IN THE UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

In re:	)	Chapter 11
LAVIE CARE CENTERS, LLC, *et al.*[1]	)	Case No. 24-55507 (PMB)
Debtors.	)	(Jointly Administered)
	)	**Related to Docket Nos. 8, 10, 11, 14, 15, 16, 17, 45, 47, 48, 49, 50, 131, 132, 133**

DEBTORS' OMNIBUS REPLY TO THE COMMITTEE'S FIRST-DAY OBJECTIONS

LaVie Care Centers, LLC ("LaVie") and certain of its affiliates and subsidiaries, as debtors and debtors-in-possession in the above-captioned chapter 11 cases (collectively, the "Debtors"), file this omnibus reply (the "Reply") to the following objections (collectively, the "Objections")[2] filed by the Official Committee of Unsecured Creditors (the "Committee"):

i. the *Objection of the Official Committee of Unsecured Creditors to the Debtors' Emergency Motion 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. 131] (the "UCC DIP Objection");

ii. the *Limited Objection and Reservation of Rights of the Official Committee of Unsecured Creditors to Debtors' Motion for Entry of an Order (I) Approving Bidding Procedures and Bid Protections, (II) Scheduling Certain Dates and Deadlines with Respect Thereto, (III) Approving the Form and Manner of Notice Thereof, (IV) Establishing Notice and Procedures for the Assumption and Assignment of Contracts and Leases, (V) Authorizing the Assumption and*

[1] The last four digits of LaVie Care Centers, LLC's federal tax identification number are 5592. There are 282 Debtors in these chapter 11 cases, which 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://www.kccllc.net/LaVie. The location of LaVie Care Centers, LLC's corporate headquarters and the Debtors' service address is 1040 Crown Pointe Parkway, Suite 600, Atlanta, GA 30338.

[2] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Objections, the Motions (as defined herein), or the First Day Declaration (as defined herein), as applicable.

Assignment of Assumed Contracts, and (VI) Authorizing the Sale of Assets [Docket No. 132] (the "UCC Bid Procedures Objection"); and

iii. the *Omnibus Response of the Official Committee of Unsecured Creditors to Certain of the Debtors' First Day Motions* [Docket No. 133] (the "UCC First-Day Objection").

In support of the Reply, the Debtors rely on the *Declaration of M. Benjamin Jones in Support of Chapter 11 Petitions and First Day Pleadings* [Docket No. 17] (the "First Day Declaration") and the *Declaration of Michael Krakovsky in Support of Debtors' Emergency Motion 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. 16] (the "DIP Declaration"), each of which are incorporated herein by reference. In further support of the Reply, the Debtors respectfully state as follows:

PRELIMINARY STATEMENT

1. From the moment of the Committee's appointment and selection of its professionals, the Debtors have held numerous conference calls to help them get up to speed, provide additional diligence information, and otherwise educate them on the operations of the Debtors, the prepetition negotiations with Omega and other constituents, and the trajectory of these Chapter 11 Cases. Within ***minutes*** of the selection of their advisors, counsel to the Committee immediately had access to the Debtors' virtual dataroom, now containing more than 6,000 documents. The Debtors subsequently received lengthy diligence requests from the Committee and set about loading additional documents responsive to those requests, and continued to hold near-daily calls amongst counsel and financial advisors to assist the Committee in navigating the information provided to date. The Debtors are certainly cognizant that the Committee is in its

relatively nascent stage; however, the Debtors have already taken extensive steps to assist the Committee in efficiently getting up to speed, and are committed to continuing those efforts.[3]

2. Throughout their numerous discussions with the Committee to date, the Debtors have endeavored to provide a roadmap with respect to their goals and ultimate trajectory of these Chapter 11 Cases. Specifically, and as articulated in the First Day Declaration and to the Court at the first day hearing, the Debtors seek to maintain stability in their operations and test the market for the Debtors' assets in a sale process run by Stout Capital, LLC ("Stout"), the Debtors' proposed investment banker, which commenced earlier this week. These processes are to be funded—if at all—by **junior** post-petition financing being offered by the Debtors' DIP Lenders, on terms that do not hamstring the Committee in their investigation efforts and provide ample opportunity for the Committee's challenge period (which, as discussed below, has been further extended). Denying the Debtors' proposed DIP Facility, or alternatively, modifying its terms in a manner that compromises the Debtors' ability to fund these Chapter 11 Cases, makes little sense at this stage and would only serve to harm the Debtors' creditors, including the very constituents the Committee has a fiduciary duty to protect. Without the liquidity provided by the DIP Facility, **the Debtors will not have sufficient liquidity to operate their business, care for their residents, make payroll, or complete a value-maximizing marketing and sale process for the Debtors' assets**. The Committee does not—and cannot—dispute this critical point, nor have they pointed to any alternative financing available to the Debtors. Rather, the Committee, through its Objections,

[3] While the Committee seems to in part recognize these efforts (*see* UCC DIP Obj. ¶ 29 ("The Committee appreciates the Debtors' swift responsiveness in populating a data room for the Committee's review, with additional files being added on a daily, and sometimes hourly, basis.")), the Objections are equally replete with statements that the Debtors have not yet provided the Committee with critical information necessary to evaluate the Motions. *See, e.g.*, UCC DIP Obj. ¶ 29; UCC Bid Procedures Obj. ¶ 5; UCC First-Day Obj. ¶ 14.

attempts to draw attention to unfounded and baseless allegations—without a shred of evidence—that have little to no bearing on the relief currently being requested from this Court.

