the skilled nursing facilities (as further defined below, the "SNF Assets") operated

[1] The Debtors in these chapter 11 cases, along with the last four digits of their respective tax identification numbers, are as follows: CMC II, LLC (6973), Salus Rehabilitation, LLC (4037), 207 Marshall Drive Operations LLC (8470), 803 Oak Street Operations LLC (3900), Sea Crest Health Care Management, LLC (2940), and Consulate Management Company, LLC (5824). The address of the Debtors' corporate headquarters is 800 Concourse Parkway South, Maitland, Florida 32751.

by Debtors 207 Marshall Drive Operations LLC, and 803 Oak Street Operations LLC (collectively, the "Operator Debtors"), and (ii) substantially all assets of Debtor CMC II, LLC ("CMC II"), along with certain potential claims and causes of action of the Debtors (the "Manager and Remaining Assets" and, together with the SNF Assets, the "Assets") pursuant to section 363 of the Bankruptcy Code (each, a "Sale"), (b) certain proposed contract assumption and assignment procedures (the "Assumption Procedures") and (c) the form and manner of notice of all procedures, protections, schedules and agreements; (ii) (a) scheduling a hearing (the "Sale Hearing") to consider final approval of each Sale, (b) following the Sale Hearing, entry of an order (each a "Sale Order") approving each such Sale to the applicable Successful Bidder or Successful Bidders or to one or more Back-Up Bidders, free and clear of all liens, claims, encumbrances and other interests, (c) authorizing the assumption and assignment of certain executory contracts and unexpired leases (collectively, the "Designated Contracts") and (d) granting related relief [ECF No. 54] (the "Motion").[2] In support of this Objection, the Committee respectfully states as follows:

PRELIMINARY STATEMENT

1. The Committee, which was appointed a little over one week ago, is generally not opposed to a sale of the Debtors' business and operating assets, including such assets of the Operator Debtors and CMC II (the "Business Assets"), through a fair and robust process that maximizes value. The sales process, however, as proposed in these cases, has been orchestrated to in an attempt to ensure that the Debtors' estates cannot preserve for the benefit of the Debtors' creditors potentially significant and valuable claims and causes of action that possibly hundreds (or more) related non-Debtor parties seek to bury and wipe off their balance sheets despite not being debtors before this Court (collectively, the "Litigation Assets").

[2] Capitalized terms not otherwise defined herein shall have the meanings ascribed to such terms in the Motion.

2. Through the proposed one-two punch of the instant Motion and the DIP Motion (defined below), the Debtors seek to deploy a highspeed financing and sale process that provides non-debtor, Debtor related parties, including directors and officers, with broad releases, free from any scrutiny that could uncover years of maneuvering by related parties, including those under the umbrella of, and including, LaVie Care Centers, LLC purportedly d/b/a Consulate Health Care ("LVCC" or "Consulate"), to leave the Debtors named in the Ruckh litigation in superficial despair and newfound financial isolation.

3. Undeterred by the history, the sought after releases for the non-debtors related to the Debtor-entities even go so far as to include parties with a connection to the fraudulent activities that are the basis of the damage award in the Ruckh judgments.

4. The proposed process seeks approval of a likely unnecessary DIP facility to provide the proposed DIP lender, also an affiliate of the Debtors and the stalking horse bidder for the Manager and Remaining Assets, CPSTN Operations, LLC (the "Insider Stalking Horse Bidder", "DIP Lender" or "Capstone"), with false "currency" to credit bid for the Debtors' Manager and Remaining Assets, including, Litigation Assets, leaving legitimate creditors wiped out of their valuable rights under the Bankruptcy Code for the benefit of related non-Debtor parties.

5. Effectively, the process contemplated by the Debtors, coupled with a sale of the Litigation Assets, will do nothing more than allow Consulate to cleanse or launder a continually evolving corporate, capital, transactional and governance structure much larger than the now isolated Debtors, and to utilize the Bankruptcy Court for a swift non-Debtor liability and balance sheet fix. This Court should not tolerate an abusive process manipulated to prevent the investigation of potential claims for the benefit of legitmate creditors. For these reasons and the

others set forth herein, the Litigation Assets must be preserved outside of the proposed sale process.

6. This Objection outlines the Committee's specific concerns with respect to the Motion. As further set forth herein, the relief sought in the Motion related to the proposed sale of the Manager and Remaining Assets to DIP Lender/Insider Stalking Horse Bidder should be entirely denied as, among other things, fostering a sale process that runs afoul of the Bankruptcy Code's primary goal of maximizing value for a debtor's estate and all of its creditors. Indeed, the Debtors' Litigation Assets, which are what principally comprise the Manager and Remaining Assets, cannot be adequately considered, investigated or pursued under any framework that looks remotely like the one proposed by the Debtors. Moreover, the Insider Stalking Horse Bidder should not be permitted to credit bid for any assets in light of the facts and circumstances of these cases.[3]

7. With these changes and other changes to the contemplated process, as well as full disclosure regarding CMC II's activities, business structure, and contracts, among other things, the Committee generally supports a revised marketing process and sale of CMC II's Business Assets that excludes the Litigation Assets. And the Committee welcomes the participation of the DIP Lender/Insider Stalking Horse Bidder in such process to bid on the business of CMC II, but not based on a credit bid that provides no real value whatsoever.

8. While the Committee also has concerns that it expressly reserves[4] as to the sale of the SNF Assets to Assisted 4 Living, Inc. ("Assisted"), a third party, the Committee believes that

[3] If there was adequate evidence presented regarding the necessity of the proposed DIP facility (which currently there is not), the Committee may be inclined to support credit bid rights with respect to assets other than Litigation Assets.
[4] These concerns include, but are not limited to: (i) whether the leases relating to the SNFs should be recharacterized as financings such that the real property should also be marketed and sold, and (ii) whether the SNF Assets were properly marketed given that the DIP Lender/Insider Stalking Horse Bidder also expressed interest in credit bidding for those assets in addition to the Manager and Remaining Assets via the Alternative Term Sheet, and the manager of the SNF Assets, CMC II, was contemplated to remain within the ownership of Consulate.

a sale process for the SNF Assets with Assisted serving as stalking horse bidder as to those SNF Assets may proceed so long as certain modifications are made, including to the proposed Order and exhibits, to ensure a fair, transparent and value-maximizing process. Such modifications include, but are not limited to (a) providing that any decision by the Debtors in relation to the bidding process and sale must be made in consultation with the Committee, (b) maintaining the proposed schedule for the sale of Business Assets only, (c) deleting of reservations/protections for the DIP Lender, (d) protecting notice and objection rights of counterparties to lease and contracts proposed to be assumed, (e) eliminating credit bidding rights absent further Court approval, (f) deleting certain restrictions on due diligence access and on what may constitute a Qualified Bid, and (g) providing consideration of whether the sale of each SNF separately may yield more value. These and other changes are generally reflected in the clean and comparison copy of the Debtors' proposed form of Order that the Committee previously circulated to the Debtors. Without such and further modifications, the Motion should also be denied as to Assisted and the SNF Assets.

