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: October 16, 2018 Objection Deadline: October 12, 2018 Re: Docket No. 10

OBJECTION OF OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO 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, (II) GRANTING LIENS AND SUPERPRIORITY ADMINISTRATIVE EXPENSE STATUS, (III) GRANTING ADEQUATE PROTECTION, (IV) MODIFYING THE AUTOMATIC STAY, AND (V) SCHEDULING A FINAL HEARING

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 *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, (II) Granting Liens and Superpriority Administrative Expense Status, (III) Granting Adequate Protection, (IV) Modifying the Automatic Stay, and (V) Scheduling a*

[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).

Final Hearing (the "DIP Motion").[2] In support of the Objection, the Committee respectfully represents as follows:

PRELIMINARY STATEMENT

The Committee, the Debtors and MidCap Financial Trust ("MidCap") have worked diligently to address any open issues regarding the DIP Facility. The Committee therefore files this Objection out of an abundance of caution in the event the negotiations between the parties are unable to yield a consensual order with respect to the DIP Facility. As a result, the Committee objects as follows.

Through the DIP Motion, the Debtors seek approval of a $15 million debtor-in-possession revolving financing facility (the "DIP Facility") with MidCap or one of its affiliates, in its capacity as lender (the "DIP Lender") under that certain debtor-in-possession credit agreement (the "DIP Credit Agreement") and other related financing documents. Only up to $4 million of the total proposed borrowing can be characterized as "new money", while the balance is simply an extension the pre-petition financing arrangement which was "rolled up" shortly after the Petition Date and prior to the formation of the Committee herein.

The DIP Facility is unworkable for several reasons, most significantly because the Debtors are already in default under the facility. The DIP Lender issued a notice of default based on the Week 5 Variance Analysis, attached hereto as Exhibit A, because the Debtors were not in compliance with the unnecessarily restrictive variance tests contained in the DIP Credit Agreement. Further, based on the Debtors' own proposed consolidated budget through February 22, 2019 (the "Budget"), attached hereto as Exhibit B, the Debtors will be in default of the

[2] Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Financing Motion, Interim DIP Order (defined below), or DIP Credit Agreement, as appropriate.

Minimum Liquidity covenant during the period covered by the Budget. As such, the DIP Lender could stop funding under the DIP Facility.

The uncertainty with regards to Debtors' facility in Clarksdale further underscores the necessity of removing or revising the variance tests and Minimum Liquidity covenant. As demonstrated in the Cumulative Entity-by-Entity Week 4 Variance Analysis, attached hereto as Exhibit C, Clarksdale is severely underperforming as compared with the other Debtor entities, which will likely cause the Debtors as a whole to continue to default under the DIP Facility. The Committee understands the Debtors will seek to either shut down operations at Clarksdale or turn the hospital over to another operator on a 30-day schedule. No budget or final financing (especially the DIP Facility with its covenants and borrowing base limitations) should be approved until the parties have a better understanding of what will happen with Clarksdale and any such financial implications on the remaining Debtors.

The Debtors' current and likely on-going defaults are especially problematic in these cases since the $4 million of "new money" is facially insufficient to pay all of the Debtors' post-petition administrative expenses (including paying for the Debtors' continuing accrual of expenses), exposing the Debtors' estates to administrative insolvency from the outset of these cases. As demonstrated herein, the DIP Facility (as currently constituted) does not provide for payment of administrative expenses accrued during the periods covered by the Budget but not payable until after the conclusion of the relevant Budget period. Since the Debtors are already in default, it is likely that there will be a future default whereby the DIP Lender can stop funding at any time, the Debtors would have no cash to pay any administrative expenses accrued during the Budget period but not payable until after February 22, 2019. Therefore, in addition to removing the "trip wires" in the DIP Loan, the Budget must account for the accrual of administrative

expenses during the Budget period and the DIP Facility should be sized to ensure that creditors who extend credit to the Debtors on a post-petition basis are repaid. Without such adjustments, the DIP Facility appears to leave the Debtors' estates administratively insolvent from the outset of these cases.

Also problematic is that the DIP Lender has extracted benefits and protections for itself beyond what it necessary and reasonable in light of the actual post-petition "new money" loan of only up to $4 million and the circumstances of these chapter 11 cases. In addition to the roll-up of pre-petition debt, the DIP Credit Agreement includes (i) representations and warranties of the Debtors that are not appropriate for a chapter 11 loan to financially distressed borrowers well known to the DIP Lender based on the pre-petition lending relationship; (ii) overreaching events of default designed to lock up these cases for the benefit of the DIP Lender and give the DIP Lender inappropriate case controls; (iii) inappropriate indemnifications, releases and waivers for the benefit of the DIP Lender; (iv) insufficient budgeted amounts and the Carve Out for the fees of the Committee's professionals to adequately discharge their duties in these cases; (v) post-petition liens and superpriority administrative claims that purport to attach to pre-petition causes of action of the Debtors, including potential causes of action against the DIP Lender; and (vi) unfettered exercise of remedies without the Bankruptcy Court's supervision.

Further, while the non-default interest rate of LIBOR plus 4.25% appears to be reasonable to the extent the DIP Facility is right-sized to ensure payment of all post-petition administrative expenses, the additional fees included in the DIP Facility, such as the unused line fee of 0.5%, the Collateral Management Fee of 1%, the Origination Fee of 1% and the Audit Fees are unreasonable given the facts and circumstances of these cases.