3. Equally concerning is the false narrative advanced by the Committee in its Objections. Indeed, the first sentence of the UCC DIP Objection states that "[t]his bankruptcy is largely about the highly unequal relationship between the Debtors and Omega, their largest landlord and secured lender." UCC DIP Obj. ¶ 1. This is simply not true and woefully mischaracterizes the facts. As discussed at length in the First Day Declaration, the Debtors could not afford to pay rent to their landlords, including Omega, on leases that hemorrhaged cash. On a prepetition basis, Omega assisted the Debtors by, among other things, providing additional working capital to the Debtors, funding a significant cooperation fee to the Debtors, deferring (and ultimately forgiving) nearly $20 million in rent, and identifying new operators to lift the burden of these facilities from the Debtors. Now, on a post-petition basis, Omega is once again assisting the Debtors by co-sponsoring **junior** DIP financing that alternative third-parties were simply unwilling to provide[4] in exchange for DIP protections that are reasonable and customary in DIP orders entered in this jurisdiction and across the country.[5]

4. Against the backdrop of arms'-length, hard fought negotiations amongst the Debtors and the DIP Lenders over the weeks prior to the Petition Date, coupled with the Debtors' undeniable need for postpetition financing to continue to support their business operations, the

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[4] *See* DIP Decl., ¶ 11.

[5] *See, e.g.*, *In re Jack Cooper Ventures, Inc., et al.*, Case No. 19-62393 (PWB) (Bankr. N.D. Ga.) [Docket No. 279]; *In re Mission Coal Co. LLC*, Case No. 18-04177 (TOM) (Bankr. N.D. Ala. Nov. 20, 2018) [Docket No. 300]; *In re Lakepoint Land LLC*, Case No. 18-41337 (BEM) (Bankr N.D. Ga. July 3, 2018) [Docket No. 64]; *In re Beaulieu Grp., LLC*, Case No. 17-41677 (MGD) (Bankr. N.D. Ga. Aug. 31, 2017) [Docket No. 247]; *In re SC Healthcare Holding, LLC*, Case No. 24-10443 (TMH) (Bankr. D. Del. May 14, 2024) [Docket No. 313]; *In re Number Holdings, Inc. (99 Cents Only Stores LLC)*, Case No. 24-10719 (JKS) (Bankr. D. Del. May 9, 2024) [Docket No. 467]; *In re Nogin, Inc.*, Case No. 23-11945 (CTG) (Bankr. D. Del. Jan 30, 2024) [Docket No. 244]; *In re Benefytt Techs., Inc.*, Case No. 23-90566 (CML) (Bankr. S.D. Tex. June 20, 2023) [Docket No. 237].

Debtors made the informed business decision that the DIP Facility, including its size, fees, milestones, and other terms and conditions, presented the best available alternative under the circumstances. The compromises contemplated under the DIP Facility include timely payments of rent to all landlords, as well as certain limited payments on account of previously divested facilities, which require attention and support even though the operations previously transferred to new operators. And yet, the Committee unabashedly takes aim to defer payment of administrative rent obligations to Omega[6] and to seek an order from the Court prohibiting the Debtors from making **any** payments on account of previously-divested facilities, including those owing to CMS on account of participation in the Medicare program.

5. The former ask—nonpayment of rent to Omega—is a bridge to nowhere and is not relevant at this stage of the Chapter 11 Cases. The Debtors acknowledge that there is a split in case law as to whether skilled nursing facilities constitute "non-residential real property leases" under Bankruptcy Code section 365(d)(4), which requires timely payment of rent, or "residential" real property leases which defers payment of rent as an administrative claim. However, the majority of cases appear to suggest that a determination as to whether a lease is "nonresidential" depends on whether the lessee enters the agreement seeking income (the "income test"), which would mean that these leases are nonresidential real property leases.[7] Regardless, the Committee readily admits that, even if it is determined to be a residential real property lease, it is an administrative expense claim that has to be paid (*see* UCC DIP Obj. ¶ 23), and simply seeks to kick the can on the most critical issue to Omega—*i.e.*, timely payment of rent—while the Debtors

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[6] Strangely, the Committee seems singularly focused on Omega, notwithstanding that the Debtors have three other landlords that they contemplate timely payment of rent to, but the Committee does not appear to take issue with those payments.

[7] *See, e.g.*, *In re Passage Midland Meadows Operations, LLC*, 578 B.R. 367, 377-78 (Bankr. S.D. W.Va. 2017) (surveying the majority and minority approaches over the past 30 years and holding that the "income test" is the appropriate measure of whether a property is residential)

continue to operate in Omega's buildings. Not only does this have the potential to impact the sale process by increasing cure payments to the Debtors' landlords, but it potentially picks a fight with the other landlords who consented to the Debtors' DIP Facility ***precisely because*** it contemplated timely payment of rent. Deferring administrative expenses does not avoid the Debtors' obligation entirely, and only seeks to finance these Chapter 11 Cases on the backs of the Debtors' landlords. Nor is it likely that the Debtors' DIP Lenders will be willing to lend without assurance that the Debtors' landlords, including Omega, can obtain assurance of timely payment of rent. Litigating this issue at the outset of the Chapter 11 Cases—particularly when support of the Debtors' landlords is critical to a successful sale process—is not in the Debtors' interest, nor should the Committee want to be the cause of that distraction at this juncture.

