IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

In re: Curae Health, Inc., *et al.*[1] 1721 Midpark Road, Suite B200 Knoxville, TN 37921 Debtors.	Chapter 11 Case No. 18-05665 Judge Walker Jointly Administered Hearing Date: September 25, 2018 Objection Deadline: September 21, 2018 Re: Docket No. 79

OBJECTION OF OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO DEBTORS' MOTION FOR ENTRY OF AN ORDER (I) AUTHORIZING AND APPROVING BIDDING PROCEDURES FOR THE SALE OF GILMORE MEDICAL CENTER, (II) AUTHORIZING THE SALE OF GILMORE MEDICAL CENTER FREE AND CLEAR OF ALL LIENS, CLAIMS, ENCUMBRANCES AND OTHER INTERESTS, (III) APPROVING STALKING HORSE PURCHASER, BREAK-UP FEE, AND OVERBID PROTECTIONS, (IV) ESTABLISHING CERTAIN PROCEDURES FOR THE ASSUMPTION AND ASSIGNMENT OF EXECUTORY CONTRACTS AND UNEXPIRED LEASES, (V) SCHEDULING AN AUCTION, (VI) SCHEDULING A HEARING AND OBJECTION DEADLINES WITH RESPECT TO THE SALE OF GILMORE MEDICAL CENTER, (VII) APPROVING THE FORM AND MANNER OF NOTICE THEREOF, AND (VIII) GRANTING RELATED RELIEF

The Official Committee of Unsecured Creditors (the "Committee") of Curae Health, Inc., *et al.* (collectively, the "Debtors"), by and through its undersigned counsel, hereby files this objection (the "Objection") to the *Debtors' Motion For Entry Of An Order (I) Authorizing And Approving Bidding Procedures For The Sale Of Gilmore Medical Center, (II) Authorizing The Sale Of Gilmore Medical Center Free And Clear Of All Liens, Claims, Encumbrances And Other Interests, (III) Approving Stalking Horse Purchaser, Break-Up Fee, And Overbid Protections,*

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are Curae Health, Inc. (5638); Amory Regional Medical Center, Inc. (2640); Batesville Regional Medical Center, Inc. (7929); and Clarksdale Regional Medical Center, Inc. (4755); Amory Regional Physicians, LLC (5044); Batesville Regional Physicians, LLC (4952); Clarksdale Regional Physicians, LLC (5311).

(IV) Establishing Certain Procedures For The Assumption And Assignment Of Executory Contracts And Unexpired Leases, (V) Scheduling An Auction, (VI) Scheduling A Hearing And Objection Deadlines With Respect To The Sale Of Gilmore Medical Center, (VII) Approving The Form And Manner Of Notice Thereof, And (VIII) Granting Related Relief [Docket No. 79] (the "Motion").[2] In support of the Objection, the Committee respectfully represents as follows:

PRELIMINARY STATEMENT

The paramount goal of any auction process is to maximize the sale proceeds for the benefit of a debtor's estate. As such, while the Committee does not generally object to the establishment of bidding procedures for the sale of Gilmore Hospital, the Committee objects to a number of procedures requested by the Debtors herein. The Committee requests that this Court modify the Debtors' proposed Bidding Procedures such that the process to sell Gilmore Hospital maximizes value and does not chill bidding or otherwise eliminate potential offers that could enhance creditor recoveries and value for the Debtors' estates. The proposed Bidding Procedures include a number of objectionable provisions including, (a) a break-up fee equal to 4% of the Initial Bid of $15,000,000 (the "Break-up Fee") payable to the Proposed Stalking Horse if, among other reasons, the Court approves a sale with a buyer other than the Proposed Stalking Horse for any reason, and (b) a minimum initial overbid of $1,000,000 above the Initial Bid (the "Minimum Initial Overbid").

The Break-up Fee and Minimum Initial Overbid are unreasonable for a transaction of this size and will chill competitive bidding to the detriment of the Debtors' estates. This is especially true here, where the Break-up Fee and Minimum Initial Overbid are applied to the Initial Bid of $15,000,000—an inflated number that fails to take into account any deductions from the

[2] Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Motion.

purchase price for, among other things, (i) pre-closing defaults and post-closing obligations under the lease for property owned by CHCT Mississippi, LLC (the "CHCT Lease"), which post-closing obligations the Committee has been informed equal approximately $3.5 million, and any pre-closing defaults and post-closing obligations (which have not been identified) with respect to capital leases assumed by the Proposed Stalking Horse, (ii) projected Net Working Capital adjustments, and (iii) the $2,000,000 to be placed in escrow by the Proposed Stalking Horse.[3] In fact, "Purchase Price"[4] is defined in the Gilmore APA to take these adjustments into account, yet such adjustments are not reflected in the definition of "Initial Bid," which definition is used solely for the purpose of establishing bid protections. The Bidding Procedures (and any protections for the benefit of the Proposed Stalking Horse) must correlate to projected actual net consideration to the Debtors' estates (the "Adjusted Initial Bid") rather than an artificial "Purchase Price" as requested in the Motion.