9. The Committee expressly reserves and preserves its rights to raise additional objections to the Bid Procedures prior to and at the hearing on the Motion. The Committee also reserves its rights to raise further objections in connection with any Sale Hearing. The Committee respectfully submits that, unless the issues raised herein are adequately addressed, the Motion should be denied.

BACKGROUND

10. On March 1, 2021 (the "Petition Date"), the Debtors filed voluntary petitions for relief with the Court under chapter 11 of the Bankruptcy Code. The Debtors continue to manage and operate their businesses as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

The Debtor Entities

11. The two Operator Debtors are (i) 207 Marshall Drive Operations LLC ("Marshall"), which operates Marshall Health and Rehabilitation Center, a 120-bed SNF located in Perry, Florida, and (ii) 803 Oak Street Operations LLC ("Governor's Creek"), which operates Governor's Creek Health and Rehabilitation, a 120-bed SNF located in Green Cove Springs, Florida. *See Declaration of Paul Rundell in Support of Chapter 11 Petitions and First Day Papers* [ECF No. 2] ("Rundell Declaration"), at ¶ 11. According to the Debtors, the Operator Debtors operate the day-to-day skilled nursing care aspects of their facilities, while CMC II (discussed below) provides centralized back office managerial support and administrative functions. *See id*. Together, the Operator Debtors employ approximately 170 people, with the majority of employees performing nursing and nursing administration functions. *See id*. at ¶ 16.

12. According to the Debtors, CMC II is not a health care business and provides centralized, back office management and support type services to 140 SNFs, including the two (2) Operator Debtors. CMC II functions as a cost center for the SNFs, charging an "at-cost management fee, without markup, pursuant to management agreements that are generally terminable on 60-days' notice."[5] *Id.* According to the Debtors:

> [CMC II] provides the infrastructure for coordination and some management across the Consulate facilities that allows the [Operator Debtors and non-Debtors] to capitalize on various economies of scale. This infrastructure functions in a tiered fashion, with regional leadership overseeing groups of eight to ten SNFs, divisional leadership overseeing groups of five to six regions, and corporate leadership overseeing all divisions. Each successive level of management has greater influence on company-wide matters – such as contracting, financial reporting, facility safety protocols, and training initiatives – and less influence on day-to-day operational matter …

[5] This 60-day notice period was added to the management agreements on or about December 19, 2017, approximately 9-months after entry of the Ruckh judgment.

Id. at ¶ 12. Moreover, the Debtors have identified CMC II as a "revenue-neutral pass-through" entity, wherein "[t]he fees paid to CMC by the [Operator Debtors and non-Debtors] are designed to offset the SNFs' *pro rata* shares of the expenses, without markup, incurred by CMC II in carrying out" certain key functions necessary for operating the SNFs. *See id*. at ¶ 13. CMC II employs 475 individuals in 17 states. *See id*. at ¶ 15.

13. The three remaining debtors -- Salus Rehabilitation, LLC ("Salus"), Sea Crest Health Care Management, LLC ("Sea Crest"), and Consulate Management Company, LLC ("CMC I"), are non-operational entities. *See id*.

The DIP Motion

14. On March 2, 2021, the Debtors filed a motion for interim and final orders (i) authorizing the Debtors to obtain up to $5 million in post-petition financing from the DIP Lender/Insider Stalking Horse Bidder pursuant to 11 U.S.C. §§ 105, 361, 362, 364(c)(1), 364(c)(2), 364(c)(3) and 364(e), (b) [sic] granting senior liens and superpriority administrative expense status; (ii) scheduling final hearing; and (iii) granting related relief [ECF No. 13] (the "DIP Motion").

15. On March 3, 2021, an interim order was entered approving the DIP Motion on an interim basis [ECF No. 37] (the "Interim DIP Order"). A final hearing on the DIP Motion is scheduled at the same time as the hearing on the instant Motion, April 1, 2021.

The Bid Procedures Motion

16. On March 11, 2021, the Debtors filed their Motion.

17. The Motion indicates that the Debtors engaged Evans Senior Investments ("ESI") prior to the Petition Date[6] to act as their broker in connection with a potential asset sale. ESI created

[6] The Debtors' filed application to retain ESI references an engagement letter dated November 30, 3020. *See* ECF No. 61.

marketing information and a data room with diligence information for prospective purchasers, and contacted more than 100 entities regarding potential interest in the Debtors' assets. Motion, p. 3. The Motion does not disclose how long the marketing process lasted, or how many prospective parties entered into confidentiality agreements or letters of intent.[7] *Id*.

18. The Motion asserts that the Debtors received a term sheet for the sale of the SNF Assets to Assisted, a third party, which has been incorporated into a stalking horse asset purchase agreement (the "Assisted APA") that was attached to and sought to be approved by the Motion. The purchase price under the Assisted APA is $2 million, plus the assumption of certain liabilities, including contract cure costs and PTO for hired employees.

19. The Motion further asserts that an affiliate of the debtors, Capstone, which is also the proposed DIP lender in these cases, signed a term sheet (the "Capstone Term Sheet") for the purchase of the Manager and Remaining Assets, but a definitive APA with Capstone has not been finalized or filed.[8] Motion, pp. 3-4. The Capstone Term Sheet is summarized in the Motion as including the sale of claims and causes of action:

> The Assets include all avoidance claims or causes of action arising under Chapter 5 of the Bankruptcy Code or applicable Law, and all other claims or causes of action under any other provision of the Bankruptcy Code or applicable laws relating to the Purchased Assets and/or Assumed Liabilities, including all actions against current or former officers of the Debtors and actions relating to vendors and service providers used in CMC II's Business that are counterparties to Assigned Contracts or relating to Assumed

[7] The Committee has requested, but not received, such information from Debtors.

[8] The Committee questions the failure to provide an asset purchase agreement. The Committee also objects to the Motion and the relief sought herein with respect to the DIP Lender/Insider Stalking Horse Bidder because the Motion fails include a copy of the proposed purchase agreement and therefore does not comply with Local Rule 6004-1(b)(i), which states in relevant part:

> (b) Sale Motions. Except as otherwise provided in these Local Rules, the Code, the Bankruptcy Rules or an Order of the Court, all Sale Motions shall attach or include the following:
>
> (i) A copy of the proposed purchase agreement, or a form of such agreement substantially similar to the one the debtor reasonably believes it will execute in connection with the proposed sale;

> Liabilities. The Assets also include all claims or causes of action against the Debtors' affiliates.[9]

Motion, p. 25. In addition, the Capstone Term Sheet expressly contemplates broad releases, subject only to approval by the DIP Lender/Insider Stalking Horse Bidder:

> The Asset Purchase Agreement and the Sale Order will contain a release of the Purchaser and its affiliates that is in form and substance acceptable to the Purchaser in its sole and absolute discretion. The Purchase Agreement and the Sale Order will provide for the full and irrevocable release of any and all claims or causes of action held (directly or derivatively) by each of the Debtors against the Purchaser, its affiliates, and each of their related persons upon entry of the Sale Order. The Sale Order shall also provide, to the sole and absolute discretion of the Purchaser, that Purchaser will acquire the Purchased Assets free and clear of any claims for successor liability.

Motion, Ex. B. at p. 9. The purchase price under the Capstone Term Sheet consists of a $3 million credit bid of the proposed DIP facility. Motion, Ex. B., p. 2.