6. The latter ask—*i.e.*, to cease payment on account of divested facilities—ignores much of the information that the Debtors have been providing to the Committee. More than half of the obligations to which the Committee objects are owed to the Center for Medicare and Medicaid Services ("CMS") on account of Medicare cost report settlements and civil monetary penalties that are assessed in the ordinary course. The Debtors are concerned that delaying any payments owed to CMS may have broader consequences, particularly where certain provider numbers have recently been transferred to new operators but remain with the Debtors pending regulatory approvals. The Debtors have relayed these concerns to the Committee, and believe that it would be irresponsible at this stage of the Chapter 11 Cases to skirt payment of amounts that are required under the Medicare program. The Debtors remain focused on a value-maximizing sale process, and there can be no doubt that poking CMS in the eye at this juncture may have more significant ramifications on the Debtors' estates than simply paying the amounts owing on account of these governmental obligations.

7. Taken as a whole, the Committee simply misses the mark in its scattershot Objections. Short on facts and long on innuendo, the Committee seeks, among other things, to pre-litigate purported claims against Omega which—if *actually* supported by the evidence (which the Debtors believe unlikely)—the DIP Facility affords the Committee an opportunity to pursue, as the release provisions and stipulations clearly remain subject to the Committee's challenge period. What's more, the DIP Lenders have agreed to certain concessions under the proposed Final DIP Order to try and reach agreement with the Committee, including a significantly extended challenge period. These modifications are significant, and will be contained in the proposed form of order submitted to the Court. And although, as of the time of filing of this Reply, these modifications do not appear to resolve the UCC DIP Objection, they seek to address many of the major concerns raised by the Committee and include:

(a) extending the challenge deadline from August 12, 2024 (60 days after formation of the Committee) to September 15, 2024 (94 days after formation of the Committee);

(b) increasing the Committee's investigation budget from $50,000 to $250,000;

(c) increasing the overall line-item budget for Committee professionals by 33% as compared to the Interim DIP Budget;

(d) clarifying that any releases of TIX 33433, LLC do not extend to any of its affiliated entities;

(e) agreeing to extend the sale milestones to accord with the Committee's requested extension (Bid Deadline of September 5, 2024; Sale Hearing of September 11, 2024); and

(f) additional clarification on credit bid rights to ensure that they remain subject to section 363(k) of the Bankruptcy Code).

8. At bottom, the Debtors take seriously both their obligations to care for their residents during these Chapter 11 Cases and their fiduciary duties to their stakeholders. This is why the Debtors believe that the proposed DIP Facility, as modified to account for many of the

Committee's concerns, is the best—and indeed only—path forward to fulfill such duties. The Debtors have embarked on a sale and marketing process with the goal of maximizing the value of their estates to benefit their creditors, including unsecured creditors. Without sufficient liquidity to operate their business and manage their affairs in chapter 11, the Debtors cannot achieve these goals and may find themselves in a position where they do not have the support (financial or otherwise) from their key stakeholders to proceed down this path, to the severe detriment of the Debtors' residents, employees, and creditors. The proposed DIP Facility provides a reasonable balance and preserves the Committee's challenge period to seek standing to pursue causes of action, to the extent they exist. Accordingly, as set forth herein, the Objections should be denied (or continued as the case may be), and the Motions should be granted.

BACKGROUND

I. The Chapter 11 Cases

9. On June 2, 2024 (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") in the United States Bankruptcy Court for the Northern District of Georgia, Atlanta Division (the "Court"). On June 3, 2024, the Debtors filed a series of "first-day" motions requesting various types of emergency relief. Of those motions, the Committee has objected to the relief requested with respect to the following:

(a) the *Debtors' Emergency Motion for Entry of Interim and Final Orders (I) Authorizing the Debtors to Maintain and Continue Resident Programs and Honor Prepetition Obligations Related Thereto, and (II) Granting Related Relief* [Docket No. 8] (the "Resident Programs Motion");

(b) the *Debtors' Emergency Motion for Entry of Interim and Final Orders Authorizing Debtors to (I) Maintain Existing Insurance Policies and Surety Bonds and Pay All Obligations Arising Thereunder; (II) Renew, Revise, Extend, Supplement, Change, or Enter Into New Insurance Policies and Surety Bonds; and (III) Granting Related Relief* [Docket No. 10] (the "Insurance Motion");

(c) the *Debtors' Emergency Motion for Entry of Interim and Final Orders (I) Authorizing Debtors to Pay Certain Prepetition Taxes, Fees, and Related Obligations and (II) Granting Related Relief* [Docket No. 11] (the "Taxes Motion");

(d) the *Debtors' Emergency Motion 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. 14] (the "Cash Management Motion"); and

(e) the *Debtors' Emergency Motion 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 Motion").

10. On June 5, 2024, the Court entered interim orders with respect to the foregoing motions. *See* Docket Nos. 45, 47, 48, 49, 50.