Adjustments to the Initial Bid could result in a reduction of at least $5.5 million, further demonstrating why the Break-up Fee and Minimum Initial Overbid should not be applied to the Initial Bid without accounting for any purchase price adjustments. Rather, the Break-up Fee and

[3] As described below, the Committee questions the propriety of, among other things, the provisions in the Gilmore APA relating to (i) pre-closing defaults and post-closing obligations with respect to the CHCT Lease and capital leases assumed by the Proposed Stalking Horse, and (ii) the $2 million Escrow Account to secure the Seller's indemnification obligations.

[4] Purchase Price is defined in Section 2.5 of the Gilmore APA as follows: "Purchase Price; Adjustments. Subject to the terms and conditions hereof, the purchase price will be an amount equal to (i) $15,000,000 (including the $2,000,000 Buyer is placing into the Escrow Account at Closing), plus (ii) the amount of Net Working Capital (as defined above) of the Hospital at Closing, minus (iii) the lease obligations assumed with respect to the leasehold interests of Seller in property owned by CHCT Mississippi, LLC (including current portions and past due portions) that are assumed by Buyer as well as the obligations (including current portions and past due portions) that are assumed by Buyer with respect to any other capital leases assumed by Buyer (the "Assumed Indebtedness") (the resulting amount from the foregoing, as finally adjusted pursuant to Section 2.8. the "Purchase Price").

the Minimum Initial Overbid should be applied to the Adjusted Initial Bid to facilitate an even playing field for all prospective bidders, prevent a windfall for the Proposed Stalking Horse (at the expense of the estates herein) and to increase the prospects for a value maximizing sale of assets.

Further, the Break-up Fee should not be pre-approved under the Bidding Procedures Order, as the Proposed Stalking Horse has not established that the Break-up Fee is an actual and necessary cost of preserving the Debtors' estates within the meaning of section 503(b) of the Bankruptcy Code. If the Proposed Stalking Horse is not ultimately the successful bidder, it should file a motion seeking allowance of the Break-up Fee after the Auction, when the Court and other parties-in-interest can assess whether the Proposed Stalking Horse's bid successfully set the floor for a competitive auction consistent with the requirements of section 503(b) of the Bankruptcy Code.

While the Bidding Procedures include certain consultation rights for Committee, such consultation rights should be extended to cover all discretionary acts of the Debtors in connection with the qualification of the Bids, conduct of the Auction, and declaration of the highest or best Bid(s). This will ensure the unsecured creditors are protected and will provide a critical oversight component to the Sale process.

Finally, the Committee has other specific comments to the Bidding Procedures which will further facilitate the maximization of value for the benefit of the Debtors' estates, including requiring (i) the Proposed Stalking Horse to calculate its Adjusted Initial Bid in advance of the Auction and share the Adjusted Initial Bid with prospective bidders sufficiently in advance of the Bid Deadline to allow such prospective bidders to formulate their bids, (ii) each Qualified Bid to provide that the bidder, if successful, will assume the Debtors' Medicare and Medicaid provider

agreements or obtain its own, in each instance within a timeframe acceptable to the Debtors in consultation with the Committee, (iii) that the Debtors' acceptance of a Successful Bid shall occur only after such Successful Bid has been approved by the Bankruptcy Court at the Sale Hearing, and (iv) that any modifications to the Bidding Procedures shall not be constrained by the Gilmore APA, thus preventing the Proposed Stalking Horse from wielding undue influence over the Bidding Procedures. The Committee's comments with respect to the Gilmore APA are set forth below and are also designed to maximize value in the Sale process.

As such, the Committee respectfully requests that the Court deny the Motion, or alternatively, approve modified Bidding Procedures that address the Committee's objections set forth herein.

BACKGROUND

I. The Chapter 11 Cases

1. On August 24, 2018, (the "Petition Date"), each of the Debtors filed a voluntary petition in this Court commencing a case for relief under chapter 11 of the Bankruptcy Code. The Debtors continue to operate their businesses and manage their properties as debtors-in-possession pursuant to §§ 1107(a) and 1108 of the Bankruptcy Code.