While providing the DIP Lender overreaching benefits and protections, the DIP Facility simultaneously strips the estates of rights afforded to them under the Bankruptcy Code, such as the right to surcharge secured lenders' collateral under section 506(c) of the Bankruptcy Code and to benefit from potential Causes of Action (defined below) and the proceeds thereof. The DIP Facility also provides an unreasonably truncated Challenge Period for the Committee to investigate any claims and/or causes of action against the Prepetition Secured Lenders and an insufficient budget to conduct such an investigation given the capital structure and numerous complex pre-petition transactions that must be investigated.

In short, in addition to the Debtors' currently being in default under the DIP Facility, as currently proposed the DIP Facility is not properly sized, is too restrictive and is too expensive, while simultaneously failing to provide sufficient liquidity to prevent the Debtors from administrative insolvency. As set forth below, this Court should approve a DIP Facility which balances interests of the DIP Lender, the Debtors and the general unsecured creditors and creates a path toward confirmation of a plan herein while maintaining administrative solvency. The DIP Facility, as currently constituted, does not meet those basic requirements.

BACKGROUND

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. The United States Trustee formed the Committee on September 6, 2018 [Docket No. 112].

3. On the Petition Date, the Debtors filed the DIP Motion and on August 29, 2018, the Court entered the *Interim Order (I) Authorizing the Debtors to (A) Obtain Postpetition Secured Financing and (B) Utilize Cash Collateral, (II) Granting Liens and Superpriority Administrative Expense Status, (III) Granting Adequate Protection, (Iv) Modifying the Automatic Stay, and (V) Scheduling a Final Hearing* [Docket No. 60] (the "Interim DIP Order"). A final hearing with respect to the DIP Motion is scheduled for October 16, 2018 at 2:00 p.m. (prevailing Eastern Time).

4. Also on the Petition Date, the Debtors filed the *Expedited Motion of Debtors for an Order Authorizing: (I) Continued Use of Existing Cash Management System, Including Maintenance of Existing Bank Accounts, Checks, and Business Forms, (II) Suspension of Certain U.S. Trustee Bank Account Requirements; and (III) Continuation of Existing Deposit Practices [*Docket No. 7] (the "Cash Management Motion"), which, among other things, seeks authorization to make intercompany transfers.

5. On August 31, 2018, the Debtors filed a motion [Docket No. 79] (the "Bidding Procedures Motion") seeking to approve, among other things, bidding procedures (the "Bidding Procedures") for and authorization of the sale of Gilmore Medical Center, owned by Debtor Amory Regional medical Center, Inc. (the "Sale"). The Court entered an order approving the Bidding Procedures on September 28, 2018 [Docet No. 260].

OBJECTION

6. In determining whether to approve debtor-in-possession financing, a court must ensure that the terms of the financing are not designed for the unwarranted benefit of the post-petition lender. *Resolution Trust Co. v. Official Unsecured Creditors Committee (In re Defender Drug Stores, Inc.)*, 145 B.R. 312, 317 (9th Cir. BAP 1992). "Thus, courts look to whether the

proposed terms would prejudice the powers and rights that the Code confers for the benefit of all creditors and leverage the Chapter 11 process by granting the lender excessive control over the debtor or its assets as to unduly prejudice the rights of other parties in interest." *In re Mid-State Raceway, Inc.*, 323 B.R. 40, 59 (Bankr. N.D.N.Y. 2005) (*citing In re Defender Drug Stores*, 145 B.R. at 317).

7. In making this determination, courts have considered, among other things, the following factors: "(1) [t]hat the proposed financing is an exercise of sound and reasonable business judgment; (2) [t]hat the financing is in the best interests of the estate and its creditors; (3) [t]hat the credit transaction is necessary to preserve the assets of the estate, and is necessary, essential, and appropriate for the continued operation of the Debtors' businesses; (4) [t]hat the terms of the transaction are fair, reasonable, and adequate, given the circumstances of the debtor-borrower and the proposed lender; and (5) [t]hat the financing agreement was negotiated in good faith and at arm's length between the Debtors, on the one hand, and the Agents and the Lenders, on the other hand." *In re Mid-State Raceway, Inc.*, 323 B.R. at 60. The burden rests with the Debtors to demonstrate that the terms of the proposed financing meet these elements. See *In re Crouse Grp., Inc.*, 71 B.R. 544, 549 (Bankr. E.D. Pa. 1987). Here, for the specific reasons discussed below, the Debtors have not satisfied their burden with respect to the DIP Facility.

I. The Debtors are Currently in Default Under the DIP Credit Agreement

8. The Debtors are already in default under the DIP Credit Agreement due to the restrictive nature of the financial covenants and Events of Default. For example, the Debtors are in default under section 10.1(jj)(i) and (iii). 10.1(jj)(i) states that an Event of Default shall occur "if the Borrowers' actual disbursements under any line item on the Budget for any four-week period (as tested weekly) exceed the budgeted disbursements for such four-week period in such

line item by more than ten percent (10%) of the budgeted amount for such four-week period[.]" According to the Week 5 Variance Analysis, the Debtors have already defaulted under this provision, as several line item budgeted amounts were exceed by 10%. Certification of Allen Wilen (the "Wilen Certification"), ¶ 8 (attached hereto as Exhibit E). The DIP Credit Agreement therefore needs to be amended, such that the variance for disbursements should be tested only on an aggregate basis, not a line item basis, and the aggregate disbursement variance should be 15%, rather than five percent (5%) currently required in 10(jj)(ii). Wilen Certification, ¶ 9.

9. Section 10.1(jj)(iii) provides that an Event of Default occurs if the Borrowers' "aggregate cash receipts during any four-week period (as tested weekly) are less than ninety percent (90%) of aggregate projected cash receipts set forth in the Budget for such four-week period[.]" The Debtors are also in default under this provision, as cash receipts are less than 90% of the projected cash receipts in the Budget, as set forth in the Week 5 Variance Analysis. Wilen Certification, ¶ 10. Further, an Event of Default linked to revenue amounts is especially problematic for a hospital whose revenue is dependent upon government receivables, which are uncertain as to timing. Thus, timing of receipts is a guessing game and creates an unnecessary risk for the Debtors of triggering a default due to a timing delay from a government agency. Wilen Certification, ¶ 11. As such, section 10.1(jj)(iii) should be removed.