11. On June 10, 2024, the Debtors filed the *Debtors' Motion for Entry of an Order (I) Approving Bidding Procedures and Bid Protections, (II) Scheduling Certain Dates and Deadlines with Respect Thereto, (III) Approving the Form and Manner of Notice Thereof, (IV) Establishing Notice and Procedures for the Assumption and Assignment of Contracts and Leases, (V) Authorizing the Assumption and Assignment of Assumed Contracts, and (VI) Authorizing the Sale of Assets* [Docket No. 104] (the "Bidding Procedures Motion" and collectively with the Resident Programs Motion, the Insurance Motion, the Taxes Motion, the Cash Management Motion, and the DIP Motion, the "Motions").

12. On June 13, 2024, the Office of the United States Trustee for Region 21 (the "U.S. Trustee") appointed the Committee. *See* Docket No. 112. On June 14, 2024, the Committee selected Troutman Pepper Hamilton Sanders LLP as its proposed counsel. That same day, the

Debtors provided proposed counsel to the Committee access to the dataroom, containing thousands of documents and related background information. On June 17, 2024, the Committee selected FTI Consulting, Inc. as its proposed financial advisor, and similarly, the Debtors immediately provided access to the dataroom upon learning of such retention.

REPLY

I. The UCC DIP Objection Should by Overruled and the DIP Motion Should be Granted on a Final Basis.

13. The terms and conditions of the DIP Facility are the product of extensive prepetition negotiations among the Debtors and the DIP Lenders. Entry into the DIP Facility is consistent with the Debtors' fiduciary duties and supported by fair consideration. When viewed in light of the Debtors' liquidity needs, the path forward provided by the DIP Lenders through the DIP Facility, and the elimination of risk and uncertainty associated with priming litigation, the terms of the DIP Facility are fair and reasonable, reflect the Debtors' exercise of prudent business judgment, and should be approved over the Committee's objection.

A. The Debtors' Decision to Enter into the DIP Facility Reflects the Reasonable Exercise of Their Business Judgment and is Entitled to Deference.

14. Entry into the DIP Facility reflects the reasonable exercise of the Debtors' business judgment and provides significant benefits to the Debtors' estates as a whole. The Debtors believe that entry into the DIP Facility is a sound exercise of their business judgment in light of their immediate need for postpetition financing and the fact that no other existing stakeholder or third party—even on a postpetition basis—has presented or was willing to present an alternative debtor-in-possession financing proposal. *See* DIP Decl. ¶ 10.

15. Courts grant considerable deference to a debtor's business judgment in obtaining postpetition secured credit, so long as the agreement to obtain such credit does not run afoul of the

provisions of, and policies underlying, the Bankruptcy Code. *See, e.g.*, *In re N. Bay Gen. Hosp., Inc.*, No. 08-20368 (Bankr. S.D. Tex. Jul. 11, 2008) (order approving postpetition financing on an interim basis as exercise of debtors' business judgment); *In re L.A. Dodgers LLC*, 457 B.R. 308, 313 (Bankr. D. Del. 2011) ("[C]ourts will almost always defer to the business judgment of a debtor in the selection of the lender.").

16. The Debtors only agreed to the terms and conditions of the DIP Facility after a marketing and negotiation process and careful evaluation of every possible financing alternative. *See* DIP Decl. ¶¶ 10-11. The Debtors negotiated the terms of the DIP Loan Documents with the DIP Lenders and the terms of the consensual use of Cash Collateral with the Prepetition ABL Lenders in good faith, at arm's-length, and with the assistance of their advisors. The Debtors believe that they have obtained the best financing available under the circumstances.

17. The Committee maintains that certain terms of the DIP Facility and the Final Order are inappropriate. Specifically, the Committee takes aim at the releases of the Prepetition ABL Secured Parties and the Prepetition Omega Secured Parties the Debtors propose to grant in connection with the Final DIP Order, arguing the releases lack consideration. *See* UCC DIP Obj. ¶¶ 7, 9. Not so.[8]

18. With respect to the Prepetition ABL Secured Parties, the Committee overlooks the fact that, without their consent, the Debtors have no right to use Cash Collateral. The Debtors negotiated in good faith for consensual use of cash collateral in exchange for a reasonable and

[8] The Committee also complains about the Debtors' intention to pay postpetition rent due under their various leases. *See* UCC DIP Obj. ¶¶ 23–24, 27. In the Committee's view, assuming the Debtors' leases constitute leases of residential real property, as opposed to nonresidential real property leases, the Debtors should simply kick the rent can down the road, let their administrative expense claims balloon, and deal with the problem later. *See* 11 U.S.C. § 365(d)(3) (requiring a debtor-in-possession to timely comply with its obligations under nonresidential real property leases). But the nature of the Debtors' leasehold interests is not an issue relevant for final approval of the proposed DIP Facility. And even if that issue were relevant, the Debtors, in an exercise of their sound business judgment, elected to account for, and pay, their postpetition rent obligations on a timely basis as part of the proposed DIP Facility.

customary adequate protection package for the Prepetition ABL Secured Parties. As a result, the Debtors obtained consensual use of cash collateral without having to incur unwanted and unnecessary legal expenses fighting over adequate protection, which also has the benefit of reducing the amount of DIP financing required to fund the Chapter 11 Cases. The Prepetition ABL Secured Parties did not seek a roll-up or other take-out of their obligations; rather, they proposed a reasonable adequate protection package. Thus, the Debtors sought the Prepetition ABL Secured Parties' consent to use Cash Collateral and the price of that consent was a customary adequate protection package.

