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Commercial Law League of America: Hot Issues in the Restructuring of a Health Care Industry Business

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Educational Materials

Hot Issues in the Restructuring of a Healthcare Industry Business¹

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Introduction

The healthcare industry in general, and hospitals in particular, have been severely impacted by the COVID-19 pandemic in many respects. At its most basic level, the impact has been devastating financially. The American Hospital Association estimates that between March 1, 2020 and June 30, 2020, hospitals will have suffered a financial impact of \$202.6 billion in losses, or approximately \$1.66 billion per day. These losses affect all hospitals, whether part of large chains or stand-alone non-profits. Economists expect the result to be more financial failures, mergers and bankruptcy filings in an industry which was already in dire financial straits. The restructuring of a healthcare entity, whether in or out of court, raises unique and significant issues, in large part because federal and state governments pay for the bulk of medical care in the United States and the industry is one of the most heavily regulated industries in the nation.

This program will discuss several issues which, although not necessarily new, have been pushed to the forefront by recent decisions in bankruptcy cases in Delaware, New York and Los Angeles. First, the relationship between the Medicare and Medicaid programs and a healthcare provider is created through a document called a provider agreement; is it a contract or a license is hotly debated and critically important to the value of assets being sold. This program will explore recent decisions on this issue, how the issue is resolved practically, and provide some practice pointers for those negotiating this issue with the government. Second, more than half the hospitals in the United States are nonprofit and many are particularly vulnerable. The 2005 Bankruptcy Code amendments codified certain obligations for debtors selling nonprofit assets in bankruptcy, but only recently have those provisions been subject to critical analysis by courts. This program will explore the issues and the recent rulings by courts on the interaction of these provisions with the sale provisions of the Bankruptcy Code. Finally, many skilled nursing and assisted living facilities are being punished financially by the pandemic, but bankruptcy may be too expensive or not efficient enough to deal with their issues. Many of these entities will be

¹ This paper is prepared to accompany a panel presentation for the American Bankruptcy Institute on October 22, 2020. It does not represent the personal opinion of any panel members or their law firms, or their clients.

dealt with in alternative proceedings, particularly through receiverships. This program will explore how those cases are being handled and the pros and cons of the various approaches.

THE PROVIDER AGREEMENTS AS A LICENSE OR CONTRACT?²

The relationship between the Medicare or Medicaid programs and the providers of healthcare goods and services is captured in a document commonly referred to as a "provider agreement." The treatment of these provider agreements in a bankruptcy proceeding can be controversial and vital to the success of a bankruptcy case involving a sale of assets. The assignment of the provider agreement under section 365 is much more likely to be for less value than a sale of the provider agreement under section 363 as a license. If the debtor sells its provider agreement pursuant to section 363, section 363(f) allows it to sell the provider agreement "free and clear of *any interest* in such property," including any successor liability.³

Outside of bankruptcy proceedings, the courts have held that the Medicare and Medi-Cal provider agreements are not contracts.⁴ However, inside of bankruptcy proceedings, the federal

² For a deeper discussion of this issue, see Samuel R. Maizel and Jody A. Bedenbaugh, *The Medicare Provider Agreement: Is It A Contract or Not? And Why Does Anyone Care?*, 71 THE BUS. LAWYER 4 (Fall 2016).

³ The Second, Third, Fourth and Seventh Circuits, and many lower courts, have applied an expansive interpretation to include not only in rem interests in property, but also other obligations that may "arise from the property being sold." See *In re Grumman Olson Industries, Inc.*, 467 B.R. 694, 702-3 (S.D.N.Y. 2012); see also *United Mine Workers of America 1992 Benefit Plan v. Leckie Smokeless Coal Co. (In re Leckie Smokeless Coal Co.)*, 99 F.3d 573 (4th Cir. 1996) (coal mine operators could sell their assets free and clear of their obligations to a benefits plan and fund under the Coal Act); *PBBPC, Inc. v. OPK Biotech, LLC (In re PBBPC, Inc.)*, 484 B.R. 860 (1st Cir. B.A.P. 2013) (First Circuit held that the right of the Commonwealth of Massachusetts to treat a purchaser of substantially all of the assets of chapter 11 debtor as "successor employer" to which debtor's experience rating could be imputed to determine purchaser's unemployment insurance contribution fell within "any interest," of which debtor's assets could be sold free and clear); *In re Tougher Industries*, 2013 WL 1276501 (Bankr. N.D.N.Y. Mar. 27, 2013) (court held that the right of the New York State Department of Labor to use the debtor's experience rating to access the buyer's tax liability as successor to the Debtor was "interest" in property, of which debtor's assets could be sold free and clear); *WBO P'ship v. Virginia Dept. of Medical Assistance Servs. (In re WBO P'ship)*, 189 B.R. 97, 104-05 (Bankr. E.D. Va. 1995) (Commonwealth of Virginia's right to recapture depreciation is an "interest" as used in section 363(f)).

⁴ *PAMC, Ltd. v. Sebelius*, 747 F.3d 1214, 1221 (9th Cir. 2014) ("We have, on occasion, stated that providers and others have contracts with the government in this area, but our decisions have

and state governments take the position that the provider agreement is an executory contract, which must be assumed by the debtor and assigned to the buyer under section 365. The government takes this position because, if the provider agreement is an executory contract, the debtor must cure existing defaults in the Medicare relationship (i.e., pay any existing prepetition obligations). Moreover, the buyer must take successor liability for the debtor's prior overpayments from Medicare.⁵ However, the Bankruptcy Code does not define the word "contract," and because a debtor's rights in property (including contracts) is defined by applicable non-bankruptcy law,⁶ the filing of a bankruptcy case should not change the essential character of a document from not being a contract to being a contract.

turned on the regulatory regime rather than on contract principles. ... As the Eleventh Circuit Court of Appeals held when hospitals complained of legislative impairment of their contract rights in this area because they had agreements with the Secretary: 'Upon joining the Medicare program, however, the hospitals received a statutory entitlement, not a contract right.'") (*quoting Memorial Hosp. v. Heckler*, 706 F.2d 1130, 1136 (11th Cir. 1983)); *Guzman v. Shewry*, 552 F.3d 941 (9th Cir. 2009) ("Participation in the Medi-Cal program entitles Guzman to reimbursement for treating patients who receive Medi-Cal benefits; it does not involve bidding on government contracts."); *see also The Germantown Hospital and Medical Ctr. v. Heckler*, 590 F. Supp. 24, 30-31 (E.D. Pa. 1983), *aff'd*, 738 F.2d 631 (3d Cir. 1984) ("There is no contractual obligation requiring HHS to provide Medicare reimbursement."); *In re BDK Health Mgmt., Inc.*, Case Nos. 98-609-B1, Order Authorizing Sale of Assets Out Of The Ordinary Course of Business, 1998 Bankr. LEXIS 2031 (Bankr. M.D. Fla., Nov. 16, 1998). *But see In re University Medical Center*, 973 F.2d 1065, 1075 n.13, 1076 (3d Cir. 1992) (Third Circuit states that "a Medicare provider agreement easily fits" within the judicial definition of an executory contract). However, even lower courts in the Third Circuit have concluded that the decision in *University Medical Center* on this issue is limited. *See, e.g., Health Care Financing Admin. v. Sun Healthcare Group, Inc. (In re Sun Healthcare Group, Inc.)*, 2002 U.S. Dist. LEXIS 17868 (D. Del. 2002) (The court held that "although the Medicare provider agreement may not be a license in the strictest sense of the word, it is clearly similar to a license for section 525 purposes.").

⁵ Outside of bankruptcy, courts have held that parties that take a provider agreement take it with liability for their predecessors, i.e., with successor liability. *See, e.g., United States v. Vernon Home Health, Inc.*, 21 F.3d 693 (5th Cir. 1994), *cert. denied*, 513 U.S. 1015 (1994).

⁶ *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1661, 203 L. Ed. 2d 876 (2019). ("And 'breach' is neither a defined nor a specialized bankruptcy term. It means in the Code what it means in contract law outside bankruptcy."); *Butner v. United States*, 440 U.S. 48, 55, 99 S. Ct. 914, 918, 59 L. Ed. 2d 136 (1979) ("Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding.").

In the *Verity Health System of California* bankruptcy cases, the Bankruptcy Court noted the difference between the treatment of the Medi-Cal provider agreement as a contract or a license: “If the Provider Agreements are executory contracts, the [Medi-Cal program] may be entitled to receive payments potentially in excess of \$50 million in connection with the transfer of the Provider Agreements to the purchaser of the Hospitals. By contrast, if the Provider Agreements are statutory entitlements, they can be transferred to the purchaser free and clear of claims and interests under § 363, meaning that the DHCS would receive no payments in connection with the transfer.” This difference is not unusual.

In *Verity* the Medi-Cal program argued that providers have no property rights in their Medi-Cal provider agreements and, therefore, they cannot be sold pursuant to § 363. The Court rejected this argument, pointing out the difference: “DHCS ignores the difference between a property interest in the right to continue to participate in Medi-Cal and a property interest in the existing right to bill Medi-Cal for providing services. ... No one disputes that if the Hospitals violated Medi-Cal statutes or regulations, their right to continue as Medi-Cal Providers could be suspended. But at present, the Provider Agreements are in good standing and the Hospitals have the right to receive reimbursements for providing services to Medi-Cal beneficiaries. It is this right that amounts to a property interest.”

Finally, the Bankruptcy Court held that the liabilities owed to the Medi-Cal program were “interests in property” that could be stripped off in a sale pursuant to § 363. The Court noted that: “[u]nder § 363(f)(5), property may be sold free and clear of an interest, if the entity holding the interest ‘could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.’ The interest that [Medi-Cal] holds in the Provider Agreements is its right to receive payment of the [l]iabilities. [The Medi-Cal program] could be compelled to accept a money satisfaction of its interest in a legal or equitable proceeding. In fact, receiving a money satisfaction is and has been [the Medi-Cal program’s] objective all along.”

A copy of the *Verity* decision is attached.

NOT FOR PROFIT HEALTHCARE BUSINESS RULES

Many healthcare businesses are not for profit entities.⁷ The Bankruptcy Code has three provisions that deal with the sale of not for profit assets, and those provisions arise out of and are frequently invoked in healthcare business bankruptcies. The catalyst for BAPCPA provisions dealing with sale of not for profit assets arose out of the bankruptcy case of *In re Allegheny Health Education and Research Foundation*, where the bankruptcy court overruled the Attorney General of Pennsylvania's efforts to intervene in the sale of not for profit hospitals in a chapter 11.⁸

Section 363 was amended to provide that the trustee may only sell or lease property of not for profits in accordance with applicable non-bankruptcy laws governing the transfer of such assets.

Section 1129(a)(16) was added to provide that, as part of confirming a plan of reorganization, the court must find that all transfers of not for profit assets is in accordance with applicable non-bankruptcy law.

Finally, § 541(f) was added to provide that property of a debtor is a not for profit health care business may be transferred to a for profit entity but only under the same conditions as would apply if the debtor were not in bankruptcy.

Two sections of BAPCPA which were not codified into the United States Code relate to the sale of not for profit assets in bankruptcy. First, section 1221(d) of BAPCPA states that "the court shall not confirm a plan...without considering whether this section would substantially affect the rights of a party in interest....The parties who may appear and be heard in a proceeding under this section include the attorney general of the State in which the debtor is incorporated, was formed, or does business." Additionally, section 1221(e) of BAPCPA states that "[n]othing in this section [which is now section 363(d)(1)] shall be construed to require the [bankruptcy] court in which a case under [the Bankruptcy Code] is pending to remand or refer any proceeding,

⁷ For example, 59% of all community hospitals in the United States are nongovernment, not for profit community hospitals. American Hospital Ass'n, *Fast Facts on US Hospitals*, available at www.aha.org/research/rc/stat-studies/fast-facts.shtml.

⁸ *In re Bankruptcy Appeal of Allegheny, Health, Education and Research Foundation*, Appeal of Order Staying/Enjoining Orphans Court Proceedings, 252 B.R. 309 (W.D. Pa. 1999).

issue, or controversy to any other court or to require the approval of any other court for the transfer of property.” These provisions make clear that the Attorney General has standing to appear on issues related to the sale of not for profit assets, but that the bankruptcy court need not defer to a state court to decide issues related to the transfer of assets.

There are not a lot of decisions related to these provisions,⁹ but in two relatively recent cases in the Central District of California there have been a total of six decisions discussing in detail the limits of these sections.¹⁰ In those cases, the Bankruptcy Court overruled efforts by the California Attorney General to impose conditions on a buyer of nonprofit hospitals which historically would have been allowed under applicable state law. The conditions would have made the value paid to the estates millions of dollars less, because they imposed onerous financial obligations on the buyers. The Court found that the conditions were an interest in property which could be cut off in a sale under §363. Copies of those rulings are attached.

Alternative Procedures for Skilled Nursing Facilities

Because of the costs of bankruptcy, alternative remedies such as receiverships are prevalent in healthcare industry in dealing with financially distressed skilled nursing facilities and assisted living facilities.¹¹ For example, the Dycora skilled nursing system had 11 facilities placed under receivership in 2019 in California and Wisconsin.¹² In 2018 the Skyline system saw receiverships imposed on skilled nursing facilities in Nebraska, Pennsylvania, South Dakota,

⁹ *In re HHH Choices Health Plan, LLC*, 554 B.R. 697, 700 (Bankr. S.D.N.Y. 2016) (construing New York state law to determine the appropriate disposition of a non-profit debtor’s assets).

¹⁰ *In re Verity Health Sys. of California, Inc.*, 598 B.R. 283 (Bankr. C.D. Cal. 2018) (“Verity I”); *In re Gardens Reg'l Hosp. & Med. Ctr., Inc.*, 567 B.R. 820, 829 (Bankr. C.D. Cal. 2017), *appeal dismissed*, No. 2:16-BK-17463-ER, 2018 WL 1229989 (C.D. Cal. Jan. 19, 2018).

¹¹ There are still plenty of bankruptcy cases including in the past three years of skilled nursing operators Welcov Healthcare, Orianna Health Systems, Senior Care Centers and Preferred Care. See Maggie Flynn, *When Nursing Homes Hit Financial Trouble, Vendors Feel the Pinch - and Fight Back* (July 11, 2019), available at <https://skillednursingnews.com/2019/07/when-snfs-hit-financial-trouble-vendors-feel-the-pinch-and-fight-back/>.

¹² See Maggie Flynn, *3 More Dycora Skilled Nursing Facilities Placed in Receivership* (April 21, 2019), available at <https://skillednursingnews.com/2019/04/3-more-dycora-skilled-nursing-facilities-placed-in-receivership/>; Corrinne Hess, *8 Wisconsin Nursing Homes In Receivership* (Apr. 5, 2019), available at <https://www.wpr.org/8-wisconsin-nursing-homes-receivership>.

Massachusetts, Arkansas and Kansas.¹³ These receiverships can be imposed by lenders, landlords or regulators. Previously, receiverships were imposed on entities operated by Fortis Management and Atrium Health and Senior Living.

In a receivership, the rules applied are state laws where the facility is located. Even if the receivership is filed in a single court and purports to cover multiple locations in different states, the receiver is required to file the appointing court order in the local federal district courts where the facilities are located. The receiver is an “officer of the court” and is responsible to the judge who appointed him. Typically, the receiver will operate the facility as long as necessary to sell the assets for the benefit of the secured creditors, and, if any funds are left over, for the unsecured creditors and then for equity.

The SNF industry, like much of the healthcare industry, is heavily regulated, so receivers must be aware of state and federal rules overseeing the operations of such facilities.¹⁴ The issue that must be dealt with from the beginning of the planning is whether the receiver can operate the facility using the license of the former operator or must they get a new license? Other issues include:

- (a) who funds the likely operating losses;
- (b) who employs the employees;
- (c) who holds the license;
- (d) who has liability for torts and similar issues after the receiver is in place;
- (e) who is responsible for filing closing cost reports and adjudicating claims; and

¹³ See Alex Planko, Mission Health Formally Takes Over 15 Skyline Skilled Nursing Facilities, Ending Receivership in Kansas (Oct. 15, 2019), available at <https://skillednursingnews.com/2019/10/mission-health-formally-takes-over-15-skyline-skilled-nursing-facilities-ending-receivership-in-kansas/>.

¹⁴ See Richard T. Arrowsmith and Nancy A. Peterman, Federal and State Oversight of SNFs; What Happens at the Point of Enforcement?, ABI Journal, Vol. XXXVII, No. 5, May 2018, available at <https://www.gtlaw.com/-/.../federal-and-state-oversight-of-snfs-peterman.pdf>.

(f) how are contracts and licenses dealt with?

A receivership has several advantages over a bankruptcy. First, there is no debtor in possession, so if the secured creditor has concerns about old management, they can get a new person in charge (although that person will report to the judge, not the secured creditor). Second, the cost of a receivership should be less than the costs of a chapter 11 bankruptcy. Third, because there is less court supervision, and fewer official parties, the process should move more quickly.

A copy of an order dealing with a receivership over a skilled nursing facility is attached.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

FANNIE MAE,

Plaintiff

v.

Capital Senior Living Properties 2 - Gramercy,
Inc., CSL Bridle Brook, LLC, CSL Canton
GA, LLC, CSL Charlestown, LLC, CSL Dillon
Pointe SC, LLC, CSL Fort Wayne LLC, CSL
Harbor Court, LLC, CSL Middletown, LLC,
CSL Oshkosh, LLC, CSL Peachtree LLC, CSL
Plainfield, LLC, CSL Richmond Heights, LLC,
CSL Roanoke, LLC, CSL Whitcomb House,
LLC, Triad Senior Living III, L.P.,

Defendants.

CIVIL ACTION NO. 3:20-cv-2395

**APPENDIX IN SUPPORT OF AGREED EMERGENCY
MOTION FOR APPOINTMENT OF RECEIVER AND BRIEF IN SUPPORT**

Plaintiff Fannie Mae files this Appendix in Support of Its Agreed Emergency Motion for Appointment of Receiver and Brief in Support (the “*Motion*”). Undefined terms used herein shall have the meanings ascribed to them in the Motion. This Appendix contains the following items:

<u>Exhibit Description</u>	<u>Appx. Page</u>
A: Declaration of Carol King	Appx. 3
A-1: Triad Note	Appx. 11
A-2: Triad Loan Agreement	Appx. 19
A-3: Triad Deed of Trust	Appx. 185
A-4: Assignment of Security Instrument (Multifamily Deed of Trust, Assignment of Leases and Rents, Security Agreement and Fixture Filing)	Appx. 224
A-5: Assignment of Collateral Agreements and Other Loan Documents	Appx. 228
A-6: Extension Agreement executed by Triad	Appx. 232
B: Curriculum vitae of Michael F. Flanagan	Appx. 237
C: Proposed Agreed Order Appointing Receiver	Appx. 257

Dated: August 21, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing was served electronically through the Court's CM/ECF system to all parties consenting to service through same. Additionally, it was served via email to Defendants' counsel as follows:

Samuel R. Maizel (samuel.maizel@dentons.com)
Spencer Hamilton (spencer.hamilton@dentons.com)

By: /s/ Jay L. Krystinik
Jay L. Krystinik

EXHIBIT A

DECLARATION OF CAROL KING

Pursuant to 28 U.S.C. § 1746, Carol King declares as follows:

1. My name is Carol King. I am over the age of 18 years, of sound mind, and capable of making this Declaration.

2. I am a Senior Asset Manager, Multifamily Loss Mitigation, for Fannie Mae. The facts and circumstances stated herein are of my own personal knowledge and are true and correct. I obtained this personal knowledge through my duties as a Senior Asset Manager, Multifamily Loss Mitigation, for Fannie Mae, which duties include being the asset manager assigned to the loan discussed herein and personal involvement with the facts set forth herein.

3. Fannie Mae is a government-sponsored private corporation which was established by Congress to carry out vital public policies enumerated by statute: to create a secondary market for residential mortgage loans, to stimulate the flow of private capital into housing, and to improve the affordability of home ownership, thereby bringing stability to the U.S. housing market. *See* 12 U.S.C. § 1716. Fannie Mae fulfills its statutory mission, in part, by purchasing mortgage loans from a network of lenders that make loans directly to consumers in what is known as the primary market. Fannie Mae's purchase of mortgage loans from lenders such as mortgage lenders, banks, thrifts, housing finance agencies, and credit unions allows those primary market lenders to replenish the funds available for mortgage lending.

4. Fannie Mae's borrowers are 15 affiliates of Capital Senior Living Corporation ("*CSL*"). *CSL* owns 100% (directly or indirectly) of each of the Defendants herein, and each Defendant owns one or more senior housing communities that serve as collateral for indebtedness owed by each Defendant to Fannie Mae. *CSL* has provided a limited guaranty of

such indebtedness. With some exceptions,¹ the loans to Fannie Mae are “non-recourse”, meaning that if indebtedness remains even after Fannie Mae has sold its collateral, Fannie Mae generally cannot seek recovery from other assets of its borrower. For this reason, it is critical for Fannie Mae to preserve the value of its collateral.

5. As it did with many of its borrowers at the beginning of the COVID-19 pandemic, Fannie Mae (through its servicers) entered into forbearance agreements with each of the Defendants. Each of the Defendants herein is presently unable to pay all of their obligations to Fannie Mae. Accordingly, CSL and the Defendants have determined that the most efficient path forward is by this receivership thereby creating a mechanism to protect the health and safety of residents at the Properties while facilitating the ultimate transfers of the facilities owned by the Defendants and referenced herein to Fannie Mae.

6. The Defendants are in default. Each mortgage or deed of trust described herein provides that upon the occurrence of, and during the continuance of any Event of Default, should Fannie Mae apply for the appointment of a receiver, each Defendant expressly consents to the appointment of a receiver.

7. The principal places of business of each of the Defendants is in Dallas, Texas, and their properties are located in ten different states, including Texas. Fannie Mae contends that the Defendants’ properties are declining in value. Due to the nature of the properties, and the requirement to provide advance notice to State regulators of a change in control, it will take months to effectuate foreclosures or sales of the properties, during which time rents from the properties (which are part of Fannie Mae’s collateral) will be lost. Because those rents cannot be recovered after they are spent, foreclosure (months from now) is an insufficient remedy. A receiver is therefore needed to take control of the properties and preserve the rents pending

¹ The exceptions include, without limitation, certain fraud-related conduct or waste of the Property.
DECLARATION OF CAROL KING

foreclosure of the properties or, potentially, a Court-approved receivership sale. As indicated by their counsel's signature on the Agreed Order Appointing Receiver submitted herewith, each of the Defendants consents to the relief requested.

8. Fannie Mae therefore seeks the appointment of a receiver to oversee the following properties (as fully defined in the applicable mortgages or deeds of trust described herein, each a "**Property**" and collectively the "**Properties**") with the powers and authority provided in the concurrently-filed Agreed Order to protect and preserve the Properties as Fannie Mae's collateral.

<u>Property Name (Existing Manager²)</u>	<u>Property Address</u>	<u>Property Owner/Defendant</u>
Gramercy Hill (Capital Senior Living, Inc.)	6800 A St Lincoln, NE 68510	Capital Senior Living Properties 2 - Gramercy, Inc.
The Waterford at Bridle Brook (CSL Bridle Brook, LLC)	1505 Patton Dr Mahomet, IL 61853	CSL Bridle Brook, LLC
The Waterford at Hidden Lake (CSL Canton GA Management LLC)	3100 Hidden Valley Dr Canton, GA 30114	CSL Canton GA, LLC
River Crossing Assisted Living (CSL Charlestown Management, LLC)	2400 Market St Charlestown, IN 47111	CSL Charlestown, LLC
Waterford at Dillon Pointe (CSL Dillon Pointe Management, LLC)	104 Dillon Dr Spartanburg, SC 29307	CSL Dillon Pointe SC, LLC
Apple Ridge Assisted Living & Memory Care (CSL Fort Wayne Management, LLC)	3320 E State Blvd Fort Wayne, IN 46805	CSL Fort Wayne LLC
The Harbor Court (CSL Harbor Court Management, LLC)	22900 Center Ridge Rd Rocky River, OH 44116	CSL Harbor Court, LLC
The Woodlands of Middletown (CSL Middletown Management, LLC)	3000 McGee Ave Middletown, OH 45044	CSL Middletown, LLC
The Waterford at Oshkosh	1010 & 1110 West	CSL Oshkosh, LLC

² Each "**Existing Manager**" set forth herein currently manages various aspects of the Defendants' respective businesses under the terms of one or more management agreements (each a "**Management Agreement**" and collectively the "**Management Agreements**") entered into between each Defendant and each identified Existing Manager.

<u>Property Name</u> <u>(Existing Manager²)</u>	<u>Property Address</u>	<u>Property Owner/Defendant</u>
(CSL Oshkosh Management, LLC)	Murdock Avenue 1 Oshkosh, WI 54901	
The Waterford at Oakwood (CSL Peachtree Management LLC)	4251 Hudson Dr Oakwood, GA 30566	CSL Peachtree LLC
Sugar Grove Senior Living (CSL Plainfield Management, LLC)	5865 Sugar Ln Plainfield, IN 46168	CSL Plainfield, LLC
The Waterford at Richmond Heights (Capital Senior Living, Inc.)	261 Richmond Rd Cleveland, OH 44143	CSL Richmond Heights, LLC
The Park-Oak Grove Retirement Community (CSL Roanoke Management, LLC)	4920 Woodmar Dr SW Roanoke, VA 24018	CSL Roanoke, LLC
Whitcomb House (CSL Whitcomb House Management, LLC)	245 West St Milford, MA 01757	CSL Whitcomb House, LLC
The Waterford at Edison Lakes (Capital Senior Living, Inc.)	1025 Park Pl Mishawaka, IN 46545	Triad Senior Living III, L.P.
The Waterford at Columbia (Capital Senior Living, Inc.)	9370 Windsor Lake Blvd Columbia, SC 29223	Triad Senior Living III, L.P.
The Waterford at Deer Park (Capital Senior Living, Inc.)	201 McDermott St Deer Park, TX 77536	Triad Senior Living III, L.P.
Waterford at Pantego (Capital Senior Living, Inc.)	2650 West Park Row Drive Arlington, TX 76013	Triad Senior Living III, L.P.

9. The Properties are Fannie Mae's collateral. Defendants desire to transfer the Properties as soon as possible. Defendants, Fannie Mae's borrowers, have defaulted on their loans to Fannie Mae and have advised that so long as the health and safety of residents at the Property can be protected, they agree to the appointment of a receiver.

10. On or about November 12, 2015, Defendant executed that certain Multifamily Note (the "**Note**"), payable to the order of Berkadia Commercial Mortgage LLC ("**Original Lender**"), in the original stated principal amount of \$11,599,000.00 (the "**Loan**"). The Loan is further evidenced by that certain Multifamily Loan and Security Agreement between Defendant and Original Lender dated as of November 12, 2015 (the "**Loan Agreement**").

11. The Note is secured by, among other instruments, a Multifamily Deed of Trust, Assignment of Leases and Rents, Security Agreement and Fixture Filing (the “**Deed of Trust**”), dated as of November 12, 2015, executed by Defendant for the benefit of Original Lender. True and correct copies of the Note, Loan Agreement, and Deed of Trust are attached hereto as **Exhibits A-1, A-2 and A-3**, respectively.

12. The Deed of Trust covers the real and personal property more particularly described therein and commonly known as Waterford at Pantego and located at 2650 West Park Row Drive, Pantego, TX 76013 (as fully defined in the Deed of Trust, the “**Property**”). Defendant owns a senior living facility on the Property (the “**Facility**”).

13. The Note and the Deed of Trust, and all other documents and instruments securing or evidencing the Loan are hereinafter collectively referred to as the “**Loan Documents**.” Fannie Mae is the assignee of the Loan Documents by way of, without limitation, that certain (i) Assignment of Security Instrument (Multifamily Deed of Trust, Assignment of Leases and Rents, Security Agreement and Fixture Filing), attached at **Exhibit A-4**; and (ii) an Assignment of Collateral Agreements and Other Loan Documents, attached at **Exhibit A-5**.

14. Similar to Triad, each of the other Defendants own senior housing communities located throughout the country (each a “**Facility**” and collectively, the “**Facilities**”). Each of the Defendants has executed one or more notes (collectively, the “**Notes**”) that evidence debt owed to Fannie Mae (collectively, the “**Loans**”). Each of the Loans is further evidenced by a Multifamily Loan and Security Agreement (collectively, the “**Loan Agreements**”). Each of the Loans is secured by a Facility, as well as the real property on which the Facility is located and the personal property of each Defendant (collectively, as fully defined in the applicable mortgage or deed of trust, the “**Property**”).

15. The Notes, the Loan Agreements, the applicable mortgages or deeds of trust, and all other documents and instruments securing or evidencing the Loans are hereinafter collectively referred to as the “***Loan Documents***.” Fannie Mae is the owner and holder of the Notes and is the assignee of the Loan Documents.

16. On May 6, 2020, each Defendant executed a Forbearance Agreement (the “***Forbearance Agreements***”). Through separate Extension Agreements executed effective as of July 8, 2020, the “Forbearance Expiration Date” in the Forbearance Agreements was extended through July 31, 2020. The Extension Agreement executed by Triad is attached as **Exhibit A-6**. In the Forbearance Agreements and Extension Agreements, each Defendant expressly acknowledged that it was in default under its Loan Documents with Fannie Mae. Without limitation, each of the Loans and Notes are delinquent for the months of April, May, June, July, and August 2020. Each Defendant was required to bring its Loan current on or before the Forbearance Expiration Date, but failed to do so. Such failure constitutes an automatic “Event of Default” under Section 14.01(a)(1) of the Loan Agreements.

17. Each of the Defendants has advised Fannie Mae that they are unable to make the full payments now due under the Notes and that they seek to transfer the Properties as soon as possible while maintaining the health and safety of residents at the Properties.

18. I am also a custodian of records of Fannie Mae and personally familiar with Fannie Mae’s record keeping practices. All of the exhibits attached hereto are true and correct copies of records made and kept by Fannie Mae in the regular course of Fannie Mae’s business, and it was the regular course of Fannie Mae’s business for an employee or representative of Fannie Mae, with knowledge of the act, event, condition, opinion, or diagnosis recorded, to make the record or to transmit information thereof to be included in such record, and the record was

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made at or near the time or reasonably soon thereafter. The records attached are the originals or exact duplicates of the originals.

19. I declare under penalty of perjury that the foregoing is true and correct.


CAROL KING

EXECUTED on August 21, 2020.

DECLARATION OF CAROL KING

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APPX. 10

EXHIBIT A-1

MULTIFAMILY NOTE

US \$11,599,000.00

As of November 12, 2015

FOR VALUE RECEIVED, the undersigned (“**Borrower**”) promises to pay to the order of BERKADIA COMMERCIAL MORTGAGE LLC, a Delaware limited liability company (“**Lender**”), the principal amount of ELEVEN MILLION FIVE HUNDRED NINETY-NINE THOUSAND and 00/100 DOLLARS (US \$11,599,000) (the “**Mortgage Loan**”), together with interest thereon accruing at the Interest Rate on the unpaid principal balance from the date the Mortgage Loan proceeds are disbursed until fully paid in accordance with the terms hereof and of that certain Multifamily Loan and Security Agreement dated as of the date hereof, by and between Borrower and Lender (as the same may be amended, restated, replaced, supplemented or otherwise modified from time to time, the “**Loan Agreement**”).

1. Defined Terms.

Capitalized terms used and not specifically defined in this Multifamily Note (this “**Note**”) have the meanings given to such terms in the Loan Agreement.

2. Repayment.

Borrower agrees to pay the principal amount of the Mortgage Loan and interest on the principal amount of the Mortgage Loan from time to time outstanding at the Interest Rate or such other rate or rates and at the times specified in the Loan Agreement, together with all other amounts due to Lender under the Loan Documents. The outstanding balance of the Mortgage Loan and all accrued and unpaid interest thereon shall be due and payable on the Maturity Date, together with all other amounts due to Lender under the Loan Documents.

3. Security.

The Mortgage Loan evidenced by this Note, together with all other Indebtedness is secured by, among other things, the Security Instrument, the Loan Agreement and the other Loan Documents. All of the terms, covenants and conditions contained in the Loan Agreement, the Security Instrument and the other Loan Documents are hereby made part of this Note to the same extent and with the same force as if they were fully set forth herein. In the event of a conflict or inconsistency between the terms of this Note and the Loan Agreement, the terms and provisions of the Loan Agreement shall govern.

4. Acceleration.

In accordance with the Loan Agreement, if an Event of Default has occurred and is continuing, the entire unpaid principal balance of the Mortgage Loan, any accrued and unpaid interest, including interest accruing at the Default Rate, the Prepayment Premium (if applicable), and all other amounts payable under this Note, the Loan Agreement and any other Loan Document shall at once become due and payable, at the option of Lender, without any prior

notice to Borrower, unless applicable law requires otherwise (and in such case, after satisfactory notice has been given).

5. Personal Liability.

The provisions of Article 3 (Personal Liability) of the Loan Agreement are hereby incorporated by reference into this Note to the same extent and with the same force as if fully set forth herein.

6. Governing Law.

This Note shall be governed in accordance with the terms and provisions of Section 15.01 (Governing Law; Consent to Jurisdiction and Venue) of the Loan Agreement.

7. Waivers.

Presentment, demand for payment, notice of nonpayment and dishonor, protest and notice of protest, notice of acceleration, notice of intent to demand or accelerate payment or maturity, presentment for payment, notice of nonpayment, grace and diligence in collecting the Indebtedness are waived by Borrower, for and on behalf of itself, Guarantor and Key Principal, and all endorsers and guarantors of this Note and all other third party obligors or others who may become liable for the payment of all or any part of the Indebtedness.

8. Commercial Purpose.

Borrower represents that the Indebtedness is being incurred by Borrower solely for the purpose of carrying on a business or commercial enterprise or activity, and not for agricultural, personal, family or household purposes.

9. Construction; Joint and Several (or Solidary, as applicable) Liability.

Section 15.08 (Construction) of the Loan Agreement is hereby incorporated herein as if fully set forth in the body of this Note.

If more than one Person executes this Note as Borrower, the obligations of such Person shall be joint and several (solidary instead for purposes of Louisiana law).

10. Notices.

All Notices required or permitted to be given by Lender to Borrower pursuant to this Note shall be given in accordance with Section 15.02 (Notice) of the Loan Agreement.

11. Time is of the Essence.

Borrower agrees that, with respect to each and every obligation and covenant contained in this Note, time is of the essence.

12. Loan Charges Savings Clause.

Borrower agrees to pay an effective rate of interest equal to the sum of the Interest Rate and any additional rate of interest resulting from any other charges of interest or in the nature of interest paid or to be paid in connection with the Mortgage Loan and any other fees or amounts to be paid by Borrower pursuant to any of the other Loan Documents. Neither this Note, the Loan Agreement nor any of the other Loan Documents shall be construed to create a contract for the use, forbearance or detention of money requiring payment of interest at a rate greater than the maximum interest rate permitted to be charged under applicable law. It is expressly stipulated and agreed to be the intent of Borrower and Lender at all times to comply with all applicable laws governing the maximum rate or amount of interest payable on the Indebtedness evidenced by this Note and the other Loan Documents. If any applicable law limiting the amount of interest or other charges permitted to be collected from Borrower is interpreted so that any interest or other charge or amount provided for in any Loan Document, whether considered separately or together with other charges or amounts provided for in any other Loan Document, or otherwise charged, taken, reserved or received in connection with the Mortgage Loan, or on acceleration of the maturity of the Mortgage Loan or as a result of any prepayment by Borrower or otherwise, violates that law, and Borrower is entitled to the benefit of that law, that interest or charge is hereby reduced to the extent necessary to eliminate any such violation. Amounts, if any, previously paid to Lender in excess of the permitted amounts shall be applied by Lender to reduce the unpaid principal balance of the Mortgage Loan without the payment of any prepayment premium (or, if the Mortgage Loan has been or would thereby be paid in full, shall be refunded to Borrower), and the provisions of the Loan Agreement and any other Loan Documents immediately shall be deemed reformed and the amounts thereafter collectible under the Loan Agreement and any other Loan Documents reduced, without the necessity of the execution of any new documents, so as to comply with any applicable law, but so as to permit the recovery of the fullest amount otherwise payable under the Loan Documents. For the purpose of determining whether any applicable law limiting the amount of interest or other charges permitted to be collected from Borrower has been violated, all Indebtedness that constitutes interest, as well as all other charges made in connection with the Indebtedness that constitute interest, and any amount paid or agreed to be paid to Lender for the use, forbearance or detention of the Indebtedness, shall be deemed to be allocated and spread ratably over the stated term of the Mortgage Loan. Unless otherwise required by applicable law, such allocation and spreading shall be effected in such a manner that the rate of interest so computed is uniform throughout the stated term of the Mortgage Loan.

13. WAIVER OF TRIAL BY JURY.

TO THE MAXIMUM EXTENT PERMITTED BY LAW, EACH OF BORROWER AND LENDER (A) AGREES NOT TO ELECT A TRIAL BY JURY WITH RESPECT TO ANY ISSUE ARISING OUT OF THIS NOTE OR THE RELATIONSHIP BETWEEN THE PARTIES AS LENDER AND BORROWER THAT IS TRIABLE OF RIGHT BY A JURY AND (B) WAIVES ANY RIGHT TO TRIAL BY JURY WITH RESPECT TO SUCH ISSUE TO THE EXTENT THAT ANY SUCH RIGHT EXISTS NOW OR IN THE FUTURE. THIS WAIVER OF RIGHT TO TRIAL BY JURY IS SEPARATELY GIVEN

BY EACH PARTY, KNOWINGLY AND VOLUNTARILY WITH THE BENEFIT OF COMPETENT LEGAL COUNSEL.

14. Receipt of Loan Documents.

Borrower acknowledges receipt of a copy of each of the Loan Documents.

15. Incorporation of Schedules.

The schedules, if any, attached to this Note are incorporated fully into this Note by this reference and each constitutes a substantive part of this Note.

16. Defined Terms.

(a) As used hereunder, the term “**Maximum Lawful Rate**” shall mean the maximum lawful rate of interest which may be contracted for, charged, taken, received or reserved by Lender in accordance with the applicable laws of the State of Texas (or applicable United States federal law to the extent that such law permits Lender to contract for, charge, take, receive or reserve a greater amount of interest than under Texas law), taking into account all Charges (as defined below) made in connection with the transaction evidenced by this Note and the other Loan Documents.

(b) As used hereunder, the term “**Charges**” shall mean all fees, charges and/or any other things of value, if any, contracted for, charged, taken, received or reserved by Lender in connection with the transactions relating to this Note and the other Loan Documents, which are treated as interest under applicable law.

17. Procedural Obligations of Borrower.

(a) In addition to the provisions of Section 12 above, Borrower hereby agrees that as a condition precedent to any claim seeking usury penalties against Lender, Borrower will provide written notice to Lender, advising Lender in reasonable detail of the nature and amount of the violation, and Lender shall have sixty (60) days after receipt of such notice in which to correct such usury violation, if any, by either refunding such excess interest to Borrower or crediting such excess interest against this Note and/or the Indebtedness then owing by Borrower to Lender. All calculations of the rate of interest contracted for, charged, taken, reserved or received by Lender for the use, forbearance or detention of any debt evidenced by this Note and/or any other Loan Documents, that are made for the purpose of determining whether such rate exceeds the Maximum Lawful Rate, shall be made, to the extent permitted by applicable law, by amortizing, prorating, allocating and spreading, using the actuarial method, all interest contracted for, charged, taken, reserved or received by Lender throughout the full term of this Note and/or any other Loan Documents (including any and all renewal and extension periods).

(b) In no event shall the provisions of Chapter 346 of the Texas Finance Code (which regulates certain revolving credit loan accounts and revolving triparty accounts) apply to this Note and/or any Indebtedness.

(c) Not later than the sixty-first (61st) day before the date Borrower files suit seeking penalties for Lender's violation of the usury law (or not later than the time of Borrower filing a counterclaim in an original action by Lender), Borrower is required to give Lender written notice stating in reasonable detail the nature and amount of the violation. Lender is then entitled to correct such violation within the sixty (60) day period beginning with the date such notice is received. If the usury violation is raised on a counterclaim, Lender can petition the court to abate the proceedings for sixty (60) days to allow Lender to cure the violation. If Lender timely corrects such violation, Lender will not be liable to Borrower for such violation, except to reimburse Borrower for reasonable attorneys' fees in the event the issue is raised by Borrower in a counterclaim. Lender is also not liable to Borrower for a violation of the usury penalty statute if Lender gives written notice to Borrower of Lender's usury violation before Borrower itself gives written notice of the violation or files an action alleging the violation, and provided Lender corrects such violation not later than the sixtieth (60th) day after the date Lender actually discovered the violation that applies to the Note and/or any of the Indebtedness. Notwithstanding anything to the contrary contained herein or in any of the other Loan Documents, it is not the intention of Lender to accelerate the maturity of any interest that has not accrued at the time of such acceleration or to collect unearned interest at the time of such acceleration.

18. Ceiling Election.

To the extent that Lender is relying on Chapter 303 of the Texas Finance Code to determine the Maximum Lawful Rate payable on the Note and/or any other portion of the Indebtedness, Lender will utilize the weekly ceiling from time to time in effect as provided in such Chapter 303, as amended. To the extent United States federal law permits Lender to contract for, charge, take, receive or reserve a greater amount of interest than under Texas law, Lender will rely on United States federal law instead of such Chapter 303 for the purpose of determining the Maximum Lawful Rate. Additionally, to the extent permitted by applicable law now or hereafter in effect, Lender may, at its option and from time to time, utilize any other method of establishing the Maximum Lawful Rate under such Chapter 303 or under other applicable law by giving notice, if required, to Borrower as provided by applicable law now or hereafter in effect.

ATTACHED SCHEDULE. The following Schedule is attached to this Note:

☐ Schedule 1 Modifications to Note

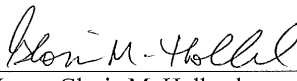
[REMAINDER OF PAGE INTENTIONALLY BLANK]

IN WITNESS WHEREOF, Borrower has signed and delivered this Note under seal (where applicable) or has caused this Note to be signed and delivered under seal (where applicable) by its duly authorized representative. Where applicable law so provides, Borrower intends that this Note shall be deemed to be signed and delivered as a sealed instrument.

BORROWER:

TRIAD SENIOR LIVING III, L.P.,
a Texas limited partnership

By: Capital Senior Living Properties 5, Inc.,
a Delaware corporation
its General Partner

By: 
Name: Gloria M. Holland
Title: Vice President

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ENDORSEMENT PAGE TO MULTIFAMILY NOTE

Pay to the order of FANNIE MAE,
without recourse.

BERKADIA COMMERCIAL MORTGAGE LLC,
a Delaware limited liability company

By:



Name:

LINDA C. KERSHAW-TIEGS

Title:

AUTHORIZED REPRESENTATIVE

Multifamily Note – Multistate
Fannie Mae

Form 6010
06-12

Endorsement Page
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APPX. 18

EXHIBIT A-2

MULTIFAMILY LOAN AND SECURITY AGREEMENT

(NON-RECOURSE)

(SENIORS HOUSING)

BY AND BETWEEN

TRIAD SENIOR LIVING III, L.P.

AND

BERKADIA COMMERCIAL MORTGAGE LLC

DATED AS OF

November 12, 2015



DMEAST #23128947 v6

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DMEAST #23128947 v6

Multifamily Loan and Security Agreement
(Non-Recourse) (Seniors Housing)
Fannie Mae

Form 6001.NR.SRS
08-14

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SCHEDULES & EXHIBITS

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Exhibits

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**MULTIFAMILY LOAN AND SECURITY AGREEMENT
(NON-RECOURSE)
(SENIORS HOUSING)**

This MULTIFAMILY LOAN AND SECURITY AGREEMENT (as amended, restated, replaced, supplemented, or otherwise modified from time to time, the “**Loan Agreement**”) is made as of the Effective Date (as hereinafter defined) by and between TRIAD SENIOR LIVING III, L.P., a Texas limited partnership (“**Borrower**”), and BERKADIA COMMERCIAL MORTGAGE LLC, a Delaware limited liability company (“**Lender**”).

RECITALS:

WHEREAS, Borrower desires to obtain the Mortgage Loan (as hereinafter defined) from Lender to be secured by the Mortgaged Property (as hereinafter defined); and

WHEREAS, Lender is willing to make the Mortgage Loan on the terms and conditions contained in this Loan Agreement and in the other Loan Documents (as hereinafter defined);

NOW, THEREFORE, in consideration of the making of the Mortgage Loan by Lender and other good and valuable consideration, the receipt and adequacy of which are hereby conclusively acknowledged, the parties hereby covenant, agree, represent, and warrant as follows:

AGREEMENTS:

ARTICLE 1 - DEFINITIONS; SUMMARY OF MORTGAGE LOAN TERMS

Section 1.01 Defined Terms.

Capitalized terms not otherwise defined in the body of this Loan Agreement shall have the meanings set forth in the Definitions Schedule attached as Schedule 1 to this Loan Agreement.

Section 1.02 Schedules, Exhibits, and Attachments Incorporated.

The schedules, exhibits, and any other addenda or attachments are incorporated fully into this Loan Agreement by this reference and each constitutes a substantive part of this Loan Agreement.

ARTICLE 2 - GENERAL MORTGAGE LOAN TERMS

Section 2.01 Mortgage Loan Origination and Security.

(a) Making of Mortgage Loan.

Subject to the terms and conditions of this Loan Agreement and the other Loan Documents, Lender hereby makes the Mortgage Loan to Borrower, and Borrower hereby accepts the Mortgage Loan from Lender. Borrower covenants and agrees that it shall:

(1) pay the Indebtedness, including the Prepayment Premium, if any (whether in connection with any voluntary prepayment or in connection with an acceleration by Lender of the Indebtedness), in accordance with the terms of this Loan Agreement and the other Loan Documents; and

(2) perform, observe, and comply with this Loan Agreement and all other provisions of the other Loan Documents.

(b) Security for Mortgage Loan.

The Mortgage Loan is made pursuant to this Loan Agreement, is evidenced by the Note, and is secured by the Security Instrument, this Loan Agreement, and the other Loan Documents that are expressly stated to be security for the Mortgage Loan.

(c) Protective Advances.

As provided in the Security Instrument, Lender may take such actions or disburse such funds as Lender reasonably deems necessary to perform the obligations of Borrower under this Loan Agreement and the other Loan Documents and to protect Lender's interest in the Mortgaged Property.

Section 2.02 Payments on Mortgage Loan.

(a) Debt Service Payments.

(1) Short Month Interest.

If the date the Mortgage Loan proceeds are disbursed is any day other than the first day of the month, interest for the period beginning on the disbursement date and ending on and including the last day of the month in which the disbursement occurs shall be payable by Borrower on the date the Mortgage Loan proceeds are disbursed. In the event that the disbursement date is not the same as the Effective Date, then:

(A) the disbursement date and the Effective Date must be in the same month, and

(B) the Effective Date shall not be the first day of the month.

(2) Interest Accrual and Computation.

Except as provided in Section 2.02(a)(1), interest shall be paid in arrears. Interest shall accrue as provided in the Schedule of Interest Rate Type Provisions and shall be computed in accordance with the Interest Accrual Method. If the Interest Accrual Method is "Actual/360," Borrower acknowledges and agrees that the amount allocated to interest for each month will vary depending on the actual number of calendar days during such month.

(3) Monthly Debt Service Payments.

Consecutive monthly debt service installments (comprised of either interest only or principal and interest, depending on the Amortization Type), each in the amount of the applicable Monthly Debt Service Payment, shall be due and payable on the First Payment Date, and on each Payment Date thereafter until the Maturity Date, at which time all Indebtedness shall be due. Any regularly scheduled Monthly Debt Service Payment that is received by Lender before the applicable Payment Date shall be deemed to have been received on such Payment Date solely for the purpose of calculating interest due. All payments made by Borrower under this Loan Agreement shall be made without set-off, counterclaim, or other defense.

(4) Payment at Maturity.

The unpaid principal balance of the Mortgage Loan, any Accrued Interest thereon and all other Indebtedness shall be due and payable on the Maturity Date.

(5) Interest Rate Type.

See the Schedule of Interest Rate Type Provisions for additional provisions, if any, specific to the Interest Rate Type.

(b) Capitalization of Accrued But Unpaid Interest.

Any accrued and unpaid interest on the Mortgage Loan remaining past due for thirty (30) days or more may, at Lender's election, be added to and become part of the unpaid principal balance of the Mortgage Loan.

(c) Late Charges.

(1) If any Monthly Debt Service Payment due hereunder is not received by Lender within ten (10) days (or fifteen (15) days for any Mortgaged Property located in Mississippi or North Carolina to comply with applicable law) after the applicable Payment Date, or any amount payable under this Loan Agreement (other than the

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payment due on the Maturity Date for repayment of the Mortgage Loan in full) or any other Loan Document is not received by Lender within ten (10) days (or fifteen (15) days for any Mortgaged Property located in Mississippi or North Carolina to comply with applicable law) after the date such amount is due, inclusive of the date on which such amount is due, Borrower shall pay to Lender, immediately without demand by Lender, the Late Charge.

The Late Charge is payable in addition to, and not in lieu of, any interest payable at the Default Rate pursuant to Section 2.02(d).

(2) Borrower acknowledges and agrees that:

(A) its failure to make timely payments will cause Lender to incur additional expenses in servicing and processing the Mortgage Loan;

(B) it is extremely difficult and impractical to determine those additional expenses;

(C) Lender is entitled to be compensated for such additional expenses; and

(D) the Late Charge represents a fair and reasonable estimate, taking into account all circumstances existing on the date hereof, of the additional expenses Lender will incur by reason of any such late payment.

(d) Default Rate.

(1) Default interest shall be paid as follows:

(A) If any amount due in respect of the Mortgage Loan (other than amounts due on the Maturity Date) remains past due for thirty (30) days or more, interest on such unpaid amount(s) shall accrue from the date payment is due at the Default Rate and shall be payable upon demand by Lender.

(B) If any Indebtedness due is not paid in full on the Maturity Date, then interest shall accrue at the Default Rate on all such unpaid amounts from the Maturity Date until fully paid and shall be payable upon demand by Lender.

Absent a demand by Lender, any such amounts shall be payable by Borrower in the same manner as provided for the payment of Monthly Debt Service Payments. To the extent permitted by applicable law, interest shall also accrue at the Default Rate on any judgment obtained by Lender against Borrower in connection with the Mortgage Loan.

(2) Borrower acknowledges and agrees that:

(A) its failure to make timely payments will cause Lender to incur additional expenses in servicing and processing the Mortgage Loan; and

(B) in connection with any failure to timely pay all amounts due in respect of the Mortgage Loan on the Maturity Date, or during the time that any amount due in respect of the Mortgage Loan is delinquent for more than thirty (30) days:

(i) Lender's risk of nonpayment of the Mortgage Loan will be materially increased;

(ii) Lender's ability to meet its other obligations and to take advantage of other investment opportunities will be adversely impacted;

(iii) Lender will incur additional costs and expenses arising from its loss of the use of the amounts due;

(iv) it is extremely difficult and impractical to determine such additional costs and expenses;

(v) Lender is entitled to be compensated for such additional risks, costs, and expenses; and

(vi) the increase from the Interest Rate to the Default Rate represents a fair and reasonable estimate of the additional risks, costs, and expenses Lender will incur by reason of Borrower's delinquent payment and the additional compensation Lender is entitled to receive for the increased risks of nonpayment associated with a delinquency on the Mortgage Loan (taking into account all circumstances existing on the Effective Date).

(e) Address for Payments.

All payments due pursuant to the Loan Documents shall be payable at Lender's Payment Address, or such other place and in such manner as may be designated from time to time by written notice to Borrower by Lender.

(f) Application of Payments.

If at any time Lender receives, from Borrower or otherwise, any payment in respect of the Indebtedness that is less than all amounts due and payable at such time, then Lender may apply such payment to amounts then due and payable in any manner and in any order determined by Lender or hold in suspense and not apply such payment at Lender's election. Neither Lender's acceptance of a payment that is less than all amounts then due and payable, nor Lender's application of, or suspension of the application of, such payment, shall constitute or be

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deemed to constitute either a waiver of the unpaid amounts or an accord and satisfaction. Notwithstanding the application of any such payment to the Indebtedness, Borrower's obligations under this Loan Agreement and the other Loan Documents shall remain unchanged.

Section 2.03 Lockout/Prepayment.

(a) Prepayment; Prepayment Lockout; Prepayment Premium.

(1) Borrower shall not make a voluntary full or partial prepayment on the Mortgage Loan during any Prepayment Lockout Period nor shall Borrower make a voluntary partial prepayment at any time. Except as expressly provided in this Loan Agreement (including as provided in the Prepayment Premium Schedule), a Prepayment Premium calculated in accordance with the Prepayment Premium Schedule shall be payable in connection with any prepayment of the Mortgage Loan.

(2) If a Prepayment Lockout Period applies to the Mortgage Loan, and during such Prepayment Lockout Period Lender accelerates the unpaid principal balance of the Mortgage Loan or otherwise applies collateral held by Lender to the repayment of any portion of the unpaid principal balance of the Mortgage Loan, the Prepayment Premium shall be due and payable and equal to the amount obtained by multiplying the percentage indicated (if at all) in the Prepayment Premium Schedule by the amount of principal being prepaid at the time of such acceleration or application.

(b) Voluntary Prepayment in Full.

At any time after the expiration of any Prepayment Lockout Period, Borrower may voluntarily prepay the Mortgage Loan in full on a Permitted Prepayment Date so long as:

(1) Borrower delivers to Lender a Prepayment Notice specifying the Intended Prepayment Date not more than sixty (60) days, but not less than thirty (30) days (if given via U.S. Postal Service) or twenty (20) days (if given via facsimile, e-mail, or overnight courier) prior to such Intended Prepayment Date; and

(2) Borrower pays to Lender an amount equal to the sum of:

- (A) the entire unpaid principal balance of the Mortgage Loan; plus
- (B) all Accrued Interest (calculated through the last day of the month in which the prepayment occurs); plus
- (C) the Prepayment Premium; plus
- (D) all other Indebtedness.

In connection with any such voluntary prepayment, Borrower acknowledges and agrees that interest shall always be calculated and paid through the last day of the month in which the prepayment occurs (even if the Permitted Prepayment Date for such month is not the last day of such month, or if Lender approves prepayment on an Intended Prepayment Date that is not a Permitted Prepayment Date). Borrower further acknowledges that Lender is not required to accept a voluntary prepayment of the Mortgage Loan on any day other than a Permitted Prepayment Date. However, if Lender does approve an Intended Prepayment Date that is not a Permitted Prepayment Date and accepts a prepayment on such Intended Prepayment Date, such prepayment shall be deemed to be received on the immediately following Permitted Prepayment Date. If Borrower fails to prepay the Mortgage Loan on the Intended Prepayment Date for any reason (including on any Intended Prepayment Date that is approved by Lender) and such failure either continues for five (5) Business Days, or into the following month, Lender shall have the right to recalculate the payoff amount. If Borrower prepays the Mortgage Loan either in the following month or more than five (5) Business Days after the Intended Prepayment Date that was approved by Lender, Lender shall also have the right to recalculate the payoff amount based upon the amount of such payment and the date such payment was received by Lender. Borrower shall immediately pay to Lender any additional amounts required by any such recalculation.

(c) Acceleration of Mortgage Loan.

Upon acceleration of the Mortgage Loan, Borrower shall pay to Lender:

- (1) the entire unpaid principal balance of the Mortgage Loan;
- (2) all Accrued Interest (calculated through the last day of the month in which the acceleration occurs);
- (3) the Prepayment Premium; and
- (4) all other Indebtedness.

(d) Application of Collateral.

Any application by Lender of any collateral or other security to the repayment of all or any portion of the unpaid principal balance of the Mortgage Loan prior to the Maturity Date in accordance with the Loan Documents shall be deemed to be a prepayment by Borrower. Any such prepayment shall require the payment to Lender by Borrower of the Prepayment Premium calculated on the amount being prepaid in accordance with this Loan Agreement.

(e) Casualty and Condemnation.

Notwithstanding any provision of this Loan Agreement to the contrary, no Prepayment Premium shall be payable with respect to any prepayment occurring as a result of the application of any insurance proceeds or amounts received in connection with a Condemnation Action in accordance with this Loan Agreement.

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(f) No Effect on Payment Obligations.

Unless otherwise expressly provided in this Loan Agreement, any prepayment required by any Loan Document of less than the entire unpaid principal balance of the Mortgage Loan shall not extend or postpone the due date of any subsequent Monthly Debt Service Payments, Monthly Replacement Reserve Deposit, or other payment, or change the amount of any such payments or deposits.

(g) Loss Resulting from Prepayment.

In any circumstance in which a Prepayment Premium is due under this Loan Agreement, Borrower acknowledges that:

(1) any prepayment of the unpaid principal balance of the Mortgage Loan, whether voluntary or involuntary, or following the occurrence of an Event of Default by Borrower, will result in Lender's incurring loss, including reinvestment loss, additional risk, expense, and frustration or impairment of Lender's ability to meet its commitments to third parties;

(2) it is extremely difficult and impractical to ascertain the extent of such losses, risks, and damages;

(3) the formula for calculating the Prepayment Premium represents a reasonable estimate of the losses, risks, and damages Lender will incur as a result of a prepayment; and

(4) the provisions regarding the Prepayment Premium contained in this Loan Agreement are a material part of the consideration for the Mortgage Loan, and that the terms of the Mortgage Loan are in other respects more favorable to Borrower as a result of Borrower's voluntary agreement to such prepayment provisions.

ARTICLE 3 - PERSONAL LIABILITY

Section 3.01 Non-Recourse Mortgage Loan; Exceptions.

Except as otherwise provided in this Article 3 or in any other Loan Document, none of Borrower, or any director, officer, manager, member, partner, shareholder, trustee, trust beneficiary, or employee of Borrower, shall have personal liability under this Loan Agreement or any other Loan Document for the repayment of the Indebtedness or for the performance of any other obligations of Borrower under the Loan Documents, and Lender's only recourse for the satisfaction of such Indebtedness and the performance of such obligations shall be Lender's exercise of its rights and remedies with respect to the Mortgaged Property and any other collateral held by Lender as security for the Indebtedness. This limitation on Borrower's liability shall not limit or impair Lender's enforcement of its rights against Guarantor under any Loan Document.

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Section 3.02 Personal Liability of Borrower (Exceptions to Non-Recourse Provision).

(a) Personal Liability Based on Lender's Loss.

Borrower shall be personally liable to Lender for the repayment of the portion of the Indebtedness equal to any loss or damage suffered by Lender as a result of, subject to any notice and cure period, if any:

(1) failure to pay as directed by Lender upon demand after an Event of Default (to the extent actually received by Borrower or Affiliated Property Operator):

(A) all Rents to which Lender is entitled under the Loan Documents;
and

(B) the amount of all security deposits then held or thereafter collected from tenants and not properly applied pursuant to the applicable Leases;

(2) failure to maintain all insurance policies required by the Loan Documents, except to the extent Lender has the obligation to pay the premiums pursuant to Section 12.03(c);

(3) failure to apply all insurance proceeds received by Borrower or Affiliated Property Operator or any amounts received by Borrower or Affiliated Property Operator in connection with a Condemnation Action, as required by the Loan Documents;

(4) failure to comply with any provision of this Loan Agreement or any other Loan Document relating to the delivery of books and records, statements, schedules, and reports;

(5) except to the extent directed otherwise by Lender pursuant to Section 3.02(a)(1), failure to apply Rents to the ordinary and necessary expenses of owning or operating, as applicable, the Mortgaged Property and Debt Service Amounts, as and when each is due and payable, except that Borrower will not be personally liable with respect to Rents that are distributed by Borrower in any calendar year if Borrower has paid all ordinary and necessary expenses of owning or operating, as applicable, the Mortgaged Property and Debt Service Amounts for such calendar year;

(6) waste or abandonment of the Mortgaged Property;

(7) grossly negligent or reckless unintentional material misrepresentation or omission by Borrower, Affiliated Property Operator, Guarantor, Key Principal, or any officer, director, partner, manager, member, shareholder, or trustee of Borrower, Affiliated Property Operator, Guarantor, or Key Principal in connection with on-going financial or other reporting required by the Loan Documents, or any request for action or consent by Lender;

(8) failure to cause the renewal, continuation, extension, or maintenance of all Licenses or, if any Licenses are to be transferred to a transferee approved by Lender, failure to cause such Licenses to be transferred or reissued within the period of time required under applicable law and to provide to Lender written notice of such transfer including copies of the newly issued Licenses; or

(9) revocation or termination without Lender's consent of the standing instructions from Borrower or Property Operator to the depository bank pursuant to any Depositary Agreement.

Notwithstanding the foregoing, Borrower shall not have personal liability under clauses (1), (3), or (5) above to the extent that Borrower lacks the legal right to direct the disbursement of the applicable funds due to an involuntary Bankruptcy Event that occurs without the consent, encouragement, or active participation of (A) Borrower, Affiliated Property Operator, Guarantor, or Key Principal, (B) any Person Controlling Borrower, Affiliated Property Operator, Guarantor, or Key Principal or (C) any Person Controlled by or under common Control with Borrower, Affiliated Property Operator, Guarantor, or Key Principal.

(b) Full Personal Liability for Mortgage Loan.

Borrower shall be personally liable to Lender for the repayment of all of the Indebtedness, and the Mortgage Loan shall be fully recourse to Borrower, upon the occurrence of any of the following:

(1) failure by Borrower to comply with the single-asset entity requirements of Section 4.02(d) of this Loan Agreement;

(2) a Transfer (other than a conveyance of the Mortgaged Property at a Foreclosure Event pursuant to the Security Instrument and this Loan Agreement) that is not permitted under this Loan Agreement or any other Loan Document;

(3) the occurrence of any Bankruptcy Event (other than an acknowledgement in writing as described in clause (b) of the definition of "Bankruptcy Event"); provided, however, in the event of an involuntary Bankruptcy Event, Borrower shall only be personally liable if such involuntary Bankruptcy Event occurs with the consent, encouragement, or active participation of (A) Borrower, Affiliated Property Operator, Guarantor, or Key Principal, (B) any Person Controlling Borrower, Affiliated Property Operator, Guarantor, or Key Principal, or (C) any Person Controlled by or under common Control with Borrower, Affiliated Property Operator, Guarantor, or Key Principal;

(4) fraud, written material misrepresentation, or material omission by Borrower, Affiliated Property Operator, Guarantor, Key Principal, or any officer, director, partner, manager, member, shareholder, or trustee of Borrower, Affiliated Property Operator, Guarantor, or Key Principal in connection with any application for or creation of the Indebtedness; or

(5) fraud, written intentional material misrepresentation, or intentional material omission by Borrower, Affiliated Property Operator, Guarantor, Key Principal, or any officer, director, partner, manager, member, shareholder, or trustee of Borrower, Affiliated Property Operator, Guarantor, or Key Principal in connection with on-going financial or other reporting required by the Loan Documents, or any request for action or consent by Lender.

Section 3.03 Personal Liability for Indemnity Obligations.

Borrower shall be personally and fully liable to Lender for Borrower's indemnity obligations under Section 13.01(e) of this Loan Agreement, the Environmental Indemnity Agreement, and any other express indemnity obligations provided by Borrower under any Loan Document. Borrower's liability for such indemnity obligations shall not be limited by the amount of the Indebtedness, the repayment of the Indebtedness, or otherwise, provided that Borrower's liability for such indemnities shall not include any loss caused by the gross negligence or willful misconduct of Lender as determined by a court of competent jurisdiction pursuant to a final non-appealable court order.

Section 3.04 Lender's Right to Forego Rights Against Mortgaged Property.

To the extent that Borrower has personal liability under this Loan Agreement or any other Loan Document, Lender may exercise its rights against Borrower personally to the fullest extent permitted by applicable law without regard to whether Lender has exercised any rights against the Mortgaged Property, the UCC Collateral, or any other security, or pursued any rights against Guarantor, or pursued any other rights available to Lender under this Loan Agreement, any other Loan Document, or applicable law. For purposes of this Section 3.04 only, the term "Mortgaged Property" shall not include any funds that have been applied by Borrower or Property Operator as required or permitted by this Loan Agreement prior to the occurrence of an Event of Default, or that Borrower was unable to apply as required or permitted by this Loan Agreement because of a Bankruptcy Event. To the fullest extent permitted by applicable law, in any action to enforce Borrower's personal liability under this Article 3, Borrower waives any right to set off the value of the Mortgaged Property against such personal liability.

ARTICLE 4 - BORROWER AND PROPERTY OPERATOR STATUS

Section 4.01 Representations and Warranties.

The representations and warranties made by Borrower to Lender in this Section 4.01 are made as of the Effective Date and are true and correct except as disclosed on the Exceptions to Representations and Warranties Schedule.

(a) Due Organization and Qualification.

Each of Borrower and Affiliated Property Operator is validly existing and qualified to transact business and is in good standing in the state in which it is formed or organized, the

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Property Jurisdiction, and in each other jurisdiction that qualification or good standing is required according to applicable law to conduct its business with respect to the Mortgaged Property and where the failure to be so qualified or in good standing would adversely affect (1) Borrower's ownership or operation of the Mortgaged Property; (2) Affiliated Property Operator's management, leasing, or operation (as applicable) of the Mortgaged Property; (3) validity or enforceability of, or the ability of Borrower to perform its obligations under, this Loan Agreement or any other Loan Document; or (4) validity or enforceability of, or the ability of Affiliated Property Operator to perform its obligations under, the Facility Operating Agreement.

(b) Location.

Borrower's General Business Address is Borrower's principal place of business and principal office. Property Operator's General Business Address is Property Operator's principal place of business and principal office.

(c) Power and Authority.

(1) Borrower has the requisite power and authority:

(A) to own the Mortgaged Property and to carry on its business as now conducted and as contemplated to be conducted in connection with the performance of its obligations under this Loan Agreement and under the other Loan Documents to which it is a party;

(B) to execute and deliver this Loan Agreement and the other Loan Documents to which it is a party, and to carry out the transactions contemplated by this Loan Agreement and the other Loan Documents to which it is a party; and

(C) to execute and deliver the Facility Operating Agreement and to carry out the transactions contemplated by the Facility Operating Agreement.

(2) Affiliated Property Operator has the requisite power and authority:

(A) to manage, lease, and operate (as applicable) the Mortgaged Property and to carry on its business as now conducted and as contemplated to be conducted in connection with the performance or its obligations under the Facility Operating Agreement; and

(B) to execute and deliver the Facility Operating Agreement, to carry out the transactions contemplated by the Facility Operating Agreement, and to facilitate Borrower's compliance with the requirements of this Loan Agreement and the other Loan Documents.

(d) Due Authorization.

(1) The execution, delivery, and performance by Borrower of this Loan Agreement, the Facility Operating Agreement, and the other Loan Documents to which it is a party have been duly authorized by all necessary action and proceedings by or on behalf of Borrower, and no further approvals or filings of any kind, including any approval of or filing with any Governmental Authority, are required by or on behalf of Borrower as a condition to the valid execution, delivery, and performance by Borrower of this Loan Agreement, the Facility Operating Agreement, or any of the other Loan Documents to which it is a party, except filings required to perfect and maintain the liens to be granted under the Loan Documents and routine filings to maintain the good standing and existence of Borrower.

(2) The execution, delivery, and performance by Affiliated Property Operator of the Facility Operating Agreement and the SASA have been duly authorized by all necessary action and proceedings by or on behalf of Affiliated Property Operator, and no further approvals or filings of any kind, including any approval of or filing with any Governmental Authority, are required by or on behalf of Affiliated Property Operator as a condition to the valid execution, delivery, and performance by Affiliated Property Operator of the Facility Operating Agreement and the SASA, except filings required to perfect and maintain the liens to be granted under the SASA and routine filings to maintain the good standing and existence of Affiliated Property Operator.

(e) Valid and Binding Obligations.

(1) This Loan Agreement, the other Loan Documents to which it is a party, and the Facility Operating Agreement have been duly executed and delivered by Borrower and constitute the legal, valid, and binding obligations of Borrower, enforceable against Borrower in accordance with their respective terms, except as such enforceability may be limited by applicable Insolvency Laws or by the exercise of discretion by any court.

(2) The Facility Operating Agreement and the SASA have been duly executed and delivered by Affiliated Property Operator and constitute the legal, valid, and binding obligations of Affiliated Property Operator, enforceable against Affiliated Property Operator in accordance with their respective terms, except as such enforceability may be limited by applicable Insolvency Laws or by the exercise of discretion by any court.

(f) Effect of Mortgage Loan on Borrower's Financial Condition.

The Mortgage Loan will not render Borrower Insolvent, and the Facility Operating Agreement obligations will not render Affiliated Property Operator insolvent. Borrower has sufficient working capital, including proceeds from the Mortgage Loan, cash flow from the Mortgaged Property including the Facility Operating Agreement, or other sources, not only to adequately maintain the Mortgaged Property in accordance with the terms of the Loan

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Documents and the Facility Operating Agreement, but also to pay all of Borrower's outstanding debts as they come due, including all Debt Service Amounts, exclusive of Borrower's ability to refinance or pay in full the Mortgage Loan on the Maturity Date. In connection with the execution and delivery of this Loan Agreement and the other Loan Documents (and the delivery to, or for the benefit of, Lender of any collateral contemplated thereunder), and the incurrence by Borrower of the obligations under this Loan Agreement and the other Loan Documents, Borrower did not receive less than reasonably equivalent value in exchange for the incurrence of the obligations of Borrower under this Loan Agreement and the other Loan Documents. Affiliated Property Operator has sufficient working capital, including cash flow from the Mortgaged Property, or other resources, not only to maintain the Mortgaged Property in accordance with the terms of the Facility Operating Agreement, but also to pay the rents and other obligations under the Facility Operating Agreement, as well as other obligations under this Loan Agreement and the other Loan Documents that Borrower elects to pass through to Affiliated Property Operator pursuant to the terms of the Facility Operating Agreement.

(g) Economic Sanctions, Anti-Money Laundering, and Anti-Corruption.

(1) None of Borrower, any Affiliated Property Operator, Guarantor, or Key Principal, nor to Borrower's knowledge, any Person Controlling Borrower, any Affiliated Property Operator, Guarantor, or Key Principal, nor any Person Controlled by Borrower, any Affiliated Property Operator, Guarantor, or Key Principal that also has a direct or indirect ownership interest in Borrower, any Affiliated Property Operator, Guarantor, or Key Principal, is in violation of any applicable civil or criminal laws or regulations (including those requiring internal controls) intended to prohibit, prevent, or regulate money laundering, drug trafficking, terrorism, or corruption, of the United States and the jurisdiction where the Mortgaged Property is located or where the Person resides, is domiciled, or has its principal place of business.

(2) None of Borrower, any Affiliated Property Operator, Guarantor, or Key Principal, nor to Borrower's knowledge, any Person Controlling Borrower, any Affiliated Property Operator, Guarantor, or Key Principal, nor any Person Controlled by Borrower, any Affiliated Property Operator, Guarantor, or Key Principal that also has a direct or indirect ownership interest in Borrower, any Affiliated Property Operator, Guarantor, or Key Principal, is a Person:

(A) against whom proceedings are pending for any alleged violation of any laws described in Section 4.01(g)(1);

(B) that has been convicted of any violation of, has been subject to civil penalties or economic sanctions pursuant to, or had any of its property seized or forfeited under, any laws described in Section 4.01(g)(1); or

(C) with whom any United States Person, any entity organized under the laws of the United States or its constituent states or territories, or any entity, regardless of where organized, having its principal place of business within the

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United States or any of its territories, is prohibited from transacting business of the type contemplated by this Loan Agreement and the other Loan Documents under any other applicable law.

(3) Borrower, any Affiliated Property Operator, Guarantor, and Key Principal are in compliance with all applicable economic sanctions laws administered by OFAC, the United States Department of State, or the United States Department of Commerce.

(h) Borrower Single Asset Status.

Borrower:

(1) does not own or lease any real property, personal property, or assets other than the Mortgaged Property;

(2) does not own, operate, or participate in any business other than the leasing, ownership, management, operation, and maintenance of the Mortgaged Property;

(3) has no material financial obligation under or secured by any indenture, mortgage, deed of trust, deed to secure debt, loan agreement, or other agreement or instrument to which Borrower is a party, or by which Borrower is otherwise bound, or to which the Mortgaged Property is subject or by which it is otherwise encumbered, other than:

(A) Permitted Equipment Financing and unsecured trade payables incurred in the ordinary course of the operation of the Mortgaged Property (exclusive of amounts for rehabilitation, restoration, repairs, or replacements of the Mortgaged Property) that (i) are not evidenced by a promissory note, (ii) are payable within sixty (60) days of the date incurred, and (iii) as of the Effective Date, do not exceed, in the aggregate, four percent (4%) of the original principal balance of the Mortgage Loan;

(B) if the Security Instrument grants a lien on a leasehold estate, Borrower's obligations as lessee under the ground lease creating such leasehold estate; and

(C) obligations under the Loan Documents and obligations secured by the Mortgaged Property to the extent permitted by the Loan Documents;

(4) has maintained its financial statements, accounting records, and other partnership, real estate investment trust, limited liability company, or corporate documents, as the case may be, separate from those of any other Person (unless Borrower's assets have been included in a consolidated financial statement prepared in accordance with generally accepted accounting principles);

(5) has not commingled its assets or funds with those of any other Person, unless such assets or funds can easily be segregated and identified in the ordinary course of business from those of any other Person;

(6) has been adequately capitalized in light of its contemplated business operations;

(7) has not assumed, guaranteed, or pledged its assets to secure the liabilities or obligations of any other Person (except in connection with the Mortgage Loan or other mortgage loans that have been paid in full or collaterally assigned to Lender, including in connection with any Consolidation, Extension and Modification Agreement or similar instrument), or held out its credit as being available to satisfy the obligations of any other Person;

(8) has not made loans or advances to any other Person; and

(9) has not entered into, and is not a party to, any transaction with any Borrower Affiliate, except in the ordinary course of business and on terms which are no more favorable to any such Borrower Affiliate than would be obtained in a comparable arm's length transaction with an unrelated third party.

(i) No Bankruptcies or Judgments.

None of Borrower, Guarantor, Key Principal, or Property Operator nor to Borrower's knowledge, any Person Controlling Borrower, Guarantor, Key Principal, or Property Operator nor any Person Controlled by Borrower, Guarantor, Key Principal, or Property Operator that also has a direct or indirect ownership interest in Borrower, Guarantor, Key Principal, or Property Operator, is currently:

(1) the subject of or a party to any completed or pending bankruptcy, reorganization, including any receivership or other insolvency proceeding;

(2) preparing or intending to be the subject of a Bankruptcy Event; or

(3) the subject of any judgment unsatisfied of record or docketed in any court;
or

(4) Insolvent.

(j) No Actions or Litigation.

(1) There are no claims, actions, suits, or proceedings at law or in equity by or before any Governmental Authority now pending against or, to Borrower's knowledge, threatened against or affecting Borrower, any Affiliated Property Operator, or the Mortgaged Property not otherwise covered by insurance (except claims, actions, suits, or

proceedings regarding fair housing, anti-discrimination, or equal opportunity, which shall always be disclosed); and

(2) there are no claims, actions, suits, or proceedings at law or in equity by or before any Governmental Authority now pending or, to Borrower's knowledge, threatened against or affecting any Affiliated Property Operator, Guarantor, or Key Principal, which claims, actions, suits, or proceedings, if adversely determined (individually or in the aggregate) reasonably would be expected to: (A) materially adversely affect the financial condition or business of Borrower, any Affiliated Property Operator, Guarantor, or Key Principal or the condition, operation, or ownership of the Mortgaged Property (except claims, actions, suits or proceedings regarding fair housing, anti-discrimination, or equal opportunity, which shall always be deemed material), (B) result in the appointment of a receiver, trustee or other official that would exercise control over the Mortgaged Property and its management and operations, or (C) result in the revocation, transfer, surrender, suspension, or other impairment of the Licenses.

(k) Payment of Taxes, Assessments, and Other Charges.

Borrower confirms that:

(1) each of Borrower and Affiliated Property Operator has filed all federal, state, county, and municipal tax returns and reports required to have been filed by it;

(2) each of Borrower and Affiliated Property Operator has paid, before any fine, penalty, interest, lien, or costs may be added thereto, all taxes, governmental charges, and assessments due and payable with respect to such returns and reports;

(3) there is no controversy or objection pending, or to the knowledge of Borrower, threatened in respect of any tax returns of Borrower or Affiliated Property Operator; and

(4) each of Borrower and Affiliated Property Operator has made adequate reserves on its books and records for all taxes that have accrued but which are not yet due and payable.

(l) Not a Foreign Person.

Borrower is not a "foreign person" within the meaning of Section 1445(f)(3) of the Internal Revenue Code.

(m) ERISA.

Borrower represents and warrants that:

(1) neither Borrower nor Affiliated Property Operator is an Employee Benefit Plan;

(2) no asset of Borrower or Affiliated Property Operator constitutes “plan assets” (within the meaning of Section 3(42) of ERISA and Department of Labor Regulation Section 2510.3 101) of an Employee Benefit Plan;

(3) no asset of Borrower or Affiliated Property Operator is subject to any laws of any Governmental Authority governing the assets of an Employee Benefit Plan; and

(4) none of Borrower, Affiliated Property Operator, or any ERISA Affiliate is subject to any obligation or liability with respect to any ERISA Plan.

(n) Default Under Other Obligations.

(1) The execution, delivery, and performance of the obligations imposed on Borrower under this Loan Agreement and the Loan Documents to which it is a party will not cause Borrower to be in default under the provisions of any agreement, judgment or order to which Borrower is a party or by which Borrower is bound, and the execution, delivery and performance of the obligations imposed on Affiliated Property Operator or Borrower under the Facility Operating Agreement will not cause Affiliated Property Operator or Borrower to be in default under the provisions of any agreement, judgment, or order to which Affiliated Property Operator or Borrower is a party or by which Affiliated Property Operator or Borrower is bound.

(2) None of Borrower, Affiliated Property Operator, Guarantor, or Key Principal is in default under any obligation to Lender. There is no condition under the Facility Operating Agreement that would cause Borrower, Affiliated Property Operator, Guarantor, or Key Principal to be in default under any obligation to Lender.

(o) Prohibited Person.

None of Borrower, Affiliated Property Operator, Guarantor, or Key Principal is a Prohibited Person, nor to Borrower’s knowledge, is any Person:

(1) Controlling Borrower, Affiliated Property Operator, Guarantor, or Key Principal a Prohibited Person; or

(2) Controlled by and having a direct or indirect ownership interest in Borrower, Affiliated Property Operator, Guarantor, or Key Principal a Prohibited Person.

(p) No Contravention.

Neither the execution and delivery of the Facility Operating Agreement and this Loan Agreement and the other Loan Documents to which Borrower is a party, nor the fulfillment of or compliance with the terms and conditions of the Facility Operating Agreement and this Loan Agreement and the other Loan Documents to which Borrower or Affiliated Property Operator is a party, nor the performance of the obligations of Borrower or Affiliated Property Operator under the Facility Operating Agreement, this Loan Agreement, and the other Loan Documents

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does or will conflict with or result in any breach or violation of, or constitute a default under, any of the terms, conditions, or provisions of Borrower's or Affiliated Property Operator's organizational documents, or any indenture, existing agreement, or other instrument to which Borrower or Affiliated Property Operator is a party or to which Borrower, Affiliated Property Operator, or the Mortgaged Property, or other assets of Borrower or Affiliated Property Operator, are subject.

(q) Lockbox Arrangement.

Neither Borrower nor Affiliated Property Operator (nor the direct or indirect owners of Borrower or Affiliated Property Operator) is party to any type of lockbox agreement or other similar cash management arrangement with any direct or indirect owner of Borrower or Affiliated Property Operator that has not been approved by Lender in writing. In the event that Lender has approved any such arrangement, Borrower and Affiliated Property Operator have, at Lender's option, entered into a lockbox agreement or other similar cash management agreement with Lender in form and substance acceptable to Lender.

(r) Licensing; Borrower/Property Operator Compliance with Laws.

(1) Borrower (or the Property Operator, if applicable) is in all respects legally authorized to operate the Mortgaged Property as a Seniors Housing Facility under the applicable laws of the Property Jurisdiction. If required by applicable law, Borrower has, or the Property Operator, if applicable, has a current provider agreement (other than the Medicaid Provider Agreement covered by Section 6.01(g)) under any and all applicable federal, state, and local laws for reimbursement for providing housing or services to residents at the Mortgaged Property. There is no decision not to renew any provider agreement (including the Medicaid Provider Agreement covered by Section 6.01(g)) related to the Mortgaged Property, nor is there any action pending or threatened to impose alternative, interim, or final sanctions with respect to the Mortgaged Property.

(2) Other than the Medicaid Provider Agreement covered by Section 6.01(g):

(A) Borrower is not a participant in any federal program whereby any Governmental Authority may have the right to recover funds by reason of the advance of federal funds; and

(B) Property Operator is not a participant in any federal program whereby any Governmental Authority may have the right to recover funds by reason of the advance of federal funds with respect to the Mortgaged Property.

(3) Borrower has not received notice, and is not aware of any violation of applicable antitrust laws of any Governmental Authority.

(4) Neither the execution and delivery of this Loan Agreement, the Note, the Security Instrument, the SASA, or the other Loan Documents, or the Facility Operating

Agreement, Borrower's performance under any of them, nor the recordation of the Security Instrument or any other Loan Document will adversely affect the Licenses.

(5) In the event any existing Facility Operating Agreement is terminated or Lender acquires the Mortgaged Property through a Foreclosure Event, none of Borrower, Lender, any current or future Property Operator, or any subsequent purchaser must obtain a certificate of need from any applicable state health care regulatory authority or agency (other than giving such notice required under the applicable state law or regulation) prior to applying for any applicable License, provided that no service or unit complement is changed.

(6) If Borrower or any Property Operator is a HIPAA Covered Entity or HIPAA Business Associate, such entity has developed and implemented appropriate administrative, technical and physical safeguards to protect the privacy and security of Protected Health Information (as that term is defined in HIPAA), and otherwise achieved substantial compliance with all applicable HIPAA requirements, including those concerning privacy, breach notification, security and electronic transaction standards.

Section 4.02 Covenants.

(a) Maintenance of Existence; Organizational Documents.

Borrower and Affiliated Property Operator shall each maintain its existence, its entity status, franchises, rights, and privileges under the laws of the state of its formation or organization (as applicable). Borrower and Affiliated Property Operator shall each continue to be duly qualified and in good standing to transact business in each jurisdiction in which qualification or standing is required according to applicable law to conduct its business with respect to the Mortgaged Property and where the failure to do so would adversely affect Borrower's or Affiliated Property Operator's applicable ownership or operation of the Mortgaged Property or the validity, enforceability, or the ability of Borrower to perform its obligations under this Loan Agreement or any other Loan Document, or Affiliated Property Operator to perform its obligations under the Facility Operating Agreement. Neither Borrower nor any partner, member, manager, officer, or director of Borrower, nor Affiliated Property Operator nor any partner, member, manager, officer, or director of Affiliated Property Operator, shall:

(1) make or allow any material change to the organizational documents or organizational structure of Borrower or Affiliated Property Operator, including changes relating to the Control of Borrower or Affiliated Property Operator, or

(2) file any action, complaint, petition, or other claim to:

(A) divide, partition, or otherwise compel the sale of the Mortgaged Property; or

(B) otherwise change the Control of Borrower or Affiliated Property Operator.

(b) Economic Sanctions, Anti-Money Laundering, and Anti-Corruption.

(1) Borrower, any Affiliated Property Operator, Guarantor, Key Principal, and any Person Controlling Borrower, any Affiliated Property Operator, Guarantor, or Key Principal, or any Person Controlled by Borrower, any Affiliated Property Operator, Guarantor, or Key Principal that also has a direct or indirect ownership interest in Borrower, any Affiliated Property Operator, Guarantor, or Key Principal shall remain in compliance with any applicable civil or criminal laws or regulations (including those requiring internal controls) intended to prohibit, prevent, or regulate money laundering, drug trafficking, terrorism, or corruption, of the United States and the jurisdiction where the Mortgaged Property is located or where the Person resides, is domiciled, or has its principal place of business.

(2) At no time shall Borrower, any Affiliated Property Operator, Guarantor, or Key Principal, or any Person Controlling Borrower, any Affiliated Property Operator, Guarantor, or Key Principal, or any Person Controlled by Borrower, any Affiliated Property Operator, Guarantor, or Key Principal that also has a direct or indirect ownership interest in Borrower, any Affiliated Property Operator, Guarantor, or Key Principal, be a Person:

(A) against whom proceedings are pending for any alleged violation of any laws described in Section 4.02(b)(1);

(B) that has been convicted of any violation of, has been subject to civil penalties or economic sanctions pursuant to, or had any of its property seized or forfeited under, any laws described in Section 4.02(b)(1); or

(C) with whom any United States Person, any entity organized under the laws of the United States or its constituent states or territories, or any entity, regardless of where organized, having its principal place of business within the United States or any of its territories, is prohibited from transacting business of the type contemplated by this Loan Agreement and the other Loan Documents under any other applicable law.

(3) Borrower, any Affiliated Property Operator, Guarantor, and Key Principal shall at all times remain in compliance with any applicable economic sanctions laws administered by OFAC, the United States Department of State, or the United States Department of Commerce.

(c) Payment of Taxes, Assessments, and Other Charges.

Borrower and Affiliated Property Operator shall each file all federal, state, county, and municipal tax returns and reports required to be filed by Borrower and Affiliated Property Operator, respectively, and shall pay, before any fine, penalty, interest, or cost may be added thereto, all taxes payable with respect to such returns and reports.

(d) Borrower Single Asset Status.

Until the Indebtedness is fully paid, Borrower:

(1) shall not acquire or lease any real property, personal property, or assets other than the Mortgaged Property;

(2) shall not acquire, own, operate, or participate in any business other than the leasing, ownership, management, operation, and maintenance of the Mortgaged Property;

(3) shall not commingle its assets or funds with those of any other Person, unless such assets or funds can easily be segregated and identified in the ordinary course of business from those of any other Person;

(4) shall maintain its financial statements, accounting records, and other partnership, real estate investment trust, limited liability company, or corporate documents, as the case may be, separate from those of any other Person (unless Borrower's assets are included in a consolidated financial statement prepared in accordance with generally accepted accounting principles);

(5) shall have no material financial obligation under any indenture, mortgage, deed of trust, deed to secure debt, loan agreement, or other agreement or instrument to which Borrower is a party or by which Borrower is otherwise bound, or to which the Mortgaged Property is subject or by which it is otherwise encumbered, other than:

(A) Permitted Equipment Financing or unsecured trade payables incurred in the ordinary course of the operation of the Mortgaged Property (exclusive of amounts (i) to be paid out of the Replacement Reserve Account or Repairs Escrow Account, or (ii) for rehabilitation, restoration, repairs, or replacements of the Mortgaged Property or otherwise approved by Lender) so long as such trade payables (1) are not evidenced by a promissory note, (2) are payable within sixty (60) days of the date incurred, and (3) as of any date, do not exceed, in the aggregate, two percent (2%) of the original principal balance of the Mortgage Loan; provided, however, that otherwise compliant outstanding trade payables may exceed two percent (2%) up to an aggregate amount of four percent (4%) of the original principal balance of the Mortgage Loan for a period

(beginning on or after the Effective Date) not to exceed ninety (90) consecutive days;

(B) if the Security Instrument grants a lien on a leasehold estate, Borrower's obligations as lessee under the ground lease creating such leasehold estate; and

(C) obligations under the Loan Documents and obligations secured by the Mortgaged Property to the extent permitted by the Loan Documents;

(6) shall not assume, guaranty, or pledge its assets to secure the liabilities or obligations of any other Person (except in connection with the Mortgage Loan or other mortgage loans that have been paid in full or collaterally assigned to Lender, including in connection with any Consolidation, Extension and Modification Agreement or similar instrument) or hold out its credit as being available to satisfy the obligations of any other Person;

(7) shall not make loans or advances to any other Person; or

(8) shall not enter into, or become a party to, any transaction with any Borrower Affiliate, except in the ordinary course of business and on terms which are no more favorable to any such Borrower Affiliate than would be obtained in a comparable arm's-length transaction with an unrelated third party.

(e) ERISA.

Borrower covenants that:

(1) no asset of Borrower shall constitute "plan assets" (within the meaning of Section 3(42) of ERISA and Department of Labor Regulation Section 2510.3 101) of an Employee Benefit Plan;

(2) no asset of Borrower shall be subject to the laws of any Governmental Authority governing the assets of an Employee Benefit Plan; and

(3) neither Borrower nor any ERISA Affiliate shall incur any obligation or liability with respect to any ERISA Plan.

(f) Notice of Litigation or Insolvency.

Borrower shall give immediate written notice to Lender of any claims, actions, suits, or proceedings at law or in equity (including any insolvency, bankruptcy, or receivership proceeding) by or before any Governmental Authority pending or, to Borrower's knowledge, threatened against or affecting Borrower, any Property Operator, Guarantor, Key Principal, or the Mortgaged Property, which claims, actions, suits, or proceedings, if adversely determined reasonably would be expected to materially adversely affect the Licenses, the financial condition

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or business of Borrower, any Property Operator, Guarantor, or Key Principal, or the condition, operation, or ownership of the Mortgaged Property (including any claims, actions, suits, or proceedings regarding fair housing, anti-discrimination, or equal opportunity, which shall always be deemed material).

(g) Payment of Costs, Fees, and Expenses.

In addition to the payments specified in this Loan Agreement, Borrower shall pay, on demand, all of Lender's out-of-pocket fees, costs, charges, or expenses (including the reasonable fees and expenses of attorneys, accountants, and other experts) incurred by Lender in connection with:

(1) any amendment to, or consent, or waiver required under, this Loan Agreement, any of the Loan Documents, or the Facility Operating Agreement (whether or not any such amendments, consents, or waivers are entered into);

(2) defending or participating in any litigation arising from actions by third parties and brought against or involving Lender with respect to:

(A) the Mortgaged Property, including the Facility Operating Agreement;

(B) any event, act, condition, or circumstance in connection with the Mortgaged Property; or

(C) the relationship between or among Lender, Borrower, Property Operator, Key Principal, and Guarantor in connection with this Loan Agreement or any of the transactions contemplated by this Loan Agreement or the Facility Operating Agreement;

(3) the administration or enforcement of, or preservation of rights or remedies under, this Loan Agreement or any other Loan Documents including or in connection with any litigation or appeals, any Foreclosure Event or other disposition of any collateral granted pursuant to the Loan Documents or collateral to which Lender acquires rights by virtue of the Facility Operating Agreement; and

(4) any Bankruptcy Event or Guarantor Bankruptcy Event.

(h) Restrictions on Distributions.

Neither Borrower nor Affiliated Property Operator shall declare or make any distributions or dividends of any nature to any Person having an ownership interest in Borrower or Affiliated Property Operator if an Event of Default has occurred and is continuing.

(i) Lockbox Arrangement.

Neither Borrower nor Affiliated Property Operator (nor the direct or indirect owners of Borrower or Affiliated Property Operator) shall enter into any type of lockbox agreement or other similar cash management arrangement with any direct or indirect owner of Borrower or Affiliated Property Operator without the prior written consent of Lender. In the event that Lender issues such consent, Borrower and Affiliated Property Operator shall, at Lender's option, be required to enter into a lockbox agreement or other similar cash management agreement with Lender in form and substance acceptable to Lender.

(j) Borrower/Property Operator Compliance with Laws.

(1) If required by applicable law, Borrower shall at all times maintain a current provider agreement under any and all applicable federal, state, and local laws for reimbursement for providing housing or other services to residents at the Mortgaged Property.

(2) Other than the Medicaid Provider Agreement covered by Section 6.02(g):

(A) Borrower shall not participate in any federal program whereby any Governmental Authority may have the right to recover funds by reason of the advance of federal funds; and

(B) Property Operator shall not participate in any federal program whereby any Governmental Authority may have the right to recover funds by reason of the advance of federal funds with respect to the Mortgaged Property.

(3) Borrower shall provide Lender notice of any violation of applicable antitrust laws of any Governmental Authority.

(4) If Borrower or any Property Operator is a HIPAA Covered Entity or HIPAA Business Associate, such entity shall develop and implement appropriate administrative, technical and physical safeguards to protect the privacy and security of Protected Health Information (as that term is defined in HIPAA), and otherwise achieve substantial compliance with all applicable HIPAA requirements, including those concerning privacy, breach notification, security, and electronic transaction standards.

ARTICLE 5 - THE MORTGAGE LOAN**Section 5.01 Representations and Warranties.**

The representations and warranties made by Borrower to Lender in this Section 5.01 are made as of the Effective Date and are true and correct except as disclosed on the Exceptions to Representations and Warranties Schedule.

(a) Receipt and Review of Loan Documents.

Borrower has received and reviewed this Loan Agreement and all of the other Loan Documents.

(b) No Default.

No default exists under any of the Loan Documents.

(c) No Defenses.

The Loan Documents are not currently subject to any right of rescission, set-off, counterclaim, or defense by either Borrower or Guarantor, including the defense of usury, and neither Borrower nor Guarantor has asserted any right of rescission, set-off, counterclaim, or defense with respect thereto.

(d) Loan Document Taxes.

All mortgage, mortgage and lease recording, stamp, intangible, or any other similar taxes required to be paid by any Person under applicable law currently in effect in connection with the execution, delivery, recordation, filing, registration, perfection, or enforcement of the Facility Operating Agreement or any of the Loan Documents, including the Security Instrument, have been paid or will be paid in the ordinary course of the closing of the Mortgage Loan.

Section 5.02 Covenants.**(a) Ratification of Covenants; Estoppels; Certifications.**

Borrower shall:

(1) promptly notify Lender in writing upon any violation of any covenant set forth in any Loan Document of which Borrower has notice or knowledge; provided, however, any such written notice by Borrower to Lender shall not relieve Borrower of, or result in a waiver of, any obligation under this Loan Agreement or any other Loan Document; and

(2) within ten (10) days after a request from Lender, provide a written statement, signed and acknowledged by Borrower, together with such corresponding certifications from Property Operator as Lender may request, certifying to Lender or any person designated by Lender, as of the date of such statement:

(A) that the Loan Documents are unmodified and in full force and effect (or, if there have been modifications, that the Loan Documents are in full force and effect as modified and setting forth such modifications);

(B) the unpaid principal balance of the Mortgage Loan;

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(C) the date to which interest on the Mortgage Loan has been paid;

(D) that Borrower is not in default in paying the Indebtedness or in performing or observing any of the covenants or agreements contained in this Loan Agreement or any of the other Loan Documents (or, if Borrower is in default, describing such default in reasonable detail);

(E) whether or not there are then-existing any setoffs or defenses known to Borrower against the enforcement of any right or remedy of Lender under the Loan Documents; and

(F) any additional facts reasonably requested in writing by Lender.

(b) Further Assurances.

(1) Other Documents As Lender May Require.

Within ten (10) days after request by Lender, Borrower shall, subject to Section 5.02(d) below, execute, acknowledge, and deliver, at its cost and expense, all further acts, deeds, conveyances, assignments, financing statements, transfers, documents, agreements, assurances, and such other instruments as Lender may reasonably require from time to time in order to better assure, grant, and convey to Lender the rights intended to be granted, now or in the future, to Lender under this Loan Agreement and the other Loan Documents.

(2) Corrective Actions.

Within ten (10) days after request by Lender, Borrower shall provide, or cause to be provided, to Lender, at Borrower's cost and expense, such further documentation or information reasonably deemed necessary or appropriate by Lender in the exercise of its rights under the related commitment letter between Borrower and Lender or to correct patent mistakes in the Loan Documents, the Title Policy, or the funding of the Mortgage Loan.

(c) Sale of Mortgage Loan.

Borrower shall, subject to Section 5.02(d) below:

(1) comply with the reasonable requirements of Lender or any Investor of the Mortgage Loan or provide, or cause to be provided, to Lender or any Investor of the Mortgage Loan within ten (10) days of the request, at Borrower's cost and expense, such further documentation or information as Lender or Investor may reasonably require, in order to enable:

(A) Lender to sell the Mortgage Loan to such Investor;

(B) Lender to obtain a refund of any commitment fee from any such Investor; or

(C) any such Investor to further sell or securitize the Mortgage Loan;

(2) ratify and affirm in writing the representations and warranties set forth in any Loan Document as of such date specified by Lender modified as necessary to reflect changes that have occurred subsequent to the Effective Date;

(3) confirm that Borrower is not in default in paying the Indebtedness or in performing or observing any of the covenants or agreements contained in this Loan Agreement or any of the other Loan Documents (or, if Borrower is in default, describing such default in reasonable detail); and

(4) execute and deliver to Lender and/or any Investor such other documentation, including any amendments, corrections, deletions, or additions to this Loan Agreement or other Loan Document(s) as is reasonably required by Lender or such Investor.

(d) Limitations on Further Acts of Borrower.

Nothing in Section 5.02(b) and Section 5.02(c) shall require Borrower to do any further act that has the effect of:

(1) changing the economic terms of the Mortgage Loan set forth in the related commitment letter between Borrower and Lender;

(2) imposing on Borrower or Guarantor greater personal liability under the Loan Documents than that set forth in the related commitment letter between Borrower and Lender; or

(3) materially changing the rights and obligations of Borrower or Guarantor under the commitment letter.

(e) Financing Statements; Record Searches.

(1) Borrower shall pay all costs and expenses associated with:

(A) any filing or recording of any financing statements, including all continuation statements, termination statements, and amendments or any other filings related to security interests in or liens on collateral; and

(B) any record searches for financing statements that Lender may require.

(2) Borrower hereby authorizes Lender to file any financing statements, continuation statements, termination statements, and amendments (including an “all assets” or “all personal property” collateral description or words of similar import) in form and substance as Lender may require in order to protect and preserve Lender’s lien

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priority and security interest in the Mortgaged Property (and to the extent Lender has filed any such financing statements, continuation statements, or amendments prior to the Effective Date, such filings by Lender are hereby authorized and ratified by Borrower).

(f) Loan Document Taxes.

Borrower shall pay, on demand, any transfer taxes, documentary taxes, assessments, or charges made by any Governmental Authority in connection with the execution, delivery, recordation, filing, registration, perfection, or enforcement of any of the Loan Documents, the Facility Operating Agreement or the Mortgage Loan.