20. Thus, it appears the combined purchase prices for the two transactions is anticipated to be just enough to pay off the proposed insider's DIP financing, leaving the estates with close to nothing, or nothing at all.[10]

21. Apparently, the DIP Lender/Insider Stalking Horse Bidder also intends to serve as backup bidder in connection with SNF Assets pursuant to a non-binding "Summary of Principal

[9] The term "affiliates" is not defined.

[10] This is evidenced by the Debtors' checking the box in its petition that "no funds will be available for distribution to unsecured creditors." *See* ECF No. 1. A review of the Motion seems to indicate that the estates may be left with the Operator Debtors' potential pre-closing accounts receivables, which value is not described and which may or may not be collectible. *See* Motion, pp. 21 (summarizing the purchased assets under the Assisted APA as "Substantially all of the assets of the selling Debtors' business as a going concern, *other than accounts receivable for periods prior to the closing, Avoidance Actions, or other claims and causes of action*.") and p. 23 (summarizing the purchased assets under the Capstone Term Sheet as "The Manager and Remaining Assets, which shall include (i) substantially all of the assets of CMC II, LLC, and (ii) certain claims and causes of action of the Debtors and their estates set forth in the Manager and Remaining Assets Term Sheet and APA. Manager and Remaining Assets shall not include accounts receivable of 207 Marshall Drive Operations LLC and 803 Oak Street Operations LLC (defined as the SNF Accounts Receivable in the Manager and Remaining Assets Term Sheet) prior to the closing of the sale of assets of those two entities."). Notably, the Capstone Term Sheet defines "SNF Accounts Receivable" narrowly to exclude intercompany receivables stating "'SNF Accounts Receivable' means accounts receivable owed to Marshall and Governors Creek by any state or federal governmental payor, insurer, resident, or other third-party payor. For clarity, the SNF Accounts Receivable shall not include any intercompany accounts receivable." See Motion, Ex. B at p. 3.

Terms of Proposed Sale of Substantially All of the Assets of CMC II, LLC and Certain Affiliates" (the "Alternative Term Sheet"),[11] which contemplates a sale of all assets of CMC II, Governor's Creek, and Marshal in exchange for a credit bid of all DIP obligations and the assumption of certain assumed liabilities (such sale the "Alternative Transaction"). In this regard, the Capstone Term Sheet states:

> Purchaser hereby confirms that (a) the Alternative Term Sheet has not been withdrawn, (b) the Alternative Term Sheet is not superseded by this Term Sheet, and (c) Purchaser will use commercially reasonable efforts to negotiate and pursue the Alternative Term Sheet (subject, in each case, to the terms and conditions set forth herein and therein), in the event that the Sellers determine that the Alternative Transaction is the highest or best bid for the assets included in the Alternative Transaction. For clarity, Purchaser shall serve as the back-up bidder for the assets of Governor's Creek and Marshall upon the terms set forth in the Alternative Term Sheet and the Bidding Procedures, pending the closing of a sale for such assets, and agrees that the Company may disclose such information in seeking first day relief in the Chapter 11 Cases.

Motion, Ex. B.

22. Aside from seeking to approve the Assisted APA as the stalking horse bid for the SNF Assets, and Capstone Term Sheet as the stalking horse bid for the Manager and Remaining Assets, the Motion seeks to approve the Bidding Procedures and Assumption Procedures, including the following key dates associated with the sale timeline:

Event or Deadline	**Date and Time**
Sale Objection Deadline (for all objections other than those stemming from the identity of the Successful Bidders (if different than the Stalking Horse Bidder))	April 30, 2021 at 5:00 p.m. ET
Contract Objection Deadline (for all objections other than adequate assurance of future performance, including to any proposed Cure Amount)	April 30, 2021 at 5:00 p.m. ET
Bid Deadline	May 5, 2021 at 5:00 p.m. ET
Selection of Qualified Bids	May 7, 2021
Auction (if necessary)	May 10, 2021 at 10:00 a.m. ET
Deadline to File Notice Designating Successful Bidder	May 11, 2021 at 12:00 p.m. ET
Deadline to Object to Adequate Assurance of Future Performance	May 12, 2021 at 12:00 p.m. ET

[11] No copy of the Alternative Term Sheet is provided.

Deadline to Object to the Sale based on the Identity of the Successful Bidder (if different than the Stalking Horse Bidder)	May 12, 2021 at 12:00 p.m. ET
Sale Hearing (subject to the Court's availability)	May 13, 2021 at 2:00 p.m. ET

23. Eight days after the Motion was filed, on March 19, 2021, the United States Trustee for the District of Delaware appointed the Committee in the Debtors' Chapter 11 cases. *See* ECF No. 71. The Committee is comprised of Angela Ruckh, Sharon Ann Outwater, and Medline Industries, Inc. The Committee has, subject to Court approval, retained Porzio Bromberg & Newman, P.C. as legal counsel and FTI Consulting, Inc. as financial advisor. *See* ECF No. 71.

ARGUMENT

24. One of the primary purposes of the Bankruptcy Code is to maximize the value of the bankruptcy estate for the benefit of creditors. *See Official Comm. of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp. v. Chinery*, 330 F.3d 548, 568 (3d Cir. 2003) (a debtor, as a fiduciary to the estate, has a duty to maximize the value of the estate). To further this purpose, sale procedures must seek to "facilitate an open and fair public sale designed to maximize value for the estate." *In re Edwards*, 228 B.R. 552, 561 (Bankr. E.D. Pa. 1998); *see also In re Food Barn Stores, Inc.*, 107 F.3d 558, 564-66 (8th Cir. 1997) (bankruptcy courts are given discretion and latitude in order to facilitate a fair and open public sale focused on maximizing value).

25. In this regard, the Court should not merely defer to the Debtors' "sound" business judgment; indeed, the Court need not consider the Debtors' business judgment in matters of process under the Bankruptcy Code, but should instead assess the fairness and reasonableness of the proposed bid procedures. *See In re American Safety Razor Co., LLC*, Case No. 10-12351 (MFW) (Bankr. D. Del. Sept. 30, 2010) Tr. at 132-33 ("I don't think, as the debtors suggest, that my consideration of bid procedures is based on the business judgment rule. I need not accept the debtors' business judgment with respect to process. The Bankruptcy Code and Rules and the

process under the Bankruptcy Code are all matters . . . for the Court's determination as to what is fair and reasonable. In fact, I think that's my only role in this case; to determine what is fair for all the parties.").