19. With respect to the Prepetition Omega Secured Parties, like the Prepetition ABL Secured Parties, the Debtors needed the Prepetition Omega Secured Parties' consent to use Cash Collateral. The Prepetition Omega Secured Parties not only consented to such use but also went a step further—by co-sponsoring DIP financing on a ***junior secured basis*** on favorable terms when no other prospective financing source was willing to meet the Debtors' needs on the Debtors' expedited timeline. In exchange, the Prepetition Omega Secured Parties required the release reflected in the proposed Final DIP Order. The Debtors, in an exercise of their sound business judgment and in consultation with their advisors, determined a release was warranted based on the foregoing circumstances.

20. But importantly, the releases are subject to the Challenge Period set forth in the proposed Final DIP Order. In other words, the Committee has until September 15, 2024—ninety-four days since its formation on June 13, 2024—to investigate whether claims exist against the Prepetition Secured Parties. The Committee's rights are therefore preserved because the releases provided for in the proposed Final DIP Order are effectively tolled during the Challenge Period.

21. For these reasons, the Debtors believe that the terms of the DIP Facility, including the releases set forth therein, are appropriate and an exercise of the Debtors' sound business judgment.

B. Granting Liens on and Superpriority Claims Against Unencumbered Assets and Avoidance Action Proceeds is Appropriate and Warranted.

22. The DIP Liens include the proceeds of Avoidance Actions (in contrast to a lien over the avoidance actions themselves, which is not granted under the Final DIP Order), which serves as a source of repayment on account of the DIP Facility. Offering the DIP Lenders and the Prepetition Secured Parties these protections is not, as the Committee argues, "fundamentally at odds" with the purpose of avoidance actions. *See* UCC DIP Obj. ¶ 13.

23. The notion that avoidance actions, commercial tort claims, and other unencumbered assets are somehow reserved only for unsecured creditors is contrary to applicable law. *See, e.g.*, 11 U.S.C. §§ 550(a) (preserving recoveries on avoidance actions "for the benefit of the estate"), 541(a)(3), 541(a)(4); *In re Texas Gen. Petrol. Corp.*, 52 F.3d 1330, 1334 (5th Cir. 1995) (determining that avoidance action proceeds must be allocated in the claims waterfall according to the relative priority of the claimants). As recognized by the Seventh Circuit:

> Lest this way of resolving the issue be taken to assume that § 550(a) requires that some benefit flow to unsecured creditors, we add that the statute does not say this. Section 550(a) speaks of **benefit to the estate**—which in bankruptcy parlance denotes the set of all potentially interested parties—**rather than to any particular class of creditors**.

Mellon Bank, N.A. v. Dick Corp., 351 F.3d 290, 293 (7th Cir. 2003) (emphasis added).

24. With respect to the proceeds of avoidance actions, the law is clear that they are property of the Debtors' estates under Bankruptcy Code section 541(a)(3)—and as with any estate asset, the Debtors may grant adequate protection liens or superpriority claims on them to the extent necessary to obtain use of cash collateral. *See* 11 U.S.C. §§ 361(2), 364(c)(2); *see also*

In re AppliedTheory Corp., 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)."); 11 U.S.C. § 361(2) ("[S]uch adequate protection may be provided by . . . (2) providing . . . an additional or replacement lien . . . ."). Indeed, the Committee does not cite a single case that supports its assertion that a debtor cannot pledge proceeds of avoidance actions as collateral.

25. Moreover, liens on proceeds of Avoidance Actions are particularly appropriate in cases such as this one where adequate protection liens on unencumbered assets may prove insufficient. *See In re Metaldyne Corp.*, No. 09-13412, 2009 WL 2883045, at *4 (Bankr. S.D.N.Y. June 23, 2009) (approving grant of lien on proceeds of avoidance actions where, among other things, "[t]he Debtors have only limited unencumbered assets upon which replacement liens can be provided"). Nor is it at all uncommon for DIP lenders to obtain a lien on proceeds of Avoidance Actions.[9]

26. Here, the liens on and superpriority claims against proceeds of Avoidance Actions to secure the DIP Facility and to adequately protect the Prepetition Secured Parties in exchange for their consent to use of their Cash Collateral will otherwise benefit the Debtors, their estates, and all of their stakeholders as discussed herein. The Debtors' grant of adequate protection liens

[9] *See, e.g.*, *In re Jack Cooper Ventures, Inc., et al.*, Case No. 19-62393 (PWB) (Bankr. N.D. Ga. Sept. 13, 2019) [Docket No. 279] (providing that the "DIP Collateral" includes, among other things, proceeds of avoidance actions); *In re Mission Coal Co. LLC*, Case No. 18-04177 (TOM) (Bankr. N.D. Ala. Nov. 20, 2018) [Docket No. 300] (providing for liens on the proceeds of avoidance actions); *In re SC Healthcare Holding, LLC*, Case No. 24-10443 (TMH) (Bankr. D. Del. May 14, 2024) [Docket No. 313] (providing for liens on the proceeds of avoidance actions); *In re Number Holdings, Inc. (99 Cents Only Stores LLC)*, Case No. 24-10719 (JKS) (Bankr. D. Del. May 9, 2024) [Docket No. 467] (providing for liens on the proceeds of avoidance actions); *In re Nogin, Inc.*, Case No. 23-11945 (CTG) (Bankr. D. Del. Jan 30, 2024) [Docket No. 244] (providing for liens on the proceeds of avoidance actions); *In re Benefytt Techs., Inc.*, Case No. 23-90566 (CML) (Bankr. S.D. Tex. June 20, 2023) [Docket No. 237] (providing for liens on the proceeds of avoidance actions).

on and superpriority claims against proceeds of Avoidance Actions was an integral part of a comprehensive bargain reflected in the DIP Facility that the Debtors, in their reasonable business judgment, and in consultation with their advisors, reached with the DIP Lenders and the Prepetition Secured Parties.