10. Similarly, based on the Debtors' Budget, the Debtors will be in default of the Minimum Liquidity covenant in section 6.1 of the DIP Credit Agreement prior to February 22, 2019. The Minimum Liquidity covenant states that the "Borrowers will not permit the Minimum Liquidity at any time during the term of this Agreement to be less than $500,000." "Minimum Liquidity" is defined as "the sum of the Revolving Loan Availability plus cash and cash equivalents that are (a) owned by any Borrower, and (b) not subject to any Lien other than a Lien

in favor of Agent." The Budget shows that the Debtors will not meet the Minimum Liquidity covenant based on cash alone for all but two weeks (11/23/18 and 11/30/18) during the Budget period since the Debtors have ending cash of less than $500,000 for all but those two weeks. Wilen Certification, ¶ 12.

11. Therefore, to comply with the Minimum Liquidity covenant for the remaining weeks, the cash plus the Revolving Loan Availability must be equal to $500,000. The definition of "Revolving Loan Availability" is "the Revolving Loan Limit minus the Revolving Loan Outstanding." The "Revolving Loan Limit" is "the lesser of (a) the Revolving Loan Commitment *and (b) the Borrowing Base*." The Borrowing Base is likely lower than the Revolving Loan Commitment and thus the Borrowing Base should be used in calculating the Revolving Loan Availability. However, even using the Revolving Loan Commitment (which is likely higher than the Borrowing Base) to calculate the Revolving Loan Availability, as demonstrated in the Budget, the Debtors will be in default of the Minimum Liquidity covenant for at least the weeks of 12/07/18 and 12/21/18. Further, there is very little cushion with respect to several other weeks during the Budget period to comply with the Minimum Liquidity covenant. Wilen Certification, ¶ 13. The Minimum Liquidity covenant should therefore be removed.

12. The problems with the restrictive covenants and unnecessary variance testing are compounded by the uncertainty with respect to Clarksdale. As demonstrated in the Cumulative Entity-by-Entity Week 4 Variance Analysis, Clarksdale is severely underperforming as compared with the other Debtor entities.[3] The total receipts for Clarksdale are 25% below the

[3] This was primarily due to a system conversion at the Clarksdale facility. In addition, a potential shutdown of the Clarksdale facility and additional issues with that system usage could create future collection issues that would distort the covenant test.

budgeted amount, whereas for Amory and Batesville the total receipts are 5% and 6% below the budgeted amounts, respectively. In addition, operating performance results for Clarksdale indicate the facility is currently losing money and has been a drain on operations for an extended period. The DIP Loan requires the testing of receipts on an aggregate basis and requires that aggregate actual cash receipts during any four-week period not be less than 90% of the aggregated projected cash receipts set forth in the Budget for such four-week period. As such, Clarksdale's underperformance or any delay in payment processing, whether system conversation related or from governmental payors, will likely cause the Debtors as a whole to continue to default under the DIP Facility. Wilen Certification, ¶ 14.

II. The Currently Proposed DIP Facility Will Likely Leave the Estates Administratively Insolvent

13. The DIP Facility needs to be properly sized to ensure the Debtors have sufficient liquidity to pay all administrative expenses throughout the pendency of these cases. The DIP Facility as currently constructed does not provide for payment of administrative expenses accrued during the periods covered by the Budget (which is prepared on a cash basis) but not payable until after the conclusion of the relevant Budget period, leaving the estates exposed to administrative insolvency. Wilen Certification, ¶ 15.

14. First, the Debtors' Budget does not account for the accrual of unpaid operating administrative expenses and unpaid fees and expenses of Retained Professionals, which expenses are incurred during the Budget period, yet are not payable until after the Budget period (the "Post-Budget Expenses"). The Budget shows that as of February 22, 2019, the Debtors will have no remaining availability from the DIP Loan. Yet, because the Budget does not account for the Post-Budget Expenses, at the end of the Budget period, the Debtors will be responsible for the Post-Budget Expenses without any ability to pay. As such, a line item should be added to the

Budget for accrual of operating administrative expenses and for accrual of fees and expenses of Retained Professionals. Further, the Committee's professionals' fees line item should be increased to $100,000 per month, rather than $75,000. The size of the DIP Facility then needs to be increased to cover these additional expenses. Wilen Certification, ¶ 16.

15. Next, the proposed DIP Facility does not make clear that the administrative expenses of the Debtors reflected in the "Disbursements" category of the Budget for a particular week, which expenses are ultimately not payable until a later week, will be subsequently covered by the Budget in the week such expenses are payable (the "Delayed Expenses," and together with the Post-Budget Expenses, the "Trailing Expenses"). The Debtors' Week 4 Cumulative Variance Analysis, attached hereto as Exhibit D, and Week 5 Variance Analysis demonstrate this concern. For example, the Week 4 Cumulative Variance Analysis shows that the Debtors budgeted $1,449,843 in "Taxes and Assessments" for the that week, yet shows an actual disbursement of only $481.00. There is a comment next to this line item that the Debtors "[h]ave yet to receive an invoice from the state of Mississippi." However, the Week 5 Variance Analysis shows that the Delayed Expense was not covered in the subsequent week when payment became due. Rather, the Week 5 Variance Analysis shows that there were no amounts budgeted for the "Taxes and Assessments" in week 5, yet there were actual disbursements of $132. There is no mechanism in the Budget to carry over the accrued but unpaid expense. Wilen Certification, ¶ 17.