26. Additionally, transactions involving insiders are subject to a heightened level of scrutiny. *See Crown Vill. Farm, LLC v. Arl. L.L.C.* (*In re Crown Vill. Farm, LLC*), 415 B.R. 86, 93 (Bankr. D. Del. 2009) (holding that "[t]he sale process will be under the close scrutiny of the Court as required where the stalking horse is an insider"); *Citicorp Venture Capital, Ltd. v. Comm. of Creditors Holding Unsecured Claims (In re Papercraft Corp.*), 211 B.R. 813, 823 (W.D. Pa. 1997), *aff'd*, 160 F.3d 982 (3d Cir. 1998) ("[I]nsider transactions are subjected to rigorous scrutiny and when challenged, the burden is on the insider not only to prove the good faith of a transaction but also to show the inherent fairness from the viewpoint of the corporation and those with interests therein."); *In re Bidermann Indus. U.S.A.*, 203 B.R. 547, 551 (Bankr. S.D.N.Y. 1997) (sales to insiders "are necessarily subjected to heightened scrutiny because they are rife with the possibility of abuse") (internal quotations omitted); *In re Summit Global Logistics, Inc.*, 2008 Bankr. LEXIS 896, 26-29 (Bankr. D.N.J. Mar. 26, 2008) (recognizing "the heightened scrutiny required by non-bankruptcy law for insider transactions"); *In re Univ. Heights Ass'n,* 2007 Bankr. LEXIS 1200, at *13 (Bankr. N.D.N.Y. Jan. 22, 2007) ("[B]ecause we are dealing with potential insiders on both sides of the transaction, the proposed sale is subject to heightened scrutiny.").

27. "In applying heightened scrutiny, courts are concerned with the integrity and entire fairness of the transaction at issue, typically examining whether the process and price of a proposed transaction not only appear fair but are fair and whether fiduciary duties were properly taken into consideration." *In re Innkeepers USA Trust,* 442 B.R. 227, 231 (Bankr. S.D.N.Y. 2010). The Debtors bear the burden of proving that their proposed transaction satisfies the heightened

standards applicable to insider transactions. *In re Summit Global Logistics, Inc,* 2008 Bankr. LEXIS 896, 26-29. Under the "entire fairness" standard, the challenged transaction must be demonstrated to involve fair dealing (which entails an examination of the timing, initiation, structure, negotiation and disclosure of a transaction), and fair price (which entails an examination of the economic and financial considerations of the transaction).[12]

A. <u>The Proposed Sale Process Is Neither Fair Nor Reasonable And Should Not Be Approved.</u>

28. There is nothing fair in the proposed "process" sought to be approved by the Motion. The "process" succeeds in handing the Debtors' potentially most valuable assets (including all claims and causes of action) to the proposed DIP Lender/Insider Stalking Horse Bidder for the benefit of likely hundreds (or more) non-debtor, Debtor related parties pursuant to an improper credit bid that wipes out significant exposure for non-debtors while leaving the estates with nothing. *See In re Def. Drug Stores, Inc*., 145 B.R. 312, 317 (B.A.P. 9th Cir. 1992) (prohibiting "convert[ing] the bankruptcy process from one designed to benefit all creditors to one designed for the unwarranted benefit of the postpetition lender."); *see generally, In re Braniff Airways, Inc*., 700 F.2d 935 (5th Cir. 1983) (reversing order authorizing section 363 sale of substantially all of a debtor's assets because if sale was approved there would be "little prospect or occasion for further reorganization."); *In re Encore Healthcare Assocs*., 312 B.R. 52, 54–55 (Bankr. E.D. Pa. 2004) (denying Motion and finding that a section 363 sale served no legitimate business purpose when debtor admitted that it would convert the case to chapter 7 following the sale, and would not have adequate funds to proceed with an administratively solvent estate).

[12] Notably, even under the more lenient business justification standard, courts must consider whether the purchase price is fair. *See In re Delaware & Hudson Railway Co*., 124 B.R. 169, 176 (D. Del. 1991) (holding that when a debtor sells substantially all of its assets outside of the ordinary course of business it must prove that: "(1) there is a sound business purpose for the sale; (2) the proposed sale price is fair; (3) the debtor has provided adequate and reasonable notice; and (4) the buyer has acted in good faith") (emphasis added).

29. Indeed, as it stands, the DIP Lender/Insider Stalking Horse Bidder is an insider, affiliate, proposed DIP Lender, stalking horse bidder for the Manager and Remaining Assets, and backup bidder for the SNF Assets. *See* Motion, p. 24 (stating, *inter alia*, "Capstone is a non-debtor affiliate and 'insider' of the Debtors."). The Insider Stalking Horse Bidder's bid (i) fails to provide adequate value to the Debtors' estates in exchange for the bulk of the Debtors' assets (including causes of action—effectively purchasing insider releases for a credit bid), (ii) relies upon a challengeable credit bid for the consideration, (iii) seeks to effectuate what amounts to a restructuring transaction without observing the creditor protection provisions of the Chapter 11 plan process, and (iv) allows an insider to retain an equity interest without providing any value whatsoever to the Debtors' estates or demonstrating that creditors would not fare better in a liquidation.

30. Moreover, the proposed "process" is a perversion where potential non-Debtor defendants – as opposed to Congress, creditors or a trustee – get to choose the time and framework available under the Bankruptcy Code to investigate and consider the claims against themselves. This process ensures that certain information will not be available, and if it ever becomes available, will not be actionable. *See* DIP Motion (including requested indemnification, releases, and budgetary restrictions).

31. Meanwhile, the Debtors' schedules of assets and liabilities and statements of financial affairs are not yet filed, and if the Debtors have their way, will not be filed until April 15, 2021. *See* ECF No. 76. Moreover, the datarooms established by ESI appear deficient insofar as they have virtually no information regarding CMC II, or the Debtors' Litigation Assets. There is also no current market for the Litigation Assets based upon the set up here. Even if a market could be established, the Court should not tolerate a sale of complex claims against related non-Debtors

that involve evolving corporate structures and restructurings, capitalizations, transactions and governance, to those very same parties that are likely to be the subject and target of such claims.

B. The Proposed Sale Process Should Not Be Used To Circumvent The Protections For Unsecured Creditors Mandated By The Bankruptcy Code.

32. Section 363 asset sales should not be used to circumvent the protections for unsecured creditors mandated by the Bankruptcy Code. *In re WestPoint Stevens, Inc.*, 333 B.R. 30, 52 (S.D.N.Y. 2005), *aff'd in part, rev'd in part on other grounds*, 600 F.3d 231 (2d Cir. 2010) (stating that "it is well established that section 363(b) is not to be utilized as a means of avoiding Chapter 11's plan confirmation procedures"). Pre-plan sales are sometimes approved if there is sound business justification supported by a consideration of factors, with often the most important factor being whether the debtor's assets are rapidly decreasing in value such that an expeditious sale is necessary to maximize the value of the assets. *In re Lionel Corp*., 722 F.2d 1063, 1071 (2d Cir. 1983) (emphasis added); *see, also, In re Chrysler LLC*, 576 F.3d 108, 126 (2d Cir. 2009) ("Typically, courts have approved § 363(b) sales to preserve wasting asset[s].") (internal quotations omitted), *vacated as moot sub. nom. Ind. State Police Pension Tr. v. Chrysler LLC*, 558 U.S. 1087 (2009).