27. Simply put, with few unencumbered assets in the Debtors' estates to support new money financing and to adequately protect the Prepetition Secured Parties, the DIP Lenders would not have extended new money on a junior secured basis to the Debtors and the Prepetition Secured Parties would not have consented to the use of Cash Collateral, unless available protections were extended, including a lien on and superpriority claims against proceeds of Avoidance Actions.

C. The Proposed Waiver of Bankruptcy Code Section 552(b) is Appropriate under the Circumstances.

28. The Committee further argues that the Debtors should not be permitted at this point in the Chapter 11 Cases to waive the "equities of the case" exception provided by Bankruptcy Code section 552(b). *See* UCC DIP Obj. ¶¶ 18, 20. However, nothing in the Bankruptcy Code or binding precedent speaks to the timing of such a waiver. Further, this waiver is entirely reasonable and appropriate within the context of the larger agreements among the Debtors, the DIP Lenders and the Prepetition Secured Parties.

29. Bankruptcy Code section 552(b) generally ensures that an entity's prepetition security interest in the proceeds of collateral extends to such proceeds obtained postpetition. *See* 11 U.S.C. § 552(b); *see also In re Veeco Inv. Co.*, 170 B.R. 149, 151–52 (Bankr. E.D. Mo. 1994). Bankruptcy Code section 552(b) contains a limited exception from this general rule to the extent that the "equities of the case" so require, which the Debtors have agreed to waive.

30. This waiver is entirely appropriate as part of the larger bargain reached among the Debtors, the DIP Lenders, and the Prepetition Secured Parties. Moreover, secured creditors

routinely request a waiver of Bankruptcy Code section 552(b) "equities of the case" claims as part of adequate protection packages, and courts regularly approve such waivers, particularly where a secured creditor has agreed to a carve-out that will fund professional fees, as the DIP Lenders and Prepetition Secured Parties have done here. *See, e.g.*, *In re Jack Cooper Ventures, Inc.*, Case No. 19-62393 (PWB) (Bankr. N.D. Ga. Sept. 13, 2019) [Docket No. 279]; *In re Mission Coal Co. LLC*, Case No. 18-04177 (TOM) (Bankr. N.D. Ala. Nov. 20, 2018) [Docket No. 300]; *In re Lakepoint Land LLC*, Case No. 18-41337 (BEM) (Bankr N.D. Ga. July 3, 2018) [Docket No. 64]; *In re Beaulieu Grp., LLC*, Case No. 17-41677 (MGD) (Bankr. N.D. Ga. Aug. 31, 2017) [Docket No. 247]; *In re Walter Energy, Inc.*, Case No. 15-02741 (TOM11) (Bankr. N.D. Ala. Jan. 28, 2016) [Docket No. 1772]; *In re Belle Foods, LLC*, Case No. 13-81963 (JAC) (Bankr. N.D. Ala. Aug. 12, 2013) [Docket No. 340].

31. The Debtors' decision to waive the "equities of the case" exception under Bankruptcy Code section 552(b) to facilitate the funding of their going-concern sale is therefore amply justified as a valid business judgment and should be approved.

D. The Committee's Investigation Rights Are Customary and Provide the Committee with the Ability to Challenge Prepetition Liens.

32. The Committee next argues that the terms of the proposed Final DIP Order unduly restrain its ability to investigate claims and causes of action related to the Prepetition Liens and Prepetition Secured Obligations. *See* UCC DIP Obj. ¶¶ 29-33. The Committee's main issues are the amounts set aside to fund its investigation and the allotted timeframe.

33. As set forth above, the Debtors and the DIP Lenders are currently proposing a $250,000 investigation budget and a 94-day investigation period. These parameters to be afforded to the Committee are entirely consistent with (if not more generous than) relief that has been routinely granted by courts in this and other districts. *See, e.g.*, *In re Jack Cooper Ventures, Inc.,*

et al., Case No. 19-62393 (PWB) (Bankr. N.D. Ga. Sept. 13, 2019) [Docket No. 279] ($100,000 investigation budget, 77-day investigation period); *In re Lakepoint Land, LLC*, Case No. 18-41337 (Bankr. N.D. Ga. July 3, 2018) [Docket No. 64] ($25,000 budget only to be used for investigations); *In re Beaulieu Grp., LLC*, Case No. 17-41677 (MGD) (Bankr. N.D. Ga. Aug. 31, 2017) [Docket No. 247] ($75,000 budget to be used for investigation only). The Committee seeks an **uncapped** investigation budget, but in so arguing, can only muster case citations from two cases from fifteen years ago. *See* UCC DIP Obj. ¶ 31. There is no justification for such relief, and the proposed $250,000 budget is more than sufficient.