ARTICLE 6 - PROPERTY USE, PRESERVATION, AND MAINTENANCE

Section 6.01 Representations and Warranties.

The representations and warranties made by Borrower to Lender in this Section 6.01 are made as of the Effective Date and are true and correct except as disclosed on the Exceptions to Representations and Warranties Schedule.

(a) Mortgaged Property Compliance with Laws; Permits and Licenses.

(1) To Borrower's knowledge, all improvements to the Land and the use of the Mortgaged Property comply with all applicable laws, ordinances, statutes, rules, and regulations, including:

(A) all applicable statutes, rules, and regulations pertaining to requirements for equal opportunity, anti-discrimination, fair housing, and rent control;

(B) the applicable provisions of all laws, rules, regulations, and published interpretations thereof including all criteria established to classify the Mortgaged Property as housing for older persons under the Fair Housing Amendments Act of 1988 and the Housing for Older Persons Act of 1995 to which Borrower, Property Operator or the Mortgaged Property is subject; and

(C) privacy, breach notification, security, and electronic transaction standards including those set forth in HIPAA; and

Borrower has no knowledge of any action or proceeding (or threatened action or proceeding) regarding noncompliance or nonconformity with any of the foregoing.

(2) To Borrower's knowledge, there is no evidence of any illegal activities on the Mortgaged Property.

(3) To Borrower's knowledge, no permits or approvals from any Governmental Authority, other than those previously obtained and furnished to Lender,

are necessary for the commencement and completion of the Repairs or Replacements, as applicable, other than those permits or approvals which will be timely obtained in the ordinary course of business.

(4) All required permits, licenses, and certificates to comply with all zoning and land use statutes, laws, ordinances, rules, and regulations, and all applicable health, fire, safety, and building codes, and for the lawful use and operation of the Mortgaged Property, including certificates of occupancy, apartment licenses, or the equivalent, have been obtained and are in full force and effect.

(5) No portion of the Mortgaged Property has been purchased with the proceeds of any illegal activity.

(6) To the extent required under applicable law for the Seniors Housing Facility Licensing Designation, the Mortgaged Property is duly licensed and such Licenses are in good standing and are in full force and effect.

(b) Operating Documents; Contracts; Resident Records.

(1) Each Facility Operating Agreement and each Contract is a valid and binding agreement enforceable against the parties in accordance with its terms and is in full force and effect.

(2) No party is in default in performing any of its obligations under any Facility Operating Agreement or Contract.

(3) Each Facility Operating Agreement and Contract is assignable and no previous assignment of Borrower's interest in the Facility Operating Agreement or Contracts has been made. Borrower has entered into the Contracts previously identified to Lender for the provision of goods or services, at or otherwise in connection with the operation, use, or management of the Mortgaged Property.

(4) All records pertaining to residents living at the Mortgaged Property are true and correct in all material respects.

(c) Property Characteristics.

(1) The Mortgaged Property contains at least:

- (A) the Property Square Footage;
- (B) the Total Parking Spaces; and
- (C) the Total Residential Units.

(2) No part of the Land is included or assessed under or as part of another tax lot or parcel, and no part of any other property is included or assessed under or as part of the tax lot or parcels for the Land.

(d) Property Ownership.

The Mortgaged Property is owned by or leased to Borrower or Property Operator.

(e) Condition of the Mortgaged Property.

(1) Borrower has not made any claims, and to Borrower's knowledge, no claims have been made, against any contractor, engineer, architect, or other party with respect to the construction or condition of the Mortgaged Property or the existence of any structural or other material defect therein; and

(2) neither the Land nor the Improvements has sustained any damage other than damage which has been fully repaired, or is fully insured and is being repaired in the ordinary course of business.

(f) Personal Property.

All Personal Property that is material to and is used in connection with the management, ownership, and operation of the Mortgaged Property is:

(1) owned by Borrower (or, to the extent disclosed on the Exceptions to Representations and Warranties Schedule, leased by Borrower, other than as lessor pursuant to the Seniors Housing Facility Lease); or

(2) as applicable, leased by Property Operator pursuant to the Seniors Housing Facility Lease.

(g) Medicaid Provider Agreement Representations.

(1) If neither Borrower nor any Property Operator is a Medicaid Participant as of the Effective Date, Borrower hereby confirms that neither Borrower nor Property Operator has entered into a Medicaid Provider Agreement with respect to the Mortgaged Property.

(2) The following provisions apply if a Medicaid Provider Agreement is in place with respect to the Mortgaged Property:

(A) Borrower has delivered to Lender a true and complete copy of the Medicaid Provider Agreement in place as of the Effective Date, together with any amendments and modifications thereto;

(B) the Medicaid Provider Agreement is a valid and binding agreement enforceable against the parties in accordance with its terms and is in full force and effect;

(C) to Borrower's knowledge, neither Borrower, Property Operator nor a Governmental Authority or Managed Care Organization is in default under the Medicaid Provider Agreement nor does any state of facts exist that with the passage of time or the giving of notice, or both, could constitute a default under the Medicaid Provider Agreement;

(D) neither Property Operator nor Borrower has received any notice from a Governmental Authority or Managed Care Organization, as applicable, to the effect that such Governmental Authority or Managed Care Organization, as applicable, intends to terminate its relationship or unilaterally modify any terms of the Medicaid Provider Agreement in effect as of the Effective Date, including the reduction of rates paid to Borrower or Property Operator for services provided under the Medicaid Provider Agreement;

(E) as of the Effective Date, Borrower or Property Operator, as applicable, meets the provider standards, including all conditions for participation, as required by such Managed Care Organization or Governmental Authority;

(F) if Borrower or any Property Operator is a Medicaid Participant as of the Effective Date with respect to the Mortgaged Property, Borrower hereby confirms that no more than twenty percent (20%) of the Mortgaged Property's effective gross income is derived from funds paid to such Borrower or Property Operator by a Governmental Authority or a Managed Care Organization, as applicable, under a Medicaid Provider Agreement; and

(G) neither Borrower nor any Property Operator has been excluded from participation in any Governmental Health Care Program with respect to the Mortgaged Property or any other property.

Section 6.02 Covenants

(a) Use of Property.

From and after the Effective Date, Borrower shall not, unless required by applicable law or Governmental Authority:

(1) change the use of all or any part of the Mortgaged Property, including any change in the unit or bed Acuity composition (provided that Borrower may effect an Allowed Change in Use so long as:

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(A) Borrower provides Lender written notice within thirty (30) days of such Allowed Change in Use; and

(B) all other terms, conditions, and covenants of the Loan Agreement are satisfied including covenants related to zoning, certificates of occupancy, Licenses and alterations to the Mortgaged Property);

(2) convert any individual dwelling units or common areas to commercial use, or convert any common area or commercial use to individual dwelling units;

(3) initiate or acquiesce in a change in the zoning classification of the Land;

(4) establish any condominium or cooperative regime with respect to the Mortgaged Property;

(5) subdivide the Land;

(6) suffer, permit, or initiate the joint assessment of any Mortgaged Property with any other real property constituting a tax lot separate from such Mortgaged Property which could cause the part of the Land to be included or assessed under or as part of another tax lot or parcel, or any part of any other property to be included or assessed under or as part of the tax lot or parcels for the Land;

(7) allow use or occupancy of the Mortgaged Property by residential tenants that do not meet the standards for a Seniors Housing Facility; or

(8) accept tenants that require skilled nursing care or permit tenants requiring skilled nursing care to remain at the Mortgaged Property as a routine matter.

(b) Property Maintenance.

Borrower shall:

(1) pay the expenses of operating, managing, maintaining, and repairing the Mortgaged Property (including insurance premiums, utilities, Repairs, and Replacements) before the last date upon which each such payment may be made without any penalty or interest charge being added;

(2) keep the Mortgaged Property in good repair and marketable condition (ordinary wear and tear excepted) (including the replacement of Personalty and Fixtures with items of equal or better function and quality) and subject to Section 9.03(b)(3) and Section 10.03(d) restore or repair promptly, in a good and workmanlike manner, any damaged part of the Mortgaged Property to the equivalent of its original condition or condition immediately prior to the damage (if improved after the Effective Date),

whether or not any insurance proceeds or amounts received in connection with a Condemnation Action are available to cover any costs of such restoration or repair;

(3) commence all Required Repairs, Additional Lender Repairs, and Additional Lender Replacements as follows:

(A) with respect to any Required Repairs, promptly following the Effective Date (subject to Force Majeure, if applicable), in accordance with the timelines set forth on the Required Repair Schedule, or if no timelines are provided, as soon as practical following the Effective Date;

(B) with respect to Additional Lender Repairs, in the event that Lender determines that Additional Lender Repairs are necessary from time to time or pursuant to Section 6.03(c), promptly following Lender's written notice of such Additional Lender Repairs (subject to Force Majeure, if applicable), commence any such Additional Lender Repairs in accordance with Lender's timelines, or if no timelines are provided, as soon as practical;

(C) with respect to Additional Lender Replacements, in the event that Lender determines that Additional Lender Replacements are necessary from time to time or pursuant to Section 6.03(c), promptly following Lender's written notice of such Additional Lender Replacements (subject to Force Majeure, if applicable), commence any such Additional Lender Replacements in accordance with Lender's timelines, or if no timelines are provided, as soon as practical;

(4) make, construct, install, diligently perform, and complete all Replacements and Repairs:

(A) in a good and workmanlike manner as soon as practicable following the commencement thereof, free and clear of any Liens, including mechanics' or materialmen's liens and encumbrances (except Permitted Encumbrances and mechanics' or materialmen's liens which attach automatically under the laws of any Governmental Authority upon the commencement of any work upon, or delivery of any materials to, the Mortgaged Property and for which Borrower is not delinquent in the payment for any such work or materials);

(B) in accordance with all applicable laws, ordinances, rules, and regulations of any Governmental Authority, including applicable building codes, special use permits, and environmental regulations;

(C) in accordance with all applicable insurance and bonding requirements; and

(D) within all timeframes required by Lender, and Borrower acknowledges that it shall be an Event of Default if Borrower abandons or ceases

work on any Repair at any time prior to the completion of the Repairs for a period of longer than twenty (20) days (except when Force Majeure exists and Borrower is diligently pursuing the reinstitution of such work, provided, however, any such abandonment or cessation shall not in any event allow the Repair to be completed after the Completion Period, subject to Force Majeure); and

(5) subject to the terms of Section 6.03(a) provide for professional operation and management of the Mortgaged Property as a Seniors Housing Facility either by Borrower or any Property Operator approved by Lender in writing;

(6) give written notice to Lender of, and, unless otherwise directed in writing by Lender, appear in and defend any action or proceeding purporting to affect the Mortgaged Property, Lender's security for the Mortgage Loan, or Lender's rights under this Loan Agreement; and

(7) upon Lender's written request, submit to Lender any contracts or work orders described in Section 13.02(b).

(c) Property Preservation.

Borrower shall:

(1) not commit waste or abandon or (ordinary wear and tear excepted) permit impairment or deterioration of the Mortgaged Property;

(2) subject to any Allowed Change in Use pursuant to Section 6.02(a) and except as otherwise permitted herein in connection with Repairs and Replacements, not remove, demolish, or alter the Mortgaged Property or any part of the Mortgaged Property (or permit any tenant or any other person to do the same) except in connection with the replacement of tangible Personalty or Fixtures (provided such Personalty and Fixtures are replaced with items of equal or better function and quality);

(3) not engage in or knowingly permit, and shall take appropriate measures to prevent and abate or cease and desist, any illegal activities at the Mortgaged Property that could endanger tenants or visitors, result in damage to the Mortgaged Property, result in forfeiture of the Land or otherwise materially impair the lien created by the Security Instrument or Lender's interest in the Mortgaged Property;

(4) not permit any condition to exist on the Mortgaged Property that would invalidate any part of any insurance coverage required by this Loan Agreement; or

(5) not subject the Mortgaged Property to any voluntary, elective, or non-compulsory tax lien or assessment (or opt in to any voluntary, elective, or non-compulsory special tax district or similar regime).

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(d) Property Inspections.

Borrower shall:

(1) permit Lender, its agents, representatives, and designees to enter upon and inspect the Mortgaged Property (including in connection with any Replacement or Repair, or to conduct any Environmental Inspection pursuant to the Environmental Indemnity Agreement), and shall cooperate and provide access to all areas of the Mortgaged Property (subject to the rights of tenants under the Leases, other than the Property Operator under the Seniors Housing Facility Lease):

(A) during normal business hours;

(B) at such other reasonable time upon reasonable notice of not less than one (1) Business Day;

(C) at any time when exigent circumstances exist; or

(D) at any time after an Event of Default has occurred and is continuing; and

(2) pay for reasonable costs or expenses incurred by Lender or its agents in connection with any such inspections.

(e) Mortgaged Property Compliance with Laws.

Borrower shall:

(1) comply with all laws, ordinances, statutes, rules, and regulations of any Governmental Authority and all recorded lawful covenants and agreements relating to or affecting the Mortgaged Property, including all laws, ordinances, statutes, rules and regulations, and covenants pertaining to construction of improvements on the Land, fair housing, and requirements for equal opportunity, anti-discrimination, and Leases;

(2) procure and maintain all required permits, licenses, charters, registrations, and certificates necessary to comply with all zoning and land use statutes, laws, ordinances, rules and regulations, and all applicable health, fire, safety, and building codes and for the lawful use and operation of the Mortgaged Property, including certificates of occupancy, apartment licenses, or the equivalent;

(3) comply with all applicable laws that pertain to the maintenance and disposition of tenant security deposits;

(4) at all times maintain records sufficient to demonstrate compliance with the provisions of this Section 6.02(e); and

(5) promptly after Borrower's or Property Operator's receipt or notification thereof, provide Lender copies of any building code or zoning violation from any Governmental Authority with respect to the Mortgaged Property.

(f) Licensing.

(1) Borrower (A) shall maintain and operate, or shall cause Property Operator, if applicable, to maintain and operate, the Mortgaged Property as a Seniors Housing Facility, (B) shall maintain, or shall cause Property Operator, if applicable, to maintain, in good standing all Licenses, (C) shall renew or extend, or shall cause Property Operator, if applicable, to renew and extend, all such required Licenses, and (D) shall not fail, nor allow the failure by Property Operator, if applicable, to take any action necessary to keep all such Licenses in good standing and full force and effect. Borrower will, or shall cause Property Operator, if applicable, to provide Lender written notice within five (5) days of Borrower's or Property Operator's receipt of any notice or order of a violation which may otherwise have an adverse impact on Borrower, Property Operator, or the Mortgaged Property, its operations, or its compliance with licensing and regulatory requirements.

(2) If any License requirement is imposed upon the Mortgaged Property after the Effective Date, Borrower shall obtain, or shall cause the Property Operator, if applicable, to obtain, all Licenses and shall maintain, or shall cause the Property Operator, if applicable, to maintain, such Licenses in full force and effect. Borrower acknowledges and agrees that all such Licenses are subject to the terms of this Loan Agreement and the Loan Documents.

(3) Without the prior written consent of Lender, Borrower shall not, and shall require Property Operator, if applicable, not to amend, modify, transfer, or otherwise change the Licenses.

(4) Borrower shall promptly inform Lender in writing and shall cause Property Operator to promptly inform Lender in writing, if such party has actual knowledge of, and shall deliver to Lender copies of, (A) any written communications, complaints, orders, judgments, and other documents relating to the commencement of any litigation, rulemaking, or disciplinary proceeding or the promulgation of any proposed or final rule which would have, or may reasonably be expected to have, a material adverse effect on the Mortgaged Property, or the Licenses, and (B) notice from any Governmental Authority having jurisdiction over Borrower or any Property Operator that (i) Borrower or Property Operator is being placed under regulatory supervision, (ii) any License related to the conduct of Borrower's or Property Operator's, if applicable, business or the Mortgaged Property is to be suspended or revoked, or (iii) Borrower or Property Operator is to cease and desist any practice, procedure, or policy employed by Borrower or Property Operator in the conduct of its business, and such cessation would have, or may reasonably be expected to have, a material adverse effect on the Mortgaged Property, or the Licenses.

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(g) Medicaid Provider Agreement.

(1) If neither Borrower nor any Property Operator is a Medicaid Participant as of the Effective Date, Borrower shall notify Lender in writing thirty (30) days prior to Borrower's or any Property Operator's submission of its request to enter into a Medicaid Provider Agreement, and will provide Lender with copies of all correspondence and documentation received from the Governmental Authority or the Managed Care Organization concerning its submission. In the event Borrower or any Property Operator becomes a Medicaid Participant with respect to the Mortgaged Property, Borrower and such Property Operator shall execute the form of Medicaid reserve agreement and Depositary Agreement as Lender may require.

(2) The following provisions apply if a Medicaid Provider Agreement is in place as of the Effective Date or entered into at any time during the Term of the Mortgage Loan:

(A) Borrower and Property Operator shall comply with the terms and conditions of the Medicaid Provider Agreement and shall enforce the obligations of each Managed Care Organization or Governmental Authority under the applicable Medicaid Provider Agreement;

(B) Borrower and Property Operator shall maintain their respective compliance with the provider standards, including all conditions for participation, as required by the Managed Care Organization or the Governmental Authority, as applicable;

(C) Borrower or Property Operator, as applicable, shall not permit or allow more than twenty percent (20%) of the Mortgaged Property's effective gross income to be derived from funds paid to Borrower or Property Operator by a Governmental Authority or a Managed Care Organization, as applicable, under a Medicaid Provider Agreement. Notwithstanding the foregoing, if Borrower or any Property Operator is a Medicaid Participant with respect to the Mortgaged Property, and if by reason of applicable law or regulation more than twenty percent (20%) of effective gross income is derived from funds paid to such Borrower or Property Operator by a Governmental Authority or a Managed Care Organization, Borrower and Property Operator shall take in a diligent and expeditious manner all reasonable steps necessary to comply with the preceding sentence to the extent permissible by applicable law or regulation;

(D) without the prior written consent of Lender, Borrower and Property Operator shall not:

(i) amend or otherwise modify the then-current Medicaid Provider Agreement;

- (ii) terminate the then-current Medicaid Provider Agreement;
- (iii) waive a default under the then-current Medicaid Provider Agreement; or
- (iv) enter into a new Medicaid Provider Agreement or renew or replace an existing Medicaid Provider Agreement; and

(E) within five (5) days after Borrower's or any Property Operator's receipt thereof, Borrower shall give Lender written notice of any notice or information received by Borrower or any Property Operator that indicates that:

- (i) either Borrower or any Property Operator is in default under the terms of the Medicaid Provider Agreement;
- (ii) the applicable Governmental Authority or Managed Care Organization intends to amend, modify, or terminate the Medicaid Provider Agreement;
- (iii) Borrower or Property Operator has ceased to meet the provider standards required by the applicable Governmental Authority or Managed Care Organization;
- (iv) Borrower or Property Operator has received notice from any Governmental Authority or Managed Care Organization that the rates for services provided under the then-current Medicaid Provider Agreement will be adjusted; or
- (v) either Borrower or any Property Operator has been excluded from participation in any Governmental Health Care Program with respect to the Mortgaged Property or any other property.

(h) Facility Operating Agreement.

(1) The provisions of this Section 6.02(h)(1) apply to all Facility Operating Agreements other than a Seniors Housing Facility Lease and to all Property Operators other than a Property Operator under a Seniors Housing Facility Lease. Borrower shall comply with and shall enforce the obligations of each Property Operator under each Facility Operating Agreement. Without the prior written consent of Lender, Borrower shall not:

- (A) modify, amend, supplement, or restate any Facility Operating Agreement;
- (B) waive a default under any Facility Operating Agreement;

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(C) waive any of Borrower's rights or fail to diligently pursue Borrower's remedies under the Facility Operating Agreement;

(D) add or release a property to or from any Facility Operating Agreement; or

(E) violate the provisions of Section 11.02(b)(3).

(2) Within five (5) days of Borrower's receipt or delivery (or any Property Operator's receipt), Borrower shall provide Lender written notice of any notice or information received by Borrower or any Property Operator that indicates either Borrower or any Property Operator is (A) in default under the terms of any Facility Operating Agreement, (B) amending, modifying, or terminating any Facility Operating Agreement, or (C) otherwise discontinuing its operation and management of the Mortgaged Property.

(3) After Borrower receives notice (or otherwise has actual knowledge) of an Event of Default under the Loan Documents, it will not make any payment of fees under or pursuant to the Facility Operating Agreement without Lender's prior written consent.

(4) Borrower shall cause each Property Operator, where applicable, to comply with the terms, conditions, provisions, requirements, and affirmative and negative covenants of this Loan Agreement relating to the use and operation of the Mortgaged Property, including all terms, conditions, provisions, requirements, and affirmative and negative covenants set forth in this Loan Agreement applicable to the organization, existence, and good standing of Property Operator necessary for the use and operation of the Mortgaged Property.

(i) Change in Property Operator.

Each Property Operator and each Facility Operating Agreement must be approved in writing in advance by Lender. Borrower shall not remove or permit or suffer the removal of any Property Operator without the prior written consent of Lender and unless and until Lender has approved in writing a replacement Property Operator. Each Facility Operating Agreement or other similar agreement between Borrower and a new Property Operator must be approved in writing in advance by Lender, and Borrower and the new Property Operator must execute and deliver to Lender a SASA in form required by Lender, subject to the provisions of Section 6.03(a). Borrower shall notify Lender in writing of any name change of an Affiliated Property Operator or any change in an Affiliated Property Operator's place of incorporation or organization. Borrower agrees that Lender shall have the right to remove any Property Operator at any time if an Event of Default has occurred and is continuing, subject to the provisions of the SASA.

(j) Contracts.

Borrower may in the future enter into Contracts for the provision of additional goods or services at or otherwise in connection with the operation, use, or management of the Mortgaged Property. Borrower absolutely and unconditionally pledges, grants a security interest in, and assigns to Lender all of Borrower's right, title, and interest in, to, and under the Contracts, including Borrower's right, power, and authority to modify the terms of, extend, or terminate any such Contract. Until Lender gives notice to Borrower of Lender's exercise of its rights under this Loan Agreement, Borrower shall have all right, power, and authority granted to Borrower under any Contract (except as otherwise limited by this subsection or any other provision of this Loan Agreement), including the right, power, and authority to modify the terms of any Contract or extend or terminate any Contract. If an Event of Default has occurred and is continuing, and at the option of Lender, the permission given to Borrower pursuant to the preceding sentence to exercise all right, power, and authority under Contracts shall terminate. Upon Lender's delivery of notice to Borrower of an Event of Default, Lender shall immediately have all right, power, and authority granted to Borrower under any Contract, including the right, power, and authority to modify the terms of, extend, or terminate any such Contract. Borrower shall fully perform all of its obligations under the Contracts, and Borrower agrees not to assign, sell, pledge, transfer, mortgage, or otherwise encumber its interests in any of the Contracts without the prior written approval of Lender. Each Contract entered into by Borrower subsequent to the date hereof, the average annual consideration of which, directly or indirectly, is at least \$50,000, shall provide: (A) that it shall be terminable for cause, and (B) that it shall be terminable, at Lender's option, upon the occurrence of an Event of Default.

Section 6.03 Mortgage Loan Administration Matters Regarding the Property.**(a) Property Management.**

If, in connection with the making of the Mortgage Loan, or at any later date, Lender waives in writing the requirement for a written contract for the operation or management of the Mortgaged Property, and Borrower later elects to enter into a written contract or change the operation or management of the Mortgaged Property, such new Property Operator and any Facility Operating Agreement must be approved by Lender. As a condition to any approval by Lender, Borrower and such new Property Operator shall enter into a SASA.

(b) Subordination of Fees by Property Operator.

All fees due to an Affiliated Property Operator in connection with the operation and management of the Mortgaged Property shall be subordinated in right to the prior payment in full of the Indebtedness. All fees due to a non-Affiliated Property Operator in connection with the operation and management of the Mortgaged Property shall be subordinated in right of payment to the prior payment in full of monthly debt service and funding of escrows and reserves as required under the Mortgage Loan Documents, and the payment of all operating expenses and capital expenditures incurred in connection with the operation and management of the Mortgaged Property.

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(c) Property Condition Assessment.

If, in connection with any inspection of the Mortgaged Property, Lender determines that the condition of the Mortgaged Property has deteriorated (ordinary wear and tear excepted) since the Effective Date, Lender may obtain, at Borrower's expense, a property condition assessment of the Mortgaged Property. Lender's right to obtain a property condition assessment pursuant to this Section 6.03(c) shall be in addition to any other rights available to Lender under this Loan Agreement in connection with any such deterioration. Any such inspection or property condition assessment may result in Lender requiring Additional Lender Repairs or Additional Lender Replacements as further described in Section 13.02(a)(9)(B).

ARTICLE 7 - LEASES AND RENTS**Section 7.01 Representations and Warranties.**

The representations and warranties made by Borrower to Lender in this Section 7.01 are made as of the Effective Date and are true and correct except as disclosed on the Exceptions to Representations and Warranties Schedule.

(a) Prior Assignment of Rents.

Borrower has not executed any:

(1) prior assignment of Rents (other than an assignment of Rents securing prior indebtedness that has been paid off and discharged or will be paid off and discharged with the proceeds of the Mortgage Loan); or

(2) instrument which would prevent Lender from exercising its rights under this Loan Agreement, the Security Instrument, or the SASA.

(b) Prepaid Rents.

Borrower has not accepted, and does not expect to receive prepayment of, any Rents for one (1) month for the Seniors Housing Facility Lease or more than two (2) months under any other Lease prior to the due dates of such Rents.

(c) Seniors Housing Facility Lease.

(1) The Seniors Housing Facility Lease is in full force and effect and there is neither a default thereunder nor any condition that, with the passage of time or the giving of notice, or both, would constitute a default thereunder. No right or claim of rescission, offset, abatement, diminution, defense, or counterclaim has been asserted with respect to the Seniors Housing Facility Lease, and there is no existing condition that, with the passage of time or giving of notice, or both, would result in a right or claim of rescission, offset, abatement, diminution, defense, or counterclaim under the terms and provisions of

the Seniors Housing Facility Lease. Borrower has performed and discharged all of the obligations on the part of Borrower to be performed and discharged pursuant to the terms set forth in the Seniors Housing Facility Lease.

(2) The Seniors Housing Facility Lease has not been modified, amended or supplemented by either party thereto. The Property Operator has not been released, in whole or in part, from any of its obligations under the Seniors Housing Facility Lease. There has been no prior sale, transfer, assignment, hypothecation, or pledge of the Seniors Housing Facility Lease (other than in connection with the Loan Documents) that is outstanding.

(3) The Seniors Housing Facility Lease has an original term ending on or after the date ninety (90) days after the Maturity Date. Absent Lender's direction, the Property Operator cannot terminate the Seniors Housing Facility Lease for any reason prior to the payment in full of the Indebtedness.

(4) There is no free rent, partial rent or rebate of rent required to be given by Borrower to Property Operator under the Seniors Housing Facility Lease. The Seniors Housing Facility Lease does not permit Property Operator to accept, and Property Operator has not accepted, prepayment of Rents more than two (2) months in advance (and Borrower has not accepted prepayment of Rents more than one (1) month in advance with respect to the Seniors Housing Facility Lease). Each payment due under the Seniors Housing Facility Lease is sufficient to pay the Debt Service Amounts (including Monthly Debt Service Payments, Taxes, Impositions, and any Replacement Reserve Deposits) in full on or prior to the due date thereof (without giving effect to any applicable grace periods) currently and throughout the term of the Mortgage Loan. Payments due under the Seniors Housing Facility Lease are payable without notice or demand, and without setoff, recoupment, abatement, or reduction.

(5) Property Operator has no right or option pursuant to the Seniors Housing Facility Lease or otherwise to purchase all or any part of the Mortgaged Property, the leased premises or the building of which the leased premises are a part.

(6) The Seniors Housing Facility Lease contains customary and enforceable provisions that render the rights and remedies of Borrower adequate for the enforcement and satisfaction of the Borrower's rights thereunder.

(7) Borrower represents and warrants that it is the express intent of Borrower and Property Operator that the Seniors Housing Facility Lease constitute a lease under applicable real property laws and laws governing bankruptcy, insolvency, and creditors' rights generally, and that the sole interest of Property Operator in the Mortgaged Property is as a tenant under the Seniors Housing Facility Lease. The Seniors Housing Facility Lease is not intended to be deemed a guaranty.

Section 7.02 Covenants.

(a) Leases.

Borrower shall:

(1) comply with and observe all landlord obligations under all Leases, including landlord's obligations pertaining to the maintenance and disposition of any tenant security deposits or any other refundable fees including entrance fees or community fees;

(2) surrender possession of the Mortgaged Property, including all Leases and all security deposits and prepaid Rents, immediately upon appointment of a receiver or Lender's entry upon and taking of possession and control of the Mortgaged Property, as applicable;

(3) require that all Residential Leases have initial lease terms of not less than six (6) months and not more than twenty-four (24) months (however, if customary in the applicable market for properties comparable to the Mortgaged Property, Residential Leases with terms of less than six (6) months (but in no case less than one (1) month) may be permitted with Lender's prior written consent; provided further, where required by Applicable Law, Residential Leases with terms of less than six (6) months (but in no case less than one (1) month) shall be permitted without Lender's consent so long as Borrower promptly notifies Lender of such requirement); and

(4) promptly provide Lender a copy of any non-Residential Lease at the time such Lease is executed (subject to Lender's consent rights for Material Commercial Leases in Section 7.02(b) and subject to Lender's consent rights for the Seniors Housing Facility Lease pursuant to Section 6.02(i) and the SASA), and, upon Lender's written request, promptly provide Lender a copy of any Residential Lease then in effect.

(b) Commercial Leases.

(1) With respect to Material Commercial Leases, Borrower shall not:

(A) enter into any Material Commercial Lease except with the prior written consent of Lender; or

(B) modify the terms of, extend, or terminate any Material Commercial Lease (including any Material Commercial Lease in existence on the Effective Date) without the prior written consent of Lender.

(2) With respect to any non-Material Commercial Lease, Borrower shall not:

(A) enter into any non-Material Commercial Lease that materially alters the use and type of operation of the premises subject to the Lease in effect as of the Effective Date or reduces the number or size of residential units at the Mortgaged Property, in each case without the prior written consent of Lender; or

(B) modify the terms of any non-Material Commercial Lease (including any non-Material Commercial Lease in existence on the Effective Date) in any way that materially alters the use and type of operation of the premises subject to such non-Material Commercial Lease in effect as of the Effective Date, reduces the number or size of residential units at the Mortgaged Property, or results in such non-Material Commercial Lease being deemed a Material Commercial Lease, in each case without the prior written consent of Lender.

(3) With respect to any Material Commercial Lease or non-Material Commercial Lease, Borrower shall cause the applicable tenant to provide within ten (10) days of the request, a certificate of estoppel, or if not provided by tenant within such ten (10) day period, Borrower shall provide such certificate of estoppel, certifying:

(A) that such Material Commercial Lease or non-Material Commercial Lease is unmodified and in full force and effect (or if there have been modifications, that such Material Commercial Lease or non-Material Commercial Lease is in full force and effect as modified and stating the modifications);

(B) the term of the Lease including any extensions thereto;

(C) the dates to which the Rent and any other charges hereunder have been paid by tenant;

(D) the amount of any security deposit delivered to Borrower as landlord;

(E) whether or not Borrower is in default (or whether any event or condition exists which, with the passage of time, would constitute an event of default) under such Lease;

(F) the address to which notices to tenant should be sent; and

(G) any other information as may be reasonably required by Lender.

(c) Payment of Rents.

Borrower shall:

(1) pay to Lender upon demand all Rents after an Event of Default has occurred and is continuing;

(2) cooperate with Lender's efforts in connection with the assignment of Rents set forth in the Security Instrument and the SASA; and

(3) not accept prepayment of Rent for one (1) month for the Seniors Housing Facility Lease or more than two (2) months under any other Lease (whether a Residential Lease or a non-Residential Lease).

(d) Assignment of Rents.

Borrower shall not:

(1) perform any acts nor execute any instrument that would prevent Lender from exercising its rights under the assignment of Rents granted in the Security Instrument, the SASA, or in any other Loan Document; nor

(2) interfere with Lender's collection of such Rents.

(e) Further Assignments of Leases and Rents.

Borrower shall execute and deliver any further assignments of Leases and Rents as Lender may reasonably require, and shall require Property Operator to execute and deliver any corresponding assignments in support thereof.

(f) Options to Purchase by Tenants.

No Lease (whether a Residential Lease or a non-Residential Lease) shall contain an option to purchase, right of first refusal to purchase or right of first offer to purchase, except as set forth in the SASA or except as required by applicable law.

(g) Special Covenants Regarding Seniors Housing Facility Lease.

(1) Seniors Housing Facility Lease.

(A) Borrower shall:

(i) at all times fully perform, observe, and comply with all terms, covenants, and conditions of the Seniors Housing Facility Lease to be performed, observed, or complied with by Borrower as lessor under the Seniors Housing Facility Lease and do all things necessary to preserve and to keep unimpaired its rights thereunder;

(ii) deliver to Lender, within five (5) days after Borrower's receipt, a true and correct copy of each written notice, demand, complaint,

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or request from Property Operator under, or with respect to, the Seniors Housing Facility Lease;

(iii) simultaneously deliver to Lender a true and correct copy of each written notice, demand, complaint, or request that Borrower sends to Property Operator under, or with respect to, the Seniors Housing Facility Lease;

(iv) to the extent not otherwise covered in Article 8 of this Loan Agreement, upon written request from Lender, deliver to Lender a copy of all business plans received by Borrower and any other information reasonably requested by Lender;

(v) enforce the terms, covenants and conditions contained in the Seniors Housing Facility Lease; and

(vi) provide Property Operator with written notice of any changes to Monthly Debt Service Payments, Imposition Deposits, Monthly Replacement Reserve Deposits, or any other amounts due under the Loan Documents.

(B) Borrower shall not:

(i) modify, amend, supplement, or restate the Seniors Housing Facility Lease either orally or in writing;

(ii) waive a default under the Seniors Housing Facility Lease;

(iii) waive any of Borrower's rights or fail to diligently pursue Borrower's remedies under the Seniors Housing Facility Lease;

(iv) add or release a property to or from any Seniors Housing Facility Lease; or

(v) violate the provisions of Section 11.02(b)(3).

If, pursuant to the Seniors Housing Facility Lease, Property Operator requests (1) the consent of Borrower (in its capacity as lessor under the Seniors Housing Facility Lease) or Borrower's designee to any matter as to which, pursuant to the Seniors Housing Facility Lease, Borrower has discretion as to whether or not to grant its consent, (2) a waiver of any covenant or obligation of Property Operator under the Seniors Housing Facility Lease, or (3) a modification of the terms of the Seniors Housing Facility Lease (any of the foregoing, a "Seniors Housing Facility Lease Request"), Borrower shall give Lender prompt written notice of such Seniors Housing Facility Lease Request (together with such supporting

information as may reasonably be required to consider such Seniors Housing Facility Lease Request, and such other information as Lender may reasonably request). Borrower shall not approve or consent to any Seniors Housing Facility Lease Request unless Lender has approved and consented in writing to such Seniors Housing Facility Lease Request.

(C) The Seniors Housing Facility Lease shall:

(i) pursuant to the SASA, be subject and subordinate in all respects to the liens, terms, covenants and conditions of the Security Instrument and the other Loan Documents, and to all renewals, modifications, consolidations, replacements and extensions thereof, and to all advances which may hereafter be made pursuant to the Note, this Loan Agreement, the Security Instrument and the other Loan Documents (including all sums advanced for the purposes of (1) protecting or further securing the lien of the Security Instrument, curing defaults by Borrower under the Loan Documents, or for any other purposes expressly permitted by this Loan Agreement, the Security Instrument or the other Loan Documents, or (2) constructing, renovating, repairing, furnishing, fixturing, or equipping the Mortgaged Property); and

(ii) provide that, in the event it shall be determined that the Seniors Housing Facility Lease is not a lease under applicable real property laws or under laws governing bankruptcy, insolvency, and creditors' rights generally, and that the interest of Property Operator in the Mortgaged Property is other than that of tenant under the Seniors Housing Facility Lease, then the Property Operator's interest in the Mortgaged Property, however characterized, shall continue to be subject and subordinate to the lien, terms, and conditions of the Security Instrument, and Borrower's fee interest in the Mortgaged Property, on all the same terms and conditions as contained in the Seniors Housing Facility Lease as of the Effective Date.

(D) The Seniors Housing Facility Lease shall provide that Borrower shall continue to have complete access throughout the Loan Term to the organizational, financial, and operational information and documentation of Property Operator in every respect as it relates to the Mortgage Loan, the Mortgaged Property, and the Seniors Housing Facility Lease (collectively, the "Property Operator Business Information"). Borrower shall continue to be fully informed regarding the Property Operator Business Information to the same extent as if Borrower were the day-to-day operator of the Mortgaged Property and the business activities thereon.

(2) Seniors Housing Facility Lease Estoppel.

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With respect to any Seniors Housing Facility Lease, Borrower shall cause Property Operator to provide as of the Effective Date (and, after the Effective Date, within ten (10) days after a request by Borrower), an Operator Estoppel Certificate, or if not provided by Property Operator within such ten (10) day period, Borrower shall provide a certificate of estoppel (and the Seniors Housing Facility Lease shall so empower Borrower as Property Operator's attorney-in-fact) substantially in the form of the Operator Estoppel Certificate.

(3) All Representations and Covenants Deemed Borrower Responsibility.

(A) Any act, action, term, condition, provision, requirement, or covenant required to be performed, or prohibited from being performed, by Borrower under the Loan Documents including with respect to

(i) the use, management or operation of the Mortgaged Property, including any licensing, repair, reporting, or insurance requirements, and

(ii) the organization, existence, good standing or other entity-level requirements,

shall be interpreted as requiring Borrower either to perform such act or action directly or to cause Property Operator, a property manager or other appropriate agent to perform such act or action. Any right or privilege assigned or delegated by Borrower or Property Operator to any other Person shall be construed as being accompanied by each relevant obligation or restriction set forth in the Loan Documents or the Seniors Housing Facility Lease, as applicable.

(B) In each instance that Borrower makes, or in the future renews or is deemed to renew, a representation, warranty, or covenant in this Loan Agreement or the other Loan Documents regarding the condition, knowledge, acts, or omissions of Property Operator or any Property Operator Business Information, or the condition of the Mortgaged Property, Borrower does and shall do so with full knowledge, after due inquiry (including the due inquiry of and by Guarantor), of such information. Any reporting or compliance delay caused by Property Operator or Guarantor shall not excuse Borrower's timely performance of the terms of this Loan Agreement or the other Loan Documents. Borrower acknowledges and agrees that Borrower's reliance upon incorrect or incomplete information received from Property Operator or Guarantor and the reporting of the same to Lender, whether or not Borrower had actual knowledge that such information was incorrect or incomplete and whether or not Borrower is otherwise in violation of the terms of this Loan Agreement, shall not be (and none of Borrower, Property Operator, Guarantor, nor Key Principal shall assert) a defense to Lender's determination that an Event of Default has occurred or that

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Borrower (or Guarantor) has incurred personal liability as set forth in Article 3 of this Loan Agreement.

Section 7.03 Mortgage Loan Administration Regarding Leases and Rents.

(a) Material Commercial Lease Requirements.

Each Material Commercial Lease, including any renewal or extension of any Material Commercial Lease in existence as of the Effective Date, shall provide, directly or pursuant to a subordination, non-disturbance and attornment agreement approved by Lender, that:

(1) the tenant shall, upon written notice from Lender after the occurrence of an Event of Default, pay all Rents payable under such Lease to Lender;

(2) such Lease and all rights of the tenant thereunder are expressly subordinate to the lien of the Security Instrument;

(3) the tenant shall attorn to Lender and any purchaser at a Foreclosure Event (such attornment to be self-executing and effective upon acquisition of title to the Mortgaged Property by any purchaser at a Foreclosure Event or by Lender in any manner);

(4) the tenant agrees to execute such further evidences of attornment as Lender or any purchaser at a Foreclosure Event may from time to time request; and

(5) such Lease shall not terminate as a result of a Foreclosure Event unless Lender or any other purchaser at such Foreclosure Event affirmatively elects to terminate such Lease pursuant to the terms of the subordination, non-disturbance and attornment agreement.

(b) Residential Lease Form.

All Residential Leases entered into from and after the Effective Date shall be on forms approved by Lender. Any Lease entered into by Property Operator will be subject and subordinate to the Seniors Housing Facility Lease and will not relieve the Property Operator of its obligations under the Seniors Housing Facility Lease.

(c) Seniors Housing Facility Lease Structure Consideration.

The agreements set forth in this Loan Agreement constitute a material portion of the consideration for Lender agreeing to make the Mortgage Loan and permit the Seniors Housing Facility Lease operating structure described in the Seniors Housing Facility Lease.

ARTICLE 8 - BOOKS AND RECORDS; FINANCIAL REPORTING

Section 8.01 Representations and Warranties.

The representations and warranties made by Borrower to Lender in this Section 8.01 are made as of the Effective Date and are true and correct except as disclosed on the Exceptions to Representations and Warranties Schedule.

(a) Financial Information.

All financial statements and data, including statements of cash flow and income and operating expenses, that have been delivered to Lender in respect of the Mortgaged Property:

- (1) are true, complete, and correct in all material respects; and
- (2) accurately represent the financial condition of the Mortgaged Property as of such date.

(b) No Change in Facts or Circumstances.

All information in the Loan Application and in all financial statements, rent rolls, reports, certificates, and other documents submitted in connection with the Loan Application are complete and accurate in all material respects. There has been no material adverse change in any fact or circumstance that would make any such information incomplete or inaccurate.

Section 8.02 Covenants.

(a) Obligation to Maintain Accurate Books and Records.

Borrower shall keep and maintain at all times at the Mortgaged Property, the property management agent's offices, Borrower's General Business Address, or Property Operator's General Business Address, as applicable, and, upon Lender's written request, shall make available to Lender at the Land:

- (1) complete and accurate books of account and records (including copies of supporting bills and invoices) adequate to reflect correctly the operation of the Mortgaged Property; and
- (2) copies of all written contracts, Leases, and other instruments that affect Borrower, Property Operator, or the Mortgaged Property.

(b) Items to Furnish to Lender.

Subject to Privacy Laws, Borrower shall furnish to Lender the following, certified as true, complete, and accurate in all material respects, by an individual having authority to bind

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Borrower (or Guarantor, as applicable), in such form and with such detail as Lender reasonably requires:

(1) within forty-five (45) days after the end of each calendar quarter, a statement of income and expenses for Borrower and each Property Operator (in connection with the operation of the Mortgaged Property) for that calendar quarter;

(2) within one hundred twenty (120) days after the end of each calendar year:

(A) for any Borrower, any Property Operator (in connection with the operation of the Mortgaged Property), and any Guarantor that is an entity, a statement of income and expenses and a statement of cash flows for such calendar year;

(B) for any Borrower, any Property Operator (in connection with the operation of the Mortgaged Property), and any Guarantor that is an individual or a trust established for estate-planning purposes, a personal financial statement for such calendar year;

(C) when requested in writing by Lender, balance sheet(s) showing all assets and liabilities of Borrower, each Property Operator (in connection with the operation of the Mortgaged Property), and Guarantor and a statement of all contingent liabilities as of the end of such calendar year;

(D) a written certification ratifying and affirming that:

(i) Borrower has taken no action in violation of Section 4.02(d) regarding its single asset status;

(ii) neither Borrower nor Property Operator has received any notice of any building code violation, or if Borrower, or Property Operator, has received such notice, evidence of remediation;

(iii) neither Borrower nor Property Operator has made any application for rezoning nor received any notice that the Mortgaged Property has been or is being rezoned; and

(iv) neither Borrower nor Property Operator has taken any action nor has any knowledge of any action that would violate the provisions of Section 11.02(b)(1)(F) regarding liens encumbering the Mortgaged Property;

(E) an accounting of all security deposits held pursuant to all Leases, including the name of the institution (if any) and the names and identification numbers of the accounts (if any) in which such security deposits are held and the

name of the person to contact at such financial institution, along with any authority or release necessary for Lender to access information regarding such accounts; and

(F) written confirmation of:

(i) any changes occurring since the Effective Date (or that no such changes have occurred since the Effective Date) in (1) the direct owners of Borrower, (2) the indirect owners (and any non-member managers) of Borrower that Control Borrower (excluding any Publicly-Held Corporations or Publicly-Held Trusts), or (3) the indirect owners of Borrower that hold twenty-five percent (25%) or more of the ownership interests in Borrower (excluding any Publicly-Held Corporations or Publicly-Held Trusts), and their respective interests;

(ii) the names of all officers and directors of (1) any Borrower which is a corporation, (2) any corporation which is a general partner of any Borrower which is a partnership, or (3) any corporation which is the managing member or non-member manager of any Borrower which is a limited liability company;

(iii) the names of all managers who are not members of (1) any Borrower which is a limited liability company, (2) any limited liability company which is a general partner of any Borrower which is a partnership, or (3) any limited liability company which is the managing member or non-member manager of any Borrower which is a limited liability company;

(iv) any changes occurring since the Effective Date (or that no such changes have occurred since the Effective Date) in (1) the direct owners of Affiliated Property Operator, (2) the indirect owners (and any non-member managers) of Affiliated Property Operator that Control Affiliated Property Operator (excluding any Publicly-Held Corporations or Publicly-Held Trusts), or (3) the indirect owners of Affiliated Property Operator that hold twenty-five percent (25%) or more of the ownership interests in Affiliated Property Operator (excluding any Publicly-Held Corporations or Publicly-Held Trusts), and their respective interests;

(v) the names of all officers and directors of (1) any Affiliated Property Operator that is a corporation, (2) any corporation which is a general partner of any Affiliated Property Operator which is a partnership, or (3) any corporation which is the managing member or non-member manager of any Property Operator which is a limited liability company; and

(vi) the names of all managers who are not members of (1) any Property Operator which is a limited liability company, (2) any limited liability company which is a general partner of any Affiliated Property Operator which is a partnership, or (3) any limited liability company which is the managing member or non-member manager of any Affiliated Property Operator which is a limited liability company.

(G) if not already provided pursuant to Section 8.02(b)(2)(A) above, a statement of income and expenses for Borrower's and Property Operator's operation of the Mortgaged Property on a year-to-date basis as of the end of each calendar year;

(3) within forty-five (45) days after the end of each first, second, and third calendar quarter and within one hundred twenty (120) days after the end of each calendar year, and at any other time upon Lender's written request, a rent schedule for the Mortgaged Property showing the name of each tenant and for each tenant, the space occupied, the lease expiration date, the lease term, the rent payable for the current month, the date through which rent has been paid, and any related information requested by Lender;

(4) within ten (10) days after Borrower's receipt, copies of all inspection reports, surveys, reviews, and certifications prepared by, for, or on behalf of any licensing or regulatory authority relating to the Mortgaged Property and any legal actions, orders, notices, or reports relating to the Mortgaged Property issued by the applicable regulatory or licensing authorities;

(5) within ten (10) days after submission, copies of all incident reports submitted by or on behalf of Borrower or any Property Operator to any liability insurance carrier or any elderly affairs, regulatory or licensing authority; and

(6) upon Lender's written request (but, absent an Event of Default, no more frequently than once in any six (6) month period):

(A) any item described in Section 8.02(b)(1) or Section 8.02(b)(2) for Borrower or any Property Operator (in connection with the operation of the Mortgaged Property), certified as true, complete and accurate by an individual having authority to bind Borrower or such Property Operator;

(B) a property management or leasing report for the Mortgaged Property, showing the number of rental applications received from tenants or prospective tenants and deposits received from tenants or prospective tenants, and any other information requested by Lender;

(C) a statement of income and expenses for Borrower's or any Property Operator's operation of the Mortgaged Property on a year-to-date basis

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as of the end of each month for such period as requested by Lender, which statement shall be delivered within thirty (30) days after the end of such month requested by Lender;

(D) a statement of real estate owned directly or indirectly by Borrower, Affiliated Property Operator and Guarantor for such period as requested by Lender, which statement(s) shall be delivered within thirty (30) days after the end of such month requested by Lender;

(E) a statement that identifies:

(i) the direct owners of Borrower and Affiliated Property Operator and their respective interests;

(ii) the indirect owners (and any non-member managers) of Borrower that Control Borrower (excluding any Publicly-Held Corporations or Publicly-Held Trusts) and their respective interests; and

(iii) the indirect owners of Borrower that hold twenty-five percent (25%) or more of the ownership interests in Borrower (excluding any Publicly-Held Corporations or Publicly-Held Trusts) and their respective interests;

(iv) the indirect owners (and any non-member managers) of Affiliated Property Operator that Control Affiliated Master Lessee (excluding any Publicly-Held Corporations or Publicly-Held Trusts) and their respective interests; and

(v) the indirect owners of Affiliated Property Operator that hold twenty-five percent (25%) or more of the ownership interests in Affiliated Master Lessee (excluding any Publicly-Held Corporations or Publicly-Held Trusts) and their respective interests.

(F) copies of all reports relating to the services and operations of the Mortgaged Property, including, if applicable, Medicaid cost reports and records relating to account balances due to or from Third Party Payments; and

(G) within ten (10) days after submission to Borrower by any Property Operator, the financial statements, reports, documents, communications, and information delivered to Borrower by any Property Operator pursuant to the Facility Operating Agreement, to the extent not otherwise provided under this Loan Agreement.

(c) Audited Financials.

In the event Borrower, any Property Operator, or Guarantor receives or obtains any audited financial statements and such financial statements are required to be delivered to Lender under Section 8.02(b), Borrower shall deliver or cause to be delivered to Lender the audited versions of such financial statements.

(d) Delivery of Books and Records.

If an Event of Default has occurred and is continuing, Borrower shall deliver to Lender, upon written demand, all books and records relating to the Mortgaged Property or its operation.

Section 8.03 Mortgage Loan Administration Matters Regarding Books and Records and Financial Reporting.

(a) Lender's Right to Obtain Audited Books and Records.

Lender may require that Borrower's, Property Operator's (in connection with the operation of the Mortgaged Property), or Guarantor's books and records be audited, at Borrower's expense, by an independent certified public accountant selected by Lender in order to produce or audit any statements, schedules, and reports of Borrower, Guarantor, Property Operator (in connection with the operation of the Mortgaged Property), or the Mortgaged Property required by Section 8.02, if:

- (1) Borrower or Guarantor fails to provide in a timely manner the statements, schedules, and reports required by Section 8.02 and, thereafter, Borrower or Guarantor fails to provide such statements, schedules, and reports within the cure period provided in Section 14.01(c);
- (2) the statements, schedules, and reports submitted to Lender pursuant to Section 8.02 are not full, complete, and accurate in all material respects as determined by Lender and, thereafter, Borrower or Guarantor fails to provide such statements, schedules, and reports within the cure period provided in Section 14.01(c); or
- (3) an Event of Default has occurred and is continuing.

Notwithstanding the foregoing, the ability of Lender to require the delivery of audited financial statements shall be limited to not more than once per Borrower's fiscal year so long as no Event of Default has occurred during such fiscal year (or any event which, with the giving of written notice or the passage of time, or both, would constitute an Event of Default has occurred and is continuing). Borrower shall cooperate with Lender in order to satisfy the provisions of this Section 8.03(a). All related costs and expenses of Lender shall become immediately due and payable by Borrower within ten (10) Business Days after demand therefor.

(b) Credit Reports; Credit Score.

No more often than once in any twelve (12) month period, Lender is authorized to obtain a credit report (if applicable) on each of Borrower, Affiliated Property Operator, and Guarantor, the cost of which report shall be paid by Borrower. Lender is authorized to obtain a Credit Score (if applicable) for Borrower, Affiliated Property Operator, or Guarantor at any time at Lender's expense.

ARTICLE 9 - INSURANCE

Section 9.01 Representations and Warranties.

The representations and warranties made by Borrower to Lender in this Section 9.01 are made as of the Effective Date and are true and correct except as disclosed on the Exceptions to Representations and Warranties Schedule.

(a) Compliance with Insurance Requirements.

Borrower is in compliance with Lender's insurance requirements (or has obtained a written waiver from Lender for any non-compliant coverage) and has timely paid or caused to be paid all premiums on all required insurance policies.

(b) Property Condition.

- (1) The Mortgaged Property has not been damaged by fire, water, wind, or other cause of loss; or
- (2) if previously damaged, any previous damage to the Mortgaged Property has been repaired and the Mortgaged Property has been fully restored.

Section 9.02 Covenants.

(a) Insurance Requirements.

- (1) As required by Lender and applicable law, and as may be modified from time to time, Borrower shall:

(A) keep the Improvements insured at all times against any hazards, which insurance shall include coverage against loss by fire and all other perils insured by the "special causes of loss" coverage form, general boiler and machinery coverage, business income coverage, and flood (if any of the Improvements are located in an area identified by the Federal Emergency Management Agency (or any successor) as an area having special flood hazards and to the extent flood insurance is available in that area), and may include sinkhole insurance, mine subsidence insurance, earthquake insurance, terrorism

insurance, windstorm insurance and, if the Mortgaged Property does not conform to applicable building, zoning, or land use laws, ordinance and law coverage;

(B) maintain at all times commercial general liability insurance, umbrella liability insurance, workmen's compensation insurance, auto liability insurance, and such other liability, errors and omissions, and fidelity insurance coverage; and professional liability insurance covering errors and omissions for medical malpractice, all types of abuse, and any service where healthcare is provided; and

(C) maintain builder's risk and public liability insurance, and other insurance in connection with completing the Repairs or Replacements, as applicable.

(b) Delivery of Policies, Renewals, Notices, and Proceeds.

Borrower shall:

(1) cause all insurance policies (including any policies not otherwise required by Lender) which can be endorsed with standard non-contributing, non-reporting mortgagee clauses making loss payable to Lender (or Lender's assigns) to be so endorsed;

(2) promptly deliver to Lender a copy of all renewal and other notices received by Borrower with respect to the policies and all receipts for paid premiums;

(3) deliver evidence, in form and content acceptable to Lender, that each required insurance policy under this Article 9 has been renewed not less than ten (10) days prior to the applicable expiration date, and (if such evidence is other than an original or duplicate original of a renewal policy) deliver the original or duplicate original of each renewal policy (or such other evidence of insurance as may be required by or acceptable to Lender) in form and content acceptable to Lender within ninety (90) days after the applicable expiration date of the original insurance policy;

(4) provide immediate written notice to the insurance company and to Lender of any event of loss;

(5) execute such further evidence of assignment of any insurance proceeds as Lender may require; and

(6) provide immediate written notice to Lender of Borrower's or Property Operator's receipt of any insurance proceeds under any insurance policy required by Section 9.02(a)(1) above and, if requested by Lender, deliver to Lender all of such proceeds received by Borrower or Property Operator to be applied by Lender in accordance with this Article 9.

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Section 9.03 Mortgage Loan Administration Matters Regarding Insurance**(a) Lender's Ongoing Insurance Requirements.**

Borrower acknowledges that Lender's insurance requirements may change from time to time. All insurance policies and renewals of insurance policies required by this Loan Agreement shall be:

- (1) in the form and with the terms required by Lender;
- (2) in such amounts, with such maximum deductibles and for such periods required by Lender; and
- (3) issued by insurance companies satisfactory to Lender.

BORROWER ACKNOWLEDGES THAT ANY FAILURE OF BORROWER TO COMPLY WITH THE REQUIREMENTS SET FORTH IN SECTION 9.02(a) OR SECTION 9.02(b)(3) ABOVE SHALL PERMIT LENDER TO PURCHASE THE APPLICABLE INSURANCE AT BORROWER'S COST. SUCH INSURANCE MAY, BUT NEED NOT, PROTECT BORROWER'S INTERESTS. THE COVERAGE THAT LENDER PURCHASES MAY NOT PAY ANY CLAIM THAT BORROWER MAKES OR ANY CLAIM THAT IS MADE AGAINST BORROWER IN CONNECTION WITH THE MORTGAGED PROPERTY. IF LENDER PURCHASES INSURANCE FOR THE MORTGAGED PROPERTY AS PERMITTED HEREUNDER, BORROWER WILL BE RESPONSIBLE FOR THE COSTS OF THAT INSURANCE, INCLUDING INTEREST AT THE DEFAULT RATE AND ANY OTHER CHARGES LENDER MAY IMPOSE IN CONNECTION WITH THE PLACEMENT OF THE INSURANCE UNTIL THE EFFECTIVE DATE OF THE CANCELLATION OR THE EXPIRATION OF THE INSURANCE. THE COSTS OF THE INSURANCE SHALL BE ADDED TO BORROWER'S TOTAL OUTSTANDING BALANCE OR OBLIGATION AND SHALL CONSTITUTE ADDITIONAL INDEBTEDNESS. THE COSTS OF THE INSURANCE MAY BE MORE THAN THE COST OF INSURANCE BORROWER MAY BE ABLE TO OBTAIN ON ITS OWN. BORROWER MAY LATER CANCEL ANY INSURANCE PURCHASED BY LENDER, BUT ONLY AFTER PROVIDING EVIDENCE THAT BORROWER HAS OBTAINED INSURANCE AS REQUIRED BY THIS LOAN AGREEMENT AND THE OTHER LOAN DOCUMENTS.

(b) Application of Proceeds on Event of Loss.

- (1) Upon an event of loss, Lender may, at Lender's option:

(A) hold such proceeds to be applied to reimburse Borrower for the cost of Restoration (in accordance with Lender's then-current policies relating to the restoration of casualty damage on similar multifamily residential properties); or

(B) apply such proceeds to the payment of the Indebtedness, whether or not then due; provided, however, Lender shall not apply insurance proceeds to the payment of the Indebtedness and shall permit Restoration pursuant to Section 9.03(b)(1)(A) if all of the following conditions are met:

(i) no Event of Default has occurred and is continuing (or any event which, with the giving of written notice or the passage of time, or both, would constitute an Event of Default has occurred and is continuing);

(ii) Lender determines that the combination of insurance proceeds and amounts provided by Borrower will be sufficient funds to complete the Restoration;

(iii) Lender determines that the net operating income generated by the Mortgaged Property after completion of the Restoration will be sufficient to support a debt service coverage ratio not less than the debt service coverage ratio immediately prior to the event of loss, but in no event less than 1.0x (the debt service coverage ratio shall be calculated on a thirty (30) year amortizing basis (if applicable, on a *proforma* basis approved by Lender) in all events and shall include payments due from any Operator under a Seniors Housing Facility Lease and all operating costs and other expenses, Imposition Deposits, deposits to Collateral Accounts, and Mortgage Loan repayment obligations);

(iv) Lender determines that the Restoration will be completed before the earlier of (1) one year before the stated Maturity Date or (2) one year after the date of the loss or casualty; and

(v) Borrower provides Lender, upon written request, evidence of the availability during and after the Restoration of the insurance required to be maintained pursuant to this Loan Agreement.

After the completion of Restoration in accordance with the above requirements, as determined by Lender, the balance, if any, of such proceeds shall be returned to Borrower.

(2) Notwithstanding the foregoing, if any loss is estimated to be in an amount equal to or less than \$50,000, Lender shall not exercise its rights and remedies as power-of-attorney herein and shall allow Borrower to make proof of loss, to adjust and compromise any claims under policies of property damage insurance, to appear in and prosecute any action arising from such policies of property damage insurance, and to collect and receive the proceeds of property damage insurance; provided that each of the following conditions shall be satisfied:

(A) Borrower shall immediately notify Lender of the casualty giving rise to the claim;

(B) no Event of Default has occurred and is continuing (or any event which, with the giving of written notice or the passage of time, or both, would constitute an Event of Default has occurred and is continuing);

(C) the Restoration will be completed before the earlier of (i) one year before the stated Maturity Date or (ii) one year after the date of the loss or casualty;

(D) Lender determines that the combination of insurance proceeds and amounts provided by Borrower will be sufficient funds to complete the Restoration;

(E) all proceeds of property damage insurance shall be issued in the form of joint checks to Borrower and Lender;

(F) all proceeds of property damage insurance shall be applied to the Restoration;

(G) Borrower shall deliver to Lender evidence satisfactory to Lender of completion of the Restoration and obtainment of all lien releases;

(H) Borrower shall have complied to Lender's satisfaction with the foregoing requirements on any prior claims subject to this provision, if any; and

(I) Lender shall have the right to inspect the Mortgaged Property (subject to the rights of tenants under the Leases, other than the Seniors Housing Facility Lease).

(3) If Lender elects to apply insurance proceeds to the Indebtedness in accordance with the terms of this Loan Agreement, Borrower shall not be obligated to restore or repair the Mortgaged Property. Rather, Borrower shall restrict access to the damaged portion of the Mortgaged Property and, at its expense and regardless of whether such costs are covered by insurance, clean up any debris resulting from the casualty event, and, if required or otherwise permitted by Lender, demolish or raze any remaining part of the damaged Mortgaged Property to the extent necessary to keep and maintain the Mortgaged Property in a safe, habitable, and marketable condition. Nothing in this Section 9.03(b) shall affect any of Lender's remedial rights against Borrower in connection with a breach by Borrower of any of its obligations under this Loan Agreement or under any Loan Document, including any failure to timely pay Monthly Debt Service Payments or maintain the insurance coverage(s) required by this Loan Agreement.

(c) Payment Obligations Unaffected.

The application of any insurance proceeds to the Indebtedness shall not extend or postpone the Maturity Date, or the due date or the full payment of any Monthly Debt Service Payment, Monthly Replacement Reserve Deposit, or any other installments referred to in this Loan Agreement or in any other Loan Document. Notwithstanding the foregoing, if Lender applies insurance proceeds to the Indebtedness in connection with a casualty of less than the entire Mortgaged Property, and after such application of proceeds the debt service coverage ratio (as determined by Lender) is less than 1.25x based on the then-applicable Monthly Debt Service Payment and the anticipated on-going net operating income of the Mortgaged Property after such casualty event, then Lender may, at its discretion, permit an adjustment to the Monthly Debt Service Payments that become due and owing thereafter, based on Lender's then-current underwriting requirements. In no event shall the preceding sentence obligate Lender to make any adjustment to the Monthly Debt Service Payments.

(d) Foreclosure Sale.

If the Mortgaged Property is transferred pursuant to a Foreclosure Event or Lender otherwise acquires title to the Mortgaged Property, Borrower acknowledges that Lender shall automatically succeed to all rights of Borrower in and to any insurance policies and unearned insurance premiums applicable to the Mortgaged Property and in and to the proceeds resulting from any damage to the Mortgaged Property prior to such Foreclosure Event or such acquisition.

(e) Appointment of Lender as Attorney-In-Fact.

Borrower hereby authorizes and appoints Lender as attorney-in-fact pursuant to Section 14.03(c).

ARTICLE 10 - CONDEMNATION**Section 10.01 Representations and Warranties.**

The representations and warranties made by Borrower to Lender in this Section 10.01 are made as of the Effective Date and are true and correct except as disclosed on the Exceptions to Representations and Warranties Schedule.

(a) Prior Condemnation Action.

No part of the Mortgaged Property has been taken in connection with a Condemnation Action.

(b) Pending Condemnation Actions.

No Condemnation Action is pending nor, to Borrower's knowledge, is threatened for the partial or total condemnation or taking of the Mortgaged Property.

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Section 10.02 Covenants.

(a) Notice of Condemnation.

Borrower shall:

- (1) promptly notify Lender of any Condemnation Action of which Borrower has knowledge;
- (2) appear in and prosecute or defend, at its own cost and expense, any action or proceeding relating to any Condemnation Action, including any defense of Lender's interest in the Mortgaged Property tendered to Borrower by Lender, unless otherwise directed by Lender in writing; and
- (3) execute such further evidence of assignment of any condemnation award in connection with a Condemnation Action as Lender may require.

(b) Condemnation Proceeds.

Borrower shall pay to Lender all awards or proceeds of a Condemnation Action promptly upon receipt.

Section 10.03 Mortgage Loan Administration Matters Regarding Condemnation.

(a) Application of Condemnation Awards.

Lender may apply any awards or proceeds of a Condemnation Action, after the deduction of Lender's expenses incurred in the collection of such amounts, to:

- (1) the restoration or repair of the Mortgaged Property, if applicable;
- (2) the payment of the Indebtedness, with the balance, if any, paid to Borrower; or
- (3) Borrower.

(b) Payment Obligations Unaffected.

The application of any awards or proceeds of a Condemnation Action to the Indebtedness shall not extend or postpone the Maturity Date, or the due date or the full payment of any Monthly Debt Service Payment, Monthly Replacement Reserve Deposit, or any other installments referred to in this Loan Agreement or in any other Loan Document.

(c) Appointment of Lender as Attorney-In-Fact.

Borrower hereby authorizes and appoints Lender as attorney-in-fact pursuant to Section 14.03(c).

(d) Preservation of Mortgaged Property.

If a Condemnation Action results in or from damage to the Mortgaged Property and Lender elects to apply the proceeds or awards from such Condemnation Action to the Indebtedness in accordance with the terms of this Loan Agreement, Borrower shall not be obligated to restore or repair the Mortgaged Property. Rather, Borrower shall restrict access to any portion of the Mortgaged Property which has been damaged or destroyed in connection with such Condemnation Action and, at Borrower's expense and regardless of whether such costs are covered by insurance, clean up any debris resulting in or from the Condemnation Action, and, if required by any Governmental Authority or otherwise permitted by Lender, demolish or raze any remaining part of the damaged Mortgaged Property to the extent necessary to keep and maintain the Mortgaged Property in a safe, habitable, and marketable condition. Nothing in this Section 10.03(d) shall affect any of Lender's remedial rights against Borrower in connection with a breach by Borrower of any of its obligations under this Loan Agreement or under any Loan Document, including any failure to timely pay Monthly Debt Service Payments or maintain the insurance coverage(s) required by this Loan Agreement.

ARTICLE 11 - LIENS, TRANSFERS, AND ASSUMPTIONS

Section 11.01 Representations and Warranties.

The representations and warranties made by Borrower to Lender in this Section 11.01 are made as of the Effective Date and are true and correct except as disclosed on the Exceptions to Representations and Warranties Schedule.

(a) No Labor or Materialmen's Claims.

All parties furnishing labor and materials on behalf of Borrower or on behalf of Property Operator with respect to the Mortgaged Property have been paid in full. There are no mechanics' or materialmen's liens (whether filed or unfiled) outstanding for work, labor, or materials (and no claims or work outstanding that under applicable law could give rise to any such mechanics' or materialmen's liens) affecting the Mortgaged Property, whether prior to, equal with, or subordinate to the lien of the Security Instrument.

(b) No Other Interests.

No Person:

(1) other than Borrower has any possessory ownership or interest in the Mortgaged Property or right to occupy the same except under and pursuant to the

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provisions of the Facility Operating Agreement and the other existing Leases, the material terms of all such Leases having been previously disclosed in writing to Lender; nor

(2) has an option, right of first refusal, or right of first offer (except as required by applicable law) to purchase the Mortgaged Property, or any interest in the Mortgaged Property.

Section 11.02 Covenants.

(a) Liens; Encumbrances.

Borrower shall not permit the grant, creation, or existence of any Lien, whether voluntary, involuntary, or by operation of law, on all or any portion of the Mortgaged Property (including any voluntary, elective, or non-compulsory tax lien or assessment pursuant to a voluntary, elective, or non-compulsory special tax district or similar regime) other than:

(1) Permitted Encumbrances;

(2) the creation of:

(A) any tax lien, municipal lien, utility lien, mechanics' lien, materialmen's lien, or judgment lien against the Mortgaged Property if bonded off, released of record, or otherwise remedied to Lender's satisfaction within sixty (60) days after the earlier of the date Borrower or Property Operator has actual notice or constructive notice of the existence of such lien; or

(B) any mechanics' or materialmen's liens which attach automatically under the laws of any Governmental Authority upon the commencement of any work upon, or delivery of any materials to, the Mortgaged Property and for which Borrower or Property Operator is not delinquent in the payment for any such work or materials; and

(3) the lien created by the Loan Documents.

(b) Transfers.

(1) Mortgaged Property.

Borrower shall not Transfer, or cause or permit a Transfer of, all or any part of the Mortgaged Property (including any interest in the Mortgaged Property) other than:

(A) a Transfer to which Lender has consented in writing;

(B) Leases permitted pursuant to the Loan Documents, including the Seniors Housing Facility Lease between Borrower and Property Operator and the

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subordination thereof to the terms, provisions, and lien of this Loan Agreement, the Security Instrument, and the other Loan Documents;

(C) [reserved];

(D) a Transfer of obsolete or worn out Personalty or Fixtures that are contemporaneously replaced by items of equal or better function and quality which are free of Liens (other than those created by the Loan Documents);

(E) the grant of an easement, servitude, or restrictive covenant to which Lender has consented, and Borrower has paid to Lender, upon demand, all costs and expenses incurred by Lender in connection with reviewing Borrower's request;

(F) a lien permitted pursuant to Section 11.02(a) of this Loan Agreement; or

(G) the conveyance of the Mortgaged Property following a Foreclosure Event.

(2) Interests in Borrower, Key Principal, Guarantor, or Affiliated Property Operator.

Other than a Transfer to which Lender has consented in writing, Borrower shall not Transfer, or cause or permit to be Transferred:

(A) any direct or indirect ownership interest in Borrower, Key Principal, Guarantor, or Affiliated Property Operator if such Transfer would cause a change in Control;

(B) a direct or indirect Restricted Ownership Interest in Borrower, Key Principal, Guarantor, or Affiliated Property Operator;

(C) fifty percent (50%) or more of Key Principal's or Guarantor's direct or indirect ownership interests in Borrower or Affiliated Property Operator (if applicable) that existed on the Effective Date (individually or on an aggregate basis);

(D) the economic benefits or rights to cash flows attributable to any ownership interests in Borrower, Key Principal, Guarantor or Affiliated Property Operator (if applicable) separate from the Transfer of the underlying ownership interests if the Transfer of the underlying ownership interest is prohibited by this Loan Agreement; or

(E) a Transfer to a new key principal or new guarantor (if such new key principal or guarantor is an entity), which entity has an organizational existence termination date that ends before the Maturity Date.

Notwithstanding the foregoing, if a Publicly-Held Corporation or a Publicly-Held Trust Controls Borrower, Key Principal, Guarantor, or Affiliated Property Operator, or owns a direct or indirect Restricted Ownership Interest in Borrower, Key Principal, Guarantor, or Affiliated Property Owner, a Transfer of any ownership interests in such Publicly-Held Corporation or Publicly-Held Trust shall not be prohibited under this Loan Agreement as long as (i) such Transfer does not result in a conversion of such Publicly-Held Corporation or Publicly-Held Trust to a privately held entity, and (ii) Borrower provides written notice to Lender not later than thirty (30) days thereafter of any such Transfer that results in any Person owning twenty percent (20%) or more of the ownership interests in such Publicly-Held Corporation or Publicly-Held Trust.

(3) Name Change or Entity Conversion.

Lender shall consent to Borrower changing its name, changing its jurisdiction of organization, or converting from one type of legal entity into another type of legal entity for any lawful purpose, provided that Borrower shall not be permitted to convert to a Delaware Statutory Trust, and provided further that:

(A) Lender receives written notice at least thirty (30) days prior to such change or conversion, which notice shall include organizational charts that reflect the structure of Borrower both prior to and subsequent to such name change or entity conversion;

(B) such Transfer is not otherwise prohibited under the provisions of Section 11.02(b)(2);

(C) Borrower executes an amendment to this Loan Agreement and any other Loan Documents required by Lender documenting the name change or entity conversion;

(D) Borrower agrees and acknowledges, at Borrower's expense, that (i) Borrower will execute and record in the land records any instrument required by the Property Jurisdiction to be recorded to evidence such name change or entity conversion (or provide Lender with written confirmation from the title company (via electronic mail or letter) that no such instrument is required), (ii) Borrower will execute any additional documents required by Lender, including the amendment to this Loan Agreement, and, if applicable, an amendment to the Facility Operating Agreement, and, if applicable, allow such documents to be recorded or filed in the land records of the Property Jurisdiction, (iii) Lender will obtain a "date down" endorsement to the Lender's Loan Policy (or obtain a new Loan Policy if a "date down" endorsement is not available in the Property Jurisdiction), evidencing title to the Mortgaged Property being in the name of the

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successor entity and the Lien of the Security Instrument against the Mortgaged Property, and (iv) Lender will file any required UCC-3 financing statement and make any other filing deemed necessary to maintain the priority of its Liens on the Mortgaged Property;

(E) no later than ten (10) days subsequent to such name change or entity conversion, Borrower shall provide Lender (i) the documentation filed with the appropriate office in Borrower's state of formation evidencing such name change or entity conversion, (ii) copies of the organizational documents of Borrower, including any amendments, filed with the appropriate office in Borrower's state of formation reflecting the post-conversion Borrower name, form of organization and structure, and (iii) if available, new certificates of good standing or valid formation for Borrower; and

(F) Borrower shall provide Lender with confirmation that any Licenses in Borrower's name remain valid and in full force and effect following the name change or entity conversion or have been properly transferred to Borrower following such name change or entity conversion.

(c) Facility Operating Agreement.

Subject to the provisions of this Article 11, Borrower shall not:

(1) Transfer its rights or interests in the Facility Operating Agreement, or Transfer the responsibility for the operation and management of the Mortgaged Property, from Property Operator to any other Person;

(2) permit Affiliated Property Operator to Transfer its interest in the Facility Operating Agreement;

(3) remove, permit, or suffer the removal of Affiliated Property Operator from the Facility Operating Agreement;

(4) surrender or accept a surrender of the Facility Operating Agreement;

(5) cancel or terminate the Facility Operating Agreement; or

(6) permit a merger of Borrower's fee interest estate in the Mortgaged Property with Property Operator's leasehold interest in the Mortgaged Property, if any.

Borrower agrees, and the Facility Operating Agreement shall provide, that Lender shall have the right to terminate the Facility Operating Agreement at any time upon the occurrence and continuance of an Event of Default.

(d) No Other Indebtedness.

Other than the Mortgage Loan, neither Borrower nor any Affiliated Property Operator shall incur or be obligated at any time with respect to any loan or other indebtedness (except trade payables as otherwise permitted in this Loan Agreement), including any indebtedness secured by a Lien on, or the cash flows from, the Mortgaged Property.

(e) No Mezzanine Financing or Preferred Equity.

Neither Borrower, any Affiliated Property Operator nor any direct or indirect owner of Borrower or any Affiliated Property Operator shall: (1) incur any Mezzanine Debt other than Permitted Mezzanine Debt, (2) issue any Preferred Equity other than Permitted Preferred Equity, or (3) incur any similar indebtedness or issue any similar equity.

Section 11.03 Mortgage Loan Administration Matters Regarding Liens, Transfers and Assumptions

(a) Assumption of Mortgage Loan.

Lender shall consent to a Transfer of the Mortgaged Property to and an assumption of the Mortgage Loan by a new borrower if each of the following conditions is satisfied prior to the Transfer:

(1) Borrower has submitted to Lender all information required by Lender to make the determination required by this Section 11.03(a);

(2) no Event of Default has occurred and is continuing, and no event which, with the giving of written notice or the passage of time, or both, would constitute an Event of Default has occurred and is continuing;

(3) Lender determines that:

(A) the proposed new borrower, new key principal, and any other new guarantor fully satisfy all of Lender's then-applicable borrower, key principal, or guarantor eligibility, credit, management, and other loan underwriting standards, which shall include an analysis of (i) the previous relationships between Lender and the proposed new borrower, new key principal, new guarantor, and any Person in Control of them, and the organization of the new borrower, new key principal, and new guarantor (if applicable), and (ii) the operating and financial performance of the Mortgaged Property, including physical condition and occupancy;

(B) none of the proposed new borrower, new key principal, and any new guarantor, or any owners of the proposed new borrower, new key principal, and any new guarantor, are a Prohibited Person; and

(C) none of the proposed new borrower, new key principal, and any new guarantor (if any of such are entities) shall have an organizational existence termination date that ends before the Maturity Date;

(4) [reserved];

(5) the proposed new borrower has:

(A) executed an assumption agreement acceptable to Lender that, among other things, requires the proposed new borrower to assume and perform all obligations of Borrower (or any other transferor), and that may require that the new borrower comply with any provisions of any Loan Document that previously may have been waived by Lender for Borrower, subject to the terms of Section 11.03(g);

(B) if required by Lender, delivered to the Title Company for filing and/or recording in all applicable jurisdictions, all applicable Loan Documents including the assumption agreement to correctly evidence the assumption and the confirmation, continuation, perfection, and priority of the Liens created hereunder and under the other Loan Documents; and

(C) delivered to Lender a “date-down” endorsement to the Title Policy acceptable to Lender (or a new title insurance policy if a “date-down” endorsement is not available);

(6) one or more individuals or entities acceptable to Lender as new guarantors have executed and delivered to Lender:

(A) an assumption agreement acceptable to Lender that requires the new guarantor to assume and perform all obligations of Guarantor under any Guaranty given in connection with the Mortgage Loan; or

(B) a substitute Non-Recourse Guaranty and other substitute guaranty in a form acceptable to Lender;

(7) Lender has reviewed and approved the Transfer documents;

(8) Lender has received the fees described in Section 11.03(g); and

(9) Borrower and Property Operator have executed a new SASA required by Lender.

(b) Transfers to Key Principal-Owned Affiliates or Guarantor-Owned Affiliates.

(1) Except as otherwise covered in Section 11.03(b)(2) below, Transfers of direct or indirect ownership interests in Borrower or Affiliated Property Operator to Key Principal or Guarantor, or to a transferee through which Key Principal or Guarantor (as applicable) Controls Borrower or Affiliated Property Operator, with the same rights and abilities as Key Principal or Guarantor (as applicable) Controls Borrower or Affiliated Property Operator immediately prior to the date of such Transfer, shall be consented to by Lender if:

(A) such Transfer satisfies the applicable requirements of Section 11.03(a), other than Section 11.03(a)(5); and

(B) after giving effect to any such Transfer, each Key Principal or Guarantor (as applicable) continues to own not less than fifty percent (50%) of such Key Principal's or Guarantor's (as applicable) direct or indirect ownership interests in Borrower and Affiliated Property Operator that existed on the Effective Date.

(2) Transfers of direct or indirect interests in Borrower or Affiliated Property Operator held by a Key Principal or Guarantor to other Key Principals or Guarantors, as applicable, shall be consented to by Lender if such Transfer satisfies the following conditions:

(A) the Transfer does not cause a change in the Control of Borrower or Affiliated Property Operator; and

(B) the transferor Key Principal or Guarantor maintains the same right and ability to Control Borrower and Affiliated Property Operator as existed prior to the Transfer.

If the conditions set forth in this Section 11.03(b) are satisfied, the Transfer Fee shall be waived provided Borrower shall pay the Review Fee and out-of-pocket costs set forth in Section 11.03(g).

(c) Estate Planning.

Notwithstanding the provisions of Section 11.02(b)(2), so long as (1) the Transfer does not cause a change in the Control of Borrower or Affiliated Property Operator, and (2) the transferor Key Principal or Guarantor, as applicable, maintains the same right and ability to Control Borrower and Affiliated Property Operator as existed prior to the Transfer, Lender shall consent to Transfers of direct or indirect ownership interests in Borrower or Affiliated Property Operator held by a Key Principal or Guarantor, and Transfers of direct or indirect ownership interests, in an entity Key Principal or entity Guarantor to:

(A) Immediate Family Members of such Key Principal or Guarantor each of whom must have obtained the legal age of majority;

(B) United States domiciled trusts established for the benefit of the transferor Key Principal or transferor Guarantor, or Immediate Family Members of the transferor Key Principal or the transferor Guarantor; or

(C) partnerships or limited liability companies of which the partners or members, respectively, are comprised entirely of (i) such Key Principal or Guarantor and Immediate Family Members (each of whom must have obtained the legal age of majority) of such Key Principal or Guarantor, (ii) Immediate Family Members (each of whom must have obtained the legal age of majority) of such Key Principal or Guarantor, or (iii) United States domiciled trusts established for the benefit of the transferor Key Principal or transferor Guarantor, or Immediate Family Members of the transferor Key Principal or the transferor Guarantor.

If the conditions set forth in this Section 11.03(c) are satisfied, the Transfer Fee shall be waived provided Borrower shall pay the Review Fee and out-of-pocket costs set forth in Section 11.03(g).

(d) Termination or Revocation of Trust.

If any of Borrower, Affiliated Property Operator, Guarantor, or Key Principal is a trust, or if Control of Borrower, Affiliated Property Operator, Guarantor, or Key Principal is Transferred or if a Restricted Ownership Interest in Borrower, Affiliated Property Operator, Guarantor, or Key Principal would be Transferred due to the termination or revocation of a trust, the termination or revocation of such trust is an unpermitted Transfer; provided that the termination or revocation of the trust due to the death of an individual trustor shall not be considered an unpermitted Transfer so long as:

(1) Lender is notified within thirty (30) days of the death; and

(2) such Borrower, Affiliated Property Operator, Guarantor, Key Principal, or other Person, as applicable, is replaced with an individual or entity acceptable to Lender, in accordance with the provisions of Section 11.03(a) within ninety (90) days of the date of the death causing the termination or revocation.

If the conditions set forth in this Section 11.03(d) are satisfied, the Transfer Fee shall be waived; provided Borrower shall pay the Review Fee and out-of-pocket costs set forth in Section 11.03(g).

(e) Death of Key Principal or Guarantor; Transfer Due to Death.

(1) If a Key Principal or Guarantor that is a natural person dies, or if Control of Borrower, Affiliated Property Operator, Guarantor, or Key Principal is Transferred, or if a Restricted Ownership Interest in Borrower, Affiliated Property Operator, Guarantor, or Key Principal would be Transferred as a result of the death of a Person (except in the case of trusts which is addressed in Section 11.03(d)), Borrower must notify Lender in writing within ninety (90) days in the event of such death. Unless waived in writing by Lender, the deceased shall be replaced by an individual or entity within one hundred eighty (180) days, subject to Borrower's satisfaction of the following conditions:

(A) Borrower has submitted to Lender all information required by Lender to make the determination required by this Section 11.03(e);

(B) Lender determines that:

(i) the proposed new key principal and any other new guarantor (or Person Controlling such new key principal or new guarantor) fully satisfies all of Lender's then-applicable key principal or guarantor eligibility, credit, management, and other loan underwriting standards (including any standards with respect to previous relationships between Lender and the proposed new key principal and new guarantor (or Person Controlling such new key principal or new guarantor) and the organization of the new key principal and new guarantor (if applicable));

(ii) none of the proposed new key principal or any new guarantor, or any owners of the proposed new key principal or any new guarantor, is a Prohibited Person; and

(iii) none of the proposed new key principal or any new guarantor (if any of such are entities) shall have an organizational existence termination date that ends before the Maturity Date; and

(C) if applicable, one or more individuals or entities acceptable to Lender as new guarantors have executed and delivered to Lender:

(i) an assumption agreement acceptable to Lender that requires the new guarantor to assume and perform all obligations of Guarantor under any Guaranty given in connection with the Mortgage Loan; or

(ii) a substitute Non-Recourse Guaranty and other substitute guaranty in a form acceptable to Lender.

(2) In the event a replacement Key Principal, Guarantor, or other Person is required by Lender due to the death described in this Section 11.03(e), and such

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replacement has not occurred within such period, the period for replacement may be extended by Lender to a date not more than one year from the date of such death; however, Lender may require as a condition to any such extension that:

(A) any then-current Property Operator be replaced with a Property Operator reasonably acceptable to Lender (or if a Property Operator has not been previously engaged, a Property Operator reasonably acceptable to Lender be engaged); or

(B) a lockbox agreement or similar cash management arrangement (with the Property Operator) reasonably acceptable to Lender during such extended replacement period be instituted.

If the conditions set forth in this Section 11.03(e) are satisfied, the Transfer Fee shall be waived, provided Borrower shall pay the Review Fee and out-of-pocket costs set forth in Section 11.03(g).

(f) Bankruptcy of Guarantor.

(1) Upon the occurrence of any Guarantor Bankruptcy Event, unless waived in writing by Lender, the applicable Guarantor shall be replaced by an individual or entity within ninety (90) days of such Guarantor Bankruptcy Event, subject to Borrower's satisfaction of the following conditions:

(A) Borrower has submitted to Lender all information required by Lender to make the determination required by this Section 11.03(f);

(B) Lender determines that:

(i) the proposed new guarantor fully satisfies all of Lender's then-applicable guarantor eligibility, credit, management, and other loan underwriting standards (including any standards with respect to previous relationships between Lender and the proposed new guarantor and the organization of the new guarantor (if applicable));

(ii) no new guarantor is a Prohibited Person; and

(iii) no new guarantor (if any of such are entities) shall have an organizational existence termination date that ends before the Maturity Date; and

(C) one or more individuals or entities acceptable to Lender as new guarantors have executed and delivered to Lender:

(i) an assumption agreement acceptable to Lender that requires the new guarantor to assume and perform all obligations of Guarantor under any Guaranty given in connection with the Mortgage Loan; or

(ii) a substitute Non-Recourse Guaranty and other substitute guaranty in a form acceptable to Lender.

(2) In the event a replacement Guarantor is required by Lender due to the Guarantor Bankruptcy Event described in this Section 11.03(f), and such replacement has not occurred within such period, the period for replacement may be extended by Lender in its discretion; however, Lender may require as a condition to any such extension that:

(A) any then-current Property Operator be replaced with a Property Operator reasonably acceptable to Lender (or if a Property Operator has not been previously engaged, a Property Operator reasonably acceptable to Lender be engaged); or

(B) a lockbox agreement or similar cash management arrangement (with the Property Operator) reasonably acceptable to Lender during such extended replacement period be instituted.

If the conditions set forth in this Section 11.03(f) are satisfied, the Transfer Fee shall be waived, provided Borrower shall pay the Review Fee and out-of-pocket costs set forth in Section 11.03(g).

(g) Further Conditions to Transfers and Assumption.

(1) In connection with any Transfer of the Mortgaged Property, or an ownership interest in Borrower, Affiliated Property Operator, Key Principal, or Guarantor for which Lender's approval is required under this Loan Agreement (including Section 11.03(a)), Lender may, as a condition to any such approval, require:

(A) additional collateral, guaranties, or other credit support to mitigate any risks concerning the proposed transferee or the performance or condition of the Mortgaged Property;

(B) amendment of the Loan Documents to delete or modify any specially negotiated terms or provisions previously granted for the exclusive benefit of original Borrower, Affiliated Property Operator, Key Principal, or Guarantor and to restore the original provisions of the standard Fannie Mae form multifamily loan documents, to the extent such provisions were previously modified; or

(C) a modification to the amounts required to be deposited into the Reserve/Escrow Account pursuant to the terms of Section 13.02(a)(3)(B).

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(2) In connection with any request by Borrower for consent to a Transfer, Borrower shall pay to Lender upon demand:

- (A) the Transfer Fee (to the extent charged by Lender);
- (B) the Review Fee (regardless of whether Lender approves or denies such request); and
- (C) all of Lender's out-of-pocket costs (including reasonable attorneys' fees) incurred in reviewing the Transfer request, regardless of whether Lender approves or denies such request.

ARTICLE 12 - IMPOSITIONS

Section 12.01 Representations and Warranties.

The representations and warranties made by Borrower to Lender in this Section 12.01 are made as of the Effective Date and are true and correct except as disclosed on the Exceptions to Representations and Warranties Schedule.

(a) Payment of Taxes, Assessments, and Other Charges.

Borrower has:

- (1) paid (or with the approval of Lender, established an escrow fund sufficient to pay when due and payable) all amounts and charges relating to the Mortgaged Property that have become due and payable before any fine, penalty interest, lien, or costs may be added thereto, including Impositions, leasehold payments, and ground rents;
- (2) paid all Taxes for the Mortgaged Property that have become due before any fine, penalty interest, lien, or costs may be added thereto pursuant to any notice of assessment received by Borrower and any and all taxes that have become due against Borrower before any fine, penalty interest, lien, or costs may be added thereto;
- (3) no knowledge of any basis for any additional assessments;
- (4) no knowledge of any presently pending special assessments against all or any part of the Mortgaged Property, or any presently pending special assessments against Borrower; and
- (5) not received any written notice of any contemplated special assessment against the Mortgaged Property, or any contemplated special assessment against Borrower.

Section 12.02 Covenants.

(a) Imposition Deposits, Taxes, and Other Charges.

Borrower shall:

(1) deposit the Imposition Deposits with Lender on each Payment Date (or on another day designated in writing by Lender) in amount sufficient, in Lender's discretion, to enable Lender to pay each Imposition before the last date upon which such payment may be made without any penalty or interest charge being added, plus an amount equal to no more than one-sixth (1/6) (or the amount permitted by applicable law) of the Impositions for the trailing twelve (12) months (calculated based on the aggregate annual Imposition costs divided by twelve (12) and multiplied by two (2));

(2) deposit with Lender, within ten (10) days after written notice from Lender (subject to applicable law), such additional amounts estimated by Lender to be reasonably necessary to cure any deficiency in the amount of the Imposition Deposits held for payment of a specific Imposition;

(3) except as set forth in Section 12.03(c) below, pay all Impositions, leasehold payments, ground rents, and Taxes when due and before any fine, penalty, interest, lien, or costs may be added thereto;

(4) promptly deliver to Lender a copy of all notices of, and invoices for, Impositions, and, if Borrower pays any Imposition directly, Borrower shall promptly furnish to Lender receipts evidencing such payments; and

(5) promptly deliver to Lender a copy of all notices of any special assessments and contemplated special assessments against the Mortgaged Property or Borrower.

Section 12.03 Mortgage Loan Administration Matters Regarding Impositions.

(a) Maintenance of Records by Lender.

Lender shall maintain records of the monthly and aggregate Imposition Deposits held by Lender for the purpose of paying Taxes, insurance premiums, and each other obligation of Borrower for which Imposition Deposits are required.

(b) Imposition Accounts.

All Imposition Deposits shall be held in an institution (which may be Lender, if Lender is such an institution) whose deposits or accounts are insured or guaranteed by a federal agency and which accounts meet the standards for custodial accounts as required by Lender from time to time. Lender shall not be obligated to open additional accounts, or deposit Imposition Deposits in additional institutions, when the amount of the Imposition Deposits exceeds the maximum

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amount of the federal deposit insurance or guaranty. No interest, earnings, or profits on the Imposition Deposits shall be paid to Borrower unless applicable law so requires. Imposition Deposits shall not be trust funds, nor shall they operate to reduce the Indebtedness, unless applied by Lender for that purpose in accordance with this Loan Agreement. For the purposes of 9-104(a)(3) of the UCC, Lender is the owner of the Imposition Deposits and shall be deemed a “customer” with sole control of the account holding the Imposition Deposits.

(c) Payment of Impositions; Sufficiency of Imposition Deposits.

Lender may pay an Imposition according to any bill, statement, or estimate from the appropriate public office or insurance company without inquiring into the accuracy of the bill, statement, or estimate or into the validity of the Imposition. Imposition Deposits shall be required to be used by Lender to pay Taxes, insurance premiums and any other individual Imposition only if:

- (1) no Event of Default exists;
- (2) Borrower has timely delivered to Lender all applicable bills or premium notices that it has received; and
- (3) sufficient Imposition Deposits are held by Lender for each Imposition at the time such Imposition becomes due and payable.

Lender shall have no liability to Borrower or any other Person for failing to pay any Imposition if any of the conditions are not satisfied. If at any time the amount of the Imposition Deposits held for payment of a specific Imposition exceeds the amount reasonably deemed necessary by Lender to be held in connection with such Imposition, the excess may be credited against future installments of Imposition Deposits for such Imposition.

(d) Imposition Deposits Upon Event of Default.

If an Event of Default has occurred and is continuing, Lender may apply any Imposition Deposits, in such amount and in such order as Lender determines, to pay any Impositions or as a credit against the Indebtedness.

(e) Contesting Impositions.

Other than insurance premiums, Borrower may contest, at its expense, by appropriate legal proceedings, the amount or validity of any Imposition if:

- (1) Borrower notifies Lender of the commencement or expected commencement of such proceedings;
- (2) Lender determines that the Mortgaged Property is not in danger of being sold or forfeited;

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(3) Borrower deposits with Lender (or the applicable Governmental Authority if required by applicable law) reserves sufficient to pay the contested Imposition, if required by Lender (or the applicable Governmental Authority);

(4) Borrower furnishes whatever additional security is required in the proceedings or is reasonably requested in writing by Lender; and

(5) Borrower commences, and at all times thereafter diligently prosecutes, such contest in good faith until a final determination is made by the applicable Governmental Authority.

(f) Release to Borrower.

Upon payment in full of all sums secured by the Security Instrument and this Loan Agreement and release by Lender of the lien of the Security Instrument, Lender shall disburse to Borrower the balance of any Imposition Deposits then on deposit with Lender.

ARTICLE 13 - REPLACEMENT RESERVE AND REPAIRS

Section 13.01 Covenants.

(a) Initial Deposits to Replacement Reserve Account and Repairs Escrow Account.

On the Effective Date, Borrower shall pay to Lender:

(1) the Initial Replacement Reserve Deposit for deposit into the Replacement Reserve Account; and

(2) the Repairs Escrow Deposit for deposit into the Repairs Escrow Account.

(b) Monthly Replacement Reserve Deposits.

Borrower shall deposit the applicable Monthly Replacement Reserve Deposit into the Replacement Reserve Account on each Payment Date.

(c) Payment for Replacements and Repairs.

Borrower shall:

(1) pay all invoices for the Replacements and Repairs, regardless of whether funds on deposit in the Replacement Reserve Account or the Repairs Escrow Account, as applicable, are sufficient, prior to any request by Borrower for disbursement from the Replacement Reserve Account or the Repairs Escrow Account, as applicable (unless Lender has agreed to issue joint checks in connection with a particular Replacement or Repair);

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(2) pay all applicable fees and charges of any Governmental Authority on account of the Replacements and Repairs, as applicable; and

(3) provide evidence satisfactory to Lender of completion of the Replacements and any Required Repairs (within the Completion Period or within such other period or by such other date set forth in the Required Repair Schedule and any Borrower Requested Repairs and Additional Lender Repairs (by the date specified by Lender for any such Borrower Requested Repairs or Additional Lender Repairs)).

(d) Assignment of Contracts for Replacements and Repairs.

Borrower shall collaterally assign to Lender as additional security any contract or subcontract for Replacements or Repairs, upon Lender's written request, on a form of assignment approved by Lender.

(e) Indemnification.

If Lender elects to exercise its rights under Section 14.03 due to Borrower's failure to timely commence or complete any Replacements or Repairs, Borrower shall indemnify and hold Lender harmless from and against any and all actions, suits, claims, demands, liabilities, losses, damages, obligations, and costs or expenses, including litigation costs and reasonable attorneys' fees, arising from or in any way connected with the performance by Lender of the Replacements or Repairs or investment of the Reserve/Escrow Account Funds; provided that Borrower shall have no indemnity obligation if such actions, suits, claims, demands, liabilities, losses, damages, obligations, and costs or expenses, including litigation costs and reasonable attorneys' fees, arise as a result of the willful misconduct or gross negligence of Lender, Lender's agents, employees, or representatives as determined by a court of competent jurisdiction pursuant to a final non-appealable court order.

(f) Amendments to Loan Documents.

Subject to Section 5.02, Borrower shall execute and deliver to Lender, upon written request, an amendment to this Loan Agreement, the Security Instrument, and any other Loan Document deemed necessary or desirable to perfect Lender's lien upon any portion of the Mortgaged Property for which Reserve/Escrow Account Funds were expended.

(g) Administrative Fees and Expenses.

Borrower shall pay to Lender:

(1) by the date specified in the applicable invoice, the Repairs Escrow Account Administrative Fee and the Replacement Reserve Account Administration Fee for Lender's services in administering the Repairs Escrow Account and Replacement Reserve Account and investing the funds on deposit in the Repairs Escrow Account and the Replacement Reserve Account, respectively;

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(2) upon demand, a reasonable inspection fee, not exceeding the Maximum Inspection Fee, for each inspection of the Mortgaged Property by Lender in connection with a Repair or Replacement, plus all other reasonable costs and out-of-pocket expenses relating to such inspections; and

(3) upon demand, all reasonable fees charged by any engineer, architect, inspector or other person inspecting the Mortgaged Property on behalf of Lender for each inspection of the Mortgaged Property in connection with a Repair or Replacement, plus all other reasonable costs and out-of-pocket expenses relating to such inspections.

Section 13.02 Mortgage Loan Administration Matters Regarding Reserves.

(a) Accounts, Deposits, and Disbursements.

(1) Custodial Accounts.

(A) The Replacement Reserve Account shall be an interest-bearing account that meets the standards for custodial accounts as required by Lender from time to time. Lender shall not be responsible for any losses resulting from the investment of the Replacement Reserve Deposits or for obtaining any specific level or percentage of earnings on such investment. All interest, if any, earned on the Replacement Reserve Deposits shall be added to and become part of the Replacement Reserve Account; provided, however, if applicable law requires, and so long as no Event of Default has occurred and is continuing under any of the Loan Documents, Lender shall pay to Borrower the interest earned on the Replacement Reserve Account not less frequently than the Replacement Reserve Account Interest Disbursement Frequency. In no event shall Lender be obligated to disburse funds from the Reserve/Escrow Account if an Event of Default has occurred and is continuing.

(B) Lender shall not be obligated to deposit the Repairs Escrow Deposits into an interest-bearing account.

(2) Disbursements by Lender Only.

Only Lender or a designated representative of Lender may make disbursements from the Replacement Reserve Account and the Repairs Escrow Account. Except as provided in Section 13.02(a)(8), disbursements shall only be made upon Borrower request and after satisfaction of all conditions for disbursement.

(3) Adjustment to Deposits.

(A) Mortgage Loan Terms Exceeding Ten (10) Years.

If the Loan Term exceeds ten (10) years (or five (5) years in the case of any Mortgaged Property that is an “affordable housing property” as indicated on the Summary of Loan Terms), a property condition assessment shall be ordered by Lender for the Mortgaged Property at the expense of Borrower (which expense may be paid out of the Replacement Reserve Account if excess funds are available). The property condition assessment shall be performed no earlier than the sixth (6th) month and no later than the ninth (9th) month of the tenth (10th) Loan Year and every tenth (10th) Loan Year thereafter if the Loan Term exceeds twenty (20) years (or the fifth (5th) Loan Year in the case of any Mortgaged Property that is an “affordable housing property” as indicated on the Summary of Loan Terms and every fifth (5th) Loan Year thereafter if the Loan Term exceeds ten (10) years). After review of the property condition assessment, the amount of the Monthly Replacement Reserve Deposit may be adjusted by Lender for the remaining Loan Term by written notice to Borrower so that the Monthly Replacement Reserve Deposits are sufficient to fund the Replacements as and when required and/or the amount to be held in the Repairs Escrow Account may be adjusted by Lender so that the Repairs Escrow Deposit is sufficient to fund the Repairs as and when required.