2. On the Petition Date, the Debtors filed the *Expedited Motion of Debtors for Entry of Interim and Final Orders: (I) Authorizing the Debtors to (A) Obtain Postpetition Secured Financing and (B) Utilize Cash Collateral, and (II) Granting Liens and Superpriority Administrative Expense Status, (III) Granting Adequate Protection, (IV) Modifying the Automatic Stay and (V) Schedule a Final Hearing* (the "DIP Motion").

3. On August 29, 2018, the Court entered an interim order granting the DIP Motion [Docket No. 60] (the "DIP Order").

4. The United States Trustee formed the Committee on September 6, 2018 [Docket No. 112]. The Committee will seek retention of Sills Cummis & Gross P.C. and Manier & Herod as co-counsel to the Committee.

II. The Sale Motion and Bidding Procedures

5. On August 31, 2018, the Debtors filed the Motion to approve, among other things, (a) the proposed bidding procedures (the "Bidding Procedures") and (b) authorization of the sale of Gilmore Medical Center ("Gilmore"), owned by Debtor Amory Regional Medical Center, Inc. (the "Sale") in accordance with the Bidding Procedures.

6. The Debtors have identified North Mississippi Health Services or its designee (the "Proposed Stalking Horse") as the prospective purchaser with the current best and highest offer for Gilmore at $15,000,000 (the "Initial Bid").

7. The Debtors and the Proposed Stalking Horse have negotiated the terms of an asset purchase agreement for Gilmore (the "Gilmore APA"), which sets forth the Proposed Purchased Assets to be sold.

8. The key terms of the Gilmore APA are as follows:

a. **Purchase Price:** $15,000,000 (including $2,000,000 the Proposed Stalking Horse is placing into an escrow account at Closing), subject to certain adjustments as set forth more specifically in the Gilmore APA

b. **Proposed Purchased Assets:** Substantially all assets and operations of the Gilmore Hospital

c. **Closing Date:** On or before December 12, 2018 or the date on which the Proposed Stalking Horse obtains regulatory approval to operate the Gilmore Hospital, whichever is later

d. **Break-up Fee:** 4.00% of the Initial Bid [rather than the Adjusted Initial Bid]

e. **Minimum Initial Overbid:** $1,000,000 if the Proposed Stalking Horse's Initial Bid is the Baseline Bid [rather than the Adjusted Initial Bid being the Baseline Bid]

f. **Bid Increments:** $100,000

9. Consistent with the terms of the Gilmore APA, the Motion seeks authorization of, among other things, (i) the Debtors' selection of the Proposed Stalking Horse as the stalking horse purchaser for Gilmore, (ii) the Gilmore APA, (iii) the Bidding Procedures, (iv) the Break-up Fee and Minimum Initial Overbid, and (v) the Debtors' proposed Auction process. The Committee objects that certain of the Debtors' requests, as explained further below, will chill bidding and reduce value for the Debtors' estates.

OBJECTION

I. The Bid Protections are Unreasonable and Will Deter Competitive Bids

10. "The purpose of procedural bidding orders is to facilitate an open and fair public sale designed to maximize value for the estate." *In re Nashville Senior Living*, 2008 Bankr. LEXIS 3197, at *4-5 (Bankr. M.D. Tenn. Oct. 22, 2008). "[B]idding incentives such as break-up fees and bid increment limitations are carefully scrutinized in § 363(b) asset sales to insure that the debtor's estate is not unduly burdened and that the relative rights of the parties in interest are protected." *In re Hupp Indus.*, 140 B.R. 191, 195-96 (Bankr. N.D. Ohio 1992). Thus, breakup fees and overbid amounts must only be approved where they are be designed to maximize value and will not cause a chilling effect upon other potential bidders. *Id.* at 194.*; In re JW Res., Inc.*, 536 B.R. 193, 197 (Bankr. E.D. Ky. 2015) ("Break-up fees should not chill bidding.").

11. "Except in extremely large transactions, break-up fees ranging from **one to two percent of the purchase price** have been authorized by some courts." *In re Nashville Senior Living*, 2008 Bankr. LEXIS 3197, at *6 (emphasis added) (approving a breakup fee of 1% of the

purchase price where the court determined it would not chill bidding); *see also In re Hupp Industries, Inc.*, 140 B.R. at 194 (denying a breakup fee of 2.1% as being "unjustified"); *In re JW Res., Inc.*, 536 B.R. at 195 (Bankr. E.D. Ky. 2015) ("Fees in the range of 1% to 2% of the purchase price are often approved."). "In bankruptcy pre-plan confirmation sales of assets, [] an allowance of such fees is to be highly scrutinized in view of the uncertainty of dividends, if any, to be received by claimants of the debtor's estate." *In re Hupp Indus.*, 140 B.R. at 195.