33. In this case, despite insinuations that the Debtors are akin to melting ice cubes, the Debtors are not rapidly losing going concern value such that a quick sale of Litigation Assets outside of a plan is necessary to capture remaining value before it melts away to the detriment of all creditors. *See* ECF No. 13 (reflecting that Debtors' operations are essentially break-even, with the budget reflecting only a slight net operating loss over the 13 week period). Additionally, the transactions contemplated essentially amount to a restructuring without observing the creditor protections encompassed in the Chapter 11 plan process. If the DIP Lender/Insider Stalking Horse Bid were approved, the new owner of the Debtors' Manager and Remaining Assets would be an

affiliate and insider of the Debtors, achieving the one notable difference, that non-debtor, Debtor related parties will have achieved broad releases and a balance sheet fix without being debtors before this Court. Meanwhile, the proposed sale seems unlikely to satisfy the "best interests" test, which requires that creditors receive more under a plan than they would in a Chapter 7 liquidation. 11 U.S.C. 1129(a)(7).[13] Moreover, the Insider Stalking Horse Bid may violate the absolute priority rule by effectively permitting the retention of equity without new value, while general unsecured creditors receive nothing, much less payment in full. *In re Dewey Ranch Hockey, LLC*, 414 B.R. 577, 592 (Bankr. D. Ariz. 2009) ("Because there is a real danger that a section 363 sale might deprive parties of substantial rights inherent in the plan confirmation process, sales of substantial portions of a debtor's assets under Section 363 must be scrutinized closely by the court."). Accordingly, the sale process, as presented, should not be approved.

C. <u>The Debtors' Litigation Assets Should Not Be Sold.</u>

34. The Debtors' Litigation Assets should not be sold. Analysis of whether the Debtors' claims and causes of action can or should be sold is inherently fact-intensive and approval should be denied where there are insufficient facts. For example, in *In re Exaeris, Inc*. a Chapter 11 debtor filed a motion for authority to sell substantially all of the debtor's assets to an insider on terms that included a credit bid of insider's $2.1 million claim for postpetition financing he provided and release of whatever claims the estate might have against him, but the Court held that the sale could not be approved based, *inter alia*, on a dearth of evidence of efforts to market the assets and lack of evidence as to value of assets being sold. *In re Exaeris, Inc*., 380 B.R. 741, 744 (Bankr. D. Del. 2008).

[13] Section 1129(a)(7) of the Bankruptcy Code requires that "each creditor in an impaired class '(i) has accepted the plan; or (ii) will receive or retain under the plan on account of such claim . . . property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date.'"

35. Any proposed sale of any claims and causes of action is both a sale of a debtor's assets outside the normal course of business and a compromise that must therefore meet heightened scrutiny and "fair and equitable" tests governing compromises. *In re Lahijani*, 325 B.R. 282, 284 (9th BAP 2005). In addition, a proposed sale must be made in "good faith." *In re Abbotts Dairies of Pennsylvania, Inc*., 788 F.2d 143, 147 (3d Cir.1986).

> We now conclude that, when a cause of action is being sold to a present or potential defendant over the objection of creditors, a bankruptcy court must, in addition to treating it as a sale, independently evaluate the transaction as a settlement under the prevailing "fair and equitable" test, and consider the possibility of authorizing the objecting creditors to prosecute the cause of action for the benefit of the estate, as permitted by § 503(b)(3)(B). Accordingly, we REVERSE the order approving the sale of the estate's causes of action under § 363.

In re Lahijani, 325 B.R. at 284.

> [U]nder the "fair and reasonable" test laid out by the Supreme Court . . . courts are instructed to apprise themselves "of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated. Further, the judge should form an educated estimate of the complexity, expense, and likely duration of such litigation, the possible difficulties of collecting any judgment which might be obtained, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise. . . the Third Circuit, in *Martin*, set forth four criteria that a bankruptcy court should consider in striking a balance between the "value of the claim that is being compromised against the value to the estate of the acceptance of the compromise proposal." *Martin*, 91 F.3d at 393. Those criteria are: (1) the probability of success in litigation; (2) the likely difficulties in collection; (3) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and (4) the paramount interest of the creditors. *Id*.

Travelers Cas. & Sur. Co. v. Future Claimants Representative, 2008 WL 821088, at *4–5 (D.N.J. Mar. 25, 2008) (quoting *Myers v. Martin (In re Martin)*, 91 F.3d 389, 393 (3d Cir. 1996)).

36. In the present matter, the record is not adequately developed to support an analysis of the *Martin* settlement factors, nor could it be in this strategically designed process. The DIP Lender/Insider Stalking Horse Bidder seeks to purchase all causes of action, such as claims under Chapter 5 of the Bankruptcy Code or other applicable law, as well as actions against current or former officers of the Debtors and affiliates without providing any analysis or information about the merit or potential value of such claims. The Motion only discloses the following blanket assertions with respect to such claims:

> The Manager and Remaining Assets include certain potential intercompany accounts receivable indicated on certain accounting records and other potential claims that the Debtors' independent fiduciaries and independent advisors have evaluated and negotiated at arms' length with the … [Insider] Stalking Horse Bidder.
>
> The bargained-for settlement value of those claims reflected in the Manager and Remaining Assets Stalking Horse Bid is equal to the approximate amount of the potential intercompany accounts receivable that Debtors' independent representatives view as potentially collectable in litigation, without discounting for litigation expense or uncertainty, but taking into account portions of such accounts that are of doubtful or uncertain collectability due to age, documentation, potential defenses (including setoff and recoupment) and possible difficulties in collection.

Motion, ¶ 35. Yet, as already discussed, we do not know, nor can we know, what causes of action are being sold given the evolving structures and Debtors' minimal disclosures. All we know right now is that there were prebankruptcy transactions that may have resulted in devaluing of the Debtors' assets. From an initial review, these transactions include omnibus revisions to CMC II management agreements[14] to make them cancellable upon 60 days' notice without cause, having

[14] Although CMC II manages approximately 140 entities, the only CMC II management agreements provided in the DIP financing and sale datarooms are the two management agreements with the two Operator Debtors—no further CMC II contracts appear to be populated. This supports the Committee's concerns regarding the pre-Petition Date marketing process. Moreover, notwithstanding requests, the Debtors have not turned over the non-Debtor management agreements, which are assets of Debtor CMC II and should be evaluated.

CMC II manage the Debtors and approximately 140 non-debtors alike without a market-rate fee, removing the Debtors from a financing source/credit facility with MidCap Financial in August 2020, and eliminating the Debtors from a master lease in August 2020 (the same date as the MidCap Financial transaction).

37. Aside from pushing the Debtors onto their artifically created financial island, these transactions may be the proverbial "tip of the iceberg." Indeed, the Ruckh litigation commenced in June 2011 spanned nearly a decade, resulted judgments of $347 million in March 2017, which were vacated, subsequently substantially reinstated by the Eleventh Circuit, and entered again in February 2021 in the final amounts of $257,721,285. Accordingly, it is probable that Consulate's concerted efforts to insulate the larger enterprise and drain the Debtors' value long predate the Petition Date. *See* Rundell Declaration [ECF No. 2], ¶¶17, 19-23.

38. The Litigation Assets, and all intercompany activity by the Debtors and related nondebtors alike, must be subjected to a thorough investigation, which would include material revisions to the timelines imposed by the special purpose non-debtor, Debtor related entity DIP Lender/Insider Stalking Horse Bidder. The Committee requires the platform provided for by the Bankruptcy Code for investigating, and if necessary, funding and bringing litigation. *See, e.g.*, 11 U.S.C. § 108 (providing that the Debtor may commence action for up to two years after the petition date). The Motion, however, asks the Court to approve a process that inappropriately ties one of the Committee's hands behind its back and shackles both of its legs. Accordingly, the Debtors' Litigation Assets should not be sold or subject to the rights-destroying process proposed in the Motion.