(B) Transfers.

In connection with any Transfer of the Mortgaged Property, the Facility Operating Agreement, or any Transfer of an ownership interest in Borrower, Affiliated Property Operator, Guarantor, or Key Principal that requires Lender’s consent, Lender may review the amounts on deposit, if any, in the Replacement Reserve Account or the Repairs Escrow Account, the amount of the Monthly Replacement Reserve Deposit and the likely repairs and replacements required by the Mortgaged Property, and the related contingencies which may arise during the remaining Loan Term. Based upon that review, Lender may require an additional deposit to the Replacement Reserve Account or the Repairs Escrow Account, or an increase in the amount of the Monthly Replacement Reserve Deposit as a condition to Lender’s consent to such Transfer.

(4) Insufficient Funds.

Lender may, upon thirty (30) days prior written notice to Borrower, require an additional deposit(s) to the Replacement Reserve Account or Repairs Escrow Account, or an increase in the amount of the Monthly Replacement Reserve Deposit, if Lender determines that the amounts on deposit in either the Replacement Reserve Account or the Repairs Escrow Account are not sufficient to cover the costs for Required Repairs or Required Replacements or, pursuant to the terms of Section 13.02(a)(9), not sufficient to

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cover the costs for Borrower Requested Repairs, Additional Lender Repairs, Borrower Requested Replacements, or Additional Lender Replacements. Borrower's agreement to complete the Replacements or Repairs as required by this Loan Agreement shall not be affected by the insufficiency of any balance in the Replacement Reserve Account or the Repairs Escrow Account, as applicable.

(5) Disbursements for Replacements and Repairs.

(A) Disbursement requests may only be made after completion of the applicable Replacements and only to reimburse Borrower for the actual approved costs of the Replacements. Lender shall not disburse from the Replacement Reserve Account the costs of routine maintenance to the Mortgaged Property or for costs which are to be reimbursed from the Repairs Escrow Account or any similar account. Disbursement from the Replacement Reserve Account shall not be made more frequently than the Maximum Replacement Reserve Disbursement Interval. Other than in connection with a final request for disbursement, disbursements from the Replacement Reserve Account shall not be less than the Minimum Replacement Reserve Disbursement Amount.

(B) Disbursement requests may only be made after completion of the applicable Repairs and only to reimburse Borrower for the actual cost of the Repairs, up to the Maximum Repair Cost. Lender shall not disburse any amounts which would cause the funds remaining in the Repairs Escrow Account after any disbursement (other than with respect to the final disbursement) to be less than the Maximum Repair Cost of the then-current estimated cost of completing all remaining Repairs. Lender shall not disburse from the Repairs Escrow Account the costs of routine maintenance to the Mortgaged Property or for costs which are to be reimbursed from the Replacement Reserve Account or any similar account. Disbursement from the Repairs Escrow Account shall not be made more frequently than the Maximum Repair Disbursement Interval. Other than in connection with a final request for disbursement, disbursements from the Repairs Escrow Account shall not be less than the Minimum Repairs Disbursement Amount.

(6) Disbursement Requests.

Each request by Borrower for disbursement from the Replacement Reserve Account or the Repairs Escrow Account must be in writing, must specify the Replacement or Repair for which reimbursement is requested (provided that for any Borrower Requested Replacements, Borrower Requested Repairs, Additional Lender Replacements, and Additional Lender Repairs, Lender shall have approved the use of the Reserve/Escrow Account Funds for such replacements or repairs pursuant to the terms of Section 13.02(a)(9)), and must:

(A) if applicable, specify the quantity and price of the items or materials purchased, grouped by type or category;

(B) if applicable, specify the cost of all contracted labor or other services involved in the Replacement or Repair for which such request for disbursement is made;

(C) if applicable, include copies of invoices for all items or materials purchased and all contracted labor or services provided;

(D) include evidence of payment of such Replacement or Repair satisfactory to Lender (unless Lender has agreed to issue joint checks in connection with a particular Repair or Replacement as provided in this Loan Agreement); and

(E) contain a certification by Borrower and, if applicable (and if reasonably requested by Lender), from Property Operator that the Repair or Replacement has been completed lien free and in a good and workmanlike manner, in accordance with any plans and specifications previously approved by Lender (if applicable) and in compliance with all applicable laws, ordinances, rules, and regulations of any Governmental Authority having jurisdiction over the Mortgaged Property, and otherwise in accordance with the provisions of this Loan Agreement.

(7) Conditions to Disbursement.

Lender may require any or all of the following at the expense of Borrower as a condition to disbursement of funds from the Replacement Reserve Account or the Repairs Escrow Account (provided that for any Borrower Requested Replacements, Borrower Requested Repairs, Additional Lender Replacements, and Additional Lender Repairs, Lender shall have approved the use of the Reserve/Escrow Account Funds for such replacements or repairs pursuant to the terms of Section 13.02(a)(9)):

(A) an inspection by Lender of the Mortgaged Property and the applicable Replacement or Repair;

(B) an inspection or certificate of completion by an appropriate independent qualified professional (such as an architect, engineer or property inspector, depending on the nature of the Repair or Replacement) selected by Lender;

(C) either:

(i) a search of title to the Mortgaged Property effective to the date of disbursement; or

(ii) a “date-down” endorsement to Lender’s Title Policy (or a new Lender’s Title Policy if a “date-down” is not available) extending the effective date of such policy to the date of disbursement, and showing no Liens other than (1) Permitted Encumbrances, (2) liens which Borrower is diligently contesting in good faith that have been bonded off to the satisfaction of Lender, or (3) mechanics’ or materialmen’s liens which attach automatically under the laws of any Governmental Authority upon the commencement of any work upon, or delivery of any materials to, the Mortgaged Property and for which Borrower is not delinquent in the payment for any such work or materials; and

(D) an acknowledgement of payment, waiver of claims, and release of lien for work performed and materials supplied from each contractor, subcontractor or materialman in accordance with the requirements of applicable law and covering all work performed and materials supplied (including equipment and fixtures) for the Mortgaged Property by that contractor, subcontractor, or materialman through the date covered by the disbursement request (or, in the event that payment to such contractor, subcontractor, or materialman is to be made by a joint check, the release of lien shall be effective through the date covered by the previous disbursement).

(8) Joint Checks for Periodic Disbursements.

Lender may, upon Borrower’s written request, issue joint checks, payable to Borrower and the applicable supplier, materialman, mechanic, contractor, subcontractor, or other similar party, if:

(A) the cost of the Replacement or Repair exceeds the Replacement Threshold or the Repair Threshold, as applicable, and the contractor performing such Replacement or Repair requires periodic payments pursuant to the terms of the applicable written contract;

(B) the contract for such Repair or Replacement requires payment upon completion of the applicable portion of the work;

(C) Borrower makes the disbursement request after completion of the applicable portion of the work required to be completed under such contract;

(D) the materials for which the request for disbursement has been made are on site at the Mortgaged Property and are properly secured or installed;

(E) Lender determines that the remaining funds in the Replacement Reserve Account designated for such Replacement, or in the Repairs Escrow Account designated for such Repair, as applicable, are sufficient to pay such costs and the then-current estimated cost of completing all remaining Required

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Replacements or Required Repairs (at the Maximum Repair Cost), as applicable, and any other Borrower Requested Replacements, Borrower Requested Repairs, Additional Lender Replacements, or Additional Lender Repairs that have been previously approved by Lender;

(F) each supplier, materialman, mechanic, contractor, subcontractor, or other similar party receiving payments shall have provided, if requested in writing by Lender, a waiver of liens with respect to amounts which have been previously paid to them; and

(G) all other conditions for disbursement have been satisfied.

(9) Replacements and Repairs Other than Required Replacements and/or Required Repairs.

(A) Borrower Requested Replacements and Borrower Requested Repairs.

Borrower may submit a disbursement request from the Replacement Reserve Account or the Repairs Escrow Account to reimburse Borrower for any Borrower Requested Replacement or Borrower Requested Repair. The disbursement request must be in writing and include an explanation for such request. Lender shall make disbursements for Borrower Requested Replacements or Borrower Requested Repairs if:

(i) they are of the type intended to be covered by the Replacement Reserve Account or the Repairs Escrow Account, as applicable;

(ii) the costs are commercially reasonable;

(iii) the amount of funds in the Replacement Reserve Account or Repairs Escrow Account, as applicable, is sufficient to pay such costs and the then-current estimated cost of completing all remaining Required Replacements or Required Repairs (at the Maximum Repair Cost), as applicable, and any other Borrower Requested Replacements, Borrower Requested Repairs, Additional Lender Replacements or Additional Lender Repairs that have been previously approved by Lender; and

(iv) all conditions for disbursement from the Replacement Reserve Account or Repairs Escrow Account, as applicable, have been satisfied.

Nothing in this Loan Agreement shall limit Lender's right to require an additional deposit to the Replacement Reserve Account or an increase to the Monthly

Replacement Reserve Deposit in connection with any such Borrower Requested Replacements, or an additional deposit to the Repairs Escrow Account for any such Borrower Requested Repairs.

(B) Additional Lender Replacements and Additional Lender Repairs.

Lender may require, as set forth in Section 6.02(b), Section 6.03(c), or otherwise from time to time, upon written notice to Borrower, that Borrower make Additional Lender Replacements or Additional Lender Repairs. Lender shall make disbursements from the Replacement Reserve Account for Additional Lender Replacements or from the Repairs Escrow Account for Additional Lender Repairs, as applicable, if:

- (i) the costs are commercially reasonable;
- (ii) the amount of funds in the Replacement Reserve Account or the Repairs Escrow Account, as applicable, is sufficient to pay such costs and the then-current estimated cost of completing all remaining Required Replacements or Required Repairs (at the Maximum Repair Cost), as applicable, and any other Borrower Requested Replacements, Borrower Requested Repairs, Additional Lender Replacements, or Additional Lender Repairs that have been previously approved by Lender; and
- (iii) all conditions for disbursement from the Replacement Reserve Account or Repairs Escrow Account, as applicable, have been satisfied.

Nothing in this Loan Agreement shall limit Lender's right to require an additional deposit to the Replacement Reserve Account or an increase to the Monthly Replacement Reserve Deposit for any such Additional Lender Replacements or an additional deposit to the Repairs Escrow Account for any such Additional Lender Repair.

(10) Excess Costs.

In the event any Replacement or Repair exceeds the approved cost set forth on the Required Replacement Schedule for Replacements, or the Maximum Repair Cost for Repairs, Borrower may submit a disbursement request to reimburse Borrower for such excess cost. The disbursement request must be in writing and include an explanation for such request. Lender shall make disbursements from the Replacement Reserve Account or the Repairs Escrow Account, as applicable, if:

- (A) the excess cost is commercially reasonable;

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(B) the amount of funds in the Replacement Reserve Account or the Repairs Escrow Account, as applicable, is sufficient to pay such costs and the then-current estimated cost of completing all remaining Required Replacements or Required Repairs (at the Maximum Repair Cost), as applicable, and any other Borrower Requested Replacements, Borrower Requested Repairs, Additional Lender Replacements, or Additional Lender Repairs that have been previously approved by Lender; and

(C) all conditions for disbursement from the Replacement Reserve Account or the Repairs Escrow Account have been satisfied.

(11) Final Disbursements.

Upon completion of all Repairs in accordance with this Loan Agreement and so long as no Event of Default has occurred and is continuing, Lender shall disburse to Borrower any amounts then remaining in the Repairs Escrow Account. Upon payment in full of the Indebtedness and release by Lender of the lien of the Security Instrument, Lender shall disburse to Borrower any and all amounts then remaining in the Replacement Reserve Account and the Repairs Escrow Account (if not previously released).

(b) Approvals of Contracts; Assignment of Claims.

Lender retains the right to approve all contracts or work orders with materialmen, mechanics, suppliers, subcontractors, contractors, or other parties providing labor or materials in connection with the Replacements or Repairs. Notwithstanding Borrower's assignment in the Security Instrument (or Property Operator's assignment pursuant to the SASA) of its rights and claims against all Persons supplying labor or materials in connection with the Replacement or Repairs, Lender will not pursue any such right or claim unless an Event of Default has occurred and is continuing or as otherwise provided in Section 14.03(c).

(c) Delays and Workmanship.

If any work for any Replacement or Repair has not timely commenced, has not been timely performed in a workmanlike manner, or has not been timely completed in a workmanlike manner, Lender may, without notice to Borrower:

- (1) withhold disbursements from the Replacement Reserve Account or Repairs Escrow Account for such unsatisfactory Replacement or Repair, as applicable;
- (2) proceed under existing contracts or contract with third parties to make or complete such Replacement or Repair;

(3) apply the funds in the Replacement Reserve Account or Repairs Escrow Account toward the labor and materials necessary to make or complete such Replacement or Repair, as applicable; or

(4) exercise any and all other remedies available to Lender under this Loan Agreement or any other Loan Document, including any remedies otherwise available upon an Event of Default pursuant to the terms of Section 14.02.

To facilitate Lender's completion or making of such Replacements or Repairs, Lender shall have the right to enter onto the Mortgaged Property and perform any and all work and labor necessary to make or complete the Replacements or Repairs and employ watchmen to protect the Mortgaged Property from damage. All funds so expended by Lender shall be deemed to have been advanced to Borrower, shall be part of the Indebtedness and shall be secured by the Security Instrument and this Loan Agreement.

(d) Appointment of Lender as Attorney-In-Fact.

Borrower hereby authorizes and appoints Lender as attorney-in-fact pursuant to Section 14.03(c).

(e) No Lender Obligation.

Nothing in this Loan Agreement shall:

(1) make Lender responsible for making or completing the Replacements or Repairs;

(2) require Lender to expend funds, whether from the Replacement Reserve Account, the Repairs Escrow Account, or otherwise, to make or complete any Replacement or Repair;

(3) obligate Lender to proceed with the Replacements or Repairs; or

(4) obligate Lender to demand from Borrower additional sums to make or complete any Replacement or Repair.

(f) No Lender Warranty.

Lender's approval of any plans for any Replacement or Repair, release of funds from the Replacement Reserve Account or Repairs Escrow Account, inspection of the Mortgaged Property by Lender or its agents, representatives, or designees, or other acknowledgment of completion of any Replacement or Repair in a manner satisfactory to Lender shall not be deemed an acknowledgment or warranty to any person that the Replacement or Repair has been completed in accordance with applicable building, zoning, or other codes, ordinances, statutes,

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laws, regulations, or requirements of any governmental agency, such responsibility being at all times exclusively that of Borrower.

ARTICLE 14 - DEFAULTS/REMEDIES

Section 14.01 Events of Default.

The occurrence of any one or more of the following in this Section 14.01 shall constitute an Event of Default under this Loan Agreement.

(a) Automatic Events of Default.

Any of the following shall constitute an automatic Event of Default:

- (1) any failure to pay or deposit when due any amount required by the Note, this Loan Agreement or any other Loan Document;
- (2) any failure by Borrower to maintain the insurance coverage required by any Loan Document;
- (3) any failure by Borrower to comply with the provisions of Section 4.02(d) relating to its single asset status;
- (4) if any warranty, representation, certification, or statement of Borrower, Guarantor, or Key Principal in this Loan Agreement or any of the other Loan Documents is false, inaccurate, or misleading in any material respect when made;
- (5) fraud, gross negligence, willful misconduct, or material misrepresentation or material omission by or on behalf of Borrower, Affiliated Property Operator, Guarantor, or Key Principal or any of their officers, directors, trustees, partners, members, or managers in connection with:
 - (A) the application for, or creation of, the Indebtedness;
 - (B) any financial statement, rent roll, or other report or information provided to Lender during the term of the Mortgage Loan; or
 - (C) any request for Lender's consent to any proposed action, including a request for disbursement of Reserve/Escrow Account Funds or Collateral Account Funds;
- (6) the occurrence of any Transfer not permitted by the Loan Documents;
- (7) the occurrence of a Bankruptcy Event;

(8) the commencement of a forfeiture action or other similar proceeding, whether civil or criminal, which, in Lender's reasonable judgment, could result in a forfeiture of the Mortgaged Property or otherwise materially impair the lien created by this Loan Agreement or the Security Instrument or Lender's interest in the Mortgaged Property;

(9) if Borrower, Affiliated Property Operator, Guarantor, or Key Principal is a trust, or if Control of Borrower, Affiliated Property Operator, Guarantor, or Key Principal is Transferred or if a Restricted Ownership Interest in Borrower, Affiliated Property Operator, Guarantor, or Key Principal would be Transferred due to the termination or revocation of a trust, the termination or revocation of such trust, except as set forth in Section 11.03(d);

(10) any failure by Borrower to complete any Repair related to fire, life, or safety issues in accordance with the terms of this Loan Agreement within the Completion Period (or such other date set forth on the Required Repair Schedule or otherwise required by Lender in writing for such Repair);

(11) any exercise by the holder of any other debt instrument secured by a mortgage, deed of trust, or deed to secure debt on the Mortgaged Property or any interest therein of a right to declare all amounts due under that debt instrument immediately due and payable;

(12) amendment or modification of Facility Operating Agreement not permitted by the Loan Documents;

(13) any failure by Borrower or any Property Operator to comply with the use and License requirements set forth in any Loan Document or as required by any applicable law;

(14) a Transfer or change in the holder of the Licenses;

(15) a termination of any Facility Operating Agreement;

(16) (A) any loss by Borrower or any Property Operator of any License, or (B) any failure by Borrower or any Property Operator to comply strictly with any consent order or decree or to correct, within the time deadlines set by any federal, state, or local licensing agency, any deficiency where such failure results, or under applicable laws and regulations, is reasonably likely to result, in an action by such agency with respect to the Mortgaged Property that may have a material adverse effect on Borrower, any Property Operator, or the management and operations of the Mortgaged Property or Borrower's or Property Operator's interest in the Mortgaged Property, including a termination, revocation, or suspension of any Licenses;

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(17) if Borrower or any Property Operator:

(A) ceases to operate the Mortgaged Property as a Seniors Housing Facility or takes any action or permits to exist any condition that causes the Mortgaged Property to no longer be classified as a Seniors Housing Facility;

(B) ceases to provide such kitchens, separate bathrooms, and areas for eating, sitting, and sleeping in each independent living or assisted living unit or at a minimum, central bathing and dining facilities for Alzheimer's/dementia care, as are provided as of the Effective Date;

(C) ceases to provide other facilities and services normally associated with independent living or assisted living units including (i) central dining services providing up to three (3) meals per day, (ii) periodic housekeeping, (iii) laundry services, (iv) customary transportation services, and (v) social activities;

(D) provides or contracts for skilled nursing care for any of the units;
or

(E) leases or holds available for lease to commercial tenants non-residential space (i.e., space other than the units, dining areas, activity rooms, lobby, parlors, kitchen, mailroom, marketing/management offices) exceeding ten percent (10%) of the net rental area;

(18) a default which continues beyond any applicable cure period under any Facility Operating Agreement; or

(19) an Event of Default under the SASA.

(b) Events of Default Subject to a Specified Cure Period.

Any of the following shall constitute an Event of Default subject to the cure period set forth in the Loan Documents:

(1) if Key Principal or Guarantor is a natural person, the death of such individual, unless all requirements of Section 11.03(e) are met;

(2) the occurrence of a Guarantor Bankruptcy Event, unless requirements of Section 11.03(f) are met;

(3) any failure by Borrower, Affiliated Property Operator, Key Principal, or Guarantor to comply with the provisions of Section 5.02(b) and Section 5.02(c); or

(4) any failure by Borrower to perform any obligation under this Loan Agreement or any Loan Document that is subject to a specified written notice and cure

period, which failure continues beyond such specified written notice and cure period as set forth herein or in the applicable Loan Document.

(c) Events of Default Subject to Extended Cure Period.

The following shall constitute an Event of Default if the existence of such condition or event, or such failure to perform or default in performance continues for a period of thirty (30) days after written notice by Lender to Borrower of the existence of such condition or event, or of such failure to perform or default in performance, provided, however, such period may be extended for up to an additional thirty (30) days if Borrower, in the discretion of Lender, is diligently pursuing a cure of such; provided, further, however, no such written notice, grace period, or extension shall apply if, in Lender's discretion, immediate exercise by Lender of a right or remedy under this Loan Agreement or any Loan Document is required to avoid harm to Lender or impairment of the Mortgage Loan (including the Loan Documents), the Mortgaged Property or any other security given for the Mortgage Loan:

(1) any failure by Borrower to perform any of its obligations under this Loan Agreement or any Loan Document (other than those specified in Section 14.01(a) or Section 14.01(b) above) as and when required.

Section 14.02 Remedies.

(a) Acceleration; Foreclosure.

If an Event of Default has occurred and is continuing, the entire unpaid principal balance of the Mortgage Loan, any Accrued Interest, interest accruing at the Default Rate, the Prepayment Premium (if applicable), and all other Indebtedness, at the option of Lender, shall immediately become due and payable, without any prior written notice to Borrower, unless applicable law requires otherwise (and in such case, after any required written notice has been given). Lender may exercise this option to accelerate regardless of any prior forbearance. In addition, Lender shall have all rights and remedies afforded to it hereunder and under the other Loan Documents, including, foreclosure on and/or the power of sale of the Mortgaged Property, as provided in the Security Instrument, and any rights and remedies available to it at law or in equity (subject to Borrower's statutory rights of reinstatement, if any, prior to a Foreclosure Event). Any proceeds of a foreclosure or other sale under this Loan Agreement or any other Loan Document may be held and applied by Lender as additional collateral for the Indebtedness pursuant to this Loan Agreement. Notwithstanding the foregoing, the occurrence of any Bankruptcy Event shall automatically accelerate the Mortgage Loan and all obligations and Indebtedness shall be immediately due and payable without written notice or further action by Lender.

(b) Loss of Right to Disbursements from Collateral Accounts.

If an Event of Default has occurred and is continuing, Borrower shall immediately lose all of its rights to receive disbursements from the Reserve/Escrow Accounts and any Collateral

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Accounts. During the continuance of any such Event of Default, Lender may use the Reserve/Escrow Account Funds and any Collateral Account Funds (or any portion thereof) for any purpose, including:

- (1) repayment of the Indebtedness, including principal prepayments and the Prepayment Premium applicable to such full or partial prepayment, as applicable (however, such application of funds shall not cure or be deemed to cure any Event of Default);
- (2) reimbursement of Lender for all losses and expenses (including reasonable legal fees) suffered or incurred by Lender as a result of such Event of Default;
- (3) completion of the Replacement or Repair or for any other replacement or repair to the Mortgaged Property; and
- (4) payment of any amount expended in exercising (and the exercise of) all rights and remedies available to Lender at law or in equity or under this Loan Agreement or under any of the other Loan Documents.

Nothing in this Loan Agreement shall obligate Lender to apply all or any portion of the Reserve/Escrow Account Funds or Collateral Account Funds on account of any Event of Default or to repayment of the Indebtedness or in any specific order of priority.

(c) Remedies Cumulative.

Each right and remedy provided in this Loan Agreement is distinct from all other rights or remedies under this Loan Agreement or any other Loan Document or afforded by applicable law, and each shall be cumulative and may be exercised concurrently, independently, or successively, in any order. Lender shall not be required to demonstrate any actual impairment of its security or any increased risk of additional default by Borrower in order to exercise any of its remedies with respect to an Event of Default.

(d) Operations upon Event of Default; Lockbox Account.

- (1) If an Event of Default has occurred and is continuing:

- (A) Borrower shall or shall cause each Property Operator to, at the option of Lender, continue to provide all necessary services required under each Facility Operating Agreement or applicable licensing or regulatory requirements to operate and manage the Mortgaged Property as a Seniors Housing Facility and shall fully cooperate with Lender and any receiver as may be appointed by a court, in performing these services and agrees to arrange for an orderly transition to a replacement property operator or provider of the necessary services, and to execute promptly all applications, assignments, consents, and documents requested by Lender to facilitate such transition; and

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(B) Lender may cause the removal of Borrower or any Property Operator (as applicable) from any Mortgaged Property operations. Until such time as Lender has located a replacement property operator, Borrower or the acting Property Operator shall continue to provide all required services to maintain the Mortgaged Property in full compliance with all License and regulatory requirements. Borrower acknowledges that its failure to perform or to cause the performance of this service shall constitute a form of waste of the Mortgaged Property, causing irreparable harm to Lender and the Mortgaged Property, and shall constitute sufficient cause for the appointment of a receiver.

(2) In addition to the remedies set forth herein and elsewhere in the Loan Documents, upon an Event of Default, Lender shall be entitled to mandate the use of a lockbox bank account or other depository account, to be maintained under the control and supervision of Lender, for all income of the Mortgaged Property, including Rents, service charges, insurance payments, and Third Party Payments.

Section 14.03 Additional Lender Rights; Forbearance.

(a) No Effect Upon Obligations.

Lender may, but shall not be obligated to, agree with Borrower, from time to time, and without giving notice to, or obtaining the consent of, or having any effect upon the obligations of, any Property Operator, Guarantor, Key Principal, or other third party obligor, to take any of the following actions:

- (1) the time for payment of the principal of or interest on the Indebtedness may be extended, or the Indebtedness may be renewed in whole or in part;
- (2) the rate of interest on or period of amortization of the Mortgage Loan or the amount of the Monthly Debt Service Payments payable under the Loan Documents may be modified;
- (3) the time for Borrower's performance of or compliance with any covenant or agreement contained in any Loan Document, whether presently existing or hereinafter entered into, may be extended or such performance or compliance may be waived;
- (4) any or all payments due under this Loan Agreement or any other Loan Document may be reduced;
- (5) any Loan Document may be modified or amended by Lender and Borrower in any respect, including an increase in the principal amount of the Mortgage Loan;
- (6) any amounts under this Loan Agreement or any other Loan Document may be released;

(7) any security for the Indebtedness may be modified, exchanged, released, surrendered, or otherwise dealt with, or additional security may be pledged or mortgaged for the Indebtedness;

(8) the payment of the Indebtedness or any security for the Indebtedness, or both, may be subordinated to the right to payment or the security, or both, of any other present or future creditor of Borrower; or

(9) any other terms of the Loan Documents may be modified.

(b) No Waiver of Rights or Remedies.

Any waiver of an Event of Default or forbearance by Lender in exercising any right or remedy under this Loan Agreement or any other Loan Document or otherwise afforded by applicable law, shall not be a waiver of any other Event of Default or preclude the exercise or failure to exercise of any other right or remedy. The acceptance by Lender of payment of all or any part of the Indebtedness after the due date of such payment, or in an amount which is less than the required payment, shall not be a waiver of Lender's right to require prompt payment when due of all other payments on account of the Indebtedness or to exercise any remedies for any failure to make prompt payment. Enforcement by Lender of any security for the Indebtedness shall not constitute an election by Lender of remedies so as to preclude the exercise or failure to exercise of any other right available to Lender. Lender's receipt of any insurance proceeds or amounts in connection with a Condemnation Action shall not operate to cure or waive any Event of Default.

(c) Appointment of Lender as Attorney-In-Fact.

Borrower hereby irrevocably makes, constitutes, and appoints Lender (and any officer of Lender or any Person designated by Lender for that purpose) as Borrower's true and lawful proxy and attorney-in-fact (and agent-in-fact) in Borrower's name, place, and stead, with full power of substitution, to:

(1) use any of the funds in the Replacement Reserve Account or Repairs Escrow Account for the purpose of making or completing the Replacements or Repairs;

(2) make such additions, changes, and corrections to the Replacements or Repairs as shall be necessary or desirable to complete the Replacements or Repairs;

(3) employ such contractors, subcontractors, agents, architects, and inspectors as shall be required for such purposes;

(4) pay, settle, or compromise all bills and claims for materials and work performed in connection with the Replacements or Repairs, or as may be necessary or desirable for the completion of the Replacements or Repairs, or for clearance of title;

(5) adjust and compromise any claims under any and all policies of insurance required pursuant to this Loan Agreement and any other Loan Document, subject only to Borrower's rights under this Loan Agreement;

(6) appear in and prosecute any action arising from any insurance policies;

(7) collect and receive the proceeds of insurance, and to deduct from such proceeds Lender's expenses incurred in the collection of such proceeds;

(8) commence, appear in, and prosecute, in Lender's or Borrower's name, any action or proceeding relating to any condemnation;

(9) settle or compromise any claim in connection with any condemnation;

(10) execute all applications and certificates in the name of Borrower which may be required by any of the contract documents;

(11) prosecute and defend all actions or proceedings in connection with the Mortgaged Property or the rehabilitation and repair of the Mortgaged Property;

(12) take such actions as are permitted in this Loan Agreement and any other Loan Documents;

(13) execute such financing statements and other documents and to do such other acts as Lender may require to perfect and preserve Lender's security interest in, and to enforce such interests in, the collateral; and

(14) carry out any remedy provided for in this Loan Agreement and any other Loan Documents, including endorsing Borrower's name to checks, drafts, instruments and other items of payment and proceeds of the collateral, executing change of address forms with the postmaster of the United States Post Office serving the address of Borrower, changing the address of Borrower to that of Lender, opening all envelopes addressed to Borrower, and applying any payments contained therein to the Indebtedness.

Borrower hereby acknowledges that the constitution and appointment of such proxy and attorney-in-fact are coupled with an interest and are irrevocable and shall not be affected by the disability or incompetence of Borrower. Borrower specifically acknowledges and agrees that this power of attorney granted to Lender may be assigned by Lender to Lender's successors or assigns as holder of the Note (and the other Loan Documents). The foregoing powers conferred on Lender under this Section 14.03(c) shall not impose any duty upon Lender to exercise any such powers and shall not require Lender to incur any expense or take any action. Borrower hereby ratifies and confirms all that such attorney-in-fact may do or cause to be done by virtue of any provision of this Loan Agreement and any other Loan Documents.

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Notwithstanding the foregoing provisions, Lender shall not exercise its rights as set forth in this Section 14.03(c) unless: (A) an Event of Default has occurred and is continuing, or (B) Lender determines, in its discretion, that exigent circumstances exist or that such exercise is necessary or prudent in order to protect and preserve the Mortgaged Property, or Lender's lien priority and security interest in the Mortgaged Property.

(d) Borrower Waivers.

If more than one Person signs this Loan Agreement as Borrower, each Borrower, with respect to any other Borrower, hereby agrees that Lender, in its discretion, may:

- (1) bring suit against Borrower, or any one or more of Borrower, jointly and severally, or against any one or more of them;
- (2) compromise or settle with any one or more of the persons constituting Borrower, for such consideration as Lender may deem proper;
- (3) release one or more of the persons constituting Borrower, from liability; or
- (4) otherwise deal with Borrower, or any one or more of them, in any manner, and no such action shall impair the rights of Lender to collect from any Borrower the full amount of the Indebtedness.

Section 14.04 Waiver of Marshaling.

Notwithstanding the existence of any other security interests in the Mortgaged Property held by Lender or by any other party, Lender shall have the right to determine the order in which any or all of the Mortgaged Property shall be subjected to the remedies provided in this Loan Agreement, any other Loan Document or applicable law. Lender shall have the right to determine the order in which all or any part of the Indebtedness is satisfied from the proceeds realized upon the exercise of such remedies. Borrower and any party who now or in the future acquires a security interest in the Mortgaged Property and who has actual or constructive notice of this Loan Agreement waives any and all right to require the marshaling of assets or to require that any of the Mortgaged Property be sold in the inverse order of alienation or that any of the Mortgaged Property be sold in parcels or as an entirety in connection with the exercise of any of the remedies permitted by applicable law or provided in this Loan Agreement or any other Loan Documents.

Lender shall account for any moneys received by Lender in respect of any foreclosure on or disposition of collateral hereunder and under the other Loan Documents provided that Lender shall not have any duty as to any collateral, and Lender shall be accountable only for amounts that it actually receives as a result of the exercise of such powers. NONE OF LENDER OR ITS AFFILIATES, OFFICERS, DIRECTORS, EMPLOYEES, AGENTS, OR REPRESENTATIVES SHALL BE RESPONSIBLE TO BORROWER (a) FOR ANY ACT OR FAILURE TO ACT UNDER ANY POWER OF ATTORNEY OR OTHERWISE, EXCEPT IN RESPECT OF

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DAMAGES ATTRIBUTABLE SOLELY TO THEIR OWN GROSS NEGLIGENCE OR WILLFUL MISCONDUCT AS FINALLY DETERMINED PURSUANT TO A FINAL, NON-APPEALABLE COURT ORDER BY A COURT OF COMPETENT JURISDICTION, NOR (b) FOR ANY PUNITIVE, EXEMPLARY, INDIRECT OR CONSEQUENTIAL DAMAGES.

ARTICLE 15 - MISCELLANEOUS

Section 15.01 Governing Law; Consent to Jurisdiction and Venue.

(a) Governing Law.

This Loan Agreement and any other Loan Document which does not itself expressly identify the law that is to apply to it, shall be governed by the laws of the Property Jurisdiction without regard to the application of choice of law principles.

(b) Venue.

Any controversy arising under or in relation to this Loan Agreement or any other Loan Document shall be litigated exclusively in the Property Jurisdiction without regard to conflicts of laws principles. The state and federal courts and authorities with jurisdiction in the Property Jurisdiction shall have exclusive jurisdiction over all controversies which shall arise under or in relation to this Loan Agreement or any other Loan Document. Borrower irrevocably consents to service, jurisdiction, and venue of such courts for any such litigation and waives any other venue to which it might be entitled by virtue of domicile, habitual residence, or otherwise.

Section 15.02 Notice.

(a) Process of Serving Notice.

Except as otherwise set forth herein or in any other Loan Document, all notices under this Loan Agreement and any other Loan Document shall be:

- (1) in writing and shall be:
 - (A) delivered, in person;
 - (B) mailed, postage prepaid, either by registered or certified delivery, return receipt requested;
 - (C) sent by overnight courier; or
 - (D) sent by electronic mail with originals to follow by overnight courier;
- (2) addressed to the intended recipient at Borrower's Notice Address and Lender's Notice Address, as applicable; and

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(3) deemed given on the earlier to occur of:

(A) the date when the notice is received by the addressee; or

(B) if the recipient refuses or rejects delivery, the date on which the notice is so refused or rejected, as conclusively established by the records of the United States Postal Service or such express courier service.

(b) Change of Address.

Any party to this Loan Agreement may change the address to which notices intended for it are to be directed by means of notice given to the other parties identified on the Summary of Loan Terms in accordance with this Section 15.02.

(c) Default Method of Notice.

Any required notice under this Loan Agreement or any other Loan Document which does not specify how notices are to be given shall be given in accordance with this Section 15.02.

(d) Receipt of Notices.

Neither Borrower nor Lender shall refuse or reject delivery of any notice given in accordance with this Loan Agreement. Each party is required to acknowledge, in writing, the receipt of any notice upon request by the other party.

(e) Property Operator Notices.

Borrower acknowledges and agrees that Borrower solely shall be responsible for (1) causing Property Operator to comply with any notice received by Borrower from Lender, and (2) promptly providing Lender with copies of notices received by Borrower from Property Operator. Borrower's compliance with or failure to act as an intermediary as described in this Section 15.02(e) shall not relieve Borrower from its obligations under this Loan Agreement, nor shall it constitute a defense or excuse for nonperformance by Borrower, Property Operator, or any Guarantor, as applicable. Lender shall have no obligation to provide any notice to Property Operator unless and until Lender has taken ownership or control of the Mortgaged Property, or in connection with Lender's exercise of the power of attorney granted herein, and then only as required by the Loan Documents or the Facility Operating Agreement.

Section 15.03 Successors and Assigns Bound; Sale of Mortgage Loan.

(a) Binding Agreement.

This Loan Agreement shall bind, and the rights granted by this Loan Agreement shall inure to, the successors and assigns of Lender and the permitted successors and assigns of

Borrower. However, a Transfer not permitted by this Loan Agreement shall be an Event of Default and shall be void ab initio.

(b) Sale of Mortgage Loan; Change of Servicer.

Nothing in this Loan Agreement shall limit Lender's (including its successors and assigns) right to sell or transfer the Mortgage Loan or any interest in the Mortgage Loan. The Mortgage Loan or a partial interest in the Mortgage Loan (together with this Loan Agreement and the other Loan Documents) may be sold one or more times without prior written notice to Borrower. A sale may result in a change of the Loan Servicer.

Section 15.04 Counterparts.

This Loan Agreement may be executed in any number of counterparts with the same effect as if the parties hereto had signed the same document and all such counterparts shall be construed together and shall constitute one instrument.

Section 15.05 Joint and Several (or Solidary) Liability.

If more than one Person signs this Loan Agreement as Borrower, the obligations of such Persons shall be joint and several (solidary instead for purposes of Louisiana law).

Section 15.06 Relationship of Parties; No Third Party Beneficiary.

(a) Solely Creditor and Debtor.

The relationship between Lender and Borrower shall be solely that of creditor and debtor, respectively, and nothing contained in this Loan Agreement shall create any other relationship between Lender and Borrower, nor between Lender and Property Operator. Nothing contained in this Loan Agreement shall constitute Lender as a joint venturer, partner, or agent of Borrower or Property Operator, or render Lender liable for any debts, obligations, acts, omissions, representations, or contracts of Borrower or Property Operator.

(b) No Third Party Beneficiaries.

No creditor of any party to this Loan Agreement and no other Person shall be a third party beneficiary of this Loan Agreement or any other Loan Document or any account created or contemplated under this Loan Agreement or any other Loan Document. Nothing contained in this Loan Agreement shall be deemed or construed to create an obligation on the part of Lender to any third party nor shall any third party have a right to enforce against Lender any right that Borrower may have under this Loan Agreement. Without limiting the foregoing:

(1) any Servicing Arrangement between Lender and any Loan Servicer shall constitute a contractual obligation of such Loan Servicer that is independent of the obligation of Borrower for the payment of the Indebtedness;

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(2) Borrower shall not be a third party beneficiary of any Servicing Arrangement; and

(3) no payment by the Loan Servicer under any Servicing Arrangement will reduce the amount of the Indebtedness.

Section 15.07 Severability; Entire Agreement; Amendments.

The invalidity or unenforceability of any provision of this Loan Agreement or any other Loan Document shall not affect the validity or enforceability of any other provision of this Loan Agreement or of any other Loan Document, all of which shall remain in full force and effect, including the Guaranty. This Loan Agreement contains the complete and entire agreement among the parties as to the matters covered, rights granted, and the obligations assumed in this Loan Agreement. This Loan Agreement may not be amended or modified except by written agreement signed by the parties hereto.

Section 15.08 Construction.

(a) The captions and headings of the sections of this Loan Agreement and the Loan Documents are for convenience only and shall be disregarded in construing this Loan Agreement and the Loan Documents.

(b) Any reference in this Loan Agreement to an “Exhibit” or “Schedule” or a “Section” or an “Article” shall, unless otherwise explicitly provided, be construed as referring, respectively, to an Exhibit or Schedule attached to this Loan Agreement or to a Section or Article of this Loan Agreement.

(c) Any reference in this Loan Agreement to a statute or regulation shall be construed as referring to that statute or regulation as amended from time to time.

(d) Use of the singular in this Loan Agreement includes the plural and use of the plural includes the singular.

(e) As used in this Loan Agreement, the term “including” means “including, but not limited to” or “including, without limitation,” and is for example only and not a limitation.

(f) Whenever Borrower’s knowledge is implicated in this Loan Agreement or the phrase “to Borrower’s knowledge” or a similar phrase is used in this Loan Agreement, Borrower’s knowledge or such phrase(s) shall be interpreted to mean to the best of Borrower’s knowledge after reasonable and diligent inquiry and investigation.

(g) Unless otherwise provided in this Loan Agreement, if Lender’s approval, designation, determination, selection, estimate, action, or decision is required, permitted, or contemplated hereunder, such approval, designation, determination, selection, estimate, action or decision shall be made in Lender’s sole and absolute discretion.

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(h) All references in this Loan Agreement to a separate instrument or agreement shall include such instrument or agreement as the same may be amended or supplemented from time to time pursuant to the applicable provisions thereof.

(i) “Lender may” shall mean at Lender’s discretion, but shall not be an obligation.

(j) If the Mortgage Loan proceeds are disbursed on a date that is later than the Effective Date, as described in Section 2.02(a)(1), the representations and warranties in the Loan Documents with respect to the ownership and operation of the Mortgaged Property shall be deemed to be made as of the disbursement date.

(k) Any references in this Loan Agreement to a Senior Housing Facility shall refer to the Mortgaged Property identified on the Summary of Loan Terms including the Seniors Housing Facility Licensing Designation.

(l) Each reference to “tenant” or “tenants” in the Loan Documents shall be interpreted to mean “subtenant” or “subtenants” where the context so indicates.

Section 15.09 Mortgage Loan Servicing.

All actions regarding the servicing of the Mortgage Loan, including the collection of payments, the giving and receipt of notice, inspections of the Mortgaged Property, inspections of books and records, and the granting of consents and approvals, may be taken by the Loan Servicer unless Borrower receives notice to the contrary. If Borrower receives conflicting notices regarding the identity of the Loan Servicer or any other subject, any such written notice from Lender shall govern. The Loan Servicer may change from time to time (whether related or unrelated to a sale of the Mortgage Loan). If there is a change of the Loan Servicer, Borrower will be given written notice of the change.

Section 15.10 Disclosure of Information.

Lender may furnish information regarding Borrower, Property Operator, Key Principal, Guarantor, or the Mortgaged Property to third parties with an existing or prospective interest in the servicing, enforcement, evaluation, performance, purchase, or securitization of the Mortgage Loan, including trustees, master servicers, special servicers, rating agencies, and organizations maintaining databases on the underwriting and performance of multifamily mortgage loans. Borrower irrevocably waives any and all rights it may have under applicable law to prohibit such disclosure, including any right of privacy.

Section 15.11 Waiver; Conflict.

No specific waiver of any of the terms of this Loan Agreement shall be considered as a general waiver. If any provision of this Loan Agreement is in conflict with any provision of any other Loan Document, the provision contained in this Loan Agreement shall control.

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Section 15.12 No Reliance.

Borrower acknowledges, represents, and warrants that:

- (a) it understands the nature and structure of the transactions contemplated by this Loan Agreement and the other Loan Documents;
- (b) it is familiar with the provisions of all of the documents and instruments relating to such transactions;
- (c) it understands the risks inherent in such transactions, including the risk of loss of all or any part of the Mortgaged Property;
- (d) it has had the opportunity to consult counsel; and
- (e) it has not relied on Lender for any guidance or expertise in analyzing the financial or other consequences of the transactions contemplated by this Loan Agreement or any other Loan Document or otherwise relied on Lender in any manner in connection with interpreting, entering into, or otherwise in connection with this Loan Agreement, any other Loan Document, or any of the matters contemplated hereby or thereby.

Section 15.13 Subrogation.

If, and to the extent that, the proceeds of the Mortgage Loan are used to pay, satisfy, or discharge any obligation of Borrower or Property Operator for the payment of money that is secured by a pre-existing mortgage, deed of trust, or other lien encumbering the Mortgaged Property, such Mortgage Loan proceeds shall be deemed to have been advanced by Lender at Borrower's request, and Lender shall automatically, and without further action on its part, be subrogated to the rights, including lien priority, of the owner or holder of the obligation secured by such prior lien, whether or not such prior lien is released.

Section 15.14 Counting of Days.

Except where otherwise specifically provided, any reference in this Loan Agreement to a period of "days" means calendar days, not Business Days. If the date on which Borrower is required to perform an obligation under this Loan Agreement is not a Business Day, Borrower shall be required to perform such obligation by the Business Day immediately preceding such date; provided, however, in respect of any Payment Date, or if the Maturity Date is other than a Business Day, Borrower shall be obligated to make such payment by the Business Day immediately following such date.

Section 15.15 Revival and Reinstatement of Indebtedness.

If the payment of all or any part of the Indebtedness by Borrower, Property Operator, any Guarantor, or any other Person, or the transfer to Lender of any collateral or other property

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should for any reason subsequently be declared to be void or voidable under any state or federal law relating to creditors' rights, including provisions of the Insolvency Laws relating to a Voidable Transfer, and if Lender is required to repay or restore, in whole or in part, any such Voidable Transfer, or elects to do so upon the advice of its counsel, then the amount of such Voidable Transfer or the amount of such Voidable Transfer that Lender is required or elects to repay or restore, including all reasonable costs, expenses, and attorneys' fees incurred by Lender in connection therewith, and the Indebtedness shall automatically shall be revived, reinstated, and restored by such amount and shall exist as though such Voidable Transfer had never been made.

Section 15.16 Time is of the Essence.

Borrower agrees that, with respect to each and every obligation and covenant contained in this Loan Agreement and the other Loan Documents, time is of the essence.

Section 15.17 Final Agreement.

THIS LOAN AGREEMENT ALONG WITH ALL OF THE OTHER LOAN DOCUMENTS REPRESENT THE FINAL AGREEMENT BETWEEN THE PARTIES WITH RESPECT TO THE SUBJECT MATTER HEREOF AND MAY NOT BE CONTRADICTED BY EVIDENCE OF PRIOR, CONTEMPORANEOUS, OR SUBSEQUENT ORAL AGREEMENTS. THERE ARE NO UNWRITTEN ORAL AGREEMENTS BETWEEN THE PARTIES. All prior or contemporaneous agreements, understandings, representations, and statements, oral or written, are merged into this Loan Agreement and the other Loan Documents. This Loan Agreement, the other Loan Documents, and any of their provisions may not be waived, modified, amended, discharged, or terminated except by an agreement in writing signed by the party against which the enforcement of the waiver, modification, amendment, discharge, or termination is sought, and then only to the extent set forth in that agreement.

Section 15.18 WAIVER OF TRIAL BY JURY.

TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, EACH OF BORROWER AND LENDER (a) COVENANTS AND AGREES NOT TO ELECT A TRIAL BY JURY WITH RESPECT TO ANY ISSUE ARISING OUT OF THIS LOAN AGREEMENT OR ANY OTHER LOAN DOCUMENT, OR THE RELATIONSHIP BETWEEN THE PARTIES AS BORROWER AND LENDER, THAT IS TRIABLE OF RIGHT BY A JURY AND (b) WAIVES ANY RIGHT TO TRIAL BY JURY WITH RESPECT TO SUCH ISSUE TO THE EXTENT THAT ANY SUCH RIGHT EXISTS NOW OR IN THE FUTURE. THIS WAIVER OF RIGHT TO TRIAL BY JURY IS SEPARATELY GIVEN BY EACH PARTY, KNOWINGLY AND VOLUNTARILY WITH THE BENEFIT OF COMPETENT LEGAL COUNSEL.

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Article 15

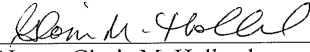
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IN WITNESS WHEREOF, Borrower and Lender have signed and delivered this Loan Agreement under seal (where applicable) or have caused this Loan Agreement to be signed and delivered under seal (where applicable) by their duly authorized representatives. Where applicable law so provides, Borrower and Lender intend that this Loan Agreement shall be deemed to be signed and delivered as a sealed instrument.

BORROWER:

TRIAD SENIOR LIVING III, L.P.,
a Texas limited partnership

By: Capital Senior Living Properties 5, Inc.,
a Delaware corporation
its General Partner

By: 
Name: Gloria M. Holland
Title: Vice President

LENDER:

BERKADIA COMMERCIAL MORTGAGE LLC,
a Delaware limited liability company

By:  (SEAL)
Name: LINDA C. KERSHAW-TIEGS
Title: AUTHORIZED REPRESENTATIVE

**SCHEDULE 1
TO MULTIFAMILY LOAN AND SECURITY AGREEMENT**

**Definitions Schedule
(Interest Rate Type - Fixed Rate)
(Seniors Housing)**

Capitalized terms used in the Loan Agreement have the meanings given to such terms in this Definitions Schedule.

“**Accounts**” has the meaning set forth in the Security Instrument.

“**Accrued Interest**” means unpaid interest, if any, on the Mortgage Loan that has not been added to the unpaid principal balance of the Mortgage Loan pursuant to Section 2.02(b) (Capitalization of Accrued But Unpaid Interest) of the Loan Agreement.

“**Acuity**” means the type of housing and services categorized as Independent Living, Assisted Living or Alzheimer's/Dementia Care provided to residents at the Mortgaged Property.

“**Additional Lender Repairs**” means repairs of the type listed on the Required Repair Schedule but not otherwise identified thereon that are determined advisable by Lender to keep the Mortgaged Property in good order and repair (ordinary wear and tear excepted) and in good marketable condition or to prevent deterioration of the Mortgaged Property.

“**Additional Lender Replacements**” means replacements of the type listed on the Required Replacement Schedule but not otherwise identified thereon that are determined advisable by Lender to keep the Mortgaged Property in good order and repair (ordinary wear and tear excepted) and in good marketable condition or to prevent deterioration of the Mortgaged Property.

“**Affiliated Property Operator**” means any Property Operator that is a Borrower Affiliate.

“**Allowed Change in Use**” means a change during the Loan Term in the unit or bed Acuity composition at the Mortgaged Property not to exceed five percent (5%) of the total number of units or beds in place as of the Effective Date.

“**Amortization Period**” has the meaning set forth in the Summary of Loan Terms.

“**Amortization Type**” has the meaning set forth in the Summary of Loan Terms.

“**Bank Secrecy Act**” means the Bank Secrecy Act of 1970, as amended (e.g., 31 U.S.C. Sections 5311-5330).

“**Bankruptcy Event**” means any one or more of the following:

- (a) the commencement, filing or continuation of a voluntary case or proceeding under one or more of the Insolvency Laws by Borrower;
- (b) the acknowledgment in writing by Borrower (other than to Lender in connection with a workout) that it is unable to pay its debts generally as they mature;
- (c) the making of a general assignment for the benefit of creditors by Borrower;
- (d) the commencement, filing or continuation of an involuntary case or proceeding under one or more Insolvency Laws against Borrower; or
- (e) the appointment of a receiver (other than a receiver appointed at the direction or request of Lender under the terms of the Loan Documents), liquidator, custodian, sequestrator, trustee or other similar officer who exercises control over Borrower or any substantial part of the assets of Borrower;

provided, however, that any proceeding or case under (d) or (e) above shall not be a Bankruptcy Event until the ninetieth (90th) day after filing (if not earlier dismissed) so long as such proceeding or case occurred without the consent, encouragement or active participation of (1) Borrower, Affiliated Property Operator, Guarantor, or Key Principal, (2) any Person Controlling Borrower, Affiliated Property Operator, Guarantor, or Key Principal, or (3) any Person Controlled by or under common Control with Borrower, Affiliated Property Operator, Guarantor, or Key Principal (in which event such case or proceeding shall be a Bankruptcy Event immediately).

“**Borrower**” means, individually (and jointly and severally (solidarily instead for purposes of Louisiana law) if more than one), the entity (or entities) identified as “Borrower” in the first paragraph of the Loan Agreement.

“**Borrower Affiliate**” means, as to Borrower, Guarantor, Key Principal or Affiliated Property Operator:

- (a) any Person that owns any direct ownership interest in Borrower, Guarantor, Key Principal or Affiliated Property Operator;
- (b) any Person that indirectly owns, with the power to vote, twenty percent (20%) or more of the ownership interests in Borrower, Guarantor, Key Principal or Affiliated Property Operator;
- (c) any Person Controlled by, under common Control with, or which Controls, Borrower, Guarantor, Key Principal or Affiliated Property Operator;

(d) any entity in which Borrower, Guarantor, Key Principal or Affiliated Property Operator directly or indirectly owns, with the power to vote, twenty percent (20%) or more of the ownership interests in such entity, or

(e) any other individual that is related (to the third degree of consanguinity) by blood or marriage to Borrower, Guarantor, Key Principal or Affiliated Property Operator.

“Borrower Requested Repairs” means repairs not listed on the Required Repair Schedule requested by Borrower to be reimbursed from the Repairs Escrow Account and determined advisable by Lender to keep the Mortgaged Property in good order and repair and in a good marketable condition or to prevent deterioration of the Mortgaged Property.

“Borrower Requested Replacements” means replacements not listed on the Required Replacement Schedule requested by Borrower to be reimbursed from the Replacement Reserve Account and determined advisable by Lender to keep the Mortgaged Property in good order and repair and in a good marketable condition or to prevent deterioration of the Mortgaged Property.

“Borrower’s General Business Address” has the meaning set forth in the Summary of Loan Terms.

“Borrower’s Notice Address” has the meaning set forth in the Summary of Loan Terms.

“Business Day” means any day other than (a) a Saturday, (b) a Sunday, (c) a day on which Lender is not open for business, or (d) a day on which the Federal Reserve Bank of New York is not open for business.

“Collateral Account Funds” means, collectively, the funds on deposit in any or all of the Collateral Accounts, including the Reserve/Escrow Account Funds.

“Collateral Accounts” means any account designated as such by Lender pursuant to a Collateral Agreement or as established pursuant to this Loan Agreement, including the Reserve/Escrow Account.

“Collateral Agreement” means any separate agreement between Borrower and Lender for the establishment of any other fund, reserve or account.

“Completion Period” has the meaning set forth in the Summary of Loan Terms.

“Condemnation Action” has the meaning set forth in the Security Instrument.

“Contract” means any contract or other agreement for the provision of goods or services at or otherwise in connection with the operation, use or maintenance of the Mortgaged Property, excluding the Facility Operating Agreement and including cash deposited to secure performance by parties of their obligations.

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“**Control**” (including with correlative meanings, such as “Controlling,” “Controlled by” and “under common Control with”) means, as applied to any entity, the possession, directly or indirectly, of the power to direct or cause the direction of the management and operations of such entity, whether through the ownership of voting securities or other ownership interests, by contract or otherwise.

“**Credit Score**” means a numerical value or a categorization derived from a statistical tool or modeling system used to measure credit risk and predict the likelihood of certain credit behaviors, including default.

“**Debt Service Amounts**” means the Monthly Debt Service Payments and all other amounts payable under the Loan Agreement, the Note, the Security Instrument or any other Loan Document.

“**Default Rate**” means an interest rate equal to the lesser of:

- (a) the sum of the Interest Rate plus four (4) percentage points; or
- (b) the maximum interest rate which may be collected from Borrower under applicable law.

“**Definitions Schedule**” means this Schedule 1 (Definitions Schedule) to the Loan Agreement.

“**Depository Agreement**” means, individually and together the Government Receivables Depository Agreement and the Government Receivables Collection Account Agreement.

“**Effective Date**” has the meaning set forth in the Summary of Loan Terms.

“**Employee Benefit Plan**” means a plan described in Section 3(3) of ERISA, regardless of whether the plan is subject to ERISA.

“**Enforcement Costs**” has the meaning set forth in the Security Instrument.

“**Environmental Indemnity Agreement**” means that certain Environmental Indemnity Agreement dated as of the Effective Date made by Borrower to and for the benefit of Lender, as the same may be amended, restated, replaced, supplemented, or otherwise modified from time to time.

“**Environmental Inspections**” has the meaning set forth in the Environmental Indemnity Agreement.

“**Environmental Laws**” has the meaning set forth in the Environmental Indemnity Agreement.

“**ERISA**” means the Employee Retirement Income Security Act of 1974, as amended.

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“ERISA Affiliate” shall mean, with respect to Borrower, any entity that, together with Borrower, would be treated as a single employer under Section 414(b) or (c) of the Internal Revenue Code, or Section 4001(a)(14) of ERISA, or the regulations thereunder.

“ERISA Plan” means any employee pension benefit plan within the meaning of Section 3(2) of ERISA (or related trust) that is subject to the requirements of Title IV of ERISA, Sections 430 or 431 of the Internal Revenue Code, or Sections 302, 303, or 304 of ERISA, which is maintained or contributed to by Borrower or its ERISA Affiliates.

“Event of Default” means the occurrence of any event listed in Section 14.01 (Events of Default) of the Loan Agreement.

“Exceptions to Representations and Warranties Schedule” means that certain Schedule 7 (Exceptions to Representations and Warranties Schedule) to the Loan Agreement.

“Facility Operating Agreement” means, individually and collectively, any of an Operating Lease, Sublease, Management Agreement or any other agreement setting forth the responsibilities for the operation, management, maintenance or administration of the Mortgaged Property as a Seniors Housing Facility.

“First Payment Date” has the meaning set forth in the Summary of Loan Terms.

“First Principal and Interest Payment Date” has the meaning set forth in the Summary of Loan Terms, if applicable.

“Fixed Rate” has the meaning set forth in the Summary of Loan Terms.

“Fixtures” has the meaning set forth in the Security Instrument.

“Force Majeure” shall mean acts of God, acts of war, civil disturbance, governmental action (including the revocation or refusal to grant licenses or permits, where such revocation or refusal is not due to the fault of Borrower), strikes, lockouts, fire, unavoidable casualties or any other causes beyond the reasonable control of Borrower (other than lack of financing), and of which Borrower shall have notified Lender in writing within ten (10) days after its occurrence.

“Foreclosure Event” means:

- (a) foreclosure under the Security Instrument;
- (b) any other exercise by Lender of rights and remedies (whether under the Security Instrument or under applicable law, including Insolvency Laws) as holder of the Mortgage Loan and/or the Security Instrument, as a result of which Lender (or its designee or nominee) or a third party purchaser becomes owner of the Mortgaged Property;

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(c) delivery by Borrower to Lender (or its designee or nominee) of a deed or other conveyance of Borrower's interest in the Mortgaged Property in lieu of any of the foregoing; or

(d) in Louisiana, any dation en paiement.

"Government Receivables Collection Account Agreement" means, if any, that certain Government Receivables Collection Account Agreement among Borrower, Lender, any applicable Property Operator and a depositary bank executed in connection with the Mortgage Loan.

"Government Receivables Depositary Agreement" means, if any, that certain Government Receivables Depositary Agreement among Borrower, Lender, any applicable Property Operator and a depositary bank executed in connection with the Mortgage Loan.

"Governmental Authority" means any court, board, commission, department or body of any municipal, county, state or federal governmental unit, or any subdivision of any of them, that has or acquires jurisdiction over Borrower or the Mortgaged Property or the use, operation or improvement of the Mortgaged Property.

"Governmental Health Care Program" means any plan or program that provides health benefits, whether directly, through insurance, or otherwise, and that is funded directly, in whole or in part, by the U.S. Government or a state health care program.

"Guarantor" means, individually and collectively, any guarantor of the Indebtedness or any other obligation of Borrower under any Loan Document.

"Guarantor Bankruptcy Event" means any one or more of the following:

(a) the commencement, filing or continuation of a voluntary case or proceeding under one or more of the Insolvency Laws by Guarantor;

(b) the acknowledgment in writing by Guarantor (other than to Lender in connection with a workout) that it is unable to pay its debts generally as they mature;

(c) the making of a general assignment for the benefit of creditors by Guarantor;

(d) the commencement, filing or continuation of an involuntary case or proceeding under one or more Insolvency Laws against Guarantor; or

(e) the appointment of a receiver, liquidator, custodian, sequestrator, trustee or other similar officer who exercises control over Guarantor or any substantial part of the assets of Guarantor, as applicable;

provided, however, that any proceeding or case under (d) or (e) above shall not be a Guarantor Bankruptcy Event until the ninetieth (90th) day after filing (if not earlier dismissed) so long as such proceeding or case occurred without the consent, encouragement or active participation of (1) Borrower, Affiliated Property Operator, Guarantor or Key Principal, (2) any Person Controlling Borrower, Affiliated Property Operator, Guarantor or Key Principal, or (3) any Person Controlled by or under common Control with Borrower, Affiliated Property Operator, Guarantor or Key Principal (in which event such case or proceeding shall be a Guarantor Bankruptcy Event immediately).

“Guarantor’s General Business Address” has the meaning set forth in the Summary of Loan Terms.

“Guarantor’s Notice Address” has the meaning set forth in the Summary of Loan Terms.

“Guaranty” means, individually and collectively, any Payment Guaranty, Non-Recourse Guaranty or other guaranty executed by Guarantor in connection with the Mortgage Loan.

“HIPAA” means the Health Insurance Portability and Accountability Act of 1996, Subtitle D of the Health Information Technology for Economic and Clinical Health Act of 2009, and all regulations and other guidance promulgated under both laws by the U.S. Department of Health and Human Services, as may be amended from time to time.

"HIPAA Business Associate" means any entity that is a "business associate" as that term is defined in HIPAA, as identified on the Summary of Loan Terms.

“HIPAA Covered Entity” means any entity that is a “covered entity” as that term is defined in HIPAA, as identified on the Summary of Loan Terms.

“Immediate Family Members” means a child, stepchild, grandchild, spouse, sibling, or parent, each of whom is not a Prohibited Person.

“Imposition Deposits” has the meaning set forth in the Security Instrument.

“Impositions” has the meaning set forth in the Security Instrument.

“Improvements” has the meaning set forth in the Security Instrument.

“Indebtedness” has the meaning set forth in the Security Instrument.

“Initial Replacement Reserve Deposit” has the meaning set forth in the Summary of Loan Terms.

“Insolvency Laws” means the United States Bankruptcy Code, 11 U.S.C. Section 101, et seq., together with any other federal or state law affecting debtor and creditor rights or relating to the

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bankruptcy, insolvency, reorganization, arrangement, moratorium, readjustment of debt, dissolution, liquidation or similar laws, proceedings, or equitable principles affecting the enforcement of creditors' rights, as amended from time to time.

"Insolvent" means:

(a) that the sum total of all of a specified Person's liabilities (whether secured or unsecured, contingent or fixed, or liquidated or unliquidated) is in excess of the value of such Person's non-exempt assets, i.e., all of the assets of such Person that are available to satisfy claims of creditors; or

(b) such Person's inability to pay its debts as they become due.

"Intended Prepayment Date" means the date upon which Borrower intends to make a prepayment on the Mortgage Loan, as set forth in the Prepayment Notice.

"Interest Accrual Method" has the meaning set forth in the Summary of Loan Terms.

"Interest Only Term" has the meaning set forth in the Summary of Loan Terms.

"Interest Rate" means the Fixed Rate.

"Interest Rate Type" has the meaning set forth in the Summary of Loan Terms.

"Internal Revenue Code" means the Internal Revenue Code of 1986, as amended.

"Investor" means any Person to whom Lender intends to sell, transfer, deliver or assign the Mortgage Loan in the secondary mortgage market.

"Key Principal" means, collectively:

(a) the natural person(s) or entity that Controls Borrower that Lender determines is critical to the successful operation and management of Borrower and the Mortgaged Property, as identified as such in the Summary of Loan Terms; or

(b) any natural person or entity who becomes a Key Principal after the date of the Loan Agreement and is identified as such in an assumption agreement, or another amendment or supplement to the Loan Agreement.

"Key Principal's General Business Address" has the meaning set forth in the Summary of Loan Terms.

"Key Principal's Notice Address" has the meaning set forth in the Summary of Loan Terms.

"Land" means the land described in Exhibit A to the Security Instrument.

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“Last Interest Only Payment Date” has the meaning set forth in the Summary of Loan Terms, if applicable.

“Late Charge” means an amount equal to the delinquent amount then due under the Loan Documents multiplied by five percent (5%).

“Leases” has the meaning set forth in the Security Instrument.

“Lender” means the entity identified as “Lender” in the first paragraph of the Loan Agreement and its transferees, successors and assigns, or any subsequent holder of the Note.

“Lender’s General Business Address” has the meaning set forth in the Summary of Loan Terms.

“Lender’s Notice Address” has the meaning set forth in the Summary of Loan Terms.

“Lender’s Payment Address” has the meaning set forth in the Summary of Loan Terms.

“License” means any operating licenses, certificates of occupancy, health department licenses, food service licenses, certificates of need, business licenses, permits, registrations, certificates, authorizations, approvals, legal authority, and similar documents required by applicable laws and regulations for the lawful operation of the Mortgaged Property as a Seniors Housing Facility in the Property Jurisdiction as of the Effective Date or during the Loan Term, including renewals, replacements and additions to any of the foregoing.

“Lien” has the meaning set forth in the Security Instrument.

“Loan Agreement” means the Multifamily Loan and Security Agreement dated as of the Effective Date executed by and between Borrower and Lender to which this Definitions Schedule is attached, as the same may be amended, restated, replaced, supplemented or otherwise modified from time to time.

“Loan Amount” has the meaning set forth in the Summary of Loan Terms.

“Loan Application” means the application for the Mortgage Loan submitted by Borrower to Lender.

“Loan Documents” means the Note, the Loan Agreement, the Security Instrument, the Environmental Indemnity Agreement, the Guaranty, the SASA, all guaranties, all indemnity agreements, all Collateral Agreements, all O&M Plans, and any other documents now or in the future executed by Borrower, Guarantor, Key Principal, any other guarantor or any other Person in connection with the Mortgage Loan, as such documents may be amended, restated, replaced, supplemented or otherwise modified from time to time.

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“**Loan Servicer**” means the entity that from time to time is designated by Lender to collect payments and deposits and receive notices under the Note, the Loan Agreement, the Security Instrument and any other Loan Document, and otherwise to service the Mortgage Loan for the benefit of Lender. Unless Borrower receives notice to the contrary, the Loan Servicer shall be the Lender originally named on the Summary of Loan Terms.

“**Loan Term**” has the meaning set forth in the Summary of Loan Terms.

“**Loan Year**” has the meaning set forth in the Summary of Loan Terms.

“**Managed Care Organization**” means a Person that has been certified by, and has entered into a contractual relationship with, a Governmental Authority in the Property Jurisdiction to make available to its members (including residents of the Mortgaged Property) certain long-term care and health care services through Medicaid Participant(s), which, as of the Effective Date, is the party identified on the Summary of Loan Terms.

“**Management Agreement**” means, if applicable, any agreement for management services as amended, restated, replaced, supplemented, or otherwise modified from time to time, preapproved in writing by Lender, under which daily management or operation with respect to the Mortgaged Property as a Seniors Housing Facility has been granted to any individual or entity other than Borrower.

“**Manager**” means the Person responsible for the operation or management of the Mortgaged Property pursuant to a Management Agreement, if any.

“**Material Commercial Lease**” means any non-Residential Lease, including any master lease (which term “master lease” shall include any master lease to a single corporate tenant), other than:

- (a) a non-Residential Lease that comprises less than five percent (5%) of total gross income of the Mortgaged Property on an annualized basis, so long as the lease is not a cell tower lease, a solar (power) lease or a solar power purchase agreement;
- (b) a cable television lease or broadband network lease with a lessee that is not a Borrower Affiliate, Key Principal or Guarantor;
- (c) storage units leased pursuant to any Residential Lease; or
- (d) a laundry lease, so long as:
 - (1) the lessee is not a Borrower Affiliate, Key Principal or Guarantor;
 - (2) the rent payable is not below-market (as determined by Lender); and

(3) such laundry lease is terminable for cause by lessor.

For purposes of the Loan Documents, any Seniors Housing Facility Lease on the Mortgaged Property shall not be deemed either a “Material Commercial Lease” or a “non-Material Commercial Lease.”

“**Maturity Date**” has the meaning set forth in the Summary of Loan Terms.

“**Maximum Inspection Fee**” has the meaning set forth in the Summary of Loan Terms.

“**Maximum Permitted Equipment Financing**” has the meaning set forth in the Summary of Loan Terms.

“**Maximum Repair Cost**” shall be the amount(s) set forth in the Required Repair Schedule, if any.

“**Maximum Repair Disbursement Interval**” has the meaning set forth in the Summary of Loan Terms.

“**Maximum Replacement Reserve Disbursement Interval**” has the meaning set forth in the Summary of Loan Terms.

“**Medicaid**” means the medical assistance program established by Title XIX of the Social Security Act (42 U.S.C. Secs. 1396 et seq.) and any statutes succeeding thereto.

“**Medicaid Participant**” means a Person that has entered into a Medicaid Provider Agreement as identified on the Summary of Loan Terms.

“**Medicaid Program**” means the Medicaid assisted living waiver program administered by a Governmental Authority under which certain benefits are available through a Governmental Authority or a Managed Care Organization.

“**Medicaid Provider Agreement**” means, individually and collectively, an agreement between Borrower or Property Operator and a Governmental Authority (or administered by a Governmental Authority, as applicable) or a Managed Care Organization to be a participating provider under the Medicaid Program, as further described in the Summary of Loan Terms, as the same may be amended, restated, replaced, supplemented, or otherwise modified from time to time.

“**Mezzanine Debt**” means a loan to a direct or indirect owner of Borrower or Affiliated Property Operator secured by a pledge of such owner’s interest in an entity owning a direct or indirect interest in Borrower or Affiliated Property Operator.

“**Minimum Repairs Disbursement Amount**” has the meaning set forth in the Summary of Loan Terms.

“**Minimum Replacement Reserve Disbursement Amount**” has the meaning set forth in the Summary of Loan Terms.

“**Monthly Debt Service Payment**” has the meaning set forth in the Summary of Loan Terms.

“**Monthly Replacement Reserve Deposit**” has the meaning set forth in the Summary of Loan Terms.

“**Mortgage Loan**” means the mortgage loan made by Lender to Borrower in the principal amount of the Note made pursuant to the Loan Agreement, evidenced by the Note and secured by the Loan Documents that are expressly stated to be security for the Mortgage Loan.

“**Mortgaged Property**” has the meaning set forth in the Security Instrument.

“**Multifamily Project**” has the meaning set forth in the Summary of Loan Terms.

“**Multifamily Project Address**” has the meaning set forth in the Summary of Loan Terms.

“**Non-Recourse Guaranty**” means, if applicable, that certain Guaranty of Non-Recourse Obligations of even date herewith executed by Guarantor to and for the benefit of Lender, as the same may be amended, restated, replaced, supplemented or otherwise modified from time to time.

“**Note**” means that certain Multifamily Note of even date herewith in the original principal amount of the stated Loan Amount made by Borrower in favor of Lender, and all schedules, riders, allonges and addenda attached thereto, as the same may be amended, restated, replaced, supplemented or otherwise modified from time to time.

“**O&M Plan**” has the meaning set forth in the Environmental Indemnity Agreement.

“**OFAC**” means the United States Treasury Department, Office of Foreign Assets Control, and any successor thereto.

“**Operating Lease**” means, if applicable, any operating lease, master lease, or similar document as amended, restated, replaced, supplemented, or otherwise modified from time to time, preapproved in writing by Lender, under which control of the occupancy, use, operation, management, maintenance or administration of the Mortgaged Property as a Seniors Housing Facility has been granted by Borrower as lessor to any Person (other than Borrower) as lessee.

“Operator” means the Person responsible for the occupancy, use, operation, management, maintenance and administration of the Mortgaged Property pursuant to an Operating Lease, if any.

“Operator Estoppel Certificate” means a certificate of estoppel from Property Operator to Lender in a form required by Lender pursuant to the terms of Section 7.03(g)(2) (Seniors Housing Facility Lease Estoppel) of the Loan Agreement.

“Payment Date” means the First Payment Date and the first day of each month thereafter until the Mortgage Loan is fully paid.

“Payment Guaranty” means, if applicable, that certain Guaranty (Payment) of even date herewith executed by Guarantor to and for the benefit of Lender, as the same may be amended, restated, replaced, supplemented or otherwise modified from time to time.

“Permitted Encumbrance” has the meaning set forth in the Security Instrument.

“Permitted Equipment Financing” means equipment lease or other purchase money financing incurred in the ordinary course for acquisition of additional or replacement equipment or other personal property, or to refinance Permitted Equipment Financing, in an amount not to exceed, at any time, the Maximum Permitted Equipment Financing.

“Permitted Mezzanine Debt” means Mezzanine Debt incurred by a direct or indirect owner or owners of Borrower or Affiliated Property Operator where the exercise of any of the rights and remedies by the holder or holders of the Mezzanine Debt would not in any circumstance cause (a) a change in Control in Borrower, Affiliated Property Operator, Key Principal, or Guarantor, or (b) a Transfer of a direct or indirect Restricted Ownership Interest in Borrower, Affiliated Property Operator, Key Principal, or Guarantor.

“Permitted Preferred Equity” means Preferred Equity that does not (a) require mandatory dividends, distributions, payments or returns (including at maturity or in connection with a redemption), or (b) provide the Preferred Equity owner with rights or remedies on account of a failure to receive any preferred dividends, distributions, payments or returns (or, if such rights are provided, the exercise of such rights do not violate the Loan Documents or are otherwise exercised with the prior written consent of Lender in accordance with Article 11 (Liens, Transfers and Assumptions) of the Loan Agreement and the payment of all applicable fees and expenses as set forth in Section 11.03(g) (Further Conditions to Transfers and Assumption)).

“Permitted Prepayment Date” means the last Business Day of a calendar month.

“Person” means an individual, an estate, a trust, a corporation, a partnership, a limited liability company or any other organization or entity (whether governmental or private).

“Personal Property” means the Goods (as defined in the Security Instrument), accounts, choses of action, chattel paper, documents, general intangibles (including Software), payment intangibles, instruments, investment property, letter of credit rights, supporting obligations, computer information, source codes, object codes, records and data, all telephone numbers or listings, claims (including claims for indemnity or breach of warranty), deposit accounts and other property or assets of any kind or nature related to the Land or the Improvements, including operating agreements, surveys, plans and specifications and contracts for architectural, engineering and construction services relating to the Land or the Improvements, and all other intangible property and rights relating to the operation of, or used in connection with, the Land or the Improvements, including all governmental permits relating to any activities on the Land.

“Personalty” has the meaning set forth in the Security Instrument.

“Preferred Equity” means a direct or indirect equity ownership interest in, economic interests in, or rights with respect to, Borrower that provide an equity owner preferred dividend, distribution, payment or return treatment relative to other equity owners.

“Prepayment Lockout Period” has the meaning set forth in the Summary of Loan Terms.

“Prepayment Notice” means the written notice that Borrower is required to provide to Lender in accordance with Section 2.03 (Lockout/Prepayment) of the Loan Agreement in order to make a prepayment on the Mortgage Loan, which shall include, at a minimum, the Intended Prepayment Date.

“Prepayment Premium” means the amount payable by Borrower in connection with a prepayment of the Mortgage Loan, as provided in Section 2.03 (Lockout/Prepayment) of the Loan Agreement and calculated in accordance with the Prepayment Premium Schedule.

“Prepayment Premium Period End Date” or “Yield Maintenance Period End Date” has the meaning set forth in the Summary of Loan Terms.

“Prepayment Premium Period Term” or “Yield Maintenance Period Term” has the meaning set forth in the Summary of Loan Terms.

“Prepayment Premium Schedule” means that certain Schedule 4 (Prepayment Premium Schedule) to the Loan Agreement.

“Privacy Laws” mean any federal, state and local laws and regulations applicable to resident and tenant privacy, including but not limited to HIPAA.

“Prohibited Person” means:

(a) any Person with whom Lender or Fannie Mae is prohibited from doing business pursuant to any law, rule, regulation, judicial proceeding or administrative directive; or

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(b) any Person identified on the United States Department of Housing and Urban Development's "Limited Denial of Participation, HUD Funding Disqualifications and Voluntary Abstentions List," or on the General Services Administration's "System for Award Management (SAM)" exclusion list, each of which may be amended from time to time, and any successor or replacement thereof; or

(c) any Person that is determined by Fannie Mae to pose an unacceptable credit risk due to the aggregate amount of debt of such Person owned or held by Fannie Mae; or

(d) any Person that has caused any unsatisfactory experience of a material nature with Fannie Mae or Lender, such as a default, fraud, intentional misrepresentation, litigation, arbitration or other similar act.

"Property Jurisdiction" has the meaning set forth in the Security Instrument.

"Property Operator" means individually and collectively, (a) any Operator (b) any Sublessee, and (c) any Manager.

"Property Operator Bankruptcy Event" means any one or more of the following:

(a) the commencement, filing or continuation of a voluntary case or proceeding under one or more of the Insolvency Laws by any Property Operator;

(b) the acknowledgment in writing by any Property Operator that it is unable to pay its debts generally as they mature;

(c) the making of a general assignment for the benefit of creditors by any Property Operator;

(d) the commencement, filing or continuation of an involuntary case or proceeding under one or more Insolvency Laws against any Property Operator; or

(e) the appointment of a receiver, liquidator, custodian, sequestrator, trustee or other similar officer who exercises control over any Property Operator or any substantial part of the assets of any Property Operator;

provided, however, that any proceeding or case under (d) or (e) above shall not be a Property Operator Bankruptcy Event until the ninetieth (90th) day after filing (if not earlier dismissed) so long as such proceeding or case occurred without the consent, encouragement or active participation of (1) any Property Operator, Borrower, Guarantor or Key Principal, (2) any Person Controlling Property Operator, Borrower, Guarantor or Key Principal, or (3) any Person Controlled by or under common Control with any Property Operator, Borrower, Guarantor or Key Principal (in which event such case or proceeding shall be a Property Operator Bankruptcy Event immediately).

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“**Property Square Footage**” has the meaning set forth in the Summary of Loan Terms.

“**Publicly-Held Corporation**” means a corporation, the outstanding voting stock of which is registered under Sections 12(b) or 12(g) of the Securities Exchange Act of 1934, as amended.

“**Publicly-Held Trust**” means a real estate investment trust, the outstanding voting shares or beneficial interests of which are registered under Sections 12(b) or 12(g) of the Securities Exchange Act of 1934, as amended.

“**Rents**” has the meaning set forth in the Security Instrument.

“**Repair Threshold**” has the meaning set forth in the Summary of Loan Terms.

“**Repairs**” means, individually and collectively, the Required Repairs, Borrower Requested Repairs, and Additional Lender Repairs.

“**Repairs Escrow Account**” means the account established by Lender into which the Repairs Escrow Deposit is deposited to fund the Repairs.

“**Repairs Escrow Account Administrative Fee**” has the meaning set forth in the Summary of Loan Terms.

“**Repairs Escrow Deposit**” has the meaning set forth in the Summary of Loan Terms.

“**Replacement Reserve Account**” means the account established by Lender into which the Replacement Reserve Deposits are deposited to fund the Replacements.

“**Replacement Reserve Account Administration Fee**” has the meaning set forth in the Summary of Loan Terms.

“**Replacement Reserve Account Interest Disbursement Frequency**” has the meaning set forth in the Summary of Loan Terms.

“**Replacement Reserve Deposits**” means the Initial Replacement Reserve Deposit, Monthly Replacement Reserve Deposits and any other deposits to the Replacement Reserve Account required by the Loan Agreement.

“**Replacement Threshold**” has the meaning set forth in the Summary of Loan Terms.

“**Replacements**” means, individually and collectively, the Required Replacements, Borrower Requested Replacements and Additional Lender Replacements.

“**Required Repair Schedule**” means that certain Schedule 6 (Required Repair Schedule) to the Loan Agreement.

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“**Required Repairs**” means those items listed on the Required Repair Schedule.

“**Required Replacement Schedule**” means that certain Schedule 5 (Required Replacement Schedule) to the Loan Agreement.

“**Required Replacements**” means those items listed on the Required Replacement Schedule.

“**Reserve/Escrow Account Funds**” means, collectively, the funds on deposit in the Reserve/Escrow Accounts.

“**Reserve/Escrow Accounts**” means, together, the Replacement Reserve Account and the Repairs Escrow Account.

“**Residential Lease**” means a leasehold interest in an individual dwelling unit and shall not include any master lease.

“**Restoration**” means restoring and repairing the Mortgaged Property to the equivalent of its physical condition immediately prior to the casualty or to a condition approved by Lender following a casualty.

“**Restricted Ownership Interest**” means, with respect to any entity, the following:

- (a) if such entity is a general partnership or a joint venture, fifty percent (50%) or more of all general partnership or joint venture interests in such entity;
- (b) if such entity is a limited partnership:
 - (1) the interest of any general partner; or
 - (2) fifty percent (50%) or more of all limited partnership interests in such entity;
- (c) if such entity is a limited liability company or a limited liability partnership:
 - (1) the interest of any managing member or the contractual rights of any non-member manager; or
 - (2) fifty percent (50%) or more of all membership or other ownership interests in such entity;
- (d) if such entity is a corporation (other than a Publicly-Held Corporation) with only one class of voting stock, fifty percent (50%) or more of voting stock in such corporation;

(e) if such entity is a corporation (other than a Publicly-Held Corporation) with more than one class of voting stock, the amount of shares of voting stock sufficient to have the power to elect the majority of directors of such corporation; or

(f) if such entity is a trust (other than a land trust or a Publicly-Held Trust), the power to Control such trust vested in the trustee of such trust or the ability to remove, appoint or substitute the trustee of such trust (unless the trustee of such trust after such removal, appointment or substitution is a trustee identified in the trust agreement approved by Lender).

“Review Fee” means the non-refundable fee of Three Thousand Dollars (\$3,000) payable to Lender.

“SASA” means a Subordination, Assignment and Security Agreement in a form approved by Lender affecting the Mortgaged Property executed and delivered to Lender by Borrower and any Property Operator as the same may be amended, restated, replaced, supplemented, or otherwise modified from time to time.

“Schedule of Interest Rate Type Provisions” means that certain Schedule 3 (Schedule of Interest Rate Type Provisions) to the Loan Agreement.

“Security Instrument” means that certain multifamily mortgage, deed to secure debt or deed of trust executed and delivered by Borrower as security for the Mortgage Loan and encumbering the Mortgaged Property, including all riders or schedules attached thereto, as the same may be amended, restated, replaced, supplemented or otherwise modified from time to time.

“Seniors Housing Facility” means a residential housing facility which qualifies as “housing for older persons” under the Fair Housing Amendments Act of 1988 and the Housing for Older Persons Act of 1995, and as the date of this Loan Agreement, is comprised of and licensed for use as identified on the Summary of Loan Terms.

“Seniors Housing Facility Lease” means, to the extent applicable, individually and together, any Operating Lease or Sublease.

“Seniors Housing Facility Licensing Designation” means the licensing designation under the laws of the Property Jurisdiction, if applicable, for the Seniors Housing Facility as set forth on the Summary of Loan Terms.

“Servicing Arrangement” means any arrangement between Lender and the Loan Servicer for loss sharing or interim advancement of funds.

“Sublease” means, if applicable, any sublease or similar document as amended, restated, replaced, supplemented or otherwise modified from time to time, preapproved in writing by Lender, pursuant to which control of the occupancy, use, operation, maintenance and

administration of the Mortgaged Property as a Seniors Housing Facility has been granted by an Operator as sub-lessor to any Person (other than Borrower or Operator) as Sublessee.

“**Sublessee**” means the Person responsible for the operation and management of the Mortgaged Property pursuant to any Sublease.

“**Summary of Loan Terms**” means that certain Schedule 2 (Summary of Loan Terms) to the Loan Agreement.

“**Taxes**” has the meaning set forth in the Security Instrument.

“**Third Party Payments**” means all payments and the rights to receive such payments from Medicaid or other federal, state or local programs, boards, bureaus or agencies, and from residents, private insurers or others.

“**Title Policy**” means the mortgagee’s loan policy of title insurance issued in connection with the Mortgage Loan and insuring the lien of the Security Instrument as set forth therein, as approved by Lender.

“**Total Parking Spaces**” has the meaning set forth in the Summary of Loan Terms.

“**Total Residential Units**” has the meaning set forth in the Summary of Loan Terms.

“**Transfer**” means:

(a) a sale, assignment, transfer or other disposition (whether voluntary, involuntary, or by operation of law), other than Residential Leases, Material Commercial Leases or non-Material Commercial Leases permitted by this Loan Agreement;

(b) a granting, pledging, creating or attachment of a lien, encumbrance or security interest (whether voluntary, involuntary, or by operation of law);

(c) an issuance or other creation of a direct or indirect ownership interest;

(d) a withdrawal, retirement, removal or involuntary resignation of any owner or manager of a legal entity; or

(e) a merger, consolidation, dissolution or liquidation of a legal entity.

“**Transfer Fee**” means a fee equal to one percent (1%) of the unpaid principal balance of the Mortgage Loan payable to Lender.

“**UCC**” has the meaning set forth in the Security Instrument.

“**UCC Collateral**” has the meaning set forth in the Security Instrument.

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“**Voidable Transfer**” means any fraudulent conveyance, preference or other voidable or recoverable payment of money or transfer of property.

“**Yield Maintenance Period End Date**” or “**Prepayment Premium Period End Date**” has the meaning set forth in the Summary of Loan Terms.

“**Yield Maintenance Period Term**” or “**Prepayment Premium Period Term**” has the meaning set forth in the Summary of Loan Terms.

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INITIAL PAGE TO SCHEDULE 1


Borrower Initials

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SCHEDULE 2
TO MULTIFAMILY LOAN AND SECURITY AGREEMENT
(Seniors Housing)

Summary of Loan Terms
(Interest Rate Type - Fixed Rate)

I. GENERAL PARTY AND MULTIFAMILY PROJECT INFORMATION	
Borrower	Triad Senior Living III, L.P., a Texas limited partnership
Lender	Berkadia Commercial Mortgage LLC, a Delaware limited liability company
Key Principal	Capital Senior Living Corporation, a Delaware corporation
Guarantor	Capital Senior Living Corporation, a Delaware corporation
Multifamily Project	The Waterford at Pantego
Type of Property	Independent Living
Seniors Housing Facility Licensing Designation	NO SENIOR HOUSING FACILITY LICENSING REQUIRED
HIPAA Covered Entity	Borrower ☐ Yes ☒ No Manager ☐ Yes ☒ No

I. GENERAL PARTY AND MULTIFAMILY PROJECT INFORMATION	
Medicaid Participant	Borrower ☐ Yes ☒ No Manager ☐ Yes ☒ No
ADDRESSES	
Borrower's General Business Address	c/o Capital Senior Living Corporation 14160 Dallas Parkway, Suite 300 Dallas, Texas 75254 Attention: General Counsel
Borrower's Notice Address	c/o Capital Senior Living Corporation 14160 Dallas Parkway, Suite 300 Dallas, Texas 75254 Attention: General Counsel Email: dbrickman@capitalsenior.com
Multifamily Project Address	2650 W. Park Row Drive, Pantego, Texas 76013
Multifamily Project County	Tarrant County
Key Principal's General Business Address	14160 Dallas Parkway, Suite 300 Dallas, Texas 75254 Attention: General Counsel
Key Principal's Notice Address	14160 Dallas Parkway, Suite 300 Dallas, Texas 75254 Attention: General Counsel Email: dbrickman@capitalsenior.com
Guarantor's General Business Address	14160 Dallas Parkway, Suite 300 Dallas, Texas 75254 Attention: General Counsel
Guarantor's Notice Address	14160 Dallas Parkway, Suite 300 Dallas, Texas 75254 Attention: General Counsel Email: dbrickman@capitalsenior.com

I. GENERAL PARTY AND MULTIFAMILY PROJECT INFORMATION	
Lender's General Business Address	521 Fifth Avenue, 20 th Floor New York, New York 10175
Lender's Notice Address	323 Norristown Road, Suite 300 Ambler, PA 19002 Attention: Servicing Senior Vice President Email: DanaJo.martino@berkadia.com
Lender's Payment Address	323 Norristown Road, Suite 300 Ambler, PA 19002
Manager's General Business Address	c/o Capital Senior Living Corporation 14160 Dallas Parkway, Suite 300 Dallas, Texas 75254 Attention: General Counsel
Manager's Notice Address	c/o Capital Senior Living Corporation 14160 Dallas Parkway, Suite 300 Dallas, Texas 75254 Attention: General Counsel Email: dbrickman@capitalsenior.com

II. MULTIFAMILY PROJECT INFORMATION									
Property Square Footage	192,442 sq. ft.								
Total Parking Spaces	103								
Total Residential Units	<table> <tr> <td>Independent Living</td><td>120 units</td></tr> <tr> <td>Assisted Living</td><td>0 units</td></tr> <tr> <td>Alzheimer's</td><td>0 units</td></tr> <tr> <td>Dementia Care</td><td>0 units</td></tr> </table>	Independent Living	120 units	Assisted Living	0 units	Alzheimer's	0 units	Dementia Care	0 units
Independent Living	120 units								
Assisted Living	0 units								
Alzheimer's	0 units								
Dementia Care	0 units								
Affordable Housing Property	☐ Yes ☒ No								

III. MORTGAGE LOAN INFORMATION	
Amortization Period	Three hundred sixty (360) months.

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Amortization Type	☒ Amortizing ☐ Full Term Interest Only ☐ Partial Interest Only
Effective Date	November 12, 2015
First Payment Date	The first day of January, 2016.
Fixed Rate	4.68%
Interest Accrual Method	☐ 30/360 (computed on the basis of a three hundred sixty (360) day year consisting of twelve (12) thirty (30) day months). or ☒ Actual/360 (computed on the basis of a three hundred sixty (360) day year and the actual number of calendar days during the applicable month, calculated by multiplying the unpaid principal balance of the Mortgage Loan by the Interest Rate, dividing the product by three hundred sixty (360), and multiplying the quotient obtained by the actual number of days elapsed in the applicable month).
Interest Only Term	Zero (0) months.
Interest Rate	The Fixed Rate
Interest Rate Type	Fixed Rate
Loan Amount	\$11,599,000.00
Loan Term	One hundred twenty (120) months.
Loan Year	The period beginning on the Effective Date and ending on the last day of November, 2016, and each successive twelve (12) month period thereafter.

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Maturity Date	The first day of December, 2025, or any earlier date on which the unpaid principal balance of the Mortgage Loan becomes due and payable by acceleration or otherwise.
Maximum Permitted Equipment Financing	\$231,980.00
Monthly Debt Service Payment	\$60,017.45
Prepayment Lockout Period	Zero (0) year(s) from the Effective Date

IV. YIELD MAINTENANCE/PREPAYMENT PREMIUM INFORMATION	
Yield Maintenance Period End Date or Prepayment Premium Period End Date	The last day of May, 2025.
Yield Maintenance Period Term or Prepayment Premium Period Term	One hundred fourteen (114) months

V. RESERVE INFORMATION	
Completion Period	Within twelve (12) months after the Effective Date or as otherwise shown on the Required Repair Schedule.
Initial Replacement Reserve Deposit	\$0.00
Maximum Inspection Fee	\$1,000.00
Maximum Repair Disbursement Interval	Quarterly

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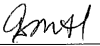
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V. RESERVE INFORMATION	
Maximum Replacement Reserve Disbursement Interval	One (1) time per calendar month
Minimum Repairs Disbursement Amount	\$3,000.00
Minimum Replacement Reserve Disbursement Amount	\$3,000.00
Monthly Replacement Reserve Deposit	\$3,322.08
Repair Threshold	\$10,000.00
Repairs Escrow Account Administrative Fee	\$0.00
Repairs Escrow Deposit	\$0.00
Replacement Reserve Account Administration Fee	\$0.00
Replacement Reserve Account Interest Disbursement Frequency	Monthly
Replacement Threshold	\$10,000.00

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INITIAL PAGE TO SCHEDULE 2


Borrower Initials

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**SCHEDULE 3
TO MULTIFAMILY LOAN AND SECURITY AGREEMENT**

**Schedule of Interest Rate Type Provisions
(Fixed Rate)**

1. Defined Terms.

Capitalized terms not otherwise defined in this Schedule have the meanings given to such terms in the Definitions Schedule to the Loan Agreement.

2. Interest Accrual.

Except as otherwise provided in the Loan Agreement, interest shall accrue at the Interest Rate until fully paid.

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INITIAL PAGE TO SCHEDULE 3


Borrower Initials

Schedule 3 to Multifamily Loan and
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**SCHEDULE 4
TO MULTIFAMILY LOAN AND SECURITY AGREEMENT**

**Prepayment Premium Schedule
(Standard Yield Maintenance – Fixed Rate)**

1. Defined Terms.

All capitalized terms used but not defined in this Prepayment Premium Schedule shall have the meanings assigned to them in the Loan Agreement.

2. Prepayment Premium.

Any Prepayment Premium payable under Section 2.03 (Lockout/Prepayment) of the Loan Agreement shall be computed as follows:

(a) If the prepayment is made at any time after the Effective Date and before the Yield Maintenance Period End Date, the Prepayment Premium shall be the greater of:

(1) one percent (1%) of the amount of principal being prepaid; or

(2) the product obtained by multiplying:

(A) the amount of principal being prepaid,

by

(B) the difference obtained by subtracting from the Fixed Rate on the Mortgage Loan, the Yield Rate (as defined below) on the twenty-fifth (25th) Business Day preceding (i) the Intended Prepayment Date, or (ii) the date Lender accelerates the Mortgage Loan or otherwise accepts a prepayment pursuant to Section 2.03(d) (Application of Collateral) of the Loan Agreement,

by

(C) the present value factor calculated using the following formula:

$$\frac{1 - (1 + r)^{-n/12}}{r}$$

[r = Yield Rate

n = the number of months remaining between (i) either of the following: (x) in the case of a voluntary prepayment, the

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last day of the month in which the prepayment is made, or (y) in any other case, the date on which Lender accelerates the unpaid principal balance of the Mortgage Loan and (ii) the Yield Maintenance Period End Date.

For purposes of this clause (2), the “**Yield Rate**” means the yield calculated by interpolating the yields for the immediately shorter and longer term U.S. “Treasury constant maturities” (as reported in the Federal Reserve Statistical Release H.15 Selected Interest Rates (the “**Fed Release**”) under the heading “U.S. government securities”) closest to the remaining term of the Yield Maintenance Period Term, as follows (rounded to three (3) decimal places):

$$\left(\frac{(a-b)}{(x-y)} \times (z-y) \right) + b$$

a = the yield for the longer U.S. Treasury constant maturity

b = the yield for the shorter U.S. Treasury constant maturity

x = the term of the longer U.S. Treasury constant maturity

y = the term of the shorter U.S. Treasury constant maturity

z = “n” (as defined in the present value factor calculation above) divided by twelve (12).

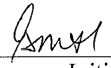
Notwithstanding any provision to the contrary, if “z” equals a term reported under the U.S. “Treasury constant maturities” subheading in the Fed Release, the yield for such term shall be used, and interpolation shall not be necessary. If publication of the Fed Release is discontinued by the Federal Reserve Board, Lender shall determine the Yield Rate from another source selected by Lender. Any determination of the Yield Rate by Lender will be binding absent manifest error.]

(b) If the prepayment is made on or after the Yield Maintenance Period End Date but before the last calendar day of the fourth (4th) month prior to the month in which the Maturity Date occurs, the Prepayment Premium shall be one percent (1%) of the amount of principal being prepaid.

(c) Notwithstanding the provisions of Section 2.03 (Lockout/Prepayment) of the Loan Agreement, no Prepayment Premium shall be payable with respect to any prepayment made on or after the last calendar day of the fourth (4th) month prior to the month in which the Maturity Date occurs.

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INITIAL PAGE TO SCHEDULE 4


Borrower Initials

Schedule 4 to Multifamily Loan and
Security Agreement (Prepayment Premium
Schedule – Standard Yield Maintenance –
Fixed Rate)
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08-13

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APPX. 168

**SCHEDULE 5 TO
MULTIFAMILY LOAN AND SECURITY AGREEMENT**

Required Replacement Schedule

The Waterford at Pantego

\$0 initial deposit (\$335/per unit/per year)

Item Description
Site
Parking, stall striping
Structural Frame & Building Envelope
Painting, Exterior
Asphalt Shingle (3-tab)
Built-up roof - Ethylene Propylene Diene Monomer (EPDM)
Mechanical/Electrical/Plumbing Systems
Unit Level Domestic Hot Water Heater
Furnace (gas heat with A/C)
Packaged HVAC (Common Areas)
Packaged Terminal Air Conditioner (PTAC)
Pad/Roof Condenser
Interior Elements (Dwelling Units / Common Areas)
Common Area Floors, Carpet
Commercial Washer
Commercial Dryer
Common Area, Washer
Common Area, Dryer
Resilient Flooring
Carpet
Kitchen: Range
Kitchen: Refrigerator
Kitchen: Microwave
Common Area Seating, FF&E, Tables, Etc.
Commercial Kitchen Equipment

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INITIAL PAGE TO
SCHEDULE 5 TO
MULTIFAMILY LOAN AND SECURITY AGREEMENT
Required Replacement Schedule


Borrower Initials

Multifamily Loan and Security Agreement
(Non-Recourse) (Seniors Housing)
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08-14

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Schedule 5

APPX. 170

**SCHEDULE 6 TO
MULTIFAMILY LOAN AND SECURITY AGREEMENT**

Required Repair Schedule

The Waterford at Pantego

Immediate Repair Escrow: **\$0** (*not required*)

Item	Type	Estimated Cost	Remedy Period
Limited/isolated areas of sparse vegetation were noted mainly under the trees along the building perimeter. Partner recommends stabilizing these areas at this time.	Routine Maintenance	\$0	Within 12 months
Management reported the water of Pantego contains salts corrosive to copper piping in the areas of turbulence, which include mainly pipe elbows in the vicinity of the water heaters. They are in process of replacing the corroded pipes and adding water treatment to minimize future corrosion.	Routine Maintenance	\$0	Within 12 months
Partner noted a few of the low-height segmental retaining wall blocks located next to the northeast corner of the building were noted as displaced.	Routine Maintenance	\$0	Within 12 months
Total Cost		\$0	

- An Alarm & Detection Equipment Test and a Sprinkler Inspection were conducted in October 2015 by Tyco/Simplex Grinnell. The reports noted the following violations:
 - Strobe in front office by copy machine did not work
 - Piping system/alarm valves 5-year inspection past due
 - No head in the elevator mechanical room and tamper reports to panel as an alarm

Violations are required to be completed within 30-days of closing. (*no escrow required*)

INITIAL PAGE TO
SCHEDULE 6 TO
MULTIFAMILY LOAN AND SECURITY AGREEMENT

Required Repair Schedule


Borrower Initials

Multifamily Loan and Security Agreement
(Non-Recourse) (Seniors Housing)
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Schedule 6

APPX. 172

**SCHEDULE 7 TO
MULTIFAMILY LOAN AND SECURITY AGREEMENT**

Exceptions to Representations and Warranties Schedule

NONE

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INITIAL PAGE TO

**SCHEDULE 7 TO
MULTIFAMILY LOAN AND SECURITY AGREEMENT**

Exceptions to Representations and Warranties Schedule


Borrower Initials

Multifamily Loan and Security Agreement
(Non-Recourse) (Seniors Housing)
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Schedule 7

APPX. 174

EXHIBIT A

**MODIFICATIONS TO MULTIFAMILY LOAN AND SECURITY AGREEMENT
(Cross-Default and Cross-Collateralization: Multi-Note)**

The foregoing Loan Agreement is hereby modified as follows:

1. Capitalized terms used and not specifically defined herein have the meanings given to such terms in the Loan Agreement.