16. Similarly, the Week 4 Cumulative Variance Analysis shows that the Debtors budgeted $295,880 in "Insurance" for that week. Yet, the Week 4 Cumulative Variance Analysis shows an actual disbursement of only $190,895 for insurance payments, with a comment stating "[t]iming difference, no payments are due or processed this week." The Week

5 Variance Analysis shows no amounts budgeted for "Insurance" for that week, but an actual disbursement of $127,867. Although there is a comment stating "timing variance – cumulatively under budget," it is unclear if that means that this line item cannot be used to trigger an event of default with respect to variance testing. Further, without clarifying that the Delayed Expenses will be covered in a subsequent Budget period when payments are due, the Debtors will be left with additional expenses not covered by the DIP Facility which they will have no means to repay, leaving the estates administratively insolvent.[4] Wilen Certification, ¶ 18.

17. To further protect against the risk of administrative insolvency, the Carve-Out in paragraph 8 of the Interim DIP Order should be modified to provide a reasonable budget for Retained Professionals and to provide for Trailing Expenses as follows:

> The Prepetition Liens, DIP Liens, DIP Superpriority Claims, Replacement Liens, and the Adequate Protection Superpriority Claims are and shall be subject and subordinate only to the following: (i) quarterly fees required to be paid pursuant to 28 U.S.C. § 1930(a)(6) (the "U.S. Trustee Fees"), together with interest payable thereon pursuant to applicable law and any fees payable to the Clerk of the Bankruptcy Court; (ii) until the issuance of a notice from the DIP Lender that an Event of Default has occurred (the "Carve-Out Notice") (which the DIP Lender may issue upon an Event of Default), the allowed, paid, accrued, and unpaid reasonable fees and expenses of professionals employed by the Debtors and the Committee pursuant to Sections 327 and 1103 of the Bankruptcy Code (the "Case Professionals") in the amounts set forth in the Budget; provided, however, that nothing herein shall be deemed a cap on the fees and expenses of the Case Professionals to the extent allowed by Orders of this Court, but shall only serve as a cap on how much of such allowed fees and expenses will be paid as part of the Initial Carve Out (defined below); (iii) the post-petition expenses of the Debtors

[4] The inadequate funding of the DIP Facility also creates challenges with respect to the Debtors' cash management system. The Cash Management Motion requests authority for the Debtors to make intercompany transfers of funds between the Debtors. This is problematic if the DIP Loan is not sufficient to pay accrued but unpaid administrative expenses. For example, if Amory performs better than Batesville and Clarksdale and provides funding to these hospitals through intercompany transfers, such transfers might cause Amory to become administratively insolvent when it otherwise would not have been because the Budget does not guarantee that there will be sufficient funds in the Debtors' estates for payment of all administrative claims on a go-forward basis. Thus, even if Amory receives an administrative priority claim against the other Debtors' estates, the other Debtors may be unable to pay Amory's priority claim in full, to the detriment of Amory's creditors. This is likely the case with respect to Clarksdale, which the Clarksdale Variance Report shows is severely underperforming. However, if the DIP Facility is properly sized to ensure there is sufficient funding to pay all administrative expenses through the conclusion of these cases, then the intercompany transfers described in the Cash Management Motion will be less problematic.

> incurred in the ordinary course of the Debtors' operations to the extent such amounts are reflected in the "Disbursements" category of the Budget and were actually paid during the relevant Budget period; (iv) the post-petition expenses of the Debtors incurred in the ordinary course of the Debtors' operations to the extent such amounts are reflected in the "Disbursements" category of the Budget but were not actually paid during the Budget Period, and (v) the post-petition expenses of the Debtors incurred in the ordinary course of the Debtor's operations and the administration of these Chapter 11 Cases that accrued during the Budget period, but were not payable during such Budget period, including without limitation any reasonable and necessary costs and expenses incurred in connection with any closure of any of the Debtors' hospitals, and any allowed fees and expenses pursuant to Sections 330 and 331 of the Bankruptcy Code (such subclauses (iv) and (v), the "Trailing Expenses") (subclauses (i)-(v) collectively, the "Initial Carve-Out"); and (vi) following delivery of a Carve-Out Notice, an aggregate amount not to exceed $150,000 (the "Residual Carve-Out," and together with the Initial Carve-Out, the "Carve-Out"), provided that (a) any payments made to Case Professionals for services rendered prior to the delivery of the Carve-Out Notice and in accordance with the Budget and (b) any fees and expenses of Case Professionals accrued prior to the delivery of the Carve-Out Notice in the amounts set forth in the Budget and subsequently allowed, shall not reduce the Residual Carve-Out.

III. The Currently Proposed DIP Credit Agreement Includes Several Other Traps for the Debtors Which Limit the Debtors' Access to Liquidity

18. Even if the DIP Lender increases the amount of the DIP Loan so that it covers all administrative expenses, the currently proposed DIP Loan is subject to a borrowing base, financial covenants and other restrictions that limit the Debtors' actual availability and access to liquidity. First, neither the DIP Credit Agreement nor the DIP Motion make clear that the Borrowing Base formula provides the Debtors with access to liquidity sufficient to fund the chapter 11 cases to their conclusion and not leave the estates administratively insolvent.