D. <u>The Proposed Sale Timeline Is Not Adequately Supported.</u>

39. The Debtors seek approval of an accelerated sale process that ends nine (9) weeks

after the Petition Date (less than eight (8) weeks after the Motion's filing) while simultaneously failing to provide, and stripping away, value. The Motion does not provide adequate support for the proposed timeline. Rather, the Motion simply assert that the short timeline is needed, not to promote a meaningful sale process, but solely to comply with milestones in connection with the insider DIP facility.

40. As already previewed, the proposed break-neck pace sought by the Debtors may achieve nothing other than delivering the Debtors' assets to the non-debtor, Debtor related DIP Lender/Insider Stalking Horse for grossly inadequate consideration. Thus, without more information and support, it can be concluded that the only parties that benefit from the proposed path are the non-debtor, Debtor related DIP Lender/Insider Stalking Horse Bidder and potentially hundreds (or more) related non-debtor parties. Absent the supposed emergency that may be the product of significant pre-petition planning, which is unnecessarily reinforced by the terms of the proposed DIP facility (and the Debtors' orchestration of these chapter 11 cases),[15] there is simply no legitimate justification for the process proposed here based upon the facts shared by the Debtors to date.

41. Facially, the Debtors' pre-petition marketing process does not appear to have been sufficiently robust so as to justify the proposed compressed sale timeline.[16] Notwithstanding, even

[15] As more thoroughly explained in the Committee's objection to the DIP Motion, the Committee also believes that the Debtors may have means other than postpetition financing available to them to support additional time needed here to run a value maximizing sale process. The budget reflects only a slight net operating loss over the 13 week period and there are practices to provide additional liquidity that the Debtors can implement here, including, for example, by deferring payments to related parties, deferring rent payments (as has been the case in many recent chapter 11 cases), having the costs of the bankruptcy be borne by over 140 nondebtor affiliates pursuant to the terms of the CMC II management agreements, having CMC II charge a reasonable management fee for its management services for nondebtor entities, utilizing the $2.9 million in Cares Act funds that it already has in its account and other items as described in the Committee's objection to the DIP Motion. .

[16] The datarooms established by ESI appear to be missing significant information. The sale dataroom only has five folders (i) "Business" (9 PDFs, 1 excel, two folders of pictures), (ii) "Contracts" (100 contracts for Governors Creek, 100 contracts for Marshall, and nothing for CMC II), (iii) "Financials" (12 excel spreadsheets, 8 pdfs), (iv) "Operations" (6 PDFS and 2 excels) and (v) "Regulatory" (12 PDFs). None of the information pre-dates the 2017

if the prepetition sale process was sufficiently robust, the timeline contemplated is untenable. The Debtors propose a Bid Deadline of May 5, 2021, such that from the date the Motion is first considered, there would be only one (1) month to market the assets, essentially leaving third party potential bidders with no time to seek, obtain, or review due diligence materials, let alone submit a bid. The nature of the Debtors' businesses, which includes multiple affiliated parties and intercompany transactions, is complicated. And the consequence of compressed timing is that only a bidder with a working knowledge of the relevant information regarding the Debtors and their businesses, and its related parties' evolving corporate structuring and restructuring, capitalization, transactions and governance, could have adequate time to formulate a reasoned bid for the assets.

42. In order for the sale process to achieve the desired goal of maximizing value, the proposed process should include Business Assets only and be extended, depending upon true liquidity circumstances, to provide maximum opportunity for all interested qualified parties to participate and submit bids for the assets. Expanding the proposed sale timeline for the Debtors' Business Assets by a reasonable time, liquidity permitting (which the Committee believes is the case), will ensure that the Debtors will utilize an optimal process for potential bidders to formulate and submit Qualified Bids, which will hopefully lead to a robust Auction that will result in value to the bankruptcy estates.

E. Credit Bid Rights Should Not Be Approved Absent Further Order Of The Court And Should Only Be Approved As To The Business Assets And Not The Litigation Assets.

43. Section 363(k) of the Bankruptcy Code provides: "At a sale under subsection (b) of this section of property that is subject to a lien that secures an allowed claim, ***unless the court for cause orders otherwise*** the holder of such claim may bid at such sale, and, if the holder of such

Ruckh judgment and the suspected attendant strategic restructuring. And only limited, summary financial information is included for 2018, 2019 and 2020.

claim purchases such property, such holder may offset such claim against the purchase price of such property." 11 U.S.C. 363(k) (emphasis added). Whether cause exists is a determination to be made on a case by case basis. *In re NJ Affordable Homes Corp.*, No. 05-60442 (DHS), 2006 WL 2128624, at *16 (Bankr. D.N.J. June 29, 2006) (limiting credit bid rights "for cause" is a flexible concept to be considered on a case-by-case basis).

44. Courts have held that the furtherance of general bankruptcy goals, such as the desire to foster a competitive bidding environment, might constitute `cause' sufficient to limit credit bidding rights under subsection (k). *See In re Fisker Automotive Holdings., Inc.*, 510 B.R. 55 (Bankr. D. Del. 2014) (capping a secured creditor's right to credit bid where "to do otherwise would freeze bidding."); *In re Free Lance-Star Publishing Co*., 512 B.R. 798 (Bankr. E.D. Va. 2014) (capping a secured creditor's right to credit bid where the creditor lacked a lien on certain of the debtors' assets, the creditor had engaged in inequitable conduct, and "limiting the amount of the credit bid in this case will restore enthusiasm for the sale and foster a robust bidding process"). "A court may deny a lender the right to credit bid in the interest of any policy advanced by the Code, such as to ensure the success of the reorganization or to foster a competitive bidding environment." *See In re Philadelphia Newspapers, LLC*, 599 F.3d 298, at n.14 (3d Cir. 2010). Additionally, credit bidding should not be allowed when it would chill bidding and threaten notions of fairness in the bankruptcy process. *See id.*

45. Courts have also denied credit bids for cause where there is inequitable conduct harming the debtor or its estate. *See In re Aloha Airlines, Inc.,* 2009 WL 1371950 (Bankr. D. Hawaii 2009) (denying right to credit bid where creditor struck a prior business deal relating to the debtor's assets with a competitor of the debtor and engaged in inequitable conduct harming the debtor); *In re The Free-Lance Star Publishing Co.,* 2014 WL 2505627 at *7 (Bankr. E.D. Va.

2014) (denying secured lender the right to credit bid because it leveraged its position as a secured lender to acquire additional collateral prior to the bankruptcy filing for the purpose of purchasing assets with credit in a bankruptcy case); and *In re Theroux,* 169 B.R. 498 (Bankr. D.R.I. 1994) (denying credit bid where the sale price grossly undervalued the assets).