34. The DIP Lenders have also increased the allocated DIP budget line-item for Committee professionals to $1.6 million over the course of the Chapter 11 Cases, which is more than sufficient for the Committee to perform their fiduciary duties. Moreover, the Committee is not precluded from incurring professional fees and expenses in excess of the budgeted amounts, but the DIP Lenders are not willing to agree to allow their collateral or the proceeds of the DIP Facility to be used to pay Committee professionals in excess of the proposed budgeted amount. To the extent the Committee exceeds the amount budgeted (*i.e.*, $1.6 million), it does so at the risk of there not being sufficient unencumbered assets to satisfy the excess amount. Financing is limited in these Chapter 11 Cases and the Debtors have carefully budgeted for all anticipated chapter 11 costs and expenses, including the payment of professional fees, and costs and expenses of operating the Debtors' business.

35. In addition, the Committee maintains in a footnote, that should it bring a Challenge, the Committee should be granted automatic standing. *See* UCC DIP Obj. ¶ 30 n.7. There is **no absolute right** under the Bankruptcy Code, or any other legal authority, permitting creditors to prosecute claims on the estates' behalf. Rather, such claims belong to the Debtors. Accordingly,

it is entirely consistent with a debtor's "central role in handling the estate's legal affairs" that the Debtors decline to cede automatic standing to the Committee on account of potential estate causes of action. *See Official Comm. of Equity Sec. Holders of Adelphia Comm'cn Corp. v. Official Comm. of Unsecured Creditors of Adelphia Comm'cn Corp.*, 544 F.3d 420, 424 (2d Cir. 2008) ("It remains the debtor's duty to wisely manage the estate claims, and this duty is implicit in the debtor's role as the estate's only fiduciary.") (quoting *In re Smart World Techs., LLC*, 423 F.3d 166, 175 (2d Cir. 2005)). Importantly, an official committee does not owe a fiduciary duty to the estate itself, but rather only to the constituents it represents. *Id.* at 424 n.1. Under established law, a committee may only initiate adversary proceedings derivatively with the express approval of the Court, and the Court's analysis of whether to grant a committee standing must be detailed and claim-specific, with the Committee bearing the burden of showing, among other things, that it has identified "colorable" claims that are in the estates' best interest to pursue and that the Debtors have unjustifiably refused to bring such claims. *See, e.g.*, *In re Enron Corp.*, 319 B.R. 128, 131 (Bankr. S.D. Tex. 2004). Thus, the Committee should, at a minimum, be required to make a proper showing to obtain standing with regard to any potential causes of action.

36. For the foregoing reasons, the UCC DIP Objection should be overruled and the relief sought in the DIP Motion should be granted on a final basis.

II. The UCC Bid Procedures Objection Should be Overruled and the Bid Procedures Motion Should be Granted.

37. Put simply, nothing raised in the Committee's objection warrants adjourning the hearing on the Bidding Procedures Motion or denying entry of the Bid Procedures Order. In the UCC Bid Procedures Objection, the Committee, among other things, complains that it lacks certain

information and does not understand certain facts.[10] *See* UCC Bid Procedures Obj. ¶ 6. On June 24, 2024, the Debtors commenced their marketing process and circulated a "teaser" to more than 140 different prospective purchasers. In advance of that process, the Debtors circulated the same "teaser" and the initial buyer list (comprising more than 140 parties), to the Committee for review and input. The Debtors have already received inbound interest and have committed to providing the Committee with regular weekly updates regarding the sale process going forward.

38. The Committee also complains about the fact that the Debtors have yet to identify cure amounts for executory contracts and unexpired leases that would potentially be assumed and assigned as part of a sale. *See* UCC Bid Procedures Obj. ¶ 7. The Committee misses the point. The proposed Bid Procedures set July 23, 2024 as the deadline for the Debtors to file a notice of contracts and unexpired leases that may potentially be assumed and assigned, along with the Debtors' good faith estimates of applicable cure amounts with respect to the same. The Debtors are currently focused on finalizing their schedules and statements of financial affairs and, contemporaneous with those efforts, the Debtors are working to prepare the cure notice as outlined in the Bid Procedures prior to the foregoing deadline. The Committee fails to explain why it would be necessary for the Debtors to propose cure amounts well in advance of the proposed deadline or how this information has any bearing on entry of the Bid Procedures Order, particularly when contract counterparties who would actually be impacted by this information will have until early September to object subsequent to the July 23 deadline pursuant to the proposed Bid Procedures.

39. At bottom, entry of the Bid Procedures Order is important to provide clear "rules of the road" for the Debtors' marketing process, as outlined by the Debtors at the first-day hearing.

[10] The Committee fails to mention any of the materials provided by the Debtors to the Committee in advance of its objection deadline, which included the draft teaser and potential list of buyers that the Committee claims it has yet to see, nor is there any reference to the call between Stout and Committee professionals that was scheduled well in advance of the objection deadline and took place shortly thereafter.

Because the Committee fails to raise any substantive objections to the Debtors' proposed Bidding Procedures, the Debtors respectfully submit that there is no basis to adjourn the hearing or delay entry of the Bid Procedures Order and the relief sought in the Bid Procedures Motion should be granted.