2. The Definitions Schedule is hereby amended by deleting the definition of “Loan Documents” and adding the following in lieu thereof:

“**Loan Documents**” means the Note, the Loan Agreement, the Security Instrument, the Environmental Indemnity Agreement, the Guaranty, all guaranties, all indemnity agreements, all Collateral Agreements, all O&M Plans, the Other Loan Documents, each Other Security Instrument, and any other documents now or in the future executed by Borrower, Borrower Affiliate, Guarantor, Key Principal, any guarantor, or any other person in connection with the Mortgage Loan or any Other Loan, as such documents may be amended, restated, replaced, supplemented, or otherwise modified from time to time.

3. The Definitions Schedule is hereby amended by adding the following new definitions in the appropriate alphabetical order:

“**Borrower Projects**” has the meaning set forth in the Security Instrument.

“**Net Operating Income**” for purposes of subsections (a) and (b) of Section 16.01 (Cross Provisions – Release of Borrower Projects), means, for any Borrower Project:

(a) the lesser of the actual rents collected for the twelve (12) month period (net of any concession) or ninety-five percent (95%) of the gross potential rental income for the twelve (12) month period; plus

(b) the actual laundry income (coin operated machines), cable and alarm fees, application fees, late fees and forfeited deposits for the twelve (12) month period; less

(c) the greater of the actual operating expenses for the twelve (12) month period (including the required Replacement Reserve Deposits funding for the period) or the operating expenses used by Lender in its final underwriting (including Replacement Reserve Deposits), increased at the rate of three percent (3%) per annum.

“**Other Loan Documents**” has the meaning set forth in the Security Instrument.

“**Other Loans**” has the meaning set forth in the Security Instrument.

“**Other Security Instrument**” has the meaning set forth in the Security Instrument.

4. The following section is hereby added to the Loan Agreement as Section 2.01(d) (Cross with Other Loans):

(d) Cross with Other Loans.

Contemporaneously with the making of the Mortgage Loan, Lender is making the Other Loans to Borrower or Borrower Affiliate secured by a lien on the Borrower Projects. Each Other Loan is cross-defaulted and cross-collateralized with the Mortgage Loan as set forth in the Security Instrument and each other Security Instrument.

5. Section 4.01(h) (Borrower Status – Representations and Warranties – Borrower Single Asset Status) of the Loan Agreement is hereby deleted and restated in its entirety to read as follows:

(h) Borrower Single Asset Status

Borrower:

(1) does not own or lease any real property, personal property, or assets other than the Borrower Projects and assets (such as accounts) related to the operation and maintenance of the Borrower Projects;

(2) does not own, operate or participate in any business other than the leasing, ownership, management, operation, and maintenance of the Borrower Projects;

(3) has no material financial obligation under or secured by any indenture, mortgage, deed of trust, deed to secure debt, loan agreement, or other agreement or instrument to which Borrower is a party or by which Borrower or the Borrower Projects are otherwise bound, or to which the Borrower Projects are subject or by which the Borrower Projects are otherwise encumbered, other than:

(A) Permitted Equipment Financing and unsecured trade payables incurred in the ordinary course of the operation of the Borrower Projects (exclusive of amounts for rehabilitation, restoration, repairs, or replacements of the Borrower Projects) so long as such trade payables (i) are not evidenced by a promissory note, (ii) are payable within sixty (60) days of the date incurred, and

(iii) as of the Effective Date, do not exceed, in the aggregate, four percent (4%) of the original principal balance of the Mortgage Loan;

(B) if the Security Instrument grants a lien on a leasehold estate, Borrower's obligations as lessee under such ground lease creating such leasehold estate; and

(C) obligations under the Loan Documents and obligations secured by the Borrower Projects to the extent permitted under the Loan Documents.

(4) has maintained its financial statements, accounting records and other partnership, real estate investment trust, limited liability company or corporate documents, as the case may be, separate from those of any other Person (unless Borrower's assets have been included in a consolidated financial statement prepared in accordance with generally accepted accounting principles);

(5) has not commingled its assets or funds with those of any other Person unless such assets or funds can easily be segregated and identified in the ordinary course of business from those of any other Person;

(6) has been adequately capitalized in light of its contemplated business operations;

(7) has not assumed, guaranteed, or pledged its assets to secure the liabilities or obligations of any other Person (except in connection with the Mortgage Loan, the Other Loans, or other mortgage loans that have been paid in full or collaterally assigned to Lender, including in connection with any Consolidation, Extension and Modification Agreement or similar instrument) or held out its credit as being available to satisfy the obligations of any other Person;

(8) not made loans or advances to any other Person; and

(9) has not entered into, and is not a party to, any transaction with any Borrower Affiliate, except in the ordinary course of business and on terms which are no more favorable to any such Borrower Affiliate than would be obtained in a comparable arm's length transaction with an unrelated third party.

6. Section 4.02(d) (Borrower Status – Covenants – Borrower Single Asset Status) of the Loan Agreement is hereby deleted and restated in its entirety to read as follows:

(d) Borrower Single Asset Status.

Until the Indebtedness is fully paid, Borrower:

(1) shall not acquire or lease any real property, personal property, or assets other than the Borrower Projects and assets (such as accounts) related to the operation and maintenance of the Borrower Projects;

(2) shall not acquire, own, operate or participate in any business other than the leasing, ownership, management, operation, and maintenance of the Borrower Projects;

(3) shall not commingle its assets or funds with those of any other Person, unless such assets or funds easily can be segregated and identified in the ordinary course of business from those of any other Person;

(4) shall maintain its financial statements, accounting records and other partnership, real estate investment trust, limited liability company or corporate documents, as the case may be, separate from those of any other Person (unless Borrower's assets are included in a consolidated financial statement prepared in accordance with generally accepted accounting principles);

(5) shall have no material financial obligation under any indenture, mortgage, deed of trust, deed to secure debt, loan agreement, or other agreement or instrument to which Borrower is a party or by which Borrower or the Borrower Projects are otherwise bound, or to which the Borrower Projects are subject or by which the Borrower Projects are otherwise encumbered, other than:

(A) Permitted Equipment Financing or unsecured trade payables incurred in the ordinary course of the operation of the Borrower Projects (exclusive of amounts (i) to be paid out of the Replacement Reserve Account or Repairs Escrow Account, or (ii) for rehabilitation, restoration, repairs, or replacements of the Borrower Projects or otherwise approved by Lender) so long as such trade payables (1) are not evidenced by a promissory note, (2) are payable within sixty (60) days of the date incurred, and (3) as of any date, do not exceed, in the aggregate, three percent (3%) of the original principal balance of the Mortgage Loan; provided, however, that otherwise compliant outstanding trade payables may exceed three percent (3%) up to an aggregate amount of four percent (4%) of the original principal balance of the Mortgage Loan for a period (beginning on or after the Effective Date) not to exceed ninety (90) consecutive days;

(B) if the Security Instrument grants a lien on a leasehold estate, Borrower's obligations as lessee under the ground lease creating such leasehold estate; and

(C) obligations under the Loan Documents and obligations secured by the Borrower Projects to the extent permitted by the Loan Documents;

(6) shall not assume, guaranty, or pledge its assets to secure the liabilities or obligations of any other Person (except in connection with the Mortgage Loan, the Other Loans, or other mortgage loans that have been paid in full or collaterally assigned to Lender, including in connection with any Consolidation, Extension and Modification Agreement or similar instrument) or hold out its credit as being available to satisfy the obligations of any other Person;

(7) shall not make loans or advances to any other Person; or

(8) shall not enter into, or become a party to, any transaction with any Borrower Affiliate, except in the ordinary course of business and on terms which are no more favorable to any such Borrower Affiliate than would be obtained in a comparable arm's length transaction with an unrelated third party.

7. Section 14.01(a) (Automatic Events of Default) is hereby amended to add the following new section to the end thereof:

(20) any "Event of Default" (as defined in the Other Loan Documents) under any Other Loan Document.

8. The following article is hereby added to the Loan Agreement as Article 16 (Cross Provisions):

ARTICLE 16 – CROSS PROVISIONS

Section 16.01 Release of Borrower Projects.

Lender hereby agrees that Borrower may request that any of the Borrower Projects be released from the cross-default and cross-collateral provisions of this Loan Agreement and the Security Instrument if (a) Borrower proposes to pay off an individual loan secured by one of the Borrower Projects, or (b) Borrower proposes to sell one of the Borrower Projects and have the loan secured by such Borrower Project assumed in accordance with Section 11.03(a) of this Loan Agreement. Upon such request from Borrower, Lender shall consent to release the Borrower Projects from the cross-default and cross-collateral provisions of this Loan Agreement and the Security Instrument, provided the following conditions are satisfied:

(a) the loans secured by the remaining Borrower Projects that are not requested to be released have, in the aggregate, a minimum overall 1.35 debt service coverage, based on the aggregate Net Operating Income for the Borrower Projects not requested to be released for the twelve (12) months of operation immediately prior to Borrower's request;

(b) a loan requested to be released and assumed must also have a minimum 1.35 debt service coverage, based on that Borrower Project's Net Operating Income for the twelve (12) months of operation immediately prior to Borrower's request;

(c) in the event Borrower proposes to pay off one of the loans secured by one of the Borrower Projects by refinancing such loan with a new lender, Borrower must convey the Borrower Project being refinanced to a different ownership entity (with neither the specific Borrower Projects nor the proposed new ownership entity being owned by Borrower) prior to such refinancing, so that none of the Borrower Projects will be security for financing held by any lender other than Lender that is the owner and holder of the Notes;

(d) no Event of Default has occurred and is continuing under the Loan Documents or Other Loans at the time of such request; and

(e) Borrower has paid all costs and expenses of Lender incurred in connection with its processing of the requested release, including all title endorsement premiums, recording fees, inspection fees, and attorney fees.

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INITIAL PAGE TO EXHIBIT A



Borrower Initials

Modifications to Multifamily Loan and
Security Agreement (Cross-Default and
Cross-Collateralization: Multi Note)
Fannie Mae

Form 6203
08-14

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APPX. 181

EXHIBIT B**MODIFICATIONS TO MULTIFAMILY LOAN AND SECURITY AGREEMENT
(Waiver of Imposition Deposits)**

The foregoing Loan Agreement is hereby modified as follows:

1. Capitalized terms used and not specifically defined herein have the meanings given to such terms in the Loan Agreement.

2. The Definitions Schedule is hereby amended by adding the following new definitions in the appropriate alphabetical order:

“Insurance Impositions” means the premiums for maintaining all Required Insurance Coverage.

“Required Insurance Coverage” means the insurance coverage required pursuant to Article 9 (Insurance) of the Loan Agreement and under any other Loan Document.

3. Section 12.02 (Imposition Deposits, Taxes, and Other Charges – Covenants) of the Loan Agreement is hereby amended by adding the following provisions to the end thereof:

(b) Conditional Waiver of Collection of Imposition Deposits.

(1) Notwithstanding anything contained in this Section 12.02 (Imposition Deposits, Taxes, and Other Charges – Covenants) to the contrary, Lender hereby agrees to waive the collection of Imposition Deposits for Insurance Impositions, provided, that:

(A) Borrower shall pay such Insurance Impositions directly to the carrier or agent ten (10) days prior to expiration or as necessary to prevent the Required Insurance Coverage from lapsing due to non-payment of premiums;

(B) Borrower shall provide Lender with proof of payment acceptable to Lender of all Insurance Impositions within five (5) days after the date such Insurance Impositions are paid; and

(C) Borrower shall cause its insurance agent to provide Lender with such certifications regarding the Required Insurance Coverage as Lender may request from time to time evidencing that the Insurance Impositions have been paid in a timely manner and that all of the Required Insurance Coverage is in full force and effect.

(2) Lender reserves the right to require Borrower to deposit the Imposition Deposits with Lender on each Payment Date for Insurance Impositions in accordance with this Section 12.02 (Imposition Deposits, Taxes, and Other Charges – Covenants) upon:

(A) Borrower's failure to pay Insurance Impositions or to provide Lender with proof of payment of Insurance Impositions as required in this Section 12.02(b) (Conditional Waiver of Collection of Imposition Deposits);

(B) Borrower's failure to maintain insurance coverage in accordance with the requirements of Article 9 (Insurance);

(C) the occurrence of any Transfer which is not permitted by the Loan Documents, or any Transfer which requires Lender's consent; or

(D) the occurrence of a default under any of the other terms, conditions and covenants set forth in this Loan Agreement or any of the other Loan Documents.

(3) Except as specifically provided in this Section 12.02(b) (Conditional Waiver of Collection of Imposition Deposits), the provisions of Article 9 (Insurance) shall remain in full force and effect.

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INITIAL PAGE TO EXHIBIT B


Borrower Initials

Modifications to Multifamily Loan and
Security Agreement (Waiver of Imposition
Deposits)
Fannie Mae

Form 6228
04-12

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APPX. 184

EXHIBIT A-3

D215256612 11/13/2015 1:20 PM PGS 38 Fee: \$164.00 Submitter: SIMPLIFILE

Electronically Recorded by Tarrant County Clerk in Official Public Records *Mary Louise Garcia* Mary Louise Garcia
Case 5:20-cv-02395-K Document 5-4 Filed 08/21/20 Page 2 of 39 PageID: 262

Prepared by, and after recording
return to:
Thomas A. Hauser, Esq.
Ballard Spahr LLP
300 East Lombard Street, 18th Floor
Baltimore, Maryland 21202

**MULTIFAMILY DEED OF TRUST,
ASSIGNMENT OF LEASES AND RENTS,
SECURITY AGREEMENT
AND FIXTURE FILING**

(TEXAS)

Fannie Mae Multifamily Security Instrument
Texas
DMEAST #23079147 v6

Form 6025.TX
06-12

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APPX. 186

**MULTIFAMILY DEED OF TRUST,
ASSIGNMENT OF LEASES AND RENTS,
SECURITY AGREEMENT
AND FIXTURE FILING**

This MULTIFAMILY DEED OF TRUST, ASSIGNMENT OF LEASES AND RENTS, SECURITY AGREEMENT AND FIXTURE FILING (as amended, restated, replaced, supplemented, or otherwise modified from time to time, the “**Security Instrument**”) dated as of November 12, 2015, is executed by TRIAD SENIOR LIVING III, L.P., a limited partnership organized and existing under the laws of Texas, as grantor (“**Borrower**”), to DAVID LAWRENCE, ESQ., an individual, as trustee (“**Trustee**”), for the benefit of BERKADIA COMMERCIAL MORTGAGE LLC, a limited liability company organized and existing under the laws of Delaware, as beneficiary (“**Lender**”).

Borrower, in consideration of (i) the loan in the original principal amount of \$11,599,000.00 (the “**Mortgage Loan**”) evidenced by that certain Multifamily Note dated as of the date of this Security Instrument, executed by Borrower and made payable to the order of Lender (as amended, restated, replaced, supplemented, or otherwise modified from time to time, the “**Note**”), (ii) that certain Multifamily Loan and Security Agreement dated as of the date of this Security Instrument, executed by and between Borrower and Lender (as amended, restated, replaced, supplemented or otherwise modified from time to time, the “**Loan Agreement**”), and (iii) the trust created by this Security Instrument, and to secure to Lender the repayment of the Indebtedness (as defined in this Security Instrument), and all renewals, extensions and modifications thereof, and the performance of the covenants and agreements of Borrower contained in the Loan Documents (as defined in the Loan Agreement), excluding the Environmental Indemnity Agreement (as defined in this Security Instrument), irrevocably and unconditionally mortgages, grants, warrants, conveys, bargains, sells, and assigns to Trustee, in trust, for benefit of Lender, with power of sale and right of entry and possession, the Mortgaged Property (as defined in this Security Instrument), including the real property located in Tarrant County, State of Texas, and described in Exhibit A attached to this Security Instrument and incorporated by reference (the “**Land**”), to have and to hold such Mortgaged Property unto Trustee and Trustee’s successors and assigns, forever; Borrower hereby releasing, relinquishing and waiving, to the fullest extent allowed by law, all rights and benefits, if any, under and by virtue of the homestead exemption laws of the Property Jurisdiction (as defined in this Security Instrument), if applicable.

Borrower represents and warrants that Borrower is lawfully seized of the Mortgaged Property and has the right, power and authority to mortgage, grant, warrant, convey, bargain, sell, and assign the Mortgaged Property, and that the Mortgaged Property is not encumbered by any Lien (as defined in this Security Instrument) other than Permitted Encumbrances (as defined in this Security Instrument). Borrower covenants that Borrower will warrant and defend the title to the Mortgaged Property against all claims and demands other than Permitted Encumbrances.

Borrower, and by their acceptance hereof, each of Trustee and Lender covenants and agrees as follows:

1. **Defined Terms.**

Capitalized terms used and not specifically defined herein have the meanings given to such terms in the Loan Agreement. All terms used and not specifically defined herein, but which are otherwise defined by the UCC, shall have the meanings assigned to them by the UCC. The following terms, when used in this Security Instrument, shall have the following meanings:

“Condemnation Action” means any action or proceeding, however characterized or named, relating to any condemnation or other taking, or conveyance in lieu thereof, of all or any part of the Mortgaged Property, whether direct or indirect.

“Enforcement Costs” means all expenses and costs, including reasonable attorneys’ fees and expenses, fees and out-of-pocket expenses of expert witnesses and costs of investigation, incurred by Lender as a result of any Event of Default under the Loan Agreement or in connection with efforts to collect any amount due under the Loan Documents, or to enforce the provisions of the Loan Agreement or any of the other Loan Documents, including those incurred in post-judgment collection efforts and in any bankruptcy or insolvency proceeding (including any action for relief from the automatic stay of any bankruptcy proceeding or Foreclosure Event) or judicial or non-judicial foreclosure proceeding, to the extent permitted by law.

“Environmental Indemnity Agreement” means that certain Environmental Indemnity Agreement dated as of the date of this Security Instrument, executed by Borrower to and for the benefit of Lender, as the same may be amended, restated, replaced, supplemented, or otherwise modified from time to time.

“Environmental Laws” has the meaning set forth in the Environmental Indemnity Agreement.

“Event of Default” has the meaning set forth in the Loan Agreement.

“Fixtures” means all Goods that are so attached or affixed to the Land or the Improvements as to constitute a fixture under the laws of the Property Jurisdiction.

“Goods” means all of Borrower’s present and hereafter acquired right, title and interest in all goods which are used now or in the future in connection with the ownership, management, or operation of the Land or the Improvements or are located on the Land or in the Improvements, including inventory; furniture; furnishings; machinery, equipment, engines, boilers, incinerators, and installed building materials; systems and equipment for the purpose of supplying or distributing heating, cooling, electricity, gas, water, air, or light; antennas, cable, wiring, and conduits used in connection with radio, television, security, fire prevention, or fire detection, or otherwise used to carry electronic signals; telephone systems and equipment; elevators and related machinery and equipment; fire detection, prevention and extinguishing systems and apparatus; security and access control systems and apparatus; plumbing systems; water heaters, ranges, stoves, microwave ovens, refrigerators, dishwashers, garbage disposers, washers, dryers, and other appliances; light fixtures, awnings, storm windows, and storm doors; pictures, screens, blinds, shades, curtains, and curtain rods; mirrors, cabinets, paneling, rugs, and floor and wall coverings; fences, trees, and plants; swimming pools; exercise equipment; supplies; tools; books and records (whether in written or electronic form); websites, URLs, blogs, and social network

pages; computer equipment (hardware and software); and other tangible personal property which is used now or in the future in connection with the ownership, management, or operation of the Land or the Improvements or are located on the Land or in the Improvements.

"Imposition Deposits" means deposits in an amount sufficient to accumulate with Lender the entire sum required to pay the Impositions when due.

"Impositions" means

(a) any water and sewer charges which, if not paid, may result in a lien on all or any part of the Mortgaged Property;

(b) the premiums for fire and other casualty insurance, liability insurance, rent loss insurance and such other insurance as Lender may require under the Loan Agreement;

(c) Taxes; and

(d) amounts for other charges and expenses assessed against the Mortgaged Property which Lender at any time reasonably deems necessary to protect the Mortgaged Property, to prevent the imposition of liens on the Mortgaged Property, or otherwise to protect Lender's interests, all as reasonably determined from time to time by Lender.

"Improvements" means the buildings, structures, improvements, and alterations now constructed or at any time in the future constructed or placed upon the Land, including any future replacements, facilities, and additions and other construction on the Land.

"Indebtedness" means the principal of, interest on, and all other amounts due at any time under the Note, the Loan Agreement, this Security Instrument or any other Loan Document (other than the Environmental Indemnity Agreement and Guaranty), including Prepayment Premiums, late charges, interest charged at the Default Rate, and accrued interest as provided in the Loan Agreement and this Security Instrument, advances, costs and expenses to perform the obligations of Borrower or to protect the Mortgaged Property or the security of this Security Instrument, all other monetary obligations of Borrower under the Loan Documents (other than the Environmental Indemnity Agreement), including amounts due as a result of any indemnification obligations, and any Enforcement Costs.

"Land" means the real property described in Exhibit A.

"Leases" means all present and future leases, subleases, licenses, concessions or grants or other possessory interests now or hereafter in force, whether oral or written, covering or affecting the Mortgaged Property, or any portion of the Mortgaged Property (including proprietary leases or occupancy agreements if Borrower is a cooperative housing corporation), and all modifications, extensions or renewals thereof.

"Lien" means any claim or charge against property for payment of a debt or an amount owed for services rendered, including any mortgage, deed of trust, deed to secure debt, security interest,

tax lien, any materialman's or mechanic's lien, or any lien of a Governmental Authority, including any lien in connection with the payment of utilities, or any other encumbrance.

"**Mortgaged Property**" means all of Borrower's present and hereafter acquired right, title and interest, if any, in and to all of the following:

- (a) the Land;
- (b) the Improvements;
- (c) the Personalty;
- (d) current and future rights, including air rights, development rights, zoning rights and other similar rights or interests, easements, tenements, rights-of-way, strips and gores of land, streets, alleys, roads, sewer rights, waters, watercourses, and appurtenances related to or benefitting the Land or the Improvements, or both, and all rights-of-way, streets, alleys and roads which may have been or may in the future be vacated;
- (e) insurance policies relating to the Mortgaged Property (and any unearned premiums) and all proceeds paid or to be paid by any insurer of the Land, the Improvements, the Personalty, or any other part of the Mortgaged Property, whether or not Borrower obtained the insurance pursuant to Lender's requirements;
- (f) awards, payments and other compensation made or to be made by any municipal, state or federal authority with respect to the Land, the Improvements, the Personalty, or any other part of the Mortgaged Property, including any awards or settlements resulting from (1) Condemnation Actions, (2) any damage to the Mortgaged Property caused by governmental action that does not result in a Condemnation Action, or (3) the total or partial taking of the Land, the Improvements, the Personalty, or any other part of the Mortgaged Property under the power of eminent domain or otherwise and including any conveyance in lieu thereof;
- (g) contracts, options and other agreements for the sale of the Land, the Improvements, the Personalty, or any other part of the Mortgaged Property entered into by Borrower now or in the future, including cash or securities deposited to secure performance by parties of their obligations;
- (h) Leases and Lease guaranties, letters of credit and any other supporting obligation for any of the Leases given in connection with any of the Leases, and all Rents;
- (i) earnings, royalties, accounts receivable, issues and profits from the Land, the Improvements or any other part of the Mortgaged Property, and all undisbursed proceeds of the Mortgage Loan and, if Borrower is a cooperative housing corporation, maintenance charges or assessments payable by shareholders or residents;
- (j) Imposition Deposits;

(k) refunds or rebates of Impositions by any municipal, state or federal authority or insurance company (other than refunds applicable to periods before the real property tax year in which this Security Instrument is dated);

(l) tenant security deposits;

(m) names under or by which any of the above Mortgaged Property may be operated or known, and all trademarks, trade names, and goodwill relating to any of the Mortgaged Property;

(n) Collateral Accounts and all Collateral Account Funds;

(o) products, and all cash and non-cash proceeds from the conversion, voluntary or involuntary, of any of the above into cash or liquidated claims, and the right to collect such proceeds; and

(p) all of Borrower's right, title and interest in the oil, gas, minerals, mineral interests, royalties, overriding royalties, production payments, net profit interests and other interests and estates in, under and on the Mortgaged Property and other oil, gas and mineral interests with which any of the foregoing interests or estates are pooled or unitized.

"Permitted Encumbrance" means only the easements, restrictions and other matters listed in a schedule of exceptions to coverage in the Title Policy and Taxes for the current tax year that are not yet due and payable.

"Personalty" means all of Borrower's present and hereafter acquired right, title and interest in all Goods, accounts, choses of action, chattel paper, documents, general intangibles (including Software), payment intangibles, instruments, investment property, letter of credit rights, supporting obligations, computer information, source codes, object codes, records and data, all telephone numbers or listings, claims (including claims for indemnity or breach of warranty), deposit accounts and other property or assets of any kind or nature related to the Land or the Improvements now or in the future, including operating agreements, surveys, plans and specifications and contracts for architectural, engineering and construction services relating to the Land or the Improvements, and all other intangible property and rights relating to the operation of, or used in connection with, the Land or the Improvements, including all governmental permits relating to any activities on the Land.

"Prepayment Premium" has the meaning set forth in the Loan Agreement.

"Property Jurisdiction" means the jurisdiction in which the Land is located.

"Rents" means all rents (whether from residential or non-residential space), revenues and other income from the Land or the Improvements, including subsidy payments received from any sources, including payments under any "Housing Assistance Payments Contract" or other rental subsidy agreement (if any), parking fees, laundry and vending machine income and fees and charges for food, health care and other services provided at the Mortgaged Property, whether now due, past due, or to become due, and tenant security deposits.

“Software” means a computer program and any supporting information provided in connection with a transaction relating to the program. The term does not include any computer program that is included in the definition of Goods.

“Taxes” means all taxes, assessments, vault rentals and other charges, if any, general, special or otherwise, including assessments for schools, public betterments and general or local improvements, which are levied, assessed or imposed by any public authority or quasi-public authority, and which, if not paid, may become a lien, on the Land or the Improvements or any taxes upon any Loan Document.

“Title Policy” has the meaning set forth in the Loan Agreement.

“UCC” means the Uniform Commercial Code in effect in the Property Jurisdiction, as amended from time to time.

“UCC Collateral” means any or all of that portion of the Mortgaged Property in which a security interest may be granted under the UCC and in which Borrower has any present or hereafter acquired right, title or interest.

2. Security Agreement; Fixture Filing.

(a) To secure to Lender, the repayment of the Indebtedness, and all renewals, extensions and modifications thereof, and the performance of the covenants and agreements of Borrower contained in the Loan Documents, Borrower hereby pledges, assigns, and grants to Lender a continuing security interest in the UCC Collateral. This Security Instrument constitutes a security agreement and a financing statement under the UCC. This Security Instrument also constitutes a financing statement pursuant to the terms of the UCC with respect to any part of the Mortgaged Property that is or may become a Fixture under applicable law, and will be recorded as a “fixture filing” in accordance with the UCC. Borrower hereby authorizes Lender to file financing statements, continuation statements and financing statement amendments in such form as Lender may require to perfect or continue the perfection of this security interest without the signature of Borrower. If an Event of Default has occurred and is continuing, Lender shall have the remedies of a secured party under the UCC or otherwise provided at law or in equity, in addition to all remedies provided by this Security Instrument and in any Loan Document. Lender may exercise any or all of its remedies against the UCC Collateral separately or together, and in any order, without in any way affecting the availability or validity of Lender’s other remedies. For purposes of the UCC, the debtor is Borrower and the secured party is Lender. The name and address of the debtor and secured party are set forth after Borrower’s signature below which are the addresses from which information on the security interest may be obtained.

(b) Borrower represents and warrants that: (1) Borrower maintains its chief executive office at the location set forth after Borrower’s signature below, and Borrower will notify Lender in writing of any change in its chief executive office within five (5) days of such change; (2) Borrower is the record owner of the Mortgaged Property; (3) Borrower’s state of incorporation, organization, or formation, if applicable, is as set forth on Page 1 of this Security Instrument; (4) Borrower’s exact legal name is as set forth on Page 1 of this Security Instrument;

(5) Borrower's organizational identification number, if applicable, is as set forth after Borrower's signature below; (6) Borrower is the owner of the UCC Collateral subject to no liens, charges or encumbrances other than the lien hereof; (7) except as expressly provided in the Loan Agreement, the UCC Collateral will not be removed from the Mortgaged Property without the consent of Lender; and (8) no financing statement covering any of the UCC Collateral or any proceeds thereof is on file in any public office except pursuant hereto.

(c) All property of every kind acquired by Borrower after the date of this Security Instrument which by the terms of this Security Instrument shall be subject to the lien and the security interest created hereby, shall immediately upon the acquisition thereof by Borrower and without further conveyance or assignment become subject to the lien and security interest created by this Security Instrument. Nevertheless, Borrower shall execute, acknowledge, deliver and record or file, as appropriate, all and every such further deeds of trust, mortgages, deeds to secure debt, security agreements, financing statements, assignments and assurances as Lender shall require for accomplishing the purposes of this Security Instrument and to comply with the rerecording requirements of the UCC.

3. Assignment of Leases and Rents; Appointment of Receiver; Lender in Possession.

(a) As part of the consideration for the Indebtedness, Borrower absolutely and unconditionally assigns and transfers to Lender all Leases and Rents. It is the intention of Borrower to establish present, absolute and irrevocable transfers and assignments to Lender of all Leases and Rents and to authorize and empower Lender to collect and receive all Rents without the necessity of further action on the part of Borrower. Borrower and Lender intend the assignments of Leases and Rents to be effective immediately and to constitute absolute present assignments, and not assignments for additional security only. Only for purposes of giving effect to these absolute assignments of Leases and Rents, and for no other purpose, the Leases and Rents shall not be deemed to be a part of the Mortgaged Property. However, if these present, absolute and unconditional assignments of Leases and Rents are not enforceable by their terms under the laws of the Property Jurisdiction, then each of the Leases and Rents shall be included as part of the Mortgaged Property, and it is the intention of Borrower, in such circumstance, that this Security Instrument create and perfect a lien on each of the Leases and Rents in favor of Lender, which liens shall be effective as of the date of this Security Instrument.

(b) Until an Event of Default has occurred and is continuing, but subject to the limitations set forth in the Loan Documents, Borrower shall have a revocable license to exercise all rights, power and authority granted to Borrower under the Leases (including the right, power and authority to modify the terms of any Lease, extend or terminate any Lease, or enter into new Leases, subject to the limitations set forth in the Loan Documents), and to collect and receive all Rents, to hold all Rents in trust for the benefit of Lender, and to apply all Rents to pay the Monthly Debt Service Payments and the other amounts then due and payable under the other Loan Documents, including Imposition Deposits, and to pay the current costs and expenses of managing, operating and maintaining the Mortgaged Property, including utilities and Impositions (to the extent not included in Imposition Deposits), tenant improvements and other capital expenditures. So long as no Event of Default has occurred and is continuing (and no event which, with the giving of notice or the passage of time, or both, would constitute an Event of

Default has occurred and is continuing), the Rents remaining after application pursuant to the preceding sentence may be retained and distributed by Borrower free and clear of, and released from, Lender's rights with respect to Rents under this Security Instrument.

(c) If an Event of Default has occurred and is continuing, without the necessity of Lender entering upon and taking and maintaining control of the Mortgaged Property directly, by a receiver, or by any other manner or proceeding permitted by the laws of the Property Jurisdiction, the revocable license granted to Borrower pursuant to Section 3(b) shall automatically terminate, and Lender shall immediately have all rights, powers and authority granted to Borrower under any Lease (including the right, power and authority to modify the terms of any such Lease, or extend or terminate any such Lease) and, without notice, Lender shall be entitled to all Rents as they become due and payable, including Rents then due and unpaid. During the continuance of an Event of Default, Borrower authorizes Lender to collect, sue for and compromise Rents and directs each tenant of the Mortgaged Property to pay all Rents to, or as directed by, Lender, and Borrower shall, upon Borrower's receipt of any Rents from any sources, pay the total amount of such receipts to Lender. Although the foregoing rights of Lender are self-effecting, at any time during the continuance of an Event of Default, Lender may make demand for all Rents, and Lender may give, and Borrower hereby irrevocably authorizes Lender to give, notice to all tenants of the Mortgaged Property instructing them to pay all Rents to Lender. No tenant shall be obligated to inquire further as to the occurrence or continuance of an Event of Default, and no tenant shall be obligated to pay to Borrower any amounts that are actually paid to Lender in response to such a notice. Any such notice by Lender shall be delivered to each tenant personally, by mail or by delivering such demand to each rental unit.

(d) If an Event of Default has occurred and is continuing, Lender may, regardless of the adequacy of Lender's security or the solvency of Borrower, and even in the absence of waste, enter upon, take and maintain full control of the Mortgaged Property, and may exclude Borrower and its agents and employees therefrom, in order to perform all acts that Lender, in its discretion, determines to be necessary or desirable for the operation and maintenance of the Mortgaged Property, including the execution, cancellation or modification of Leases, the collection of all Rents (including through use of a lockbox, at Lender's election), the making of repairs to the Mortgaged Property and the execution or termination of contracts providing for the management, operation or maintenance of the Mortgaged Property, for the purposes of enforcing this assignment of Rents, protecting the Mortgaged Property or the security of this Security Instrument and the Mortgage Loan, or for such other purposes as Lender in its discretion may deem necessary or desirable.

(e) Notwithstanding any other right provided Lender under this Security Instrument, or any other Loan Document, if an Event of Default has occurred and is continuing, and regardless of the adequacy of Lender's security or Borrower's solvency, and without the necessity of giving prior notice (oral or written) to Borrower, Lender may apply to any court having jurisdiction for the appointment of a receiver for the Mortgaged Property to take any or all of the actions set forth in Section 3. If Lender elects to seek the appointment of a receiver for the Mortgaged Property at any time after an Event of Default has occurred and is continuing, Borrower, by its execution of this Security Instrument, expressly consents to the appointment of such receiver, including the appointment of a receiver *ex parte*, if permitted by applicable law.

Borrower consents to shortened time consideration of a motion to appoint a receiver. Lender or the receiver, as applicable, shall be entitled to receive a reasonable fee for managing the Mortgaged Property and such fee shall become an additional part of the Indebtedness. Immediately upon appointment of a receiver or Lender's entry upon and taking possession and control of the Mortgaged Property, possession of the Mortgaged Property and all documents, records (including records on electronic or magnetic media), accounts, surveys, plans, and specifications relating to the Mortgaged Property, and all security deposits and prepaid Rents, shall be surrendered to Lender or the receiver, as applicable. If Lender or receiver takes possession and control of the Mortgaged Property, Lender or receiver may exclude Borrower and its representatives from the Mortgaged Property.

(f) The acceptance by Lender of the assignments of the Leases and Rents pursuant to this Section 3 shall not at any time or in any event obligate Lender to take any action under any Loan Document or to expend any money or to incur any expense. Lender shall not be liable in any way for any injury or damage to person or property sustained by any Person in, on or about the Mortgaged Property. Prior to Lender's actual entry upon and taking possession and control of the Land and Improvements, Lender shall not be:

- (1) obligated to perform any of the terms, covenants and conditions contained in any Lease (or otherwise have any obligation with respect to any Lease);
- (2) obligated to appear in or defend any action or proceeding relating to any Lease or the Mortgaged Property; or
- (3) responsible for the operation, control, care, management or repair of the Mortgaged Property or any portion of the Mortgaged Property.

The execution of this Security Instrument shall constitute conclusive evidence that all responsibility for the operation, control, care, management and repair of the Mortgaged Property is and shall be that of Borrower, prior to such actual entry and taking possession and control by Lender of the Land and Improvements.

(g) Lender shall be liable to account only to Borrower and only for Rents actually received by Lender. Lender shall not be liable to Borrower, anyone claiming under or through Borrower or anyone having an interest in the Mortgaged Property by reason of any act or omission of Lender under this Section 3, and Borrower hereby releases and discharges Lender from any such liability to the fullest extent permitted by law, provided that Lender shall not be released from liability that occurs as a result of Lender's gross negligence or willful misconduct as determined by a court of competent jurisdiction pursuant to a final, non-appealable court order. If the Rents are not sufficient to meet the costs of taking control of and managing the Mortgaged Property and collecting the Rents, any funds expended by Lender for such purposes shall be added to, and become a part of, the principal balance of the Indebtedness, be immediately due and payable, and bear interest at the Default Rate from the date of disbursement until fully paid. Any entering upon and taking control of the Mortgaged Property by Lender or the receiver, and any application of Rents as provided in this Security Instrument, shall not cure

or waive any Event of Default or invalidate any other right or remedy of Lender under applicable law or provided for in this Security Instrument or any Loan Document.

4. Protection of Lender's Security.

If Borrower fails to perform any of its obligations under this Security Instrument or any other Loan Document, or any action or proceeding is commenced that purports to affect the Mortgaged Property, Lender's security, rights or interests under this Security Instrument or any Loan Document (including eminent domain, insolvency, code enforcement, civil or criminal forfeiture, enforcement of Environmental Laws, fraudulent conveyance or reorganizations or proceedings involving a debtor or decedent), Lender may, at its option, make such appearances, disburse or pay such sums and take such actions, whether before or after an Event of Default or whether directly or to any receiver for the Mortgaged Property, as Lender reasonably deems necessary to perform such obligations of Borrower and to protect the Mortgaged Property or Lender's security, rights or interests in the Mortgaged Property or the Mortgage Loan, including:

- (a) paying fees and out-of-pocket expenses of attorneys, accountants, inspectors and consultants;
- (b) entering upon the Mortgaged Property to make repairs or secure the Mortgaged Property;
- (c) obtaining (or force-placing) the insurance required by the Loan Documents; and
- (d) paying any amounts required under any of the Loan Documents that Borrower has failed to pay.

Any amounts so disbursed or paid by Lender shall be added to, and become part of, the principal balance of the Indebtedness, be immediately due and payable and bear interest at the Default Rate from the date of disbursement until fully paid. The provisions of this Section 4 shall not be deemed to obligate or require Lender to incur any expense or take any action.

5. Default; Acceleration; Remedies.

(a) If an Event of Default has occurred and is continuing, Lender, at its option, may declare the Indebtedness to be immediately due and payable without further demand, and may either with or without entry or taking possession as herein provided or otherwise, proceed by suit or suits at law or in equity or any other appropriate proceeding or remedy (1) to enforce payment of the Mortgage Loan; (2) to foreclose this Security Instrument judicially or non-judicially by the power of sale granted herein; (3) to enforce or exercise any right under any Loan Document; and (4) to pursue any one (1) or more other remedies provided in this Security Instrument or in any other Loan Document or otherwise afforded by applicable law. Each right and remedy provided in this Security Instrument or any other Loan Document is distinct from all other rights or remedies under this Security Instrument or any other Loan Document or otherwise afforded by applicable law, and each shall be cumulative and may be exercised concurrently, independently, or successively, in any order. Borrower has the right to bring an action to assert the nonexistence of an Event of Default or any other defense of Borrower to acceleration and sale.

(b) Borrower acknowledges that the power of sale granted in this Security Instrument may be exercised or directed by Lender without prior judicial hearing. In the event Lender invokes the power of sale:

(1) Lender may, by and through the Trustee, or otherwise, sell or offer for sale the Mortgaged Property in such portions, order and parcels as Lender may determine, with or without having first taken possession of the Mortgaged Property, to the highest bidder for cash at public auction. Such sale shall be made at the courthouse door of the county in which all or any part of the Mortgaged Property to be sold is situated (whether the parts or parcel, if any, situated in different counties are contiguous or not, and without the necessity of having any Personalty present at such sale) on the first Tuesday of any month between the hours of 10:00 a.m. and 4:00 p.m., after advertising the time, place and terms of sale and that portion of the Mortgaged Property to be sold by posting or causing to be posted written or printed notice of sale at least twenty-one (21) days before the date of the sale at the courthouse door of the county in which the sale is to be made and at the courthouse door of any other county in which a portion of the Mortgaged Property may be situated, and by filing such notice with the County Clerk(s) of the county(s) in which all or a portion of the Mortgaged Property may be situated, which notice may be posted and filed by the Trustee acting, or by any person acting for the Trustee; and Lender has, at least twenty-one (21) days before the date of the sale, served written or printed notice of the proposed sale by certified mail on each debtor obligated to pay the Indebtedness according to Lender's records by the deposit of such notice, enclosed in a postpaid wrapper, properly addressed to such debtor at debtor's most recent address as shown by Lender's records, in a post office or official depository under the care and custody of the United States Postal Service. The affidavit of any person having knowledge of the facts to the effect that such service was completed shall be prima facie evidence of the fact of service;

(2) Trustee shall deliver to the purchaser at the sale, within a reasonable time after the sale, a deed conveying the Mortgaged Property so sold in fee simple with covenants of general warranty. Borrower covenants and agrees to defend generally the purchaser's title to the Mortgaged Property against all claims and demands. The recitals in Trustee's deed shall be prima facie evidence of the truth of the statements contained in those recitals;

(3) Trustee shall be entitled to receive fees and expenses from such sale not to exceed the amount permitted by applicable law; and

(4) Lender shall have the right to become the purchaser at any sale made under or by virtue of this Security Instrument and Lender so purchasing at any such sale shall have the right to be credited upon the amount of the bid made therefor by Lender with the amount payable to Lender out of the net proceeds of such sale. In the event of any such sale, the outstanding principal amount of the Mortgage Loan and the other Indebtedness, if not previously due, shall be and become immediately due and payable without demand or notice of any kind. If the Mortgaged Property is sold for an amount less than the amount outstanding under the Indebtedness, the deficiency shall be

determined by the purchase price at the sale or sales. Borrower waives all rights, claims, and defenses with respect to Lender's ability to obtain a deficiency judgment.

(c) Borrower acknowledges and agrees that the proceeds of any sale shall be applied as determined by Lender unless otherwise required by applicable law.

(d) In connection with the exercise of Lender's rights and remedies under this Security Instrument and any other Loan Document, there shall be allowed and included as Indebtedness: (1) all expenditures and expenses authorized by applicable law and all other expenditures and expenses which may be paid or incurred by or on behalf of Lender for reasonable legal fees, appraisal fees, outlays for documentary and expert evidence, stenographic charges and publication costs; (2) all expenses of any environmental site assessments, environmental audits, environmental remediation costs, appraisals, surveys, engineering studies, wetlands delineations, flood plain studies, and any other similar testing or investigation deemed necessary or advisable by Lender incurred in preparation for, contemplation of or in connection with the exercise of Lender's rights and remedies under the Loan Documents; and (3) costs (which may be reasonably estimated as to items to be expended in connection with the exercise of Lender's rights and remedies under the Loan Documents) of procuring all abstracts of title, title searches and examinations, title insurance policies, and similar data and assurance with respect to title as Lender may deem reasonably necessary either to prosecute any suit or to evidence the true conditions of the title to or the value of the Mortgaged Property to bidders at any sale which may be held in connection with the exercise of Lender's rights and remedies under the Loan Documents. All expenditures and expenses of the nature mentioned in this Section 5, and such other expenses and fees as may be incurred in the protection of the Mortgaged Property and rents and income therefrom and the maintenance of the lien of this Security Instrument, including the fees of any attorney employed by Lender in any litigation or proceedings affecting this Security Instrument, the Note, the other Loan Documents, or the Mortgaged Property, including bankruptcy proceedings, any Foreclosure Event, or in preparation of the commencement or defense of any proceedings or threatened suit or proceeding, or otherwise in dealing specifically therewith, shall be so much additional Indebtedness and shall be immediately due and payable by Borrower, with interest thereon at the Default Rate until paid.

(e) If all or any part of the Mortgaged Property is sold pursuant to this Section 5, Borrower will be divested of any and all interest and claim to the Mortgaged Property, including any interest or claim to all insurance policies, utility deposits, bonds, loan commitments and other intangible property included as a part of the Mortgaged Property. Additionally, after a sale of all or any part of the Land, Improvements, Fixtures and Personalty, Borrower will be considered a tenant at sufferance of the purchaser of the same, and the purchaser shall be entitled to immediate possession of such property. If Borrower shall fail to vacate the Mortgaged Property immediately, the purchaser may and shall have the right, without further notice to Borrower, to go into any justice court in any precinct or county in which the Mortgaged Property is located and file an action in forcible entry and detainer, which action shall lie against Borrower or its assigns or legal representatives, as a tenant at sufferance. This remedy is cumulative of any and all remedies the purchaser may have under this Security Instrument or otherwise.

(f) In any action for a deficiency after a foreclosure under this Security Instrument, if any person against whom recovery is sought requests the court in which the action is pending to determine the fair market value of the Mortgaged Property, as of the date of the foreclosure sale, the following shall be the basis of the court's determination of fair market value; provided that Borrower and any guarantor hereby waive any rights to contest the amount of the deficiency claim afforded to Borrower and such guarantor under Tex. Prop. Code Sections 51.003; 51.004 and 51.005; in the event the waiver of such provision is held invalid, that the valuation method as currently set forth below shall be used;

(1) the Mortgaged Property shall be valued "as is" and in its condition as of the date of foreclosure, and no assumption of increased value because of post-foreclosure repairs, refurbishment, restorations or improvements shall be made;

(2) any adverse effect on the marketability of title because of the foreclosure or because of any other title condition not existing as of the date of this Security Instrument shall be considered;

(3) the valuation of the Mortgaged Property shall be based upon an assumption that the foreclosure purchaser desires a prompt resale of the Mortgaged Property for cash within a six (6) month period after foreclosure;

(4) although the Mortgaged Property may be disposed of more quickly by the foreclosure purchaser, the gross valuation of the Mortgaged Property as of the date of foreclosure shall be discounted for a hypothetical reasonable holding period (not to exceed six (6) months) at a monthly rate equal to the average monthly interest rate on the Note for the twelve (12) months before the date of foreclosure;

(5) the gross valuation of the Mortgaged Property as of the date of foreclosure shall be further discounted and reduced by reasonable estimated costs of disposition, including brokerage commissions, title policy premiums, environmental assessment and clean-up costs, tax and assessment, prorations, costs to comply with legal requirements, and attorneys' fees;

(6) expert opinion testimony shall be considered only from a licensed appraiser certified by the State of Texas and, to the extent permitted under Texas law, a member of the Appraisal Institute, having at least five (5) years' experience in appraising property similar to the Mortgaged Property in the county where the Mortgaged Property is located, and who has conducted and prepared a complete written appraisal of the Mortgaged Property taking into considerations the factors set forth in this Security Instrument; no expert opinion testimony shall be considered without such written appraisal;

(7) evidence of comparable sales shall be considered only if also included in the expert opinion testimony and written appraisal referred to in the preceding paragraph; and

(8) an affidavit executed by Lender to the effect that the foreclosure bid accepted by Trustee was equal to or greater than the value of the Mortgaged Property determined by Lender based upon the factors and methods set forth in subparagraphs (1) through (7) above before the foreclosure shall constitute prima facie evidence that the foreclosure bid was equal to or greater than the fair market value of the Mortgaged Property on the foreclosure date.

(g) Lender may, at Lender's option, comply with these provisions in the manner permitted or required by Title 5, Section 51.002 of the Texas Property Code (relating to the sale of real estate) or by Chapter 9 of the Texas Business and Commerce Code (relating to the sale of collateral after default by a debtor), as those titles and chapters now exist or may be amended or succeeded in the future, or by any other present or future articles or enactments relating to same subject. Unless expressly excluded, the Mortgaged Property shall include Rents collected before a foreclosure sale, but attributable to the period following the foreclosure sale, and Borrower shall pay such Rents to the purchaser at such sale. At any such sale:

(1) whether made under the power contained in this Security Instrument, Section 51.002, the Texas Business and Commerce Code, any other legal requirement or by virtue of any judicial proceedings or any other legal right, remedy or recourse, it shall not be necessary for Trustee to have physically present, or to have constructive possession of, the Mortgaged Property (Borrower shall deliver to Trustee any portion of the Mortgaged Property not actually or constructively possessed by Trustee immediately upon demand by Trustee) and the title to and right of possession of any such Mortgaged Property shall pass to the purchaser as completely as if the Mortgaged Property had been actually present and delivered to the purchaser at the sale;

(2) each instrument of conveyance executed by Trustee shall contain a general warranty of title, binding upon Borrower;

(3) the recitals contained in any instrument of conveyance made by Trustee shall conclusively establish the truth and accuracy of the matters recited in the Instrument, including nonpayment of the Indebtedness and the advertisement and conduct of the sale in the manner provided in this Security Instrument and otherwise by law and the appointment of any successor Trustee;

(4) all prerequisites to the validity of the sale shall be conclusively presumed to have been satisfied;

(5) the receipt of Trustee or of such other party or officer making the sale shall be sufficient to discharge to the purchaser or purchasers for such purchaser(s)' purchase money, and no such purchaser or purchasers, or such purchaser(s)' assigns or personal representatives, shall thereafter be obligated to see to the application of such purchase money or be in any way answerable for any loss, misapplication or nonapplication of such purchase money; and

(6) to the fullest extent permitted by law, Borrower shall be completely and irrevocably divested of all of Borrower's right, title, interest, claim and demand whatsoever, either at law or in equity, in and to the Mortgaged Property sold, and such sale shall be a perpetual bar to any claim to all or any part of the Mortgaged Property sold, both at law and in equity, against Borrower and against any person claiming by, through or under Borrower.

(h) Any action taken by Trustee or Lender pursuant to the provisions of this Section 5 shall comply with the laws of the Property Jurisdiction. Such applicable laws shall take precedence over the provisions of this Section 5, but shall not invalidate or render unenforceable any other provision of any Loan Document that can be construed in a manner consistent with any applicable law. If any provision of this Security Instrument shall grant to Lender (including Lender acting as a mortgagee-in-possession), Trustee or a receiver appointed pursuant to the provisions of this Security Instrument any powers, rights or remedies prior to, upon, during the continuance of or following an Event of Default that are more limited than the powers, rights, or remedies that would otherwise be vested in such party under any applicable law in the absence of said provision, such party shall be vested with the powers, rights, and remedies granted in such applicable law to the full extent permitted by law.

6. Waiver of Statute of Limitations and Marshaling.

Borrower hereby waives the right to assert any statute of limitations as a bar to the enforcement of the lien of this Security Instrument or to any action brought to enforce any Loan Document. Notwithstanding the existence of any other security interests in the Mortgaged Property held by Lender or by any other party, Lender shall have the right to determine the order in which any or all of the Mortgaged Property shall be subjected to the remedies provided in this Security Instrument and/or any other Loan Document or by applicable law. Lender shall have the right to determine the order in which any or all portions of the Indebtedness are satisfied from the proceeds realized upon the exercise of such remedies. Borrower, for itself and all who may claim by, through, or under it, and any party who now or in the future acquires a security interest in the Mortgaged Property and who has actual or constructive notice of this Security Instrument waives any and all right to require the marshaling of assets or to require that any of the Mortgaged Property be sold in the inverse order of alienation or that any of the Mortgaged Property be sold in parcels (at the same time or different times) in connection with the exercise of any of the remedies provided in this Security Instrument or any other Loan Document, or afforded by applicable law.

7. Waiver of Redemption; Rights of Tenants.

(a) Borrower hereby covenants and agrees that it will not at any time apply for, insist upon, plead, avail itself, or in any manner claim or take any advantage of, any appraisal, stay, exemption or extension law or any so-called "Moratorium Law" now or at any time hereafter enacted or in force in order to prevent or hinder the enforcement or foreclosure of this Security Instrument. Without limiting the foregoing:

(1) Borrower for itself and all Persons who may claim by, through, or under Borrower, hereby expressly waives any so-called "Moratorium Law" and any and all

rights of reinstatement and redemption, if any, under any order or decree of foreclosure of this Security Instrument, it being the intent hereof that any and all such "Moratorium Laws," and all rights of reinstatement and redemption of Borrower and of all other Persons claiming by, through, or under Borrower are and shall be deemed to be hereby waived to the fullest extent permitted by applicable law;

(2) Borrower shall not invoke or utilize any such law or laws or otherwise hinder, delay or impede the execution of any right, power remedy herein or otherwise granted or delegated to Lender but will suffer and permit the execution of every such right, power and remedy as though no such law or laws had been made or enacted; and

(3) if Borrower is a trust, Borrower represents that the provisions of this Section 7 (including the waiver of reinstatement and redemption rights) were made at the express direction of Borrower's beneficiaries and the persons having the power of direction over Borrower, and are made on behalf of the trust estate of Borrower and all beneficiaries of Borrower, as well as all other persons mentioned above.

(b) Lender shall have the right to foreclose subject to the rights of any tenant or tenants of the Mortgaged Property having an interest in the Mortgaged Property prior to that of Lender. The failure to join any such tenant or tenants of the Mortgaged Property as party defendant or defendants in any such civil action or the failure of any decree of foreclosure and sale to foreclose their rights shall not be asserted by Borrower as a defense in any civil action instituted to collect the Indebtedness, or any part thereof or any deficiency remaining unpaid after foreclosure and sale of the Mortgaged Property, any statute or rule of law at any time existing to the contrary notwithstanding.

8. Notice.

(a) All notices under this Security Instrument shall be:

(1) in writing, and shall be (A) delivered, in person, (B) mailed, postage prepaid, either by registered or certified delivery, return receipt requested, or (C) sent by overnight express courier;

(2) addressed to the intended recipient at its respective address set forth at the end of this Security Instrument; and

(3) deemed given on the earlier to occur of:

(A) the date when the notice is received by the addressee; or

(B) if the recipient refuses or rejects delivery, the date on which the notice is so refused or rejected, as conclusively established by the records of the United States Postal Service or such express courier service.

(b) Any party to this Security Instrument may change the address to which notices intended for it are to be directed by means of notice given to the other party in accordance with this Section 8.

(c) Any required notice under this Security Instrument which does not specify how notices are to be given shall be given in accordance with this Section 8.

9. Mortgagee-in-Possession.

Borrower acknowledges and agrees that the exercise by Lender of any of the rights conferred in this Security Instrument shall not be construed to make Lender a mortgagee-in-possession of the Mortgaged Property so long as Lender has not itself entered into actual possession of the Land and Improvements.

10. Release.

Upon payment in full of the Indebtedness, Lender shall cause the release of this Security Instrument and Borrower shall pay Lender's costs incurred in connection with such release.

11. Trustee.

(a) Trustee may resign by giving of notice of such resignation in writing to Lender. If Trustee shall die, resign or become disqualified from acting under this Security Instrument or shall fail or refuse to act in accordance with this Security Instrument when requested by Lender or if for any reason and without cause Lender shall prefer to appoint a substitute trustee to act instead of the original Trustee named in this Security Instrument or any prior successor or substitute trustee, Lender shall have full power to appoint a substitute trustee and, if preferred, several substitute trustees in succession who shall succeed to all the estate, rights, powers and duties of the original Trustee named in this Security Instrument. Such appointment may be executed by an authorized officer, agent or attorney-in-fact of Lender (whether acting pursuant to a power of attorney or otherwise), and such appointment shall be conclusively presumed to be executed with authority and shall be valid and sufficient without proof of any action by Lender.

(b) Any successor Trustee appointed pursuant to this Section 11 shall, without any further act, deed or conveyance, become vested with all the estates, properties, rights, powers and trusts of the predecessor Trustee with like effect as if originally named as Trustee in this Security Instrument; but, nevertheless, upon the written request of Lender or such successor Trustee, the Trustee ceasing to act shall execute and deliver an instrument transferring to such successor Trustee, all the estates, properties, rights, powers and trusts of the Trustee so ceasing to act, and shall duly assign, transfer and deliver any of the Mortgaged Property and monies held by the Trustee ceasing to act to the successor Trustee.

(c) Trustee may authorize one (1) or more parties to act on Trustee's behalf to perform the ministerial functions required of Trustee under this Security Instrument, including the transmittal and posting of any notices.

12. No Fiduciary Duty.

Lender owes no fiduciary or other special duty to Borrower.

13. Additional Provisions Regarding Assignment of Leases and Rents.

In no event shall the assignment of Rents or Leases in Section 3 cause the Indebtedness to be reduced by an amount greater than the Rents actually received by Lender and applied by Lender to the Indebtedness, whether before, during or after (a) an Event of Default, or (b) a suspension or revocation of the license granted to Borrower in Section 3 with regard to the Rents. Borrower and Lender specifically intend that the assignment of Rents and Leases in Section 3 is not intended to result in a pro tanto reduction of the Indebtedness. The assignment of Rents and Leases in Section 3 is not intended to constitute a payment of, or with respect to, the Indebtedness and, therefore, Borrower and Lender specifically intend that the Indebtedness shall not be reduced by the value of the Rents and Leases assigned. Such reduction shall occur only if, and to the extent that, Lender actually receives Rents pursuant to Section 3 and applies such Rents to the Indebtedness. Borrower agrees that the value of the license granted with regard to the Rents equals the value of the absolute assignment of Rents to Lender. The assignment of Rents contained in Section 3 shall terminate upon the release of this Security Instrument.

14. Loan Charges.

Borrower agrees to pay an effective rate of interest equal to the sum of the Interest Rate and any additional rate of interest resulting from any other charges of interest or in the nature of interest paid or to be paid in connection with the Mortgage Loan and any other fees or amounts to be paid by Borrower pursuant to any of the other Loan Documents. Neither this Security Instrument, the Note, the Loan Agreement, nor any of the other Loan Documents shall be construed to create a contract for the use, forbearance or detention of money requiring payment of interest at a rate greater than the maximum interest rate permitted to be charged under applicable law. It is expressly stipulated and agreed to be the intent of Borrower and Lender at all times to comply with all applicable laws governing the maximum rate or amount of interest payable on the indebtedness evidenced by this Security Instrument, the Note and the other Loan Documents. If any applicable law limiting the amount of interest or other charges permitted to be collected from Borrower is interpreted so that any interest or other charge or amount provided for in any Loan Document, whether considered separately or together with other charges or amounts provided for in any other Loan Document, or otherwise charged, taken, reserved or received in connection with the Mortgage Loan, or on acceleration of the maturity of the Mortgage Loan or as a result of any prepayment by Borrower or otherwise, violates that law, and Borrower is entitled to the benefit of that law, that interest or charge is hereby reduced to the extent necessary to eliminate any such violation. Amounts, if any, previously paid to Lender in excess of the permitted amounts shall be applied by Lender to reduce the unpaid principal balance of the Mortgage Loan without the payment of any Prepayment Premium (or, if the Mortgage Loan has been or would thereby be paid in full, shall be refunded to Borrower), and the provisions of the Loan Agreement and any other Loan Documents immediately shall be deemed reformed and the amounts thereafter collectible under the Loan Agreement and any other Loan Documents reduced, without the necessity of the execution of any new documents, so as to comply with any applicable law, but so as to permit the recovery of the fullest amount

otherwise payable under the Loan Documents. For the purpose of determining whether any applicable law limiting the amount of interest or other charges permitted to be collected from Borrower has been violated, all Indebtedness that constitutes interest, as well as all other charges made in connection with the Indebtedness that constitute interest, and any amount paid or agreed to be paid to Lender for the use, forbearance or detention of the Indebtedness, shall be deemed to be allocated and spread ratably over the stated term of the Mortgage Loan. Unless otherwise required by applicable law, such allocation and spreading shall be effected in such a manner that the rate of interest so computed is uniform throughout the stated term of the Mortgage Loan.

15. ENTIRE AGREEMENT.

THIS SECURITY INSTRUMENT, THE NOTE, THE LOAN AGREEMENT, AND THE OTHER LOAN DOCUMENTS REPRESENT THE FINAL AGREEMENT BETWEEN THE PARTIES AND MAY NOT BE CONTRADICTED BY EVIDENCE OF PRIOR, CONTEMPORANEOUS OR SUBSEQUENT ORAL AGREEMENTS. THERE ARE NO UNWRITTEN ORAL AGREEMENTS BETWEEN THE PARTIES.

16. Governing Law; Consent to Jurisdiction and Venue.

This Security Instrument shall be governed by the laws of the Property Jurisdiction without giving effect to any choice of law provisions thereof that would result in the application of the laws of another jurisdiction. Borrower agrees that any controversy arising under or in relation to this Security Instrument shall be litigated exclusively in the Property Jurisdiction. The state and federal courts and authorities with jurisdiction in the Property Jurisdiction shall have exclusive jurisdiction over all controversies that arise under or in relation to any security for the Indebtedness. Borrower irrevocably consents to service, jurisdiction, and venue of such courts for any such litigation and waives any other venue to which it might be entitled by virtue of domicile, habitual residence or otherwise.

17. Miscellaneous Provisions.

(a) This Security Instrument shall bind, and the rights granted by this Security Instrument shall benefit, the successors and assigns of Lender. This Security Instrument shall bind, and the obligations granted by this Security Instrument shall inure to, any permitted successors and assigns of Borrower under the Loan Agreement. If more than one (1) person or entity signs this Security Instrument as Borrower, the obligations of such persons and entities shall be joint and several. The relationship between Lender and Borrower shall be solely that of creditor and debtor, respectively, and nothing contained in this Security Instrument shall create any other relationship between Lender and Borrower. No creditor of any party to this Security Instrument and no other person shall be a third party beneficiary of this Security Instrument or any other Loan Document.

(b) The invalidity or unenforceability of any provision of this Security Instrument or any other Loan Document shall not affect the validity or enforceability of any other provision of this Security Instrument or of any other Loan Document, all of which shall remain in full force and effect. This Security Instrument contains the complete and entire agreement among the parties as to the matters covered, rights granted and the obligations assumed in this Security

Instrument. This Security Instrument may not be amended or modified except by written agreement signed by the parties hereto.

(c) The following rules of construction shall apply to this Security Instrument:

(1) The captions and headings of the sections of this Security Instrument are for convenience only and shall be disregarded in construing this Security Instrument.

(2) Any reference in this Security Instrument to an "Exhibit" or "Schedule" or a "Section" or an "Article" shall, unless otherwise explicitly provided, be construed as referring, respectively, to an exhibit or schedule attached to this Security Instrument or to a Section or Article of this Security Instrument.

(3) Any reference in this Security Instrument to a statute or regulation shall be construed as referring to that statute or regulation as amended from time to time.

(4) Use of the singular in this Security Instrument includes the plural and use of the plural includes the singular.

(5) As used in this Security Instrument, the term "including" means "including, but not limited to" or "including, without limitation," and is for example only, and not a limitation.

(6) Whenever Borrower's knowledge is implicated in this Security Instrument or the phrase "to Borrower's knowledge" or a similar phrase is used in this Security Instrument, Borrower's knowledge or such phrase(s) shall be interpreted to mean to the best of Borrower's knowledge after reasonable and diligent inquiry and investigation.

(7) Unless otherwise provided in this Security Instrument, if Lender's approval, designation, determination, selection, estimate, action or decision is required, permitted or contemplated hereunder, such approval, designation, determination, selection, estimate, action or decision shall be made in Lender's sole and absolute discretion.

(8) All references in this Security Instrument to a separate instrument or agreement shall include such instrument or agreement as the same may be amended or supplemented from time to time pursuant to the applicable provisions thereof.

(9) "Lender may" shall mean at Lender's discretion, but shall not be an obligation.

18. Time is of the Essence.

Borrower agrees that, with respect to each and every obligation and covenant contained in this Security Instrument and the other Loan Documents, time is of the essence.

19. WAIVER OF TRIAL BY JURY.

TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, EACH OF BORROWER AND LENDER (BY ITS ACCEPTANCE HEREOF) (A) COVENANTS AND AGREES NOT TO ELECT A TRIAL BY JURY WITH RESPECT TO ANY ISSUE ARISING OUT OF THIS SECURITY INSTRUMENT OR THE RELATIONSHIP BETWEEN THE PARTIES AS BORROWER AND LENDER THAT IS TRIABLE OF RIGHT BY A JURY AND (B) WAIVES ANY RIGHT TO TRIAL BY JURY WITH RESPECT TO SUCH ISSUE TO THE EXTENT THAT ANY SUCH RIGHT EXISTS NOW OR IN THE FUTURE. THIS WAIVER OF RIGHT TO TRIAL BY JURY IS SEPARATELY GIVEN BY EACH OF BORROWER AND LENDER, KNOWINGLY AND VOLUNTARILY WITH THE BENEFIT OF COMPETENT LEGAL COUNSEL.

ATTACHED EXHIBITS. The following Exhibits are attached to this Security Instrument and incorporated fully herein by reference:

☒	Exhibit A	Description of the Land (required)
☒	Exhibit B	Modifications to Security Instrument (Cross-Default and Cross-Collateralization: Multi-Note)
☒	Exhibit C	Modifications to Security Instrument (Borrower Projects)
☒	Exhibit D	Modifications to Security Instrument (Seniors Housing)

[Remainder of Page Intentionally Blank]

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IN WITNESS WHEREOF, Borrower has signed and delivered this Security Instrument under seal (where applicable) or has caused this Security Instrument to be signed and delivered by its duly authorized representative under seal (where applicable). Where applicable law so provides, Borrower intends that this Security Instrument shall be deemed to be signed and delivered as a sealed instrument.

BORROWER:

TRIAD SENIOR LIVING III, L.P.,
a Texas limited partnership

By: Capital Senior Living Properties 5, Inc.,
a Delaware corporation
its General Partner

By: *Gloria M. Holland* (SEAL)
Name: Gloria M. Holland
Title: Vice President

STATE OF TEXAS)
) SS:
COUNTY OF DALLAS)

Before me, the undersigned, a Notary Public in and for said County and State, personally appeared TRIAD SENIOR LIVING III, L.P., a Texas limited partnership ("Partnership"), by Gloria M. Holland, the Vice President of Capital Senior Living Properties 5, Inc., the general partner of the Partnership, which Partnership executed the foregoing instrument, who acknowledged that she did sign the foregoing instrument for and on behalf of the Partnership by, being thereunto duly authorized and that the same is her free act and deed individually and in said capacity and the free act and deed of the Partnership.

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at Dallas, Texas, this 9th day of November, 2015.



Elizabeth E. Marks
Notary Public

My commission expires: 7-7-2016

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The name, chief executive office and organizational identification number of Borrower (as Debtor under any applicable Uniform Commercial Code) are:

Debtor Name/Record Owner:
Triad Senior Living III, L.P.

Debtor Chief Executive Office Address:
c/o Capital Senior Living Corporation
14160 Dallas Parkway, Suite 300
Dallas, Texas 75254
Attention: General Counsel

Debtor Organizational ID Number:
0011421510

The name and chief executive office of Lender (as Secured Party) are:

Secured Party Name:
Berkadia Commercial Mortgage LLC

Secured Party Chief Executive Office Address:
521 Fifth Avenue, 20th Floor
New York, New York 10175

Secured Party Notice Address:
323 Norristown Road, Suite 300
Ambler, Pennsylvania 19002

TRUSTEE NOTICE ADDRESS
8201 Preston Road, Suite 450
Dallas, Texas 75225

EXHIBIT A

[DESCRIPTION OF THE LAND]

Tract 1 - Fee Simple

Lot 1, Block A, of The Waterford, an Addition to the Town of Pantego, Tarrant County, Texas, according to the replat thereof recorded in Cabinet A, Slide 5329, of the Plat Records of Tarrant County, Texas.

Tract 2 - Easement

Perpetual nonexclusive easement created in Easement for Construction and Maintenance of Retaining Wall dated February 5, 1999, executed by Maylis Ballay and Triad Senior Living III, L.P., a Texas limited partnership, filed February 9, 1999, recorded in Volume 13652, Page 395, Real Property Records, Tarrant County, Texas.

EXHIBIT B

MODIFICATIONS TO SECURITY INSTRUMENT
(Cross-Default and Cross-Collateralization: Multi-Note)

The foregoing Security Instrument is hereby modified as follows:

1. Capitalized terms used and not specifically defined herein have the meanings given to such terms in the Security Instrument.

2. Section 1 of the Security Instrument (Defined Terms) is hereby amended by amending and restating the following definitions:

"Indebtedness" means the principal of, interest on, and all other amounts due at any time under the Note, the Loan Agreement, this Security Instrument and any other Loan Document (other than the Environmental Indemnity Agreement and Guaranty), the Other Security Instrument, and any Other Loan Document (other than the Environmental Indemnity Agreement for the Other Loan and the Guaranty for the Other Loan), including Prepayment Premiums, late charges, interest charged at the Default Rate, and accrued interest as provided in the Loan Agreement and this Security Instrument, advances, costs and expenses to perform the obligations of Borrower or to protect the Mortgaged Property or the security of this Security Instrument, all other monetary obligations of Borrower under the Loan Documents (other than the Environmental Indemnity Agreement) and the Other Security Instrument, and any Other Loan Document (other than the Environmental Indemnity Agreement for the Other Loan) including amounts due as a result of any indemnification obligations, and any Enforcement Costs.

3. Section 1 of the Security Instrument (Defined Terms) is hereby amended by adding the following new definitions in the appropriate alphabetical order:

"Borrower Projects" means all of the properties owned by Borrower or Borrower Affiliate as described on Exhibit C, attached hereto, together with the Mortgaged Property, that secure the Indebtedness and each Other Loan.

"Other Loan" means, individually and collectively, each additional loan extended from Lender to Borrower or Borrower Affiliate, as described on Exhibit C, attached hereto.

"Other Loan Documents" means each Other Security Instrument and any other loan documents, including any loan agreement or note evidencing any Other Loan.

"Other Security Instrument" means, individually and collectively, each multifamily mortgage, deed of trust or deed to secure debt encumbering each of

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the Borrower Projects (other than the Mortgaged Property) securing each Other Loan.

4. The first full paragraph of the Security Instrument is revised to delete clause (i) and restate it as follows:

(i) the loan in the original principal amount of \$11,599,000.00 (the “**Mortgage Loan**”) evidenced by that certain Multifamily Note dated as of the date of this Security Instrument, executed by Borrower and made payable to the order of Lender (as amended, restated, replaced, supplemented, or otherwise modified from time to time, the “**Note**”) and the Other Loan in the aggregate principal amount of \$41,175,000.00 as evidenced by the Other Loan Documents;

5. The following section is hereby added to the Security Instrument as Section 20 (Cross-Default and Cross-Collateralization):

20. Cross-Default and Cross-Collateralization.

(a) Cross-Default.

Borrower hereby agrees and consents that the occurrence of an “Event of Default” (as defined in each Other Security Instrument) shall be an Event of Default under the Loan Agreement.

(b) Cross-Collateralization; Remedies Against Other Collateral.

Borrower hereby agrees and consents that the Indebtedness and each of the Other Loans are and shall be collateralized and secured by the lien of this Security Instrument on the Mortgaged Property and by the liens of each Other Security Instrument on each of the Borrower Projects. Borrower further agrees that the Mortgaged Property shall secure both the Indebtedness of the Borrower and the obligations of Borrower or any Borrower Affiliate pursuant to each Other Loan and the Other Loan Documents.

Borrower hereby acknowledges that the Indebtedness is also secured by liens on collateral which may be located in jurisdictions other than the Property Jurisdiction. Borrower further agrees and consents that upon the occurrence and during the continuance of an Event of Default, Lender shall have the right, in its sole and absolute discretion, to exercise any and all rights and remedies in and under any of the Loan Documents, including the right to proceed, at the same or at different times, to foreclose any or all liens against such collateral (or sell such collateral under power of sale) in accordance with the terms of this Security Instrument or any Other Security Instrument, by any proceedings appropriate in the jurisdictions where such collateral is located, and that no enforcement action taking place in any jurisdiction shall preclude or bar enforcement in any other jurisdiction. Any Foreclosure Event brought in any jurisdiction in which

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collateral is located may be brought and prosecuted as to any part of such collateral without regard to the fact that a Foreclosure Event has not been instituted elsewhere on any other part of the collateral for the Indebtedness. No notice, except as may be expressly required by the Loan Documents or by applicable law, shall be required to be given to Borrower in connection with (a) the occurrence of such Event of Default, or (b) Lender's exercise of any and all of its rights or remedies after the occurrence of such Event of Default.

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INITIAL PAGE TO EXHIBIT B



Borrower Initials

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**EXHIBIT C
TO
MODIFICATIONS TO MULTIFAMILY SECURITY INSTRUMENT
(Cross-Default and Cross-Collateralization: Multi-Note)**

Borrower Projects

BORROWER	BORROWER PROJECTS
Triad Senior Living III, L.P.	The Waterford at Deer Park, 201 McDermott Street, Deer Park, TX 77536
Triad Senior Living III, L.P.	The Waterford at Columbia, 9370 Windsor Lake Boulevard, Columbia, SC 29223
Triad Senior Living III, L.P.	The Waterford at Edison Lakes, 1025 Park Place, Mishawaka, IN 46545

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INITIAL PAGE TO EXHIBIT C


Borrower Initials

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EXHIBIT D

MODIFICATIONS TO SECURITY INSTRUMENT
(Seniors Housing)

The foregoing Security Instrument is hereby modified as follows:

1. Capitalized terms used and not specifically defined herein have the meanings given to such terms in the Security Instrument.

2. Section 1 of the Security Instrument (Defined Terms) is hereby amended by adding the following new definition:

“Accounts” means all money, funds, investment property, accounts, general intangibles, deposit accounts, chattel paper, documents, instruments, judgments, claims, settlements of claims, causes of action, refunds, rebates, reimbursements, reserves, deposits, subsidies, proceeds, products, Rents, and profits, now or hereafter arising, received or receivable, from or on account of the management and operation of the Mortgaged Property as a Seniors Housing Facility.

3. Section 1 of the Security Instrument (Defined Terms) is hereby amended by deleting and restating in their entirety the definitions of **“Goods,” “Indebtedness,” “Leases,” “Mortgaged Property,” “Personalty,”** and **“Rents”** to read as follows:

“Goods” means all of Borrower’s present and hereafter acquired right, title and interest in all goods which are used now or in the future in connection with the ownership, management, or operation of the Land or the Improvements or are located on the Land or in the Improvements, including inventory; furniture; furnishings; machinery, equipment, engines, boilers, incinerators and installed building materials; systems and equipment for the purpose of supplying or distributing heating, cooling, electricity, gas, water, air or light; antennas, cable, wiring and conduits used in connection with radio, television, security, fire prevention or fire detection, or otherwise used to carry electronic signals; telephone systems and equipment; elevators and related machinery and equipment; fire detection, prevention and extinguishing systems and apparatus; security and access control systems and apparatus; plumbing systems; water heaters, ranges, stoves, microwave ovens, refrigerators, dishwashers, garbage disposers, washers, dryers and other appliances; light fixtures, awnings, storm windows and storm doors; pictures, screens, blinds, shades, curtains and curtain rods; mirrors, cabinets, paneling, rugs and floor and wall coverings; fences, trees and plants; swimming pools; exercise equipment; supplies; tools; books and records (whether in written or electronic form); websites, URLs, blogs and social network pages; computer equipment (hardware and software); all kitchen or restaurant supplies and facilities; dining room supplies and facilities; medical supplies and facilities; leasehold improvements or related furniture and

equipment; including all present and future parts, additions, accessories, replacements, attachments, accessions, replacement parts and substitutions of the foregoing, and the proceeds thereof (cash and non-cash, including insurance proceeds) and any other equipment, supplies or furniture owned by Borrower and leased to any third party service provider or any operator or manager of the Land or the Improvements; and other tangible personal property which is used now or in the future in connection with the ownership, management, or operation of the Land or the Improvements or are located on the Land or in the Improvements.

"Indebtedness" means the principal of, interest on, and all other amounts due at any time under the Note, the Loan Agreement, this Security Instrument, the SASA or any other Loan Document (other than the Environmental Indemnity Agreement and Guaranty), including Prepayment Premiums, late charges, interest charged at the Default Rate, and accrued interest as provided in the Loan Agreement and this Security Instrument, advances, costs and expenses to perform the obligations of Borrower or Property Operator or to protect the Mortgaged Property or the security of this Security Instrument, all other monetary obligations of Borrower or Property Operator under the Loan Documents (other than the Environmental Indemnity Agreement), including amounts due as a result of any indemnification obligations, and any Enforcement Costs.

"Leases" means all present and future leases, subleases, licenses, concessions or grants or other possessory interests now or hereafter in force, whether oral or written, covering or affecting the Mortgaged Property, or any portion of the Mortgaged Property (including proprietary leases or occupancy agreements if Borrower is a cooperative housing corporation), any residency, occupancy, admission and care agreements pertaining to residents of the Mortgaged Property and any Seniors Housing Facility Lease, and all modifications, extensions or renewals thereof.

"Mortgaged Property" means all of Borrower's present and hereafter acquired right, title and interest, if any, in and to all of the following:

- (a) the Land;
- (b) the Improvements;
- (c) the Personalty;
- (d) current and future rights, including air rights, development rights, zoning rights and other similar rights or interests, easements, tenements, rights-of-way, strips and gores of land, streets, alleys, roads, sewer rights, waters, watercourses, and appurtenances related to or benefitting the Land or the Improvements, or both, and all rights-of-way, streets, alleys and roads which may have been or may in the future be vacated;

(e) insurance policies relating to the Mortgaged Property (and any unearned premiums) and all proceeds paid or to be paid by any insurer of the Land, the Improvements, the Personalty, or any other part of the Mortgaged Property, whether or not Borrower obtained the insurance pursuant to Lender's requirements;

(f) awards, payments and other compensation made or to be made by any municipal, state or federal authority with respect to the Land, the Improvements, the Personalty, or any other part of the Mortgaged Property, including any awards or settlements resulting from (1) Condemnation Actions, (2) any damage to the Mortgaged Property caused by governmental action that does not result in a Condemnation Action, or (3) the total or partial taking of the Land, the Improvements, the Personalty, or any other part of the Mortgaged Property under the power of eminent domain or otherwise and including any conveyance in lieu thereof;

(g) contracts, options and other agreements for the sale of the Land, the Improvements, the Personalty, or any other part of the Mortgaged Property entered into by Borrower now or in the future, including cash or securities deposited to secure performance by parties of their obligations;

(h) Leases and Lease guaranties, letters of credit and any other supporting obligation for any of the Leases given in connection with any of the Leases, and all Rents;

(i) earnings, royalties, accounts receivable, issues and profits from the Land, the Improvements or any other part of the Mortgaged Property, and all undisbursed proceeds of the Mortgage Loan and, if Borrower is a cooperative housing corporation, maintenance charges or assessments payable by shareholders or residents;

(j) Imposition Deposits;

(k) refunds or rebates of Impositions by any municipal, state or federal authority or insurance company (other than refunds applicable to periods before the real property tax year in which this Security Instrument is dated);

(l) resident and tenant security deposits, entrance fees, application fees, processing fees, community fees and any other amounts or fees paid by any resident or tenant upon execution of a Lease;

(m) names under or by which any of the above Mortgaged Property may be operated or known, and all trademarks, trade names, and goodwill relating to any of the Mortgaged Property;

(n) Collateral Accounts and all Collateral Account Funds;

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(o) products, and all cash and non-cash proceeds from the conversion, voluntary or involuntary, of any of the above into cash or liquidated claims, and the right to collect such proceeds;

(p) all of Borrower's right, title and interest in the oil, gas, minerals, mineral interests, royalties, overriding royalties, production payments, net profit interests and other interests and estates in, under and on the Mortgaged Property and other oil, gas and mineral interests with which any of the foregoing interests or estates are pooled or unitized;

(q) all payments due, or received, from residents, second party charges added to base rental income, base or additional meal sales, commercial operations located on the Mortgaged Property or provided as a service to the residents of the Mortgaged Property, rental from guest suites, seasonal lease charges, furniture leases, and laundry services, and any and all other services provided to residents in connection with the Mortgaged Property, and any and all other personal property on the Mortgaged Property, excluding personal property owned by residents of the Mortgaged Property (other than Personalty owned by Borrower);

(r) subject to applicable law and regulations, all Licenses and Contracts relating to the operation and authority to operate the Mortgaged Property as a Seniors Housing Facility;

(s) all Third Party Payments arising from the operation of the Mortgaged Property as a Seniors Housing Facility;

(t) all of Borrower's Accounts and Contracts; and

(u) all Facility Operating Agreements.

"Personalty" means all Goods, accounts, choses of action, chattel paper, documents, general intangibles (including Software), payment intangibles, instruments, investment property, letter of credit rights, supporting obligations, computer information, source codes, object codes, records and data, all telephone numbers or listings, claims (including claims for indemnity or breach of warranty), deposit accounts and other property or assets of any kind or nature related to the Land or the Improvements now or in the future, including operating agreements, surveys, plans and specifications and contracts for architectural, engineering and construction services relating to the Land or the Improvements, and all other intangible property and rights relating to the operation of, or used in connection with, the Land or the Improvements, including all governmental permits relating to any activities on the Land, all personal property currently owned or hereafter acquired by Borrower used in connection with the ownership and operation of the Mortgaged Property as a Seniors Housing Facility, all kitchen or restaurant supplies and facilities, dining room supplies and facilities, medical supplies and facilities, leasehold improvements, or related furniture and

equipment, together with all present and future parts, additions, accessories, replacements, attachments, accessions, replacement parts and substitutions therefor, and the proceeds thereof (cash and non-cash including insurance proceeds) and any other equipment, supplies or furniture owned by Borrower and leased to any third party service provider or any Property Operator, including replacements and additions to any of the foregoing.

“Rents” means all rents (whether from residential or non-residential space), revenues and other income from the Land or the Improvements, including rent paid under any Facility Operating Agreement, subsidy payments received from any sources, including payments under any “Housing Assistance Payments Contract” or other rental subsidy agreement (if any), parking fees, laundry and vending machine income, furniture rental income, and fees and charges for food, health care and other services provided at the Mortgaged Property, whether now due, past due, or to become due, and tenant security deposits, entrance fees (if any), application fees, processing fees, community fees, late fees and any other amounts or fees paid by any resident or tenant, together with and including all proceeds from any private insurance for residents to cover rental charges and charges for services at or in connection with the Mortgaged Property, and the right to Third Party Payments (other than Medicaid payments from governmental entities) due for the rents or services of residents at the Mortgaged Property.

4. Section 3(c) (Assignment of Leases and Rents; Appointment of Receiver; Lender in Possession) of the Security Instrument is hereby amended by adding the following to the end thereof:

If an Event of Default has occurred and is continuing, at Lender’s option, Lender is further authorized to give notice to all Third Party Payment payors (other than Medicaid payments from governmental entities), instructing them to pay all Third Party Payments to Lender which would be otherwise paid to Borrower, to the extent permitted by law. In the case of Third Party Payments for Medicaid, Lender and Borrower have executed a depository agreement dated as of the Effective Date which establishes special procedures for the receipt and disposition of the Third Party Payments.

5. Section 3(e) (Assignment of Leases and Rents; Appointment of Receiver; Lender in Possession) of the Security Instrument is hereby deleted in its entirety and replaced with the following in lieu thereof:

(e) Notwithstanding any other right provided Lender under this Security Instrument or any other Loan Document, if an Event of Default has occurred and is continuing, and regardless of the adequacy of Lender’s security or Borrower’s solvency, and without the necessity of giving prior notice (oral or written) to Borrower, Lender may apply to any court having jurisdiction for the appointment of a receiver for the Mortgaged Property to take any or all of the actions set forth in Section 3. If Lender elects to seek the appointment of a

Case 3:20-cv-02395-K Document 5-4 Filed 08/21/20 Page 38 of 39 PageID 298

receiver for the Mortgaged Property at any time after an Event of Default has occurred and is continuing, Borrower, by its execution of this Security Instrument, expressly consents to the appointment of such receiver, including the appointment of a receiver ex parte, if permitted by applicable law. Borrower consents to shortened time consideration of a motion to appoint a receiver. Lender or the receiver, as applicable, shall be entitled to receive a reasonable fee for managing or operating the Mortgaged Property and such fee shall become an additional part of the Indebtedness. Immediately upon appointment of a receiver or Lender's entry upon and taking possession and control of the Mortgaged Property, possession of the Mortgaged Property and all documents, records (including records on electronic or magnetic media), accounts, surveys, plans, and specifications relating to the Mortgaged Property, and all security deposits and prepaid Rents, shall be surrendered to Lender or the receiver, as applicable. If Lender or receiver takes possession and control of the Mortgaged Property, Lender or receiver may exclude Borrower and its representatives from the Mortgaged Property.

6. A new subsection 4(e) is hereby added to Section 4 (Protection of Lender's Security) of the Security Instrument as follows:

(e) paying for any required licensing fees, permits, or other expenses related to the operation of the Mortgaged Property as a Seniors Housing Facility by or on behalf of Lender, any fines or penalties that may be assessed against the Mortgaged Property, paying any costs incurred to bring the Mortgaged Property into full compliance with applicable codes and regulatory requirements, and paying any fees or costs related to Lender's employment of any Property Operator or service provider for the Mortgaged Property.

7. A new Section 21 is hereby added to the Security Instrument as follows:

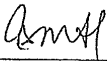
21. Subordination of Seniors Housing Facility Lease.

Any Seniors Housing Facility Lease is and shall be subject and subordinate in all respects to the liens, terms, covenants and conditions of this Security Instrument and the other Loan Documents, and to all renewals, modifications, consolidations, replacements and extensions thereof, and to all advances heretofore made or which may hereafter be made pursuant to this Security Instrument (including all sums advanced for the purposes of (a) protecting or further securing the lien of this Security Instrument, curing defaults by Borrower under the Loan Documents or for any other purposes expressly permitted by this Security Instrument or (b) constructing, renovating, repairing, furnishing, fixturing or equipping the Mortgaged Property).

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INITIAL PAGE TO EXHIBIT D


Borrower Initials

Modifications to Security Instrument
(Seniors Housing)
Fannie Mae

Form 6310.SRS
08-14

Initial Page
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APPX. 223

EXHIBIT A-4

AMERICAN BANKRUPTCY INSTITUTE



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Tarrant County Clerk

Verify Key: y5k22xc7
Case 3:20-bk-02395-K Document 9-5 Filed 08/21/20 Page 2 of 4 PageID#301
Certification Date: 7/23/2020
Mary Louise Garcia

Page 1 of 3

D215256613 11/13/2015 1:20 PM PGS 3 Fee: \$24.00 Submitter: SIMPLIFILE

Electronically Recorded by Tarrant County Clerk in Official Public Records *Mary Louise Garcia* Mary Louise Garcia

Prepared by and
when recorded mail to:

Thomas A. Hauser, Esq.
Ballard Spahr LLP
300 East Lombard Street, 18th Floor
Baltimore, Maryland 21202

ASSIGNMENT OF DEED OF TRUST

KNOW THAT BERKADIA COMMERCIAL MORTGAGE LLC, a Delaware limited liability company ("Assignor") with an address at 521 Fifth Avenue, 20th Floor, New York, New York 10175, in consideration of One Dollar (\$1.00) and other good and valuable consideration in hand paid by FANNIE MAE ("Assignee") with an address at 3900 Wisconsin Avenue, N.W., Washington, DC 20016, the receipt and sufficiency of which are hereby acknowledged, on this 12th day of November, 2015, does hereby assign, sell, transfer and set over unto Assignee, all rights, title, interests, obligations and burdens in, to and arising under that certain Multifamily Deed of Trust, Assignment of Leases and Rents, Security Agreement and Fixture Filing dated as of the 12th day of November, 2015, by TRIAD SENIOR LIVING III, L.P., a Texas limited partnership, to Assignor in the principal sum of Eleven Million Five Hundred Ninety-Nine Thousand and 00/100 Dollars (\$11,599,000.00) (the "Deed of Trust"). Said Deed of Trust was recorded in the Land Records of Tarrant County, State of Texas immediately prior to and concurrently with the recording of this Assignment of Deed of Trust and encumbers the real property described in Exhibit "A", attached hereto and incorporated herein.

TO HAVE AND TO HOLD the same unto the Assignee and to the successors, legal representatives and assigns of the Assignee forever.

[SIGNATURE APPEARS ON THE FOLLOWING PAGE]

Assignment
DMEAST #23110736 v2

APPX. 225



A True and Correct Copy of Original Record Filed in Tarrant County, TEXAS

Tarrant County Clerk

Verify Key: y5k22xc7
 Case 3:20-bk-02396-K Document 9-5 Filed 08/21/20 Page 3 of 4 PageID 302
 Certification Date: 7/23/2020
 Mary Louise Nicholson

Page 2 of 3

IN WITNESS WHEREOF, the Assignor has duly executed this Assignment as of the date first above written.

BERKADIA COMMERCIAL MORTGAGE LLC,
 a Delaware limited liability company

By: Linda C. Kershaw-Tiegs
 Name: LINDA C. KERSHAW-TIEGS
 Title:

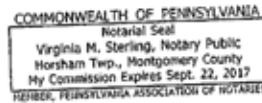
AUTHORIZED REPRESENTATIVE

STATE OF Pennsylvania)
)
 COUNTY OF Montgomery)

On this 9th day of November, 2015, before me, the undersigned officer, personally appeared LINDA C. KERSHAW-TIEGS, who acknowledged himself/herself to be the Authorized Representative of BERKADIA COMMERCIAL MORTGAGE LLC, a Delaware limited liability company, and that he/she as such officer being authorized so to do, acknowledged that he/she executed the foregoing instrument on behalf of such company for the purposes herein contained.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

Virginia M. Sterling
 Notary Public
 My Commission Expires: 9-22-2017



Assignment

AMERICAN BANKRUPTCY INSTITUTE



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Tarrant County Clerk

Verify Key: y5k22xc7
Case 3:20-bk-02395-K Document 9-5 Filed 08/21/20 Page 4 of 4 PageID# 303
Certification Date: 7/23/2020
Mary Louise Nicholas

Page 3 of 3

EXHIBIT "A"

Legal Description

Tract 1 - Fee Simple

Lot 1, Block A, of The Waterford, an Addition to the Town of Pantego, Tarrant County, Texas, according to the replat thereof recorded in Cabinet A, Slide 5329, of the Plat Records of Tarrant County, Texas.

Tract 2 - Easement

Perpetual nonexclusive easement created in Easement for Construction and Maintenance of Retaining Wall dated February 5, 1999, executed by Maylis Ballay and Triad Senior Living III, L.P., a Texas limited partnership, filed February 9, 1999, recorded in Volume 13652, Page 395, Real Property Records, Tarrant County, Texas.

Assignment
DMEAST #23110736 v2

A-1

APPX. 227

EXHIBIT A-5

**ASSIGNMENT OF COLLATERAL AGREEMENTS
AND OTHER LOAN DOCUMENTS**

Pursuant to that certain Multifamily Loan and Security Agreement dated as of the date hereof, executed by and between TRIAD SENIOR LIVING III, L.P., a Texas limited partnership ("**Borrower**") and BERKADIA COMMERCIAL MORTGAGE LLC, a Delaware limited liability company ("**Lender**") (as amended, restated, replaced, supplemented or otherwise modified from time to time, the "**Loan Agreement**"), Lender has agreed to make a loan to Borrower in the original principal amount of Eleven Million Five Hundred Ninety-Nine Thousand and 00/100 Dollars (\$11,599,000.00) (the "**Mortgage Loan**"), as evidenced by that certain Multifamily Note dated as of the date hereof, executed by Borrower and made payable to Lender in the amount of the Mortgage Loan.

Lender hereby assigns to Fannie Mae, a corporation duly organized under the Federal National Mortgage Association Charter Act, as amended, 12 U.S.C. Section 1716 et seq. and duly organized and existing under the laws of the United States ("**Fannie Mae**") all right, title and interest of Lender in the Loan Documents, including but not limited to the Loan Documents listed on Exhibit A hereto, executed in connection with the Mortgage Loan.

This Assignment is given in connection with, and in consideration of, Fannie Mae's purchase of the Mortgage Loan made by Lender to Borrower, and for other good and valuable consideration, the receipt and sufficiency of which are acknowledged.

Capitalized terms used and not specifically defined herein shall have the meanings given to such terms in the Loan Agreement.

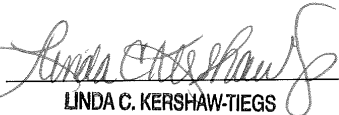
[REMAINDER OF PAGE INTENTIONALLY BLANK]

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IN WITNESS WHEREOF, Lender has signed and delivered this Assignment under seal (where applicable) or has caused this Assignment to be signed and delivered under seal (where applicable) by its duly authorized representative as of November 12, 2015. Where applicable law so provides, Lender intends that this Assignment shall be deemed to be signed and delivered as a sealed instrument.

LENDER:

BERKADIA COMMERCIAL MORTGAGE LLC,
a Delaware limited liability company

By:  (SEAL)

Name:

LINDA C. KERSHAW-TIEGS

Title:

AUTHORIZED REPRESENTATIVE

Assignment of Collateral Agreements and
Other Loan Documents
Fannie Mae

Form 6402
01-11

Signature Page
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APPX. 230

**EXHIBIT A
TO
ASSIGNMENT OF COLLATERAL AGREEMENTS
AND OTHER LOAN DOCUMENTS**

1. Multifamily Loan and Security Agreement dated as of the date hereof, by and between Borrower and Lender.
2. Subordination, Non-Disturbance and Attornment Agreement dated as of the date hereof, by and among Lender, Borrower and Capital Senior Living, Inc., a Texas corporation.
3. Environmental Indemnity Agreement dated as of the date hereof, from Borrower to Lender.
4. Guaranty of Non-Recourse Obligations dated as of the date hereof, from Capital Senior Living Corporation, a Delaware corporation, to Lender.
5. Any other documents executed in connection with the Mortgage Loan.

EXHIBIT A-6

Fannie Mae[®]

July 8, 2020

VIA EMAIL

Triad Senior Living III, L.P.
c/o Capital Senior Living Corporation
14160 Dallas Parkway, Suite 300
Dallas, Texas 75254
Attention: Ms. Gloria Holland
Email: gholland@capitalsenior.com

Re: Fannie Mae Loan No. 1717466480 (the "Loan")
The Waterford at Pantego (the "Property")
Extension of Forbearance and Non-Waiver (the "Extension Agreement")

Dear Ms. Holland:

Reference is hereby made to the \$11,599,000 Multifamily Note dated November 12, 2015 (the "Note"), executed by Triad Senior Living III, L.P. ("Borrower"), payable to the order of Berkadia Commercial Mortgage LLC, a Delaware limited liability company (the "Servicer"). Servicer assigned, negotiated and transferred the Note to Fannie Mae, the current owner and holder of the Note. Capitalized terms not defined herein shall have the meaning ascribed to such term in the Loan Documents and the Forbearance and Non-Waiver Agreement.

1. Borrower accepted and agreed to that certain Forbearance and Non-Waiver Agreement with an Effective Date of May 6, 2020 ("Forbearance Agreement") providing payment relief to Borrower during a financial hardship due, directly or indirectly, to the Health Crisis. Accordingly, the Loan and Note are currently delinquent for the months of April, May, June, and July, 2020. Borrower's obligation to make these monthly payments under the Note has not been waived by Fannie Mae and such payments continue to be due and payable, subject to the terms and conditions described herein.
2. Borrower represents to Fannie Mae and Servicer the operations and financial performance of the Property continue to suffer a hardship as a result of the Health Crisis such that additional short-term relief from Borrower's obligations is needed. As a further accommodation to Borrower to allow Borrower the opportunity to stabilize the operations of the Property and notwithstanding the defaults as a result of the delinquent monthly payments, Fannie Mae has agreed to continue to forbear from exercising its rights and remedies under the Note and other Loan Documents on the terms set forth within this Extension Agreement.
3. The Forbearance Expiration Date is hereby extended through July 31, 2020; conditioned, however, on Borrower's cooperation with and providing monthly rent rolls, monthly rent collection reports, monthly operating statements, and such other information as requested by Servicer to determine the on-going nature of the hardship, the extent of the operational needs of the Property and such other action or relief that may be necessary.



4. Borrower will be required to bring the Loan current at the Forbearance Expiration Date. Neither the Forbearance Agreement nor this Extension Agreement shall extend or modify the Maturity Date for the Loan.
5. The eviction suspension in the Forbearance Agreement is hereby extended through the new Forbearance Expiration Date, and Borrower shall:
 - (a) Allow tenants who missed rent payments during the Forbearance Period with a reasonable time to repay such missed rent payments as determined in the sole discretion of the Borrower; and in any event shall not require tenants to repay missed rent payments in one lump sum amount;
 - (b) Not impose on any tenant a late fee, charge, or other penalty for the late or missed payment of the tenant's rent obligation until Borrower has paid all outstanding Monthly Debt Service and is current on the Loan;
 - (c) Provide any tenant subject to eviction for nonpayment of rent at least 30 days' written notice to vacate the premises before repossessing the unit from the tenant, but cannot give such notice prior to the expiration of Borrower's Forbearance Period; and,
 - (d) Each month until Borrower is current on the Loan, provide a written certification from an authorized representative of Borrower to Fannie Mae and Servicer that Borrower has complied with the eviction suspension and the requirements of this paragraph.
6. Except as expressly stated herein, all other terms and conditions of the Forbearance Agreement remain in full force and effect and Borrower hereby ratifies and affirms all representations, certifications, and agreements within the Loan Documents and the Forbearance Agreement. Borrower additionally agrees as follows: On or before July 10, 2020, Borrower and its affiliates shall pay the total sum of \$1,013,881.05 ("Forbearance Amount"). This amount may be satisfied by the remittance of June NOI to the Servicer, which is due on or before July 10, 2020, plus all additional funds necessary to pay the difference between the June NOI and the Forbearance Amount.
7. Notwithstanding Fannie Mae's agreement to forbear from exercising its rights and remedies, and the acceptance of any partial payments at any time by the Servicer, the Note remains in default, and Fannie Mae does not waive any defaults set forth in this letter, or any other defaults which may exist or arise under the Note and any Loan Document executed in connection with the Note. This Agreement is to evidence Fannie Mae's and Borrower's continued agreement for forbearance and does not, and should not be deemed to, amend or modify the Note, the other Loan Documents or Borrower's obligations thereunder. Acceptance of late payments does not imply that any future late payments will be accepted by Fannie Mae or Servicer, and shall not be deemed a waiver of Fannie Mae's right to reject late payments, assess late charges, charge a default rate of interest, or prevent Fannie Mae from exercising any right, remedy, or power available to Fannie Mae, including, without limitation, all rights, remedies, and powers granted under the Note and any Loan Documents and at law or in equity.
8. This Agreement may be signed or executed using electronic signatures. This Agreement may be executed in as many counterparts as necessary or convenient, including both counterparts that are executed on paper and counterparts that are electronic records and executed electronically. Each executed counterpart (and any copy of an executed counterpart that is an electronic record) shall be deemed an original, and all such counterparts shall constitute one and the same agreement. An electronic or other copy of a signed document shall be considered as effective as an original. By signing this Agreement, Borrower agrees that Fannie Mae and Servicer may deliver communications



electronically, that this Agreement, other Loan Documents, and any communications may, at Fannie Mae and Servicer's option, be signed or executed using electronic signatures, and that the use of electronic records and signatures will be in place of written documents and handwritten signatures. If Borrower executes this Agreement electronically, Borrower agrees that the electronic mark affixed to this Agreement constitutes the signature of an individually legally authorized to act on behalf of Borrower and will be enforceable as and to the full extent of a hand-written signature.