46. Courts have also found cause to deny credit bidding when a sufficient dispute exists regarding the validity of the lien forming the basis for the credit bid. *In re Fisker Automotive Holdings, Inc.,* 510 B.R. at 61 ("The law leaves no doubt that the holder of a lien the validity of which has not been determined, as here, may not bid its lien."); *In re Daufuskie Island Properties, LLC,* 441 B.R. 60, 63-64 (Bankr. D.S.C. 2010) (denying secured creditor the right to credit bid because its mortgage and claim were subject to dispute). Only property in which the secured creditor holds a valid perfected security interest may be purchased by such creditor's credit bid. *In re The Free-Lance Star Publishing Co.,* 2014 WL 2505627 at *6 (Bankr. E.D. Va. 2014) (denying creditor the right to credit bid for assets in which it did not hold properly perfected security interests). The Third Circuit has emphasized the import of "review by the creditors," equipped with "full information," in any prospective asset sale under § 363(b)(1). *See Myers v. Martin* (*In re Martin*), 91 F.3d 389, 395 (3d Cir. 1996) (noting that the "creditor body could suffer" if the review process is not fully informed). Unsurprisingly, there is "no doubt that the holder of a lien the validity of which has not been determined, as here, may not bid its lien." *Fisker Automotive*, 510 B.R. at 61. Moreover, bids on unencumbered property must pay cash:

> If the creditor's lien reaches only some of the property to be sold, the creditor cannot credit bid the secured claim for the unencumbered property but must pay cash. How much the creditor must pay depends on the relative value of the encumbered and unencumbered property. A court might conclude that if the sale requires a complicated valuation process that could delay the sale, it should "order otherwise" and deny the right to credit bid, unless, for example, the valuation could take place after the sale and the secured

> creditor can provide adequate assurance that it will be able to pay the cash portion once the amount is determined.

Collier on Bankruptcy ¶ 363.09[1] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.). Finally, the right of a secured creditor to credit bid is intended to protect secured creditors from the sale of its collateral for an unreasonably low value. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2070 at n.2 (2012).

47. Here, no credit bidding should be permitted absent further order of the Court. The DIP Lender/Insider Stalking Horse should not be permitted to credit bid given the facts and circumstances of this case—particularly where the DIP Lender/Insider Stalking Horse appears to be exerting insider control over the process to obtain broad releases and gut the Debtors' estate of value while acquiring assets for no true consideration. This is wholly inequitable to the legitimate creditors and constitutes "cause" to deny credit bidding rights. Also, permitting credit bidding in this context would not serve the defensive purpose and policy underlying credit bidding, but rather provide a sword in which the DIP Lender/Insider Stalking Horse Bidder can extract assets from a Debtors' estate without providing any value in return, achieving the ultimate balance sheet clean-up for a conglomerate of non-debtor, Debtor related parties without even filing for bankruptcy.

48. Furthermore, any funding from DIP Lender/Insider Stalking Horse Bidder is likely subject to recharacterization as equity, or actually owed to the Debtors via an intercompany claim. By virtue of CMC II's management agreements, the Debtors' non-debtor affiliates (including possibly even the DIP Lender itself), may be obligated to pay for the Debtors' very restructuring costs sought to be funded by the proposed DIP loan. Because the DIP facility may be subject to recharacterization as an equity contribution, or otherwise modified due to a legitimate amount due and owing to the Debtors by virtue of intercompany claims, it is inappropriate for use as part of a credit bid.

49. Accordingly, sufficient cause exists to deny the proposed credit bid, as there is inadequate information to disregard a potential dispute regarding the validity and existence of any purported secured claim, an investigation has not occurred, Debtors have delayed and withheld information, the bid relates to presently unencumbered assets which should require cash payment, the credit bidding rights are being proposed as a sword and not a shield, and permitting a credit bid threatens notions of fairness in the bankruptcy process whereas denying credit bidding here will foster a competitive bidding environment that could result in cash for the estates. Other than with respect to the DIP facility that is proposed by the DIP Lender/Insider Stalking Horse Bidder, the Debtors assets appear to be free of claims of other secured creditors with the exception of possibly equipment lenders or landlords.[17] *See* DIP Motion, ¶14 ("As of the Petition Date, the Debtors are not party to any credit facilities (secured or otherwise)."), ¶16 ("The Operator Debtors granted a security interest in substantially all of their assets to the Omega Landlords.") & ¶17 ("Prior to the Petition Date, certain of the Debtors entered into various secured equipment and personal property leases . . . [which] Equipment Lessors have liens on specific pieces of equipment and/or personal property identified in their lease agreements and UCC-1s."). For these reasons, no credit bidding should be permitted absent further order of the Court.[18]

[17] Even if the DIP Lender/Insider Stalking Horse Purchaser is allowed to credit bid any portion of claims based on the DIP Facility, it should not be permitted a credit bid up to the full amount of the anticipated DIP Facility given that it unclear how much of the proposed DIP Facility will actually be used. Additionally, the Committee's ability to object to any credit bid should be preserved, the Stalking Horse Purchaser's alleged liens and security interests are not ipso facto found valid by the entry of the Bidding Procedures Order, and Insider Stalking Horse Bidder should be required to provide some form of protection to the estates, such as a letter of credit, to prevent a back-door release of potentially valuable estate claims. *See, e.g., In re Octagon Roofing*, 123 B.R. 583, 592 (Bankr. N.D. Ill. 1991) (bank allowed to credit bid conditioned upon the posting of an irrevocable letter of credit to protect the estate in the event the liens were later avoided).

[18] To the extent DIP financing is approved, and credit bid rights are sought, for the reasons set forth herein, any such credit bid should apply to only the Debtors' Business Assets and not the Litigation Assets.

F. <u>There Should Be No Finding of Good Faith as to the DIP Lender/Insider Stalking Horse Bidder.</u>

50. Section 363(m) articulates the "good faith" requirement of a Section 363 asset sale whereby:

> (m) The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

11 U.S.C. § 363(m). A finding of good faith is also required for any sale under the substantive law of the Third Circuit. *Abbotts Dairies*, 788 F.2d at 149–50 ("[W]hen a bankruptcy court authorizes a sale of assets pursuant to section 363(b)(1), it is required to make a finding with respect to the "good faith" of the purchaser."). A court may not find good faith if fraud, collusion or unfair advantages are determined. *Id*. at 147.

51. Pursuant to section 363(m) of the Bankruptcy Code, a good faith purchaser is one who purchases assets for value, in good faith, and without notice of adverse claims. *Abbotts Dairies*, 788 F.2d at 147 (holding that section 363(m) "encompasses one who purchases in 'good faith' and for 'value'" under traditional equitable principles). In determining whether an asset purchaser is entitled to such protections, courts examine "the integrity of his conduct in the course of the sale proceedings." *Abbotts Dairies*, 788 F.2d at 148. In assessing the good faith of a purchaser, courts have considered factors such as: (1) whether the sale was negotiated at arm's length; (2) whether any officer or director of the debtor holds any interest in or is otherwise related to the potential purchaser; and (3) whether fraud or collusion exists among the prospective purchaser, any other bidders or the trustee. *See Abbotts Dairies*, 788 F.2d at 147-48. For the reasons already discussed herein, any acquisition of the Debtor's assets by the DIP Lender/Insider Stalking

Horse Bidder is not in good faith and should not be afforded the protections of section 363(m) of the Bankruptcy Code.