III. Certain First Day Motions Have Been Continued, and the UCC First-Day Objection With Respect To The Resident Programs Motion Should be Overruled.

40. In the UCC First-Day Objection, the Committee seeks (a) a 14-day continuance of the relief requested in the Resident Programs Motion, the Insurance Motion, the Taxes Motion, and the Cash Management Motion and (b) an order from the Court that the Debtors cease making any distributions on account of Non-Operating Debtor obligations until after the continuance, notwithstanding the authority granted on an interim basis. *See* UCC First-Day Obj. ¶ 7. As an accommodation to the Committee, the Debtors have agreed to continue three of the four Motions (*i.e.*, the Taxes Motion, the Insurance Motion, and the Cash Management Motion), while the Resident Programs Motion cannot be continued and should be granted on a final basis over the Committee's objection.

41. With respect to the Resident Programs Motion, the Committee argues that "any amount due for a Cost Report to CMS from a Non-Operating Debtor should be asserted as a claim in the Chapter 11 Cases and should not be paid now and all amounts that may be due to CMS need to be scrutinized carefully before payment is made to preserve estate cash." UCC First-Day Obj. ¶ 9. The Debtors disagree. While the Committee may be willing to risk provoking CMS, the Debtors are simply not willing to pick a fight with CMS at this early stage in the Chapter 11 Cases over amounts that are already contemplated as payments under the DIP Facility.

42. As a general matter, and as discussed at length with the Committee, there are significant potential risks involved with failing to pay amounts owed to CMS, particularly those

amounts that are required for a provider, like the Debtors, to continue to participate in the Medicare program (*i.e.*, cost report settlements). Such risks include, among others, CMS' setoff and/or recoupment of incoming Medicare receivables, CMS' withholding or freezing of the same (often done without notice), and CMS escalating the issue to the U.S. Department of Treasury, which can lead to revocation (and 10-20 year bans) of a provider's Medicare participation. The Debtors fear that failure to pay any amounts to CMS, including those amounts attributable to the Debtors' divested facilities, could result in CMS taking one or multiple of the foregoing actions, to the detriment of both the Debtors and the new operators regarding access to incoming Medicare receivables.

43. The amounts objected to by the Committee primarily consist of (a) cost report settlement amounts (approximately $1.5 million) and (b) civil monetary penalties ("CMPs") (approximately $300,000) attributable to the Debtors' recently divested facilities. The Debtors agreed to reimburse their new operators for those amounts as part of operations transfer agreements entered into by the Debtors in connection with the facility divestitures. Though the new operators may be the ultimate obligor in CMS' view where the transfer of ownership has already been approved by CMS, the same cannot be said for transfers that are still subject to regulatory approval. Indeed, the provider numbers of at least seven of the Debtors' recently divested facilities have not officially transferred to the new operators from a regulatory perspective, meaning that failure to pay outstanding amounts owed to CMS could result in such regulatory transfers not being approved. Should such transfers be voided, the Debtors will remain on the hook for the obligations from CMS' perspective and CMS may take any of the "self-help" actions enumerated above, further justifying payment of any and all amounts due and owing to CMS.

44. Even if CMS looks only to the new operators for the foregoing obligations from a regulatory standpoint, the Debtors previously agreed to reimburse such amounts held in trust under operations transfer agreements and are not in a position to simply walk away from those agreements due to the mutually beneficial provisions contained therein. In addition, the Debtors are concerned that the Committee's requested relief may also only serve to chill bidding and risk amplifying potential market trepidation that may result if interested parties know in advance that there remain pending issues with CMS. The Debtors are unwilling to jeopardize their marketing and sale process in its nascent stages and potentially undermine its likelihood of success before the process even begins, particularly for amounts that the Debtors are already prepared to pay under the proposed DIP Facility.

45. Indeed, the administrative expenses incurred by the estate either addressing CMS' self-help actions, or potential blowback, filing of administrative claims or other potential actions from the new operators would likely far exceed any potential savings. Increasing the potential for CMS to issue an administrative freeze on the Debtors would immediately stop the flow of CMS receivables at a time when the Debtors require it and would create needless distraction when the Debtors should be focused on maintaining stability of their operations. Though the Committee may believe that these contractual obligations can simply be tossed aside, the Debtors as fiduciaries believe that maintaining status quo during the sale process is in the best interests of the Debtors' estates.

46. For the foregoing reasons, the Committee's objection with respect to the Resident Programs Motion should be overruled and the Resident Programs Motion should be granted on a final basis.

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WHEREFORE, for these reasons, the Debtors respectfully request that the Court (a) overrule the Objections, (b) grant the applicable relief requested with respect to the DIP Motion, the Bid Procedures Motion, and the Resident Programs Motion on a final basis, and (c) provide any other relief consistent with the foregoing the Court deems appropriate.

Dated: Atlanta, Georgia
June 26, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on this date a true and correct copy of the foregoing Reply was served by the Court's CM/ECF system on all counsel of record registered in these Chapter 11 Cases through CM/ECF. The Debtors' claims and noticing agent, Kurtzman Carson Consultants LLC, will be filing a supplemental certificate of service on the docket to reflect any additional service of the foregoing Reply.

Dated: Atlanta, Georgia
June 26, 2024

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