19. Further, the DIP Credit Agreement and Interim DIP Order include several Events of Default which must be revised so that they do not afford the DIP Lender the opportunity to unnecessarily terminate the DIP Facility and cut off the Debtors' access to its bargained-for liquidity. As such, section 10.1 of the DIP Credit Agreement and paragraph 16 of the Interim DIP Order should be amended as follows:

Current Language	**Committee's Proposed Changes**
	DIP Credit Agreement
Section 10.1(a)	• Limit reference to Section 4.2(b) and 4.4 to post-petition Taxes; • Make reference to Section 4.4 subject to availability of funds; • The definition of Permitted Distributions should include any payment or transfer pursuant to Orders of the Bankruptcy Court; • The definition of Asset Sale should not include DIP Lender's veto right; • Reference to Section 5.8 should be made consistent with intercompany transfers; • Section 5.9 should include a carve out from any modification approved by the Bankruptcy Court; • The definition of the Ordinary Course of Business should include typical and customary operation of a debtor-in-possession in a case under chapter 11 of title 11 of the United States Code; • Delete reference to any Asset Sale Order in Section 5.16(a); • Include a carve out for Orders of the Bankruptcy Court in Section 5.16(a) and (b); and • Delete reference to Article 6.
10.1(d)	Remove
10.1(g)	Remove
10.1(k)	Remove
10.1(m)	Remove

10.1(o)	Remove
10.1(p)	Remove
10.1(q)	Remove
10.1(s)	Remove
10.1(t)	Remove
10.1(x)	Increase threshold to $500,000
10.1(y)	Remove DIP Lender's veto right
10.1(z)	Include a cure period
10.1(dd)	Remove
10.1(ee)	Limit to Final Order and Financing Documents
10.1(jj)	• Budget variance for disbursements should be tested only on an aggregate basis and not on a line item basis. • The allowed disbursements variance should be 15%. • Remove section (iii) requiring the testing cash receipts.
10(kk)	Remove
Interim DIP Order	
Paragraph 16(c)	DIP Lender should not have a veto power over the sales of assets to the extent such sales are approved by orders of the Bankruptcy Court.
Paragraph 16(e)	Should only include the 100-day milestone for the entry of the order approving Amory Sale. The rest of the paragraph should be removed.
Paragraph 16(f)	Should only include the 120-day milestone for closing of the Amory sale. The rest of the paragraph should be removed.

20. Further, with respect to the Events of Default, as currently provided in the Interim DIP Order, (i) the DIP Lender must only provide two days' notice of an Event of Default before it is entitled to exercise its remedies, and (ii) after the Debtors receive notice of an Event of Default, the Debtors shall be entitled to an emergency hearing for the purpose of contesting whether an Event of Default has occurred. Interim DIP Order, ¶ 17(a) and (b). Significantly, the Debtors are not afforded an opportunity to cure any Event of Default. Any final order approving the DIP Motion (the "Final DIP Order"), to the extent entered, should provide that if the DIP Lender asserts that an Event of Default has occurred, the Debtors have a reasonable opportunity to cure such default and, in any event, the DIP Lender should not be authorized to exercise remedies absent further order of the Court. This will further protect the Debtors' ability to access the DIP Loan and receive the requisite liquidity to fund their chapter 11 cases.

21. The DIP Credit Agreement also requires the Debtors make unnecessary and extensive representations which could trigger an Event of Default if any representation is incorrect in any respect, resulting in the early termination of the DIP Facility. DIP Credit Agreement, Article 3, Sections 10.1(c), 10.2. The Debtors' representations in Article 3 of the DIP Credit Agreement should thus be limited based on the fact that (i) the DIP Lender is the Debtors' pre-petition lender who therefore already has detailed knowledge of the Debtors and (ii) the Borrowers are in chapter 11 and thus the Bankruptcy Code provides the DIP Lender with protections not available outside the chapter 11 process. Accordingly, the representations should be generally limited to those regarding (i) good standing as a corporation; (ii) ownership and title to the assets pledged as collateral and existence of insurance; (iii) requisite corporate authorizations of the borrowing; (iv) accreditation of the hospitals; and (v) absence of litigation or other proceeding that will render the contemplated incurrence of credit illegal. By including

the additional representations currently contained in the DIP Credit Agreement (which are unnecessary for borrowers in chapter 11 cases), the DIP Lender is provided with another means of terminating the Debtors' access to liquidity.

22. Given the insufficient funding and inclusion of terms limiting the Debtors' access to liquidity, the currently proposed DIP Financing is not in the best interests of the Debtors' estates and creditors and is not fair, reasonable and adequate. *See In re Mid-State Raceway, Inc.*, 323 B.R. at 60. As such, in its current form, the DIP Motion should be denied.

IV. The Terms of the DIP Financing Provide Unnecessary Benefits to the DIP Lender to the Determent of the Unsecured Creditors

23. "[B]ankruptcy courts do not allow terms in financing arrangements that convert the bankruptcy process from one designed to benefit all creditors to one designed for the unwarranted benefit of the post-petition lender[.]" *Mid-State Raceway*, 323 B.R. at 59; *see also In re Tenney Vill. Co.*, 104 B.R. 562, 568 (Bankr. D.N.H. 1989) (characterizing the proposed financing as one that would "pervert the reorganizational process from one designed to accommodate all classes of creditors and equity interests to one specially crafted for the benefit of the Bank and the Debtor's principals who guaranteed the debt.").

24. Here, the proposed DIP Financing provides the DIP Lender with excess protections that are not necessary under the facts of these cases, to the detriment of the unsecured creditors. For example, in addition to the Obligations bearing interest at the non-default interest rate of LIBOR Rate plus 4.25%, which appears to be reasonable to the extent the DIP Facility is right-sized, the DIP Facility also includes an Unused Line Fee of one half of one percent (.50%), a Collateral Fee of 1%, an Origination Fee of 1%, and Audit Fees (together with the Unused Line Fee, Collateral Fee and the Origination Fee, the "Excess Fees"). DIP Credit Agreement, § 2.2 (a), (b), (e), (f), (j). These Excess Fees, as currently proposed, are unreasonably high and/or

unnecessary, especially since the DIP Lender is already receiving non-default interest per annuum at LIBOR plus 4.25%. As such, the Unused Line Fee, Collateral Fee and Audit Fees should be eliminated and the Origination Fee should be reduced and should only apply to the Overadvances.