12. A bidder requesting a breakup fee must do so pursuant to section 503(b)(1) of the Bankruptcy Code, which requires that the bidder establish that its breakup fee was an actual and necessary cost of preserving the estate. *Calpine Corp. v. O'Brien Env't Energy, Inc. (In re O'Brien Env't Energy, Inc.)*, 181 F.3d 527 (3d Cir. 1999) ("O'Brien"); *In re Reliant Energy Channelview LP*, 594 F.3d 200, 202 (3d Cir. 2010) ("Reliant"). In *O'Brien* and *Reliant*, the Third Circuit held that a bidder must seek break-up fees under section 503(b) of the Bankruptcy Code, rather than under the business judgment standard. Section 503(b) only permits payment for the actual and necessary costs and expenses of preserving the estate. *In re Reliant Energy Channelview LP*, 594 F.3d at 206. The Third Circuit stated that the business judgment rule was not appropriate in considering breakup fees in the bankruptcy context. *Id.* at 209 ("Furthermore, the role of the business judgment rule is of limited use on this appeal because in *O'Brien* we stated that 'we conclude that the business judgment rule should not be applied as such in the bankruptcy context.'"). Thus, applicants seeking approval of a breakup fee must establish that the buyer's bid served as a catalyst to higher bids. *In re O'Brien Env't Energy, Inc.*, 181 F.3d at 537. As such, a breakup fee should not be pre-approved in bidding procedures, as it would be impossible for an applicant to establish that the proposed breakup fee was an actual and necessary cost of preserving the estate until other bids are submitted and analyzed.

13. The Motion, however, states that courts consider bidding incentives, such as breakup fees and minimum overbids, under the business judgment rule. Motion, ¶¶ 64, 68. To support this contention, the Debtors do not cite to any Sixth Circuit cases. Rather, the Debtors cite to Fifth Circuit cases--*ASARCO, Inc. v. Elliott Mgmt. (In re Asarco, L.L.C.)*, 650 F.3d 593 (5th Cir. 2011) and *In re ASARCO LLC*, 441 B.R. 813 (S.D. Tex. 2010). These cases, however, deal with due diligence reimbursement fees to be paid to all bidders regardless of whether a bidder is ultimately successful. *In re Asarco, L.L.C.*, 650 F.3d at 602. Under those specific circumstances, the Fifth Circuit held that the business judgment standard was appropriate to consider the due diligence reimbursement fee request. *Id.*

14. However, the Fifth Circuit explained why, under the specific facts in *Asarco*, the business judgment rule was a "better fit" than application of section 503(b) in determining whether to award due diligence reimbursement fees, stating:

> We are not persuaded that *Reliant* and *O'Brien* are apt where, as here, a debtor requests the authority to reimburse expense fees 'for second-round 'qualified' bidders in a multiple stage auction for a very unique and very valuable but possibly worthless asset.' For one, **the break-up fee provisions at issue in *Reliant* and *O'Brien* significantly differ from the due diligence reimbursement fees at issue in this case.** The break-up fees were to be paid only if the prospective bidder was unsuccessful. Here, in contrast, prospective (and qualified) bidders could be reimbursed regardless of whether they were ultimately successful. **Moreover, in both *O'Brien* and *Reliant Energy* the bankruptcy court refused to approve the break-up fee in part due to the concern that the fee would 'chill . . . the competitive bidding process.' *O'Brien*, 181 F.3d at 529; *see also Reliant Energy*, 594 F.3d at 204. No such concern arises in this context, where ASARCO sought to increase competition by providing bidders an incentive to undertake the costly but necessary due diligence.**
>
> On this record, we conclude that the business judgment standard is the better fit for assessing ASARCO's reimbursement motion.

In re Asarco, L.L.C., 650 F.3d at 602 (emphasis added).