[NO FURTHER TEXT ON THIS PAGE. SIGNATURES FOLLOW.]



If you have any questions regarding this matter, please do not hesitate to call Carol King at (972) 773-7815 or email at carol_king@fanniemae.com

Sincerely,

Fannie Mae

By: 
Name: Roy E. Miller
Title: Assistant Vice President

BORROWER ACCEPTANCE:

ACCEPTED AND AGREED this 8th day of July, 2020. ("Effective Date")

Triad Senior Living III, L.P.
a Texas limited partnership

By: Capital Senior Living Properties 5, Inc.,
a Delaware corporation,
its General Partner

By: Gloria Holland
Name: Gloria Holland
Title: Vice President



FLANAGAN & ASSOCIATES, L.L.C.



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KANSAS CITY, MISSOURI 64114
(816) 444-0637

Michael F. Flanagan
Admitted to Practice in
Missouri, Kansas, Illinois & Nebraska

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www.MFFLLC.com

Cell: (913) 269-8280
Telecopy: (816) 276-0121
MikeFlanagan@MFFLLC.com

LEGAL EXPERIENCE

November 1997 to present. Sole member of Michael F. Flanagan, L.L.C. and Flanagan & Associates, L.L.C. Flanagan's clients include long term care facility owners and operators, as well as lenders and landlords to long term care facility owners and operators. Flanagan currently concentrates his practice in the areas of health care, corporate, bankruptcy, debtor/creditor rights, commercial law and business workouts primarily involving long term care facilities. Flanagan has assisted numerous lenders, indenture trustees, bondholders and owners of health care facilities, including acting as a receiver on numerous facilities. Flanagan is well versed in corporate and regulatory matters involving long term care facilities and has developed a special expertise in advising and consulting with owners, operators and/or lenders to long term care facilities that are experiencing financial or other difficulties in connection with the operation of their facilities. He has acted as borrower's counsel on matters involving hundreds of millions of dollars in conventional, HUD and tax-exempt bond financing. Flanagan also serves as a member of the Board of Directors for Central Bank of Kansas City.

May 1988 – November 1997. Associate (May 1988 to November 1994) and Equity Shareholder (November 1994 to November 1997) with Polsinelli P.C. During his employment at Polsinelli, Flanagan represented numerous clients in complex Chapter 11 bankruptcy proceedings. Flanagan drafted and successfully confirmed a Chapter 11 Plan of Reorganization for a not-for-profit nursing home owner that owed secured and unsecured debts in excess of \$100 million. At the time, this chapter 11 case was the second largest ever filed in the Western District of Missouri and the largest involving a not-for-profit owner of nursing homes. Flanagan's bankruptcy practice required that he handle various aspects of corporate, real estate, bond and tax law matters as each has related to bankruptcy cases. Flanagan has negotiated numerous leases, asset purchase agreements, loan agreements, real estate contracts, debtor in possession financing agreements and cash collateral orders, as well as represented clients in negotiations or disputes involving various governmental agencies, including the Internal Revenue Service and the Environmental Protection Agency. While at Polsinelli, Flanagan also served as the Chairman of the Recruiting Committee.

PROFESSIONAL ASSOCIATIONS

Flanagan is licensed to practice in the States of Missouri, Kansas, Illinois and Nebraska. At the special request of the Chief Bankruptcy Judge, he served as a member of the Ad Hoc Advisory Committee for the Western District of Missouri Bankruptcy Court. He is a member of the Corporate, Banking and Business Sections of the American Bar Association and The Missouri Bar Association and the American Health Lawyers Association. Flanagan is also a member of the Board of Directors of Central Bank of Kansas City.



FLANAGAN & ASSOCIATES, L.L.C.

EDUCATION

Flanagan received his law degree, with distinction, from the University of Iowa in May 1988, where he received the American Jurisprudence Award for excellence in Bankruptcy Reorganizations. Flanagan served as a law clerk for The Honorable Chief Bankruptcy Judge Michael J. Melloy, United States Bankruptcy Court for the Northern District of Iowa, who now sits on the Eighth Circuit Court of Appeals. A 1985 graduate of Central College, a liberal arts college in Pella, Iowa, Flanagan was a four (4) year recipient of the Rolscreen Scholarship (the top academic scholarship awarded by Central College).

REPRESENTATIVE RECEIVERSHIP TRANSACTIONS

In re: First Humanics Corporation

United States Bankruptcy Court for the Western
District of Missouri, Western Division,
Case No. 89-42041-11

First Humanics Corporation was one of the largest not-for-profit long-term care providers to ever file a chapter 11 bankruptcy proceeding. This case involved twenty-one (21) nursing homes that were acquired through the issuance of approximately \$83,000,000 in I.R.C. § 501(c)(3) tax-exempt bonds. Flanagan represented the debtor in this proceeding and developed and confirmed the plan of reorganization which involved obtaining a \$5,000,000 super-priority priming loan for use as post-confirmation working capital and numerous modifications to the existing bond documents to maximize the return to bondholders.

In re: South Park Care Associates, Inc.

United States Bankruptcy Court for the Western
District of Missouri, Western Division,
Case No. 94-42992-11

South Park Care Center is a 178 licensed bed skilled nursing facility located in Kansas City, Missouri. Flanagan represented Tutera as the debtor's post-petition manager and debtor in possession lender in the total amount of \$250,000. Flanagan proposed and confirmed a plan of reorganization in October, 1995 whereby a newly formed limited partnership (whose general partner is a limited liability company wholly owned by Tutera and whose limited partners are the debtor's unsecured creditors) purchased this project through the assumption of various secured debts pursuant to 11 U.S.C. § 363(f).

In re: Third and Oak Corporation

United States Bankruptcy Court for the Western
District of Kentucky, Louisville Division,
Case No. 94-32247-11

Flanagan represented the special advisor to Mark Twain Bank, as Successor Indenture Trustee for the \$22,370,000 County of Jefferson (Kentucky) First Mortgage Residential Care Facilities Revenue Bonds (Treyton Oak Towers Economic Development Project) Series 1988, in connection with the debtor's chapter 11 bankruptcy proceeding until the debtor's plan was confirmed in August, 1995.



In re: The SterlingCare Group, Ltd.

United States Bankruptcy Court for the Southern
District of Indiana, Indianapolis Division,
Case No. 92-9594-RLB-11

The SterlingCare Group, Ltd. filed a voluntary chapter 11 petition for relief on September 18, 1992. Flanagan represented the post-petition manager and DIP lender for SterlingCare's seven (7) facilities. During the course of this case, Flanagan prepared and filed a plan of reorganization proposing to assume the leases for these seven (7) facilities, which had a collective value in excess of \$20,000,000, and operate the facilities for the benefit of the creditors. However, prior to the confirmation of this plan, the State of Indiana enacted Rule 14, which dramatically changed the method by which Medicaid payments were being reimburse to Indiana providers and rendered the continued operation of these seven (7) homes unprofitable. In part based upon the advice of Flanagan, the debtor requested that the Bankruptcy Court authorize the debtor to reject the leases for the seven (7) facilities and hand them back to their respective landlords.

In re: Brook Meade Health Care Center, Inc.

United States Bankruptcy Court for the Middle
District of Tennessee, Nashville Division,
Case No. 391-04724-11

Flanagan prepared and filed a plan of reorganization on behalf of his bondholder client proposing to purchase this long term care facility through a refunding the \$4,900,000 Health and Educational Facilities Board of the Metropolitan Government of Nashville and Davidson County, Tennessee Industrial Revenue Bonds (Brook Meade Health Care Center Project) Series 1985 and the \$575,000 Health and Educational Facilities Board of the Metropolitan Government of Nashville and Davidson County, Tennessee Industrial Revenue Bonds (Brook Meade Health Care Center Project) Series 1986. While Flanagan's client was not the successful plan proponent, Flanagan's client was paid a substantial "break up fee" not to pursue its plan.

Mattoon Convalescent Care Center

Mattoon, Illinois

Flanagan represents Mattoon, Inc., which is the court-appointed receiver for this Illinois nursing home since April, 1991 in conjunction with a foreclosure proceeding filed by South Side National Bank in St. Louis, as Indenture Trustee for the \$5,650,000 City of Mattoon, Illinois First Mortgage Revenue Bonds (Mattoon Manor Project) Series 1985. In conjunction with the rehabilitation of a portion of the facility, Flanagan devised a method by which the receiver make a substantial capital improvement loan for use at the facility which otherwise appeared to be prohibited under the applicable bond documents. This facility was thereafter sold to a third party.

Bayou Villas

Pensacola, Florida

Flanagan represented the receiver of this Florida nursing home, which was appointed at the request of the debtor and Barnett Bank, as Successor Indenture Trustee for the \$3,700,000 Pensacola Care, Inc. First Mortgage Revenue Bonds Series 1980, from October, 1992 until the facility was sold by Barnett Bank to a third party in 1996.



In re: Gallatin Health Care Associates

United States Bankruptcy Court for the Middle
District of Tennessee, Nashville Division,
Case No. 395-09504

Flanagan acted as a consultant and special advisor to the debtor's general partner in connection with the formulation, negotiation and financing of the debtor's chapter 11 plan of reorganization. The major component of the plan was the refinancing of the \$6,700,000 Health, Educational and Housing Facilities Board of the County of Sumner, Tennessee Revenue Bonds, Series 1986 (Gallatin Health Care Associates Project) through the private placement of \$5,200,000 refunding tax exempt bonds and a \$900,000 taxable note with a single sophisticated investor arranged by Flanagan. The debtor's confirmed plan became effective on August 1, 1997.

In re: The Phoenix Rehabilitation Center, Inc.

United States Bankruptcy Court for the
District of Kansas, Topeka Division,
Case No. 97-41334-11

The Phoenix Rehabilitation Center, Inc. is a Kansas not-for-profit corporation which owned The Phoenix Nursing & Rehabilitation Center, a 235 licensed bed skilled nursing facility located in Olathe, Kansas. Flanagan's client provided post-petition consulting services, as well as a debtor in possession loan in the total amount of \$150,000, to the owner during its chapter 11 bankruptcy proceeding filed on May 16, 1997. At the time that the chapter 11 bankruptcy was filed, the facility was the subject of a de-certification proceeding and its Medicaid provider agreement was set to terminate on June 9, 1997. Flanagan's client ultimately purchased the facility pursuant to a credit bid which was submitted in accordance with 11 U.S.C. § 363(k) in an amount equal to the first mortgage note which had been previously purchased by Flanagan's client.

In re Stonebridge, L.L.C., et al.

United States Bankruptcy Court for the Eastern
District of Louisiana, New Orleans Division,
Case No.'s 97-14854, 97-14855, 97-14856,
97-14857, 97-14858 and 97-14859
(Jointly Administered)

On August 29, 1997, Stonebridge, L.L.C., Audubon Living Center, Inc., Carrollton-Glyndana, L.P., Flower Mound-Glyndana, L.P., Glenn Laborde, Inc., and Glyndana-Windsor, L.P., filed voluntary chapter 11 petitions for relief. Flanagan represented the post-petition manager of the six (6) facilities that are owned or leased by the above-referenced debtors. On July 23, 1998, the Bankruptcy Court confirmed plans of reorganization for Stonebridge, Cross Timbers and Amite which provided for the restructuring of debts totaling in excess of \$20,000,000, including approximately \$13,000,000 in long term debt currently held by Bank One Louisiana, N.A., which was negotiated, in large part, by Flanagan. Flanagan also represented Tutura in the acquisition of Windsor Care Center pursuant to a Section 363 sale of the facility conducted by the Bankruptcy Court.

Belwood Nursing Home

Peoria County, Illinois

Flanagan represented the consultant and special advisor for the operation of Belwood Nursing Home, which is owned and operated by Peoria County, Illinois.



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In re: Fountain Manor, Inc.

United States Bankruptcy Court for the
Eastern District of Louisiana, New Orleans Division,
Case No. 98-15367-B-11

Fountain Manor, Inc., a Louisiana corporation, owned Fountain Manor, a 131 licensed bed skilled and intermediate care nursing facility located in East New Orleans, Louisiana. On September 3, 1998, the Bankruptcy Court appointed a chapter 11 trustee to take over the management and operation of FMI and the facility. The chapter 11 trustee thereafter immediately engaged Flanagan's client to provide management services at the facility pending the sale of the facility through a bankruptcy court auction.

Armour Assisted Living Facility, Inc.

Kansas City, Missouri

On January 14, 1999, Flanagan's client was engaged by the state court appointed receiver to manage this 120 unit residential care II facility located in Kansas City, Missouri following the receiver's appointment upon the request of the Missouri Department of Social Services, Division of Aging.

In re: Carewell Corporation of Oklahoma, Inc., et al.

United States Bankruptcy Court for the Western
District of Missouri, Western Division,
Case No. 99-40827-1-11, et seq.
(Jointly Administered)

On March 8, 1999, Carewell Corporation of Oklahoma, Inc., together with six (6) wholly owned limited liability companies (collectively "Carewell"), filed voluntary chapter 11 petitions for relief. Flanagan's client was the manager of nine (9) facilities owned and operated by Carewell until the facilities were ultimately transferred back to Carewell's respective secured creditors following a determination that the terms and conditions by which such lenders would agree to such a transfer would be far in excess of what general unsecured creditors would ever receive if the Debtors' were to reorganize under chapter 11.

In re: Axiom Healthcare Services, Inc., et al.

United States Bankruptcy Court for
the Eastern District of Louisiana
Case No.'s 99-11875-11, et seq.
(Jointly Administered)

On April 14, 1999, Axiom Healthcare Services, Inc., together with six (6) wholly owned limited liability companies (collectively "Axiom"), filed voluntary chapter 11 petitions for relief. Pursuant to an order entered by the Bankruptcy Court on or about April 19, 1999, Flanagan's client began managing six (6) skilled nursing facilities leased or owned and operated by Axiom that are located in the State of Oklahoma. Flanagan's client also provided Axiom with a debtor in possession line of credit in the total amount of \$500,000 for use as working capital at the facilities. Shortly following the filing of the procedure, it became clear that Axiom would be unable to reorganize its affairs, primarily since five (5) of the facilities were leased by Axiom and the landlord was unwilling to make the concessions necessary to allow the facilities to operate profitably. Therefore, upon the advice of Tutera, the Court rejected the leases for the five (5) facilities effective as of June 11, 1999, thereby preserving the ability of Axiom to pay in full its administrative expense claims owing to creditors.



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Blue Hills Care Center

Kansas City, Missouri

On July 12, 1999, Flanagan's client was appointed by the Missouri Department of Social Services, Division of Aging and the licensed operator of the facility to serve as the temporary manager to manage and close this 180 bed skilled nursing facility leased and operated by an affiliate of Lenox Healthcare located in Kansas City, Missouri, which has a population of 132 residents upon the date of appointment. Within approximately 3 weeks of being appointed as receiver, all residents were relocated to other facilities and this facility was closed in accordance with applicable law.

In re: Oakwood Village Nurse Care Center, Inc., et al.

United States Bankruptcy Court for
the Western District of Louisiana

Case No. 00-50485 (Jointly Administered)

On March 9, 2000, Geriatrics, Inc., a Louisiana corporation ("Geriatrics") and six (6) wholly owned subsidiaries filed Voluntary Chapter 11 Petitions for Relief with the United States Bankruptcy Court for the Western District of Louisiana. The subsidiaries each own and operate a long term care facility, multi-handicapped center and/or group home for the developmentally disabled. Flanagan's client initially proposed to provide the Debtors with a debtor in possession loan in the total amount of \$1,500,000, which caused the Debtors' primary secured creditor to agree to provide a debtor in possession loan in the amount of \$1,750,000 on virtually identical terms and conditions. Flanagan's client subsequently did make a \$500,000 debtor in possession loan to the Debtors, whose plan of reorganization was confirmed and went effective as of April 1, 2003. Subsequently thereafter, Flanagan represented his client in the making of a \$5,300,000 loan to take out the indebtedness owing by Geriatrics to Hibernia National Bank.

In re: Brentwood Nursing and Rehabilitation Center, Inc.

United States Bankruptcy Court for
the Northern District of Illinois

On March 24, 2000, Brentwood North Nursing and Rehabilitation Center, Inc. and Riverwoods Associates each filed Voluntary Chapter 11 Petitions for Relief with the United States Bankruptcy Court for the Southern District of Florida, which cases were later transferred to the United States Bankruptcy Court for the Northern District of Illinois. Riverwoods owns and leases Brentwood Nursing and Rehabilitation Center, a 244 licensed bed skilled care and rehabilitation facility located near Deerfield, Illinois to Brentwood. Flanagan's client took over the management of Brentwood immediately prior to the filing of the chapter 11 proceedings and, in conjunction therewith, offered to make a debtor in possession loan in the amount of \$500,000 available to Brentwood. However, this offer ultimately caused Brentwood's primary working capital lender to make a \$500,000 debtor in possession loan available to Brentwood on virtually identical terms and conditions as those offered by Flanagan's client. This facility was sold on July 20, 2001 through a bankruptcy court auction.

Holmesdale Care Center

Kansas City, Missouri

On July 1, 2000, Flanagan's client took over the day-to-day management of Holmesdale Care Center for the landlord of this facility following the rejection of a lease by an affiliate of Integrated Health Services, Inc. in conjunction with IHS's chapter 11 proceeding pending before the United States Bankruptcy Court for District of Delaware. Flanagan's client and the landlord worked in unison with the Missouri Department of Social Services, Division of Aging to cause this facility to be closed and all of its residents relocated to other facilities in the Kansas City area by July 10, 2000.



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Senior Living Properties, LLC

On October 1, 2000, Flanagan's client took over the day-to-day management of thirty-one (31) long term care facilities located in the State of Illinois which are owned by Senior Living Centers, LLC. These facilities, together with an additional fifty-five (55) facilities located in Texas which are owned by SLP, serve as the collateral for a \$225,000,000 loan provided to SLP by GMAC Commercial Mortgage Credit Corporation. Flanagan's client was selected as the replacement third party manager for these thirty-one (31) facilities following an extensive interview process jointly conducted by SLP, GMAC and ZC Specialty Insurance Company, which had issued a surety bond in the amount of \$140,000,000 to secure, in part, repayment of the obligations owing by SLP to GMAC. These facilities were subsequently sold to a third party.

Oak Forest North, L.L.C.

St. Louis, Missouri

On February 5, 2001, Flanagan's client took over the day-to-day management of Oak Forest North, a 120 bed long term care in accordance with a Consent Agreement entered into by and between Oak Forest North, L.L.C. and the Missouri Department of Social Services, Division of Aging whereby Oak Forest was permitted by the MDOA to engage Tutera as its manager in lieu of having MDOA revoke its license for failing to cure certain survey deficiencies which occurred while Oak Forest was operating the facility. Tutera ceased managing this facility on July 9, 2001 when Oak Forest, together with its various affiliates, leased all of their respective properties to a new third party operator.

Grand Court II – Chattanooga

Chattanooga, Tennessee

On March 1, 2001, Flanagan's client took over the day-to-day management of the Grand Court II – Chattanooga, which is a 142 unit independent living and assisted living facility located in Chattanooga, Tennessee. This facility was previously operated by Grand Court Lifestyles, Inc., who is currently involved in a chapter 11 proceeding pending before the United States Bankruptcy Court for District of New Jersey. This engagement was arranged by CRIIMI MAE Services, L.P., as the subservicer for the holder of first mortgage loan. This facility was later sold to a third party.

Sunbridge Care Center at Jackson

Jackson, California

On April 23, 2001, Flanagan's client took over the day-to-day management of Sunbridge Care Center for the landlord of this long term care facility following the rejection of a lease by an affiliate of Sun Healthcare Group in conjunction with Sun's chapter 11 proceeding pending before the United States Bankruptcy Court for District of Delaware. Flanagan's client and the landlord, together with FINOVA Capital Corporation, which held a first mortgage lien in the facility, worked in unison to take back the operations for Sun. In conjunction with the management of this facility, Tutera provided the owner with access to a \$1,050,000 line of credit for which FINOVA agreed to subordinate its first mortgage liens and security interests to secure repayment of such loan. The facility was subsequently sold to a third party.

The Manor

Las Vegas, Nevada

On August 15, 2001, Flanagan was appointed the receiver for The Manor, a 225 bed skilled nursing facility located in Las Vegas, Nevada which opened in 1999, in conjunction with a legal proceeding filed by



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Key Corporate Capital, Inc. seeking to foreclose on the facility based upon the borrowers' default on indebtedness owing to Key in excess of \$16,000,000. In conjunction with his appointment as Receiver, Flanagan engaged Tuteria to assume the day to day management of the facility, and oversaw the marketing and negotiations for the sale of the facility through a foreclosure sale.

Medford Nursing Center

Medford, Oklahoma

Flanagan was appointed the receiver for this Oklahoma nursing home in January 2002 in conjunction with a foreclosure proceeding filed by the first mortgage lender in the United States District Court for the Western District of Oklahoma. Flanagan oversaw the marketing and sale of the facility through a foreclosure sale.

Grand Court II – Kansas City

Kansas City, Kansas

On March 21, 2002, Flanagan was appointed as the receiver of the Grand Court II – Kansas City, Kansas, which is a 127 unit independent living and assisted living facility located in Kansas City, Kansas. Flanagan's appointment was accomplished at the request of Brotherhood Bank & Trust Company, which held the first mortgage loan and was the subject of a foreclosure action. This facility was ultimately sold by Brotherhood following its foreclosure for more than the original debt against it based, in part, on the actions of the Reciever to stabilize and improve the operation of the facility.

In re: TriNat Health Care, Inc.

United States Bankruptcy Court for the Southern
District of Indiana, Indianapolis Division
Case No. 02-06360-JKC-11

TriNat Health Care, Inc. filed a voluntary chapter 11 petition for relief on April 15, 2002. TriNat leases and operated nine (9) long term care facilities located in Indiana. Flanagan's client took over the management of the TriNat facilities immediately prior to the filing of the chapter 11 proceeding and, in conjunction therewith, offered to make a debtor in possession loan in the amount of \$500,000 available to TriNat. However, shortly following the filing of the proceeding, the State of Indiana implemented another dramatic Medicaid rate decrease that reduced the overall annual Medicaid revenue for these nine (9) homes by approximately \$2,800,000. Once it was determined that TriNat would be unable to reorganize its affairs, primarily since TriNat leased its facilities and the landlord was unwilling to make the rent concessions necessary to allow the facilities to operate profitably, the Court authorized the rejection of the leases for the nine (9) facilities effective as of June 30, 2002, thereby preserving the ability of TriNat to maximize its distributions to its creditors.

In re: Metro Health/Indiana, Inc.

United States Bankruptcy Court for the Northern
District of Georgia, Atlanta Division
Case No. 02-63019

Metro Health/Indiana, Inc. filed a voluntary chapter 11 petition for relief on March 19, 2002. Metro owns and operates twenty (20) long-term care facilities located in Indiana. On September 20, 2002, Tuteria was appointed as the oversight manager and consultant for the Metro Health/Indiana facilities. Flanagan's client is the oversight manager in this chapter 11 proceeding, with its primary duties to include reviewing and commenting on Metro's operations in an effort to improve the profitability and



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efficiency of the facilities, as well as recommending changes in the owner's operating procedures and confirming whether certain facilities should be sold or closed.

In re: Highland Health Services, Inc., et al.

United States Bankruptcy Court for the
Southern District of Texas – Houston Division
Case No. 01-35491-H5-11

On January 28, 2002, the Bankruptcy Court confirmed the Plan of Reorganization filed by the Debtors in the above-referenced case. In accordance with the confirmed Plan, all of the Debtors' assets were transferred into Autumn Hills Health Foundation. Flanagan was nominated by the Official Unsecured Creditors' Committee, and approved by the Bankruptcy Court, to serve as one of the directors of Autumn Hills upon the confirmation of the Plan. Following confirmation, Flanagan was elected Chairman of the Board and oversaw the initial operation of the Debtors' twelve (12) long term care facilities. After operating the facilities for a period of time, it became apparent that the facilities would not be able to make their debt payments under the plan, and Flanagan (as the sole remaining officer and directors as all other officers and directors had resigned) oversaw the transfer of control of the facilities back to the lender, followed by the liquidation of Autumn Hills' remaining assets.

Maplewood Nursing and Rehabilitation Center

Monroe, Louisiana

On November 19, 2002, Flanagan's client was appointed as the receiver of Maplewood Nursing and Rehabilitation Center, a 99 bed licensed skilled nursing care facility located in Monroe, Louisiana, at the request of Bank One Trust Company, N.A., the indenture trustee of the tax exempt bonds which encumber the facility. Flanagan negotiated the sale of the facility in conjunction with a foreclosure sale.

In re: Mariner Post-Acute Networks, Inc.

United States Bankruptcy Court for the
District of Delaware
Case Nos. 00-113 (MFW) through 00-214 (MFW)

On December 1, 2002, Flanagan assisted LaSalle Bank National Association (formerly known as LaSalle National Bank), as Trustee under that certain Pooling and Servicing Agreement effective as of December 1, 1995, relating to the RMF Commercial Mortgage Pass-Through Certificates, Series 1995-1, in taking back three (3) long term care facilities located in Illinois from Mariner in conjunction with Mariner's chapter 11 bankruptcy proceeding. Flanagan's client thereafter purchased the facilities from the lender.

Country Gardens

Norcross, Georgia

On January 21, 2003, Flanagan was appointed as the rent receiver of Country Gardens, a 27 bed assisted living facility located in Norcross, Georgia. Flanagan's appointment was requested by CRIMI MAE Services, L.P., as the subservicer for holder of the first mortgage loan. This facility was later sold to a third party.



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Lodge at Lompoc

Lompoc, California

On February 6, 2003, Flanagan was appointed as the receiver of the Lodge at Lompoc, a 130 bed assisted living facility located in Lompoc, California. Flanagan's appointment was requested by CRIIMI MAE Services, L.P., as the subservicer for holder of the first mortgage loan which is the subject of a pending foreclosure action. Flanagan negotiated the sale of the facility to a third party at a price which was in excess of the appraised value of the facility.

**The Plaza at Sun Mountain and
The Regency Plaza at Sun Mountain**

Las Vegas, Nevada

On March 11, 2003, Flanagan was appointed the receiver for The Plaza at Sun Mountain, a 179 unit assisted living facility, and The Regency at Sun Mountain, a 188 licensed bed skilled nursing facility, both of which are located in Las Vegas, Nevada. Flanagan was appointed in conjunction with a legal proceeding filed by Lehman Brothers Holdings, Inc. seeking to foreclose on the facility based upon the borrowers' default on indebtedness owing to Lehman Brothers in excess of \$20,000,000. The facility was thereafter sold for a price well in excess of the amount of the debt outstanding at the time of the foreclosure.

Meadowbrook Manor

Topeka, Kansas

On April 14, 2003, Flanagan was appointed as the receiver for Meadowbrook Manor of Topeka, L.P., which owns a 95 bed skilled nursing facility located in Topeka, Kansas. Flanagan's appointment was requested by Beal Bank, which was the holder of a HUD insured loan which it purchased from HUD. The home was thereafter sold through a foreclosure action.

In re: Southern Healthcare Systems, Inc.

United States Bankruptcy Court for the Middle

District of Louisiana, Baton Rouge Division

Case No. 02-11621

Southern Healthcare Systems, Inc. filed a voluntary chapter 11 petition for relief on June 11, 2002. Southern owns and operates six (6) long-term care facilities located in Texas, Kentucky and Tennessee. On December 11, 2002, a chapter 11 trustee was appointed to serve in the case. On April 29, 2003, the chapter 11 Trustee engaged Tutura as the oversight manager and consultant for Southern's facilities, which engagement was arranged by Flanagan. Tutura's primary duties included reviewing and commenting on the clinical and accounting aspects of Southern's operations until the sale of the facilities was closed.

Grand Court II – Overland Park

Overland Park, Kansas

On June 7, 2003, Flanagan's client was appointed as the receiver for the Grand Court II – Overland Park, which is a 100 unit assisted living facility located in Overland Park, Kansas. The appointment of Flanagan's client was arranged by The Mission Bank, which held the first mortgage loan in a pending foreclosure action. Flanagan assisted in negotiating the resolution of several issues involving the transition of operations from Brookdale Living Communities and the issuance of a provisional license by the Kansas



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Department of Aging. Flanagan thereafter assisted Tuteria in the purchase of this facility from The Mission Bank.

The Vyne at Crestview

Wichita, Kansas

On November 24, 2004, Flanagan was appointed as the receiver for The Vyne at Crestview, an assisted living facility located in Wichita, Kansas. Flanagan's appointment was made at the request of TouchStone Asset Management LLC, as servicer for TC10 Grantor Trust, which filed a foreclosure action against its collateral. Flanagan negotiated the sale of the facility to a third party at a price which was in excess of the appraised value of the facility.

Camelot Nursing and Rehabilitation Center

Farmington, Missouri

On December 13, 2004, Flanagan was appointed by the Missouri Department of Health and Senior Services, Division of Senior Services and Regulation, to serve as the receiver for this facility due to the insolvency of its licensed operator. On January 12, 2005, the Coles County Circuit Court discharged Flanagan as the receiver following Flanagan's completion of a transaction to turn the facility back to the landlord, who had a pending licensure application on file when Flanagan was appointed.

Caravilla Charitable Corporation

Mount Vernon, Illinois

On February 2, 2005, Flanagan was appointed by the Circuit Court of the Second Judicial Circuit, Jefferson County, Illinois as the receiver for Casey Care Center, Jeffersonian Care Center and Mount Vernon Care Center, all three of which are skilled nursing facilities located in Mount Vernon, Illinois which are owned by Caravilla Charitable Corporation, an Illinois not-for-profit corporation. Flanagan's appointment was made at the request of Midland Loan Services, Inc., as servicer for PAMI MidAtlantic LLC, which filed a foreclosure action against its collateral. Flanagan oversaw the sale of the facilities to a third party purchaser of the lender's debt at a foreclosure sale conducted in Jefferson County, Illinois.

Independence Court at Ormond Beach

Ormond Beach, Florida

On March 30, 2005, the Circuit Court of the Seventh Judicial Circuit, Volusia County, Florida, in an action styled: TC10 Grantor Trust, Plaintiff, vs. Independence Court of Ormond Beach Associates, L.P., et al., Defendants., Case No. 2005-30383-CICI appointed Flanagan as the receiver for Independence Court of Ormond Beach, an assisted living facility located at 535 North Nova Road, Ormond Beach, Florida 32174. Flanagan was appointed as the receiver for the Facility at the request of TC10 Grantor Trust, who is the holder of the first mortgage indebtedness encumbering the Facility.

Austin Nursing Center

Austin, Texas

On May 27, 2005, the Circuit Court of the 200th Judicial Circuit, Travis County, Texas, in an action styled: TC10 Grantor Trust, Plaintiff, vs. Century Care of America, Inc. et al., Defendants., Case No. GN501-879, appointed Flanagan as the receiver for Austin Nursing Center, a 170 bed skilled nursing facility located at 110 E. Live Oak at Congress, Austin, Texas. Flanagan was appointed as the receiver for the Facility at the request of TC10 Grantor Trust, who is the holder of the first mortgage indebtedness encumbering the Facility. This facility was sold in August 2007 to a third party.



Somerset Point Assisted Living and Nursing Home
Shaker Heights, Ohio

On October 3, 2005, the Court of Common Pleas for Cuyahoga County, Ohio, in an action styled: TC14 Grantor Trust, Plaintiff, vs. Somerset Point, L.P., et al., Defendants., Case No. CV 05 573748, appointed Flanagan as the receiver for Somerset Point Assisted Living and Nursing Home, a skilled nursing and assisted living facility located in Shaker Heights, Ohio. Flanagan was appointed as the receiver for the Facility at the request of TC14 Grantor Trust, who is the holder of the first mortgage indebtedness encumbering the Facility.

Chestnut Grove Assisted Living Facility
Richmond, Virginia

On March 3, 2006, the Circuit Court for Henrico County, Virginia, in an action styled: TC14 Grantor Trust, Plaintiff, vs. Chestnut Grove, L.P., Defendants., Case No. CL06-466, appointed Flanagan as the receiver for Chestnut Grove Assisted Living Facility. Flanagan was appointed as the receiver for the Facility at the request of TC14 Grantor Trust, who is the holder of the first mortgage indebtedness encumbering the Facility. Flanagan thereafter sold the facility to a third party at a foreclosure sale.

The Rose Estates Assisted Living Facility
Overland Park, Kansas

On June 15, 2006, the District Court for Johnson County, Kansas, in an action styled: TI – HUD Investments I, L.L.C., Plaintiff, vs. The Rose Estates, L.L.C., Defendant., Case No. 06CV04595 - Division 7, appointed Flanagan as the receiver for The Rose Estates Assisted Living Facility. The Receiver was appointed at the request of TI – HUD Investments I, L.L.C. The Facility was later sold at a foreclosure sale.

St. Louis Hills Retirement Center
St. Louis, Missouri

On August 23, 2006, the Circuit Court for St. Louis City, Missouri, in an action styled: Metro St. Louis Property, LLC, Plaintiff, vs. Maloney Group and Maloney Group II, Defendants., Cause No. 0622-CC05304, appointed Flanagan as the receiver for Maloney Group II and St. Louis Hills Retirement Center. Flanagan was appointed as the receiver for the Facility at the request of Metro St. Louis Property, LLC, who is the holder of the first mortgage indebtedness encumbering the Facility, and the State of Missouri Department of Department of Health and Senior Services. The Facility was later sold to the note holder at a foreclosure sale.

In re: Robert E. Lee, LLC
United States Bankruptcy Court for the Southern
District of Indiana, New Albany Division
Case No. 05-92641-BHL-11

Robert E. Lee, LLC filed a voluntary chapter 11 petition for relief on July 8, 2005. Robert E. Lee, LLC owns and operates Landmark Nursing and Rehabilitation Center, a 142 licensed bed skilled nursing facility located in New Albany, Indiana. On January 26, 2007, Elliott D. Levin was appointed as the Chapter 11 trustee was appointed to serve in the case. On January 29, 2007, the Chapter 11 Trustee engaged Walnut Creek (an affiliate of Tutera) as the oversight manager and consultant for the facility,



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which engagement was arranged by Flanagan. The facility was sold to a third party purchaser at a bankruptcy court sale in July 2007.

Gentilly Gardens

Stateboro, Georgia

On February 5, 2007, the Superior Court for Bulloch County, Georgia, in an action styled: TI – HUD Investments I, L.L.C., Plaintiff, vs. Integra of Statesboro, L.L.C., Defendant, Case No. 1B07CV068T, appointed Flanagan as the receiver for Gentilly Gardens Assisted Living Facility. The Receiver was appointed at the request of TI – HUD Investments I, L.L.C.. The Facility was later sold at a foreclosure sale.

In re: Pleasant Care Corporation, et al.

United States Bankruptcy Court for the Central
District of California, Los Angeles Division
Case No. LA 07-12312-EC

On March 22, 2007, Pleasant Care Corporation, SNF Properties Incorporated, PCC Health Services, Inc., Atlas Care Enterprises, Inc., and Ember Care Corporation each filed voluntary chapter 11 petitions for relief. The Debtors are the second largest operator of skilled nursing facilities in the State of California, currently lease and operate 27 skilled nursing facilities and 3 assisted living facilities, with annual revenues in excess of \$200,000,000. Effective as of April 1, 2007, Flanagan's client (Joseph C. Tuter), at the insistence of the secured creditors, unsecured creditors and regulatory authorities, was installed as the President and COO of the Debtors in accordance with a Retention Agreement executed by Manny Bernabe, the Debtors' principal shareholder. Pursuant to the terms of the Retention Agreement, Mr. Tuter was vested with full and complete control over the Debtors' business operations, including having exclusive control over, and decision-making power with respect to, the Debtors' day-to-day business operations and the sale, assignment or transfer of any assets or Facilities of the Debtors. Flanagan was actively involved in supporting Mr. Tuter in all aspects of operating the business and selling or disposing of various of the assets.

Garden Valley Retirement Village

Garden City, Kansas

On February 13, 2008, the 25th District Court for Finney County, Kansas, in an action styled: Bank of Oklahoma, N.A., as successor trustee for the holders of the Retirement Facility Refunding Revenues Bonds (Garden Valley Retirement Village, Inc.) Series 1993, Plaintiff, vs. Garden Valley Retirement Village, Inc. and the City of Garden City, Kansas, Defendants, Case No. CV-08, appointed Flanagan as the receiver for Garden Valley Retirement Village. The Facility was later sold at foreclosure.

In re: Haven Eldercare, LLC, et al.

United States Bankruptcy Court for the
District of Connecticut, New Haven Division
Case No. 07-32720

Haven Eldercare, LLC and its affiliates filed for chapter 11 relief in November 2007. Haven was the one of the largest operators of skilled nursing facilities in New England, having owned or leased and operated 25 skilled nursing facilities. In July 2008, Flanagan assisted Tuter and CapitalSource Finance, LLC in purchasing four (4) long term care facilities located in Connecticut and New Hampshire from Haven's bankruptcy estate and following such purchase, Tuter thereafter began leasing and



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operating the facilities through December 2010, at which time they were sold by CapitalSource Finance, LLC to an unrelated third party purchaser.

Chestnut Hill of Highlands Assisted Living Facility

Highlands, Macon County, North Carolina

On November 17, 2008, the General Court for Justice, Superior Court Division for Macon County, North Carolina, in an action styled: The Palmetto Bank, Plaintiff, vs. Highlands Senior Living Property, LLC, Highlands Senior Living, LLC, Jon M. Harder, Kristin P. Harder, Darryl E. Fisher, Carol L. Fisher and Sunwest Management Inc., Defendants. Case No. 08 CVS 798, appointed Michael F. Flanagan as the Receiver pursuant to N.C. Gen. Stat. § 1-501 *et seq.*, over: (a) Highlands Senior Living Property, LLC; and (b) Highlands Senior Living, LLC; and (c) the senior living community commonly known as “Chestnut Hill of Highlands” located in Highlands, Macon County, North Carolina. The Receiver was appointed at the request of the Palmetto Bank. The Facility was later sold to the note holder at a foreclosure sale.

Park Place Assisted Living Facility

Spartanburg County, South Carolina

On January 20, 2009, the Court of Common Pleas for Spartanburg County, South Carolina, in an action styled: The Palmetto Bank, Plaintiff, vs. Spartanburg Senior Living, LLC, et al., Defendants. Case No. 2008-CP-42-6355, appointed Michael F. Flanagan as the Receiver pursuant to S. C. Code § 15-65-10(1) *et seq.*, over: (a) Spartanburg Senior Living, LLC; and (b) the senior living community commonly known as Park Place located in Spartanburg County, South Carolina. The Receiver was appointed as the receiver at the request of The Palmetto Bank. The Facility was later sold to the note holder at a foreclosure sale.

Loving Care Home

Lindenwood, Missouri

On August 30, 2010, the Circuit Court for St. Louis County, Missouri in an action styled: First Bank, Plaintiff, vs. Lindenwood Care Corporation, Jamieson Realty, L.L.C., et al., Defendants. Case No. 10SL-CC03497, Division 20 entered an Order appointing Michael F. Flanagan as the Receiver for Loving Care Home, a 111-bed Residential Care Facility I as located at 3715 Jamieson Ave., St. Louis, MO 63109. The Receiver was appointed as the receiver at the request of First Bank. The Facility was later sold to the note holder at a foreclosure sale.

Summer Place Assisted Living Facility

Spartanburg County, South Carolina

On August 3, 2010, the Court of Common Pleas for Spartanburg County, South Carolina, in an action styled: The Palmetto Bank, Plaintiff, vs. Summer Place Assisted Living, LLC, et al., Defendants. Case No. 2010-CP-42-1740, entered an Order appointed Michael F. Flanagan as the Receiver over the senior living community commonly known as “Summer Place Assisted Living” located 916 Wesley Court, Boiling Springs, South Carolina 29316, effective as of September 4, 2010. The Receiver was appointed as the receiver at the request of The Palmetto Bank. The Facility was later sold to the note holder at a foreclosure sale.



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Paradise Park Assisted Living Facility

New Lenox, Illinois

On December 23, 2010, the Circuit Court of Twelve Judicial District for Will County, Illinois, in an action styled: First Choice Bank, Plaintiff, vs. Paradise Park Assisted Living – New Lenox, LLC and James F. Boris, Defendants, Case No. 10 CH 7749 (Will Cty., IL), entered an Order appointing Michael F. Flanagan as the Receiver over the assisted living facility commonly known as “Paradise Park Assisted Living” located at 1023 South Cedar Road, New Lenox, Will County, Illinois. The Receiver was appointed as the receiver at the request of First Choice Bank. The Facility was sold to a third party purchaser pursuant to a Receiver’s sale approved by the court.

Wichita Nursing Center

Wichita, Kansas

On September 2, 2011, the Eighteenth Judicial District Court for Sedgwick County, Kansas, in an action styled: Shawn Sullivan, Secretary of the Kansas Department on Aging, Applicant, vs. Kansas Healthcare Leasing, Inc., d/b/a Wichita Nursing Center, Respondent, Case No. 11 CV 3086, entered an Order appointing Shawn Sullivan, Secretary of the Kansas Department on Aging, as the duly appointed receiver for Wichita Nursing Center, a 70 bed skilled nursing facility located at 2840 S Hillside Street, Wichita, KS 67216-2544. The Receiver engaged Flanagan as a consultant and business advisor to the Receiver to assist the Receiver in discharging his duties and responsibilities as Receiver. Flanagan and the Facility’s manager closed down the Facility and relocated all of the residents to other long term care facilities in the Wichita area within approximately 45 days after being appointed.

Wardship Residential Care, LLC

St. Louis, Missouri

On March 10, 2014, the Circuit Court for the City of St. Louis County, Missouri, in an action styled: State of Missouri, et al., Plaintiff, vs. Wardship Residential Care, LLC, Defendant, Case No. 1422-CC00546, entered an Order appointing Flanagan as the Receiver for Wardship Residential Care Facility, a 30 bed Residential Care II Facility located at 3409 Missouri Avenue, St. Louis, MO 63118. Flanagan was appointed as the receiver at the request of Missouri Department of Health and Senior Services. Flanagan ultimately sold the Facility to a new qualified operator.

Deseret Nursing & Rehabilitation at Onaga

Onaga, Kansas

On May 12, 2014, the Second Judicial District Court of Pottawatomie County, Kansas, in an action styled: Shawn Sullivan, Secretary of the Kansas Department for Aging and Disability Services, Applicant, vs. Deseret Health and Rehab at Onaga, LLC, d/b/a Deseret Nursing & Rehabilitation at Onaga, Respondent, Case No. 14-CV-34, entered an Order appointing Shawn Sullivan, Secretary of the Kansas Department of Aging and Disability Services, as the duly appointed receiver for Deseret Nursing & Rehabilitation at Onaga, a 46 bed skilled nursing facility located at 500 Western Street, Onaga, Kansas 66521. The Receiver engaged Flanagan as a consultant and business advisor to the Receiver to assist the Receiver in discharging his duties and responsibilities as Receiver. The Facility was ultimately sold to a new qualified operator.



Washburn Community Care Center
Topeka, Kansas

On May 1, 2015, the Third Judicial District Court of Shawnee County, Kansas, in an action styled: Kari M. Bruffett, Secretary of the Kansas Department for Aging and Disability Services, Applicant, vs. Washburn Community Care Center, LLC, et al., Respondents., Case No. 15-CV-398, entered an Ex Parte Temporary Restraining Order appointing Kari M. Bruffett, Secretary of the Kansas Department of Aging and Disability Services, as the duly appointed receiver for Washburn Community Health Care, a skilled nursing facility located at 1334 Buchanan Street, Topeka, Kansas 66604. The Receiver engaged Flanagan as a consultant and business advisor to the Receiver to assist the Receiver in discharging her duties and responsibilities as Receiver. Flanagan and the Facility's manager closed down the Facility and relocated all of the residents to other long term care facilities in the Topeka area within approximately 30 days after being appointed.

Deseret Health and Rehab at Woodlawn
Wichita, Kansas

On May 4, 2015, the Second Judicial District Court of Sedgwick County, Kansas, in an action styled: Kari M. Bruffett, Secretary of the Kansas Department for Aging and Disability Services, Applicant, vs. Deseret Health and Rehab at Woodlawn, LLC, Respondent., Case No. 15-CV-1123, entered an Order appointing Kari M. Bruffett, Secretary of the Kansas Department of Aging and Disability Services, as the duly appointed receiver for Deseret Health and Rehab at Woodlawn, a skilled nursing facility located at 1600 South Woodlawn, Wichita, Kansas 67218. The Receiver engaged Flanagan as a consultant and business advisor to the Receiver to assist the Receiver in discharging her duties and responsibilities as Receiver. The Facility was sold to a new qualified operator eighty (8) days following the appointment of the Receiver.

Close to Home, Ramsey Creek Village and Holly Ridge
Southeastern Missouri

On October 21, 2015, the Circuit Court for St. Louis County, Missouri, Division 12, in an action styled: Great Southern Bank, Plaintiff, vs. Arbor Health Properties, Inc., et al., Defendants, Case No. 15SL-CC03593, entered an Order appointing Flanagan as the Receiver for Close to Home, Ramsey Creek Village and Holly Ridge. The Receiver was appointed at the request of Great Southern Bank. The three facilities were ultimately sold.

Maple Heights
Hiawatha, Kansas

On April 28, 2016, the 22nd District Court for Brown County, Kansas entered an Order in an action styled: BOKF, N.A., as Successor Trustee for the holders of the Health Care Facilities Revenue Bonds Series 1999A and Taxable Health Care Facilities Revenue Bonds Series 1999B (Maple Heights Nursing and Rehabilitation Center, Project), Plaintiff, vs. Lafayette Lifeplans Corporation, Lafayette Lifeplans of Hiawatha, Inc. and the City of Hiawatha, Kansas, Defendants, Case No. 2016-CV-000010 appointing Flanagan as the receiver for Maple Heights Nursing and Rehabilitation Center, a 67 bed skilled nursing facility and 13 unit/15 bed residential care facility located at 302 East Iowa Street, Hiawatha, Brown County, Kansas 66434. The Receiver was appointed at the request of Bank of Oklahoma.



FLANAGAN & ASSOCIATES, L.L.C.

Bright Oaks of Aurora

Aurora, Illinois

On August 9, 2017, the Circuit Court of the Sixteenth Judicial Circuit, Kane County, Illinois entered an Order in an action styled: West Suburban Bank, Plaintiff, vs. Aurora Memory Care, LLC, et al., Defendants, Case No. 17-CH-662 appointing Flanagan to serve as the receiver for Bright Oaks of Aurora, a 60-unit assisted living and memory care facility located at 1340 River Street, Aurora, Kane County, Illinois 60506. The Receiver was appointed at the request of West Suburban Bank and oversaw the operation of the Facility until it was sold.

Skyline Healthcare

Kansas

On March 28, 2018, Timothy E. Keck, Secretary of the Kansas Department for Aging and Disability Services, was appointed as the receiver by the various state district courts across the State of Kansas with respect to the fifteen (15) skilled nursing facilities located throughout the State of Kansas. These cases were consolidated into a single action pending before the District Court for Johnson County, Kansas styled: Timothy E. Keck, Secretary of KDADS v. Spring Hill Care and Rehabilitation Center, LLC, et al., Case No. 18-CV-01688. The Receiver engaged Flanagan as a consultant and business advisor to the Receiver to assist the Receiver in discharging his duties and responsibilities as Receiver. Flanagan oversaw the sale of the facilities to a new qualified owner and operator.

DJKierl, Inc.

Fort Scott and Pleasanton, Kansas

On May 15, 2018, the District Court of Bourbon County, Kansas entered a Temporary Restraining Order appointing Timothy E. Keck, Secretary of the Kansas Department of Aging and Disability Services, as the duly appointed receiver for Ft. Scott Manor, a licensed bed skilled nursing facility located at 736 Heylman Street, Fort Scott, Bourbon County, Kansas 66701. The Receiver engaged Flanagan as a consultant and business advisor to the Receiver to assist the Receiver in discharging his duties and responsibilities as Receiver. Flanagan oversaw the closure of the Ft. Scott facility. In conjunction therewith, the District Court of Linn County, Kansas entered an Order appointing Flanagan as the receiver for The Residences at Pleasanton, an assisted living facility located at 706 West 15th Street, Pleasanton, Linn County, Kansas 66075 and Flanagan is currently operating this facility pending the completion of the foreclosure action and sale of the facility.

Great Bend Care & Rehab

Great Bend, Kansas

On July 11, 2018, the District Court of Barton County, Kansas, in an action styled: Timothy E. Keck, Secretary of the Kansas Department for Aging and Disability Services, Applicant, vs., Great Bend Health & Rehab Center, HP/Great Bend, Inc., Great Bend – LTC, LLC, Five Rivers Management, LLC, Douglas Mittleider, Kerry Gibson and Daren Douston, Respondents., Case No. 2018-CV-000080, entered a Temporary Restraining Order appointing Timothy E. Keck, Secretary of the Kansas Department of Aging and Disability Services, as the duly appointed receiver for Great Bend Health & Rehab Center, which is located at 1560 K 96 Hwy, Great Bend, KS 67530. Receiver engaged Flanagan as a consultant and business advisor to Receiver with full and complete control over the Facility to assist Receiver in discharging his duties and obligations as receiver.



Pinnacle Management

Nortonville, Topeka and Emporia, Kansas

On August 1, 2018, the District Court for Shawnee County, Kansas appointed Timothy E. Keck, Secretary of the Kansas Department of Aging and Disability Services, as the receiver over Village Villa, Inc., Village Estates, Inc., Providence Living Center, Inc., and Flint Hills Care Center, Inc. Receiver engaged Flanagan as a consultant and business advisor to Receiver with full and complete control over the Facilities. Flanagan is currently overseeing the operation of the facilities while they are being marketed for sale.

Westview of Derby

Derby, Kansas

On September 12, 2018, the District Court of Sedgwick County, Kansas, in an action styled: Timothy E. Keck, Secretary of the Kansas Department for Aging and Disability Services, Applicant, vs. and LSL of Derby, LLC, Sovran Management Company, LLC, Michael Marshall and Westview of Derby, Respondents., Case No. 2018-CV-001991-TO, entered a Temporary Restraining Order appointing Timothy E. Keck, Secretary of the Kansas Department of Aging and Disability Services, as the duly appointed receiver for Westview of Derby, a skilled nursing facility commonly located at 445 North Westview Drive, Derby, Sedgwick County, Kansas 67037. Receiver engaged Flanagan as a consultant and business advisor to Receiver with full and complete control over the Facility. In November 2018, the facility's secured lender had Flanagan appointed as the replacement receiver of the facility pending completion of a pending foreclosure action and the sale of the facility.

Christian Care Home

Ferguson, Missouri

On November 16, 2018, the Judicial Circuit Court of Cole County, Missouri, in an action styled: State of Missouri ex rel. Josh Hawley, Attorney General, at the request of the Missouri Department of Health and Senior Services, Division of Long Term Regulation & Licensure, Section for Long-Term Care Regulation, Petitioners, vs. Christian Woman's Benevolent Association, d/b/a Christina Care Home, Respondent., Case No. 18AC-CC00461, entered an Order Appointing Receiver appointing Flanagan as the duly appointed receiver for Christian Care Home, a skilled nursing and residential care facility located at 800 Chambers Road, Ferguson, Missouri 63135 for the purpose of relocating the residents and closing the facility as soon as possible, which Flanagan accomplished in less than 20 days.

Westview Manor of Peabody

Peabody, Kansas

On December 12, 2018, the District Court of Marion County, Kansas, in an action styled: Timothy E. Keck, Secretary of the Kansas Department for Aging and Disability Services, Applicant, vs. Franklin Healthcare of Peabody, LLC, d/b/a Westview Manor of Peabody, Altacare Corporation, Franklin Healthcare, Inc., Peabody Associates, LLC, Douglas Mittleider and Julie Mittleider, Respondents., Case No. 2018-CV000068, entered a Temporary Restraining Order appointing Timothy E. Keck, Secretary of the Kansas Department of Aging and Disability Services, as the duly appointed receiver for Westview Manor of Peabody, a skilled nursing facility located at 500 Peabody Street, Peabody, Marion County, Kansas 66866. Receiver engaged Flanagan as a consultant and business advisor to Receiver with full and complete control over the Facility to assist Receiver in discharging his duties and obligations as receiver. Flanagan assisted in the sale of the Facility, which concluded the receivership action.



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Eden Springs

Green Springs, Ohio

On January 18, 2019, the Court of Common Pleas for Sandusky County, Ohio, in an action styled: CIBC Bank USA, Plaintiff, vs. and Eden Realty West LLC, Eden Realty East LLC, Eden Springs Independent Living LLC, Eden Springs Assisted Living East LLC, Eden Springs Nursing and Rehabilitation East LLC, Eden Springs Nursing and Rehabilitation West LLC, Eden Springs Healthcare Center LLC Eden Springs Pharmacy LLC, Defendants., Case No. 19-CV-50, entered an Order appointing Flanagan as the duly appointed receiver for Eden Springs, which consists of skilled nursing facilities, a long term acute care hospital, an assisted living facility, a pharmacy, independent senior housing (rental) units, and vacant land whose principal office is located at 430 North Broadway Street, Green Springs, Ohio 44836. The Receiver was appointed at the request of CIBC Bank.

SureFunding, LLC

Las Vegas, Nevada

On April 13, 2020, the District Court for Clark County, Nevada, in an action styled: Brett Hatton, et. al., Plaintiffs, vs. and SureFunding LLC, Defendant, Case No. A-20-812651-B, entered an Order appointing Flanagan as the duly appointed receiver for SureFunding, LLC. The Receiver was appointed at the request of group of investors who had loaned SureFunding, LLC in excess of \$23,000,000 for the purpose of making investments in a diversified portfolio of assets. Instead, SureFunding, LLC placed 80%-90% of those assets with TradePAY Capital, LLC, an international A/R factoring company located in India, who proceeded to defraud SureFunding, LLC and divert the money for the benefit of the principals of TradePAY Capital, LLC. Flanagan has been appointed to oversee the liquidation of SureFunding, LLC, which will involve liquidating the balance of its assets, as well as pursuing litigation against parties who may contributed to the investors' losses.

EXHIBIT B



FLANAGAN & ASSOCIATES, L.L.C.



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LEGAL EXPERIENCE

November 1997 to present. Sole member of Michael F. Flanagan, L.L.C. and Flanagan & Associates, L.L.C. Flanagan's clients include long term care facility owners and operators, as well as lenders and landlords to long term care facility owners and operators. Flanagan currently concentrates his practice in the areas of health care, corporate, bankruptcy, debtor/creditor rights, commercial law and business workouts primarily involving long term care facilities. Flanagan has assisted numerous lenders, indenture trustees, bondholders and owners of health care facilities, including acting as a receiver on numerous facilities. Flanagan is well versed in corporate and regulatory matters involving long term care facilities and has developed a special expertise in advising and consulting with owners, operators and/or lenders to long term care facilities that are experiencing financial or other difficulties in connection with the operation of their facilities. He has acted as borrower's counsel on matters involving hundreds of millions of dollars in conventional, HUD and tax-exempt bond financing. Flanagan also serves as a member of the Board of Directors for Central Bank of Kansas City.

May 1988 – November 1997. Associate (May 1988 to November 1994) and Equity Shareholder (November 1994 to November 1997) with Polsinelli P.C. During his employment at Polsinelli, Flanagan represented numerous clients in complex Chapter 11 bankruptcy proceedings. Flanagan drafted and successfully confirmed a Chapter 11 Plan of Reorganization for a not-for-profit nursing home owner that owed secured and unsecured debts in excess of \$100 million. At the time, this chapter 11 case was the second largest ever filed in the Western District of Missouri and the largest involving a not-for-profit owner of nursing homes. Flanagan's bankruptcy practice required that he handle various aspects of corporate, real estate, bond and tax law matters as each has related to bankruptcy cases. Flanagan has negotiated numerous leases, asset purchase agreements, loan agreements, real estate contracts, debtor in possession financing agreements and cash collateral orders, as well as represented clients in negotiations or disputes involving various governmental agencies, including the Internal Revenue Service and the Environmental Protection Agency. While at Polsinelli, Flanagan also served as the Chairman of the Recruiting Committee.

PROFESSIONAL ASSOCIATIONS

Flanagan is licensed to practice in the States of Missouri, Kansas, Illinois and Nebraska. At the special request of the Chief Bankruptcy Judge, he served as a member of the Ad Hoc Advisory Committee for the Western District of Missouri Bankruptcy Court. He is a member of the Corporate, Banking and Business Sections of the American Bar Association and The Missouri Bar Association and the American Health Lawyers Association. Flanagan is also a member of the Board of Directors of Central Bank of Kansas City.



FLANAGAN & ASSOCIATES, L.L.C.

**EDUCATION**

Flanagan received his law degree, with distinction, from the University of Iowa in May 1988, where he received the American Jurisprudence Award for excellence in Bankruptcy Reorganizations. Flanagan served as a law clerk for The Honorable Chief Bankruptcy Judge Michael J. Melloy, United States Bankruptcy Court for the Northern District of Iowa, who now sits on the Eighth Circuit Court of Appeals. A 1985 graduate of Central College, a liberal arts college in Pella, Iowa, Flanagan was a four (4) year recipient of the Rolscreen Scholarship (the top academic scholarship awarded by Central College).

REPRESENTATIVE RECEIVERSHIP TRANSACTIONS**In re: First Humanics Corporation**

United States Bankruptcy Court for the Western
District of Missouri, Western Division,
Case No. 89-42041-11

First Humanics Corporation was one of the largest not-for-profit long-term care providers to ever file a chapter 11 bankruptcy proceeding. This case involved twenty-one (21) nursing homes that were acquired through the issuance of approximately \$83,000,000 in I.R.C. § 501(c)(3) tax-exempt bonds. Flanagan represented the debtor in this proceeding and developed and confirmed the plan of reorganization which involved obtaining a \$5,000,000 super-priority priming loan for use as post-confirmation working capital and numerous modifications to the existing bond documents to maximize the return to bondholders.

In re: South Park Care Associates, Inc.

United States Bankruptcy Court for the Western
District of Missouri, Western Division,
Case No. 94-42992-11

South Park Care Center is a 178 licensed bed skilled nursing facility located in Kansas City, Missouri. Flanagan represented Tutera as the debtor's post-petition manager and debtor in possession lender in the total amount of \$250,000. Flanagan proposed and confirmed a plan of reorganization in October, 1995 whereby a newly formed limited partnership (whose general partner is a limited liability company wholly owned by Tutera and whose limited partners are the debtor's unsecured creditors) purchased this project through the assumption of various secured debts pursuant to 11 U.S.C. § 363(f).

In re: Third and Oak Corporation

United States Bankruptcy Court for the Western
District of Kentucky, Louisville Division,
Case No. 94-32247-11

Flanagan represented the special advisor to Mark Twain Bank, as Successor Indenture Trustee for the \$22,370,000 County of Jefferson (Kentucky) First Mortgage Residential Care Facilities Revenue Bonds (Treyton Oak Towers Economic Development Project) Series 1988, in connection with the debtor's chapter 11 bankruptcy proceeding until the debtor's plan was confirmed in August, 1995.



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In re: The SterlingCare Group, Ltd.

United States Bankruptcy Court for the Southern
District of Indiana, Indianapolis Division,
Case No. 92-9594-RLB-11

The SterlingCare Group, Ltd. filed a voluntary chapter 11 petition for relief on September 18, 1992. Flanagan represented the post-petition manager and DIP lender for SterlingCare's seven (7) facilities. During the course of this case, Flanagan prepared and filed a plan of reorganization proposing to assume the leases for these seven (7) facilities, which had a collective value in excess of \$20,000,000, and operate the facilities for the benefit of the creditors. However, prior to the confirmation of this plan, the State of Indiana enacted Rule 14, which dramatically changed the method by which Medicaid payments were being reimburse to Indiana providers and rendered the continued operation of these seven (7) homes unprofitable. In part based upon the advice of Flanagan, the debtor requested that the Bankruptcy Court authorize the debtor to reject the leases for the seven (7) facilities and hand them back to their respective landlords.

In re: Brook Meade Health Care Center, Inc.

United States Bankruptcy Court for the Middle
District of Tennessee, Nashville Division,
Case No. 391-04724-11

Flanagan prepared and filed a plan of reorganization on behalf of his bondholder client proposing to purchase this long term care facility through a refunding the \$4,900,000 Health and Educational Facilities Board of the Metropolitan Government of Nashville and Davidson County, Tennessee Industrial Revenue Bonds (Brook Meade Health Care Center Project) Series 1985 and the \$575,000 Health and Educational Facilities Board of the Metropolitan Government of Nashville and Davidson County, Tennessee Industrial Revenue Bonds (Brook Meade Health Care Center Project) Series 1986. While Flanagan's client was not the successful plan proponent, Flanagan's client was paid a substantial "break up fee" not to pursue its plan.

Mattoon Convalescent Care Center

Mattoon, Illinois

Flanagan represents Mattoon, Inc., which is the court-appointed receiver for this Illinois nursing home since April, 1991 in conjunction with a foreclosure proceeding filed by South Side National Bank in St. Louis, as Indenture Trustee for the \$5,650,000 City of Mattoon, Illinois First Mortgage Revenue Bonds (Mattoon Manor Project) Series 1985. In conjunction with the rehabilitation of a portion of the facility, Flanagan devised a method by which the receiver make a substantial capital improvement loan for use at the facility which otherwise appeared to be prohibited under the applicable bond documents. This facility was thereafter sold to a third party.

Bayou Villas

Pensacola, Florida

Flanagan represented the receiver of this Florida nursing home, which was appointed at the request of the debtor and Barnett Bank, as Successor Indenture Trustee for the \$3,700,000 Pensacola Care, Inc. First Mortgage Revenue Bonds Series 1980, from October, 1992 until the facility was sold by Barnett Bank to a third party in 1996.



In re: Gallatin Health Care Associates

United States Bankruptcy Court for the Middle
District of Tennessee, Nashville Division,
Case No. 395-09504

Flanagan acted as a consultant and special advisor to the debtor's general partner in connection with the formulation, negotiation and financing of the debtor's chapter 11 plan of reorganization. The major component of the plan was the refinancing of the \$6,700,000 Health, Educational and Housing Facilities Board of the County of Sumner, Tennessee Revenue Bonds, Series 1986 (Gallatin Health Care Associates Project) through the private placement of \$5,200,000 refunding tax exempt bonds and a \$900,000 taxable note with a single sophisticated investor arranged by Flanagan. The debtor's confirmed plan became effective on August 1, 1997.

In re: The Phoenix Rehabilitation Center, Inc.

United States Bankruptcy Court for the
District of Kansas, Topeka Division,
Case No. 97-41334-11

The Phoenix Rehabilitation Center, Inc. is a Kansas not-for-profit corporation which owned The Phoenix Nursing & Rehabilitation Center, a 235 licensed bed skilled nursing facility located in Olathe, Kansas. Flanagan's client provided post-petition consulting services, as well as a debtor in possession loan in the total amount of \$150,000, to the owner during its chapter 11 bankruptcy proceeding filed on May 16, 1997. At the time that the chapter 11 bankruptcy was filed, the facility was the subject of a de-certification proceeding and its Medicaid provider agreement was set to terminate on June 9, 1997. Flanagan's client ultimately purchased the facility pursuant to a credit bid which was submitted in accordance with 11 U.S.C. § 363(k) in an amount equal to the first mortgage note which had been previously purchased by Flanagan's client.

In re Stonebridge, L.L.C., et al.

United States Bankruptcy Court for the Eastern
District of Louisiana, New Orleans Division,
Case No.'s 97-14854, 97-14855, 97-14856,
97-14857, 97-14858 and 97-14859
(Jointly Administered)

On August 29, 1997, Stonebridge, L.L.C., Audubon Living Center, Inc., Carrollton-Glyndana, L.P., Flower Mound-Glyndana, L.P., Glenn Laborde, Inc., and Glyndana-Windsor, L.P., filed voluntary chapter 11 petitions for relief. Flanagan represented the post-petition manager of the six (6) facilities that are owned or leased by the above-referenced debtors. On July 23, 1998, the Bankruptcy Court confirmed plans of reorganization for Stonebridge, Cross Timbers and Amite which provided for the restructuring of debts totaling in excess of \$20,000,000, including approximately \$13,000,000 in long term debt currently held by Bank One Louisiana, N.A., which was negotiated, in large part, by Flanagan. Flanagan also represented Tutura in the acquisition of Windsor Care Center pursuant to a Section 363 sale of the facility conducted by the Bankruptcy Court.

Belwood Nursing Home

Peoria County, Illinois

Flanagan represented the consultant and special advisor for the operation of Belwood Nursing Home, which is owned and operated by Peoria County, Illinois.



In re: Fountain Manor, Inc.

United States Bankruptcy Court for the
Eastern District of Louisiana, New Orleans Division,
Case No. 98-15367-B-11

Fountain Manor, Inc., a Louisiana corporation, owned Fountain Manor, a 131 licensed bed skilled and intermediate care nursing facility located in East New Orleans, Louisiana. On September 3, 1998, the Bankruptcy Court appointed a chapter 11 trustee to take over the management and operation of FMI and the facility. The chapter 11 trustee thereafter immediately engaged Flanagan's client to provide management services at the facility pending the sale of the facility through a bankruptcy court auction.

Armour Assisted Living Facility, Inc.

Kansas City, Missouri

On January 14, 1999, Flanagan's client was engaged by the state court appointed receiver to manage this 120 unit residential care II facility located in Kansas City, Missouri following the receiver's appointment upon the request of the Missouri Department of Social Services, Division of Aging.

In re: Carewell Corporation of Oklahoma, Inc., et al.

United States Bankruptcy Court for the Western
District of Missouri, Western Division,
Case No. 99-40827-1-11, et seq.
(Jointly Administered)

On March 8, 1999, Carewell Corporation of Oklahoma, Inc., together with six (6) wholly owned limited liability companies (collectively "Carewell"), filed voluntary chapter 11 petitions for relief. Flanagan's client was the manager of nine (9) facilities owned and operated by Carewell until the facilities were ultimately transferred back to Carewell's respective secured creditors following a determination that the terms and conditions by which such lenders would agree to such a transfer would be far in excess of what general unsecured creditors would ever receive if the Debtors' were to reorganize under chapter 11.

In re: Axiom Healthcare Services, Inc., et al.

United States Bankruptcy Court for
the Eastern District of Louisiana
Case No.'s 99-11875-11, et seq.
(Jointly Administered)

On April 14, 1999, Axiom Healthcare Services, Inc., together with six (6) wholly owned limited liability companies (collectively "Axiom"), filed voluntary chapter 11 petitions for relief. Pursuant to an order entered by the Bankruptcy Court on or about April 19, 1999, Flanagan's client began managing six (6) skilled nursing facilities leased or owned and operated by Axiom that are located in the State of Oklahoma. Flanagan's client also provided Axiom with a debtor in possession line of credit in the total amount of \$500,000 for use as working capital at the facilities. Shortly following the filing of the procedure, it became clear that Axiom would be unable to reorganize its affairs, primarily since five (5) of the facilities were leased by Axiom and the landlord was unwilling to make the concessions necessary to allow the facilities to operate profitably. Therefore, upon the advice of Tutera, the Court rejected the leases for the five (5) facilities effective as of June 11, 1999, thereby preserving the ability of Axiom to pay in full its administrative expense claims owing to creditors.



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Blue Hills Care Center

Kansas City, Missouri

On July 12, 1999, Flanagan's client was appointed by the Missouri Department of Social Services, Division of Aging and the licensed operator of the facility to serve as the temporary manager to manage and close this 180 bed skilled nursing facility leased and operated by an affiliate of Lenox Healthcare located in Kansas City, Missouri, which has a population of 132 residents upon the date of appointment. Within approximately 3 weeks of being appointed as receiver, all residents were relocated to other facilities and this facility was closed in accordance with applicable law.

In re: Oakwood Village Nurse Care Center, Inc., et al.

United States Bankruptcy Court for
the Western District of Louisiana
Case No. 00-50485 (Jointly Administered)

On March 9, 2000, Geriatrics, Inc., a Louisiana corporation ("Geriatrics") and six (6) wholly owned subsidiaries filed Voluntary Chapter 11 Petitions for Relief with the United States Bankruptcy Court for the Western District of Louisiana. The subsidiaries each own and operate a long term care facility, multi-handicapped center and/or group home for the developmentally disabled. Flanagan's client initially proposed to provide the Debtors with a debtor in possession loan in the total amount of \$1,500,000, which caused the Debtors' primary secured creditor to agree to provide a debtor in possession loan in the amount of \$1,750,000 on virtually identical terms and conditions. Flanagan's client subsequently did make a \$500,000 debtor in possession loan to the Debtors, whose plan of reorganization was confirmed and went effective as of April 1, 2003. Subsequently thereafter, Flanagan represented his client in the making of a \$5,300,000 loan to take out the indebtedness owing by Geriatrics to Hibernia National Bank.

In re: Brentwood Nursing and Rehabilitation Center, Inc.

United States Bankruptcy Court for
the Northern District of Illinois

On March 24, 2000, Brentwood North Nursing and Rehabilitation Center, Inc. and Riverwoods Associates each filed Voluntary Chapter 11 Petitions for Relief with the United States Bankruptcy Court for the Southern District of Florida, which cases were later transferred to the United States Bankruptcy Court for the Northern District of Illinois. Riverwoods owns and leases Brentwood Nursing and Rehabilitation Center, a 244 licensed bed skilled care and rehabilitation facility located near Deerfield, Illinois to Brentwood. Flanagan's client took over the management of Brentwood immediately prior to the filing of the chapter 11 proceedings and, in conjunction therewith, offered to make a debtor in possession loan in the amount of \$500,000 available to Brentwood. However, this offer ultimately caused Brentwood's primary working capital lender to make a \$500,000 debtor in possession loan available to Brentwood on virtually identical terms and conditions as those offered by Flanagan's client. This facility was sold on July 20, 2001 through a bankruptcy court auction.

Holmesdale Care Center

Kansas City, Missouri

On July 1, 2000, Flanagan's client took over the day-to-day management of Holmesdale Care Center for the landlord of this facility following the rejection of a lease by an affiliate of Integrated Health Services, Inc. in conjunction with IHS's chapter 11 proceeding pending before the United States Bankruptcy Court for District of Delaware. Flanagan's client and the landlord worked in unison with the Missouri Department of Social Services, Division of Aging to cause this facility to be closed and all of its residents relocated to other facilities in the Kansas City area by July 10, 2000.



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Senior Living Properties, LLC

On October 1, 2000, Flanagan's client took over the day-to-day management of thirty-one (31) long term care facilities located in the State of Illinois which are owned by Senior Living Centers, LLC. These facilities, together with an additional fifty-five (55) facilities located in Texas which are owned by SLP, serve as the collateral for a \$225,000,000 loan provided to SLP by GMAC Commercial Mortgage Credit Corporation. Flanagan's client was selected as the replacement third party manager for these thirty-one (31) facilities following an extensive interview process jointly conducted by SLP, GMAC and ZC Specialty Insurance Company, which had issued a surety bond in the amount of \$140,000,000 to secure, in part, repayment of the obligations owing by SLP to GMAC. These facilities were subsequently sold to a third party.

Oak Forest North, L.L.C.

St. Louis, Missouri

On February 5, 2001, Flanagan's client took over the day-to-day management of Oak Forest North, a 120 bed long term care in accordance with a Consent Agreement entered into by and between Oak Forest North, L.L.C. and the Missouri Department of Social Services, Division of Aging whereby Oak Forest was permitted by the MDOA to engage Tuteria as its manager in lieu of having MDOA revoke its license for failing to cure certain survey deficiencies which occurred while Oak Forest was operating the facility. Tuteria ceased managing this facility on July 9, 2001 when Oak Forest, together with its various affiliates, leased all of their respective properties to a new third party operator.

Grand Court II – Chattanooga

Chattanooga, Tennessee

On March 1, 2001, Flanagan's client took over the day-to-day management of the Grand Court II – Chattanooga, which is a 142 unit independent living and assisted living facility located in Chattanooga, Tennessee. This facility was previously operated by Grand Court Lifestyles, Inc., who is currently involved in a chapter 11 proceeding pending before the United States Bankruptcy Court for District of New Jersey. This engagement was arranged by CRIIMI MAE Services, L.P., as the subservicer for the holder of first mortgage loan. This facility was later sold to a third party.

Sunbridge Care Center at Jackson

Jackson, California

On April 23, 2001, Flanagan's client took over the day-to-day management of Sunbridge Care Center for the landlord of this long term care facility following the rejection of a lease by an affiliate of Sun Healthcare Group in conjunction with Sun's chapter 11 proceeding pending before the United States Bankruptcy Court for District of Delaware. Flanagan's client and the landlord, together with FINOVA Capital Corporation, which held a first mortgage lien in the facility, worked in unison to take back the operations for Sun. In conjunction with the management of this facility, Tuteria provided the owner with access to a \$1,050,000 line of credit for which FINOVA agreed to subordinate its first mortgage liens and security interests to secure repayment of such loan. The facility was subsequently sold to a third party.

The Manor

Las Vegas, Nevada

On August 15, 2001, Flanagan was appointed the receiver for The Manor, a 225 bed skilled nursing facility located in Las Vegas, Nevada which opened in 1999, in conjunction with a legal proceeding filed by



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Key Corporate Capital, Inc. seeking to foreclose on the facility based upon the borrowers' default on indebtedness owing to Key in excess of \$16,000,000. In conjunction with his appointment as Receiver, Flanagan engaged Tutura to assume the day to day management of the facility, and oversaw the marketing and negotiations for the sale of the facility through a foreclosure sale.

Medford Nursing Center

Medford, Oklahoma

Flanagan was appointed the receiver for this Oklahoma nursing home in January 2002 in conjunction with a foreclosure proceeding filed by the first mortgage lender in the United States District Court for the Western District of Oklahoma. Flanagan oversaw the marketing and sale of the facility through a foreclosure sale.

Grand Court II – Kansas City

Kansas City, Kansas

On March 21, 2002, Flanagan was appointed as the receiver of the Grand Court II – Kansas City, Kansas, which is a 127 unit independent living and assisted living facility located in Kansas City, Kansas. Flanagan's appointment was accomplished at the request of Brotherhood Bank & Trust Company, which held the first mortgage loan and was the subject of a foreclosure action. This facility was ultimately sold by Brotherhood following its foreclosure for more than the original debt against it based, in part, on the actions of the Reciever to stabilize and improve the operation of the facility.

In re: TriNat Health Care, Inc.

United States Bankruptcy Court for the Southern
District of Indiana, Indianapolis Division
Case No. 02-06360-JKC-11

TriNat Health Care, Inc. filed a voluntary chapter 11 petition for relief on April 15, 2002. TriNat leases and operated nine (9) long term care facilities located in Indiana. Flanagan's client took over the management of the TriNat facilities immediately prior to the filing of the chapter 11 proceeding and, in conjunction therewith, offered to make a debtor in possession loan in the amount of \$500,000 available to TriNat. However, shortly following the filing of the proceeding, the State of Indiana implemented another dramatic Medicaid rate decrease that reduced the overall annual Medicaid revenue for these nine (9) homes by approximately \$2,800,000. Once it was determined that TriNat would be unable to reorganize its affairs, primarily since TriNat leased its facilities and the landlord was unwilling to make the rent concessions necessary to allow the facilities to operate profitably, the Court authorized the rejection of the leases for the nine (9) facilities effective as of June 30, 2002, thereby preserving the ability of TriNat to maximize its distributions to its creditors.

In re: Metro Health/Indiana, Inc.

United States Bankruptcy Court for the Northern
District of Georgia, Atlanta Division
Case No. 02-63019

Metro Health/Indiana, Inc. filed a voluntary chapter 11 petition for relief on March 19, 2002. Metro owns and operates twenty (20) long-term care facilities located in Indiana. On September 20, 2002, Tutura was appointed as the oversight manager and consultant for the Metro Health/Indiana facilities. Flanagan's client is the oversight manager in this chapter 11 proceeding, with its primary duties to include reviewing and commenting on Metro's operations in an effort to improve the profitability and



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efficiency of the facilities, as well as recommending changes in the owner's operating procedures and confirming whether certain facilities should be sold or closed.

In re: Highland Health Services, Inc., et al.

United States Bankruptcy Court for the
Southern District of Texas – Houston Division
Case No. 01-35491-H5-11

On January 28, 2002, the Bankruptcy Court confirmed the Plan of Reorganization filed by the Debtors in the above-referenced case. In accordance with the confirmed Plan, all of the Debtors' assets were transferred into Autumn Hills Health Foundation. Flanagan was nominated by the Official Unsecured Creditors' Committee, and approved by the Bankruptcy Court, to serve as one of the directors of Autumn Hills upon the confirmation of the Plan. Following confirmation, Flanagan was elected Chairman of the Board and oversaw the initial operation of the Debtors' twelve (12) long term care facilities. After operating the facilities for a period of time, it became apparent that the facilities would not be able to make their debt payments under the plan, and Flanagan (as the sole remaining officer and directors as all other officers and directors had resigned) oversaw the transfer of control of the facilities back to the lender, followed by the liquidation of Autumn Hills' remaining assets.

Maplewood Nursing and Rehabilitation Center

Monroe, Louisiana

On November 19, 2002, Flanagan's client was appointed as the receiver of Maplewood Nursing and Rehabilitation Center, a 99 bed licensed skilled nursing care facility located in Monroe, Louisiana, at the request of Bank One Trust Company, N.A., the indenture trustee of the tax exempt bonds which encumber the facility. Flanagan negotiated the sale of the facility in conjunction with a foreclosure sale.

In re: Mariner Post-Acute Networks, Inc.

United States Bankruptcy Court for the
District of Delaware
Case Nos. 00-113 (MFW) through 00-214 (MFW)

On December 1, 2002, Flanagan assisted LaSalle Bank National Association (formerly known as LaSalle National Bank), as Trustee under that certain Pooling and Servicing Agreement effective as of December 1, 1995, relating to the RMF Commercial Mortgage Pass-Through Certificates, Series 1995-1, in taking back three (3) long term care facilities located in Illinois from Mariner in conjunction with Mariner's chapter 11 bankruptcy proceeding. Flanagan's client thereafter purchased the facilities from the lender.

Country Gardens

Norcross, Georgia

On January 21, 2003, Flanagan was appointed as the rent receiver of Country Gardens, a 27 bed assisted living facility located in Norcross, Georgia. Flanagan's appointment was requested by CRIIMI MAE Services, L.P., as the subservicer for holder of the first mortgage loan. This facility was later sold to a third party.



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Lodge at Lompoc

Lompoc, California

On February 6, 2003, Flanagan was appointed as the receiver of the Lodge at Lompoc, a 130 bed assisted living facility located in Lompoc, California. Flanagan's appointment was requested by CRIIMI MAE Services, L.P., as the subservicer for holder of the first mortgage loan which is the subject of a pending foreclosure action. Flanagan negotiated the sale of the facility to a third party at a price which was in excess of the appraised value of the facility.

**The Plaza at Sun Mountain and
The Regency Plaza at Sun Mountain**

Las Vegas, Nevada

On March 11, 2003, Flanagan was appointed the receiver for The Plaza at Sun Mountain, a 179 unit assisted living facility, and The Regency at Sun Mountain, a 188 licensed bed skilled nursing facility, both of which are located in Las Vegas, Nevada. Flanagan was appointed in conjunction with a legal proceeding filed by Lehman Brothers Holdings, Inc. seeking to foreclose on the facility based upon the borrowers' default on indebtedness owing to Lehman Brothers in excess of \$20,000,000. The facility was thereafter sold for a price well in excess of the amount of the debt outstanding at the time of the foreclosure.

Meadowbrook Manor

Topeka, Kansas

On April 14, 2003, Flanagan was appointed as the receiver for Meadowbrook Manor of Topeka, L.P., which owns a 95 bed skilled nursing facility located in Topeka, Kansas. Flanagan's appointment was requested by Beal Bank, which was the holder of a HUD insured loan which it purchased from HUD. The home was thereafter sold through a foreclosure action.

In re: Southern Healthcare Systems, Inc.

United States Bankruptcy Court for the Middle

District of Louisiana, Baton Rouge Division

Case No. 02-11621

Southern Healthcare Systems, Inc. filed a voluntary chapter 11 petition for relief on June 11, 2002. Southern owns and operates six (6) long-term care facilities located in Texas, Kentucky and Tennessee. On December 11, 2002, a chapter 11 trustee was appointed to serve in the case. On April 29, 2003, the chapter 11 Trustee engaged Tutura as the oversight manager and consultant for Southern's facilities, which engagement was arranged by Flanagan. Tutura's primary duties included reviewing and commenting on the clinical and accounting aspects of Southern's operations until the sale of the facilities was closed.

Grand Court II – Overland Park

Overland Park, Kansas

On June 7, 2003, Flanagan's client was appointed as the receiver for the Grand Court II – Overland Park, which is a 100 unit assisted living facility located in Overland Park, Kansas. The appointment of Flanagan's client was arranged by The Mission Bank, which held the first mortgage loan in a pending foreclosure action. Flanagan assisted in negotiating the resolution of several issues involving the transition of operations from Brookdale Living Communities and the issuance of a provisional license by the Kansas



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Department of Aging. Flanagan thereafter assisted Tuteria in the purchase of this facility from The Mission Bank.

The Vyne at Crestview

Wichita, Kansas

On November 24, 2004, Flanagan was appointed as the receiver for The Vyne at Crestview, an assisted living facility located in Wichita, Kansas. Flanagan's appointment was made at the request of TouchStone Asset Management LLC, as servicer for TC10 Grantor Trust, which filed a foreclosure action against its collateral. Flanagan negotiated the sale of the facility to a third party at a price which was in excess of the appraised value of the facility.

Camelot Nursing and Rehabilitation Center

Farmington, Missouri

On December 13, 2004, Flanagan was appointed by the Missouri Department of Health and Senior Services, Division of Senior Services and Regulation, to serve as the receiver for this facility due to the insolvency of its licensed operator. On January 12, 2005, the Coles County Circuit Court discharged Flanagan as the receiver following Flanagan's completion of a transaction to turn the facility back to the landlord, who had a pending licensure application on file when Flanagan was appointed.

Caravilla Charitable Corporation

Mount Vernon, Illinois

On February 2, 2005, Flanagan was appointed by the Circuit Court of the Second Judicial Circuit, Jefferson County, Illinois as the receiver for Casey Care Center, Jeffersonian Care Center and Mount Vernon Care Center, all three of which are skilled nursing facilities located in Mount Vernon, Illinois which are owned by Caravilla Charitable Corporation, an Illinois not-for-profit corporation. Flanagan's appointment was made at the request of Midland Loan Services, Inc., as servicer for PAMI MidAtlantic LLC, which filed a foreclosure action against its collateral. Flanagan oversaw the sale of the facilities to a third party purchaser of the lender's debt at a foreclosure sale conducted in Jefferson County, Illinois.

Independence Court at Ormond Beach

Ormond Beach, Florida

On March 30, 2005, the Circuit Court of the Seventh Judicial Circuit, Volusia County, Florida, in an action styled: TC10 Grantor Trust, Plaintiff, vs. Independence Court of Ormond Beach Associates, L.P., et al., Defendants., Case No. 2005-30383-CICI appointed Flanagan as the receiver for Independence Court of Ormond Beach, an assisted living facility located at 535 North Nova Road, Ormond Beach, Florida 32174. Flanagan was appointed as the receiver for the Facility at the request of TC10 Grantor Trust, who is the holder of the first mortgage indebtedness encumbering the Facility.

Austin Nursing Center

Austin, Texas

On May 27, 2005, the Circuit Court of the 200th Judicial Circuit, Travis County, Texas, in an action styled: TC10 Grantor Trust, Plaintiff, vs. Century Care of America, Inc. et al., Defendants., Case No. GN501-879, appointed Flanagan as the receiver for Austin Nursing Center, a 170 bed skilled nursing facility located at 110 E. Live Oak at Congress, Austin, Texas. Flanagan was appointed as the receiver for the Facility at the request of TC10 Grantor Trust, who is the holder of the first mortgage indebtedness encumbering the Facility. This facility was sold in August 2007 to a third party.



Somerset Point Assisted Living and Nursing Home

Shaker Heights, Ohio

On October 3, 2005, the Court of Common Pleas for Cuyahoga County, Ohio, in an action styled: TC14 Grantor Trust, Plaintiff, vs. Somerset Point, L.P., et al., Defendants., Case No. CV 05 573748, appointed Flanagan as the receiver for Somerset Point Assisted Living and Nursing Home, a skilled nursing and assisted living facility located in Shaker Heights, Ohio. Flanagan was appointed as the receiver for the Facility at the request of TC14 Grantor Trust, who is the holder of the first mortgage indebtedness encumbering the Facility.

Chestnut Grove Assisted Living Facility

Richmond, Virginia

On March 3, 2006, the Circuit Court for Henrico County, Virginia, in an action styled: TC14 Grantor Trust, Plaintiff, vs. Chestnut Grove, L.P., Defendants. Case No. CL06-466, appointed Flanagan as the receiver for Chestnut Grove Assisted Living Facility. Flanagan was appointed as the receiver for the Facility at the request of TC14 Grantor Trust, who is the holder of the first mortgage indebtedness encumbering the Facility. Flanagan thereafter sold the facility to a third party at a foreclosure sale.

The Rose Estates Assisted Living Facility

Overland Park, Kansas

On June 15, 2006, the District Court for Johnson County, Kansas, in an action styled: TI – HUD Investments I, L.L.C., Plaintiff, vs. The Rose Estates, L.L.C., Defendant. Case No. 06CV04595 - Division 7, appointed Flanagan as the receiver for The Rose Estates Assisted Living Facility. The Receiver was appointed at the request of TI – HUD Investments I, L.L.C. The Facility was later sold at a foreclosure sale.

St. Louis Hills Retirement Center

St. Louis, Missouri

On August 23, 2006, the Circuit Court for St. Louis City, Missouri, in an action styled: Metro St. Louis Property, LLC, Plaintiff, vs. Maloney Group and Maloney Group II, Defendants. Cause No. 0622-CC05304, appointed Flanagan as the receiver for Maloney Group II and St. Louis Hills Retirement Center. Flanagan was appointed as the receiver for the Facility at the request of Metro St. Louis Property, LLC, who is the holder of the first mortgage indebtedness encumbering the Facility, and the State of Missouri Department of Department of Health and Senior Services. The Facility was later sold to the note holder at a foreclosure sale.

In re: Robert E. Lee, LLC

United States Bankruptcy Court for the Southern
District of Indiana, New Albany Division
Case No. 05-92641-BHL-11

Robert E. Lee, LLC filed a voluntary chapter 11 petition for relief on July 8, 2005. Robert E. Lee, LLC owns and operates Landmark Nursing and Rehabilitation Center, a 142 licensed bed skilled nursing facility located in New Albany, Indiana. On January 26, 2007, Elliott D. Levin was appointed as the Chapter 11 trustee was appointed to serve in the case. On January 29, 2007, the Chapter 11 Trustee engaged Walnut Creek (an affiliate of Tutera) as the oversight manager and consultant for the facility,



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which engagement was arranged by Flanagan. The facility was sold to a third party purchaser at a bankruptcy court sale in July 2007.

Gentilly Gardens

Stateboro, Georgia

On February 5, 2007, the Superior Court for Bulloch County, Georgia, in an action styled: TI – HUD Investments I, L.L.C., Plaintiff, vs. Integra of Statesboro, L.L.C., Defendant, Case No. 1B07CV068T, appointed Flanagan as the receiver for Gentilly Gardens Assisted Living Facility. The Receiver was appointed at the request of TI – HUD Investments I, L.L.C.. The Facility was later sold at a foreclosure sale.

In re: Pleasant Care Corporation, et al.

United States Bankruptcy Court for the Central
District of California, Los Angeles Division
Case No. LA 07-12312-EC

On March 22, 2007, Pleasant Care Corporation, SNF Properties Incorporated, PCC Health Services, Inc., Atlas Care Enterprises, Inc., and Ember Care Corporation each filed voluntary chapter 11 petitions for relief. The Debtors are the second largest operator of skilled nursing facilities in the State of California, currently lease and operate 27 skilled nursing facilities and 3 assisted living facilities, with annual revenues in excess of \$200,000,000. Effective as of April 1, 2007, Flanagan's client (Joseph C. Tuter), at the insistence of the secured creditors, unsecured creditors and regulatory authorities, was installed as the President and COO of the Debtors in accordance with a Retention Agreement executed by Manny Bernabe, the Debtors' principal shareholder. Pursuant to the terms of the Retention Agreement, Mr. Tuter was vested with full and complete control over the Debtors' business operations, including having exclusive control over, and decision-making power with respect to, the Debtors' day-to-day business operations and the sale, assignment or transfer of any assets or Facilities of the Debtors. Flanagan was actively involved in supporting Mr. Tuter in all aspects of operating the business and selling or disposing of various of the assets.

Garden Valley Retirement Village

Garden City, Kansas

On February 13, 2008, the 25th District Court for Finney County, Kansas, in an action styled: Bank of Oklahoma, N.A., as successor trustee for the holders of the Retirement Facility Refunding Revenues Bonds (Garden Valley Retirement Village, Inc.) Series 1993, Plaintiff, vs. Garden Valley Retirement Village, Inc. and the City of Garden City, Kansas, Defendants, Case No. CV-08, appointed Flanagan as the receiver for Garden Valley Retirement Village. The Facility was later sold at foreclosure.

In re: Haven Eldercare, LLC, et al.

United States Bankruptcy Court for the
District of Connecticut, New Haven Division
Case No. 07-32720

Haven Eldercare, LLC and its affiliates filed for chapter 11 relief in November 2007. Haven was the one of the largest operators of skilled nursing facilities in New England, having owned or leased and operated 25 skilled nursing facilities. In July 2008, Flanagan assisted Tuter and CapitalSource Finance, LLC in purchasing four (4) long term care facilities located in Connecticut and New Hampshire from Haven's bankruptcy estate and following such purchase, Tuter thereafter began leasing and



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operating the facilities through December 2010, at which time they were sold by CapitalSource Finance, LLC to an unrelated third party purchaser.

Chestnut Hill of Highlands Assisted Living Facility

Highlands, Macon County, North Carolina

On November 17, 2008, the General Court for Justice, Superior Court Division for Macon County, North Carolina, in an action styled: The Palmetto Bank, Plaintiff, vs. Highlands Senior Living Property, LLC, Highlands Senior Living, LLC, Jon M. Harder, Kristin P. Harder, Darryl E. Fisher, Carol L. Fisher and Sunwest Management Inc., Defendants, Case No. 08 CVS 798, appointed Michael F. Flanagan as the Receiver pursuant to N.C. Gen. Stat. § 1-501 *et seq.*, over: (a) Highlands Senior Living Property, LLC; and (b) Highlands Senior Living, LLC; and (c) the senior living community commonly known as “Chestnut Hill of Highlands” located in Highlands, Macon County, North Carolina. The Receiver was appointed at the request of the Palmetto Bank. The Facility was later sold to the note holder at a foreclosure sale.

Park Place Assisted Living Facility

Spartanburg County, South Carolina

On January 20, 2009, the Court of Common Pleas for Spartanburg County, South Carolina, in an action styled: The Palmetto Bank, Plaintiff, vs. Spartanburg Senior Living, LLC, et al., Defendants, Case No. 2008-CP-42-6355, appointed Michael F. Flanagan as the Receiver pursuant to S. C. Code § 15-65-10(1) *et seq.*, over: (a) Spartanburg Senior Living, LLC; and (b) the senior living community commonly known as Park Place located in Spartanburg County, South Carolina. The Receiver was appointed as the receiver at the request of The Palmetto Bank. The Facility was later sold to the note holder at a foreclosure sale.

Loving Care Home

Lindenwood, Missouri

On August 30, 2010, the Circuit Court for St. Louis County, Missouri in an action styled: First Bank, Plaintiff, vs. Lindenwood Care Corporation, Jamieson Realty, L.L.C., et al., Defendants, Case No. 10SL-CC03497, Division 20 entered an Order appointing Michael F. Flanagan as the Receiver for Loving Care Home, a 111-bed Residential Care Facility I as located at 3715 Jamieson Ave., St. Louis, MO 63109. The Receiver was appointed as the receiver at the request of First Bank. The Facility was later sold to the note holder at a foreclosure sale.

Summer Place Assisted Living Facility

Spartanburg County, South Carolina

On August 3, 2010, the Court of Common Pleas for Spartanburg County, South Carolina, in an action styled: The Palmetto Bank, Plaintiff, vs. Summer Place Assisted Living, LLC, et al., Defendants, Case No. 2010-CP-42-1740, entered an Order appointed Michael F. Flanagan as the Receiver over the senior living community commonly known as “Summer Place Assisted Living” located 916 Wesley Court, Boiling Springs, South Carolina 29316, effective as of September 4, 2010. The Receiver was appointed as the receiver at the request of The Palmetto Bank. The Facility was later sold to the note holder at a foreclosure sale.



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Paradise Park Assisted Living Facility

New Lenox, Illinois

On December 23, 2010, the Circuit Court of Twelve Judicial District for Will County, Illinois, in an action styled: First Choice Bank, Plaintiff, vs. Paradise Park Assisted Living – New Lenox, LLC and James F. Boris, Defendants, Case No. 10 CH 7749 (Will Cty., IL), entered an Order appointing Michael F. Flanagan as the Receiver over the assisted living facility commonly known as “Paradise Park Assisted Living” located at 1023 South Cedar Road, New Lenox, Will County, Illinois. The Receiver was appointed as the receiver at the request of First Choice Bank. The Facility was sold to a third party purchaser pursuant to a Receiver’s sale approved by the court.

Wichita Nursing Center

Wichita, Kansas

On September 2, 2011, the Eighteenth Judicial District Court for Sedgwick County, Kansas, in an action styled: Shawn Sullivan, Secretary of the Kansas Department on Aging, Applicant, vs. Kansas Healthcare Leasing, Inc., d/b/a Wichita Nursing Center, Respondent, Case No. 11 CV 3086, entered an Order appointing Shawn Sullivan, Secretary of the Kansas Department on Aging, as the duly appointed receiver for Wichita Nursing Center, a 70 bed skilled nursing facility located at 2840 S Hillside Street, Wichita, KS 67216-2544. The Receiver engaged Flanagan as a consultant and business advisor to the Receiver to assist the Receiver in discharging his duties and responsibilities as Receiver. Flanagan and the Facility’s manager closed down the Facility and relocated all of the residents to other long term care facilities in the Wichita area within approximately 45 days after being appointed.

Wardship Residential Care, LLC

St. Louis, Missouri

On March 10, 2014, the Circuit Court for the City of St. Louis County, Missouri, in an action styled: State of Missouri, et al., Plaintiff, vs. Wardship Residential Care, LLC, Defendant, Case No. 1422-CC00546, entered an Order appointing Flanagan as the Receiver for Wardship Residential Care Facility, a 30 bed Residential Care II Facility located at 3409 Missouri Avenue, St. Louis, MO 63118. Flanagan was appointed as the receiver at the request of Missouri Department of Health and Senior Services. Flanagan ultimately sold the Facility to a new qualified operator.

Deseret Nursing & Rehabilitation at Onaga

Onaga, Kansas

On May 12, 2014, the Second Judicial District Court of Pottawatomie County, Kansas, in an action styled: Shawn Sullivan, Secretary of the Kansas Department for Aging and Disability Services, Applicant, vs. Deseret Health and Rehab at Onaga, LLC, d/b/a Deseret Nursing & Rehabilitation at Onaga, Respondent, Case No. 14-CV-34, entered an Order appointing Shawn Sullivan, Secretary of the Kansas Department of Aging and Disability Services, as the duly appointed receiver for Deseret Nursing & Rehabilitation at Onaga, a 46 bed skilled nursing facility located at 500 Western Street, Onaga, Kansas 66521. The Receiver engaged Flanagan as a consultant and business advisor to the Receiver to assist the Receiver in discharging his duties and responsibilities as Receiver. The Facility was ultimately sold to a new qualified operator.



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**Washburn Community Care Center**

Topeka, Kansas

On May 1, 2015, the Third Judicial District Court of Shawnee County, Kansas, in an action styled: Kari M. Bruffett, Secretary of the Kansas Department for Aging and Disability Services, Applicant, vs. Washburn Community Care Center, LLC, et al., Respondents., Case No. 15-CV-398, entered an Ex Parte Temporary Restraining Order appointing Kari M. Bruffett, Secretary of the Kansas Department of Aging and Disability Services, as the duly appointed receiver for Washburn Community Health Care, a skilled nursing facility located at 1334 Buchanan Street, Topeka, Kansas 66604. The Receiver engaged Flanagan as a consultant and business advisor to the Receiver to assist the Receiver in discharging her duties and responsibilities as Receiver. Flanagan and the Facility's manager closed down the Facility and relocated all of the residents to other long term care facilities in the Topeka area within approximately 30 days after being appointed.

Deseret Health and Rehab at Woodlawn

Wichita, Kansas

On May 4, 2015, the Second Judicial District Court of Sedgwick County, Kansas, in an action styled: Kari M. Bruffett, Secretary of the Kansas Department for Aging and Disability Services, Applicant, vs. Deseret Health and Rehab at Woodlawn, LLC, Respondent., Case No. 15-CV-1123, entered an Order appointing Kari M. Bruffett, Secretary of the Kansas Department of Aging and Disability Services, as the duly appointed receiver for Deseret Health and Rehab at Woodlawn, a skilled nursing facility located at 1600 South Woodlawn, Wichita, Kansas 67218. The Receiver engaged Flanagan as a consultant and business advisor to the Receiver to assist the Receiver in discharging her duties and responsibilities as Receiver. The Facility was sold to a new qualified operator eighty (8) days following the appointment of the Receiver.