25. Further, section 2.2(c) of the DIP Credit Agreement requires, among other things, that Borrowers "reimburse, on a current basis, all costs and expenses (including legal, financial advisor, appraisal and valuation-related fees and expenses) incurred by Agent and any Lender in connection with the preparation, negotiation, documentation and court approval of this Agreement, the other Financing Documents and the Financing Orders[.]" This section should be amended to (i) provide that all costs and expenses must be reasonable and (ii) remove the reference to costs and expenses for legal counsel. Further, the DIP Lender must provide the Committee copies of invoices for all costs and expenses for which it seeks reimbursement and the Committee must be provided an opportunity to object to such amounts.

26. Similarly, the provisions of the Interim DIP Order that provide the DIP Lender with control over the chapter 11 process must be removed. For example, paragraph 15 of the Interim DIP Order states that "[t]he Debtors shall not sell, transfer, lease, encumber or otherwise dispose of any portion of the DIP Collateral, *without the prior written consent of the DIP Lender* (and no such consent shall be implied, from any other action, inaction or acquiescence by the DIP Lender or an order of this Court)" (emphasis added). The Debtors should be able to dispose of DIP Collateral outside of the ordinary course pursuant to orders of the Bankruptcy Court without the prior written consent of the DIP Lender.

27. The full roll up of the DIP Lender's prepetition debt is also inappropriate under the facts of these cases. Based on the Debtors' representations, the DIP Lender appears to be

oversecured with respect to its pre-petition debt by accounts receivable and the DIP Lender's post-petition Overadvance of up to $4 million is oversecured as a result of the post-petition priming lien on substantially all of the Debtors' assets. As such, a roll up of the DIP Lender's prepetition debt is not necessary and falls short of satisfying the standard of debtor-in-possession financing under section 364 of the Bankruptcy Code, which requires that the proposed DIP facility is an exercise of the debtor's sound business judgment, that the financing is in the best interests of the Debtors' estates and their creditors, and that the terms are "fair, reasonable, and adequate." *See In re Mid-State Raceway, Inc.*, 323 B.R. at 60. On the contrary, based on the Debtors' own representations, the full roll up is completely unnecessary and provides no benefit to the Debtors' estates. At most, the roll up of the pre-petition debt should be partial and equal only to the amount of new money actually advanced by the DIP Lender to the Debtors post-petition.

V. The Proposed DIP Financing Strips the Estates of Rights Afforded to Them Under the Bankruptcy Code

28. Debtor-in-possession financing is not meant to "tilt the conduct of the bankruptcy case [and] prejudice, at an early stage, the powers and rights that the Bankruptcy Code confers for the benefit of all creditors." *In re Ames Dep't Stores*, 115 B.R. 34, 37 (Bankr. S.D.N.Y. 1990)*; see also In re Tenney Village Co., Inc.*, 104 B.R. at 568. Rather, debtor-in-possession financing is meant to benefit the debtor's estate as a whole, including the unsecured creditors.

A. *The DIP Collateral Should Exclude Causes of Action and the Proceeds Thereof*

29. The Committee has not yet had an opportunity to investigate potential (i) causes of action against any and all Prepetition Secured Lenders, the DIP Lender, CHS and all affiliates thereof, the Debtors' current and former D&Os and all former and/or current professionals of the Debtors, including, without limitations, consultants, accountants, auditors and attorneys or (ii)

chapter 5 causes of action (collectively, the "Causes of Action"). As such, the overall value of the Causes of Action is presently unknown. The Causes of Action, however, may be one of the only sources of recovery for unsecured creditors in these chapter 11 cases. As such, the DIP Collateral should expressly exclude, and no post-petition liens or super-priority administrative claims should attach to, the Causes of Action or any proceeds thereof to avoid potentially diminishing recoveries to unsecured creditors. Interim DIP Order, § 2(d),(e),(h), 4(a)

30. Numerous courts have restricted a debtor-in-possession's ability to pledge avoidance actions as security for post-petition financing, holding that avoidance actions are not property of a debtor's estate. *See Official Comm. of Unsecured Creditors* v, *Chinery (In re Cybergenics, Corp.)*, 226 F.3d 237, 244 (3d Cir. 2000) (avoidance actions are not property of the estate, but are essentially rights held by the estate for the benefit of creditors); *In re Sweetwater,* 55 B.R. 724, 731 (D. Utah 1985), *rev'd on other grounds,* 884 F.2d 1323 (10th Cir. 1989) ("The avoiding powers are not 'property' but a statutorily created power to recover property"); *Bethlehem Steel Corp. v. Moran Towing Corp.*, 390 B.R. 784, 786 (Bankr. S.D. N.Y. 2008) ("Avoidance actions brought pursuant to the Bankruptcy Code never belonged to the Debtor, but rather were creditor claims that could only be brought by a trustee or debtor in possession . . . ."). Similarly, granting liens on other unencumbered causes of action belonging to the Debtor would be at odds with the Bankruptcy Code's goal of maximizing value for the debtor's estate and its creditors. *See In re Ames Dep't Stores*, 115 B.R. at 37.