15. Further, courts in the Sixth Circuit have applied the administrative expense standard under section 503(b) when considering breakup fees. For example, in *Hupp Industries*,

the court analyzed the breakup fee under section 503(b) of the Bankruptcy Code, finding that the breakup fee was "unjustified" because it was not "sufficiently described to allow it to be paid under any provisions of section 503." *In re Hupp Indus.*, 140 B.R. at 196. The party seeking the breakup fee must establish that it has conferred a substantial benefit to the debtor's estate to warrant an administrative expense allowance. *Id.* With respect to business judgment, the Court in *Hupp Industries* explained that "in the context of a nonbankruptcy asset sale, the propriety of break-up fees are presumptively appropriate in view of the business judgment rule and, thusly, seldom require judicial attention. In the bankruptcy context, however, the Court must be necessarily wary of any potential detrimental effect that an allowance of such a fee would visit upon the debtor's estate." *In re Hupp Indus.*, 140 B.R. at 194.

16. Courts in the Sixth Circuit have also considered a totality of the circumstances approach when determining the reasonableness of a breakup fee, including the following factors:

> 1) Whether the fee requested correlates with a maximization of value to the debtor's estate;
>
> 2) Whether the underlying negotiated agreement is an arms-length transaction between the debtor's estate and the negotiating acquirer;
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> 3) Whether the principal secured creditors and the official creditors committee are supportive of the concession;
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> 4) Whether the subject break-up fee constitutes a fair and reasonable percentage of the proposed purchase price;
>
> 5) Whether the dollar amount of the break-up fee is so substantial that it provides a "chilling effect" on other potential bidders;
>
> 6) The existence of available safeguards beneficial to the debtor's estate;
>
> 7) Whether there exists a substantial adverse impact upon unsecured creditors, where such creditors are in opposition to the break-up fee.

In re Nashville Senior Living, 2008 Bankr. LEXIS 3197, at *6-7; *In re Hupp Indus.*, 140 B.R. at 194.

17. Similarly, a minimum initial overbid amount must not be arbitrary and unreasonably high. *In re Hupp Indus.*, 140 B.R. at 195. For example, in *In re Nashville Senior Living*, the court approved an initial overbid of $750,000 where the initial offer was $50,0000,000, which was 1.5% increase from the initial offer. *In re Nashville Senior Living*, 2008 Bankr. LEXIS 3197, at *3. In *Hupp Industries*, the court held the initial overbid amount of $300,000 relative to a proposed purchase price of $4,750,000.00 (i.e., 6.3%), was arbitrary and unreasonably high and thus unjustified. *In re Hupp Indus.*, 140 B.R. at 195. The court explained that bid increments must be carefully scrutinized noting that "[i]n the bankruptcy context . . . bid increment limitations are carefully scrutinized in § 363(b) asset sales to insure that the debtor's estate is not unduly burdened and that the relative rights of the parties in interest are protected." *Id.*

18. In this case, both the Break-up Fee of 4% of the Initial Bid and the Minimum Initial Overbid of $1,000,000 applied to the Initial Bid of $15,000,000 (i.e., a 6.67% requested increase) are unreasonably high and will chill bidding to the detriment of the Debtor's estate. As explained above, courts in the Sixth Circuit generally approve breakup fees of between 1-2% of the purchase price. The fee of 4% of the Initial Bid, especially for a transaction of this size, is unreasonable, as it does not constitute "a fair and reasonable percentage of the **proposed purchase price**." *In re Nashville Senior Living*, 2008 Bankr. LEXIS 3197, at *6-7 (emphasis added). In fact, the Purchase Price, as defined in the Gilmore APA, will be significantly lower than the $15,000,000 Initial Bid. The Break-up Fee must therefore be based on the Adjusted Initial Bid, rather than the Initial Bid which fails to take into account, among other things, deductions for (i) pre-closing defaults and post-closing obligations under the CHCT Lease, which post-closing obligations the Committee has been informed equal approximately $3.5

million, and any pre-closing defaults and post-closing obligations (which have not been identified) with respect to capital leases assumed by the Proposed Stalking Horse, (ii) projected Net Working Capital adjustments, and (iii) the $2,000,000 to be placed in escrow by the Proposed Stalking Horse.

19. Even if the Break-up Fee applied to the Adjusted Initial Bid, the amount of 4% remains too high. It is out of market and inconsistent with the breakup fees approved by courts in the Sixth Circuit in connection with similar transactions. As such, "the dollar amount of the break-up fee is so substantial that it provides a chilling effect on other potentially bidders." *Id.* The Committee objects to the breakup fee at 4% as it will chill prospective bidders from entering the Auction and have an adverse impact on unsecured creditors. *Id.*