Close to Home, Ramsey Creek Village and Holly Ridge

Southeastern Missouri

On October 21, 2015, the Circuit Court for St. Louis County, Missouri, Division 12, in an action styled: Great Southern Bank, Plaintiff, vs. Arbor Health Properties, Inc., et al., Defendants, Case No. 15SL-CC03593, entered an Order appointing Flanagan as the Receiver for Close to Home, Ramsey Creek Village and Holly Ridge. The Receiver was appointed at the request of Great Southern Bank. The three facilities were ultimately sold.

Maple Heights

Hiawatha, Kansas

On April 28, 2016, the 22nd District Court for Brown County, Kansas entered an Order in an action styled: BOKF, N.A., as Successor Trustee for the holders of the Health Care Facilities Revenue Bonds Series 1999A and Taxable Health Care Facilities Revenue Bonds Series 1999B (Maple Heights Nursing and Rehabilitation Center, Project), Plaintiff, vs. Lafayette Lifeplans Corporation, Lafayette Lifeplans of Hiawatha, Inc. and the City of Hiawatha, Kansas, Defendants, Case No. 2016-CV-000010 appointing Flanagan as the receiver for Maple Heights Nursing and Rehabilitation Center, a 67 bed skilled nursing facility and 13 unit/15 bed residential care facility located at 302 East Iowa Street, Hiawatha, Brown County, Kansas 66434. The Receiver was appointed at the request of Bank of Oklahoma.



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Bright Oaks of Aurora

Aurora, Illinois

On August 9, 2017, the Circuit Court of the Sixteenth Judicial Circuit, Kane County, Illinois entered an Order in an action styled: West Suburban Bank, Plaintiff, vs. Aurora Memory Care, LLC, et al., Defendants, Case No. 17-CH-662 appointing Flanagan to serve as the receiver for Bright Oaks of Aurora, a 60-unit assisted living and memory care facility located at 1340 River Street, Aurora, Kane County, Illinois 60506. The Receiver was appointed at the request of West Suburban Bank and oversaw the operation of the Facility until it was sold.

Skyline Healthcare

Kansas

On March 28, 2018, Timothy E. Keck, Secretary of the Kansas Department for Aging and Disability Services, was appointed as the receiver by the various state district courts across the State of Kansas with respect to the fifteen (15) skilled nursing facilities located throughout the State of Kansas. These cases were consolidated into a single action pending before the District Court for Johnson County, Kansas styled: Timothy E. Keck, Secretary of KDADS v. Spring Hill Care and Rehabilitation Center, LLC, et al., Case No. 18-CV-01688. The Receiver engaged Flanagan as a consultant and business advisor to the Receiver to assist the Receiver in discharging his duties and responsibilities as Receiver. Flanagan oversaw the sale of the facilities to a new qualified owner and operator.

DJKierl, Inc.

Fort Scott and Pleasanton, Kansas

On May 15, 2018, the District Court of Bourbon County, Kansas entered a Temporary Restraining Order appointing Timothy E. Keck, Secretary of the Kansas Department of Aging and Disability Services, as the duly appointed receiver for Ft. Scott Manor, a licensed bed skilled nursing facility located at 736 Heylman Street, Fort Scott, Bourbon County, Kansas 66701. The Receiver engaged Flanagan as a consultant and business advisor to the Receiver to assist the Receiver in discharging his duties and responsibilities as Receiver. Flanagan oversaw the closure of the Ft. Scott facility. In conjunction therewith, the District Court of Linn County, Kansas entered an Order appointing Flanagan as the receiver for The Residences at Pleasanton, an assisted living facility located at 706 West 15th Street, Pleasanton, Linn County, Kansas 66075 and Flanagan is currently operating this facility pending the completion of the foreclosure action and sale of the facility.

Great Bend Care & Rehab

Great Bend, Kansas

On July 11, 2018, the District Court of Barton County, Kansas, in an action styled: Timothy E. Keck, Secretary of the Kansas Department for Aging and Disability Services, Applicant, vs., Great Bend Health & Rehab Center, HP/Great Bend, Inc., Great Bend – LTC, LLC, Five Rivers Management, LLC, Douglas Mittleider, Kerry Gibson and Daren Douston, Respondents, Case No. 2018-CV-000080, entered a Temporary Restraining Order appointing Timothy E. Keck, Secretary of the Kansas Department of Aging and Disability Services, as the duly appointed receiver for Great Bend Health & Rehab Center, which is located at 1560 K 96 Hwy, Great Bend, KS 67530. Receiver engaged Flanagan as a consultant and business advisor to Receiver with full and complete control over the Facility to assist Receiver in discharging his duties and obligations as receiver.



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Pinnacle Management

Nortonville, Topeka and Emporia, Kansas

On August 1, 2018, the District Court for Shawnee County, Kansas appointed Timothy E. Keck, Secretary of the Kansas Department of Aging and Disability Services, as the receiver over Village Villa, Inc., Village Estates, Inc., Providence Living Center, Inc., and Flint Hills Care Center, Inc. Receiver engaged Flanagan as a consultant and business advisor to Receiver with full and complete control over the Facilities. Flanagan is currently overseeing the operation of the facilities while they are being marketed for sale.

Westview of Derby

Derby, Kansas

On September 12, 2018, the District Court of Sedgwick County, Kansas, in an action styled: Timothy E. Keck, Secretary of the Kansas Department for Aging and Disability Services, Applicant, vs. and LSL of Derby, LLC, Sovran Management Company, LLC, Michael Marshall and Westview of Derby, Respondents., Case No. 2018-CV-001991-TO, entered a Temporary Restraining Order appointing Timothy E. Keck, Secretary of the Kansas Department of Aging and Disability Services, as the duly appointed receiver for Westview of Derby, a skilled nursing facility commonly located at 445 North Westview Drive, Derby, Sedgwick County, Kansas 67037. Receiver engaged Flanagan as a consultant and business advisor to Receiver with full and complete control over the Facility. In November 2018, the facility's secured lender had Flanagan appointed as the replacement receiver of the facility pending completion of a pending foreclosure action and the sale of the facility.

Christian Care Home

Ferguson, Missouri

On November 16, 2018, the Judicial Circuit Court of Cole County, Missouri, in an action styled: State of Missouri ex rel. Josh Hawley, Attorney General, at the request of the Missouri Department of Health and Senior Services, Division of Long Term Regulation & Licensure, Section for Long-Term Care Regulation, Petitioners, vs. Christian Woman's Benevolent Association, d/b/a Christina Care Home, Respondent., Case No. 18AC-CC00461, entered an Order Appointing Receiver appointing Flanagan as the duly appointed receiver for Christian Care Home, a skilled nursing and residential care facility located at 800 Chambers Road, Ferguson, Missouri 63135 for the purpose of relocating the residents and closing the facility as soon as possible, which Flanagan accomplished in less than 20 days.

Westview Manor of Peabody

Peabody, Kansas

On December 12, 2018, the District Court of Marion County, Kansas, in an action styled: Timothy E. Keck, Secretary of the Kansas Department for Aging and Disability Services, Applicant, vs. Franklin Healthcare of Peabody, LLC, d/b/a Westview Manor of Peabody, Altacare Corporation, Franklin Healthcare, Inc., Peabody Associates, LLC, Douglas Mittleider and Julie Mittleider, Respondents., Case No. 2018-CV000068, entered a Temporary Restraining Order appointing Timothy E. Keck, Secretary of the Kansas Department of Aging and Disability Services, as the duly appointed receiver for Westview Manor of Peabody, a skilled nursing facility located at 500 Peabody Street, Peabody, Marion County, Kansas 66866. Receiver engaged Flanagan as a consultant and business advisor to Receiver with full and complete control over the Facility to assist Receiver in discharging his duties and obligations as receiver. Flanagan assisted in the sale of the Facility, which concluded the receivership action.



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Eden Springs

Green Springs, Ohio

On January 18, 2019, the Court of Common Pleas for Sandusky County, Ohio, in an action styled: CIBC Bank USA, Plaintiff, vs. and Eden Realty West LLC, Eden Realty East LLC, Eden Springs Independent Living LLC, Eden Springs Assisted Living East LLC, Eden Springs Nursing and Rehabilitation East LLC, Eden Springs Nursing and Rehabilitation West LLC, Eden Springs Healthcare Center LLC, Eden Springs Pharmacy LLC, Defendants., Case No. 19-CV-50, entered an Order appointing Flanagan as the duly appointed receiver for Eden Springs, which consists of skilled nursing facilities, a long term acute care hospital, an assisted living facility, a pharmacy, independent senior housing (rental) units, and vacant land whose principal office is located at 430 North Broadway Street, Green Springs, Ohio 44836. The Receiver was appointed at the request of CIBC Bank.

SureFunding, LLC

Las Vegas, Nevada

On April 13, 2020, the District Court for Clark County, Nevada, in an action styled: Brett Hatton, et. al., Plaintiffs, vs. and SureFunding LLC, Defendant. Case No. A-20-812651-B, entered an Order appointing Flanagan as the duly appointed receiver for SureFunding, LLC. The Receiver was appointed at the request of group of investors who had loaned SureFunding, LLC in excess of \$23,000,000 for the purpose of making investments in a diversified portfolio of assets. Instead, SureFunding, LLC placed 80%-90% of those assets with TradePAY Capital, LLC, an international A/R factoring company located in India, who proceeded to defraud SureFunding, LLC and divert the money for the benefit of the principals of TradePAY Capital, LLC. Flanagan has been appointed to oversee the liquidation of SureFunding, LLC, which will involve liquidating the balance of its assets, as well as pursuing litigation against parties who may contributed to the investors' losses.

EXHIBIT C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

FANNIE MAE,

Plaintiff

v.

Capital Senior Living Properties 2 - Gramercy,
Inc., CSL Bridle Brook, LLC, CSL Canton
GA, LLC, CSL Charlestown, LLC, CSL Dillon
Pointe SC, LLC, CSL Fort Wayne LLC, CSL
Harbor Court, LLC, CSL Middletown, LLC,
CSL Oshkosh, LLC, CSL Peachtree LLC, CSL
Plainfield, LLC, CSL Richmond Heights, LLC,
CSL Roanoke, LLC, CSL Whitcomb House,
LLC, Triad Senior Living III, L.P.,

Defendants.

CIVIL ACTION NO. 3:20-cv-2395

AGREED ORDER APPOINTING RECEIVER

CAME ON FOR CONSIDERATION the Agreed Application for Appointment of Receiver (the “Application”) filed by Plaintiff Fannie Mae, against Capital Senior Living Properties 2 - Gramercy, Inc., CSL Bridle Brook, LLC, CSL Canton GA, LLC, CSL Charlestown, LLC, CSL Dillon Pointe SC, LLC, CSL Fort Wayne LLC, CSL Harbor Court, LLC, CSL Middletown, LLC, CSL Oshkosh, LLC, CSL Peachtree LLC, CSL Plainfield, LLC, CSL Richmond Heights, LLC, CSL Roanoke, LLC, CSL Whitcomb House, LLC, and Triad Senior Living III, L.P. (each a “Defendant” and collectively the “Defendants”). All capitalized terms not defined in this Order Appointing Receiver shall have the meanings ascribed to them in the Application.

By its Application, and in order to facilitate an agreed upon transition of ownership and operations, the Federal National Mortgage Association (“Fannie Mae”, and collectively with the Defendants, the “Parties”) seeks the appointment of a receiver to enter upon and take exclusive power, authority and control over the assets, management, operations, maintenance, leasing, repair and preservation of the following properties, real and personal, including the operations of the

senior housing communities situated on such properties, except as set forth herein (as fully defined in the Application, each a “Property” and collectively the “Properties”):

<u>Property Name (Existing Manager¹)</u>	<u>Property Address</u>	<u>Property Owner/Defendant</u>
Gramercy Hill (Capital Senior Living, Inc.)	6800 A St Lincoln, NE 68510	Capital Senior Living Properties 2 - Gramercy, Inc.
The Waterford at Bridle Brook (CSL Bridle Brook, LLC)	1505 Patton Dr Mahomet, IL 61853	CSL Bridle Brook, LLC
The Waterford at Hidden Lake (CSL Canton GA Management LLC)	3100 Hidden Valley Dr Canton, GA 30114	CSL Canton GA, LLC
River Crossing Assisted Living (CSL Charlestown Management, LLC)	2400 Market St Charlestown, IN 47111	CSL Charlestown, LLC
Waterford at Dillon Pointe (CSL Dillon Pointe Management, LLC)	104 Dillon Dr Spartanburg, SC 29307	CSL Dillon Pointe SC, LLC
Apple Ridge Assisted Living & Memory Care (CSL Fort Wayne Management, LLC)	3320 E State Blvd Fort Wayne, IN 46805	CSL Fort Wayne LLC
The Harbor Court (CSL Harbor Court Management, LLC)	22900 Center Ridge Rd Rocky River, OH 44116	CSL Harbor Court, LLC
The Woodlands of Middletown (CSL Middletown Management, LLC)	3000 Mcgee Ave Middletown, OH 45044	CSL Middletown, LLC
The Waterford at Oshkosh (CSL Oshkosh Management, LLC)	1010 & 1110 West Murdock Avenue 1 Oshkosh, WI 54901	CSL Oshkosh, LLC
The Waterford at Oakwood (CSL Peachtree Management LLC)	4251 Hudson Dr Oakwood, GA 30566	CSL Peachtree LLC
Sugar Grove Senior Living (CSL Plainfield Management, LLC)	5865 Sugar Ln Plainfield, IN 46168	CSL Plainfield, LLC
The Waterford at Richmond Heights (Capital Senior Living, Inc.)	261 Richmond Rd Cleveland, OH 44143	CSL Richmond Heights, LLC
The Park-Oak Grove Retirement Community (CSL Roanoke Management, LLC)	4920 Woodmar Dr SW Roanoke, VA 24018	CSL Roanoke, LLC

¹ Each “Existing Manager” set forth herein currently manages various aspects of the Defendants’ respective businesses under the terms of one or more management agreements (each a “Management Agreement” and collectively the “Management Agreements”) entered into between each Defendant and each identified Existing Manager.

<u>Property Name (Existing Manager¹)</u>	<u>Property Address</u>	<u>Property Owner/Defendant</u>
Whitcomb House (CSL Whitcomb House Management, LLC)	245 West St Milford, MA 01757	CSL Whitcomb House, LLC
The Waterford at Edison Lakes (Capital Senior Living, Inc.)	1025 Park Pl. Mishawaka, IN 46545	Triad Senior Living III, L.P.
The Waterford at Columbia (Capital Senior Living, Inc.)	9370 Windsor Lake Blvd Columbia, SC 29223	Triad Senior Living III, L.P.
The Waterford at Deer Park (Capital Senior Living, Inc.)	201 McDermott St Deer Park, TX 77536	Triad Senior Living III, L.P.
Waterford at Pantego (Capital Senior Living, Inc.)	2650 West Park Row Drive Arlington, TX 76013	Triad Senior Living III, L.P.

FINDINGS IN SUPPORT OF ORDER

A. Fannie Mae has a valid, enforceable, properly perfected first priority lien and security interest on each Property as described in the Application. Each Defendant has failed to pay certain amounts due under the Notes and is in default for failure to pay such amounts. As a result of each Defendant's failure to timely pay all amounts due and owing, an "Event of Default" exists under Fannie Mae's Loan Documents with each Defendant. As indicated by their counsel's signature hereto, each of the Defendants consents to the relief granted herein. No further notice is required under the Loan Documents.

B. Fannie Mae's liens extend to Defendants' real and personal property of any kind that is owned by Defendants as described in Fannie Mae's Loan Documents. Fannie Mae's liens do not extend to real and personal property that may be in the possession of Defendants or located at the Properties, but is owned by third parties.

C. Fannie Mae is the owner and holder of the Notes, each of which is secured by one or more of the Properties.

D. Each Mortgage or Deed of Trust, as applicable, provides that upon the occurrence of, and during the continuance of any Event of Default: (i) Fannie Mae may enter into or upon each Property or any part thereof to take possession of each Property, either personally or through its agents; (ii) the applicable Defendant's right to collect rents shall automatically terminate and Fannie Mae shall without notice be entitled to all rents as they become due and payable, including rents then due and unpaid; and (iii) Fannie Mae may apply for the appointment of a receiver for each Property. Each Mortgage or Deed of Trust, as applicable, further provides that upon the occurrence of, and during the continuance of any Event of Default, should Fannie Mae apply for the appointment of a receiver, each Defendant has expressly consented to the appointment of a receiver.

E. Each Mortgage or Deed of Trust, as applicable, provides that upon the occurrence of, and during the continuance of, any Event of Default, Fannie Mae may: (i) declare the unpaid debt to be immediately due and payable; and (ii) institute proceedings for the complete foreclosure of the Mortgage or Deed of Trust, as applicable.

F. Fannie Mae has valid claims against the Defendants, which are secured by the Properties. Due to the nature of each Property (which includes real property), and the requirement to provide advance notice to State regulators of a change or change of control of the operator holding the applicable licenses, it may take months to effectuate sales or foreclosures of the portions of the Properties constituting real property, during which time rents from the Properties (which are part of Fannie Mae's collateral) will be lost. Because those rents cannot be recovered after they are spent, foreclosure is an insufficient remedy, and Fannie Mae's rights will be frustrated and diminished in value unless a receiver is appointed. No less drastic equitable remedy

is available. A receiver is therefore needed to take control of each Property and preserve the rents pending foreclosure of such Property.

ORDER APPOINTING RECEIVER

In light of the Application and the facts in support the Application, it is therefore ORDERED, ADJUDGED, and DECREED that:

1. **Appointment of Receiver.** Michael F. Flanagan of Kansas City, Missouri, who is not a party, attorney, or other person interested in this action, and otherwise qualified to serve as receiver under applicable law, is appointed receiver of the Receivership Estate (as defined below) for all purposes (the “Receiver”), with all of the powers and obligations set forth herein.

2. **Bond of Receiver.** The Receiver shall file with the Clerk of this Court a cash deposit or bond in the penal amount of amount of \$10,000.00 (the “Bond”)², on the Receiver’s pledge that he will discharge the duties of Receiver in this action and obey the orders of this Court. The filing of Receiver’s Bond with this Court shall take place within ten (10) business days after the entry of this Order. This Order shall not be effective until the Bond and oath are filed. Once this order is effective, Receiver shall take and keep possession, custody, and control of the Properties subject to the terms of this Order. The cost of the Receiver’s Bond shall be an expense of the receivership estate, and the Receiver shall be entitled to be reimbursed for the costs associated with obtaining said Bond (including, without limitation, any premium for such Bond) from revenue generated from the Properties. The Bond shall be maintained in full force and effect during the course of the Receivership and continue until the Receiver files and obtains court

² In the event the Receiver is unable to promptly post a bond, he may, in the alternative, post a \$10,000 cash deposit. Such deposit shall be deposited into the Registry of Court. Should the Receiver subsequently obtain a bond in the amount of \$10,000, the Receiver shall file a notice of such bond with the Court, at which time the Clerk of Court shall promptly return the \$10,000 cash deposit without further Court order, upon the Receiver producing a file-stamped copy of the notice of bond to the Clerk.

approval for his final account and report, the expiration of any time periods to appeal the approval, or the resolution in favor of the Receiver of the appeal if one is filed. Upon filing the Bond and oath (which may be in the form of a declaration pursuant to 28 U.S. Code § 1746), the Receiver shall be vested with all the powers and responsibilities of a receiver as provided by law and as specifically set forth herein; provided, however, that the Receiver shall not be deemed to have commenced his responsibilities as receiver hereunder, including possession of the Receivership Estate (as defined below), until he has delivered, by email, to counsel for the Parties a written notice declaring the date and time at which his oversight and control of the Defendants and possession of the Receivership Estate will begin (the “Commencement Notice”). Within three business days following the delivery of the Commencement Notice, the Receiver may, with the approval of the respective manager of the Property (i.e., the “Existing Manager”), notify the residents of the Properties (as defined below) of the appointment of the Receiver.

3. **The Receivership Estate.** The Court shall have jurisdiction over the Receiver and the Receivership Estate, which includes all tangible and intangible assets of each of the Defendants including: all real and personal property owned, leased or otherwise in the possession of the Defendants including the Properties and all offices owned, leased or occupied by the Defendants or the Existing Managers at the Properties (together with the Properties, the “Receivership Premises”), all funds, bank accounts, all litigation claims, accounts receivable, computers, all media on which information is stored electronically, vehicles, equipment, inventory, furniture, furnishings, licenses, permits, books, records, and documents, excluding any “Privileged Communications” as defined in paragraph 6 (collectively, the “Receivership Estate”).

4. **Defendants’ Existing Managers, Managers, and Board of Directors.** The Existing Managers and Defendants’ managers and boards of directors (the “Boards”) shall remain

in existence. The Receiver or his representative shall regularly provide status reports to the designated representative of the manager as to material developments concerning the Receivership Estate, and shall timely provide any documents or information reasonably requested by the designated representative of the manager or the applicable Board upon written request.

5. **Receiver's Powers and Duties.** Immediately upon the later of the filing of the Receiver's oath and bond and delivery of the Commencement Notice, the Receiver shall, without further order of this Court unless specified, immediately have the following powers and legal responsibilities:

- a. **The Receivership Estate.** The Receiver shall take physical custody and possession of the Receivership Estate subject to the terms of this Order. Notwithstanding the foregoing, the Receiver shall not exclude the Existing Managers, the licensed operators or any related parties from being physically present at the Properties unless and until the Receiver has obtained, with respect to each Property, an alternative licensed operator to take control of and operate such Property, in which case, the Receiver shall replace the Existing Manager subject to the terms of this Order. The Parties agree to fully cooperate with each other to achieve the mutual goals of a prompt, consensual transfer of the Properties, while minimizing the impact of the receivership on the management and operation of the Properties and its Residents.
- b. **Management of Properties and Operations.** The Existing Managers shall continue to manage all of the ordinary course operations of the Properties, subject to and consistent with the terms and conditions of the Existing Managers' current contract with the Defendants (the "Existing Management Agreements"). The

Existing Managers shall notify the Receiver regarding any matters that would vary from the current management and operations of the Properties, as modified by the terms of the Budget (as discussed below). In accordance with the Existing Managements Agreements, the Existing Managers shall regularly provide to the Receiver updates and reports relating to management or operation of the Properties, and the Receiver and shall provide to the designated representatives of the Existing Managers any and all documents or information relating to the management or operation of the Properties not contained in such regular updates or reports, in each case, within three (3) business days following written request. For purposes hereof, any action or expenditure by Existing Managers contemplated by a line item in the Budget and consistent with budgeted amounts (subject to permitted Variances) shall be deemed to be in the ordinary course of business (as such capitalized terms are herein defined). Notwithstanding this provision, in consultation with Fannie Mae, the Receiver shall be permitted to retain (and shall use all commercially reasonable efforts to retain expeditiously) a replacement management company (the “New Manager”) for each Property, and contract with that New Manager on commercially reasonable terms, both without further Court order. The New Manager will not replace the Existing Manager (or its affiliates) at each Property unless and until it or a new operator has obtained its own license with respect to such Property in accordance with all applicable State regulations. For the avoidance of doubt, no manager other than the Existing Manager shall be able to operate under the licenses currently in effect and held by Defendants or its affiliates.

Any New Manager shall have the same rights and responsibilities under this order as the Existing Manager.

- c. **Keys.** The Receiver shall have non-exclusive access to all keys, lock combinations, access cards and other means to access locked areas relating to the Receivership Premises, including all lockboxes and locked drawers and cabinets, except for keys and access cards in the possession of residents of the Properties. The Receiver may make copies of such keys, access cards, and other means to access locked areas relating to the Receivership Premises for his use in the administration of the Receivership Estate.
- d. **Books and Records.** The Receiver shall have non-exclusive access to all non-Privileged Communications in the books and records of the Defendant related to the Receivership Estate, whether in hard copy or electronic form, including, but not limited to, all financial records, tax returns, and any and all documents under the control of, or prepared by any third party on behalf of the Defendant (the “**Books and Records**”). The Receiver may make copies of such non-Privileged Communications in the Books and Records for his use in the administration of the Receivership Estate.
- e. **Bank Accounts.** The Receiver, in his sole discretion and after consultation with Existing Managers, may continue to use the Defendants’/Existing Managers’ bank accounts or may open one or more new bank accounts under the Receiver’s control (except as may be prohibited by applicable laws relating to Medicaid payments), at a bank or other suitable financial institution (the “**Receiver Account**”); provided, however, that Existing Managers, the Receiver and the Defendants shall ensure the

continued deposit of all of the Defendants' gross revenues into such accounts. Existing Managers shall have access to any Receiver Account, subject to the terms of this Order. The Defendants and their agents and employees shall provide the Receiver with all information necessary for the Receiver to take control of each of the Defendant's bank accounts and to open and maintain the Receiver Account, including all login information necessary to access the Defendants' bank accounts through the website(s) of the bank(s) where such accounts are maintained. The Receiver and Existing Managers shall be the sole signatories on all of the Defendants' bank accounts. Any withdrawals from the Defendants' bank accounts or the Receiver Account by the Existing Managers and the Receiver shall be in accordance with the Budget (as defined below) or as otherwise expressly provided in the Order.

- f. **Revenues.** The Receiver shall, in conjunction with the Existing Managers, monitor cash management processes, including processing of payments and the preparation of financial reports. The Existing Managers, in collaboration with the Receiver, shall have the authority to demand, collect and receive all accounts receivable, monies, funds and payments related to the operations of the Properties, and shall ensure that all such amounts are properly received, collected and recorded. All monies coming into the possession of the Receiver and not reserved or expended for any purposes authorized hereunder shall be deposited in the Receivership Account.
- g. **Budget.** Concurrently with the filing of his inventory, pursuant to this Order, the Receiver shall, following consultation with the Existing Managers and the

Defendants, provide the Parties with an initial cash flow budget, which shall be acceptable to Fannie Mae, comprising a bi-monthly cash flow budget for each Property, on a monthly basis, for the period commencing upon the date the Receiver's inventory is filed (the "Budget Initiation Date") and continuing through October 30, 2020 (the "Initial Budget", and as amended, the "Budget"). The Receiver shall, in consultation with the Existing Managers and the Defendants, update the Initial Budget (each, an "Amended Budget") no later than October 30, 2020 by providing a new bi-monthly cash flow for each month for the two (2) months after the period covered by the Initial Budget, or the Amended Budget, as applicable, for acceptance by Fannie Mae. The Budget shall include detailed operating assumptions, projected receipts, disbursements, entrance fee collections, entrance fee refunds, cash balances, and accounts receivable information in a form attached hereto as **Exhibit 1**. Absent further order of the Court, the Existing Managers and the Receiver shall pay only those amounts as permitted by the Budget; provided, however, that Existing Managers and the Receiver shall be permitted to exceed the amounts set forth in the Budget to pay categories of expenses listed in the Budget to the extent that such payments would not cause the aggregate expenditures to exceed either (the following constituting "Variances"): (x) one hundred ten percent (110%) of the total budgeted expenses for that same period or (y) one hundred twenty percent (120%) of the amount budgeted for that same line item for that same period (each comparison period, a "Measuring Period") and *provided further, however*, that if the Receiver, in the exercise of his business judgment, determines that he must make expenditures in excess of the

amounts as permitted by the Budget for purposes of resident life, health, or safety, the Receiver is authorized to do so and should immediately notify Fannie Mae and Defendants. Following the entry of the Receivership Order, Existing Managers shall deliver to Fannie Mae and the Receiver on the 20th of each calendar month at a minimum (i) a budget-to-actual report comparing actual receipts and disbursements to the amounts budgeted in the preceding month and (ii) occupancy statistics.

- h. **Payment of Expenses and Use of Checks.** The Existing Manager shall pay the normal, ordinary and necessary operating expenses of the Properties, in accordance with the Budget (except as otherwise expressly provided in this Order), from the rents and other revenues collected from the Properties. The Receiver shall pay any and all operating expenses of the Properties which are outside of the ordinary course of business and any and all expenditures and expenses of the Receivership Estate, in each case, in accordance with the Budget or with the consent of Receiver. The Receiver is also authorized to employ and pay the Existing Managers, property managers, property operators, accountants, and other persons and professionals as the Receiver deems appropriate to perform his and their duties, without further order of this Court, provided however that the Receiver may only replace the Existing Manager with respect to each Property, when and if it has a suitable, licensed replacement Operator therefor (and the Existing Managers and their affiliates are relieved and released from their obligations to operate and/or control such Property, including, without limitation, by terminating the applicable Existing Management Agreement). Neither the Receivership Estate, the Receiver nor

Fannie Mae shall be liable for any expenses with regard to any Property which are incurred prior to the Receiver taking possession of such Property, provided however that the Existing Manager shall be entitled to pay, in the ordinary course of business, amounts accrued pre-receivership that include amounts which are within the normal billing cycles. Subject to the Budget, the Existing Managers and the Receiver shall have the authority to write checks and expend funds for the purpose of making any payments or distributions required or permitted to be made hereunder, including, without limitation, expenses incurred in connection with the operation, preservation and maintenance of the Receivership Estate, bank service charges, insurance, accounting and other professional services, postage costs and courier and other deliver costs, inventory, office expenses, rent, security deposits, repairs, supplies, taxes, utilities, wages, and renewals of the Receiver's bond. For the avoidance of doubt, the Existing Managers shall write checks and expend funds to pay liabilities incurred in the ordinary course operations of the Properties subject to the Budget, and obligations imposed by federal, state or local statutes or regulations, or imposed by regulatory authorities, or, to the extent practical under the circumstances, with the permission of the Receiver, emergencies resulting in life, health and safety issues. The Receiver shall, if practicable, provide the Existing Managers with notice 48 hours prior to writing any checks in excess of \$50,000 for any liabilities incurred outside the ordinary course of business.

- i. **Insurance.** The Defendants shall promptly following the filing of this Order (a) provide the Receiver with copies of all existing insurance policies for the Defendants, the Properties, and/or the assets of the Receivership Estate, and (b)

name the Receiver as an additional insured on any existing insurance policies for the period that the Receiver shall be in possession of the Receivership Estate. The Receiver shall determine, following consultation with the Defendants and Fannie, whether, in the Receiver's judgment, there is sufficient insurance coverage for the Receivership Estate. If sufficient insurance coverage does not exist, the Receiver shall immediately notify the Parties and the Defendants, and Existing Managers and the Receiver shall have sixty (60) days to procure sufficient insurance for the Receivership Estate. The Receiver shall name himself as the insured and Fannie Mae as additional insureds and as loss payees for any policies he procures. No insurer may cancel its existing policy as a result of the appointment of the Receiver without prior order of this Court. No Party or the Existing Managers may cancel, reduce the limits of or modify any and all insurance coverage currently in existence with respect to the Defendants and/or its assets, except as otherwise provided herein or when the Existing Manager is replaced by the New Manager. For the avoidance of doubt, all insurance premiums, and all deductibles payable under the applicable insurance policies shall be considered ordinary course expenditures and payable in accordance with the Budget and otherwise from the Receivership Estate.

- j. **Borrowings.** The Parties acknowledge that some of the Properties currently operate, and are expected to continue to operate during this receivership, at a cash flow deficit. The Receiver, Defendants, and Existing Managers shall not co-mingle cash receipts from the Properties. However, without further order of this Court, the Receiver may, on behalf of the Receivership Estate, from time to time, borrow funds from Fannie Mae, and Fannie Mae must loan to the Receiver, as necessary to

perform his duties hereunder and to otherwise ensure sufficient funds for those amounts set forth in the Budget and/or to otherwise meet any and all obligations or requirements imposed by regulatory authorities (including but not limited to legal counsel fees), and may issue Receiver's certificates of indebtedness ("Certificates") to evidence such borrowings, and the Receiver shall be authorized to execute such other documents as requested by Fannie Mae evidencing the advance of such funds (the "Lending Documents"). Any such funds advanced by Fannie Mae and evidenced by the issuance of Certificates shall be considered advances made under the Lending Documents between the Receiver and Fannie Mae. The obligations under each Certificate shall be a super-priority administrative claim against the Receivership Estate, and shall be secured by a perfected first priority security interest in and lien on all of the Defendants' property, including, without limitation, all of the Defendants' existing and future acquired property interests of any nature whatsoever (including assets of the Receivership Estate), real and personal, tangible and intangible, including, without limitation, owned and leased real property, any other interests in real property, accounts receivable, inventory, equipment, cash, deposit accounts, investment property, general intangibles, payment intangibles, supporting obligations, instruments, documents, chattel paper, commercial tort claims, insurance, licenses and permits, intellectual property, trade secrets, goodwill, machinery, contract rights and tax refunds, and all proceeds of the foregoing. Fannie Mae shall be authorized to take such actions, and record such documents, as it deems appropriate to reflect the granting and perfection of the foregoing liens.

- k. **Foreclosure of Assets of the Receivership Estate.** Without further order of this Court, Fannie Mae with advanced notice to the Defendants as required by the existing loan documents and applicable law may foreclose by judicial or non-judicial means its interests in the Receivership Estate.
- l. **Contracts.** The Existing Manager will continue to operate and perform under the Existing Management Agreements, as well as any contracts, leases or other agreements required to operate the Properties in the ordinary course of business. The Existing Managers may negotiate, make, enter into, or modify contracts or agreements of or related to the ordinary course operations of the Properties and the Receivership Estate subject to the terms of the Budget and only with approval of the Receiver. The Receiver may negotiate, make, enter into, or modify contracts or agreements of or related to matters outside the ordinary course operations of the Properties and the Receivership Estate, and may immediately terminate any existing contract, agreement, lease or instrument of the Defendants related to matters outside of the ordinary course of operations of the Defendants and the Receivership Estate which is determined not to be beneficial to the Defendants; provided that, unless any such contract, agreement, lease, or instrument relates to a foreclosure sale process, the Receiver shall first consult with the Existing Managers. Following consultation with the Receiver, the Existing Managers may terminate any existing contract, agreement, lease or instrument of the Defendants relating to the ordinary course operations of the Properties which is determined by the Existing Managers not to be beneficial to the Properties. The Receiver shall not be bound by any contract between the Defendants and any third party that the

Receiver does not expressly assume in writing. The Receiver shall have the authority to sign any and all documents on behalf of the Defendants, provided however that the Receiver shall consult with Defendants prior to executing any documents on behalf of Defendants, and shall provide copies of any and all documents signed by them immediately to the Defendants.

- m. **Litigation.** The Receiver shall have the authority to negotiate and settle claims that are property of the Receivership Estate.
- n. **Mail.** The Existing Managers shall take any and all steps necessary to retrieve, collect and review all non-Privileged Communications in mail addressed to the Defendants, and is authorized to instruct the United States Postal Service to reroute, hold, and/or release such mail to the Existing Managers. The Existing Managers shall provide to the Receiver photocopies of all non-Privileged Communications in mail addressed to the Defendants that may relate to the Receiver's duties established hereunder or to the Receivership Estate.
- o. **Tax ID.** The Receiver shall have the authority to use any federal tax identification number(s) of the Defendant to carry out his duties established hereunder.
- p. **Licenses and Permits.** Nothing contained within this Order shall authorize the Receiver to use any of the Defendants' Medicaid Provider numbers. The Receiver may apply for, obtain, and pay any reasonable fees for any necessary license, permit or other governmental approval relating to the Properties, the Receivership Estate or the operation of either of the foregoing (and all such expenses shall be considered ordinary course expenditures payable from revenues generated from the Properties or as otherwise provided by Fannie Mae in accordance with this Order), and

confirm the existence of, and do all things necessary to protect and maintain, any such licenses, permits or governmental approvals.

- q. **Risks.** Subject to the Budget and the expressed terms of this Order, the Receiver shall have the authority to incur, in his official capacity, the risks and obligations ordinarily incurred by owners, Existing Managers and operations of businesses similar to the Properties, provided that no risk or obligation so incurred shall be the personal risk or obligation of the Receiver.
- r. **Receiver's Professionals.** Subject to the express terms of this Order, the Receiver is authorized to employ legal counsel to assist him in the discharge of his duties without the need for a Court order. In addition, upon further order of this Court, the Receiver may retain such accountants, consultants, managers, brokers, appraisers and other professionals as are necessary to the proper discharge of the Receiver's duties, and may pay such professionals reasonable fees from the funds of the Receivership Estate in accordance with the Budget. Notwithstanding the foregoing, the Receiver is authorized, without Court approval, to employ legal counsel to assist with any regulatory issues that may arise in connection with the Receivership Estate, with such legal fees not to exceed \$100,000, absent further Court order.
- s. **Improvements.** The Existing Managers or the Receiver may, to the extent provided for in the Budget or otherwise with the consent of Fannie Mae or required by applicable regulations, make such capital expenditures necessary or desirable relating to the operations and maintenance of the Properties. The Receiver may, following consultation with the Defendants and the Existing Managers, and subject

to the Budget or otherwise with the consent of Fannie Mae, make any alterations, renovations, repairs, improvements, or replacements of or to the Properties or the Receivership Estate that the Receiver deems necessary or otherwise required by the state regulator.

- t. **Additional Powers.** The Court vests the Receiver with any and all authority necessary or appropriate, at law and in equity, to carry out the intent of this Order.

6. **Cooperation by Defendants.** The Defendants and the Existing Managers and their respective agents, directors, officers, employees, attorneys, representatives, affiliates, all other persons and entities who are successors in interest to, or are acting in concert with them, and all persons and entities in control of, in possession of, with knowledge of, or overseeing any of the Defendants' assets, including, but not limited to its books and records: (a) shall fully cooperate with the Receiver and his professionals, representatives and their agents in connection with the Receiver's performance of their duties and the exercise of the authority granted to the Receiver herein (at no cost to Defendants, Existing Managers and such other related parties which are not paid out of the Receivership Estate); and (b) are hereby enjoined and restrained from interfering with the Receiver carrying out his duties under this Order and any further orders of the Court. Notwithstanding any provision of this Agreed Order, nothing contained in this Agreed Order shall provide the Receiver access to any of Defendant's privileged information (including by way of example and not limitation, emails, documents, and conversations) subject to the Attorney/Client evidentiary privilege or Attorney Work Product Doctrine (a "Privileged Communication"). Should the Receiver discover that he has been provided or accessed a Privileged Communication, he shall advise counsel for Defendants by email, identify the Privileged Communication, destroy any copies he has made, and refrain from using any knowledge of the Privileged Communication

in any manner or for any purpose. Nothing contained in this Agreed Order shall waive the Defendant's Attorney/Client evidentiary privilege, the Attorney Work Product Doctrine, nor the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") or similar privacy laws with which the Receiver shall comply. The Receiver shall not have access to any patient care information protected under HIPAA.

7. **Cooperation by Banks.** Each institution where the Defendants or the Existing Managers maintain accounts is ordered, except as expressly prohibited by applicable laws or regulations, to allow the Receiver to take over the Defendants' accounts, to transfer control to the Receiver of the funds and accounts, and to provide account statements and other account documents for such accounts at the Receiver's request. The Receiver is authorized to execute new signature cards for such accounts to ensure the transfer of control of such accounts to the Receiver. Upon the Receiver's request and presentation of this Order, each institution where the Defendants maintain accounts is ordered to delete all current designated signatories on such accounts except for those signatories identified by the Receiver, including Existing Managers.

8. **Addresses for Notice.** The Parties shall promptly notify the Receiver in writing of the names, addresses, and telephone numbers of all parties who appear in this action and their counsel, to the extent such information is available. The Parties shall give notice to the Receiver of any service of process affecting the Receivership Estate or any correspondence, notices, or other communications received on behalf of the Defendant.

9. **Suit Against Receiver.** All parties and persons are hereby restrained and enjoined, without the prior approval of this Court, from taking any of the following actions, except in this Court, unless otherwise provided herein or in a subsequent order of this Court, consistent

with general principles of equity and in accordance with its ancillary equitable jurisdiction in this matter:

- a. The commencement or continuation, including the issuance or employment of process, of any judicial, administrative, or other proceeding against the Receiver or any Receiver-Related Person, or the Receivership Estate, arising from the subject matter of this proceeding;
- b. The enforcement against the Receiver, property of the Receivership Estate or the Defendants, of any judgment obtained before the date this proceeding was commenced;
- c. Any act to obtain possession of property of the Receivership Estate or property from the Receivership Estate or to exercise control over property of the Receivership Estate;
- d. Any act to create, perfect, or enforce any lien against property of the Receivership Estate;
- e. Any act to collect, assess, or recover a claim against the Receiver or the Receivership Estate that arose before the date this proceeding was commenced; and
- f. The setoff of any debt owed by the Defendants or the Receivership Estate, or secured by assets of the Receivership Estate, against any claim against the Defendants or the Receivership Estate.

10. **No Personal Liability.** Michael F. Flanagan and Flanagan & Associates, LLC, through and by Michael F. Flanagan, is acting solely in its capacity as Receiver and, except as provided by applicable law, no risk, obligation, liability or expense incurred shall be the personal

risk, obligations, liability or expense of Mr. Flanagan or Flanagan & Associates LLC, but instead shall be the risk, obligation, liability or expense of the Receivership Estate.

11. **Security Deposits; Resident Contracts.** Any security or other deposits which residents, tenants or others have paid to the Defendants or their agents shall be turned over to the Receiver with such funds being utilized in accordance with the terms and conditions of the applicable resident contracts. Any other security or other deposits that residents, tenants or others have paid or may pay to the Receiver, if otherwise refundable under the terms of the leases or agreements with such residents, tenants or others, shall be expenses of the Receivership Estate and shall be refunded by the Receiver in accordance with such leases or agreements.

12. **Utilities.** Without prior order of this Court, no utility companies, including, but not limited to, electricity, gas, water, sewage, waste water, recycling, garbage, telephone, television, cable and internet providers, may terminate service to the Defendants and/or the Receivership Estate as a result of nonpayment of obligations incurred prior to the date of the Commencement Notice, nor may any utility demand an additional deposit as a condition to the continued provision of service.

13. **HIPAA.** This Order constitutes a Protective Order under HIPAA. Receiver and the Receiver's respective agents, representatives, and anyone acting on their behalves ("Receiver Representatives"), shall be permitted to access confidential patient information, pursuant to the terms of this Order. Receiver and the Receiver Representatives shall implement the following procedures to safeguard the confidentiality of protected health information ("PHI"), as defined under HIPAA:

- a. The Receiver and Receiver Representatives shall be prohibited from using or disclosing the PHI for any purpose other than for purposes of fulfilling the

Receiver's responsibilities under this Order. The Receiver and Receiver Representatives shall use only the minimum necessary confidential information for such purposes;

- b. The Receiver and Receiver Representatives shall implement appropriate safeguards to prevent review, use, or disclosure of PHI, including subjecting the Receiver and Receiver Representatives to the same standards regarding confidentiality of patient records as Defendants under applicable laws, including HIPAA;
- c. The Receiver and Receiver Representatives shall mitigate (to the extent reasonably practicable) any harmful effect that is known to them from a use or disclosure of PHI by them in violation of the requirements of this Order;
- d. The Receiver and Receiver Representatives must not make any paper or electronic copies of, or otherwise acquire, any PHI in the course of their duties, such that it is not necessary for them to return or destroy the PHI received at the end of all litigation; and
- e. Any other person with whom the Receiver retains, employs, or contracts, or who otherwise acts as an agent for the Receiver, shall abide by the same restrictions and conditions that apply to the Receiver with respect to PHI.

14. Reasonably prior to Receiver implementing any change in the operator or manager of any Property or retaining any new operator or manager of any Property, the Receiver shall (a) confirm in writing to Defendants and the Existing Manager that the new manager/operator has obtained all required licenses and permits needed to operate the Property under applicable law for the jurisdiction where the Property is located and provide the Existing Managers with copies of said licenses and permits, (b) execute an appropriate joint notice with Defendants and the Existing

Managers required under applicable state law regarding the change in the controlling person over each Properties, and (c) send the joint notice, along with a cover letter explaining that the notice is an update pursuant to this Order and summarizing the anticipated change in the operator, manager and/or controlling person of such Property, to each applicable state regulatory agency. The Receiver shall consult with and coordinate these communications with Defendants to ensure the morale, health and welfare of the Properties' residents and tenants and the interests of their families are considered when such communications are made.

15. Within ten (10) days of this Order, the Receiver shall, pursuant to 28 U.S.C. § 754, file copies of Fannie Mae's Complaint and a copy of this Order in the federal district court for each district in which a Property is located.

16. Upon taking charge of each Property as authorized by the immediately preceding paragraph, the Receiver shall comply with all local, state and Federal regulations, including but not limited to U.S. Department of Health and Human Services rules and regulations regarding the safety of residents during the COVID-19 pandemic crisis.

17. The Receiver is authorized and directed in coordination with Defendants to contact any regulatory authority responsible for a Property and to provide a copy of this Order with three business days' written notice to Defendants. The Receiver may file documents with applicable regulatory authorities and pay all necessary fees. The Receiver is authorized to hire and retain professionals, including legal counsel, necessary to assist with such filings without further order of this Court.

18. The Receiver shall, subject to the limitations expressly provided in this Order, retain possession of each Property until the earlier of further order of this Court, a sale of such Property or judicial or nonjudicial foreclosure of such Property by Fannie Mae, with the express

understanding that judicial or nonjudicial foreclosure of a Property may proceed without further order of the Court either judicially in a court of competent jurisdiction or nonjudicially. Fannie Mae may also accelerate any of the indebtedness owed by any Defendant to Fannie Mae in accordance with applicable law and Fannie Mae's Loan Documents.

19. The Receiver shall be paid a monthly fee equal to \$2,500 per month per Property for the first three (3) months, and \$1,500 per month per Property thereafter. All of the fees approved in this paragraph are to be paid as a priority from the rents and revenues of each Property.

20. The Receiver shall initially engage the Existing Managers to operate the Properties in accordance with the Existing Management Agreements (as modified in accordance with the terms of this Order), and may engage New Managers on any terms determined to be reasonable by Receiver, subject to the limitations expressly provided herein, including but not limited to the obligation that a new operator with the appropriate license must be obtained prior to or simultaneously with the engagement of a New Manager, subject to the prior approval of Fannie Mae. The Receiver shall use his commercially reasonable best efforts to expediently select a duly licensed new operator and a New Manager with respect to each Property. In the event that the Receiver is unable to select and engage a New Manager for any Property by November 30, 2020, and there are material changes in the financial situation at the applicable Property, the Existing Manager shall have the right to petition the Court for (i) a revision to the fees charged pursuant to the Existing Management Agreement, or (ii) termination of, the Existing Management Agreement. The Receiver shall cooperate with Fannie Mae in locating and licensing new operator(s) for each of the Properties and the Receiver is authorized, as and when such new operators are secured and licensed with respect to each Property, to enter into and perform services under an Operations Transition Agreements (each an "OTA") and/or purchase and sale agreement(s), as applicable,

with each such new operator or new owner to ensure the uninterrupted care for residents at subject Property and the orderly transfer of operations, subject to and in compliance with all applicable laws, rules and regulations relating to the transfer of operations for senior housing communities. The OTA shall be in commercially reasonable form and substance acceptable to the applicable Parties. The Receiver is authorized to pay any amounts owing pursuant to any OTA, as applicable.

21. Each Defendant shall or shall cause its Existing Manager to continue to provide all necessary services required under each Existing Management Agreement or applicable licensing or regulatory requirements to operate and manage its Property under applicable law and shall fully cooperate with the Receiver in performing these services, and in the orderly transition to any new operator or property manager, and shall execute promptly all applications, assignments, consents, and documents requested by the Receiver to facilitate such transition, provided that, in all cases, appropriate funds are provided to Existing Managers to carry out such obligations. The Receiver is further authorized to compensate any such Existing Manager in accordance with the provisions of Management Agreement (as modified in accordance with this Order). Upon successful transition to the New Manager, the Receiver shall terminate the Management Agreement upon ten (10) days' notice and payment of any management fees accrued after the date of entry of this Agreed Order, unless the Parties agree otherwise. The Parties agree that any events that might constitute an "event of default" as that term is currently defined in the existing contract with the Existing Manager shall not excuse payment of any management fees owed to the Existing Manager.

22. No later than the 25th day of each month, the Receiver shall make an accounting of all rents and revenues collected and all expenses paid for the previous month and shall file said accounting with the Court and shall serve upon Fannie Mae's counsel and Defendants' counsel a

copy of said accounting. The Receiver shall file a final report within ninety (90) days after the termination of the receivership unless otherwise ordered by the Court.

23. Within ninety (90) days after the termination of the receivership, the Receiver shall pay to Fannie Mae all receipts remaining, if any, after payment of the items set forth herein, to be applied to the indebtedness of the Defendants to Fannie Mae, pursuant to the Notes. The Receiver is authorized, but not required, to make any or all of the payments set forth in this paragraph during the pendency of the receivership.

24. In the event the Receiver desires to make any repair to any Property or pay any unforeseen operating expenses other than those ordinarily and normally incurred in the operation of the business or which are required to address life safety concerns, the Receiver shall so notify Fannie Mae, directly or through counsel, informing Fannie Mae of the nature and approximate cost of the desired expenditure. Fannie Mae shall respond within three (3) business days of such notice, either authorizing such expenditure or joining with the Receiver in a request for a hearing before the Court to determine whether such expenditure should be authorized. The provisions of this paragraph do not apply to emergency repairs, life safety repairs, or repairs required by applicable city, municipal, or state ordinance or code or as directed by federal, state or local regulatory authorities.

25. **No Impairment.** Fannie Mae's title to and security interest in the rents, issues, profits, and revenues of each Property shall not be impaired by the appointment of the Receiver.

29. **Liability:**

- a. Except as provided otherwise in this Order, neither Fannie Mae nor the Receiver shall be liable for any obligations (including, without limitation, obligations between, on the one part, Defendants, and, on the other part, one or more

employees, directors, agents, shareholders, creditors, members, and/or representatives of Defendants), whether or not such obligations have been liquidated and whether or not such obligations are conditional, that arose prior to this Order and that relate in any way to the acquisition, ownership, maintenance, operation, financing, sale or use of the any of the Properties and of any part of it. If obligated, Defendants shall remain liable for all obligations of the Properties.

- b. This Order shall not impose upon either Fannie Mae or the Receiver any liability to any party for any claims, actions, or causes of action relating to any of the Properties that arise out of or relate to events or circumstances occurring prior to the appointment of the Receiver (including but not limited to any liability resulting from the performance of services rendered by third parties on behalf of Defendants, and any liability to which Defendants are currently or may ultimately be exposed under any applicable laws pertaining to the ownership, management, and operations of any of the Properties).
- c. To the extent the Receiver continues the services of any current employees, agents, or other personnel with respect to any of the Properties, the Receiver shall not be liable for any claims of any nature whatsoever of such employees, agents, or other personnel that arose prior to the date and time of the entry of this Order, which claims include, but are not limited to, liabilities related to unemployment and/or worker's compensation claims, claims or violations related to Employee Retirement Income Security Act of 1974 or any other claims relating to employee benefits or employee benefits plan.
- d. Except for acts of willful misconduct, gross negligence or fraud, neither the

Receiver nor any of his employees, agents, representatives, attorneys, officers, directors, partners, shareholders, members, affiliates, successors or assigns (the “Receiver-Related Persons”) shall be liable for any loss or damage incurred by the Receivership Estate, or any of the Defendants, the Defendants’ clients, patients or associates, or their respective subsidiaries, affiliates, officers, directors, agents and employees or equity holders because of any act performed or not performed by the Receiver or Receiver-Related Persons in connection with the discharge of the Receiver’s duties and responsibilities hereunder..

30. **Not Deemed Owners.** Neither the Receiver nor Fannie Mae shall be deemed in any way to be an owner or operator of any of the Properties. Except for claims arising from the Receiver’s willful misconduct, gross negligence, or fraud, the Receiver shall have no liability as to any claims, actions, or causes of actions of any third parties who have or would have claims against Defendants or any officer, director, or shareholder thereof (including, without limitation, any claims under any federal or state environmental laws).

31. **Further Instructions.** The Receiver, the Parties and the Defendants may, from time to time, and upon 72 hours’ notice to each other (or, in the case of an extreme emergency, on 24 hours’ notice), petition the Court for instructions in furtherance of this Order and any further orders the Court may make with respect to the Receivership Estate.

32. **Inventory.** Within thirty (30) days of the date hereof and with the assistance of the Existing Managers, the Receiver shall file an inventory of all assets of the Receivership Estate, including all real property, tangible personal property and intangible personal property, but excluding the personal property of any residents of the Property.

IT IS FURTHER ORDERED that money coming into the possession of the Receiver and not expended for any of the purposes authorized herein shall be held by the Receiver subject to such orders as this Court may hereafter issue.

IT IS FURTHER ORDERED the Receiver shall not be responsible for the preparation and filing of any tax returns for Defendants or any affiliate(s) of Defendants, including income, personal property, commercial activity, gross receipts, sales and use, or other tax returns. Upon reasonable request, the Receiver shall provide the Defendants or their affiliates with information in the Receiver's possession that may be necessary for the Defendants or their affiliate(s) to prepare and file their tax returns. Notwithstanding the above, the Receiver shall be responsible for the preparation and filing of any tax returns required for the Receivership Estate but not the Defendants.

IT IS FURTHER ORDERED that the Receiver may at any time request from the Court that they be exonerated, discharged and released from his appointment as Receiver.

IT IS FURTHER ORDERED that no lien, claim, or other security interest in any Property shall be affected by this Order, nor shall the appointment impair Fannie Mae's right or ability to proceed with any judicial or nonjudicial foreclosure of such Property now posted or instituted or hereafter posted or instituted by Fannie Mae, with the express understanding that judicial or nonjudicial foreclosure of any of the Property may occur without further order of the Court in accordance with applicable state law.

IT IS FURTHER ORDERED that this Court shall retain exclusive jurisdiction and supervision of all matters concerning the Receiver, the receivership created hereby, the interpretation and implementation of this Order and the Properties.

IT IS FURTHER ORDERED that this receivership shall continue in effect until further order of this Court.

SIGNED: August ____, 2020.

UNITED STATES DISTRICT JUDGE

AGREED AS TO FORM AND SUBSTANCE BY:

By: /s/ Keith M. Aurzada
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EXHIBIT 1

AMERICAN BANKRUPTCY INSTITUTE

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Gramercy Hill

September	October

Total Receipts	358,000	360,000
Total Labor	187,618	188,187
Food	25,000	25,000
Legal & Professional Fees	5,285	5,285
Management Fees	17,391	17,079
Advertising & Promotions	23,000	23,000
Repair & Maintenance	9,550	9,550
Service Contracts	4,000	4,000
Computer Software/Hosting	580	580
Printing	335	335
Postage	135	135
Supplies	7,825	7,825
Utilities	20,000	20,000
Telephone	2,600	2,600
Other Expenses	15,000	15,000
Property Taxes	11,326	11,326
Insurance	5,220	5,220
Professional Fees	1,600	1,600
COVID Non-Labor	4,402	4,402
Receivership expense	5,000	5,000
Cap Ex	8,938	8,938
Cash Flow after Cap Ex	3,196	4,939

Harbor Court

September October

Total Receipts	250,000	245,000
Total Labor	212,496	212,996
Food	18,000	18,000
Legal & Professional Fees	5,000	5,000
Management Fees	12,613	12,265
Advertising & Promotions	12,000	12,000
Repair & Maintenance	5,000	5,000
Service Contracts	2,324	2,324
Computer Software/Hosting	2,000	2,000
Printing	2,000	2,000
Postage	100	100
Supplies	7,950	7,950
Utilities	14,000	14,000
Telephone	3,300	3,300
Other Expenses	8,963	8,763
Property Taxes	20,000	20,000
Insurance	6,315	6,315
Professional Fees	1,500	1,500
COVID Non-Labor	6,200	6,200
Receivership expense	5,000	5,000
Cap Ex	7,000	7,000
Cash Flow after Cap Ex	(101,762)	(106,713)

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Middletown

September	October

Total Receipts	165,000	165,000
Total Labor	148,000	148,000
Food	10,000	10,000
Legal & Professional Fees	5,000	5,000
Management Fees	8,910	8,910
Advertising & Promotions	9,000	9,000
Repair & Maintenance	6,500	6,500
Service Contracts	5,400	5,400
Computer Software/Hosting	2,500	2,500
Printing	100	100
Postage	200	200
Supplies	7,000	7,000
Utilities	10,500	10,500
Telephone	1,200	1,200
Other Expenses	5,300	5,300
Property Taxes	10,000	10,000
Insurance	3,000	3,000
Professional Fees	2,000	2,000
COVID Non-Labor	2,323	2,323
Receivership expense	5,000	5,000
Cap Ex	3,813	3,813
Cash Flow after Cap Ex	(80,745)	(80,745)

Oakwood

September	October

Total Receipts	175,000	175,000
 Total Labor	 140,000	 140,000
Food	11,500	11,500
Legal & Professional Fees	5,020	5,020
Management Fees	8,590	8,301
Advertising & Promotions	6,700	6,700
Repair & Maintenance	1,000	1,000
Service Contracts	2,500	2,500
Computer Software/Hosting	200	200
Printing	250	250
Postage	150	150
Supplies	3,000	3,000
Utilities	9,500	9,500
Telephone	900	900
Other Expenses	3,500	3,500
Property Taxes	3,600	3,600
Insurance	3,750	3,750
Professional Fees	1,000	1,000
COVID Non-Labor	5,000	5,000
Receivership expense	5,000	5,000
Cap Ex	4,160	4,160
 Cash Flow after Cap Ex	 (40,320)	 (40,031)

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 C1314 C1314
 Whitcomb House Whitcomb House

September	October

	Total Labor	156,590	153,714
	Food	12,500	12,500
	Legal & Professional Fees	5,375	5,375
	Management Fees	10,241	9,866
	Advertising & Promotions	6,000	6,000
	Repair & Maintenance	2,500	2,500
	Service Contracts	4,250	4,250
	Computer Software/Hosting	1,500	1,500
	Printing	100	100
	Postage	250	250
	Supplies	7,000	7,000
	Utilities	18,000	18,000
	Telephone	1,000	1,000
	Other Expenses	4,000	4,000
	Property Taxes	7,937	7,937
	Insurance	5,500	5,500
	Professional Fees	1,000	1,000
	COVID Non-Labor	7,500	7,500
	Reeivership expense	5,000	5,000
750	Cap Ex	4,938	4,938

River Crossing River Crossing

September	October

Total Labor	145,000	145,000
Food	19,000	19,000
Legal & Professional Fees	5,000	5,000
Management Fees	12,073	11,922
Advertising & Promotions	2,500	2,500
Repair & Maintenance	2,500	2,500
Service Contracts	4,500	4,500
Computer Software/Hosting	100	100
Printing	50	50
Postage	125	125
Supplies	4,000	4,000
Utilities	12,500	12,500
Telephone	800	800
Other Expenses	7,500	7,500
Property Taxes	9,000	9,000
Insurance	6,000	6,000
Professional Fees	1,250	1,250
COVID Non-Labor	7,500	7,500
Receivership expense	5,000	5,000
750 Cap Ex	6,250	6,250

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Apple Ridge / Woodview

	September	October
Total Revenue	190,000	192,000
Total Labor	155,000	155,000
Food	14,000	14,000
Legal & Professional Fees	5,000	5,000
Management Fees	9,259	8,705
Advertising & Promotions	6,000	6,000
Repair & Maintenance	3,500	3,500
Service Contracts	4,000	4,000
Computer Software/Hosting	50	50
Printing	100	100
Postage	300	300
Supplies	9,000	9,000
Utilities	12,500	12,500
Telephone	3,000	3,000
Other Expenses	6,261	6,261
Property Taxes	13,110	13,110
Insurance	5,000	5,000
Professional Fees	1,200	1,200
COVID Non-Labor	2,500	2,500
Receivership expense	5,000	5,000
Cap Ex	5,500	5,500
Cash Flow after Cap Ex	(70,280)	(67,726)

C1317
 Sugar Grove

September	October

Total Receipts	425,000	420,000
 Total Labor	 235,000	 225,000
Food	19,500	19,500
Legal & Professional Fees	5,000	5,000
Management Fees	21,468	20,926
Advertising & Promotions	10,000	10,000
Repair & Maintenance	1,500	1,500
Service Contracts	7,500	7,500
Computer Software/Hosting	1,000	1,000
Printing	150	150
Postage	250	250
Supplies	7,500	7,500
Utilities	32,000	32,000
Telephone	4,500	4,500
Other Expenses	12,000	12,000
Property Taxes	19,750	19,750
Insurance	6,000	6,000
Professional Fees	2,500	2,500
COVID Non-Labor	5,000	5,000
Receivership expense	5,000	5,000
Cap Ex	10,250	10,250
 Cash Flow after Cap Ex	 19,132	 24,674

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Case 3:20-cv-02395-R
Dillon Pointe Dillon Point

September	October

Total Labor	97,869	97,737
Food	11,000	11,000
Legal & Professional Fees	5,000	5,000
Management Fees	6,866	6,668
Advertising & Promotions	7,000	7,000
Repair & Maintenance	1,500	1,500
Service Contracts	3,000	3,000
Computer Software/Hosting	100	100
Printing	100	100
Postage	125	125
Supplies	4,000	4,000
Utilities	5,750	5,750
Telephone	750	750
Other Expenses	4,500	4,500
Property Taxes	3,200	3,200
Insurance	3,500	3,500
Professional Fees	1,000	1,000
COVID Non-Labor	3,600	3,600
Receivership expense	5,000	5,000
750 Cap Ex	2,250	2,250

C-1324
Richmond Heights
C-1324
Richmond Heights

September	October

Total Labor	210,000	210,000
Food	19,000	19,000
Legal & Professional Fees	6,035	6,075
Management Fees	20,000	20,000
Advertising & Promotions	15,000	15,000
Repair & Maintenance	1,500	1,500
Service Contracts	9,000	9,000
Computer Software/Hosting	1,000	1,000
Printing	900	900
Postage	200	200
Supplies	6,000	6,000
Utilities	30,000	30,000
Telephone	2,000	2,000
Bad Debt	0	0
Other Expenses	9,500	9,500
Property Taxes	36,750	36,750
Insurance	7,500	7,500
Professional Fees	3,000	3,000
COVID Non-Labor	6,000	6,000
Receivership expense	5,000	5,000
750 Cap Ex	8,813	8,813

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Park - Oak Grove

September	October

Total Revenue	300,000	302,000
Total Labor	135,645	135,919
Food	17,000	17,250
Legal & Professional Fees	5,000	5,000
Management Fees	15,000	15,000
Advertising & Promotions	8,500	8,500
Repair & Maintenance	5,000	5,000
Service Contracts	1,954	3,254
Computer Software/Hosting	315	315
Printing	50	50
Postage	200	200
Supplies	5,350	5,350
Utilities	9,500	9,500
Telephone	750	750
Other Expenses	8,500	8,500
Property Taxes	8,250	8,250
Insurance	5,200	5,200
Professional Fees	1,200	1,200
COVID Non-Labor	4,000	4,000
Receivership expense	5,000	5,000
Cap Ex	5,813	5,813
Cash Flow after Cap Ex	57,773	57,950

Oshkosh

September October

Total Receipts	278,000	275,000
 Total Labor	 191,000	 195,000
Food	13,750	13,750
Legal & Professional Fees	5,130	5,130
Management Fees	14,500	14,500
Advertising & Promotions	7,000	7,000
Repair & Maintenance	5,000	5,000
Service Contracts	4,600	4,600
Computer Software/Hosting	1,700	1,500
Printing	50	50
Postage	200	200
Supplies	6,500	6,500
Utilities	13,000	13,000
Telephone	1,800	1,800
Other Expenses	9,000	9,000
Property Taxes	23,250	23,250
Insurance	6,000	6,000
Professional Fees	1,500	1,500
COVID Non-Labor	3,000	3,000
Receivership expense	5,000	5,000
Cap Ex	5,625	5,625
 Cash Flow after Cap Ex	 (39,605)	 (46,405)

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Hidden Lake

September	October

Total Receipts	165,000	165,000
Total Labor	120,000	122,000
Food	12,000	12,000
Legal & Professional Fees	5,140	5,140
Management Fees	8,500	8,500
Advertising & Promotions	12,000	12,000
Repair & Maintenance	1,100	1,100
Service Contracts	1,490	1,490
Computer Software/Hosting	500	500
Printing	50	50
Postage	100	100
Supplies	3,500	3,500
Utilities	8,375	8,375
Telephone	650	650
Other Expenses	5,500	5,500
Property Taxes	4,875	4,875
Insurance	4,200	4,200
Professional Fees	1,000	1,000
COVID Non-Labor	5,000	5,000
Receivership expense	5,000	5,000
Cap Ex	3,063	3,063
Cash Flow after Cap Ex	(37,043)	(39,043)

C-1387
Bridle Brook

C-1337
Bridle Brook

September	October

Total Labor	140,000	142,500
Food	15,000	15,000
Legal & Professional Fees	5,000	5,000
Management Fees	12,000	12,000
Advertising & Promotions	4,470	3,470
Repair & Maintenance	5,700	5,700
Service Contracts	1,900	1,900
Computer Software/Hosting	100	100
Printing	50	50
Postage	250	150
Supplies	5,500	5,500
Utilities	14,500	14,955
Telephone	1,250	1,250
Other Expenses	9,160	8,960
Property Taxes	23,500	23,500
Insurance	4,250	4,250
Professional Fees	1,100	1,100
COVID Non-Labor	4,000	4,000
Receivership expense	5,000	5,000
750 Cap Ex	4,875	4,875

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Columbia

September October

Total Receipts	170,000	170,000
Total Labor	61,500	61,500
Food	14,000	14,000
Legal & Professional Fees	5,000	5,000
Management Fees	9,000	9,000
Advertising & Promotions	4,500	4,500
Repair & Maintenance	2,700	2,700
Service Contracts	2,700	2,700
Computer Software/Hosting	100	100
Printing	200	200
Postage	200	200
Supplies	2,300	2,300
Utilities	22,000	22,000
Telephone	1,300	1,300
Bad Debt	0	0
Other Expenses	9,500	9,500
Property Taxes	17,500	17,500
Insurance	5,000	5,000
Professional Fees	1,350	1,350
COVID Non-Labor	4,000	4,000
Receivership expense	5,000	5,000
Cap Ex	7,375	7,375
Cash Flow after Cap Ex	(5,225)	(5,225)

Deer Park

September	October

Total Receipts	107,000	107,000
Total Labor	64,000	64,000
Food	10,000	10,000
Legal & Professional Fees	5,000	5,000
Management Fees	6,002	5,888
Advertising & Promotions	7,000	7,000
Repair & Maintenance	850	1,300
Service Contracts	3,150	3,150
Computer Software/Hosting	0	0
Printing	50	50
Postage	150	150
Supplies	2,900	2,900
Utilities	17,000	17,000
Telephone	1,500	1,500
Bad Debt	0	0
Other Expenses	11,000	11,000
Property Taxes	21,064	21,064
Insurance	5,000	5,000
Professional Fees	1,350	1,350
COVID Non-Labor	9,000	9,000
Receivership expense	5,000	5,000
Cap Ex	7,500	7,500
Cash Flow after Cap Ex	(70,516)	(70,852)

750

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Edison Lakes

September October

Total Receipts	289,281	290,000
Total Labor	173,000	173,000
Food	19,000	19,000
Legal & Professional Fees	5,108	5,108
Management Fees	15,000	15,000
Advertising & Promotions	12,500	12,500
Repair & Maintenance	3,000	3,000
Service Contracts	7,000	7,000
Computer Software/Hosting	100	100
Printing	50	50
Postage	350	350
Supplies	5,200	5,200
Utilities	20,000	20,000
Telephone	947	947
Other Expenses	10,000	10,000
Property Taxes	8,700	8,700
Insurance	6,251	6,251
Professional Fees	1,350	1,350
COVID Non-Labor	4,000	4,000
Receivership expense	5,000	5,000
Cap Ex	7,250	7,250
Cash Flow after Cap Ex	(14,525)	(13,806)

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C1894
Pantego

C1904
Pantego

September	October

Total Labor	73,000	73,130
Food	16,966	17,201
Legal & Professional Fees	5,000	5,000
Management Fees	13,747	13,583
Advertising & Promotions	7,500	7,500
Repair & Maintenance	2,100	2,100
Service Contracts	5,000	5,000
Computer Software/Hosting	100	100
Printing	50	50
Postage	150	150
Supplies	3,000	3,000
Utilities	20,000	20,000
Telephone	1,200	1,200
Bad Debt	0	0
Other Expenses	9,345	9,421
Property Taxes	27,011	27,011
Insurance	5,071	5,071
Professional Fees	4,000	4,000
COVID Non-Labor	5,000	5,000
Receivership expense	5,000	5,000
750 Cap Ex	7,375	7,375

567 B.R. 820
United States Bankruptcy Court,
C.D. California,
Los Angeles Division.

IN RE: GARDENS REGIONAL HOSPITAL
AND MEDICAL CENTER, INC., Debtor.

Case No.: 2:16-bk-17463-ER

|
Heard May 3, 2017

|
Signed May 15, 2017

Synopsis

Background: Chapter 11 debtor, a non-profit entity, moved for authority to sell assets of its now-defunct acute care facility, and the California Attorney General objected.

Holdings: The Bankruptcy Court, Ernest M. Robles, J., held that:

[1] California Attorney General's alleged authority to review proposed sale of property which Chapter 11 debtor, a non-profit entity, had used to operate an acute care facility, before the facility closed its doors postpetition, qualified as "Interest in property," such as could be cut off by a sale free and clear;

[2] closed acute care facility no longer qualified as "health care facility," for purposes of California statute; and

[3] Attorney General was not entitled to stay pending appeal.

Objections overruled.

West Headnotes (21)

[1] Bankruptcy

🔑 Time for sale; emergency and sale outside course of business

Debtor must articulate a business justification for sale of estate property outside the ordinary course of its business, and whether the articulated business justification is sufficient depends on facts of the case, in view of all salient factors pertaining to the proceeding. 11 U.S.C.A. § 363(b).

Cases that cite this headnote

[2] Bankruptcy

🔑 Adequate protection; sale free of liens

California Attorney General's alleged authority to review proposed sale of property which Chapter 11 debtor, a non-profit entity, had used to operate an acute care facility, before the facility closed its doors postpetition, qualified as "Interest in property," such as could be cut off by a sale free and clear pursuant to bankruptcy statute. 11 U.S.C.A. § 363(f).

Cases that cite this headnote

[3] Bankruptcy

🔑 Adequate protection; sale free of liens

Term "interest in property," of kind that may be cut off by a sale free and clear in bankruptcy, refers to obligations that are connected to, or arise from, the property being sold. 11 U.S.C.A. § 363(f).

Cases that cite this headnote

[4] Health

🔑 Institutions and Facilities

California statute requiring "[a]ny nonprofit corporation that operates or controls a health facility" to obtain written consent of the Attorney General prior to entering into any agreement or transaction to sell its assets did not require Chapter 11 debtor, a bankrupt non-profit entity that had operated acute care facility in past, but that had since closed its doors because it did not have the finances needed to continue operating, to obtain consent of the Attorney General prior to selling its below market lease, furniture,

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and other assets; statute spoke of nonprofit corporation that “operates” or “controls” health care facility, in present tense, and did not apply to debtor’s closed business, which no longer qualified as “health care facility.” Cal. Corp. Code § 5914(a); Cal. Health & Safety Code § 1250.

Cases that cite this headnote

[5] **Statutes**

🔑 Intent

Under California law, ultimate task in statutory interpretation is to ascertain legislature’s intent.

Cases that cite this headnote

[6] **Statutes**

🔑 Language and intent, will, purpose, or policy

Under California law, words of statute generally provide the most reliable indication of legislative intent.

Cases that cite this headnote

[7] **Statutes**

🔑 Purpose and intent;determination thereof

Only when statutory language is ambiguous may California courts consider evidence of legislature’s intent beyond the words of statute, such as the statutory scheme of which that language is a part, the history and background of the statute, its apparent purpose, and any considerations of constitutionality.

Cases that cite this headnote

[8] **Statutes**

🔑 Absence of Ambiguity;Application of Clear or Unambiguous Statute or Language

Under California law, when statutory language is clear and unambiguous, there is no need for statutory construction, and courts should not indulge in it.

Cases that cite this headnote

[9] **Statutes**

🔑 Relation to plain, literal, or clear meaning;ambiguity

Under California law, language of statute should not be given a literal meaning if doing so would result in absurd consequences which legislature did not intend.

Cases that cite this headnote

[10] **Statutes**

🔑 Tense, mood, and voice

Under California law, verb tense used by legislature is considered significant by courts when interpreting statute.

Cases that cite this headnote

[11] **Bankruptcy**

🔑 Debtor in possession

Federal statute that requires debtor to manage and operate property in its possession “according to the requirements of the valid laws of the State in which such property is situated” applies only when debtor continues to operate its business, and does not apply when debtor is liquidating its assets. 28 U.S.C.A. § 959(b).

Cases that cite this headnote

[12] **Bankruptcy**

🔑 Right;grant or denial;discretion

In determining whether to grant a stay pending appeal, bankruptcy court considers the following four factors: (1) whether the stay applicant has made strong showing that he is likely to succeed on merits; (2) whether applicant will be irreparably injured absent a stay; (3) whether issuance of stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. Fed. R. Bankr. P. 8007(a)(1).

Cases that cite this headnote

[13] Bankruptcy

👉 Right;grant or denial;discretion

Stay pending appeal is not a matter of right, not even if irreparable injury might otherwise result. Fed. R. Bankr. P. 8007(a)(1).

Cases that cite this headnote

[14] Bankruptcy

👉 Right;grant or denial;discretion

Issuance of stay pending appeal is an exercise of judicial discretion, and propriety of its issue is dependent upon the circumstances of particular case. Fed. R. Bankr. P. 8007(a)(1).

Cases that cite this headnote

[15] Bankruptcy

👉 Proceedings;which court

Party requesting a stay pending appeal bears burden of showing that the circumstances justify such relief. Fed. R. Bankr. P. 8007(a)(1).

Cases that cite this headnote

[16] Bankruptcy

👉 Right;grant or denial;discretion

First two factors, a likelihood of success and risk of irreparable injury, are the most critical in deciding whether party is entitled to stay pending appeal. Fed. R. Bankr. P. 8007(a)(1).

Cases that cite this headnote

[17] Bankruptcy

👉 Right;grant or denial;discretion

It is not enough for issuance of stay pending appeal that applicant has a chance of success on the merits which is better than negligible, or that there is some possibility of irreparable injury. Fed. R. Bankr. P. 8007(a)(1).

Cases that cite this headnote

[18] Bankruptcy

👉 Right;grant or denial;discretion

To be entitled to a stay pending appeal, moving party must make a minimum permissible showing with respect to each of the four factors, and as long as moving party meets a minimum threshold as to each factor, court may balance the various stay factors once they are established. Fed. R. Bankr. P. 8007(a)(1).

Cases that cite this headnote

[19] Bankruptcy

👉 Right;grant or denial;discretion

Under balancing approach applied by bankruptcy court in deciding whether to grant a stay pending appeal, a stronger showing of irreparable harm can offset a weaker showing of likelihood of success on the merits, and vice versa, provided that the minimum threshold with respect to each stay factor has been established. Fed. R. Bankr. P. 8007(a)(1).

Cases that cite this headnote

[20] Bankruptcy

👉 Right;grant or denial;discretion

California Attorney General was not entitled to stay pending appeal of bankruptcy court's decision that Chapter 11 debtor, a non-profit entity, did not have to obtain the Attorney General's consent prior to selling the below-market lease and other assets of closed health care facility that it had operated; while the Attorney General established irreparable injury based on the likelihood that appeal would become moot if stay were not granted, Attorney General failed to establish likelihood of success on appeal, and "balance of hardships" and "public interest" factors weighed against issuance of stay. Cal. Corp. Code § 5914(a); Cal. Health & Safety Code § 1250; Fed. R. Bankr. P. 8007(a)(1).

Cases that cite this headnote

In re Gardens Regional Hospital and Medical Center, Inc., 567 B.R. 820 (2017)

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[21] Bankruptcy

🔑 Effect of want of stay; conclusiveness of sale

Purpose of statutory mootness rule that applies only upon unstayed sale of estate assets to good faith purchaser is to discourage bidders from colluding for the purpose of driving down the sales prices at bankruptcy auctions. 11 U.S.C.A. § 363(m).

Cases that cite this headnote

Attorneys and Law Firms

***822** Steven J. Katzman, Bienert, Miller & Katzman, PLC, San Clemente, CA, Samuel R. Maizel, John A. Moe, Dentons US LLP, Reed M. Mercado, Los Angeles, CA, Amelia Puertas-Samara, Employment Development Department, Sacramento, CA, for Debtor.

Dare Law, Office of the United States Trustee, Hatty K. Yip, Office of the UST/DOJ, Los Angeles, CA, for U.S. Trustee.

**MEMORANDUM OF DECISION FINDING
THAT THE DEBTOR IS NOT REQUIRED
TO OBTAIN THE CONSENT OF THE
CALIFORNIA ATTORNEY GENERAL TO
SELL THE ASSETS OF A CLOSED HOSPITAL**

Ernest M. Robles, United States Bankruptcy Judge

At issue is whether the Debtor, a non-profit entity, is required to obtain the consent of the California Attorney General to sell certain assets of a closed hospital.¹ Under the relevant California statutes, a non-profit entity operating a “health facility” that wishes to sell a material amount of its assets must obtain the consent of the California Attorney General. Because a closed hospital does not qualify as a “health facility” under California law, the ***823** Court finds that the Debtor is not required to obtain the California Attorney General’s consent prior to selling a material amount of its assets.

I. Facts

Gardens Regional Hospital and Medical Center, Inc. (the “Debtor”) commenced a voluntary Chapter 11 petition on June 6, 2016. As of the petition date, the Debtor operated a 137-bed acute care hospital located in Hawaiian Gardens, California (the “Hospital”). The Hospital contained an intensive care unit, a cardiac unit, and an eight-bed Emergency Department. In 2015, more than 8,500 patients visited the Emergency Department, and the Hospital had a total of more than 2,850 admissions. The Hospital served a high number of indigent patients and was designated as a Disproportionate Share Hospital by the United States Department of Health and Human Services in connection with the Medicaid program. Disproportionate Share Hospitals receive payments from the Centers for Medicaid and Medicare Services to cover the costs of providing care to uninsured patients. The Debtor operated the Hospital as a non-profit entity.

On July 28, 2016, the Court approved the sale of the operating Hospital to Strategic Global Management, Inc. (“Strategic”), a for-profit entity, for consideration of approximately \$19.5 million. Strategic assigned its rights under the Asset Purchase Agreement (the “APA”) to KPC Global Management, LLC (“KPC”). Pursuant to Cal. Corp. Code § 5914(a) (West 2017), which requires a non-profit entity operating a health facility to obtain approval from the California Attorney General (the “Attorney General”) when selling a material amount of its assets to a for-profit entity, the Debtor requested that the Attorney General authorize the sale. On November 18, 2016, the Attorney General approved the sale, but only on the conditions that Strategic and KPC (1) provide \$2.25 million per year in charitable care for six years, (2) provide approximately \$860,000 in community benefit services per year for six years, and (3) assume at least \$2.4 million in liability under the Hospitality Quality Assurance Fee Program (“HQA”). The \$2.25 million charity care condition was particularly challenging for Strategic and KPC, as the Hospital had provided only approximately \$500,000 in charity care in 2015. The conditions imposed by the Attorney General increased Strategic and KPC’s acquisition cost by approximately \$21 million.

On December 5, 2016, Strategic, the Debtor, and representatives of two unions representing the Debtor’s employees met with representatives of the Attorney General to request modification of the conditions. On December 16, 2016, the Attorney General’s office issued a

letter stating that the conditions would not be modified. On January 9, 2017, after negotiating with Strategic, the Debtor proposed to the Attorney General a modified transaction, under which Strategic and KPC would continue operating the hospital and would assume at least \$2.4 million in HQAF liability, but only if the charity care requirement was reduced to \$500,000 annually. On January 11, 2017, the Attorney General's office issued a letter stating that it lacked the authority to modify the charitable care condition that it had imposed. On January 6, 2017, Strategic and KPC provided the Debtor formal notice that, in view of the conditions imposed by the Attorney General, they were exercising their option under the APA to terminate the transaction.

By this point in the case, the Debtor had nearly exhausted the \$3.13 million in debtor-in-possession financing it had obtained, and the lack of unencumbered assets made *824 it impossible for the Debtor to obtain additional financing. The Hospital continued to operate at a loss, and the Debtor was on the verge of running out of cash. In view of these circumstances, on January 20, 2017, the Court granted the Debtor's emergency motion to close the Hospital. The Court found that in voting to close the Hospital, the Debtor's Board of Directors had acted in accordance with the Debtor's mission of sustaining public health and welfare, as health and welfare would be jeopardized if the Hospital continued to admit new patients when it lacked the funds to adequately sustain operations. As of February 2, 2017, all patients in the Hospital had been discharged or relocated, and the Hospital was completely closed.

After the Hospital closed, the Debtor caused its general acute care hospital license to be placed in suspense, pursuant to Cal. Health & Safety Code § 1300(a) (West 2017).² A license placed in suspense may be reinstated, but only if the applicant demonstrates compliance with the requirements of Cal. Health & Safety Code § 1265. Reinstatement requires the applicant to submit, among other things, satisfactory evidence of its reputable character and its ability to comply with applicable health and safety regulations. *See* Cal. Health & Safety Code § 1265(e)–(f).

The Debtor now moves to sell the following assets of the closed Hospital (collectively, the “Assets”):

- The below-market lease to the building in which the Hospital formerly operated (the “Hospital Lease”).
- The suspended hospital license, and licenses and permits relating to the pharmacy and laboratory.
- Any furniture, fixtures, and equipment at the premises that are not owned by the landlord under the Hospital Lease.
- Inventory and supplies (which have negligible value).
- Books and records.

The sale does not include the Debtor's cash and cash equivalents, accounts receivable, Medicare and Medi-Cal provider agreements, real property leases other than the Hospital Lease, or claims and causes of action against third parties. The purchaser, American Specialty Management Group (“American Specialty”), intends to seek reinstatement of the Hospital's suspended license, and open a new general acute care hospital on the premises.

The Debtor asserts that it is not required to obtain the consent of the Attorney General to sell the Assets. The Debtor's theory is that because the Hospital has closed, the Assets no longer qualify as a “health facility.” As a result, the Debtor asserts, the Attorney General lacks authority to review the sale under Cal. Corp. Code § 5914(a). The Attorney General disagrees, maintaining that the Assets still constitute a “health facility” even though the Hospital is not operating. According to the Attorney General, a finding that Cal. Corp. Code § 5914(a) does not apply would enable other non-profit entities to temporarily cease operations for the purpose of selling their assets free of the Attorney General's review and consent. Such sales, the Attorney General contends, would jeopardize public welfare by allowing assets intended for charitable purposes to be acquired by for-profit entities without proper oversight.

*825 II. Discussion

[1] Section 363(d)(1)³ authorizes non-profit entities, such as the Debtor, to sell estate assets only if the sale is “in accordance with nonbankruptcy law applicable to the transfer of property by” a non-profit entity. Section 541(f) similarly provides that property held by debtors that are § 501(c)(3) corporations under the Internal Revenue Code may be transferred, but “only under the same conditions

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as would apply if the debtor had not filed a case under this title.” Section 363(b) permits the debtor to sell estate property out of the ordinary course of business, subject to court approval. The debtor must articulate a business justification for the sale. *In re Walter*, 83 B.R. 14, 19–20 (9th Cir. BAP 1988). Whether the articulated business justification is sufficient “depends on the case,” in view of “all salient factors pertaining to the proceeding.” *Id.* at 19–20. Section 363(f)(1) provides that a sale of estate property may be “free and clear of any interest in such property of an entity other than the estate, only if applicable nonbankruptcy law permits sale of such property free and clear of such interest”

A. The Attorney General's Alleged Authority to Review the Sale is an “Interest in Property,” and the Assets May Be Sold Free and Clear of That Interest

[2] Pursuant to § 363(b) and (f)(1), the Court approves the sale of the Assets free and clear of the Attorney General's claim that he may impose conditions upon the terms of the sale or the use of the Assets after the sale. Applicable nonbankruptcy law permits the sale of the Assets absent the consent or review of the Attorney General. As explained below, because the Assets do not qualify as a “health facility” under California law, the Debtor is not required to obtain the Attorney General's consent to sell the Assets. In addition, the Attorney General's contention that he is entitled to impose conditions upon the sale, including monetary conditions, constitutes an “interest in ... property” of which the Assets may be sold free and clear.

[3] The Bankruptcy Code does not define the phrase “interest in ... property” for purposes of § 363(f). The Third Circuit has held that the phrase “interest in ... property” is “intended to refer to obligations that are connected to, or arise from, the property being sold.” *Folger Adam Sec., Inc. v. DeMatteis/MacGregor JV*, 209 F.3d 252, 259 (3d Cir. 2000). That conclusion is echoed by *Collier on Bankruptcy*, which observes a trend in caselaw “in favor of a broader definition [of the phrase] that encompasses other obligations that may flow from ownership of the property.” 3 Alan N. Resnick & Henry J. Sommer, *Collier on Bankruptcy* ¶ 363.06[1] (16th ed. 2017).

Courts have held that interests in property include monetary obligations arising from the ownership of property, even when those obligations are imposed by statute. For example, in *Mass. Dep't of Unemployment*

Assistance v. OPK Biotech, LLC (In re PBBPC, Inc.), 484 B.R. 860 (1st Cir. BAP 2013), the court held that taxes assessed by Massachusetts under its unemployment insurance statutes constituted an “interest in ... property.” The taxes were computed based on the Debtor's “experience rating,” which was determined by the number of employees it had terminated in the past. *Id.* at 862.

*826 Because the Debtor had terminated most of its employees prior to selling its assets, its experiencing rating, and corresponding unemployment insurance tax liabilities, were very high. *Id.* The *PBBPC* court held that the experience rating was an interest in property that could be cut off under § 363(f). *Id.* at 869–70. Similarly, in *United Mine Workers of Am. Combined Benefit Fund v. Leckie Smokeless Coal Co. (In re Leckie Smokeless Coal Co.)*, 99 F.3d 573, 581, the court held that monetary obligations imposed by the Coal Industry Retiree Health Benefit Act of 1992 constituted an “interest in ... property” within the meaning of § 363(f).

Here, the Attorney General takes the position that California law empowers him to require the purchaser of the Assets to agree to certain monetary obligations, such as furnishing a specified amount of charitable care. The charitable care obligations are connected to and arise from the Assets being sold. Had the Assets not originally been earmarked for charitable purposes, the Attorney General could not seek to impose continuing charitable care obligations. The Attorney General's claim to regulatory authority is similar to the regulatory interests asserted in *PBBPC* and *Leckie Smokeless Coal*, and therefore constitutes an “interest in ... property” for purposes of § 363(f).

B. Applicable Nonbankruptcy Law Does Not Require the Debtor to Obtain the Attorney General's Consent to Sell the Assets

[4] Cal. Corp. Code § 5914(a) provides in relevant part:

Any nonprofit corporation that ... operates or controls a health facility, as defined in Section 1250 of the Health and Safety Code, or operates or controls a facility that provides similar health care, shall be required to provide written notice to, and to obtain the written consent of, the Attorney General prior to entering into any agreement or transaction to

... [s]ell ... its assets to a for-profit corporation or entity ... when a material amount of the assets of the nonprofit corporation are involved in the agreement or transaction.

Cal. Health & Safety Code § 1250 defines a “health facility” as

a facility, place, or building that is organized, maintained, and operated for the diagnosis, care, prevention, and treatment of human illness, physical or mental, including convalescence and rehabilitation and including care during and after pregnancy, or for any one or more of these purposes, for one or more persons, to which the persons are admitted for a 24-hour stay or longer

The parties have not identified, and the Court has been unable to locate, any decisions by California courts addressing the applicability of Cal. Corp. Code § 5914(a) and Cal. Health & Safety Code § 1250 to a closed hospital. Accordingly, the Court is required to interpret these statutes applying California's rules of statutory construction. *See Fed. Sav. & Loan Ins. Corp. v. Butler*, 904 F.2d 505, 510 (9th Cir. 1990) (applying California's rules of statutory construction to interpret Cal. Civ. Proc. Code § 877).

[5] [6] [7] [8] [9] Under California law, the “ultimate task” in statutory interpretation “is to ascertain the Legislature's intent.” *People v. Massie*, 19 Cal.4th 550, 569, 79 Cal.Rptr.2d 816, 967 P.2d 29 (1998). “Ordinarily, the words of the statute provide the most reliable indication of legislative intent.” *Pac. Gas & Elec. Co. v. Cty. of Stanislaus*, 16 Cal.4th 1143, 1152, 69 Cal.Rptr.2d 329, 947 P.2d 291 (1997). Only where the statutory language is ambiguous may the Court consider “evidence of the Legislature's intent beyond the words of the statute,” such as the “statutory scheme of which the provision is a part, the history and background of the statute, the apparent purpose, and any considerations of constitutionality” *Hughes v. Bd. of Architectural Examiners*, 17 Cal.4th 763, 776, 952 P.2d 641, 72 Cal.Rptr.2d 624 (1998). “When statutory language is ... clear and unambiguous there is no need for construction,

and courts should not indulge in it.” *Delaney v. Superior Court*, 50 Cal.3d 785, 800, 268 Cal.Rptr. 753, 789 P.2d 934 (1990) (emphasis in original). However, the “language of a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend.” *Younger v. Superior Court*, 21 Cal.3d 102, 113, 145 Cal.Rptr. 674, 577 P.2d 1014 (1978).

[10] Applying these principles of statutory construction, the Court finds that the Assets being sold do not qualify as a “health facility” within the meaning of Cal. Corp. Code § 5914(a) or Cal. Health & Safety Code § 1250. All patients were transferred out of the Hospital by 4:00 p.m. on February 1, 2017. As of that date, the Hospital was completely closed. All signage was covered and the doors were locked. The Hospital has not, and cannot, receive new patients. The plain language of Cal. Health & Safety Code § 1250 establishes that a facility qualifies as a “health facility” only if it is operating and receiving patients. The statute specifies the characteristics of a “health facility” in the present tense—a facility qualifies only if it “is ... operated for the diagnosis, care, prevention, and treatment of human illness” (emphasis added). Cal. Health & Safety Code § 1250. “In construing statutes, the use of verb tense by the Legislature is considered significant.” *Hughes, supra*, 17 Cal.4th at 776, 72 Cal.Rptr.2d 624, 952 P.2d 641. The statute does not say that it applies to a facility that “is or previously was operated for the ... treatment of human illness.” In addition, a facility that is closed cannot meet the other requirements of the statute's definition—a closed facility cannot diagnose or care for patients, or admit patients for a 24-hour stay or longer. In sum, the statute clearly and unambiguously applies only to health facilities that are operating. Because the Assets being sold do not include an operating hospital, they do not constitute a “health facility,” Cal. Corp. Code § 5914(a) does not apply, and the Debtor is not required to obtain the approval of the Attorney General to sell the Assets.

The Attorney General maintains that Cal. Corp. Code § 5914(a) applies because the Debtor “controls” the Assets being sold, notwithstanding the fact that the Hospital is closed. That argument misses the mark. No one disputes that the Debtor controls the Assets in question, but that is not the issue. The issue is whether the Assets qualify as a “health facility” within the meaning of Cal. Health & Safety Code § 1250—and as explained above, they do not.

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The possibility that the purchaser may be able to reinstate the suspended license once the transaction closes does not change this fact. If the purchaser reinstates the license and opens a new general acute care hospital, the Assets may meet the definition of a “health facility” at some point in the future. But the future status of the Assets is irrelevant. All that matters is whether the Assets are a “health facility” now.

In this regard, the Court notes that reinstatement of the license is by no means an automatic process. To obtain reinstatement the applicant must submit satisfactory evidence of its reputable character and its ability to comply with all applicable health and safety regulations. *See* Cal. Health & Safety Code § 1265. Therefore, *828 the Court's determination that Cal. Corp. Code § 5914(a) does not apply will not allow the purchaser to operate a health facility without adequate oversight.

The Attorney General next argues that permitting the sale to proceed without his consent will subvert Cal. Corp. Code § 5914's purpose of protecting public health, safety, and welfare, by encouraging other health facilities to temporarily cease operations in order to circumvent the Attorney General's review of a sale of those facilities' assets. According to the Attorney General, allowing the Assets to be sold free of his review, when the Assets may be used as a health facility in the future, is an absurd result that requires the Court to depart from the literal language of the statute. The Court's construction, the Attorney General maintains, would defeat the legislation's purpose of ensuring that charitable healthcare assets could not be transferred from non-profit to for-profit entities absent regulatory oversight.

The Court does not agree that enforcing the literal language of the statute produces an absurd result demonstrably at odds with legislative intent. The Legislature enacted Cal. Corp. Code § 5914 to ensure that the public was not deprived of the benefits of charitable health facilities as a result of the transfer of those facilities' assets to for-profit entities. In enacting § 5914, the Legislature found:

Charitable, nonprofit health facilities have a substantial and beneficial effect on the provision of health care to the people of California, providing as part of their charitable mission uncompensated care to uninsured low-income families and under-compensated care to the poor, elderly, and disabled.

Transfers of the assets of nonprofit, charitable health facilities to the for-profit sector, such as by sale, joint venture, or other sharing of assets, directly affect the charitable use of those assets and may affect the availability of community health care services....

It is in the best interests of the public to ensure that the public interest is fully protected whenever the assets of a charitable nonprofit health facility are transferred out of the charitable trust and to a for-profit or mutual benefit entity.

1996 Cal. Legis. Serv. Ch. 1105 (A.B. 3101) (West).

Here, the Hospital was not operating at the time of the sale and thus was providing no healthcare services to uninsured low-income families. As a result, the Legislature's objective of preserving charitable health facilities for the benefit of the uninsured is not implicated by the sale of the former Hospital's Assets. In addition, the Assets are fully encumbered by the claims of secured creditors, leaving no remaining equity that could be devoted to charitable purposes. With the charitable assets having been exhausted, nothing remains to be protected by the Attorney General.

The Attorney General's concern that health facilities will deliberately close in order to sell their Assets free of the Attorney General's review is belied by the history of this case. Now that the Hospital has closed, the value the estate will receive on account of the sale has plunged from approximately \$19.5 million to approximately \$6.6 million. It is true that the present sale allows the Debtor to retain accounts receivable, which was not the case in the previous sale. But even after adjusting for this difference, the loss in value attributable to the closure of the Hospital is in the neighborhood of \$8 million. It defies credulity to assume that other non-profit hospitals would voluntarily close to escape the Attorney General's review of a sale, when closure results in such significant value destruction.

*829 Nor is there any indication here that the Debtor closed the Hospital for the purpose of evading the Attorney General's review of a sale. The Debtor initially attempted to sell the Hospital as an operating entity, and applied to the Attorney General for review of the sale. After the Attorney General imposed onerous and unrealistic financial conditions on the transaction, the Debtor, the proposed buyer, and representatives of

the Debtor's employee unions met with the Attorney General in a good-faith effort to obtain amendments to the conditions that would allow the sale to close. The Attorney General refused to modify the conditions. Only after it became impossible for the Debtor to sell the Hospital as an operating entity did the Debtor close the Hospital and seek to sell the Assets free of the Attorney General's review.

The Attorney General's assertion that health facilities will strategically close to circumvent oversight also ignores the reality that closing a hospital is time-consuming, costly, and requires fastidious planning. It is not a matter of simply locking the doors and putting up a "Gone Out of Business" sign. The reports prepared by the Patient Care Ombudsman appointed in this case illustrate the extent of the work performed by the Debtor to close the Hospital. The Debtor was required to insure that all patients were either discharged or relocated to suitable alternative facilities. Patient relocation provided particularly difficult, as many hospitals refused to accept certain patients because they lacked sufficient insurance coverage.⁴ The Debtor was required to terminate over 100 remaining staff members.⁵ The Debtor was required to arrange for medication remaining in its pharmacy to be returned to suppliers.⁶ Arrangements for suppliers to retrieve expensive and fragile leased medical equipment had to be made.⁷ The Debtor was required to comply with health and safety regulations, which were enforced by a daily on-site surveyor from the California Department of Public Health.⁸

[11] Finally, the Attorney General argues that sale of the Assets free of the Attorney General's review and consent is a violation of 28 U.S.C. § 959(b). Section 959(b) requires the Debtor to "manage and operate the property" in its possession "according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof." The Attorney General's argument lacks merit. First, § 959(b) applies only when the Debtor continues to operate its business, and does not apply where, as here, the Debtor is liquidating its assets. *See, e.g., S.E.C. v. Wealth Mgmt. LLC*, 628 F.3d 323, 334 (7th Cir. 2010) ("Modern courts have ... concluded that § 959(b) does not apply to liquidations"); *Alabama Surface Min. Comm'n v. N.P. Min. Co. (In re N.P. Min. Co., Inc.)*, 963 F.2d 1449, 1460

(11th Cir. 1992) ("A number of courts have held that section 959(b) does not apply when a business's operations have ceased and its assets are being liquidated"); *Saravia v. 1736 18th St., N.W., Ltd. P'ship*, 844 F.2d 823, 827 (D.C. Cir. 1988) (viewing § 959(b) "as applying only to operating businesses, not ones that were in the process of being liquidated"). Second, even if § 959(b) did apply to the Debtor, the sale of the Assets free of the Attorney General's review and consent does not violate applicable state law, as explained above.

C. The Attorney General's Application for a Stay Pending Appeal of the Order Approving the Sale is Denied

[12] The Attorney General's application for a stay pending appeal of the order approving the sale (the "Sale Order") is denied. Pursuant to Fed. R. Bankr. P. 8007(a) (1), the Court may issue a stay of a judgment, order, or decree pending appeal. In determining whether to grant a stay pending appeal, the Court considers the following four factors:

- (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits;
- (2) whether the applicant will be irreparably injured absent a stay;
- (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4)
- where the public interest lies.

Nken v. Holder, 556 U.S. 418, 426, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009).