B. *The Adequate Protection Package Must be Revised to Protect Unsecured Creditors*

31. Similarly, the adequate protection package provided to the Prepetition Secured Lenders must be revised so that it is not detrimental to the rights of unsecured creditors. As such, neither Replacement Liens nor Adequate Protection Superpriority Claims should not attach

to any Causes of Action or the proceeds thereof, which should be preserved for the benefit of unsecured creditors. Interim DIP Order, ¶ 4(a)(i)(A), (ii) and (iii).

32. With respect to interest, interest payments (at the non-default rate) to the Prepetition First Lien Revolving Lender (MidCap) should be monthly, not weekly, consistent with the Budget, and there should be no double payment to the extent of any rolled up amounts. Interim DIP Order, ¶ 4(c). The Committee should be provided copies of all the DIP Lender's professionals' bills and an opportunity to object. Interim DIP Order, ¶ 4(c). To the extent it is determined that the Prepetition First Lien Revolving Facility Obligations are not oversecured as of the Petition Date, all payments of interest and professional fees should be applied to reduce principal. Interim DIP Order, ¶ 4(c). Interest payments to ServisFirst must be at the non-default rate. Interim DIP Order, ¶ 4(c).

33. Further, Replacement Liens should be subject to sections 551, 552 and 506(c) of the Bankruptcy Code, so that secured creditors do not receive a windfall at the expense of unsecured creditors. Interim DIP Order, ¶ 4(a)(i)(B). Section 551 of the Bankruptcy Code provides that "[a]ny transfer avoided under section 522, 544, 545, 547, 548, 549, or 724(a) of this title, or any lien void under section 506(d) of this title, is preserved for the benefit of the estate but only with respect to property of the estate." 11 U.S.C. § 551. Therefore, for example, if a lien "is avoided as a preference under section 547 or as a fraudulent transfer under section 548, the estate steps into the shoes of the holder of the avoided lien and the lien's priority remains the same as it was with respect to other liens prior to the avoidance." 5 Collier on Bankruptcy ¶ 551.02 (16th 2018). Section 551 ensures that the estate benefits from the avoidance of liens, rather than the junior secured creditors.

34. Section 552(b) of the Bankruptcy Code permits a court to disregard a post-petition lien on "proceeds, products, offspring, or profits" of collateral based on the "equities of the case." 11 U.S.C. § 552(b). "The purpose of the equity exception is to prevent a secured creditor from reaping benefits from collateral that has appreciated in value as a result of the trustee's/debtor-in-possession's use of other assets of the estate (which normally would go to general creditors) to cause the appreciated value." *In re Muma Servs*., 322 B.R. 541, 558-559 (Bankr. D. Del. 2005) (quoting *Delbridge v. Prod. Credit Ass'n*, 104 B.R. 824, 826 (E.D. Mich. 1989)).

35. Section 506(c) of the Bankruptcy Code permits a debtor to recover the "reasonable, necessary costs and expenses of preserving, or disposing of, [secured property] to the extent of any benefit to the holder of such claim." 11 U.S.C. § 506(c). The purpose of section 506(c) is to allow a claimant who "expends money to provide for the reasonable and necessary costs and expenses of preserving or disposing of a secured creditor's collateral . . . to recovery such expenses from the secured party or from the property securing an allowed secured claim held by such party," thus "prevent[ing] a windfall to the secured creditor at the expense of the claimant." *Precision Steel Shearing, Inc. v. Fremont Fin. Corp. (In re Visual Industries, Inc.)*, 57 F.3d 321, 325 (3d Cir. 1995). Section 506(c) "understandably" shifts the costs of preserving or disposing of a secured party's collateral back to the secured party who has benefited from the expenditure, "which costs might otherwise be paid from the unencumbered assets of the bankruptcy estate. *Id.* at 325.

36. Sections 551, 552 and 506(c) thus provide important protections for unsecured creditors which should not be destroyed by the Debtors' proposed adequate protection package for its Prepetition Secured Lenders.

C. *Debtors Should Not Be Permitted to Waive Their Rights to Surcharge Collateral Under Section 506(c) of the Bankruptcy Code*

37. Similarly, the section 506(c) waiver in paragraph 2(d) of the Interim DIP Order should be removed. As stated above, section 506(c) ensures that secured creditors do not receive a windfall at the expense of the unsecured creditors and waiving this right at such an early stage of these cases is inappropriate. *See Hartford Fire Ins. Co. v. Norwest Bank Minn., N.A. (In re Lockwood Corp.)*, 223 B.R. 170, 176 (B.A.P. 8th Cir. 1998) (finding that 506(c) waiver provisions are unenforceable on the basis they "operate as a windfall to the secured creditor at the expense of administrative claimants"). As such, to protect this valuable right, courts have routinely rejected the waiver of surcharge rights under section 506(c) of the Bankruptcy Code. *See, e.g., Id.*; *McAlpine v. Comerica Bank-Detroit (In re Brown Bros., Inc.)*, 136 B.R. 470, 74 (W.D. Mich. 1991). Rather, any Final DIP Order should include an express reservation of the estates' surcharge rights under section 506(c) with respect to the Prepetition Secured Lenders and the DIP Lender. Interim DIP Order, ¶ 12.

VI. The Committee Must be Afforded (I) Adequate Time to Investigate the Liens and Claims of the Prepetition Secured Lenders, (ii) Standing to Initiate A Challenge with Respect to the Same, and (iii) an Adequate Budget to Conduct the Investigation

38. The Committee's rights with respect to the investigation of liens and claims of the Prepetition Secured Lenders must be protected. *See In re Ames Dep't Stores*, 115 B.R. at 38 (stating that "[n]o court of which we are aware has approved financing arrangements . . . [that] would skew the conduct of the bankruptcy case, destroy the adversary process that contemplates representation by counsel and deprive the estate of possible rights and powers before the creditors' committee counsel would have a reasonable time to examine whether the estate had viable claims"). Section 1103(c)(2) of the Bankruptcy Code provides that one of the duties of the Committee is to "investigate the acts, conducts, assets, liabilities, and financial condition of

the debtor . . . and any other matter relevant to the formulation of the plan." 11 U.S.C. § 1103(c)(2). These statutory duties clearly include the investigation of the purported liens of, and potential claims against, the Prepetition Secured Lenders. The Interim DIP Order, however, includes provisions that limit the Committee's ability to conduct its investigation.