20. This is especially true because the Gilmore APA requires that the Proposed Stalking Horse receive the Break-up Fee if "(i) the Bankruptcy Court approves a sale of all or some of the Purchased Assets with a buyer other than Buyer, (ii), Seller enters into a definitive agreement for an Alternative Transaction or (iii) Seller files a plan of reorganization that does not contemplate a sale of the Purchased Assets to Buyer[.]" Gilmore APA, § 6.17(f). Under this structure, the Proposed Stalking Horse will receive the Break-up Fee even if the Court approves a sale with a different buyer due to the Proposed Stalking Horse's (i) inability to satisfy a closing condition or (ii) termination of the Sale pursuant to any of its discretionary outs. The Gilmore APA should be clarified to make clear that the Proposed Stalking Horse is not entitled to any breakup fee if any sale with the Proposed Stalking Horse fails to close because of the Proposed Stalking Horse's failure to satisfy a closing condition or exercise of its discretionary outs.

21. Similarly, the Minimum Initial Overbid is too high, especially since it is also applied to the Initial Bid, rather than the Adjusted Initial Bid. Courts in the Sixth Circuit have

specifically found that an initial overbid that requires a 6% increase in the purchase price is unreasonable. *See In re Hupp Indus.*, 140 B.R. at 195. Here, the Debtors are requesting a 6.7% increase with respect to the Initial Bid. If the Minimum Initial Overbid is compared with the Adjusted Initial Bid, it would result in a requested bid increase of at least 10.5%, which is too high and will prevent otherwise qualified bidders from entering the auction. The Debtors explain that the reason for such a high initial overbid is to cover the cost of the Break-up Fee. Motion, ¶ 58. However, if the Break-up Fee is reduced to 1-2% of the Adjusted Initial Bid, such a high Minimum Initial Overbid will no longer be necessary.

22. Rather, the Committee submits that a reasonable breakup fee in this case is 1-2% of the Adjusted Initial Bid, consistent with Sixth Circuit law. Further, the Committee submits that a reasonable minimum initial overbid is $250,000 above the Adjusted Initial Bid (with bid increments of $100,000 thereafter) , plus the break-up fee of 1-2%. These reduced bid protections will not chill bidding and will allow the Debtors to run a value maximizing sale process, while still providing adequate protection for the Proposed Stalking Horse under the circumstances of these cases.

23. Further, any breakup fee should not be pre-approved under the Bidding Procedures Order but rather the Proposed Stalking Horse Purchaser should file a motion under section 503(b) after the Auction to the extent it is not the Successful Bidder and is otherwise eligible for a breakup fee. The facts here are more closely aligned with those in *Reliant* and *O'Brien* than *Asarco*, as the Debtors are requesting authorization of a breakup fee for the Proposed Stalking Horse, which has the ability to chill bidding. Thus, the "narrower standard in section 503" should apply and the Proposed Stalking Horse should be required to establish that

the Break-up Fee is an actual and necessary cost of preserving the Debtors' estates. *See In re Asarco, L.L.C.*, 650 F.3d at 601.

24. It can only do this after the Auction by showing that the Proposed Stalking Horse's initial bid generated value for the estates by setting the floor for other bids. If, however, other bidders submit bids that are substantially higher or better than the Proposed Stalking Horse's bid, the Proposed Stalking Horse will carry a higher burden to establish that it set a floor and should be entitled to the Break-up Fee. Moreover, because the Initial Bid fails to clearly quantify any adjustments to the Purchase Price, this creates a hurdle for other bidders to determine the appropriate amount to overbid. As a result, the Committee questions whether the Proposed Stalking Horse is actually setting a clear floor for other bidders and whether it should be entitled to any bid protections, as bid protections are reserved for stalking horse purchasers whose bids act as a catalyst for other bids. *See In re O'Brien Env't Energy, Inc.*, 181 F.3d at 537. The Proposed Stalking Horse must therefore clearly identify its Adjusted Initial Bid and demonstrate after the Auction that its Adjusted Initial Bid set the floor for other bids and was therefore an actual and necessary cost of preserving the Debtors' estates.

II. Additional Modifications to the Bidding Procedures Are Necessary to Ensure A Value Maximizing Sale Process

25. Although the proposed Bidding Procedures and the proposed Bidding Procedures Order provides the Committee with some consultation rights as a Sale Notice Party, these consultation rights should be expanded to cover all discretionary acts of the Debtor in connection with the qualification of the Bids, conduct of the Auction and declaration of the highest of best Bid(s). Expanding the Committee's consultation rights will provide meaningful oversight to the Sale process by a party interested in maximizing value of the Debtors' estates.