[13] [14] [15] [16] [17] As the Supreme Court has explained, a stay pending appeal

"is not a matter of right, even if irreparable injury might otherwise result." *Virginian R. Co. [v. U.S.]*, 272 U.S. [658] at 672, 47 S.Ct. 222 [71 L.Ed. 463 (1926)]. It is instead "an exercise of judicial discretion," and "[t]he propriety of its issue is dependent upon the circumstances of the particular case." *Id.*, at 672–673, 47 S.Ct. 222; *see Hilton [v. Braunskill]*, *supra*, [481 U.S. 770] at 777, 107 S.Ct. 2113[, 95 L.Ed.2d 724 (1987)] ("[T]he traditional stay factors contemplate individualized judgments in each case"). The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion....

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The first two factors of the traditional standard are the most critical. It is not enough that the chance of success on the merits be “better than negligible.” ... By the same token, simply showing some “possibility of irreparable injury,” *Abbassi v. INS*, 143 F.3d 513, 514 (9th Cir. 1998), fails to satisfy the second factor.

Id. at 433–35.

[18] [19] To be entitled to a stay pending appeal, the moving party must make a “minimum permissible showing” with respect to each of the four factors. *Leiva–Perez v. Holder*, 640 F.3d 962, 965 (9th Cir. 2011). Provided the moving party meets a minimum threshold as to each factor, the Court may “balance the various stay factors once they are established.” *Id.* at 965. Under this balancing approach, a stronger showing of irreparable harm can offset a weaker showing of likelihood of success on the merits, and vice versa—provided that the minimum threshold with respect to each factor has been established. *Id.* at 965–66; see also *id.* at 964 (“Petitioner must show either a probability of success on the merits and the possibility of irreparable injury, or that serious legal questions are raised and the balance of hardships tips sharply in petitioner’s favor. These standards represent the outer extremes of a continuum, with the relative hardships to the parties providing the critical element in determining at what point on the continuum a stay pending review is justified.”).

1. Likelihood of Success on the Merits

[20] As the Ninth Circuit has explained:

*831 The first showing a stay petitioner must make is “a strong showing that he is likely to succeed on the merits.” *Id.* at 966 (quoting *Hilton*, 481 U.S. at 776, 107 S.Ct. 2113) (quotation marks omitted). There is some uncertainty as to the exact degree of likely success that stay petitioners must show, due principally to the fact that courts routinely use different formulations to describe this element of the stay test. What is clear, however, is that to justify a stay, petitioners need not demonstrate that it is more likely than not that they will win on the merits....

There are many ways to articulate the minimum quantum of likely success necessary to justify a stay—be it a “reasonable probability” or “fair prospect,” as *Hollingsworth*, [558 U.S. 183] 130 S.Ct. [705] at 710

[175 L.Ed.2d 657 (2010)], suggests; “a substantial case on the merits,” in *Hilton’s* words, 481 U.S. at 778, 107 S.Ct. 2113; or, as articulated in *Abbassi*, 143 F.3d at 514, that “serious legal questions are raised.” We think these formulations are essentially interchangeable, and that none of them demand a showing that success is more likely than not. Regardless of how one expresses the requirement, the idea is that in order to justify a stay, a petitioner must show, at a minimum, that she has a substantial case for relief on the merits.

Leiva–Perez, 640 F.3d at 967–68.

The Attorney General has failed to demonstrate that he is likely to succeed on the merits. As discussed above, accepting the Attorney General’s argument that the closed Hospital qualifies as a “health facility” under Cal. Health & Safety Code § 1250 would require the Court to read into the statute language that is not there. No absurd result flows from applying the statute’s plain language, which means that the Court is required to enforce the statute according to its terms.

2. Irreparable Injury

The Attorney General argues that he will be irreparably injured absent a stay because the closing of the sale, in conjunction with the Court’s finding that American Specialty is a good-faith purchaser within the meaning of § 363(m), will render an appeal moot. As a result, the Attorney General argues, he will be unable to obtain appellate review of an important issue affecting the welfare of the people of California.

Outside the bankruptcy context, the Ninth Circuit has held that the certainty that an appeal will become moot is enough to constitute irreparable injury. See *Artukovic v. Rison*, 784 F.2d 1354, 1356 (9th Cir.1986). However, within bankruptcy, a majority of courts have concluded that mootness does not demonstrate irreparable injury. See, e.g., *Ohanian v. Irwin (In re Irwin)*, 338 B.R. 839, 853 (E.D. Cal. 2006) (“It is well settled that an appeal being rendered moot does not itself constitute irreparable harm”); *In re Red Mountain Mach. Co.*, 451 B.R. 897, 908–09 (Bankr. D. Ariz. 2011) (internal citations omitted) (“[T]he law is clear in the Ninth Circuit that irreparable injury cannot be shown solely from the possibility that an appeal may be moot”); *In re Convenience USA, Inc.*, 290 B.R. 558, 563 (Bankr. M.D.N.C. 2003) (stating that “a majority of the cases which have considered the issue

have found that the risk that an appeal may become moot does not, standing alone, constitute irreparable injury” and citing cases).

The inquiry is complicated in this case by the fact that the Attorney General seeks review of an important issue of state law that will likely recur in future bankruptcy cases. Therefore, although the *832 question is a close one, the Court finds that under the circumstances of this case the likelihood of mootness does amount to irreparable harm. However, a stay pending appeal is not a matter of right “even if irreparable injury might otherwise result.” *Nken*, 556 U.S. at 427, 129 S.Ct. 1749. Given that the three other factors weigh strongly against a stay, the Court declines to issue a stay notwithstanding the Attorney General's showing of irreparable injury.

3. Balance of the Hardships

The injury to the Debtor resulting from issuance of a stay will be substantially greater than the injury to the Attorney General from denial of a stay. The estate is in a precarious financial position and is desperately in need of the funds from the sale. As discussed above, the collapse of the previous sale has already caused the estate's financial position to deteriorate significantly. Issuance of a stay could cause the present sale to collapse, depriving the estate of much-needed funds. By contrast, denial of a stay will most likely result in the Attorney General being unable to obtain appellate review of the Court's decision. This injury is less severe than the financial injury the Debtor would likely suffer were a stay issued, because the Court has found that the Attorney General's appeal is unlikely to succeed and does not raise serious legal questions.

4. Public Interest

“There is a great public interest in the efficient administration of the bankruptcy system.” *Adelson v. Smith (In re Smith)*, 397 B.R. 134, 148 (Bankr. D. Nev. 2008). As noted, a stay could cause the sale to collapse, seriously injuring the estate. Here, the public's interest in the Attorney General's ability to obtain appellate review with respect to an important state law issue is outweighed by the public's interest in efficient administration of the bankruptcy system, particularly in view of the Court's determination that the Attorney General's appeal is unlikely to succeed.

D. American Specialty is a Good-Faith Purchaser Pursuant to Bankruptcy Code § 363(m)

Section 363(m) provides that the “reversal or modification on appeal of an authorization ... of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.” Based on the testimony of Dr. Gurpreet Singh, American Specialty's principal, the Court finds that American Specialty is a good-faith purchaser within the meaning of § 363(m).

[21] In one of the more bizarre objections to a § 363(m) determination that this Court has encountered, Promise Hospital of East Los Angeles, L.P. (“Promise”), the disgruntled stalking-horse bidder who lost to American Specialty, maintains that American Specialty is not a good-faith purchaser, on the grounds that Dr. Singh failed to disclose to the Court the extent of his due diligence discussions with the Debtor prior to the auction. Before American Specialty's overbid, the Debtor intended to sell the Assets to Promise for \$4.5 million. American Specialty's bidding increased the sale price to \$6.7 million. The purpose of § 363(m) is to discourage bidders from colluding for the purpose of driving down the sales prices at bankruptcy auctions. *See Ewell v. Diebert (In re Ewell)*, 958 F.2d 276, 281 (9th Cir. 1992) (“Typically, lack of good faith is shown by fraud, collusion between the purchaser and other bidders or the trustee, or an attempt *833 to take grossly unfair advantage of other bidders”). Here, American Specialty's bidding increased the value received by the estate on account of the sale by \$2.1 million. Promise's objections are nothing more than a last-ditch attempt to scuttle the sale to American Specialty so that it may buy the Assets on the cheap.

E. Promise's Other Objections to American Specialty's Bid are Overruled

Promise argues that the Court's determination to allow American Specialty to bid at the sale hearing violated its due process rights, since the Debtor noticed the hearing as a private sale not subject to overbids. Promise cites *In re Northern Star Indus., Inc.*, 38 B.R. 1019 (E.D.N.Y. 1984) in support of its position. In *Northern Star*, the Trustee sought approval of a sale of real property to Wardam Steel Corporation (“Wardam Steel”). *Id.* at 1020. Because no

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objections were filed to the sale motion, Wardam did not attend the sale hearing. *Id.* At the sale hearing, Sydney Bletter appeared and presented a purchaser offer superior to Wardam Steel's. *Id.* The bankruptcy court approved the sale to Mr. Bletter. *Id.* Wardam objected to the bankruptcy court's ruling, stating that it had already made substantial improvements to the property in reliance upon the fact that no objections had been filed to the original proposed sale. *Id.* at 1021. The district court overturned the bankruptcy court's ruling, finding that the bankruptcy court's decision to accept Mr. Bletter's increased offer, without notice to Wardam Steel, violated Wardam Steel's due process rights. *Id.*

Unlike the losing bidder in *Northern Star*, Promise both participated in the sale hearing and had advance notice that the Court was likely to consider overbids at the sale hearing. The day prior to the sale hearing, the Court made available to the parties its tentative ruling, which stated that the Court was inclined to approve American Specialty's bid over Promise's. Likely because of the distinct possibility of an auction, Promise appeared at the hearing via counsel and with its CEO, Peter Baranoff, and CFO, James Hopwood. As bidding progressed, the Court granted Promise a one-hour recess to allow it to

further consider its bidding position. Thus, Promise had a full opportunity to participate in the auction, and there was no violation of its due process rights. In addition, contrary to the situation in *Northern Star*, Promise has not made capital improvements to the Assets. *Northern Star* is inapposite, and Promise's objections to the Court's decision to allow American Specialty to bid are overruled.

III. Conclusion

For the foregoing reasons, the Assets of the closed Hospital are not a "health facility" within the meaning of Cal. Corp. Code § 5914(a). Consequently, the Debtor is not required to obtain the consent of the Attorney General prior to selling those Assets. The Attorney General's contention that he has the authority to review the sale is an "interest in ... property" within the meaning of Bankruptcy Code § 363(f). The Assets may be sold free and clear of that interest pursuant to Bankruptcy Code § 363(f)(1).

All Citations

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Footnotes

- 1 This Court has jurisdiction pursuant to 28 U.S.C. §§ 157 and 1334 and General Order No. 13–05 of the U.S. District Court for the Central District of California.
- 2 Cal. Health & Safety Code § 1300(a) provides in relevant part: "Any licensee or holder of a special permit may, with the approval of the state department, surrender his or her license or special permit for suspension or cancellation by the state department."
- 3 Unless otherwise indicated, all statutory references are to the Bankruptcy Code, 11 U.S.C. §§ 101–1532.
- 4 See Second Interim Report of Patient Care Ombudsman Pursuant to 11 U.S.C. § 333(b)(2) [Doc No. 657] at 10–16 (describing the difficulties the Hospital encountered in relocating patients).
- 5 *Id.* at 13.
- 6 *Id.* at 12.
- 7 *Id.* at 15.
- 8 *Id.* at 11–13 (describing daily visits by the California Department of Public Health to monitor the Hospital's orderly shutdown).

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Ruling Page 1 of 32

United States Bankruptcy Court
Central District of California
Los Angeles
Judge Ernest Robles, Presiding
Courtroom 1568 Calendar

Wednesday, August 12, 2020

Hearing Room 1568

10:00 AM

2:18-20151 Verity Health System of California, Inc.

Chapter 11

#10.00 Hearing re [5199] *Debtors' Emergency Motion for the Entry of an Order: (I) Enforcing the Order Authorizing the Sale to Prime Healthcare Services, Inc.; (II) Finding that the Sale is Free and Clear of Additional Conditions; (III) Finding That the Attorney General Abused His Discretion in Imposing Conditions on the St. Francis Medical Center Sale; and (IV) Granting Related Relief*

Docket 0

Matter Notes:

8/12/2020

The tentative ruling will be the order.

Party to lodge order: As set forth in the Tentative Ruling

POST PDF OF TENTATIVE OR AMENDED TENTATIVE RULING TO CIAO

Tentative Ruling:

8/12/2020

Note: Telephonic Appearances Only. The Courtroom will be unavailable for in-court appearances. If you wish to make a telephonic appearance, contact Court Call at 888-882-6878, ext. 188 no later than one hour before the hearing. The cost for persons representing themselves has been waived.

(Amended after hearing in RED.) Before the Court is the Debtors' motion to sell St. Francis Medical Center ("St. Francis"), a not-for-profit hospital, free and clear of regulatory conditions which the California Attorney General claims authority to impose under Cal. Corp. Code §§ 5914 *et seq.* For the reasons set forth below, the Court finds that § 363 of the Bankruptcy Code authorizes a sale free and clear of the conditions which the Attorney General contends he is authorized to impose.

Pleadings Filed and Reviewed:

8/12/2020 5:25:03 PM

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Los Angeles
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Hearing Room 1568

10:00 AM

CONT... Verity Health System of California, Inc. Chapter 11

- 1) Debtors' Emergency Motion for the Entry of an Order: (I) Enforcing the Order Authorizing the Sale to Prime Healthcare Services, Inc.; (II) Finding that the Sale is Free and Clear of Additional Conditions; (III) Finding that the Attorney General Abused His Discretion in Imposing Additional Conditions on the St. Francis Medical Center Sale; and (IV) Granting Related Relief [Doc. No. 5199] (the "Motion")
 - a) Order Setting Hearing on Emergency Motion for Entry of an Order Enforcing the Order Authorizing the Sale to Prime Healthcare Services, Inc. [Doc. No. 5206]
- 2) Opposition of California Attorney General to [Motion] [Doc. No. 5388]
 - a) Errata to Opposition of California Attorney General to [Motion] [Doc. No. 5404]
- 3) Debtors' Reply to California Attorney General's Opposition to [Motion] [Doc. No. 5423]
- 4) Order Striking from the Record Prospect Medical's Opposition to the Debtors' Emergency Motion to Enforce the Sale Order [Doc. No. 5401]
 - a) Memorandum of Decision Finding that Prospect Medical Lacks Standing to Oppose the Debtors' Emergency Motion to Enforce the Sale Order [Doc. No. 5399]
 - b) Prospect Medical's Response to [the Motion] [Doc. No. 5368]

I. Facts

On August 31, 2018 (the "Petition Date"), Verity Health System of California, Inc. ("VHS") and certain affiliated entities (collectively, the "Debtors") each filed voluntary Chapter 11 petitions. The Debtors' cases are being jointly administered.

As of the Petition Date, the Debtors operated six acute care hospitals in the state of California. On December 27, 2018, the Court authorized the Debtors to sell two of their hospitals—O'Connor Hospital and Saint Louise Regional Hospital—to Santa Clara County (the "Santa Clara Sale"). **[Note 1]** The Santa Clara Sale closed on February 28, 2019.

A. The 2015 Conditions

In 2015, prior to the commencement of these cases, the Debtors' predecessor sought authorization from the California Attorney General (the "Attorney General"), pursuant to Cal. Corp. Code § 5914, to implement a *System Restructuring and Support Agreement* (the "Restructuring Agreement"). The Attorney General approved

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the Restructuring Agreement, subject to various conditions (the "2015 Conditions"). Among other things, the 2015 Conditions required St. Francis to (1) maintain specified health services at minimum levels, (2) participate in the Medicare and Medi-Cal programs, (3) provide community benefit programs, (4) provide specified levels of charity care, (5) maintain various county contracts, and (6) assume pension obligations.

B. The Failed SGM Sale

On February 19, 2019, the Court entered an order establishing bidding procedures [Doc. No. 1572] (the "SGM Bidding Procedures Order") for the auction of the Debtors' four remaining hospitals—St. Francis Medical Center ("St. Francis"), St. Vincent Medical Center (including St. Vincent Dialysis Center) ("St. Vincent"), and Seton (including Seton Medical Center Coastsides ("Seton Coastsides")). Under the SGM Bidding Procedures Order, Strategic Global Management, Inc. ("SGM") was designated as the stalking horse bidder. SGM's bid for all four of the hospitals was \$610 million. The Bidding Procedures Order approved an Asset Purchase Agreement between the Debtors and SGM (the "SGM APA").

The hospitals were extensively marketed by the Debtors' investment banker, Cain Brothers, a division of KeyBank Capital Markets, Inc. ("Cain"). Cain notified ninety parties of the auction process. Sixteen of these parties requested continued access to a data room containing information about the hospitals.

Notwithstanding Cain's thorough marketing efforts, the Debtors did not receive any qualified bids for all of the hospitals. The Debtors received one bid to purchase only St. Vincent and one bid to purchase only St. Francis. After consulting with the Official Committee of Unsecured Creditors (the "Committee") and the largest secured creditors, the Debtors determined not to conduct an auction. On May 2, 2019, the Court entered an order finding that SGM was the winning bidder and approving the sale to SGM (the "SGM Sale").

On November 27, 2019, the Court entered a memorandum of decision and accompanying order finding that as of November 19, 2019, all conditions precedent under the SGM APA to SGM's obligation to close the SGM Sale had been satisfied. Doc. Nos. 3723–24. The Court found that pursuant to § 1.3 of the SGM APA, SGM was obligated to close the SGM Sale by no later than December 5, 2019. *Id.* SGM did not close the sale by December 5, 2019. On December 27, 2019, the Debtors sent SGM a notice terminating the SGM APA and asserting that SGM had materially breached the SGM APA. Doc. No. 3899.

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Los Angeles
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Wednesday, August 12, 2020

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CONT... Verity Health System of California, Inc.

Chapter 11

C. The Prime Sale

After the SGM Sale failed to close, Cain commenced a new marketing process. In December 2019, Cain began making phone calls to parties who had previously expressed interest in acquiring St. Francis. On January 3, 2020, Cain e-mailed all parties who had previously executed NDAs and explained that the Debtors were initiating another marketing process. Ultimately, 61 parties executed NDAs with respect to the renewed marketing process and were granted access to an online data room.

On January 31, 2020, the Debtors received seven Indications of Interest (the "IOIs") for the potential acquisition of St. Francis. Cain contacted the seven potential purchasers who submitted the IOIs and continued to work with the purchasers to respond to questions and provide information.

On February 26, 2020, the Court entered an *Order (1) Approving Auction Sale Format and Bidding Procedures; (2) Approving Process for Discretionary Selection of Stalking Horse Bidder and Bid Protections; (3) Approving Form of Notice to be Provided to Interested Parties; (4) Scheduling a Court Hearing to Consider Approval of the Sale to the Highest and Best Bidder; and (5) Approving Procedures Related to the Assumption of Certain Executory Contracts and Unexpired Leases* [Doc. No. 4165] (the "Bidding Procedures Order," and the motion for entry of the Bidding Procedures Order, the "Bidding Procedures Motion"). The Bidding Procedures Order established procedures governing the auction (the "Auction") of St. Francis.

The Bidding Procedures Order authorized the Debtors to designate a Stalking Horse Bidder without further order of the Court. The Debtors designated Prime Healthcare Services, Inc. ("Prime") as the Stalking Horse Bidder. The Debtors received bids from potential purchasers, but after consulting with their advisors and the Consultation Parties (as defined in the Bidding Procedures Order), determined that such bids did not constitute Qualified Bids. The Debtors selected Prime as the Winning Bidder and did not conduct the Auction. On April 9, 2020, the Court entered an order authorizing the Debtors to sell St. Francis to Prime. *See* Doc. No. 4511 (the "Sale Order").

The Asset Purchase Agreement under which Prime agreed to purchase St. Francis (the "APA") provided that Prime would close the sale so long as any conditions imposed by the Attorney General under the review process set forth in Cal. Corp. Code §§ 5914 *et seq.* were substantially consistent with conditions that Prime had agreed to accept (the "Approved Conditions"). [Note 2] In the event that the Attorney

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General sought to impose conditions materially different from the Approved Conditions (the "Additional Conditions"), the APA provided that the Debtors would have an opportunity to seek a determination from the Court that the St. Francis could be sold free and clear of the Additional Conditions under § 363(f) of the Bankruptcy Code. Under the APA, Additional Conditions imposing upon Prime costs of \$5 million or more are conclusively deemed to be materially different from the Approved Conditions. Prime is not required to close the Sale unless the Debtors obtain an unstayed order authorizing the sale free and clear of the Additional Conditions.

On June 25, 2020, Prime filed *Prime Healthcare's Notice of Acceptance of Additional Attorney General Conditions for Purchase of St. Francis Medical Center* [Doc. No. 4954] (the "Prime Notice"). Notwithstanding the fact that it was not obligated to do so under the APA, Prime agreed to accept certain of the Additional Conditions that had been recommended in the *Health Care Impact Statement* prepared by JD Healthcare in connection with the Attorney General's review of the sale. Among other things, Prime agreed to (1) maintain cancer services, including radiation oncology, at existing levels for at least the next ten years, (2) maintain the pediatric behavioral counseling clinic located at 4390 Tweedy Avenue, South Gate, CA 90280, (3) maintain the multi-specialty clinic located at 3628 East Imperial Highway, Ste. 103, Lynwood, CA 90262, and (4) maintain the American Career College program for onsite training for at least five years from the closing date.

On July 16, 2020, the Attorney General consented to the sale, but conditioned his consent upon Prime's adherence to a new set of conditions (the "2020 Conditions"). The 2020 Conditions include numerous Additional Conditions materially different from the Approved Conditions. On July 21, 2020, Prime sent a letter to the Attorney General, requesting an opportunity to meet and confer regarding a potential consensual resolution with respect to the Additional Conditions. On July 24, 2020, Prime confirmed that it agreed to accept all but three of the Additional Conditions—charity care amount, the community benefit services commitment, and the continuation of an Affiliation Agreement for physicians in post-graduate training. Prime and the Attorney General have been unable to reach an agreement with respect to these three Additional Conditions.

The differences between the charity care and community benefit payments Prime has agreed to accept, and the payments which the Attorney General asserts must be made, are set forth in the following table:

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Condition	Terms Acceptable to Prime	Terms Asserted by Attorney General	Difference
Charity care amount	\$8 million per year for six years	\$10,186,173 per year for six years	\$13.117 million over six years
Community benefit services amount	\$1,139,301 per year for six years	\$1,597,077 per year for six years	\$2.747 million over six years

The third condition in dispute is the Attorney General's requirement that Prime accept an Affiliation Agreement for physicians in post-graduate training. Under the Affiliation Agreement, one post-graduate fellow rotates through St. Francis' trauma center for one month, twice per year. Prime opposes this condition because it would prevent Prime from establishing a robust post-graduate resident training program due to certain regulations.

Prime will not close the sale absent an order finding that St. Francis can be sold free and clear of the Additional Conditions pursuant to § 363(f). If the sale does not close, the most likely outcome will be the closure of St. Francis. The Debtors incur operational losses of approximately \$450,000 for each day that the sale does not close. Chadwick Decl. [Doc. No. 5199] at ¶ 7. The Debtors do not have sufficient cash on hand to conduct another sale of St. Francis. *Id.*

It is against this backdrop that the Debtors move for authorization to sell the St. Francis free and clear of the Additional Conditions, pursuant to § 363(f). The Debtors argue that the Additional Conditions constitute an "interest in property" within the meaning of § 363(f), and that a sale free and clear of the Additional Conditions may be authorized under § 363(f)(1), (4), or (5), for the following reasons:

- Pursuant to § 363(f)(1), St. Francis may be sold under applicable nonbankruptcy law, because under California law, the purchaser of assets does not assume successor liability.
- Pursuant to § 363(f)(4), the validity of the Additional Conditions is subject to a *bona fide* dispute, because the Attorney General abused his discretion in imposing the Additional Conditions.
- Pursuant to § 363(f)(5), the Attorney General could be compelled to accept a money satisfaction of certain of the Additional Conditions, such as the condition that Prime provide specified levels of charitable care.

In addition, the Debtors assert that imposition of the Additional Conditions

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violates § 525, which prohibits government entities from discriminating against debtors who have failed to pay dischargeable debts when issuing licenses. According to the Debtors, the Additional Conditions constitute an attempt by the Attorney General to collect a dischargeable debt. The Debtors' theory is that Attorney General's refusal to approve the sale absent imposition of the Additional Conditions amounts to the discriminatory denial of licensure in contravention of § 525.

The Attorney General opposes the Motion. He argues that because the Debtors are non-profit entities, the sale is governed exclusively by § 363(d)(1), and that § 363(f) does not apply. The Attorney General denies that he abused his discretion in imposing the Additional Conditions. He notes that he considered an extensive record in arriving at the Additional Conditions, and states that Prime's unwillingness to accept the Additional Conditions does not mean that his decision to impose them was an abuse of discretion.

II. Findings of Fact and Conclusions of Law

Section 363(d)(1) authorizes non-profit entities, such as the Debtors, to sell estate assets only if the sale is "in accordance with nonbankruptcy law applicable to the transfer of property by" a non-profit entity. Section 541(f) similarly provides that property held by debtors that are § 501(c)(3) corporations under the Internal Revenue Code may be transferred, but "only under the same conditions as would apply if the debtor had not filed a case under this title." Section 363(b) authorizes the Debtors to sell estate property out of the ordinary course of business, subject to court approval. The Debtors must articulate a business justification for the sale. *In re Walter*, 83 B.R. 14, 19–20 (9th Cir. BAP 1988). Whether the articulated business justification is sufficient "depends on the case," in view of "all salient factors pertaining to the proceeding." *Id.* at 19–20. Section 363(f) provides that a sale of estate property may be "free and clear of any interest in such property of an entity other than the estate," provided that certain conditions are satisfied.

A. The Additional Conditions are an "Interest in Property" Within the Meaning of § 363(f)

As this Court has previously explained:

The Bankruptcy Code does not define the phrase "interest in ... property" for purposes of § 363(f). The Third Circuit has held that the phrase "interest in ... property" is "intended to refer to obligations that are connected to, or

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arise from, the property being sold." *Folger Adam Sec., Inc. v. DeMatteis/MacGregor JV*, 209 F.3d 252, 259 (3d Cir. 2000). That conclusion is echoed by *Collier on Bankruptcy*, which observes a trend in caselaw "in favor of a broader definition [of the phrase] that encompasses other obligations that may flow from ownership of the property." 3 Alan N. Resnick & Henry J. Sommer, *Collier on Bankruptcy* ¶ 363.06[1] (16th ed. 2017).

Courts have held that interests in property include monetary obligations arising from the ownership of property, even when those obligations are imposed by statute. For example, in *Mass. Dep't of Unemployment Assistance v. OPK Biotech, LLC (In re PBBPC, Inc.)*, 484 B.R. 860 (1st Cir. BAP 2013), the court held that taxes assessed by Massachusetts under its unemployment insurance statutes constituted an "interest in ... property." The taxes were computed based on the Debtor's "experience rating," which was determined by the number of employees it had terminated in the past. *Id.* at 862. Because the Debtor had terminated most of its employees prior to selling its assets, its experiencing rating, and corresponding unemployment insurance tax liabilities, were very high. *Id.* The *PBBPC* court held that the experience rating was an interest in property that could be cut off under § 363(f). *Id.* at 869–70. Similarly, in *United Mine Workers of Am. Combined Benefit Fund v. Leckie Smokeless Coal Co. (In re Leckie Smokeless Coal Co.)*, 99 F.3d 573, 581, the court held that monetary obligations imposed by the Coal Industry Retiree Health Benefit Act of 1992 constituted an "interest in ... property" within the meaning of § 363(f).

In re Gardens Reg'l Hosp. & Med. Ctr., Inc., 567 B.R. 820, 825–26 (Bankr. C.D. Cal. 2017), *appeal dismissed*, No. 2:16-BK-17463-ER, 2018 WL 1229989 (C.D. Cal. Jan. 19, 2018) ("*Gardens I*").

The Additional Conditions are an "interest in property" within the meaning of § 363(f). First, the Additional Conditions are monetary obligations arising from the ownership of property. Similar to the "experience rating" at issue in *PBBPC, Inc.*, the Additional Conditions were calculated based upon St. Francis' prior operating history. Among other things, the Additional Conditions require that Prime furnish specified levels of charity care and community benefit services. The required service levels have been set based upon St. Francis' historical operations.

Second, the Attorney General's statutory authority to impose the Additional Conditions arises from the Debtors' operation of St. Francis as a non-profit entity.

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Had the Debtors not operated St. Francis in this manner, there could be no contention that the Prime Sale is subject to the Attorney General's review pursuant to Cal. Corp. Code § 5914. In this sense as well, the Additional Conditions "arise from the property being sold," *In re Trans World Airlines, Inc.*, 322 F.3d 283, 290 (3d Cir. 2003), and therefore qualify as an "interest in ... property" within the meaning of § 363(f).

Third, the Attorney General is barred by the law of the case doctrine from asserting that the Additional Conditions are not an "interest in ... property." "Under the 'law of the case' doctrine, a court is ordinarily precluded from reexamining an issue previously decided by the same court, or a higher court, in the same case." *Richardson v. United States*, 841 F.2d 993, 996 (9th Cir.), *amended*, 860 F.2d 357 (9th Cir. 1988). "For the doctrine to apply, the issue in question must have been 'decided explicitly or by necessary implication in [the] previous disposition.'" *United States v. Lummi Indian Tribe*, 235 F.3d 443, 452 (9th Cir. 2000).

In connection with the Santa Clara Sale, the Court addressed the exact issue presented here—whether conditions that the Attorney General sought to impose upon the sale constituted an "interest in ... property" for purposes of § 363(f). **[Note 3]** The Attorney General litigated the issue, and the Court overruled the Attorney General's arguments. **[Note 4]** The Attorney General voluntarily dismissed his appeal of the order finding that the conditions he sought to impose were an "interest in ... property." The law of the case doctrine bars relitigation of the issue.

The Attorney General's new argument that the Additional Conditions are not an interest in property because a sale involving a non-profit debtor is governed exclusively by § 363(d), and not § 363(f), is also barred by the law of the case doctrine. The Attorney General could have made this argument in connection with the prior litigation, but he did not do so. The Court's prior decision implicitly rejected the theory that § 363(f) does not apply to a sale involving a non-profit debtor.

The doctrine of issue preclusion is a further bar to any attempt by the Attorney General to contest the Additional Conditions' status as an "interest in ... property." As explained by the Supreme Court, issue preclusion forecloses "'successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment,' even if the issue recurs in the context of a different claim." *Taylor v. Sturgell*, 553 U.S. 880, 892, 128 S. Ct. 2161, 2171, 171 L. Ed. 2d 155 (2008) (internal citations omitted). The doctrine protects "against 'the expense and vexation attending multiple lawsuits, conserve[s] judicial resources, and foster[s] reliance on judicial action by minimizing the possibility of inconsistent decisions.'" *Id.* Issue preclusion applies if "(1) the issue at stake was identical in both proceedings;

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(2) the issue was actually litigated and decided in the prior proceedings; (3) there was a full and fair opportunity to litigate the issue; and (4) the issue was necessary to decide the merits." *Howard v. City of Coos Bay*, 871 F.3d 1032, 1041 (9th Cir. 2017).

The Attorney General has litigated the issue presented here, both in connection with the Santa Clara Sale and in connection with a sale in *Gardens I* (the "Gardens Sale"). Just as he did in the Santa Clara Sale, the Attorney General claimed in the Gardens Sale the regulatory authority to impose conditions. The Court found that the Attorney General's claim to regulatory authority was an "interest in ... property" for purposes of § 363(f). *Gardens I*, 567 B.R. at 826. The Attorney General is precluded from relitigating the issue of whether his claimed authority to impose conditions on the SGM Sale is an "interest in ... property."

B. The Debtors May Sell the Hospitals Free and Clear of the Additional Conditions Pursuant to § 363(f)(1)

Sale of St. Francis may be free and clear of the Additional Conditions only upon satisfaction of one or more of the five disjunctive sub-factors set forth in § 363(f). Under § 363(f)(1), a sale free and clear may be approved if permitted by applicable nonbankruptcy law.

Applicable nonbankruptcy law permits a sale free and clear for two reasons. First, the Attorney General's attempt to impose the Additional Conditions upon Prime is equivalent to an attempt to impose successor liability upon Prime. California law does not authorize the imposition of successor liability upon Prime under these circumstances. Second, even if the Attorney General were authorized to impose successor liability under California law, the Attorney General abused his discretion in imposing the Additional Conditions, meaning that the Additional Conditions must be set aside.

1. California Law Does Not Authorize the Attorney General to Impose Successor Liability Upon Prime

i. The Additional Conditions Qualify as Successor Liability

The Attorney General's attempt to impose the Additional Conditions upon Prime qualifies as an attempt to impose successor liability upon Prime. The reason is that the Additional Conditions impose upon Prime many of the same obligations imposed upon the Debtors by the 2015 Conditions. By attempting to enforce the Additional

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Conditions, the Attorney General is attempting to enforce the obligations imposed by the 2015 Conditions against Prime.

It is true that the 2015 Conditions are not identical to the Additional Conditions. Under the 2015 Conditions, St. Francis was required to provide annual charity care in an amount equal to or greater than \$16,646,323; the charity care amount under the Additional Conditions is \$10,186,173 annually. The community benefit requirement under the 2015 Conditions was \$1,362,680 annually; under the Additional Conditions, the amount is \$1,597,077 annually.

Considered within the overall scope of the obligations imposed, the differences between the 2015 Conditions and the Additional Conditions are comparatively inconsequential. The Additional Conditions still qualify as successor liability even though they are not exactly identical to the 2015 Conditions.

The Additional Conditions cannot be appropriately categorized as Prime's obligation to comply with applicable law on a going-forward basis, rather than as successor liability. For example, the Additional Conditions are unlike environmental remediation obligations that are not successor liability given that any entity purchasing contaminated property has an obligation to comply with environmental law. The distinction can be illustrated by an examination of the court's discussion of environmental remediation obligations in *In re Gen. Motors Corp.*:

Under section 363(f), there could be no successor liability imposed on the purchaser for the [seller's] ... monetary obligations related to cleanup costs, or any other obligations that were obligations of the seller. But the purchaser would have to comply with its environmental responsibilities starting with the day it got the property, and if the property required remediation as of that time, any such remediation would be the buyer's responsibility Those same principles will be applied here. Any Old GM properties to be transferred will be transferred free and clear of successor liability, but New GM will be liable from the day it gets any such properties for its environmental responsibilities going forward.

407 B.R. 463, 508 (Bankr. S.D.N.Y. 2009).

The key difference between the contaminated property at issue in *General Motors* and the present situation is that *any* entity that purchased the contaminated property at issue in *General Motors* would have been required to comply with environmental regulations going forward. Environmental compliance obligations would not vary

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based upon the identity of the purchaser or seller. Here, by contrast, whether a purchaser is obligated to comply with Attorney General conditions can vary, depending upon either the identity of the purchaser or the identity of the seller. There is no general obligation imposed upon an entity that purchases a hospital in the State of California to operate that hospital in accordance with conditions asserted by the Attorney General. The Attorney General's regulatory authority applies only to non-profit hospitals, and only to certain types of sale transactions. Had the Hospitals been sold to a public entity, such as the County of Los Angeles, the Attorney General could not have reviewed the sale. *See Verity I*, 598 B.R. at 294 (holding that Cal. Corp. Code § 5914 did not apply where non-profit hospitals were sold to a public entity). Had St. Francis been operated by a for-profit entity, the Attorney General could not have reviewed the sale. *See* Cal. Corp. Code § 5914(a) (requiring only nonprofit corporations to submit the sale of assets to Attorney General review).

Because the obligation to comply with the Additional Conditions is contingent upon the identity of the purchaser and the identity of the seller, the conditions cannot fairly be characterized as the purchaser's obligation to comply with applicable law on a going-forward basis. The Attorney General can claim authority to impose the Additional Conditions upon purchaser Prime only because the Debtors operated the St. Francis as a non-profit. Since the Attorney General's alleged authority to impose the Additional Conditions derives from the manner in which the Debtors operated St. Francis, the Additional Conditions are appropriately characterized as successor liability.

ii. Successor Liability Cannot Be Imposed Under California Law

Under California law, the general rule is "that where a corporation purchases, or otherwise acquires by transfer, the assets of another corporation, the acquiring corporation does not assume the selling corporation's debts and liabilities." *Fisher v. Allis-Chalmers Corp. Prod. Liab. Tr.*, 95 Cal. App. 4th 1182, 1188, 116 Cal. Rptr. 2d 310, 315 (2002). The general rule does not apply if "(1) there is an express or implied agreement of assumption, (2) the transaction amounts to a consolidation or merger of the two corporations, (3) the purchasing corporation is a mere continuation of the seller, or (4) the transfer of assets to the purchaser is for the fraudulent purpose of escaping liability for the seller's debts." *Id.*

None of the exceptions to the general rule are present here. First, Prime has not agreed to assume the Additional Conditions, either expressly or by implication.

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Second, the Prime Sale is not a consolidation or merger of the Debtors and Prime. A sale transaction is a consolidation or merger of two corporations "where one corporation takes all of another's assets without providing any consideration that could be made available to meet claims of the other's creditors or where the consideration consists wholly of shares of the purchaser's stock which are promptly distributed to the seller's shareholders in conjunction with the seller's liquidation." *Ray v. Alad Corp.*, 19 Cal. 3d 22, 28, 560 P.2d 3 (1977) (internal citations omitted). Neither factor applies. Prime is paying for the Hospitals in cash (not stock), and that cash will be distributed to the Debtors' creditors through a plan of liquidation. Third, Prime is not a mere continuation of the Debtors. A purchaser is a mere continuation of a seller if there is inadequate consideration for the purchaser or if one or more persons are officers, directors, or stockholders or both corporations. *Id.* Consideration for the Prime Sale is adequate and no officers or directors of the Debtors are officers or directors of Prime. [Note 5] Fourth, the Debtors are not selling St. Francis for the purpose of escaping liabilities for their debts. In fact, the opposite is true—the objective of the Prime Sale is to generate proceeds to pay the Debtors' debts through a liquidating Plan. In sum, successor liability cannot be imposed on Prime under California common law.

Successor liability cannot be imposed under Cal. Corp. Code §§ 5914–5919. Cal. Corp. Code § 5914 authorizes the Attorney General to review transactions in which a non-profit healthcare facility seeks to transfer a material amount of its assets to a for-profit entity, and provides in relevant part:

Any nonprofit corporation that is defined in Section 5046 and operates or controls a health facility, as defined in Section 1250 of the Health and Safety Code, or operates or controls a facility that provides similar health care, regardless of whether it is currently operating or providing health care services or has a suspended license, shall be required to provide written notice to, and to obtain the written consent of, the Attorney General prior to entering into any agreement or transaction to do either of the following:

(A) Sell, transfer, lease, exchange, option, convey, or otherwise dispose of, its assets to a for-profit corporation or entity or to a mutual benefit corporation or entity when a material amount of the assets of the nonprofit corporation are involved in the agreement or transaction.

Cal. Corp. Code § 5914(a)(1) (West).

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The "Attorney General shall have discretion to consent to, give conditional consent to, or not consent to" the transaction. Cal. Corp. Code § 5917.

Nothing within the statute authorizes the Attorney General to impose successor liability upon Prime, the for-profit entity that purchased the healthcare assets from the non-profit Debtors. Under the statute, the Attorney General is authorized to review transactions entered into by a "nonprofit corporation that ... operates or controls a health facility," Cal. Corp. Code § 5914(a)(1), and to "consent to, give conditional consent to, or not consent to" any such transactions, Cal. Corp. Code § 5917. These provisions do not grant the Attorney General authority to impose going-forward obligations on the assets that are the subject of the transaction. That is, the statute does not provide that the healthcare assets themselves are subject to regulation by the Attorney General. Rather, it is the non-profit status of the entity operating the healthcare assets that triggers the Attorney General's regulatory authority. Upon transfer of the healthcare assets from the non-profit entity to the for-profit entity, the Attorney General's regulatory authority over the assets terminates.

The issue of the Attorney General's authority to impose successor liability arose in the case of *La Paloma Generating Co.*, No. 16-12700, 2017 WL 5197116 (Bankr. D. Del. Nov. 9, 2017). In *La Paloma*, the debtor operated a power plant subject to a cap-and-trade emissions regulation. The regulation required "Covered Entities"—defined as entities engaging in operations that generated emissions—to surrender "Compliance Instruments" equal to the amount of emissions generated at specified times. At issue was whether a power plant could be sold "free and clear of, and without the purchaser assuming, any obligation to surrender compliance instruments under the California Cap-and-Trade Program for emissions generated by the Debtors and/or their facility during the period before the transfer of the assets." *Id.* at *2. The court found that "[u]nder the Regulation, only entities—and not assets—are Covered Entities" subject to the obligation to surrender Compliance Instruments. *Id.* at *5. As a result, the court found, the debtors could sell the power plant free and clear of the surrender obligations, pursuant to § 363(f)(1). *Id.* at *8. The court reasoned that the regulation did not impose successor liability on the purchaser, because it imposed liability only on "Covered Entities," and the purchaser would not become a Covered Entity until after it acquired the power plant. *Id.* at *7–*8. The regulation, the court held, was limited to Covered Entities, and could not be used to "impugn liability on the purchaser of ... the Covered Entity's assets." *Id.* at *8.

With respect to the imposition of successor liability, the statute at issue here operates in the same manner as the regulation examined in *La Paloma*. Similar to the

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regulation in *La Paloma*, Cal. Corp. Code § 5914–5919 permits the imposition of liability upon St. Francis only because it is operated by a non-profit entity. That is, independent of the fact that it is operated by a non-profit entity, nothing within Cal. Corp. Code § 5914–5919 authorizes the Attorney General to impose liabilities upon the St. Francis. Further, the Attorney General's regulatory authority under the statute does not extend to for-profit entities. As was the case in *La Paloma*, Cal. Corp. Code § 5914–5919 does not authorized the Attorney General to impose liability upon Prime, the for-profit purchaser of St. Francis.

2. Even if California Law Allowed the Attorney General to Impose Successor Liability Upon Prime, the Attorney General Abused his Discretion in Imposing the Additional Conditions

As set forth below, the Court finds that the Attorney General's decision to impose the Additional Conditions is subject to judicial review by administrative mandate under California law. This Court is empowered to conduct such judicial review pursuant to § 1221(e) of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), which provides:

Nothing in this section shall be construed to require the court in which a case under chapter 11 of title 11, United States Code, is pending to remand or refer any proceeding, issue, or controversy to any other court or to require the approval of any other court for the transfer of property.

Pub. L. No. 109-8, § 1221(e) (2005). [Note 6] See also *In re HHH Choices Health Plan, LLC*, 554 B.R. 697, 700 (Bankr. S.D.N.Y. 2016) (construing New York state law to determine the appropriate disposition of a non-profit debtor's assets).

Upon review of the Attorney General's decision, the Court finds that the imposition of the Additional Conditions constituted an abuse of discretion, for the reasons explained below. Therefore, the Additional Conditions must be set aside, which means that the Debtors are authorized to sell St. Francis free and clear of the Additional Conditions under applicable nonbankruptcy law.

i. The Attorney General's Imposition of the Additional Conditions is Subject to Judicial Review by Administrative Mandate

Cal. Civ. Proc. Code § 1094.5 provides for judicial review by administrative mandate of decisions made by agencies or officers of the State of California. A writ of

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mandate may be issued if the agency or officer making the decision engaged in a "prejudicial abuse of discretion." Cal. Civ. Proc. Code § 1094.5(b). An "abuse of discretion is established if ... the order or decision is not supported by the findings, or the findings are not supported by the evidence." *Id.*

The Attorney General contends that administrative mandamus review is not available because the Additional Conditions were not issued subsequent to "a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal." Cal. Civ. Proc. Code § 1094.5(a). The Attorney General acknowledges that he conducted "public meetings ... to hear comments from interested parties" as required by Cal. Corp. Code § 5922. However, the Attorney General asserts that such public meetings were not "hearings" within the meaning of Cal. Civ. Proc. Code § 1094.5(a), because public comments were not presented under oath and no effort was made to determine the accuracy of the information offered by members of the public. The Attorney General's position is that the Debtors are entitled only to traditional mandamus review under Cal. Civ. Proc. Code § 1085.

"Quasi-legislative acts are ordinarily reviewed by traditional mandate, and quasi-judicial acts are reviewed by administrative mandate. 'Generally speaking, a legislative action is the formulation of a rule to be applied to all future cases, while an adjudicatory act involves the actual application of such a rule to a specific set of existing facts.'" *Friends of the Old Trees v. Dep't of Forestry & Fire Prot.*, 52 Cal. App. 4th 1383, 1389, 61 Cal. Rptr. 2d 297, 303 (1997) (internal citation omitted).

The Court is not persuaded by the Attorney General's contention that administrative mandamus review is unavailable to the Debtors. In reviewing the Prime Sale, the Attorney General hired JD Healthcare, Inc. to prepare an expert report containing information on how the Prime Sale would affect the availability of healthcare services in the region served by St. Francis.

The JD Healthcare expert report contains recommendations regarding the conditions that the Attorney General should impose on the Prime Sale. Upon receiving the expert report, the Attorney General asked the Debtors and Prime to respond to the conditions recommended by JD Healthcare. The Attorney General conducted meetings at which members of the public commented on the Prime Sale. "[P]urely documentary proceedings can satisfy the hearing requirement of Code of Civil Procedure § 1094.5, so long as the agency is required by law to accept and consider evidence from interested parties before making its decision." *Friends of the Old Trees*, 52 Cal. App. 4th at 1391–92. A "trial-type hearing" is not necessary. *Id.* at 1392.

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The Attorney General's review involved "the actual application of ... a rule to a specific set of existing facts." *Friends*, 52 Cal. App. 4th at 1389. The Attorney General received evidence from JD Healthcare, heard comments from members of the public, and elected to impose the Additional Conditions after considering all the evidence collected during the review process. The Attorney General's review of the Prime Sale was a quasi-judicial act subject to review by administrative mandate.

The Attorney General next asserts that administrative mandamus review is unavailable because the Debtors have failed to produce the complete administrative record supporting the Attorney General's decision. This contention is without merit. For purposes of administrative mandamus review, a partial record is sufficient if it "accurately represent[s] the administrative proceedings, provide[s] the reviewing court with an understanding of what occurred below, and enable[s] that court to undertake an independent judicial review of the administrative decision." *Elizabeth D. v. Zolin*, 21 Cal. App. 4th 347, 349, 25 Cal. Rptr. 2d 852 (1993). The record before the Court consists of the expert report prepared by JD Healthcare and letters from the Debtors and Prime responding to the Attorney General's request for a list of Additional Conditions that would be "deal breakers." It is not possible for the Debtors to submit the complete record to the Court because that record is in the sole possession of the Attorney General. In contrast to the prior hearing in connection with the failed SGM Sale involving the same issues, the Attorney General made the decision not to include in his opposition excerpts of the public meeting transcript—perhaps in a tactical attempt to defeat the Debtors' request for administrative mandamus review. At any rate, the record on file is sufficient to provide the Court with an understanding of the reasons for the Attorney General's decision.

There are two tests for judicial review by administrative mandate. "The 'independent judgment' rule applies when the decision of an administrative agency will substantially affect a fundamental vested right." *Mann v. Dep't of Motor Vehicles*, 76 Cal. App. 4th 312, 320, 90 Cal. Rptr. 2d 277, 283 (1999). Under the "independent judgment" rule, the Court must "begin its review with a presumption of the correctness of administrative findings, and then, after affording the respect due to these findings, exercise independent judgment in making its own findings." *Fukuda v. City of Angels*, 20 Cal. 4th 805, 819, 977 P.2d 693, 701 (1999). "[T]he presumption provides the trial court with a starting point for review but it is only a presumption, and may be overcome. Because the trial court ultimately must exercise its own independent judgment, that court is free to substitute its own findings after first giving due respect to the agency's findings." *Id.*

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"The 'substantial evidence' rule applies when the administrative decision neither involves nor substantially affects a vested right. The trial court must then review the entire administrative record to determine whether the findings are supported by substantial evidence and whether the agency committed any errors of law" *Mann*, 76 Cal. App. 4th 312, 320, 90 Cal. Rptr. 2d 277, 283 (1999).

To determine whether an administrative decision affects a fundamental vested right, the Court examines "whether the affected right is deemed to be of sufficient significance to preclude its extinction or abridgement by a body lacking *judicial* power." *Interstate Brands v. Unemployment Ins. Appeals Bd.*, 26 Cal. 3d 770, 779, 608 P.2d 707, 713 (1980) (emphasis in original). An administrative decision that would have the effect of shutting down a business affects a fundamental vested right. *See, e.g., The Termo Co. v. Luther*, 169 Cal. App. 4th 394, 407–08, 86 Cal. Rptr. 3d 687, 697 (2008) ("The implementation of the Order and Decision would have the effect not only of shutting down a business that has been in existence for 20 years or more, but also of terminating the right to produce oil—an extraordinarily valuable resource, especially in the current economic era.... Certainly, a fundamental vested right is at issue."); *Goat Hill Tavern v. City of Costa Mesa*, 6 Cal. App. 4th 1519, 1529, 8 Cal. Rptr. 2d 385, 391 (1992) (holding that "the right to continue operating an established business in which [the owner] has made a substantial investment" is a fundamental vested right).

Imposition of the Additional Conditions will precipitate the collapse of the Prime Sale and likely lead to the closing of St. Francis. The Debtors' right to preserve St. Francis' operations, by means of a sale to Prime, is a fundamental vested right that is abrogated by the Attorney General's attempt to impose the Additional Conditions. Consequently, the Court reviews the Attorney General's decision under the independent judgment test.

ii. In Imposing the Additional Conditions, the Attorney General Abused His Discretion

Under certain circumstances, the sale of a not-for-profit healthcare facility is subject to review by the Attorney General. Cal. Corp. Code § 5914. The Legislature enacted Cal. Corp. Code § 5914 to ensure that the public was not deprived of the benefits of charitable health facilities as a result of the transfer of those facilities' assets to for-profit entities. In enacting § 5914, the Legislature found:

Charitable, nonprofit health facilities have a substantial and beneficial

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effect on the provision of health care to the people of California, providing as part of their charitable mission uncompensated care to uninsured low-income families and under-compensated care to the poor, elderly, and disabled.

Transfers of the assets of nonprofit, charitable health facilities to the for-profit sector, such as by sale, joint venture, or other sharing of assets, directly affect the charitable use of those assets and may affect the availability of community health care services....

It is in the best interests of the public to ensure that the public interest is fully protected whenever the assets of a charitable nonprofit health facility are transferred out of the charitable trust and to a for-profit or mutual benefit entity.

1996 Cal. Legis. Serv. Ch. 1105 (A.B. 3101) (West).

The Attorney General has "discretion to consent to, give conditional consent to, or not consent to" the sale of a healthcare facility. Cal. Corp. Code § 5917. In exercising that discretion, the Attorney General "shall consider any factors that the Attorney General deems relevant," including but not limited to whether any of the following apply:

- a) The terms and conditions of the agreement or transaction are fair and reasonable to the nonprofit corporation.
- b) The agreement or transaction will result in inurement to any private person or entity.
- c) Any agreement or transaction that is subject to this article is at fair market value. In this regard, "fair market value" means the most likely price that the assets being sold would bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller, each acting prudently, knowledgeably and in their own best interest, and a reasonable time being allowed for exposure in the open market.
- d) The market value has been manipulated by the actions of the parties in a manner that causes the value of the assets to decrease.
- e) The proposed use of the proceeds from the agreement or transaction is consistent with the charitable trust on which the assets are held by the health facility or by the affiliated nonprofit health system.
- f) The agreement or transaction involves or constitutes any breach of trust.
- g) The Attorney General has been provided, pursuant to Section 5250, with

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sufficient information and data by the nonprofit corporation to evaluate adequately the agreement or transaction or the effects thereof on the public.

- h) The agreement or transaction may create a significant effect on the availability or accessibility of health care services to the affected community.
- i) The proposed agreement or transaction is in the public interest.
- j) The agreement or transaction may create a significant effect on the availability and accessibility of cultural interests provided by the facility in the affected community.

Cal. Corp. Code § 5917 (West).

Nothing in the record indicates that Prime's bid was other than for fair market value (factor (c)). St. Francis was thoroughly marketed by Cain Brothers. Prime was the only bidder interested in purchasing the Hospitals. The Court must presume that a bid submitted after extensive marketing reflects the St. Francis fair market value. *See Bank of Am. Nat. Tr. & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 457, 119 S. Ct. 1411, 1423, 143 L. Ed. 2d 607 (1999) (stating that "the best way to determine value is exposure to a market"). [Note 7]

There is no indication that Prime, or any other party, took any actions to decrease the value of St. Francis (factor (d)). In view of the extensive marketing, the terms of the sale are fair and reasonable (factor (a)). There is no evidence that any of the parties involved in the Prime Sale have engaged in any conduct that would amount to a breach of trust (factor (f)), or that the Prime Sale will inure to the benefit of any private person or entity (factor (b)). Nor has there been any suggestion that the Debtors failed to provide the Attorney General with sufficient information to evaluate the Prime Sale (factor (g)). Factor (e) does not apply, because the proceeds of the Prime Sale are fully encumbered by the claims of creditors, leaving no remaining equity that could be devoted to charitable purposes.

The remaining factors are (1) the effect of the Prime Sale on the accessibility of healthcare services (factor (h)) and cultural interests (factor (j)) in the affected communities and (2) whether the Prime Sale is in the public interest (factor (i)). Applying the independent judgment standard of review, the Court finds that in electing to impose the Additional Conditions, the Attorney General abused his discretion with respect to these factors.

The Prime Sale will not close if the Additional Conditions are imposed. The most likely result of the failure of the Prime Sale will be the closure of St. Francis. Therefore, imposition of the Additional Conditions will dramatically reduce, rather

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than preserve, the availability of healthcare services. That is not in the public interest.

Having overseen the Debtors' bankruptcy cases since their inception, the Court has become intimately familiar with the Debtors' operational and cash flow situation. The Court does not view the Debtors' representations regarding the likely closure of St. Francis as an idle threat.

The Court understands that the Additional Conditions were imposed with the laudable objective of increasing the amount of healthcare services provided by St. Francis. The Court can only assume that the Attorney General does not believe the representation that imposition of the Additional Conditions will result in a collapse of the Prime Sale. Unfortunately, the dire economic circumstances in which the Debtors now find themselves leaves the Court with little doubt that if the Prime Sale is not completed, St. Francis will almost certainly close. The Debtors have already been required to close one of their hospitals, St. Vincent Medical Center, as the result of the failure of the SGM Sale.

Because the Additional Conditions will reduce health care services by resulting in the closure of St. Francis, imposition of the Additional Conditions was an abuse of the Attorney General's discretion.

Outside of bankruptcy, the finding that the Attorney General abused his discretion would result in the entry of a judgment commanding the issuance of a peremptory writ of mandate, followed by the issuance of the writ. The writ would command the Attorney General to set aside the Additional Conditions, and would further command the Attorney General to exercise his discretion with respect to the review of the Prime Sale in a lawful manner. *See, e.g., California Hosp. Assn. v. Maxwell-Jolly*, 188 Cal. App. 4th 559, 570, 115 Cal. Rptr. 3d 572, 581 (2010), *as modified on denial of reh'g* (Sept. 16, 2010).

BAPCPA § 1221(e) compels a different result inside bankruptcy. Section 1221(e) provides that the Court is not required "to remand or refer any proceeding, issue, or controversy to any other court or to require the approval of any other court for the transfer of property." In *In re HHH Choices Health Plan*, the Bankruptcy Court relied upon BAPCPA § 1221(e) to conclude that it had the authority to interpret a New York law governing the transfer of the assets of a non-profit entity. The court observed that "[i]n the case of an insolvent not-for-profit corporation, section 511 of the New York Not-For-Profit Corporation Law ordinarily, would require the approval of the New York State Supreme Court for a transfer of assets." *HHH Choices Health Plan*, 554 B.R. at 700. The court rejected arguments advanced by certain of the parties "that the ordinary state court procedures must still be followed" with respect to the transfer of

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the assets. *Id.* Instead, the court held that substantive state law requirements remained applicable, but that it was the Bankruptcy Court that had authority to apply those requirements. *Id.*

Pursuant to BAPCPA § 1221(e), and consistent with the ruling in *HHH Choices Health Plan*, the Court is not required to issue a judgment and writ commanding the Attorney General to set aside the Additional Conditions, and is not required to remand these proceedings to allow the Attorney General to conduct a further review of the Prime Sale in light of the Court's finding that the Attorney General abused his discretion. Instead, the Court is empowered to apply Cal. Corp. Code § 5914, and to determine the conditions under which the Debtors may sell St. Francis to Prime.

Under the circumstances presented here, the only way that the Prime Sale can close, and the closure of St. Francis can be avoided, is if a sale not subject to the Additional Conditions is approved. A decision by the Attorney General to not consent to the sale, or a decision to consent to the sale subject to the Additional Conditions, would constitute an abuse of discretion.

In reaching this conclusion, the Court is not limiting or controlling the discretion vested in the Attorney General, in contravention of Cal. Code Civ. Proc. § 1094.5(f). St. Francis has been financially distressed for years. A \$100 million capital infusion made in connection with the 2015 Restructuring Agreement failed to stabilize St. Francis' operations. A further capital infusion of \$148 million in 2017 failed to restore St. Francis to financial health. This demonstrates that it was not possible to successfully operate St. Francis subject to the 2015 Conditions. It should come as no surprise that no buyer exists that is willing to purchase and operate the Hospitals if operations are constrained by Additional Conditions that are substantially similar to the 2015 Conditions. The Attorney General's continued attempts to impose conditions rendering sustainable operation of the Hospitals impossible amounts to an abuse of discretion.

The Attorney General contends that Prime, by refusing to purchase and operate the Hospitals subject to the Additional Conditions, is attempting to divest the Attorney General of his regulatory authority by forcing him to accede to a transaction on Prime's terms. This argument ignores the financial and operational realities facing St. Francis. Prime's refusal to accept the Additional Conditions is not an attempt to blackmail the Attorney General into approving the sale. Such refusal is instead dictated by economic reality.

iii. Even if the Attorney General's Decision is Subject to Traditional Mandamus

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*Review Under Cal. Civ. Proc. Code § 1085, Imposition of the Additional Conditions
Was an Abuse of Discretion*

Even if the Attorney General's review of the sale transaction is a quasi-legislative decision, subject to traditional mandamus review under Cal. Civ. Proc. Code § 1085, the decision to impose the Additional Conditions was an abuse of discretion.

Under Cal. Civ. Proc. Code § 1085, a traditional mandate "may issue to correct the exercise of discretionary legislative power, *but only* if the action taken is so palpably unreasonable and arbitrary as to show an abuse of discretion as a matter of law." *Carrancho v. California Air Res. Bd.*, 111 Cal. App. 4th 1255, 1265, 4 Cal. Rptr. 3d 536, 545 (2003) (emphasis in original). In reviewing quasi-legislative decisions, the "authority of the court is limited to determining whether the decision of the agency was arbitrary, capricious, entirely lacking in evidentiary support, or unlawfully or procedurally unfair." *Fullerton Joint Union High Sch. Dist. v. State Bd. of Educ.*, 32 Cal. 3d 779, 786, 654 P.2d 168, 172 (1982). The Court must ensure that the agency or officer making the decision "has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute." *W. States Petroleum Assn. v. Superior Court*, 9 Cal. 4th 559, 577, 888 P.2d 1268, 1277 (1995). Traditional mandamus review of a quasi-legislative decision is therefore more deferential than administrative mandamus review of a quasi-judicial decision under the independent judgment standard.

Even applying this more deferential standard of review, the Court finds that the decision to impose the Additional Conditions was an abuse of discretion, and that a proper exercise of discretion required the Attorney General to consent to the sale without seeking to impose the Additional Conditions. Preservation of access to healthcare is one of the factors the Attorney General must consider in reviewing the transaction. *See* Cal. Corp. Code § 5917(h) (requiring the Attorney General to consider whether the "agreement or transaction may create a significant effect on the availability or accessibility of health care services to the affected community"). The effect of the Additional Conditions will be the closure of St. Francis, which will significantly reduce access to healthcare. There is no "rational connection" between the purpose of the Additional Conditions (preserving healthcare access) and the actual results of the conditions (a severe reduction in healthcare access). *See W. States Petroleum Ass'n*, 888 P.2d at 1277. The Attorney General's decision will destroy the very charitable assets that he is charged with protecting.

In sum, regardless of whether the Debtors are entitled to review of the Attorney

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General's decision under traditional mandamus or administrative mandamus, the Attorney General's decision to impose the Additional Conditions was an abuse of discretion. In the unique circumstances of this case, the Attorney General was required to consent to the Prime Sale without imposing the Additional Conditions. As a result, sale of St. Francis to Prime free and clear of the Additional Conditions is authorized under applicable nonbankruptcy law. The Court approves the Prime Sale, free and clear of the Additional Conditions, pursuant to § 363(f)(1).

C. The Debtors May Sell St. Francis Free and Clear of the Additional Conditions Pursuant to § 363(f)(4)

Under § 363(f)(4), St. Francis may be sold free and clear of the Additional Conditions provided the Additional Conditions are "in bona fide dispute ..." A bona fide dispute exists if "there is an objective basis for either a factual or legal dispute as to the validity" of the interest at issue. *In re Octagon Roofing*, 123 B.R. 583, 590 (Bankr. N.D. Ill. 1991). The court "court need not determine the probable outcome of the dispute, but merely whether one exists." *Id.*

The Debtors dispute the Attorney General's authority to impose the Additional Conditions, on the grounds that the (1) Additional Conditions attempt to impose successor liability in a manner not authorized under California law and that (2) the Attorney General abused his discretion in issuing the Additional Conditions. As discussed above, the Debtors have shown that the Attorney General cannot impose the Additional Conditions for both of these reasons. The Debtors have easily satisfied § 363(f)(4), which does not require the Debtors to show that they will prevail upon the dispute—only that a dispute exists.

With respect to the charity care and community benefit conditions, a bona fide dispute exists for yet another reason. The Debtors have shown that by imposing these conditions, the Attorney General violated § 525.

Section 525 provides in relevant part:

[A] governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title ... or another person with whom such ... debtor has been associated, solely because such ... debtor is or has been a debtor under this title ... or has not paid a debt that is

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dischargeable in the case under this title

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In *In re Aurora Gas, LLC*, the court held that the State of Alaska violated § 525 by refusing to approve the debtor's sale of oil and gas leases unless the purchaser posted a bond of \$6 million to pay for the cost of plugging abandoned wells that the purchaser was not acquiring. *In re Aurora Gas, LLC*, No. A16-00130-GS, 2017 WL 4325560 (Bankr. D. Alaska Sept. 26, 2017). The court held that by conditioning approval of the sale upon the posting of a bond, the State was attempting to collect upon the debtor's obligation to pay for the costs of plugging the abandoned wells. Imposition of such a condition, the court found, constituted impermissible discrimination against the debtor and its affiliate, the purchaser of the gas leases, in violation of § 525.

The facts of this case are strikingly similar. The Attorney General's consent is akin to a "license," "permit," or "franchise," within the meaning of § 525, since that consent is necessary for Prime to close the transaction. The Attorney General has conditioned approval of the Prime Sale upon Prime assuming charity care and community benefit obligations similar to the 2015 Conditions that are an obligation of the Debtors. In so doing, the Attorney General is attempting to enforce the charity care and community benefit liabilities imposed by the 2015 Conditions. The 2015 Conditions are liabilities that are dischargeable in bankruptcy, and by attempting to enforce them in connection with the Prime Sale, the Attorney General is impermissibly discriminating against the Debtors in violation of § 525.

The fact that the charity care and community benefit liabilities can be characterized as a regulatory obligation does not change the analysis. As the Supreme Court has explained:

Under the Bankruptcy Code, "debt" means "liability on a claim," 11 U.S.C. § 101(12), and "claim," in turn, includes any "right to payment," § 101(5)(A). We have said that "[c]laim" has "the broadest available definition," *Johnson v. Home State Bank*, 501 U.S. 78, 83, 111 S.Ct. 2150, 115 L.Ed.2d 66 (1991), and have held that the "plain meaning of a 'right to payment' is nothing more nor less than an enforceable obligation, regardless of the objectives the State seeks to serve in imposing the obligation," *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. 552, 559, 110 S.Ct. 2126 (1990). See also *Ohio v. Kovacs*, 469 U.S. 274, 105 S.Ct. 705, 83 L.Ed.2d 649 (1985). In short, a debt is a debt, even when the obligation to pay it is also a regulatory

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D. The Debtors May Sell the St. Francis Free and Clear of the ~~Additional Conditions Pertaining to Charity Care and Community Benefits~~ Conditions Pursuant to § 363(f)(5)

Under § 363(f)(5), property may be sold free and clear of an interest, if the entity holding the interest “could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.”

An interest “that can be reduced to a specific monetary value” falls within the scope of § 363(f)(5). *In re Trans World Airlines, Inc.*, 322 F.3d 283, 291 (3d Cir. 2003); *see also In re Vista Marketing Grp. Ltd.*, 557 B.R. 630, 635 (Bankr. N.D. Ill. 2016) (“[O]ne would be hard-pressed to present a clearer example of a situation where the interest-holder could be compelled to accept a money satisfaction of its interest under subsection (f)(5) than the calculable monetary obligation asserted by the District in its surcharge bill and disconnection notice.”).

The charity care and community benefit conditions require St. Francis to provide specified levels of charity care and community benefit services. Any shortfalls can be satisfied through deficiency payments to tax-exempt entities within St. Francis’ service area. The **Additional Conditions** pertaining to charity care and community benefit obligations can easily be reduced to a specific monetary value. The Debtors may sell the St. Francis free and clear of these obligations pursuant to § 363(f)(5).

[Note 7a]

E. Section 363(d)(1) Does Not Bar the Sale

As noted, § 363(d)(1) provides that non-profit entities, such as the Debtors, may sell estate assets only if the sale is “in accordance with nonbankruptcy law applicable to the transfer of property by” a non-profit entity.

For the reasons discussed in Section II.B., above, the Debtors are authorized to sell St. Francis, free and clear of the Additional Conditions, under applicable nonbankruptcy law.

Even if the Debtors were not authorized to sell the St. Francis free and clear under applicable nonbankruptcy law, § 363(d)(1) does not limit the Debtors’ ability to sell St. Francis free and clear of the Additional Conditions under § 363(f)(4) or (5). **[Note**

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8] Basic principles of statutory construction dictate this result. "Statutory construction ... is a holistic endeavor." *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371, 108 S. Ct. 626, 630, 98 L. Ed. 2d 740 (1988). The Court must look "to the provisions of the whole law, and to its object and policy." *John Hancock Mut. Life Ins. Co. v. Harris Tr. & Sav. Bank*, 510 U.S. 86, 94–95, 114 S. Ct. 517, 523, 126 L. Ed. 2d 524 (1993). Absent a "clear intention otherwise," specific provisions addressing an issue apply instead of more generalized provisions covering the same issue. *Morton v. Mancari*, 417 U.S. 535, 550–51, 94 S. Ct. 2474, 2483, 41 L. Ed. 2d 290 (1974). This rule applies "regardless of the priority of enactment" of the provisions. *Id.*

Section 363(f) sets forth specific circumstances under which assets may be sold free and clear. Section 363(f) is not limited by a non-profit debtor's general obligation under § 363(d)(1) to comply with nonbankruptcy law. The general requirement set forth in § 363(d)(1) makes no reference to § 363(f), which more specifically delineates the circumstances in which assets may be sold free and clear. Without a "clear intention otherwise," *Morton*, 417 U.S. at 550–51, the general requirement of § 363(d)(1) does not repeal the specifics of free and clear sales under § 363(f), even though § 363(d)(1) was enacted subsequent to § 363(f).

F. Section 541(f) Does Not Bar the Sale

Section 541(f) provides:

Notwithstanding any other provision of this title, property that is held by a debtor that is a corporation described in section 501(c)(3) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such Code may be transferred to an entity that is not such a corporation, but only under the same conditions as would apply if the debtor had not filed a case under this title.

The Attorney General asserts that § 541(f)'s initial clause, "[n]otwithstanding any other provision of this title," is broad enough to trump § 363(f). According to the Attorney General, § 541(f) requires that the Prime Sale comply with applicable California law. As a result, the Attorney General argues, the Prime Sale can occur only if SGM agrees to accept all of the 2019 Conditions, including the Additional Conditions.

The language of § 541(f) is similar, but not identical to, the language of § 363(d)

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(1). Section 363(d)(1) requires that non-profit entities transfer property "in accordance with nonbankruptcy law applicable to the transfer of property by" the non-profit entity; § 541(f) requires that such transfers occur "only under the same conditions as would apply if the debtor had not filed a case under this title."

"[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23, 104 S. Ct. 296, 300, 78 L. Ed. 2d 17 (1983). Therefore, the Court cannot assume that § 541(f) has the same meaning as § 363(f). That is, § 541(f) cannot mean that the Debtors are required to transfer property "in accordance with nonbankruptcy law applicable to the transfer of [such] property," since that is the language used in § 363(d)(1).

There is no legislative history to guide the Court in construing the phrase "under the same conditions" in § 541(f). Nor has the Court been able to locate any cases interpreting this section. In the absence of legislative history, phrases are construed in accordance with their "ordinary or natural meaning." *F.D.I.C. v. Meyer*, 510 U.S. 471, 476, 114 S. Ct. 996, 1001, 127 L. Ed. 2d 308 (1994). According to *Roget's 21st Century Thesaurus* (3d ed. 2013), a synonymous phrase for "under the same conditions" is "in these circumstances."

Here, the Debtors have complied with § 541(f)'s mandate. That is, "[n]otwithstanding any other provisions" of the Bankruptcy Code, they have sought to transfer St. Francis in the same manner as the transfer would have occurred under applicable nonbankruptcy law. The Debtors submitted the transfer to the review of the Attorney General, paid for the expert healthcare impact statements required under the statute, and waited for 90 days for the Attorney General to review the transaction. The transfer has been subject to the same conditions that would have applied had the Debtors not sought bankruptcy protection.

Even if the Attorney General were correct that § 541(f) had the same meaning as § 363(d)(1), the Debtors would still be able to sell the St. Francis free and clear of the Additional Conditions, pursuant to § 363(f)(1), (4), and (5). Contrary to the Attorney General's contention, the "notwithstanding" clause does not mean that § 541(f) trumps § 363(f). The Ninth Circuit has held:

In examining specific statutes, we have not, however, always accorded universal effect to the "notwithstanding" language, standing alone. *See Or. Natural Res. Council v. Thomas*, 92 F.3d 792, 796 (9th Cir.1996) ("We have

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Verity Health System of California, Inc.**Chapter 11**

repeatedly held that the phrase 'notwithstanding any other law' is not always construed literally." (citing *E.P. Paup Co. v. Dir., Office of Workers Comp. Programs*, 999 F.2d 1341, 1348 (9th Cir.1993); *Kee Leasing Co. v. McGahan (In re The Glacier Bay)*, 944 F.2d 577, 582 (9th Cir.1991); *Golden Nugget, Inc. v. Am. Stock Exch., Inc.*, 828 F.2d 586, 588–89 (9th Cir.1987) (per curium))). Instead, we have determined the reach of each such "notwithstanding" clause by taking into account the whole of the statutory context in which it appears.

United States v. Novak, 476 F.3d 1041, 1046 (9th Cir. 2007).

Relying upon the "common-sense principle of statutory construction that sections of a statute generally should be read to give effect, if possible, to every clause," the Ninth Circuit has held that a "notwithstanding" provision should not be given its broadest possible interpretation if doing so would render other statutory provisions ineffectual. *Oregon Nat. Res. Council v. Thomas*, 92 F.3d 792, 797 (9th Cir. 1996).

According to the "notwithstanding" clause the broad construction advocated by the Attorney General would render § 363(f) of the Bankruptcy Code ineffectual with respect to non-profit debtors. The elimination of § 363(f) from a non-profit debtor's toolkit would meaningfully circumscribe the ability of non-profit debtors to reorganize their debts in a Chapter 11 proceeding. Sales under § 363 are the most efficient way for a debtor to obtain the highest price for its assets, which in turn yields the greatest recovery to creditors. Such sales played a critical role in the bankruptcies of Lehman Brothers, General Motors Corporation, Enron Corp., Adelphia Communications Corp., Refco Finance Inc., New Century Financial Corp., Sears Holdings Corp., and countless others. Barring non-profit debtors from taking advantage of this valuable tool would not be in the public interest.

Section 541(f) was added to the Bankruptcy Code by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 1221(e) ("BAPCPA"). BAPCPA made no changes to § 363(f). The Court cannot find that Congress intended § 541(f) to trump § 363(f) with respect to non-profit debtors.

III. Conclusion

Based upon the foregoing, the Court finds that the Debtors may sell St. Francis to Prime, free and clear of the Additional Conditions. The sale may proceed under applicable nonbankruptcy law pursuant to § 363(f)(1) because (1) the Additional Conditions qualify as successor liability that may not be imposed against SGM under

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California law and because (2) the Attorney General abused his discretion in attempting to impose the Additional Conditions, which therefore must be set aside. A bona dispute as to the Attorney General's authority to impose the Additional Conditions exists under § 363(f)(4), because the Debtors (1) have shown that the Additional Conditions are not authorized under California law and that (2) the attempted imposition of the **Additional Conditions pertaining to** charity care and community benefits ~~conditions~~ violates § 525. Pursuant to §363(f)(5), the sale is free and clear of the **Additional Conditions pertaining to** charity care and community benefit obligations, which can be reduced to a monetary valuation.

Note 1

For a description of the Santa Clara Sale, see *In re Verity Health Sys. of California, Inc.*, 598 B.R. 283 (Bankr. C.D. Cal. 2018) ("*Verity I*").

Note 2

The Approved Conditions are set forth in Exhibit 5.8(c) to the APA.

Note 3

See *Verity I*, 598 B.R. at 293 ("The Conditions [imposed by the Attorney General] are an 'interest in property' within the meaning of § 363(f). The Conditions provide that any owner of the Hospitals must furnish specified levels of emergency services, intensive care services, cardiac services, and various other services. The required service levels were derived based upon the historical experience of the prior operator. As such, the Conditions are monetary obligations arising from the ownership of property.").

Note 4

See generally *Verity I*.

Note 5

As nonprofit public benefit corporations, the Debtors do not have stockholders.

Note 6

This provision of BAPCPA does not appear in the Bankruptcy Code itself.

Note 7

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On August 7, 2020, the Court enter an order and corresponding memorandum of decision striking from the record an opposition to the Motion filed by Prospect Medical ("Prospect"). *See* Doc. Nos. 5399 (the "Prospect Memorandum") and 5401 (the "Prospect Order"). Notwithstanding the fact that Prospect's opposition has been stricken, the Court finds it appropriate to briefly address Prospect's assertion that it is willing to purchase St. Francis subject to all of the Additional Conditions at a higher price than that offered by Prime.

At this late stage, Prospect's offer cannot be considered a serious alternative to the Prime Sale. First, the offer is contingent upon a ten-day due diligence period. Therefore, there can be no assurance that Prospect will proceed with its offer. Second, the Court has not been provided sufficient information regarding the offer to ascertain whether it really is superior to the Prime Sale. Third, even if the offer is superior to the Prime Sale and the contingency risk is disregarded, a sale to Prospect would require another 90-day review period by the Attorney General. The Debtors lack sufficient funds to continue operating St. Francis during the time it would take to complete another sale.

Note 7a

The sale is free and clear of the charity care and community benefit obligations only to the extent that those obligations exceed the Approved Conditions. Prime remains subject to the charity care and community benefit obligations that do not exceed the Approved Conditions.

Note 8

Under § 363(f)(4), the Debtors are authorized to sell St. Francis free and clear of all of the Additional Conditions. *See* Section II.C., above. Under § 363(f)(5), the Debtors are authorized to sell St. Francis free and clear of the **Additional Conditions pertaining to** charity care and community benefit obligations. *See* Section II.D., above.

Party Information**Debtor(s):**

Verity Health System of California,

Represented By

Samuel R Maizel

John A Moe II

Tania M Moyron

Claude D Montgomery

Sam J Alberts

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Verity Health System of California, Inc.

Chapter 11

Shirley Cho
Patrick Maxcy
Steven J Kahn
Nicholas A Koffroth
Kerry L Duffy

AMERICAN BANKRUPTCY INSTITUTE

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UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

In re: Verity Health System of California, Inc., *et al.*,
Debtors and Debtors in Possession.

☒ Affects All Debtors

- ☐ Affects Verity Health System of California, Inc.
- ☐ Affects O'Connor Hospital
- ☐ Affects Saint Louise Regional Hospital
- ☐ Affects St. Francis Medical Center
- ☐ Affects St. Vincent Medical Center
- ☐ Affects Seton Medical Center
- ☐ Affects O'Connor Hospital Foundation
- ☐ Affects Saint Louise Regional Hospital Foundation
- ☐ Affects St. Francis Medical Center of Lynwood Medical Foundation
- ☐ Affects St. Vincent Foundation
- ☐ Affects St. Vincent Dialysis Center, Inc.
- ☐ Affects Seton Medical Center Foundation
- ☐ Affects Verity Business Services
- ☐ Affects Verity Medical Foundation
- ☐ Affects Verity Holdings, LLC
- ☐ Affects De Paul Ventures, LLC
- ☐ Affects De Paul Ventures - San Jose Dialysis, LLC

Debtors and Debtors in Possession.,

Lead Case No.: 2:18-bk-20151-ER
Chapter: 11

Jointly Administered With:

Case No. 2:18-bk-20162-ER;
Case No. 2:18-bk-20163-ER;
Case No. 2:18-bk-20164-ER;
Case No. 2:18-bk-20165-ER;
Case No. 2:18-bk-20167-ER;
Case No. 2:18-bk-20168-ER;
Case No. 2:18-bk-20169-ER;
Case No. 2:18-bk-20171-ER;
Case No. 2:18-bk-20172-ER;
Case No. 2:18-bk-20173-ER;
Case No. 2:18-bk-20175-ER;
Case No. 2:18-bk-20176-ER;
Case No. 2:18-bk-20178-ER;
Case No. 2:18-bk-20179-ER;
Case No. 2:18-bk-20180-ER;
Case No. 2:18-bk-20181-ER;

Chapter 11 Cases.

**MEMORANDUM OF DECISION GRANTING
DEBTORS' EMERGENCY MOTION TO ENFORCE
THE SALE ORDER [DOC. NO. 3188]**

Date: October 15, 2019
Time: 10:00 a.m.
Location: Ctrm. 1568
Roybal Federal Building
255 East Temple Street
Los Angeles, CA 90012

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Before the Court is the Debtors' motion to sell four not-for-profit hospitals free and clear of regulatory conditions which the California Attorney General claims authority to impose under Cal. Corp. Code § 5914. For the reasons set forth below, the Court finds that § 363 of the Bankruptcy Code authorizes a sale free and clear of the conditions which the Attorney General contends he is authorized to impose.

I. Facts

On August 31, 2018 (the "Petition Date"), Verity Health Systems of California ("VHS") and certain of its subsidiaries (collectively, the "Debtors") filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. The Debtors' cases are being jointly administered.

As of the Petition Date, the Debtors operated six acute care hospitals in the state of California. On December 27, 2018, the Court authorized the Debtors to sell two of their hospitals—O'Connor Hospital and Saint Louise Regional Hospital—to Santa Clara County (the "Santa Clara Sale").¹ The Santa Clara Sale closed on February 28, 2019.

On February 19, 2019, the Court entered an order establishing bidding procedures (the "Bidding Procedures Order") for the auction of the Debtors' four remaining hospitals—St. Francis Medical Center ("St. Francis"), St. Vincent Medical Center (including St. Vincent Dialysis Center) ("St. Vincent"), Seton Medical Center ("Seton"), and Seton Medical Center Coastside ("Seton Coastside") (collectively, the "Hospitals"). Under the Bidding Procedures Order, Strategic Global Management ("SGM") was designated as the stalking horse bidder. SGM's bid for all four of the Hospitals was \$610 million.

The Hospitals were extensively marketed by the Debtors' investment banker, Cain Brothers, a division of KeyBank Capital Markets, Inc. ("Cain Brothers"). Cain Brothers notified ninety parties of the auction process. Sixteen of these parties requested continued access to a data room containing information about the Hospitals.

Notwithstanding Cain Brothers' thorough marketing efforts, the Debtors did not receive any qualified bids for all of the Hospitals. The Debtors received one bid to purchase only St. Vincent and one bid to purchase only St. Francis. After consulting with the Official Committee of Unsecured Creditors (the "Committee") and the largest secured creditors, the Debtors determined not to conduct an auction. On May 2, 2019, the Court entered an order finding that SGM was the winning bidder and approving the sale to SGM (the "SGM Sale").

In 2015, prior to the commencement of these cases, the Debtors' predecessor sought authorization from the California Attorney General (the "Attorney General"), pursuant to Cal. Corp. Code § 5914, to implement a *System Restructuring and Support Agreement* (the "Restructuring Agreement"). The Attorney General approved the Restructuring Agreement, subject to various conditions (the "2015 Conditions"). Among other things, the 2015 Conditions required capital expenditures to make the Hospitals seismically compliant, and required the Hospitals to maintain specified levels of emergency services, intensive care services, cardiac services, and various other services.

Cal. Corp. Code § 5914 requires a non-profit entity operating a health facility to obtain approval from the Attorney General when selling a material amount of its assets to a for-profit entity. Pursuant to Cal. Corp. Code § 5914, the Debtors submitted the SGM Sale to the Attorney General for review.

¹ For a description of the Santa Clara Sale, see *In re Verity Health Sys. of California, Inc.*, 598 B.R. 283 (Bankr. C.D. Cal. 2018) ("*Verity I*").

The Asset Purchase Agreement under which SGM agreed to purchase the Hospitals (the “APA”) provided that SGM would close the sale so long as any conditions imposed by the Attorney General under the review process set forth in Cal. Corp. Code § 5914 were substantially consistent with conditions that SGM had agreed to accept (the “Approved Conditions”).² In the event that the Attorney General sought to impose conditions materially different from the Approved Conditions (the “Additional Conditions”), the APA provided that the Debtors would have an opportunity to seek a determination from the Court that the Hospitals could be sold free and clear of the Additional Conditions under § 363(f) of the Bankruptcy Code. Under the APA, Additional Conditions imposing upon SGM costs of \$5 million or more are conclusively deemed to be materially different from the Approved Conditions. Further, if the Debtors fail to obtain a final, non-appealable order authorizing the sale free and clear of the Additional Conditions, SGM is not obligated to close on the sale and is entitled to a refund of its good faith deposit.

On September 25, 2019, the Attorney General consented to the SGM Sale, subject to various conditions (the “2019 Conditions”). The 2019 Conditions are materially different from the Approved Conditions that SGM had agreed to accept. In particular, two of the 2019 Conditions impose an additional financial burden upon SGM of approximately \$305 million. First, the 2019 Conditions require that SGM continue to operate St. Vincent as a licensed general acute care hospital through December 2024. SGM had agreed to maintain St. Vincent’s general acute care license only through December 2020. SGM estimates that continuing to operate St. Vincent as a general acute care hospital for an additional four years would cost approximately \$285 million. Second, the 2019 Conditions require St. Francis to provide annual charity care in an amount of \$12,793,435 for six fiscal years. The required charity care amount is approximately \$6.4 million more than the charity care that St. Francis provided in fiscal year 2019. The charity care requirement imposes an additional incremental cost of approximately \$20 million.

SGM will not close the sale absent an order finding that the Hospitals can be sold free and clear of the Additional Conditions pursuant to § 363(f). If the SGM Sale does not close, the most likely outcome will be the closure of St. Vincent, Seton, and Seton Coastside. The Debtors would be required to close these three Hospitals to conserve resources to continue to operate St. Francis, the most solvent of the Hospitals, during the time it would take to obtain approval of a sale of St. Francis. The Debtors cannot continue to sustain operational losses of approximately \$450,000 per day without the prospect of a prompt sale. There is no back-up bidder to purchase the Hospitals if the SGM Sale does not close.

The Debtors are facing very significant liquidity constraints. Recently, the California Department of Health Care Services (the “DHCS”) began withholding certain Medi-Cal fee-for-service payments owed to the Debtors, for the purposing of recovering alleged Medi-Cal overpayments. As of the beginning of October 2019, DHCS had withheld approximately \$4.5 million. The Debtors do not have the ability to borrow under any debtor-in-possession financing facility. At this time, the Debtors’ cases are being financed by a consensual cash collateral stipulation executed between the Debtors and the principal secured creditors (the “Cash Collateral Stipulation”). Termination of the APA constitutes an event of default under the Cash Collateral Stipulation. It is unclear whether the Debtors would be able to obtain alternative financing. Further, the Debtors must begin the expensive process of closing the Hospitals while

² The Approved Conditions are set forth in Schedule 8.6 of the APA.

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they still possess a significant cash buffer.³ In short, the Debtors' prediction that failure of the SGM Sale would necessitate the closure of St. Vincent, Seton, and Seton Coastside is not a bluff.

The Attorney General asserts that imposition of the 2019 Conditions will not result in the closure of St. Vincent, Seton, or Seton Coastside. The Attorney General points to a declaration from Kenneth Sim, M.D. (the "Sim Decl."), the Chairman of Allied Physicians of California, A Professional Medical Corporation ("Allied"). According to the Attorney General, the Sim Decl. shows that Allied is prepared to acquire Seton and Seton Coastside and operate both Hospitals in accordance with the 2019 Conditions.

Contrary to the Attorney General's characterization, the Sim Decl. provides no certainty that a sale of Seton and Seton Coastside will occur. The Sim Decl. states only that "Allied remains interested in purchasing Seton" Sim Decl. at ¶ 5. The Court further notes that Allied did not timely submit a qualified bid for Seton. At this late stage in the proceedings, Allied's vague statement that it is "interested" in purchasing Seton and Seton Coastside does nothing to dissuade the Court from its conclusion that absent consummation of the SGM Sale, Seton and Seton Coastside will most likely close.

The Attorney General also points to a bid for the Hospitals submitted by Prime Healthcare ("Prime"). The Attorney General overlooks the Prime did not submit a qualified bid. Among other things, Prime failed to submit the mandatory good faith deposit. In fact, Prime itself recognized that its "bid will not be formally considered at auction" and was submitted only "for reference."⁴ Further, Prime stated that it did not want to serve as a back-up bidder.⁵ In short, Prime's offer to purchase the Hospitals is just as illusory as Allied's.

Finally, the Attorney General points to an offer by AHMC Healthcare, Inc. ("AHMC Healthcare") to purchase St. Francis. The Attorney General is correct that AHMC submitted a qualified bid to purchase St. Francis. However, even assuming that AHMC would follow through on its prior bid to purchase St. Francis, that still would not prevent the closure of St. Vincent, Seton, and Seton Coastside. As discussed above, the Debtors lack sufficient cash to continue operating all four Hospitals during the time it would take for a sale of St. Francis to close. The Debtors would be required to close St. Vincent, Seton, and Seton Coastside to conserve the cash necessary to operate St. Francis during the sale process.

It is against this backdrop that the Debtors move for authorization to sell the Hospitals free and clear of the Additional Conditions, pursuant to § 363(f). The Debtors argue that the Additional Conditions constitute an "interest in property" within the meaning of § 363(f), and that a sale free and clear of the 2019 Conditions may be authorized under § 363(f)(1), (4), or (5), for the following reasons:

- Pursuant to § 363(f)(1), the Hospitals may be sold under applicable nonbankruptcy law, because under California law, the purchaser of assets does not assume successor liability.
- Pursuant to § 363(f)(4), the validity of the Additional Conditions is subject to a *bona fide* dispute, because the Attorney General abused his discretion in imposing the Additional Conditions.

³ For a description of the difficulties associated with closing a much smaller hospital, see *In re Gardens Reg'l Hosp. & Med. Ctr., Inc.*, 567 B.R. 820, 829 (Bankr. C.D. Cal. 2017), *appeal dismissed*, No. 2:16-BK-17463-ER, 2018 WL 1229989 (C.D. Cal. Jan. 19, 2018).

⁴ April 3, 2019 E-mail from Prime to the Debtors [Doc. No. 3333, Ex. 6].

⁵ *Id.*

- Pursuant to § 363(f)(5), the Attorney General could be compelled to accept a money satisfaction of certain of the Additional Conditions, such as the condition that SGM provide specified levels of charitable care.

The Debtors assert that imposition of the Additional Conditions violates § 525, which prohibits government entities from discriminating against debtors who have failed to pay dischargeable debts when issuing licenses. According to the Debtors, the Additional Conditions constitute an attempt by the Attorney General to collect a dischargeable debt. The Debtors' theory is that Attorney General's refusal to approve the SGM Sale absent imposition of the Additional Conditions amounts to the discriminatory denial of licensure in contravention of § 525.

Finally, the Debtors request that the Court issue a writ of mandate compelling the Attorney General to approve the SGM Sale without imposition of the Additional Conditions, pursuant to Cal. Civ. Proc. Code § 1085 or § 1094.5. The Debtors assert that a writ of mandate is justified because the Attorney General abused his discretion by imposing the Additional Conditions.

The Committee supports the Motion. The Committee argues that prompt closing of the SGM Sale is the best means of insuring a distribution to unsecured creditors.

The Attorney General opposes the Motion. He disputes the Debtors' contention that the Hospitals may be sold under applicable nonbankruptcy law, or that a bona fide dispute exists as to the Attorney General's authority to impose the Additional Conditions. The Attorney General denies that he abused his discretion in imposing the Additional Conditions. He notes that he considered an extensive record in arriving at the Additional Conditions, and states that the Debtors' dislike of the Additional Conditions does not mean that imposing the conditions was an abuse of discretion.

Service Employees International Union, United Healthcare Workers-West ("SEIU-UHW"), which represents approximately 1,303 employees at St. Vincent and St. Francis, opposes the Motion. SEIU-UHW contends that the Additional Conditions are economically feasible for SGM.

The United Nurses Association of California/Union of Health Care Professional ("UNAC"), which represents approximately 900 registered nurses at St. Francis, urges SGM, the Attorney General, and the Debtors to explore prospects for a consensual resolution with respect to the Additional Conditions.

II. Discussion

Section 363(d)(1) authorizes non-profit entities, such as the Debtors, to sell estate assets only if the sale is "in accordance with nonbankruptcy law applicable to the transfer of property by" a non-profit entity. Section 541(f) similarly provides that property held by debtors that are § 501(c)(3) corporations under the Internal Revenue Code may be transferred, but "only under the same conditions as would apply if the debtor had not filed a case under this title." Section 363(b) authorizes the Debtors to sell estate property out of the ordinary course of business, subject to court approval. The Debtors must articulate a business justification for the sale. *In re Walter*, 83 B.R. 14, 19–20 (9th Cir. BAP 1988). Whether the articulated business justification is sufficient "depends on the case," in view of "all salient factors pertaining to the proceeding." *Id.* at 19–20. Section 363(f) provides that a sale of estate property may be "free and clear of any interest in such property of an entity other than the estate," provided that certain conditions are satisfied.

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A. The Additional Conditions are an “Interest in Property” Within the Meaning of § 363(f)

As this Court has previously explained:

The Bankruptcy Code does not define the phrase “interest in ... property” for purposes of § 363(f). The Third Circuit has held that the phrase “interest in ... property” is “intended to refer to obligations that are connected to, or arise from, the property being sold.” *Folger Adam Sec., Inc. v. DeMatteis/MacGregor JV*, 209 F.3d 252, 259 (3d Cir. 2000). That conclusion is echoed by *Collier on Bankruptcy*, which observes a trend in caselaw “in favor of a broader definition [of the phrase] that encompasses other obligations that may flow from ownership of the property.” 3 Alan N. Resnick & Henry J. Sommer, *Collier on Bankruptcy* ¶ 363.06[1] (16th ed. 2017).

Courts have held that interests in property include monetary obligations arising from the ownership of property, even when those obligations are imposed by statute. For example, in *Mass. Dep’t of Unemployment Assistance v. OPK Biotech, LLC (In re PBBPC, Inc.)*, 484 B.R. 860 (1st Cir. BAP 2013), the court held that taxes assessed by Massachusetts under its unemployment insurance statutes constituted an “interest in ... property.” The taxes were computed based on the Debtor’s “experience rating,” which was determined by the number of employees it had terminated in the past. *Id.* at 862. Because the Debtor had terminated most of its employees prior to selling its assets, its experiencing rating, and corresponding unemployment insurance tax liabilities, were very high. *Id.* The PBBPC court held that the experience rating was an interest in property that could be cut off under § 363(f). *Id.* at 869–70. Similarly, in *United Mine Workers of Am. Combined Benefit Fund v. Leckie Smokeless Coal Co. (In re Leckie Smokeless Coal Co.)*, 99 F.3d 573, 581, the court held that monetary obligations imposed by the Coal Industry Retiree Health Benefit Act of 1992 constituted an “interest in ... property” within the meaning of § 363(f).

In re Gardens Reg’l Hosp. & Med. Ctr., Inc., 567 B.R. 820, 825–26 (Bankr. C.D. Cal. 2017), appeal dismissed, No. 2:16-BK-17463-ER, 2018 WL 1229989 (C.D. Cal. Jan. 19, 2018) (“*Gardens I*”).

The Additional Conditions are an “interest in property” within the meaning of § 363(f). First, the Additional Conditions are monetary obligations arising from the ownership of property. Similar to the “experience rating” at issue in *PBBPC, Inc.*, the Additional Conditions were calculated based upon the Hospitals’ prior operating history. Among other things, the Additional Conditions require that SGM cause the Hospitals to provide specified levels of healthcare services. The required service levels have been set based upon the Hospitals’ historical operations. For example, the Additional Conditions require that St. Francis “maintain and provide 24-hour emergency and trauma medical services at no less than current licensure and designation with the same types and/or levels of services”⁶ St. Francis is required to maintain cardiac services, critical care services, neonatal intensive services, women’s health services, cancer services, pediatric services, orthopedic and rehabilitation services, wound care services, behavioral health services, and perinatal services, all at “current licensures, types, and/or levels

⁶ St. Francis Conditions at § IV [Doc. No. 3188, Ex. B].

of services.”⁷ St. Vincent, Seton, and Seton Coastside are also required to maintain various healthcare services at current levels.⁸

Second, the Attorney General’s statutory authority to impose the Additional Conditions arises from the Debtors’ operation of the Hospitals as non-profit entities. Had the Debtors not operated the Hospitals in this manner, there could be no contention that the SGM Sale is subject to the Attorney General’s review pursuant to Cal. Corp. Code § 5914. In this sense as well, the Additional Conditions “arise from the property being sold,” *In re Trans World Airlines, Inc.*, 322 F.3d 283, 290 (3d Cir. 2003), and therefore qualify as an “interest in ... property” within the meaning of § 363(f).

Third, the Attorney General is barred by the law of the case doctrine from asserting that the Additional Conditions are not an “interest in ... property.” “Under the ‘law of the case’ doctrine, a court is ordinarily precluded from reexamining an issue previously decided by the same court, or a higher court, in the same case.” *Richardson v. United States*, 841 F.2d 993, 996 (9th Cir.), *amended*, 860 F.2d 357 (9th Cir. 1988). “For the doctrine to apply, the issue in question must have been ‘decided explicitly or by necessary implication in [the] previous disposition.’” *United States v. Lummi Indian Tribe*, 235 F.3d 443, 452 (9th Cir. 2000).

In connection with the Santa Clara Sale, the Court addressed the exact issue presented here—whether conditions that the Attorney General sought to impose upon the sale constituted an “interest in ... property” for purposes of § 363(f).⁹ The Attorney General litigated the issue, and the Court overruled the Attorney General’s arguments.¹⁰ The Attorney General voluntarily dismissed his appeal of the order finding that the conditions he sought to impose were an “interest in ... property.” The law of the case doctrine bars relitigation of the issue.

The doctrine of issue preclusion is a further bar to any attempt by the Attorney General to contest the Additional Conditions’ status as an “interest in ... property.” As explained by the Supreme Court, issue preclusion forecloses “‘successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment,’ even if the issue recurs in the context of a different claim.” *Taylor v. Sturgell*, 553 U.S. 880, 892, 128 S. Ct. 2161, 2171, 171 L. Ed. 2d 155 (2008) (internal citations omitted). The doctrine protects “against ‘the expense and vexation attending multiple lawsuits, conserve[s] judicial resources, and foster[s] reliance on judicial action by minimizing the possibility of inconsistent decisions.’” *Id.* Issue preclusion applies if “(1) the issue at stake was identical in both proceedings; (2) the issue was actually litigated and decided in the prior proceedings; (3) there was a full and fair opportunity to litigate the issue; and (4) the issue was necessary to decide the merits.” *Howard v. City of Coos Bay*, 871 F.3d 1032, 1041 (9th Cir. 2017).

⁷ *Id.* at § VI.

⁸ See St. Vincent Conditions at § VI (setting forth a list of healthcare services that St. Vincent must maintain at current levels); see also Seton and Seton Coastside Conditions at § VI (same).

⁹ See *Verity I*, 598 B.R. at 293 (“The Conditions [imposed by the Attorney General] are an ‘interest in property’ within the meaning of § 363(f). The Conditions provide that any owner of the Hospitals must furnish specified levels of emergency services, intensive care services, cardiac services, and various other services. The required service levels were derived based upon the historical experience of the prior operator. As such, the Conditions are monetary obligations arising from the ownership of property.”).

¹⁰ See generally *Verity I*.

The Attorney General has litigated the issue presented here, both in connection with the Santa Clara Sale and in connection with a sale in *Gardens I* (the “Gardens Sale”). Just as he did in the Santa Clara Sale, the Attorney General claimed in the Gardens Sale the regulatory authority to impose conditions. The Court found that the Attorney General’s claim to regulatory authority was an “interest in ... property” for purposes of § 363(f). *Gardens I*, 567 B.R. at 826. The Attorney General is precluded from relitigating the issue of whether his claimed authority to impose conditions on the SGM Sale is an “interest in ... property.”

B. The Debtors May Sell the Hospitals Free and Clear of the Additional Conditions

Pursuant to § 363(f)(1)

Sale of the Hospitals may be free and clear of the Additional Conditions only upon satisfaction of one or more of the five disjunctive sub-factors set forth in § 363(f). Under § 363(f)(1), a sale free and clear may be approved if permitted by applicable nonbankruptcy law.