G. There Should Be No Waiver of Bankruptcy Rules 6004(h) and 6006(d).

52. Bankruptcy Rule 6004(h) provides that an "order authorizing the use, sale, or lease of property . . . is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise." Fed. R. Bankr. P. 6004(h). Additionally, Bankruptcy Rule 6006(d) provides that an "order authorizing the trustee to assign an executory contract or unexpired lease . . . is stayed until the expiration of 14 days after the entry of the order, unless the court orders otherwise." Fed. R. Bankr. P. 6006(d).

53. The purpose of Bankruptcy Rules 6004(h) and 6006(d) is to provide sufficient time for an objecting party to request a stay pending appeal before an order can be implemented. Fed R. Bankr. P. 6004(d) advisory committee's note. The stay pursuant to Bankruptcy Rule 6004(h) may be waived to allow a sale to close immediately "where there has been no objection to the procedure." Collier on Bankruptcy ¶ 6004.11 (16th ed. 2016). Courts may waive the stays under rules 6004 and 6006 upon an "evidentiary showing of a business exigency requiring a closing within 10 days of an approval order . . . ." *In re PSINet, Inc.,* 268 B.R. 358, 379 (Bankr. S.D.N.Y. 2001) (decided under the pre-revision rules providing for a ten day stay period).

54. Here, the Debtors have made no showing of any business exigency constituting cause to waive the fourteen day stay period. To the contrary, waiving such period could seriously prejudice the Debtors' other creditors, as it could allow a sale to close prior to any reasonable investigation of the assets being sold, and prior to the end of any appeal period. Since no exigency exists, the fourteen day stays under Rules 6004(h) and 6006(d) should not be waived.

H. Additional Bidding Procedures Are Objectionable.

55. In addition to the issues raised above, there are specific Assumption and Bidding Procedures that will need to be modified to maximize value and transparency. These include, but are not limited to, the following requests:

a. Eliminate the requirement that Potential Bidders provide proof of financial wherewithal before receiving access to the data room and conduct due diligence; rather, the only requirement for access should be a signed confidentiality agreement which should be acceptable to the Debtors, in consultation with the Committee;

b. Require the Debtors to consult with the Consultation Parties (including the Committee) on certain decisions now reserved for the Debtors only, including with respect to any bidding or sale determination, such as whether bids are "same or better," which should not be made by the Debtors alone, but should be made in consultation with the Committee;

c. Require a good faith deposit of 10 percent of the cash consideration of the Bid Value of all bidders, including the DIP Lender/Insider Stalking Horse Bidder or credit bidders;

d. Allow flexibility in certain categories, including in Qualified Bidder requirements and the following items, which should not be a bar to consideration of bids, but rather be considered in the determining the highest or otherwise best bid:

   i. the time frame for closing;

   ii. accepting non-conforming or not Qualified bids;

iii. consideration of partial bids;[19]

iv. requirement of executed transaction documents;

v. prohibitions on financing contingencies, approvals or diligence outs;

vi. evidence of funding commitments to satisfy bid obligations;

e. Remove special treatment afforded the DIP Lender/Stalking Horse Bidder or credit bidders, including:

i. that such party need not be "Qualified";[20]

ii. that such party need not put up a good faith deposit of 10 percent of the cash consideration of the Bid Value;

f. Extend due diligence should through the Auction, whereas the Bid Procedures currently provide that all due diligence expires on the Bid Deadline;

g. Require that the Debtors shall provide access or promptly deliver to the Committee copies of any materials provided to or by Potential Bidders in connection with the sale process, including, promptly upon receipt, all draft term sheets and other documentation in connection with any Sale transaction;

h. Extend the deadline for objections to Sale to after the Auction, whereas the Motion is currently seeking to establish April 30, 2021, at 5:00 p.m. ET, as the deadline for objections to the Sale, which is 5 days before the Bid Deadline, 10 days before the Auction and 13 days before the Sale Hearing (Motion, ¶16); and

i. Modify Assumption Procedures to provide (i) more than one (1) day for

[19] Component bids should not be excluded solely because the combination of all component bids does not exceed the Stalking Horse Bid. In the case of partial bids, where each bidder will not know what its counterparts are bidding, flexibility and inclusion should be the rule – not gating and exclusion.

[20] The Motion states "For the avoidance of doubt, the CMC Stalking Horse Bid (and any bid of the CMC Stalking Horse Bidder at the Auction) shall be deemed a Qualified Bid regardless of the foregoing requirements." Presumably, this applies not only the Insider Stalking Horse bid, but also the Insider Stalking Horse's back-up bid for the SNF Assets under the Alternative Term Sheet. This should be deleted.

counterparties to object to adequate assurance of future payment from the Successful Bidder that is not the stalking horse bidder,[21] (ii) deadlines to object to any Supplemental Assumption Notice should be set at a minimum number of days of notice,[22] and (iii) require that all undisputed portions of cure amounts are paid in the event that there is an unresolved cure objection.

RESERVATION OF RIGHTS

56. The Committee reserves the right to supplement this Objection or to raise additional or further objections to the Motion, the order and/or exhibits thereto, including any form term sheets or asset purchase agreements, at or prior to the hearing on the Motion, Sale Hearing or any other relevant hearing.

CONCLUSION

WHEREFORE, for the reasons stated above, the Committee respectfully requests that the Court deny the Motion as submitted, and grant such other and further relief as this Court deems just and proper.

Dated: March 29, 2021

/s/ Cheryl A. Santaniello

Cheryl A. Santaniello, Esq. (DE Bar No. 5062)
Porzio, Bromberg & Newman, P.C.
300 Delaware Avenue, Suite 1220
Wilmington, DE 19801
Telephone: (302) 526-1235
Facsimile: (302) 416-6064
E-mail: casantaniello@pbnlaw.com

[21] Currently, the Debtors propose May 11, 2021, at 12:00 p.m. (noon) (Eastern) as the deadline for Debtors to (i) file with the Court the Notice of Successful Bidder and (ii) provide notice to non-Debtor parties of any Designated Contracts, and May 12, 2021 as deadline to object to assumption and assignment solely with respect to the adequate assurance of future payment from the Successful Bidder. Indeed, the Debtors anticipated service of the notice of successful bidder is unlikely to even reach the counterparties in time for them to file an objection. Motion, ¶16.

[22] Currently, there is not set notice period contemplated. Instead, objections must "filed with the Court and served upon counsel to the Debtors and counsel to the Stalking Horse Bidder so as to be actually received by April 30, 2021, at 5:00 p.m. (Eastern), or *such deadline set forth in the applicable Supplemental Assumption Notice*." Motion, ¶17.

-and-

Robert M. Schechter, Esq. *(Pro Hac Vice Admitted)*
Rachel A. Parisi, Esq. *(Pro Hac Vice Admitted)*
David E. Sklar, Esq. *(Pro Hac Vice Admitted)*
Porzio, Bromberg & Newman, P.C.
100 Southgate Parkway
P.O. Box. 1997
Morristown, New Jersey 07962
Telephone: (973) 538-4006
Facsimile: (973) 538-5146
E-mail: rmschechter@pbnlaw.com
E-mail: raparisi@pbnlaw.com
E-mail: desklar@pbnlaw.com

Proposed Counsel for the Official Committee of Unsecured Creditors