26. Next, the Bidding Procedures should require the Proposed Stalking Horse to calculate its Adjusted Initial Bid in advance of the Auction and to share the Adjusted Initial Bid with prospective bidders sufficiently in advance of the Bid Deadline to allow such prospective bidders to formulate their bids. Without determining the projected net consideration generated from the proposed Sale, other potential bidders will not have a clear understanding of what amount they should overbid. This defeats the purpose of selecting a stalking horse purchaser.

27. The Bidding Procedures should also require that each Qualified Bid must provide that the Bidder, if successful, will either (i) assume the Debtor's Medicare and Medicaid provider agreements or (ii) obtain its own, in each instance within a timeframe acceptable to the Debtors in consultation with the Committee. The Bidding Procedures should also be amended such that a selected Bid shall not be accepted as a Successful Bid unless and until such Bid is approved by the Bankruptcy Court at the Sale Hearing. This provides the Debtors, in consultation with the Committee, the ability to generate additional value for their estates if a higher or better Bid becomes available after the Auction. Further, the Bidding Procedures currently provides that any modifications to the Bidding Procedures must not be inconsistent with the Bidding Procedures or the Gilmore APA. Bidding Procedures, § X. The reference to the Gilmore APA should be removed, as the Gilmore APA should not dictate the terms of or modifications to the Bidding Procedures, as this gives the Proposed Stalking Horse undue influence over the Bidding Procedures. The relevant sentence should therefore read: "Provided, however, that modifications are not inconsistent in any material respect with the Bidding Procedures ~~or the Gilmore APA~~." These modifications to the Bidding Procedures will maximize value for the Debtors' estates through the Sale process.

III. The Gilmore APA Should Be Revised So As To Maximize Value for the Estates

28. There are several aspects of the Gilmore APA that are unreasonable and should be revised to maximize value for the Debtors' estates (to the extent that the Proposed Stalking Horse is selected as the highest and best bidder), as summarized in the chart below.

Asset Purchase Agreement	
Parties	Curae Health Inc. should not be a party to the APA.
Excluded Assets	Excluded Assets must expressly include the following: • All causes of action (i) under Chapter 5 of the Bankruptcy Code; (ii) against present and former D&Os of the Debtors; (iii) against any pre-petition professionals of the Debtors; (iii) against CHS and any of its affiliates, employees or agents and (iv) against any pre-petition lenders of the Debtors. • All insurance policies and proceeds thereof. All pre-paid expenses / deposits should be moved from Purchased Assets to Excluded Assets. Schedule 2.2(l) must be made available for review.
Cure Amounts	The Buyer must pay cure amounts on all Assumed Contracts without a cap. If a Buyer does not wish to pay the cure amount it can elect not to assume the contract. [§ 2.3(b)]
Purchase Price / Adjustment	It must be clear what the projected net consideration is to the estates. Net Working Capital and obligations assumed with respect to leasehold interests and capital leases must be calculated prior to Closing and shared with prospective bidders prior to the Auction. [§ 2.5] The amount necessary to cure current defaults under the CHCT Lease must be identified. If Buyer wishes to have the CHCT Lease or any other capital lease assumed and assigned to it, the purchase price should not be reduced by the post-closing

	obligations under the CHCT Lease or any other lease, which the Committee has been informed by the Debtor' advisors is approximately $3.5 million for the CHCT Lease.
Seller Representations and Warranties	Curae should not be jointly and severally liable with Seller. [§ 4] Seller representations should be consistent with a sale under section 363 of the Bankruptcy Code and the recognition that the Buyer will purchase the assets free and clear pursuant to section 363. As such, Seller representations should be limited to representations regarding: (i) good standing as a corporation; (ii) ownership and title to the assets being sold; (iii) requisite corporate authorizations of the sale; (iv) accreditation of the hospital and (v) absence of litigation or other proceeding that will render the contemplated sale illegal. The remainder of the representations should be deleted. There should be no reference to or inclusion of any Seller warranties.
Restrictions on Marketing Activities	This section should be removed. [§ 6.13]
Additional Financial Information	Proposed Stalking Horse should not receive greater access to information than other bidders. [§ 6.7]
Indemnification Provisions	Article X providing for Seller and Buyer indemnifications should be removed. The concept of $2 million Escrow Account to secure Seller's indemnification obligations should be removed and the $2 million should not be deducted from the cash consideration delivered to Seller at Closing. There should be no limitation on Seller's or Buyer's remedies for breach of the APA.
PTO	The provision that at or before the Closing, Seller shall have paid out all unused PTO as of the Closing in excess of up to 40 hours of PTO that Buyer will assume and credit to transferred employees should be removed. [§ 7.1(b)]