39. First, the Committee must be granted standing to object to or challenge the findings contained in the Interim DIP Order and/or any Final DIP Order and the Stipulations contained therein regarding (i) the validity, extent, perfection, enforceability or priority of the Prepetition Liens in and on the Prepetition Collateral, (ii) the validity, allowability, priority, status or amount of the Prepetition First Lien Revolving Facility Obligations, Prepetition Senior Term Loan Facility Obligations or CHS Prepetition Obligations (collectively, the "Prepetition Secured Obligations"), and/or (iii) any other claim or cause of action that the Committee may assert individually or on behalf of the Debtors' estates against any of the Prepetition Secured Lenders, including without limitation, asserting any claim in the nature of a setoff, counterclaim or defense to the Prepetition Secured Obligations (including but not limited to, those under sections 506, 544, 547, 548, 549 and 550 of the Bankruptcy Code) (each, a "Challenge").

40. Second, the Committee should be authorized to use up to $75,000 (rather than $20,000) of the Initial Carve-Out to investigate the liens, claims and interests of the Prepetition Secured Lenders. Interim DIP Order, ¶¶ G, 10. Third, the Prepetition Secured Lenders should not be allowed to add the costs and expenses of defending any challenge to the principal amount of their pre-petition claims. Interim DIP Order, ¶ 7.

41. Finally, the Challenge Period should be amended to reflect the circumstances of these chapter 11 cases. With respect to MidCap, the Challenge Period should be extended through and including December 31, 2018, rather than the currently proposed deadline of the

earlier of (a) sixty (60) days from the date of the entry of order appointing counsel to the Committee, and (b) November 5, 2018. Interim DIP Order, ¶ 6. This will give the Committee adequate time to investigate claims and liens as they relate to MidCap.

42. However, with respect to ServisFirst and CHS, there should be no Challenge Period, as providing a date by which the Committee must bring a Challenge against ServisFirst or CHS could result in an unnecessary use of the estates' limited resources. The Committee will not know whether ServisFirst is fully secured under section 506(a) of the Bankruptcy Code until the asset sales are complete with respect to Amory, Batesville and Clarksdale. A Challenge Period for ServisFirst that expires prior to the closing of such sales would require the Committee initiate an adversary proceeding against ServisFirst before it has the relevant information regarding the market value of the assets as determined by the asset sales. As such, there should be no Challenge Period with respect to ServisFirst.

43. Similarly, with respect to CHS, based on the Committee's preliminary diligence, the estates may have claims against CHS relating to the Debtors' acquisition of the Facilities from CHS pursuant to the asset purchase agreement between Curae and CHS, dated September 28, 2016, as set forth in the First Day Declaration [Docket No. 49]. Given the Committee's need to investigate these potential claims, as well as utilize the tools afforded in the Bankruptcy Code to assist with this investigation, such as rule 2004 of the Federal Rules of Bankruptcy Procedure, there should be no Challenge Period with respect to CHS.

VII. Other Objectionable Provisions of the Proposed DIP Facility and Interim DIP Order

44. In addition to those provisions discussed above, the proposed DIP Facility and Interim DIP Order contain a number of other objectionable provisions, including without limitation, the following provisions which should be modified as indicated below:

- The Committee should receive the same reporting and at the same time as the DIP Lender pursuant to Section 4.1 of the DIP Credit Agreement.
- DIP Credit Agreement Section 4.13 ("Power of Attorney") should be removed.
- DIP Credit Agreement Sections 12.7 ("Waiver of Consequential and Other Damages") and 12.14 ("Administrative Expense Indemnity") should be removed.
- The Bankruptcy Court should have sole jurisdiction. DIP Credit Agreement, § 12.8.
- DIP Credit Agreement Section 12.20 ("Cross Default and Cross Collateralization") should be modified to make it consistent with the remedies provision of the Interim DIP Order.
- The DIP Lender and Prepetition First Lien Revolving Lender's right to credit bid should be subject to compliance with section 363(k) and the Bidding Procedures. Interim DIP Order, ¶ 4(b).
- The $2 million escrow of Sale Proceeds should be removed. Instead such funds should be used to fund the remaining Debtors' operations and create new accounts receivables or, alternatively, pay down outstanding DIP Obligations and provide additional availability under the DIP Facility. Interim DIP Order, ¶ H.
- No portion of the Sale Proceeds should be used to pay ServisFirst or any other secured debt outside of a plan of liquidation. Interim DIP Order, ¶ H.
- The Order should provide that the Debtors' estates do not release any claims or causes of action that they have or may have in the future against the DIP Lender.
- Any amendment of any Interim DIP Order, Final DIP Order or DIP Financing Document without further order of the Court approving such an

amendment must be subject to the Committee's approval. Interim DIP Order, ¶ 20(f).

RESERVATION OF RIGHTS

45. The Committee reserves the right to revise, amend or supplement this Objection at any time prior to or at the final hearing.

WHEREFORE, the Committee respectfully requests that the Court (i) modify any Final DIP Order with respect to the DIP Motion and DIP Facility as necessary to incorporate the concerns and objections of the Committee set forth herein; and (ii) grant the Committee such other and further relief as the Court deems just and appropriate.

Dated: October 12, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on October 12, 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:

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