COBRA and 401/403 Plans	Sections 7.1(e), (f) and (g) should be removed.
Transition Services Agreement	Copy must be shared with Committee to determine if necessary. [§ 3.2(f)]
Curae Restrictive Covenants Agreement	Copy must be shared with Committee to understand the impact on marketability and value of remaining assets. [§ 3.2(j)]
Cost Reports	Seller should not be liable to Buyer for any recoupments or offsets effected post-Closing to the extent the applicable provider agreement is assumed and assigned to the Buyer. [§§ 7.4; 7.5]
MDSP, LVP and MU Payments	Seller, rather than Buyer, should be entitled to any MDSP, LVP and MU payments (as defined in Gilmore APA) related to operations prior to Closing. [§ 7.10]
Termination	Buyer's due diligence out should be removed. [§ 12.1(b)] Buyer's out based on lack of satisfaction in sole discretion that Assumed Contracts can be assumed and assigned for less than the Cure Cap should be removed. [§ 12.1(c)] Buyer's out based on Material Adverse Effect out should be removed or substantially narrowed. [§ 12.1(g), (h)] Buyer's out based on secured creditor's relief from stay should be qualified by materiality / amount of the asset. [§ 12.1(k), (i)] Buyer's out based on Seller's inability to obtain assignment of contracts of all Physicians is too broad. [§ 12.1(k),(iv)] Buyer's out because the assignment or reconciliation of any past due amounts owed to any provider or vendor of medical services shall not have been obtained to Buyer's sole satisfaction should be removed. [§ 12.1(v)]

Buyer's Conditions to Closing	Buyer's due diligence out should be removed. [§ 8.3] Buyer's MAE out should be removed or substantially narrowed. [§ 8.5] Buyer's out based on lack of enrollment of Buyer, Hospital and Practitioners under the auspices of Buyer in the Government Programs needs to be discussed. [§ 8.6(d)] Buyer's out based on lack of third party consents to assignment of Assumed Contracts should be removed or limited to specific personal services contracts. [§ 8.10] Phase I and II environmental outs to be further considered. [§ 8.13] Sale Order free and clear should be the only evidence necessary to establish delivery of assets free of encumbrances. [§ 8.14] The requirement that Seller buy tail on insurance policies should be removed. [§ 8.16] Transition Services Agreement out to be further considered. [§ 8.17] The Sale Order out should be qualified by reasonableness. [§ 8.20] Swing beds and Women's Building outs to be further considered. [§ 8.21]
Recording Fees and Costs relating to transfer of Real Property	Should not be payable by the Seller. [§ 13.9(a)]
Other Owners of Purchased Assets	If Seller Affiliates own any Purchased Assets, there needs to be disclosure of such assets, authorization of sale of such assets by the applicable owner and allocation of purchase price to such assets. [§ 13.7]
Post-Closing Access to Information	Seller should have reasonable access to books and records and Buyer's employees post-closing without paying for such access for the purposes of winding down the estate.

RESERVATION OF RIGHTS

29. The Committee reserves the right to raise further and other objections to the Motion prior to or at the hearing thereon in the event the Committee's objections raised herein are not resolved prior to the hearing.

WHEREFORE, the Committee respectfully requests that the Court deny the Motion, or alternatively, approve modified Bidding Procedures that address the Committee's concerns.

Dated: September 21, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2018, a copy of the foregoing was sent via ECF to all parties registered to receive electronic notice in the case and via U.S. mail, postage prepaid, to the following:

Polsinelli c/o David Gordon 1201 West Peachtree Street Suite 1100 Atlanta GA 30309	Waller Lansden Dortch & Davis, LLP c/o David Lemke 511 Union Street Suite 2700 Nashville TN 37219	Neal & Harwell, PLC c/o David Thompson 1201 Demonbreun Street, Suite 1000 Nashville TN 37203
Proposed Counsel for the Debtors	Counsel for Midcap Funding IV Trust	Counsel for ServisFirst Bank
Office of the United States Trustee c/o Megan Seliber 318 Customs House 701 Broadway Nashville TN 37203	Bass, Berry & Sims PLC c/o Paul Jennings 150 Third Avenue South Suite 2800 Nashville TN 37201	Burr & Forman LLP c/o David W. Houston, IV 222 Second Avenue South, Suite 2000 Nashville, TN 37201
Counsel for the United States Trustee	Counsel for Community Health Systems	Counsel for North Mississippi Health Services

/s/ Michael E. Collins
Michael E. Collins