Applicable nonbankruptcy law permits a sale free and clear for two reasons. First, the Attorney General’s attempt to impose the Additional Conditions upon SGM is equivalent to an attempt to impose successor liability upon SGM. California law does not authorize the imposition of successor liability upon SGM. Second, even if the Attorney General were authorized to impose successor liability under California law, the Attorney General abused his discretion in imposing the Additional Conditions, meaning that the Additional Conditions must be set aside.

1. California Law Does Not Authorize the Attorney General to Impose Successor Liability Upon SGM

i. The Additional Conditions Qualify as Successor Liability

The Attorney General’s attempt to impose the Additional Conditions upon SGM qualifies as an attempt to impose successor liability upon SGM. The reason is that the Additional Conditions impose upon SGM many of the same obligations imposed upon the Debtors by the 2015 Conditions. By attempting to enforce the Additional Conditions, the Attorney General is attempting to enforce the obligations imposed by the 2015 Conditions against SGM.

It is true that the 2015 Conditions are not identical to the Additional Conditions. Some medical services required under the 2015 Conditions are no longer required under the Additional Conditions. And unlike the 2015 Conditions, the Additional Conditions do not impose obligations to fund pension plans. But for the most part the Additional Conditions reinstate obligations imposed by the 2015 Conditions. For example, both the 2015 Conditions and the Additional Conditions require that St. Francis maintain cardiac services, including designation as a STEMI Receiving Center; critical care services, including a minimum of 36 intensive care unit beds; neonatal intensive care services, including a minimum of 29 neonatal intensive care beds; women’s health services, including women’s imaging services; cancer services, including radiation oncology; orthopedic and rehabilitation services; and wound care services. The Additional Conditions do not reinstate St. Francis’ obligation to maintain advanced certification as a Primary Stroke Center, and the Additional Conditions reduce St. Francis’ pediatric services obligation from 14 beds to 5 beds.

The 2015 Conditions required St. Francis to maintain the specified healthcare services for ten years from the date of the closing of the Restructuring Agreement. The Additional Conditions

require that the specified services be maintained for ten years from the date of the closing of the APA. That is, the Additional Conditions extend the term of the 2015 Conditions by approximately six years.

Considered within the overall scope of the obligations imposed, the differences between the 2015 Conditions and the Additional Conditions are comparatively inconsequential. The Attorney General relies upon these minor differences in support of his argument that the Additional Conditions do not impose successor liability. Such reliance is misplaced. The Additional Conditions still qualify as successor liability even though they are not exactly identical to the 2015 Conditions. Nor does the extension in the term of the reinstituted obligations remove the Additional Conditions from the category of successor liability.

The Attorney General argues that the Additional Conditions do not impose successor liability because they are SGM's own obligations, going forward from the date of the sale. According to the Attorney General, the Additional Conditions are based upon healthcare impact reports prepared for each Hospital. The Attorney General asserts that it is not surprising that the Additional Conditions resemble the 2015 Conditions, which are only four years old and relate to the same Hospitals and communities. Citing *In re General Motors Corp.*, 407 B.R. 463, 508 (Bankr. S.D.N.Y. 2009), the Attorney General analogizes the Additional Conditions to the environmental remediation liabilities that would remain the obligation of a purchaser of contaminated real estate.

These arguments are not persuasive. In *General Motors*, the environmental remediation obligations were not successor liability because any entity purchasing contaminated property would have an obligation to comply with environmental law:

Under section 363(f), there could be no successor liability imposed on the purchaser for the [seller's] ... monetary obligations related to cleanup costs, or any other obligations that were obligations of the seller. But the purchaser would have to comply with its environmental responsibilities starting with the day it got the property, and if the property required remediation as of that time, any such remediation would be the buyer's responsibility Those same principles will be applied here. Any Old GM properties to be transferred will be transferred free and clear of successor liability, but New GM will be liable from the day it gets any such properties for its environmental responsibilities going forward.

In re Gen. Motors Corp., 407 B.R. 463, 508 (Bankr. S.D.N.Y. 2009).

There is a key difference between the contaminated property at issue in *General Motors* and the Hospitals at issue here. Any entity that purchased the contaminated property at issue in *General Motors* would have been required to comply with environmental regulations going forward. A purchaser's duty to comply with environmental regulations would not vary based upon the identity of the purchaser or the identity of the seller. Here, by contrast, whether a purchaser is obligated to comply with Attorney General conditions can vary, depending upon either the identity of the purchaser or the identity of the seller. There is no general obligation imposed upon an entity that purchases a hospital in the State of California to operate that hospital in accordance with conditions asserted by the Attorney General. The Attorney General's regulatory authority applies only to non-profit hospitals, and only to certain types of sale transactions. Had the Hospitals been sold to a public entity, such as the County of Los Angeles, the Attorney General could not have reviewed the sale. See *Verity I*, 598 B.R. at 294 (holding

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that Cal. Corp. Code § 5914 did not apply where non-profit hospitals were sold to a public entity). Had the Hospitals been operated by a for-profit entity, the Attorney General could not have reviewed the sale. *See* Cal. Corp. Code § 5914(a) (requiring only nonprofit corporations to submit the sale of assets to Attorney General review).

Because the obligation to comply with the Additional Conditions is contingent upon the identity of the purchaser and the identity of the seller, the conditions cannot fairly be characterized as the purchaser's obligation to comply with applicable law on a going-forward basis. The Attorney General can claim authority to impose the Additional Conditions upon purchaser SGM only because the Debtors operated the Hospitals as non-profit entities. Since the Attorney General's alleged authority to impose the Additional Conditions derives from the manner in which the sellers operated the Hospitals, the Additional Conditions are appropriately characterized as successor liability.

ii. Successor Liability Cannot Be Imposed Under California Law

Under California law, the general rule is “that where a corporation purchases, or otherwise acquires by transfer, the assets of another corporation, the acquiring corporation does not assume the selling corporation's debts and liabilities.” *Fisher v. Allis-Chalmers Corp. Prod. Liab. Tr.*, 95 Cal. App. 4th 1182, 1188, 116 Cal. Rptr. 2d 310, 315 (2002). The general rule does not apply if “(1) there is an express or implied agreement of assumption, (2) the transaction amounts to a consolidation or merger of the two corporations, (3) the purchasing corporation is a mere continuation of the seller, or (4) the transfer of assets to the purchaser is for the fraudulent purpose of escaping liability for the seller's debts.” *Id.*

None of the exceptions to the general rule are present here. First, SGM has not agreed to assume the Additional Conditions, either expressly or by implication. Second, the SGM Sale is not a consolidation or merger of the Debtors and SGM. A sale transaction is a consolidation or merger of two corporations “where one corporation takes all of another's assets without providing any consideration that could be made available to meet claims of the other's creditors or where the consideration consists wholly of shares of the purchaser's stock which are promptly distributed to the seller's shareholders in conjunction with the seller's liquidation.” *Ray v. Alad Corp.*, 19 Cal. 3d 22, 28, 560 P.2d 3 (1977) (internal citations omitted). Neither factor applies. SGM is paying for the Hospitals in cash (not stock),¹¹ and that cash will be distributed to the Debtors' creditors through a plan of liquidation. Third, SGM is not a mere continuation of the Debtors. A purchaser is a mere continuation of a seller if there is inadequate consideration for the purchaser or if one or more persons are officers, directors, or stockholders or both corporations. *Id.* Consideration for the SGM Sale is adequate and no officers or directors of the Debtors are officers or directors of SGM.¹² Fourth, the Debtors are not selling the Hospitals for the purpose of escaping liabilities for their debts. In fact, the opposite is true—the objective of the SGM Sale is to generate proceeds to pay the Debtors' debts, to the extent possible. In sum, successor liability cannot be imposed on SGM under California common law.

Successor liability cannot be imposed under Cal. Corp. Code §§ 5914–5919. Cal. Corp. Code § 5914 authorizes the Attorney General to review transactions in which a non-profit healthcare

¹¹ *See* APA at § 1.1(a)(i) [Doc. No. 2305, Part 1].

¹² As nonprofit public benefit corporations, the Debtors do not have stockholders.

facility seeks to transfer a material amount of its assets to a for-profit entity, and provides in relevant part:

Any nonprofit corporation that is defined in Section 5046 and operates or controls a health facility, as defined in Section 1250 of the Health and Safety Code, or operates or controls a facility that provides similar health care, regardless of whether it is currently operating or providing health care services or has a suspended license, shall be required to provide written notice to, and to obtain the written consent of, the Attorney General prior to entering into any agreement or transaction to do either of the following:

(A) Sell, transfer, lease, exchange, option, convey, or otherwise dispose of, its assets to a for-profit corporation or entity or to a mutual benefit corporation or entity when a material amount of the assets of the nonprofit corporation are involved in the agreement or transaction.

Cal. Corp. Code § 5914(a)(1) (West).

The “Attorney General shall have discretion to consent to, give conditional consent to, or not consent to” the transaction. Cal. Corp. Code § 5917.

Nothing within the statute authorizes the Attorney General to impose successor liability upon SGM, the for-profit entity that purchased the healthcare assets from the non-profit Debtors. Under the statute, the Attorney General is authorized to review transactions entered into by a “nonprofit corporation that ... operates or controls a health facility,” Cal. Corp. Code § 5914(a)(1), and to “consent to, give conditional consent to, or not consent to” any such transactions, Cal. Corp. Code § 5917. These provisions do not grant the Attorney General authority to impose going-forward obligations on the assets that are the subject of the transaction. That is, the statute does not provide that the healthcare assets themselves are subject to regulation by the Attorney General. Rather, it is the non-profit status of the entity operating the healthcare assets that triggers the Attorney General’s regulatory authority. Upon transfer of the healthcare assets from the non-profit entity to the for-profit entity, the Attorney General’s regulatory authority over the assets terminates.

The issue of the Attorney General’s authority to impose successor liability arose in the case of *La Paloma Generating Co.*, No. 16-12700, 2017 WL 5197116 (Bankr. D. Del. Nov. 9, 2017). In *La Paloma*, the debtor operated a power plant subject to a cap-and-trade emissions regulation. The regulation required “Covered Entities”—defined as entities engaging in operations that generated emissions—to surrender “Compliance Instruments” equal to the amount of emissions generated at specified times. At issue was whether a power plant could be sold “free and clear of, and without the purchaser assuming, any obligation to surrender compliance instruments under the California Cap-and-Trade Program for emissions generated by the Debtors and/or their facility during the period before the transfer of the assets.” *Id.* at *2. The court found that “[u]nder the Regulation, only entities—and not assets—are Covered Entities” subject to the obligation to surrender Compliance Instruments. *Id.* at *5. As a result, the court found, the debtors could sell the power plant free and clear of the surrender obligations, pursuant to § 363(f)(1). *Id.* at *8. The court reasoned that the regulation did not impose successor liability on the purchaser, because it imposed liability only on “Covered Entities,” and the purchaser would not become a Covered Entity until after it acquired the power plant. *Id.* at *7–*8. The regulation, the court held, was limited to Covered Entities, and could not be used to “impugn liability on the purchaser of ... the Covered Entity’s assets.” *Id.* at *8.

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With respect to the imposition of successor liability, the statute at issue here operates in the same manner as the regulation examined in *La Paloma*. Similar to the regulation in *La Paloma*, Cal. Corp. Code § 5914–5919 permits the imposition of liability upon the Hospitals only because they are operated by a non-profit corporation. That is, independent of the fact that they are operated by a non-profit entity, nothing within Cal. Corp. Code § 5914–5919 authorizes the Attorney General to impose liabilities upon the Hospitals. Further, the Attorney General’s regulatory authority under the statute does not extend to for-profit entities. As was the case in *La Paloma*, Cal. Corp. Code § 5914–5919 does not authorize the Attorney General to impose liability upon the for-profit purchaser of the Hospitals.

The Attorney General argues that the statute’s implementing regulations authorize the imposition of successor liability. Specifically, the Attorney General points to Cal. Code Regs. Tit. 11, § 999.5, which provides in relevant part:

It is the policy of the Attorney General, in consenting to an agreement or transaction involving a general acute care hospital, to require for a period of at least five years the continuation at the hospital of existing levels of essential healthcare services, including but not limited to emergency room services. The Attorney General shall retain complete discretion to determine whether this policy shall be applied in any specific transaction under review.

Cal. Code Regs. tit. 11, § 999.5.

Significantly, the statute’s implementing regulations do not differentiate between Cal. Corp. Code §§ 5914–5919, which codifies the Attorney General’s authority to review transfers between a non-profit and a for-profit entity, and Cal. Corp. Code §§ 5920–5925, which codifies the Attorney General’s authority to review transfers between a non-profit entity and a different non-profit entity. Where assets are transferred between two different non-profit entities, the structure of the statute clearly provides the Attorney General the authority to impose successor liability.

The Court construes Cal. Code Regs. Tit. 11, § 999.5 as implementing Cal. Corp. Code §§ 5920–5925, not as implementing Cal. Corp. Code §§ 5914–5919. Cal. Corp. Code §§ 5920–5925 does authorize the imposition of successor liability, whereas Cal. Corp. Code §§ 5914–5919 does not. This construction is appropriate because it harmonizes the language of the regulation with the language of the statute, while still giving full effect to every part of the regulation. *See Butts v. Bd. of Trustees of California State Univ.*, 225 Cal. App. 4th 825, 835, 170 Cal. Rptr. 3d 604, 612 (2014) (“The rules of statutory construction also govern our interpretation of regulations promulgated by administrative agencies. We give the regulatory language its plain, commonsense meaning. If possible, we must accord meaning to every word and phrase in the regulation, and we must read regulations as a whole so that all of the parts are given effect.”).

Because the Attorney General’s authority to review the sale arises under Cal. Corp. Code §§ 5914–5919, the Attorney General cannot rely upon Cal. Code Regs. tit. 11, § 999.5, which implements Cal. Corp. Code §§ 5920–5925, as the basis for imposing successor liability upon SGM.

2. Even if California Law Allowed the Attorney General to Impose Successor Liability Upon SGM, the Attorney General Abused his Discretion in Imposing the Additional Conditions

As set forth below, the Court finds that the Attorney General's decision to impose the Additional Conditions is subject to judicial review by administrative mandate under California law. This Court is empowered to conduct such judicial review pursuant to § 1221(e) of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), which provides:

Nothing in this section shall be construed to require the court in which a case under chapter 11 of title 11, United States Code, is pending to remand or refer any proceeding, issue, or controversy to any other court or to require the approval of any other court for the transfer of property.

Pub. L. No. 109-8, § 1221(e) (2005).¹³ *See also In re HHH Choices Health Plan, LLC*, 554 B.R. 697, 700 (Bankr. S.D.N.Y. 2016) (construing New York state law to determine the appropriate disposition of a non-profit debtor's assets).

Upon review of the Attorney General's decision, the Court finds that the imposition of the Additional Conditions constituted an abuse of discretion, for the reasons explained below. Therefore, the Additional Conditions must be set aside, which means that the Debtors are authorized to sell the Hospitals free and clear of the Additional Conditions under applicable nonbankruptcy law.

i. The Attorney General's Imposition of the Additional Conditions is Subject to Judicial Review by Administrative Mandate

Cal. Civ. Proc. Code § 1094.5 provides for judicial review by administrative mandate of decisions made by agencies or officers of the State of California. A writ of mandate may be issued if the agency or officer making the decision engaged in a "prejudicial abuse of discretion." Cal. Civ. Proc. Code § 1094.5(b). An "abuse of discretion is established if ... the order or decision is not supported by the findings, or the findings are not supported by the evidence." *Id.*

The Attorney General contends that administrative mandamus review is not available because the Additional Conditions were not issued subsequent to "a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal." Cal. Civ. Proc. Code § 1094.5(a). The Attorney General acknowledges that he conducted "public meetings ... to hear comments from interested parties" as required by Cal. Corp. Code § 5922. However, the Attorney General asserts that such public meetings were not "hearings" within the meaning of Cal. Civ. Proc. Code § 1094.5(a), because public comments were not presented under oath and no effort was made to determine the accuracy of the information offered by members of the public. The Attorney General's position is that the Debtors are entitled only to traditional mandamus review under Cal. Civ. Proc. Code § 1085.

"Quasi-legislative acts are ordinarily reviewed by traditional mandate, and quasi-judicial acts are reviewed by administrative mandate. 'Generally speaking, a legislative action is the formulation of a rule to be applied to all future cases, while an adjudicatory act involves the actual application of such a rule to a specific set of existing facts.'" *Friends of the Old Trees v. Dep't of Forestry & Fire Prot.*, 52 Cal. App. 4th 1383, 1389, 61 Cal. Rptr. 2d 297, 303 (1997) (internal citation omitted).

¹³ This provision of BAPCPA does not appear in the Bankruptcy Code itself.

The Court is not persuaded by the Attorney General's contention that administrative mandamus review is unavailable to the Debtors. In reviewing the SGM Sale, the Attorney General hired JD Healthcare, Inc. to prepare expert reports containing information on how the SGM Sale would affect the availability of healthcare services in the regions served by the Hospitals. The JD Healthcare expert reports contained recommendations regarding the conditions that the Attorney General should impose on the SGM Sale. Upon receiving the expert reports, the Attorney General asked the Debtors to respond to the conditions recommended by JD Healthcare. The Attorney General conducted public meetings, all of which were transcribed, at which members of the public commented on the SGM Sale. "[P]urely documentary proceedings can satisfy the hearing requirement of Code of Civil Procedure § 1094.5, so long as the agency is required by law to accept and consider evidence from interested parties before making its decision." *Friends of the Old Trees*, 52 Cal. App. 4th at 1391–92. A "trial-type hearing" is not necessary. *Id.* at 1392.

The Attorney General's review involved "the actual application of ... a rule to a specific set of existing facts." *Friends*, 52 Cal. App. 4th at 1389. The Attorney General received evidence from JD Healthcare, heard comments from members of the public, and elected to impose the Additional Conditions after considering all the evidence collected during the review process. The Attorney General's review of the SGM Sale was a quasi-judicial act subject to review by administrative mandate.

The Attorney General next asserts that administrative mandamus review is unavailable because the Debtors have failed to produce the complete administrative record supporting the Attorney General's decision. This contention is without merit. For purposes of administrative mandamus review, a partial record is sufficient if it "accurately represent[s] the administrative proceedings, provide[s] the reviewing court with an understanding of what occurred below, and enable[s] that court to undertake an independent judicial review of the administrative decision." *Elizabeth D. v. Zolin*, 21 Cal. App. 4th 347, 349, 25 Cal. Rptr. 2d 852 (1993). The record before the Court consists of the expert reports prepared by JD Healthcare, partial transcripts of public meetings conducted by the Attorney General, and various letters submitted by stakeholders. The record on file provides the Court with an understanding of reasons for the Attorney General's decision.

There are two tests for judicial review by administrative mandate. "The 'independent judgment' rule applies when the decision of an administrative agency will substantially affect a fundamental vested right." *Mann v. Dep't of Motor Vehicles*, 76 Cal. App. 4th 312, 320, 90 Cal. Rptr. 2d 277, 283 (1999). Under the "independent judgment" rule, the Court must "begin its review with a presumption of the correctness of administrative findings, and then, after affording the respect due to these findings, exercise independent judgment in making its own findings." *Fukuda v. City of Angels*, 20 Cal. 4th 805, 819, 977 P.2d 693, 701 (1999). "[T]he presumption provides the trial court with a starting point for review but it is only a presumption, and may be overcome. Because the trial court ultimately must exercise its own independent judgment, that court is free to substitute its own findings after first giving due respect to the agency's findings." *Id.*

"The 'substantial evidence' rule applies when the administrative decision neither involves nor substantially affects a vested right. The trial court must then review the entire administrative record to determine whether the findings are supported by substantial evidence and whether the agency committed any errors of law" *Mann*, 76 Cal. App. 4th 312, 320, 90 Cal. Rptr. 2d 277, 283 (1999).

To determine whether an administrative decision affects a fundamental vested right, the Court examines “whether the affected right is deemed to be of sufficient significance to preclude its extinction or abridgement by a body lacking *judicial* power.” *Interstate Brands v. Unemployment Ins. Appeals Bd.*, 26 Cal. 3d 770, 779, 608 P.2d 707, 713 (1980) (emphasis in original). An administrative decision that would have the effect of shutting down a business affects a fundamental vested right. *See, e.g., The Termo Co. v. Luther*, 169 Cal. App. 4th 394, 407–08, 86 Cal. Rptr. 3d 687, 697 (2008) (“The implementation of the Order and Decision would have the effect not only of shutting down a business that has been in existence for 20 years or more, but also of terminating the right to produce oil—an extraordinarily valuable resource, especially in the current economic era.... Certainly, a fundamental vested right is at issue.”); *Goat Hill Tavern v. City of Costa Mesa*, 6 Cal. App. 4th 1519, 1529, 8 Cal. Rptr. 2d 385, 391 (1992) (holding that “the right to continue operating an established business in which [the owner] has made a substantial investment” is a fundamental vested right).

Imposition of the Additional Conditions will precipitate the collapse of the SGM Sale and require the Debtors to close three of the four Hospitals. The Debtors’ rights to preserve the Hospitals’ operations, by means of a sale to SGM, is a fundamental vested right that is abrogated by the Attorney General’s attempt to impose the Additional Conditions. Consequently, the Court reviews the Attorney General’s decision under the independent judgment test.

ii. In Imposing the Additional Conditions, the Attorney General Abused His Discretion

Under certain circumstances, the sale of a not-for-profit healthcare facility is subject to review by the Attorney General. Cal. Corp. Code § 5914. The Legislature enacted Cal. Corp. Code § 5914 to ensure that the public was not deprived of the benefits of charitable health facilities as a result of the transfer of those facilities’ assets to for-profit entities. In enacting § 5914, the Legislature found:

Charitable, nonprofit health facilities have a substantial and beneficial effect on the provision of health care to the people of California, providing as part of their charitable mission uncompensated care to uninsured low-income families and under-compensated care to the poor, elderly, and disabled.

Transfers of the assets of nonprofit, charitable health facilities to the for-profit sector, such as by sale, joint venture, or other sharing of assets, directly affect the charitable use of those assets and may affect the availability of community health care services....

It is in the best interests of the public to ensure that the public interest is fully protected whenever the assets of a charitable nonprofit health facility are transferred out of the charitable trust and to a for-profit or mutual benefit entity.

1996 Cal. Legis. Serv. Ch. 1105 (A.B. 3101) (West).

The Attorney General has “discretion to consent to, give conditional consent to, or not consent to” the sale of a healthcare facility. Cal. Corp. Code § 5917. In exercising that discretion, the Attorney General “shall consider any factors that the Attorney General deems relevant,” including but not limited to whether any of the following apply:

- a) The terms and conditions of the agreement or transaction are fair and reasonable to the nonprofit corporation.
- b) The agreement or transaction will result in inurement to any private person or entity.

- c) Any agreement or transaction that is subject to this article is at fair market value. In this regard, “fair market value” means the most likely price that the assets being sold would bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller, each acting prudently, knowledgeably and in their own best interest, and a reasonable time being allowed for exposure in the open market.
- d) The market value has been manipulated by the actions of the parties in a manner that causes the value of the assets to decrease.
- e) The proposed use of the proceeds from the agreement or transaction is consistent with the charitable trust on which the assets are held by the health facility or by the affiliated nonprofit health system.
- f) The agreement or transaction involves or constitutes any breach of trust.
- g) The Attorney General has been provided, pursuant to Section 5250, with sufficient information and data by the nonprofit corporation to evaluate adequately the agreement or transaction or the effects thereof on the public.
- h) The agreement or transaction may create a significant effect on the availability or accessibility of health care services to the affected community.
- i) The proposed agreement or transaction is in the public interest.
- j) The agreement or transaction may create a significant effect on the availability and accessibility of cultural interests provided by the facility in the affected community.

Cal. Corp. Code § 5917 (West).

Nothing in the record indicates that SGM’s bid was other than for fair market value (factor (c)). The Hospitals were thoroughly marketed by Cain Brothers. SGM was the only bidder interested in purchasing the Hospitals. The Court must presume that a bid submitted after extensive marketing reflects the Hospital’s fair market value. *See Bank of Am. Nat. Tr. & Sav. Ass’n v. 203 N. LaSalle St. P’ship*, 526 U.S. 434, 457, 119 S. Ct. 1411, 1423, 143 L. Ed. 2d 607 (1999) (stating that “the best way to determine value is exposure to a market”).

There is no indication that SGM, or any other party, took any actions to decrease the value of the Hospitals (factor (d)). In view of the extensive marketing, the terms of the sale are fair and reasonable to the Debtors (factor (a)). There is no evidence that any of the parties involved in the SGM sale have engaged in any conduct that would amount to a breach of trust (factor (f)), or that the SGM Sale will inure to the benefit of any private person or entity (factor (b)). Nor has there been any suggestion that the Debtors failed to provide the Attorney General with sufficient information to evaluate the SGM Sale (factor (g)). Factor (e) does not apply, because the proceeds of the SGM Sale are fully encumbered by the claims of creditors, leaving no remaining equity that could be devoted to charitable purposes.

The remaining factors are (1) the effect of the SGM Sale on the accessibility of healthcare services (factor (h)) and cultural interests (factor (j)) in the affected communities and (2) whether the SGM Sale is in the public interest (factor (i)). Applying the independent judgment standard of review, the Court finds that in electing to impose the Additional Conditions, the Attorney General abused his discretion with respect to these factors.

By letter dated August 23, 2019 (the “August Letter”), the Debtors advised the Attorney General that if the Additional Conditions were imposed, SGM would not complete the sale and the most likely outcome would be the closure of St. Vincent, Seton, and Seton Coastside. The August Letter advised the Attorney General that SGM had submitted the only offer for the Hospitals, and that the “Debtors cannot sustain incurring ongoing operational losses to maintain

the going-concern value of St. Vincent and Seton without the realistic prospect of a purchaser.”¹⁴ The Debtors stated that upon the failure of the SGM Sale, they would be required to begin the process of closing St. Vincent, Seton, and Seton Coastsides “almost immediately.”¹⁵

Having overseen the Debtors’ bankruptcy cases since their inception, the Court has become intimately familiar with the Debtors’ operational and cash flow situation. As discussed above, the Debtors’ statements regarding the necessity of closing certain of the Hospitals upon the failure of the SGM Sale are not an idle threat.

Imposition of the Additional Conditions will dramatically reduce the availability of healthcare services by causing the closure of three of the four Hospitals. In addition to the loss of healthcare services, closure of the Hospitals will destroy approximately 2900 jobs. Closure of the Hospitals will require the relocation of many patients suffering from critical conditions. None of this is in the public interest.¹⁶

The Court understands that the Additional Conditions were imposed with the laudable objective of increasing the amount of healthcare services provided by the Hospitals. The Court can only assume that the Attorney General does not believe the representation that imposition of the Additional Conditions will result in a collapse of the SGM Sale. Unfortunately, the dire economic circumstances in which the Debtors now find themselves leaves the Court with no doubt that if the SGM Sale is not completed, three of the Hospitals will almost certainly close.

Because the Additional Conditions will reduce health care services by resulting in the closure of three of the Hospitals, imposition of the Additional Conditions was an abuse of the Attorney General’s discretion.

Outside of bankruptcy, the finding that the Attorney General abused his discretion would result in the entry of a judgment commanding the issuance of a peremptory writ of mandate, followed by the issuance of the writ. The writ would command the Attorney General to set aside the 2019 Conditions, and would further command the Attorney General to exercise his discretion with respect to the review of the SGM Sale in a lawful manner. *See, e.g., California Hosp. Assn. v. Maxwell-Jolly*, 188 Cal. App. 4th 559, 570, 115 Cal. Rptr. 3d 572, 581 (2010), *as modified on denial of reh’g* (Sept. 16, 2010).

BAPCPA § 1221(e) compels a different result inside bankruptcy. Section 1221(e) provides that the Court is not required “to remand or refer any proceeding, issue, or controversy to any other court or to require the approval of any other court for the transfer of property.” In *In re HHH Choices Health Plan*, the Bankruptcy Court relied upon BAPCPA § 1221(e) to conclude that it had the authority to interpret a New York law governing the transfer of the assets of a non-profit entity. The court observed that “[i]n the case of an insolvent not-for-profit corporation, section 511 of the New York Not-For-Profit Corporation Law ordinarily, would require the approval of the New York State Supreme Court for a transfer of assets.” *HHH Choices Health Plan*, 554 B.R. at 700. The court rejected arguments advanced by certain of the parties “that the

¹⁴ August Letter at 14.

¹⁵ *Id.*

¹⁶ SEIU-UHW contends that it is economically feasible for SGM to operate the Hospitals while complying with the Additional Conditions. The record does not support SEIU-UHW’s contention. SGM was the only bidder willing to purchase the Hospitals and has stated unequivocally that it will not complete its purchase if the Additional Conditions are imposed. These facts show that the Additional Conditions render operation of the Hospitals economically infeasible.

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ordinary state court procedures must still be followed” with respect to the transfer of the assets. *Id.* Instead, the court held that substantive state law requirements remained applicable, but that it was the Bankruptcy Court that had authority to apply those requirements. *Id.*

Pursuant to BAPCPA § 1221(e), and consistent with the ruling in *HHH Choices Health Plan*, the Court is not required to issue a judgment and writ commanding the Attorney General to set aside the 2019 Conditions, and is not required to remand these proceedings to allow the Attorney General to conduct a further review of the SGM Sale in light of the Court’s finding that the Attorney General abused his discretion. Instead, the Court is empowered to apply Cal. Corp. Code § 5914, and to determine the conditions under which the Debtors may sell the Hospitals to SGM.

Under the circumstances presented here, the only way that closure of three of the four Hospitals can be avoided is if a sale not subject to the Additional Conditions is approved. A decision by the Attorney General to not consent to the sale, or a decision to consent to the sale subject to conditions other than the Approved Conditions, would constitute an abuse of discretion. That is because SGM, the only entity willing to purchase and continue to operate the Hospitals, will do so only if it is permitted to operate the Hospitals in a manner consistent with the Approved Conditions.

In reaching this conclusion, the Court is not limiting or controlling the discretion vested in the Attorney General, in contravention of Cal. Code Civ. Proc. § 1094.5(f). The Hospitals have been financially distressed for years. A \$100 million capital infusion made in connection with the 2015 Restructuring Agreement failed to stabilize the Hospitals’ operations. A further capital infusion of \$148 million in 2017 failed to restore the Hospitals to financial health. This demonstrates that it was not possible to successfully operate the Hospitals subject to the 2015 Conditions. It should come as no surprise that no buyer exists that is willing to purchase and operate the Hospitals if operations are constrained by Additional Conditions that are substantially similar to the 2015 Conditions. The Attorney General’s continued attempts to impose conditions rendering sustainable operation of the Hospitals impossible amounts to an abuse of discretion.

The Attorney General contends that SGM, by refusing to purchase and operate the Hospitals subject to conditions other than the Approved Conditions, is attempting to divest the Attorney General of his regulatory authority by forcing him to accede to a transaction on SGM’s terms. This argument ignores the financial and operational realities facing the Hospitals. SGM’s refusal to accept the Additional Conditions is not an attempt to blackmail the Attorney General into approving the sale. Such refusal is instead dictated by economic reality.

iii. Even if the Attorney General’s Decision is Subject to Traditional Mandamus Review Under Cal. Civ. Proc. Code § 1085, Imposition of the Additional Conditions Was an Abuse of Discretion

Even if the Attorney General’s review of the sale transaction is a quasi-legislative decision, subject to traditional mandamus review under Cal. Civ. Proc. Code § 1085, the decision to impose the Additional Conditions was an abuse of discretion.

Under Cal. Civ. Proc. Code § 1085, a traditional mandate “may issue to correct the exercise of discretionary legislative power, *but only* if the action taken is so palpably unreasonable and arbitrary as to show an abuse of discretion as a matter of law.” *Carrancho v. California Air Res. Bd.*, 111 Cal. App. 4th 1255, 1265, 4 Cal. Rptr. 3d 536, 545 (2003) (emphasis in original). In reviewing quasi-legislative decisions, the “authority of the court is limited to determining

whether the decision of the agency was arbitrary, capricious, entirely lacking in evidentiary support, or unlawfully or procedurally unfair.” *Fullerton Joint Union High Sch. Dist. v. State Bd. of Educ.*, 32 Cal. 3d 779, 786, 654 P.2d 168, 172 (1982). The Court must ensure that the agency or officer making the decision “has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute.” *W. States Petroleum Assn. v. Superior Court*, 9 Cal. 4th 559, 577, 888 P.2d 1268, 1277 (1995). Traditional mandamus review of a quasi-legislative decision is therefore more deferential than administrative mandamus review of a quasi-judicial decision under the independent judgment standard.

Even applying this more deferential standard of review, the Court finds that the decision to impose the Additional Conditions was an abuse of discretion, and that a proper exercise of discretion required the Attorney General to consent to the sale subject only to the Approved Conditions. Preservation of access to healthcare is one of the factors the Attorney General must consider in reviewing the transaction. *See* Cal. Corp. Code § 5917(h) (requiring the Attorney General to consider whether the “agreement or transaction may create a significant effect on the availability or accessibility of health care services to the affected community”). At the hearing, the Attorney General stated that he imposed the Additional Conditions in furtherance of § 5917(h)’s objective of preserving healthcare access.¹⁷ The effect of the Additional Conditions will be the closure of three of the four Hospitals, which will significantly reduce access to healthcare. There is no “rational connection” between the purpose of the Additional Conditions (preserving healthcare access) and the actual results of the conditions (a severe reduction in healthcare access). *See W. States Petroleum Ass’n*, 888 P.2d at 1277. With respect to three of the four Hospitals, the Attorney General’s decision will destroy the very charitable assets that he is charged with protecting.

In sum, regardless of whether the Debtors are entitled to review of the Attorney General’s decision under traditional mandamus or administrative mandamus, the Attorney General’s decision to impose the Additional Conditions was an abuse of discretion. In the unique circumstances of this case, the Attorney General was required to consent to the SGM Sale without imposing the Additional Conditions. As a result, sale of the Hospitals to SGM free and clear of the Additional Conditions is authorized under applicable nonbankruptcy law. The Court approves the SGM Sale, free and clear of the Additional Conditions, pursuant to § 363(f)(1).

C. The Debtors May Sell the Hospitals Free and Clear of the Additional Conditions Pursuant to § 363(f)(4)

Under § 363(f)(4), the Hospitals may be sold free and clear of the Additional Conditions provided the Additional Conditions are “in bona fide dispute ...” A bona fide dispute exists if “there is an objective basis for either a factual or legal dispute as to the validity” of the interest at

¹⁷ Specifically, counsel for the Attorney General explained that in imposing the conditions, the Attorney General “is weighing the impact on the affected community, and making a determination as to what would be the best outcome for this community in order to ensure that it is not being adversely impacted, and not inappropriately losing access to these nonprofit hospitals” Hearing Transcript [Doc. No. 3416] at 24. Counsel further stated that the Attorney General’s “obligation is ... to do what’s needed to preserve access to healthcare, in particular for disadvantaged populations, which is clearly what we’re dealing with here.” *Id.* at 12.

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issue. *In re Octagon Roofing*, 123 B.R. 583, 590 (Bankr. N.D. Ill. 1991). The court “court need not determine the probable outcome of the dispute, but merely whether one exists.” *Id.*

The Debtors dispute the Attorney General’s authority to impose the Additional Conditions, on the grounds that the (1) Additional Conditions attempt to impose successor liability in a manner not authorized under California law and that (2) the Attorney General abused his discretion in issuing the Additional Conditions. As discussed above, the Debtors have shown that the Attorney General cannot impose the Additional Conditions for both of these reasons. The Debtors have easily satisfied §363(f)(4), which does not require the Debtors to show that they will prevail upon the dispute—only that a dispute exists.

A bona fide dispute exists for yet another reason. The Debtors have shown that by imposing the Additional Conditions, the Attorney General violated § 525.

Section 525 provides in relevant part:

[A] governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title ... or another person with whom such ... debtor has been associated, solely because such ... debtor is or has been a debtor under this title ... or has not paid a debt that is dischargeable in the case under this title

In *In re Aurora Gas, LLC*, the court held that the State of Alaska violated § 525 by refusing to approve the debtor’s sale of oil and gas leases unless the purchaser posted a bond of \$6 million to pay for the cost of plugging abandoned wells that the purchaser was not acquiring. *In re Aurora Gas, LLC*, No. A16-00130-GS, 2017 WL 4325560 (Bankr. D. Alaska Sept. 26, 2017). The court held that by conditioning approval of the sale upon the posting of a bond, the State was attempting to collect upon the debtor’s obligation to pay for the costs of plugging the abandoned wells. Imposition of such a condition, the court found, constituted impermissible discrimination against the debtor and its affiliate, the purchaser of the gas leases, in violation of § 525.

The facts of this case are strikingly similar. Here, the Attorney General has conditioned approval of the SGM Sale upon SGM assuming the obligation to operate the Hospitals in accordance with conditions similar to the 2015 Conditions that are an obligation of the Debtors. As discussed, the Additional Conditions require that SGM maintain and operate the Hospitals at current licensure and service levels. The Additional Conditions amount to an attempt by the Attorney General to enforce the obligations imposed by the 2015 Conditions. The 2015 Conditions are liabilities that are dischargeable in bankruptcy. By conditioning the transfer of the Hospitals upon the assumption of the Additional Conditions, which impose obligations equal to or in excess of the 2015 Conditions, the Attorney General is impermissibly discriminating against the Debtors in violation of § 525.

The fact that the Additional Conditions can be characterized as a regulatory obligation does not change the analysis. Regulatory obligations such as the Additional Conditions qualify as a “debt” under the Bankruptcy Code’s broad definition of the term:

Under the Bankruptcy Code, “debt” means “liability on a claim,” 11 U.S.C. § 101(12), and “claim,” in turn, includes any “right to payment,” § 101(5)(A). We have said that “[c]laim” has “the broadest available definition,” *Johnson v. Home State Bank*, 501 U.S.

78, 83, 111 S.Ct. 2150, 115 L.Ed.2d 66 (1991), and have held that the “plain meaning of a ‘right to payment’ is nothing more nor less than an enforceable obligation, regardless of the objectives the State seeks to serve in imposing the obligation,” *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. 552, 559, 110 S.Ct. 2126 (1990). See also *Ohio v. Kovacs*, 469 U.S. 274, 105 S.Ct. 705, 83 L.Ed.2d 649 (1985). In short, a debt is a debt, even when the obligation to pay it is also a regulatory condition.

F.C.C. v. NextWave Pers. Commc'ns Inc., 537 U.S. 293, 302–03, 123 S. Ct. 832, 839, 154 L. Ed. 2d 863 (2003).

D. The Debtors May Sell the Hospitals Free and Clear of Certain of the Additional Conditions Pursuant to § 363(f)(5)

Under § 363(f)(5), property may be sold free and clear of an interest, if the entity holding the interest “could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.”

An interest “that can be reduced to a specific monetary value” falls within the scope of § 363(f)(5). *In re Trans World Airlines, Inc.*, 322 F.3d 283, 291 (3d Cir. 2003); *see also In re Vista Marketing Grp. Ltd.*, 557 B.R. 630, 635 (Bankr. N.D. Ill. 2016) (“[O]ne would be hard-pressed to present a clearer example of a situation where the interest-holder could be compelled to accept a money satisfaction of its interest under subsection (f)(5) than the calculable monetary obligation asserted by the District in its surcharge bill and disconnection notice.”).

Among the Additional Conditions are requirements that each of the Hospitals provide specified levels of charity care and community benefit services. The Additional Conditions allow any shortfalls in charity care or community benefit services to be satisfied through deficiency payments to tax-exempt entities within the Hospitals’ service area. The charity care and community benefit obligations can easily be reduced to a specific monetary value. The Debtors may sell the Hospitals free and clear of these obligations pursuant to § 363(f)(5).

E. Section 363(d)(1) Does Not Bar the Sale

As noted, § 363(d)(1) provides that non-profit entities, such as the Debtors, may sell estate assets only if the sale is “in accordance with nonbankruptcy law applicable to the transfer of property by” a non-profit entity.

For the reasons discussed in Section II.B., above, the Debtors are authorized to sell the Hospitals, free and clear of the Additional Conditions, under applicable nonbankruptcy law.

Even if the Debtors were not authorized to sell the Hospitals free and clear under applicable nonbankruptcy law, § 363(d)(1) does not limit the Debtors’ ability to sell the Hospitals free and clear of the Additional Conditions under § 363(f)(4) or (5).¹⁸ Basic principles of statutory construction dictate this result. “Statutory construction ... is a holistic endeavor.” *United Sav. Ass’n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371, 108 S. Ct. 626, 630, 98 L. Ed. 2d 740 (1988). The Court must look “to the provisions of the whole law, and to its object and policy.” *John Hancock Mut. Life Ins. Co. v. Harris Tr. & Sav. Bank*, 510 U.S. 86, 94–

¹⁸ Under § 363(f)(4), the Debtors are authorized to sell the Hospitals free and clear of all of the Additional Conditions. *See* Section II.C., above. Under § 363(f)(5), the Debtors are authorized to sell the Hospitals free and clear of the charity care and community benefit obligations. *See* Section II.D., above.

95, 114 S. Ct. 517, 523, 126 L. Ed. 2d 524 (1993). Absent a “clear intention otherwise,” specific provisions addressing an issue apply instead of more generalized provisions covering the same issue. *Morton v. Mancari*, 417 U.S. 535, 550–51, 94 S. Ct. 2474, 2483, 41 L. Ed. 2d 290 (1974). This rule applies “regardless of the priority of enactment” of the provisions. *Id.*

Section 363(f) sets forth specific circumstances under which assets may be sold free and clear. Section 363(f) is not limited by a non-profit debtor’s general obligation under § 363(d)(1) to comply with nonbankruptcy law. The general requirement set forth in § 363(d)(1) makes no reference to § 363(f), which more specifically delineates the circumstances in which assets may be sold free and clear. Without a “clear intention otherwise,” *Morton*, 417 U.S. at 550–51, the general requirement of § 363(d)(1) does not repeal the specifics of free and clear sales under § 363(f), even though § 363(d)(1) was enacted subsequent to § 363(f).

F. Section 541(f) Does Not Bar the Sale

Section 541(f) provides:

Notwithstanding any other provision of this title, property that is held by a debtor that is a corporation described in section 501(c)(3) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such Code may be transferred to an entity that is not such a corporation, but only under the same conditions as would apply if the debtor had not filed a case under this title.

The Attorney General asserts that § 541(f)’s initial clause, “[n]otwithstanding any other provision of this title,” is broad enough to trump § 363(f). According to the Attorney General, § 541(f) requires that the SGM Sale comply with applicable California law. As a result, the Attorney General argues, the SGM Sale can occur only if SGM agrees to accept all of the 2019 Conditions, including the Additional Conditions.

The language of § 541(f) is similar, but not identical to, the language of § 363(d)(1). Section 363(d)(1) requires that non-profit entities transfer property “in accordance with nonbankruptcy law applicable to the transfer of property by” the non-profit entity; § 541(f) requires that such transfers occur “only under the same conditions as would apply if the debtor had not filed a case under this title.”

“[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Russello v. United States*, 464 U.S. 16, 23, 104 S. Ct. 296, 300, 78 L. Ed. 2d 17 (1983). Therefore, the Court cannot assume that § 541(f) has the same meaning as § 363(f). That is, § 541(f) cannot mean that the Debtors are required to transfer property “in accordance with nonbankruptcy law applicable to the transfer of [such] property,” since that is the language used in § 363(d)(1).

There is no legislative history to guide the Court in construing the phrase “under the same conditions” in § 541(f). Nor has the Court been able to locate any cases interpreting this section. In the absence of legislative history, phrases are construed in accordance with their “ordinary or natural meaning.” *F.D.I.C. v. Meyer*, 510 U.S. 471, 476, 114 S. Ct. 996, 1001, 127 L. Ed. 2d 308 (1994). According to *Roget’s 21st Century Thesaurus* (3d ed. 2013), a synonymous phrase for “under the same conditions” is “in these circumstances.”

Here, the Debtors have complied with § 541(f)’s mandate. That is, “[n]otwithstanding any other provisions” of the Bankruptcy Code, they have sought to transfer the Hospitals in the same

manner as the transfer would have occurred under applicable nonbankruptcy law. The Debtors submitted the transfer to the review of the Attorney General, paid for the expert healthcare impact statements required under the statute, and waited for 135 days for the Attorney General to review the transaction. The transfer has been subject to the same conditions that would have applied had the Debtors not sought bankruptcy protection.

Even if the Attorney General were correct that § 541(f) had the same meaning as § 363(d)(1), the Debtors would still be able to sell the Hospitals free and clear of the Additional Conditions, pursuant to § 363(f)(1), (4), and (5). Contrary to the Attorney General's contention, the "notwithstanding" clause does not mean that § 541(f) trumps § 363(f). The Ninth Circuit has held:

In examining specific statutes, we have not, however, always accorded universal effect to the "notwithstanding" language, standing alone. *See Or. Natural Res. Council v. Thomas*, 92 F.3d 792, 796 (9th Cir.1996) ("We have repeatedly held that the phrase 'notwithstanding any other law' is not always construed literally." (citing *E.P. Paup Co. v. Dir., Office of Workers Comp. Programs*, 999 F.2d 1341, 1348 (9th Cir.1993); *Kee Leasing Co. v. McGahan (In re The Glacier Bay)*, 944 F.2d 577, 582 (9th Cir.1991); *Golden Nugget, Inc. v. Am. Stock Exch., Inc.*, 828 F.2d 586, 588–89 (9th Cir.1987) (per curium))). Instead, we have determined the reach of each such "notwithstanding" clause by taking into account the whole of the statutory context in which it appears.

United States v. Novak, 476 F.3d 1041, 1046 (9th Cir. 2007).

Relying upon the "common-sense principle of statutory construction that sections of a statute generally should be read to give effect, if possible, to every clause," the Ninth Circuit has held that a "notwithstanding" provision should not be given its broadest possible interpretation if doing so would render other statutory provisions ineffectual. *Oregon Nat. Res. Council v. Thomas*, 92 F.3d 792, 797 (9th Cir. 1996).

According to the "notwithstanding" clause the broad construction advocated by the Attorney General would render § 363(f) of the Bankruptcy Code ineffectual with respect to non-profit debtors. Section 541(f) was added to the Bankruptcy Code by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 1221(e) ("BAPCPA"). BAPCPA made no changes to § 363(f). The Court cannot find that Congress intended § 541(f) to trump § 363(f) with respect to non-profit debtors.

G. The Court Certifies a Direct Appeal of its Decision to the Ninth Circuit Court of Appeals

Title 28 U.S.C. § 158(d)(2) provides that the Bankruptcy Court, acting on its motion, may certify a direct appeal of an order to the Court of Appeals if the order "involves a matter of public importance" or if an immediate appeal of the order will "materially advance the progress of the case or proceeding."

Certification is warranted here. The interplay between the sale provisions of the Bankruptcy Code and the authority of the Attorney General to regulate the sale of assets subject to a charitable trust is a matter of public importance. The issue has previously arisen in *Gardens I* and *Verity I*, and will continue to arise in future cases.

A direct appeal will materially advance the progress of the case. Closing of the SGM Sale is the lynchpin of the Debtors' plan of reorganization. However, under the APA, SGM is not

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obligated to close the sale unless the Debtors obtain a final, non-appealable order authorizing a sale free and clear. The Debtors are facing severe liquidity constraints and cannot afford to continue to operate the Hospitals for much longer. A direct appeal will facilitate resolution of this case by providing certainty regarding the permissibility of a sale free and clear far sooner than would otherwise be possible. If the Court's order is upheld, SGM can proceed to close the sale. If not, the Debtors can commence shutting down St. Vincent, Seton, and Seton Coastside.

III. Conclusion

Based upon the foregoing, the Court finds that the Debtors may sell the Hospitals to SGM, free and clear of the Additional Conditions. The sale may proceed under applicable nonbankruptcy law pursuant to § 363(f)(1) because (1) the Additional Conditions qualify as successor liability that may not be imposed against SGM under California law and because (2) the Attorney General abused his discretion in attempting to impose the Additional Conditions, which therefore must be set aside. A bona dispute as to the Attorney General's authority to impose the Additional Conditions exists under § 363(f)(4), because the Debtors (1) have shown that the Additional Conditions are not authorized under California law and that (2) the attempted imposition of the Additional Conditions violates § 525. Pursuant to §363(f)(5), the sale is free and clear of the charity care and community benefit obligations, which can be reduced to a monetary valuation.

The Court will prepare and enter an order certifying this matter for a direct appeal to the Ninth Circuit. The Debtors shall submit an order granting the Motion within seven days of the issuance of this Memorandum of Decision.

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Date: October 23, 2019


Ernest M. Robles
United States Bankruptcy Judge

AMERICAN BANKRUPTCY INSTITUTE

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UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA - LOS ANGELES DIVISION

In re

VERITY HEALTH SYSTEM OF
CALIFORNIA, INC., *et al.*,

Debtor and Debtor In
Possession.

- ☒ Affects All Debtors
- ☐ Affects Verity Health System of California, Inc.
- ☐ Affects O'Connor Hospital
- ☐ Affects Saint Louise Regional Hospital
- ☐ Affects St. Francis Medical Center
- ☐ Affects St. Vincent Medical Center
- ☐ Affects Seton Medical Center
- ☐ Affects O'Connor Hospital Foundation
- ☐ Affects Saint Louise Regional Hospital
Foundation
- ☐ Affects St. Francis Medical Center of Lynwood
Foundation
- ☐ Affects St. Vincent Foundation
- ☐ Affects St. Vincent Dialysis Center, Inc.
- ☐ Affects Seton Medical Center Foundation
- ☐ Affects Verity Business Services
- ☐ Affects Verity Medical Foundation
- ☐ Affects Verity Holdings, LLC
- ☐ Affects De Paul Ventures, LLC
- ☐ Affects De Paul Ventures - San Jose Dialysis,
LLC

Debtors and Debtors In
Possession.

Lead Case No. 2:18-bk-20151-ER

Jointly Administered With:

Case No. 2:18-bk-20162-ER
Case No. 2:18-bk-20163-ER
Case No. 2:18-bk-20164-ER
Case No. 2:18-bk-20165-ER
Case No. 2:18-bk-20167-ER
Case No. 2:18-bk-20168-ER
Case No. 2:18-bk-20169-ER
Case No. 2:18-bk-20171-ER
Case No. 2:18-bk-20172-ER
Case No. 2:18-bk-20173-ER
Case No. 2:18-bk-20175-ER
Case No. 2:18-bk-20176-ER
Case No. 2:18-bk-20178-ER
Case No. 2:18-bk-20179-ER
Case No. 2:18-bk-20180-ER
Case No. 2:18-bk-20181-ER

Chapter 11 Cases
Hon. Judge Ernest M. Robles

**ORDER GRANTING DEBTORS' EMERGENCY
MOTION FOR THE ENTRY OF AN ORDER: (I)
ENFORCING THE ORDER AUTHORIZING THE
SALE TO PRIME HEALTHCARE SERVICES,
INC.; (II) FINDING THAT THE SALE IS FREE AND
CLEAR OF ADDITIONAL CONDITIONS; (III)
FINDING THAT THE ATTORNEY GENERAL
ABUSED HIS DISCRETION IN IMPOSING
ADDITIONAL CONDITIONS ON THE ST.
FRANCIS MEDICAL CENTER SALE; AND (IV)
GRANTING RELATED RELIEF**

Hearing Date and Time:

Date: August 12, 2020
Time: 10:00 a.m. (Pacific Time)
Location: Courtroom 1568
255 E. Temple Street
Los Angeles, CA

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This matter came before the Court on the *Debtors' Emergency Motion for the Entry of an Order: (I) Enforcing the Order Authorizing the Sale to Prime Healthcare Services, Inc.; (II) Finding That the Sale Is Free and Clear of Additional Conditions; (III) Finding That the Attorney General Abused His Discretion in Imposing Additional Conditions of the St. Francis Medical Center Sale; and (IV) Granting Related Relief* [Docket No. 5199] (the "Motion")¹ filed by Verity Health System of California, Inc. ("VHS") and the affiliated debtors, the debtors and debtors in possession (collectively, the "Debtors") in the above-captioned chapter 11 bankruptcy cases (the "Cases." Pursuant to §§ 105, 362, 363, and 525 of title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* (the "Bankruptcy Code") and 28 U.S.C. § 1334(e),² the Motion sought entry of an order: (i) enforcing this Court's previous order [Docket No. 4511] (the "Sale Order") authorizing the sale (the "Sale") of certain assets used in the operation of the general acute care hospital known as "St. Francis Medical Center" (the "Hospital"), which is owned by St. Francis Medical Center, a California nonprofit public benefit corporation ("St. Francis"), to Prime Healthcare Services, Inc. ("Prime"); (ii) finding that the Sale is free and clear of the conditions imposed by the California Attorney General (the "Attorney General") that have not been agreed to by Prime in Exhibit 5.8(c) of the asset purchase agreement (the "APA") [Docket No. 4471] as supplemented or modified by Prime, including, without limitation, the additional Charity Care expenditures, the additional Community Benefit Services expenditures, and the Affiliation Agreement (the "Additional Conditions"); (iii) finding that the Attorney General abused his discretion imposing the Additional Conditions under applicable nonbankruptcy law; and (iv) granting such other and further relief as the Court deems just and proper.

The Court, having reviewed the Motion and the Declarations of Richard G. Adcock [Docket Nos. 8, 5199], Peter C. Chadwick [Docket No. 5199], and Hope R. Levy-Biehl [Docket No. 5199]; the *Opposition of California Attorney General to "Debtors' Emergency Motion for the Entry of an*

¹ Unless otherwise defined herein, all capitalized terms have the definitions set forth in the Motion.

² All references to "§" are to sections of the Bankruptcy Code; all references to "Bankruptcy Rules" are to provisions of the Federal Rules of Bankruptcy Practice; all references to "LBR" are to provisions of the Local Bankruptcy Rules of the United States Bankruptcy Court for the Central District of California.

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1 *Order: (I) Enforcing the Order Authorizing the Sale to Prime Healthcare Services, Inc.;*
2 *(II) Finding That the Sale Is Free and Clear of Additional Conditions; (III) Finding That the*
3 *Attorney General Abused His Discretion in Imposing Conditions on the St. Francis Medical Center*
4 *Sale; and (IV) Granting Related Relief* [Docket No. 5388] (the “Opposition”) filed by the Attorney
5 General, the Declaration of David K. Eldan [Docket No. 5388] in support thereof, and the *Errata*
6 *to Opposition of California Attorney General to “Debtors’ Emergency Motion for the Entry of an*
7 *Order: (I) Enforcing the Order Authorizing the Sale to Prime Healthcare Services, Inc.; (II)*
8 *Finding That the Sale is Free and Clear of Additional Conditions; (III) Finding That the Attorney*
9 *General Abused His Discretion in Imposing Additional Conditions on the St. Francis Medical*
10 *Center Sale; and (IV) Granting Related Relief”* [Doc. 5199] [Doc. 5388] [Docket No. 5404]; and
11 the *Debtors’ Reply to California Attorney General’s Opposition to Debtors’ Motion for the Entry*
12 *of an Order Enforcing the Order Authorizing the St. Francis Sale to Prime Healthcare Services,*
13 *Inc.* [Docket No. 5423] (the “Reply”); having stricken *Prospect Medical’s Response to Debtors’*
14 *Emergency Motion for the Entry of an Order: (I) Enforcing the Order Authorizing the Sale to Prime*
15 *Healthcare Services, Inc.; (II) Finding That the Sale is Free and Clear of Additional Conditions;*
16 *(III) Finding That the Attorney General Abused His Discretion in Imposing Additional Conditions*
17 *on the St. Francis Medical Center Sale; and (IV) Granting Related Relief* (the “Prospect
18 Opposition”) for the reasons set forth in this Court’s separate memorandum of decision [Docket No.
19 5399] and order [Docket No. 5401]; having considered the statements, arguments and
20 representations of the parties made at the hearing on the Motion (the “Hearing”); and the entire
21 record of these Cases; and the Court, having determined that the relief sought in the Motion is in
22 the best interests of the Debtors, their estates and their creditors, and that the legal and factual bases
23 set forth in the Motion and presented at the Hearing establish just cause for the relief granted herein,
24 and for the reasons set forth in the Court’s **amended** tentative ruling issued on August ~~11~~ **12**, 2020,
25 which the Court adopts as its final ruling and which is incorporated herein by reference [**Docket**
26 **No. 5477**] (the “Ruling”); and all objections to the Motion, if any, having been withdrawn,
27 continued, overruled, or settled by stipulation approved by the Court; and after due deliberation and
28 sufficient good cause appearing therefor:

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LOS ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

HEREBY ORDERS AS FOLLOWS:

1. The Motion is GRANTED in its entirety.
2. The Opposition is OVERRULED in its entirety.
3. The Additional Conditions are “interests in property” for purposes of 11 U.S.C. § 363(f).
4. The Assets (as that term is defined in the APA) are sold free and clear of the Additional Conditions without the imposition of any other conditions which would adversely affect the Purchaser (as that term is defined in the APA).
5. The Sale is free and clear of the Additional Conditions pursuant to § 363(f)(1) because (a) the Additional Conditions qualify as successor liability that may not be imposed against Prime under California law and, (b) under applicable California law, the Attorney General abused his discretion in attempting to impose the Additional Conditions.
6. The Sale is free and clear of the Additional Conditions pursuant to § 363(f)(4) because (a) the Additional Conditions are not authorized under California law and (b) the attempted imposition of the **Additional Conditions pertaining to** charity care and community benefits ~~conditions~~ violates § 525.³
7. The Sale is free and clear of the Additional Conditions related to charity care and community benefit services pursuant to § 363(f)(5) because the **Additional Conditions pertaining to** charity care and community benefit obligations can be reduced to a monetary valuation.⁴
8. Consistent with the Court’s findings in the Sale Order, which are incorporated herein by this reference, notwithstanding Bankruptcy Rules 6004(h), 6006(d), 7062, or 9014, if applicable, or any other LBR or otherwise, this Order shall not be stayed for 14 days after the entry hereof, but shall be effective and enforceable immediately upon entry pursuant to Bankruptcy Rules 6004(h)

³ The sale is free and clear of the charity care and community benefit obligations only to the extent that those obligations exceed the Approved Conditions (as defined in the Ruling). Prime remains subject to the charity care and community benefit obligations that do not exceed the Approved Conditions.

⁴ The sale is free and clear of the charity care and community benefit obligations only to the extent that those obligations exceed the Approved Conditions (as defined in the Ruling). Prime remains subject to the charity care and community benefit obligations that do not exceed the Approved Conditions.

and 6006(d). Time is of the essence in approving the Transaction (including the transfer and the sale of the Purchased Assets) (as those terms are defined in the Sale Order).

IT IS SO ORDERED.

###

DENTONS US LLP
601 SOUTH FIGUEROA STREET, SUITE 2500
LOS ANGELES, CALIFORNIA 90017-5704
(213) 623-9300

Date: August 12, 2020


Ernest M. Robles
United States Bankruptcy Judge

Case 2:18-bk-20151-ER Doc 1125 Filed 12/21/18 Entered 12/21/18 13:03:02 Desc
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UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

In re: Verity Health System of California, Inc., *et al.*,

Debtors and Debtors in Possession.

☒ Affects All Debtors

- ☐ Affects Verity Health System of California, Inc.
- ☐ Affects O'Connor Hospital
- ☐ Affects Saint Louise Regional Hospital
- ☐ Affects St. Francis Medical Center
- ☐ Affects St. Vincent Medical Center
- ☐ Affects Seton Medical Center
- ☐ Affects O'Connor Hospital Foundation
- ☐ Affects Saint Louise Regional Hospital Foundation
- ☐ Affects St. Francis Medical Center of Lynwood Medical Foundation
- ☐ Affects St. Vincent Foundation
- ☐ Affects St. Vincent Dialysis Center, Inc.
- ☐ Affects Seton Medical Center Foundation
- ☐ Affects Verity Business Services
- ☐ Affects Verity Medical Foundation
- ☐ Affects Verity Holdings, LLC
- ☐ Affects De Paul Ventures, LLC
- ☐ Affects De Paul Ventures - San Jose Dialysis, LLC

Debtors and Debtors in Possession.,

Lead Case No.: 2:18-bk-20151-ER
Chapter: 11

**ORDER PROVIDING NOTICE OF THE COURT'S
INTENT TO AUTHORIZE THE DEBTORS TO
SELL HOSPITALS FREE AND CLEAR OF THE
2015 CONDITIONS ASSERTED BY THE
CALIFORNIA ATTORNEY GENERAL**

Jointly Administered With:

Case No. 2:18-bk-20162-ER;
Case No. 2:18-bk-20163-ER;
Case No. 2:18-bk-20164-ER;
Case No. 2:18-bk-20165-ER;
Case No. 2:18-bk-20167-ER;
Case No. 2:18-bk-20168-ER;
Case No. 2:18-bk-20169-ER;
Case No. 2:18-bk-20171-ER;
Case No. 2:18-bk-20172-ER;
Case No. 2:18-bk-20173-ER;
Case No. 2:18-bk-20175-ER;
Case No. 2:18-bk-20176-ER;
Case No. 2:18-bk-20178-ER;
Case No. 2:18-bk-20179-ER;
Case No. 2:18-bk-20180-ER;
Case No. 2:18-bk-20181-ER;

Chapter 11 Cases.

Date: December 19, 2018

Time: 10:00 a.m.

Location: Ctrm. 1568
Roybal Federal Building
255 East Temple Street
Los Angeles, CA 90012

Having conducted a hearing on the Debtors' motion for authorization to sell two hospitals at the above-captioned date and time; and the California Attorney General having objected to any sale free and clear of the Conditions (defined below), the Court HEREBY FINDS and ORDERS as follows:

- 1) The Court intends to authorize the sale, free and clear of the Conditions, for the reasons set forth in the *Preliminary Findings and Conclusions* attached hereto as Exhibit A.
- 2) By no later than **Monday, December 24, 2018 at 12:00 p.m.**, the Debtors, the California Attorney General, the Official Committee of Unsecured Creditors, and the County of Santa Clara shall file responses to the *Preliminary Findings and Conclusions*. Any other interested party with standing may also submit a response.
- 3) This matter shall stand submitted as of **December 24, 2018**. If the Court determines that further oral argument is necessary, the parties will be notified.

IT IS SO ORDERED.

###

Date: December 21, 2018



Ernest M. Robles
United States Bankruptcy Judge

Exhibit A—Preliminary Findings and Conclusions

I. Background

On August 31, 2018 (the “Petition Date”), Verity Health Systems of California (“VHS”) and certain of its subsidiaries (collectively, the “Debtors”) filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. On August 31, 2018, the Court entered an order granting the Debtors’ motion for joint administration of the Debtors’ Chapter 11 cases.¹

On October 31, 2018, the Court entered an establishing auction procedures for the sale of two of the Debtors’ hospitals (the “Bidding Procedures Order,” and the motion for entry of the Bidding Procedures Order, the “Bidding Procedures Motion”).² Specifically, the Bidding Procedures Order established procedures governing the auction of Saint Louise Regional Hospital (“St. Louise”), O’Connor Hospital (“O’Connor”), and related assets used in the operation of the hospitals (collectively, the “Hospitals”).³ Pursuant to an Asset Purchase Agreement (the “APA”)⁴ dated October 1, 2018, the County of Santa Clara (“Santa Clara”) was designated as the stalking horse bidder (the “Stalking Horse Bidder”). The Bidding Procedures Order set a hearing on December 19, 2018 to consider the Debtors’ motion for entry of an order (the “Sale Order”) approving the sale of the Hospitals (the “Sale Motion,” and the hearing on the Sale Motion, the “Sale Hearing”). The Debtors expect that the sale will close no earlier than February 28, 2019.

The Assets were vigorously marketed by the Debtors’ investment banker, Cain Brothers, a division of KeyBank Capital Markets, Inc. (“Cain”). Twenty-five parties executed non-disclosure agreements and were granted access to a data room containing information about the Assets.⁵ Cain sent a direct e-mail communication to over 170 interested potential purchasers which contained key information about the Assets.⁶ Cain actively followed up with two serious potential purchasers, assisting those parties with due diligence and making itself available to answer questions.⁷ Notwithstanding these thorough marketing efforts, no party emerged willing to place a bid for the Hospitals.⁸

In 2015, the Debtors’ predecessor, Daughters of Charity Ministry Services Corporation (“Daughters”), sought authorization from the California Attorney General (the “Attorney

¹ Doc. No. 17.

² Doc. No. 724.

³ An Asset Purchase Agreement dated October 1, 2018 (the “APA”) defines the assets being sold as follows: “all assets, businesses, real property, personal property, equipment, supplies, software, contracts, leases, licenses/permits, books, records, offices, facilities, and all other tangible and intangible property (a) whatsoever and wherever located that is owned, leased, or used primarily in connection with the Businesses by a Hospital Seller, (b) located in Santa Clara County, California that is owned, leased, or used primarily in connection with the Businesses by Verity Holdings, and (c) whatsoever and wherever located that is owned, leased, or used by Verity primarily in connection with the Businesses, in each case, except for the Excluded Assets.” APA at ¶1.8.

⁴ Doc. No. 365, Ex. A.

⁵ Decl. of James M. Moloney [Doc. No. 1041] (the “Moloney Decl.”) at ¶6.

⁶ *Id.* at ¶7.

⁷ *Id.* at ¶¶7–8.

⁸ *Id.* at ¶9.

General”), pursuant to Cal. Corp. Code §5914, to implement a *System Restructuring and Support Agreement* (the “Restructuring Agreement”). The Attorney General approved the Restructuring Agreement, subject to various conditions (each, a “Condition,” and collectively, the “Conditions”).⁹ O’Connor was subject to 21 Conditions; St. Louise was subject to 22 Conditions. Among other things, the Conditions require the Hospitals to maintain specified levels of emergency services, intensive care services, cardiac services, and various other services. The Conditions purport to be binding upon “any and all current and future owners” of the Hospitals.¹⁰

On October 10, 2018, the Attorney General filed an objection to the Bidding Procedures Motion.¹¹ The Attorney General objected to the Debtors’ proposal to sell the Hospitals free and clear of the Conditions, contending that the Conditions remained binding upon any purchaser of the Hospitals. The Court did not address the Attorney General’s objection when adjudicating the Bidding Procedures Motion, finding the objection to be premature. The Bidding Procedures Order provided that the Attorney General’s objection was “preserved for the Sale Hearing and may be raised at that time.”¹²

On November 2, 2018, Santa Clara asked the Attorney General to provide clarification regarding his position as to the applicability of certain of the Conditions.¹³ Santa Clara asserted that its status as a government entity made it impossible to comply with certain Conditions without violating its obligations under California law and the California Constitution. On November 9, 2018, the Attorney General responded, advising that five of the Conditions would not be enforced against Santa Clara.¹⁴ Specifically, the Attorney General waived enforcement of Conditions requiring the Hospitals to furnish specified amounts of charity care and community benefits, Conditions pertaining to pension obligations, and Conditions pertaining to the composition of the Board of Trustees of each Hospital.

On December 14, 2018, the Attorney General filed a response to the Debtors’ memorandum in support of the Sale Motion (the “Response”).¹⁵ The Response provided:

The California Attorney General does not object to the sale to the County of Santa Clara, in light of the conditions as clarified in the Attorney General’s November 9, 2018 letter to the County of Santa Clara and as may be subsequently further clarified or modified by

⁹ The Conditions are memorialized in documents captioned *Conditions to Change in Control and Governance of O’Connor Hospital and Approval of the System Restructuring and Support Agreement by and among Daughters of Charity Ministry Services Corporation, Daughters of Charity Health System, Certain Funds Managed by BlueMountain Capital Management, LLC, and Integrity Healthcare, LLC* [Doc. No. 256, Ex. A, at 176–187] (the “O’Connor Conditions”) and *Conditions to Change in Control and Governance of Saint Louise Regional Hospital and Approval of the System Restructuring and Support Agreement by and among Daughters of Charity Ministry Services Corporation, Daughters of Charity Health System, Certain Funds Managed by BlueMountain Capital Management, LLC, and Integrity Healthcare, LLC* [Doc. No. 256, Ex. A, at 261–273] (the “St. Louise Conditions”).

¹⁰ O’Connor Conditions at 176–77 and St. Louise Conditions at 261–62.

¹¹ Doc. No. 463.

¹² Bidding Procedures Order [Doc. No. 724] at ¶3.

¹³ Doc. No. 1066, Ex. 1.

¹⁴ Doc. No. 1066, Ex. 2.

¹⁵ Doc. No. 1066.

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the Attorney General. The Attorney General and the County are presently engaged in further discussions about the Conditions not addressed by the Attorney General's November 9, 2018 letter, and as such, the Attorney General will continue to consider any further requests for clarification or modification presented by the County.

Response at 2.

The APA provides that Santa Clara is not required to accept a Sale Order that does not provide for the sale of the Hospitals free and clear of all liens, claims, and interests (including the Conditions).¹⁶ The Attorney General's Response did not state that the Attorney General objected to sale of the Hospitals free and clear of the Conditions.

At the Sale Hearing, the Attorney General stated that the Response was "inartfully drafted," and that the Attorney General did in fact object to sale of the Hospitals free and clear of the Conditions. The Debtors and Santa Clara asked the Court to approve the sale free and clear of the Conditions, asserting that the Attorney General had waived its objections and/or was estopped from asserting such objections. Santa Clara's counsel explained that in order for the County to be able to proceed with the closing—anticipated to occur at the end of February 2019—it was necessary for any uncertainty regarding the applicability of the Conditions to be immediately resolved. Santa Clara stated that if an order providing for a sale free and clear of the Conditions was not entered by the January 2, 2019 deadline set forth in the APA, it would be Santa Clara's position that a breach of the APA had occurred.

II. Findings and Conclusions

A. The Attorney General Has Waived His Ability to Contest a Sale Free and Clear of the Conditions

"Waiver is the voluntary relinquishment of a known right or conduct such as to warrant an inference to that effect. It implies knowledge of all material facts and of one's rights, together with a willingness to refrain from enforcing those rights." *Hauk v. JP Morgan Chase Bank USA*, 552 F.3d 1114, 1119 (9th Cir. 2009). Waiver also occurs when a "party's acts are so inconsistent with an intent to enforce the right as to induce a reasonable belief that such right has been relinquished." *Salyers v. Metro. Life Ins. Co.*, 871 F.3d 934, 938 (9th Cir. 2017)

The Response filed by the Attorney General on December 14, 2018 waived the Attorney General's right to object to a sale free and clear of the Conditions. The Response provided: "The California Attorney General *does not object* to the sale to the County of Santa Clara" (emphasis added).¹⁷ It contained no reservation of the Attorney General's right to object in the event that the contemplated "further requests for clarification or modification presented by the County"¹⁸ did not yield results acceptable to the Attorney General. The Attorney General knew that the Debtors were seeking approval of a sale free and clear of the Conditions, because the APA contained unequivocal language to that effect. By filing the Response, the Attorney General voluntarily relinquished his right to object to a sale free and clear.

In addition, the filing of the Response was so inconsistent with an intent to continue to enforce the Conditions against the Hospitals once purchased by Santa Clara as to induce Santa

¹⁶ APA at ¶6.2.6.

¹⁷ Response at 2.

¹⁸ *Id.*

Clara to reasonably believe that the Attorney General had abandoned his position as to the enforceability of the Conditions. *See Salyers*, 871 F.3d at 938.

B. The Attorney General is Equitably Estopped from Contesting a Sale Free and Clear of the Conditions

A party may be equitably estopped from asserting a position if the following conditions apply:

- (1) [T]he party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury.

Gabriel v. Alaska Elec. Pension Fund, 773 F.3d 945, 955 (9th Cir. 2014).

Under the circumstances, the Attorney General is equitably estopped from contesting the Debtors' ability to sell the Hospitals free and clear of the Conditions. The Attorney General knew that the Debtors and Santa Clara would rely upon the Response's representation that he had no objection to the sale. The Debtors and Santa Clara had no way of knowing that when the Attorney General stated that he did "not object to the sale to the County of Santa Clara,"¹⁹ what he really meant was that he did not object except to the extent that he did object. The Debtors and Santa Clara relied upon this representation to their detriment. Had they been aware of the Attorney General's true position, the Debtors and Santa Clara would have more vigorously contested the Attorney General's arguments regarding the binding effect of the Conditions.

C. Even if the Doctrines of Waiver and Equitable Estoppel Did Not Apply, a Sale of the Hospitals Free and Clear of the Conditions is Authorized under §363(f)(1)

Section 363(d)(1)²⁰ authorizes non-profit entities, such as the Debtors, to sell estate assets only if the sale is "in accordance with nonbankruptcy law applicable to the transfer of property by" a non-profit entity. Section 363(b) permits the debtor to sell estate property out of the ordinary course of business, subject to court approval. The debtor must articulate a business justification for the sale. *In re Walter*, 83 B.R. 14, 19–20 (9th Cir. BAP 1988). Whether the articulated business justification is sufficient "depends on the case," in view of "all salient factors pertaining to the proceeding." *Id.* at 19–20. Section 363(f)(1) provides that a sale of estate property may be "free and clear of any interest in such property of an entity other than the estate, only if applicable nonbankruptcy law permits sale of such property free and clear of such interest"

1. The Conditions Are an Interest in Property Within the Meaning of §363

As this Court has previously explained:

The Bankruptcy Code does not define the phrase "interest in ... property" for purposes of § 363(f). The Third Circuit has held that the phrase "interest in ... property" is

¹⁹ Response at 2.

²⁰ Unless otherwise indicated, all statutory references are to the Bankruptcy Code, 11 U.S.C. §§ 101–1532.

“intended to refer to obligations that are connected to, or arise from, the property being sold.” *Folger Adam Sec., Inc. v. DeMatteis/MacGregor JV*, 209 F.3d 252, 259 (3d Cir. 2000). That conclusion is echoed by *Collier on Bankruptcy*, which observes a trend in caselaw “in favor of a broader definition [of the phrase] that encompasses other obligations that may flow from ownership of the property.” 3 Alan N. Resnick & Henry J. Sommer, *Collier on Bankruptcy* ¶ 363.06[1] (16th ed. 2017).

Courts have held that interests in property include monetary obligations arising from the ownership of property, even when those obligations are imposed by statute. For example, in *Mass. Dep’t of Unemployment Assistance v. OPK Biotech, LLC (In re PBBPC, Inc.)*, 484 B.R. 860 (1st Cir. BAP 2013), the court held that taxes assessed by Massachusetts under its unemployment insurance statutes constituted an “interest in ... property.” The taxes were computed based on the Debtor’s “experience rating,” which was determined by the number of employees it had terminated in the past. *Id.* at 862. Because the Debtor had terminated most of its employees prior to selling its assets, its experiencing rating, and corresponding unemployment insurance tax liabilities, were very high. *Id.* The PBBPC court held that the experience rating was an interest in property that could be cut off under § 363(f). *Id.* at 869–70. Similarly, in *United Mine Workers of Am. Combined Benefit Fund v. Leckie Smokeless Coal Co. (In re Leckie Smokeless Coal Co.)*, 99 F.3d 573, 581, the court held that monetary obligations imposed by the Coal Industry Retiree Health Benefit Act of 1992 constituted an “interest in ... property” within the meaning of § 363(f).

In re Gardens Reg'l Hosp. & Med. Ctr., Inc., 567 B.R. 820, 825–26 (Bankr. C.D. Cal. 2017), appeal dismissed, No. 2:16-BK-17463-ER, 2018 WL 1229989 (C.D. Cal. Jan. 19, 2018).

The Conditions are an “interest in property” within the meaning of §363(f). The Conditions provide that any owner of the Hospitals must furnish specified levels of emergency services, intensive care services, cardiac services, and various other services. The required service levels were derived based upon the historical experience of the prior operator. As such, the Conditions are monetary obligations arising from the ownership of property.

2. The Debtors May Sell the Hospitals Free and Clear of the Conditions under Applicable Nonbankruptcy Law

Under certain circumstances, the sale of a not-for-profit healthcare facility is subject to review by the Attorney General. Cal. Corp. Code §5914 provides in relevant part (emphasis added):

Any nonprofit corporation that is defined in Section 5046 and operates or controls a health facility, as defined in Section 1250 of the Health and Safety Code, or operates or controls a facility that provides similar health care, regardless of whether it is currently operating or providing health care services or has a suspended license, shall be required to provide written notice to, and to obtain the written consent of, the Attorney General prior to entering into any agreement or transaction to do either of the following:

- (A) Sell, transfer, lease, exchange, option, convey, or otherwise dispose of, its assets to a *for-profit corporation or entity or to a mutual benefit corporation or entity* when a material amount of the assets of the nonprofit corporation are involved in the agreement or transaction.

(B) Transfer control, responsibility, or governance of a material amount of the assets or operations of the nonprofit corporation to any *for-profit corporation or entity or to any mutual benefit corporation or entity*.

Here, the sale is not subject to Attorney General review because the Hospitals are being sold to Santa Clara, which is a public entity, not a for-profit corporation or mutual benefit corporation. Notwithstanding its inability to review the sale, the Attorney General contends that the Conditions—which were imposed in connection with the Attorney General’s §5914 review authority—nonetheless remain binding upon any subsequent purchaser of the Hospitals. In support of this contention, the Attorney General cites Cal. Corp. Code §5926, which provides: “The Attorney General may enforce conditions imposed on the Attorney General’s consent to an agreement or transaction pursuant to Section 5914 or 5920 to the fullest extent provided by law.”

The Court finds that neither Cal. Corp. Code §5926 nor any of the other provisions set forth in Cal. Corp. Code §§ 5914–30 provide the Attorney General with authority to enforce the Conditions against Santa Clara if Santa Clara acquires the Hospitals. In reaching this conclusion, the Court construes the California Corporations Code consistent with California’s rules of statutory construction. *See Fed. Sav. & Loan Ins. Corp. v. Butler*, 904 F.2d 505, 510 (9th Cir. 1990) (applying California’s rules of statutory construction to interpret Cal. Civ. Proc. Code § 877).

Under California law, the “ultimate task” in statutory interpretation “is to ascertain the Legislature’s intent.” *People v. Massie*, 19 Cal.4th 550, 569, 79 Cal.Rptr.2d 816, 967 P.2d 29 (1998). “Ordinarily, the words of the statute provide the most reliable indication of legislative intent.” *Pac. Gas & Elec. Co. v. Cty. of Stanislaus*, 16 Cal.4th 1143, 1152, 69 Cal.Rptr.2d 329, 947 P.2d 291 (1997). Only where the statutory language is ambiguous may the Court consider “evidence of the Legislature’s intent beyond the words of the statute,” such as the “statutory scheme of which the provision is a part, the history and background of the statute, the apparent purpose, and any considerations of constitutionality” *Hughes v. Bd. of Architectural Examiners*, 17 Cal.4th 763, 776, 952 P.2d 641 (1998). “When statutory language is ... clear and unambiguous there is no need for construction, and *courts should not indulge in it*.” *Delaney v. Superior Court*, 50 Cal.3d 785, 800, 268 Cal.Rptr. 753, 789 P.2d 934 (1990) (emphasis in original). However, the “language of a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend.” *Younger v. Superior Court*, 21 Cal.3d 102, 113, 145 Cal.Rptr. 674, 577 P.2d 1014 (1978).

The Legislature enacted Cal. Corp. Code § 5914 to ensure that the public was not deprived of the benefits of charitable health facilities as a result of the transfer of those facilities’ assets to for-profit entities. In enacting § 5914, the Legislature found:

Charitable, nonprofit health facilities have a substantial and beneficial effect on the provision of health care to the people of California, providing as part of their charitable mission uncompensated care to uninsured low-income families and under-compensated care to the poor, elderly, and disabled.

Transfers of the assets of nonprofit, charitable health facilities to the for-profit sector, such as by sale, joint venture, or other sharing of assets, directly affect the charitable use of those assets and may affect the availability of community health care services....

It is in the best interests of the public to ensure that the public interest is fully protected whenever the assets of a charitable nonprofit health facility are transferred out of the charitable trust and to a for-profit or mutual benefit entity.

1996 Cal. Legis. Serv. Ch. 1105 (A.B. 3101) (West).

As discussed, the sale of a nonprofit health facilities' assets to a public entity (such as Santa Clara) are not subject to Attorney General review. This exception is consistent with the statute's objective of ensuring that nonprofit health assets are operated consistent with a charitable mission and in the public interest, because public entities are required by law to furnish healthcare services to those in need. Cal. Welf. & Inst. Code §17000 requires public entities to provide support, including healthcare, to indigent members of the public:

Every county and every city and county shall relieve and support all incompetent, poor, indigent persons, and those incapacitated by age, disease, or accident, lawfully resident therein, when such persons are not supported and relieved by their relatives or friends, by their own means, or by state hospitals or other state or private institutions.

As one court has explained, “[s]ection 17000 imposes various obligations on counties with respect to their indigent residents. Among other obligations, courts have interpreted section 17000 as requiring counties to provide indigent residents with emergency and medically necessary care.” *Fuchino v. Edwards-Buckley*, 196 Cal. App. 4th 1128, 1134, 126 Cal. Rptr. 3d 886, 890 (2011).

As set forth above, the Attorney General's position is that the Conditions remain binding upon Santa Clara, notwithstanding the Attorney General's inability to review the sale. The Attorney General's reliance upon Cal. Corp. Code §5926 in support of this position is unavailing. Section 5926 provides only that the Attorney General may enforce the Conditions to the fullest extent provided by law. However, the Attorney General has not identified the specific provisions of California law that permit the continued enforcement of the Conditions. This omission is particularly glaring in view of the Attorney General's lack of authority to review the sale.

The Attorney General's contention that the Conditions remain binding upon Santa Clara is inconsistent with the statute and its legislative history. The concern motivating enactment of the statute was to prevent charitable assets from falling into the hands of for-profit entities who would not continue to use the assets for charitable purposes. The concern has no applicability where the assets are transferred to a public entity, which has independent statutory obligations to maintain the assets' charitable character.

Because the Attorney General has no authority to review the sale of the Hospitals to Santa Clara, and because the Attorney General has identified no statutory provision permitting his continued enforcement of the Conditions under the circumstances, the Court finds that the Debtors may sell the Hospitals free and clear of the Conditions under applicable nonbankruptcy law.

FOR PUBLICATION

FILED & ENTERED

SEP 26 2019

CLERK U.S. BANKRUPTCY COURT
Central District of California
BY gonzalez DEPUTY CLERKUNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISIONIn re: Verity Health System of California, Inc., *et al.*,

Debtors and Debtors in Possession.

☒ Affects All Debtors

- ☐ Affects Verity Health System of California, Inc.
☐ Affects O'Connor Hospital
☐ Affects Saint Louise Regional Hospital
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☐ Affects Verity Medical Foundation
☐ Affects Verity Holdings, LLC
☐ Affects De Paul Ventures, LLC
☐ Affects De Paul Ventures - San Jose Dialysis, LLC

Debtors and Debtors in Possession.,

Lead Case No.: 2:18-bk-20151-ER

Chapter: 11

**MEMORANDUM OF DECISION AUTHORIZING
DEBTORS TO SELL MEDI-CAL PROVIDER
AGREEMENTS, FREE AND CLEAR OF
INTERESTS ASSERTED BY THE CALIFORNIA
DEPARTMENT OF HEALTH CARE SERVICES,
PURSUANT TO § 363(F)(5)**

Jointly Administered With:

Case No. 2:18-bk-20162-ER;
Case No. 2:18-bk-20163-ER;
Case No. 2:18-bk-20164-ER;
Case No. 2:18-bk-20165-ER;
Case No. 2:18-bk-20167-ER;
Case No. 2:18-bk-20168-ER;
Case No. 2:18-bk-20169-ER;
Case No. 2:18-bk-20171-ER;
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Case No. 2:18-bk-20175-ER;
Case No. 2:18-bk-20176-ER;
Case No. 2:18-bk-20178-ER;
Case No. 2:18-bk-20179-ER;
Case No. 2:18-bk-20180-ER;
Case No. 2:18-bk-20181-ER;

Chapter 11 Cases.

Date: September 25, 2019

Time: 10:00 a.m.

Location: Ctrm. 1568
Roybal Federal Building
255 East Temple Street
Los Angeles, CA 90012

Case 2:18-bk-20151-ER Doc 3146 Filed 09/26/19 Entered 09/26/19 10:11:40 Desc
Main Document Page 2 of 11

At issue is whether Medi-Cal Provider Agreements (the “Provider Agreements”) entered into between four hospitals (the “Hospitals”) and the California Department of Health Care Services (the “DHCS”) are executory contracts which must be transferred pursuant to § 365 of the Bankruptcy Code, or statutory entitlements that may be transferred free and clear of successor liability under § 363 of the Bankruptcy Code.¹ If the Provider Agreements are executory contracts, the DHCS may be entitled to receive payments potentially in excess of \$50 million in connection with the transfer of the Provider Agreements to the purchaser of the Hospitals. By contrast, if the Provider Agreements are statutory entitlements, they can be transferred to the purchaser free and clear of claims and interests under § 363, meaning that the DHCS would receive no payments in connection with the transfer. For the reasons set forth below, the Court finds that the Provider Agreements are statutory entitlements.²

¹ Unless otherwise indicated, all “Civil Rule” references are to the Federal Rules of Civil Procedure, Rules 1–86; all “Bankruptcy Rule” references are to the Federal Rules of Bankruptcy Procedure, Rules 1001–9037; all “Evidence Rule” references are to the Federal Rules of Evidence, Rules 101–1103; all “LBR” references are to the Local Bankruptcy Rules of the United States Bankruptcy Court for the Central District of California, Rules 1001-1–9075-1; and all statutory references are to the Bankruptcy Code, 11 U.S.C. §§101–1532.

² The Court considered the following papers in adjudicating this matter:

- 1) Debtors’ Memorandum in Support of Entry of an Order: (A) Authorizing the Sale of Property Free and Clear of all Claims, Liens and Encumbrances; (B) Authorizing the Assumption and Assignment of Designated Executory Contracts and Unexpired Leases; and (C) Granting Related Relief [Doc. No. 2115] (the “Sale Motion”);
- 2) Creditor California Department of Health Care Services’s Objection to Notice to Counterparties to Executory Contracts and Unexpired Leases of the Debtors that May be Assumed and Assigned [Doc. No. 1879];
- 3) Creditor California Department of Health Care Services’s Supplemental Objection to (1) Debtors’ Motion for the Entry of an Order Authorizing the Sale of Property Free and Clear of All Claims, Liens, and Encumbrances; (2) Approving form of Asset Purchase Agreement [Doc. No. 3043];
- 4) Official Committee of Unsecured Creditors’ Reply to Creditor California Department of Health Care Services’s Supplemental Objection to Sale [Doc. No. 3093];
- 5) Debtors’ Reply to California Department of Health Care Services Objection to Debtors’ Sale of Assets to Strategic Global Management [Doc. No. 3095];
 - a) Objection to Declaration of Hanh Vo in Support of Creditor California Department of Health Care Services’s Supplemental Objection to (1) Debtors’ Motion for the Entry of an Order Authorizing the Sale of Property Free and Clear of All Claims, Liens, and Encumbrances; (2) Approving form of Asset Purchase Agreement [Doc. No. 3115];
 - b) Declaration of Anita Chou in Support of Debtors’ Reply to the California Department of Health Care Services’ Objection to Debtors’ Sale of Assets to Strategic Global Management [Doc. No. 3112]; and
 - c) Notice of Debtors’ Request to Bifurcate Hearing Regarding California Department of Health Care Services’ Objection to Debtors’ Sale of Assets to Strategic Global Management [Doc. No. 3113].

I. Facts

On August 31, 2018 (the “Petition Date”), Verity Health Systems of California (“VHS”) and certain of its subsidiaries (collectively, the “Debtors”) filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. On August 31, 2018, the Court entered an order granting the Debtors’ motion for joint administration of the Debtors’ Chapter 11 cases.³

On May 2, 2019, the Court entered an order approving the sale of substantially all of the assets of four of the Debtors’ hospitals—St. Francis Medical Center, St. Vincent Medical Center, St. Vincent Dialysis Center, and Seton Medical Center (collectively, the “Hospitals”)—to Strategic Global Management, Inc. (“SGM”).⁴

Each of the Hospitals has executed a Provider Agreement with DHCS. The Asset Purchase Agreement (the “APA”) [Doc. No. 2305-1] which governs the sale of the Hospitals to SGM provides that the sale cannot close unless issues regarding alleged financial defaults existing under each Provider Agreement have been resolved.⁵

Pursuant to Cal. Welf. & Inst. Code § 14169.52(a), each of the Hospitals is required to pay a quarterly Hospital Quality Assurance Fee (an “HQA Fee”) to the DHCS, which is assessed regardless of whether the hospital participates in the Medi-Cal Program. *See* Cal. Welf. & Inst. Code § 14169.52(a) (imposing the HQA Fee upon “each general acute care hospital that is not an exempt facility”). As this Court has previously explained, the “HQA Fee allows California to obtain more healthcare funds from the federal government, which generally matches state Medi-Cal contributions dollar-for-dollar.” *In re Gardens Reg’l Hosp. & Med. Ctr., Inc.*, 569 B.R. 788, 791 (Bankr. C.D. Cal. 2017), *aff’d*, No. 2:16-BK-17463-ER, 2018 WL 1354334 (B.A.P. 9th Cir. Mar. 12, 2018) (“*Gardens II*”).

According to the DHCS, the Debtors are liable for approximately \$30 million in HQA Fees attributable to the Hospitals. DHCS asserts that the Provider Agreements associated with each Hospital cannot be transferred to SGM unless the Debtors first assume the Provider Agreements under § 365 of the Bankruptcy Code. In the process of assuming the Provider Agreements, the Debtors would be required to cure the unpaid HQA Fees, or provide adequate assurance that the unpaid HQA Fees would be promptly cured.

The Debtors receive Medi-Cal fee-for-service payments on account of medical services provided to Medi-Cal beneficiaries by the Hospitals. DHCS asserts that the Debtors are liable for approximately \$25 million in Medi-Cal fee-for-service overpayments, and that such overpayments must also be cured in connection with the assumption of the Provider Agreements. The Debtors dispute the validity of the audit that resulted in the calculation of the overpayments.

The Debtors contend that the Provider Agreements are not contracts and that it is therefore unnecessary for the Debtors to assume the Provider Agreements under § 365 in order to transfer the agreements to SGM. According to the Debtors, the Provider Agreements are a statutory entitlement to participate in the Medi-Cal program and should be treated as licenses that can be sold, free and clear of claims, interests, and encumbrances, pursuant to § 363(f). In support of the contention that the Provider Agreements are not contracts, Debtors argue that the Provider Agreements do not impose any obligations upon the DHCS. Debtors maintain that the only obligations existing under the Provider Agreements are those that are already imposed under applicable law, and that an agreement to comply with applicable law “is a gratuitous promise

³ Doc. No. 17.

⁴ Doc. No. 2306 (the “SGM Sale Order”).

⁵ APA at ¶ 8.7.

which does not provide the consideration necessary to make a contract enforceable.” *Gardens II*, 569 B.R. at 797.

The Official Committee of Unsecured Creditors (the “Committee”) agrees with the Debtors that the Provider Agreements are not contracts. Like the Debtors, the Committee takes the position that the Provider Agreements are assets of the Debtors’ respective estates that can be sold free and clear of all interests pursuant to § 363(f).

II. Discussion

If the Provider Agreements are executory contracts, they can be transferred to SGM only if they are first assumed by the Debtors. To assume an executory contract, the Debtors must either cure all defaults under the contract, or provide adequate assurance that the defaults will be cured promptly. § 365(b).

An executory contract is “a contract that neither party has finished performing.” *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1657, 203 L. Ed. 2d 876 (2019). Of course, an agreement that is not a contract can never qualify as an executory contract.

Terms not defined in the Bankruptcy Code have the meaning accorded to such terms under nonbankruptcy law. *See Mission Prod. Holdings*, 139 S.Ct. at 1661 (“And ‘breach’ is neither a defined nor a specialized bankruptcy term. It means in the Code what it means in contract law outside bankruptcy.”). The Bankruptcy Code does not define the term “contract,” so the term has the same meaning under § 365 of the Bankruptcy Code as it does under non-bankruptcy law. As the Supreme Court has explained, “[p]roperty interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding.” *Butner v. United States*, 440 U.S. 48, 55, 99 S. Ct. 914, 918, 59 L. Ed. 2d 136 (1979).

A. The Provider Agreements Are Not Contracts

The first issue the Court must confront, then, is whether the Provider Agreements are contracts. The Court finds that they are not.⁶

⁶ In *Gardens II*, the Court found that under the principle of equitable recoupment, DHCS could withhold Medi-Cal and supplemental quality assurance payments owed to a debtor, for the purpose of recovering unpaid hospital quality assurance fees owed by the debtor. *Gardens II* did not decide whether a Medi-Cal Provider Agreement was a contract or a statutory entitlement akin to a license, as the issue did not affect the outcome of the decision:

The Court finds that, regardless of whether the Provider Agreement is considered a license or contract, the Debtor’s HQA Fee liability and entitlement to Medi-Cal Payments would still arise from the same transaction or occurrence.... As discussed previously, the Debtor’s acknowledgment in the Provider Agreement that unpaid HQA Fees could be withheld from its Medi-Cal Payments establishes the necessary logical relationship between the Debtor’s fee liabilities and its payment entitlements. That logical relationship exists whether the Provider Agreement is classified as a license or a contract.

Gardens II, 569 B.R. at 799.

The Court's determination of whether the Provider Agreements are contracts is informed by decisions involving Medicare Provider Agreements. For purposes of this issue, there are no meaningful differences between the Provider Agreements and a Medicare Provider Agreement. Both types of agreements allow hospitals to obtain reimbursement from the government for providing healthcare services. In both cases, the hospitals' reimbursement entitlement is dictated by the Medicare statute and the regulations promulgated thereunder.⁷

In *PAMC, Ltd. v. Sebelius*, 747 F.3d 1214, 1221 (9th Cir. 2014), the Ninth Circuit declined to apply the contract doctrine of "substantial compliance" to a Medicare Provider Agreement. In that case, PAMC, a hospital, appealed the decision of the Secretary of the Department of Health and Human Services to reduce the reimbursements for which PAMC was eligible. *Id.* at 1215–16. PAMC's reimbursements had been reduced because it had submitted certain required data 28 minutes late. *Id.* at 1216. In challenging the Secretary's decision to reduce its reimbursement eligibility, PAMC argued, among other things, that it had substantially complied with the terms of its Medicare Provider Agreement. *Id.* at 1220. The Ninth Circuit rejected PAMC's attempt to avail itself of the contract doctrine of "substantial compliance":

[T]he whole notion of importing contract doctrines into an area that is a complex statutory and regulatory scheme is problematic. We have, on occasion, stated that providers and others have contracts with the government in this area, but our decisions have turned on the regulatory regime rather than on contract principles. *See, e.g., United States v. Bourseau*, 531 F.3d 1159, 1162, 1169–70 (9th Cir.2008); *Pac. Coast Med. Enters. v. Harris*, 633 F.2d 123, 125 n. 1, 133–35 (9th Cir.1980). As the Eleventh Circuit Court of Appeals held when hospitals complained of legislative impairment of their contract rights in this area because they had agreements with the Secretary: "Upon joining the Medicare program, however, the hospitals received a statutory entitlement, not a contractual right." *Mem'l Hosp. v. Heckler*, 706 F.2d 1130, 1136 (11th Cir.1983); *see also Bennett v. Ky. Dep't of Educ.*, 470 U.S. 656, 669, 105 S.Ct. 1544, 1552, 84 L.Ed.2d 590 (1985) (stating that while states had "grant agreements" with the federal government and those had a "contractual aspect," the program should not be viewed like a "bilateral contract" and should not "be construed most strongly against the drafter" (internal quotation marks omitted)); *cf. Sebelius v. Auburn Reg'l Med. Ctr.*, — U.S. —, —, —, 133 S.Ct. 817, 828–29, 184 L.Ed.2d 627 (2013) (declining to apply equitable tolling principles to time set by Secretary for appealing to the Board); *Kaiser Found.*

In support of its argument that the Provider Agreements are executory contracts, DHCS cites the observation made in *Gardens II* that Medicare Provider Agreements "are similar in many respects to ... [a] Medi-Cal Provider Agreement." *Gardens II*, 569 B.R. at 799 n.12. DHCS then cites decisions holding that Medicare Provider Agreements are executory contracts. As discussed in greater detail below, the Court does not find the decisions cited by DHCS to be persuasive, because they reached the conclusion that Medicare Provider Agreements are executory contracts without meaningful analysis.

⁷ Because the Medi-Cal program is funded in part by federal funds, reimbursement entitlements under Medi-Cal must be consistent with the provisions of the Medicare statute. *See generally* 42 U.S.C. § 1396a (setting forth requirements applicable to state medical assistance plans such as Medi-Cal).

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Hosp., 649 F.3d at 1160 (declining to apply excusable neglect equitable analysis to Board's dismissal of case for "failure to timely submit a position paper").

PAMC, Ltd. v. Sebelius, 747 F.3d 1214, 1221 (9th Cir. 2014).

Other courts have been even more explicit in stating that a Medicare Provider Agreement is not a contract. In *Mem'l Hosp. v. Heckler*, cited with approval in *PAMC*, hospitals argued that new legislation reducing their Medicare reimbursement entitlements constituted "an unconstitutional taking of their property without just compensation in violation of the fifth amendment, because it would abrogate a vested contractual right to Medicare reimbursement." *Heckler*, 706 F.2d 1130, 1136 (11th Cir. 1983). The *Heckler* court squarely rejected the hospitals' contention that their Medicare Provider Agreements were contracts: "Upon joining the Medicare program, however, the hospitals received a statutory entitlement, not a contractual right." *Heckler*, 706 F.2d at 1136.

Significantly, the *Heckler* court observed that "[c]ourts have upheld retroactive adjustments in the Medicare reimbursement system." *Id.* It emphasized that such retroactive adjustments were permissible precisely because Medicare Provider Agreements were not contracts. *Id.* A similar result was reached in *Germantown Hosp. & Med. Ctr. v. Heckler*, 590 F. Supp. 24, 30–31 (E.D. Pa. 1983), *aff'd sub nom. Germantown Hosp. & Med. Ctr. v. Schweiker*, 738 F.2d 631 (3d Cir. 1984), in which the court held:

There is no contractual obligation requiring [the Department of Health and Human Services] to provide Medicare reimbursement. Rather, upon joining the Medicare program, providers gain a statutory entitlement to reimbursement. Thus the amount of reimbursement is governed not by contract but by statute; specifically the Medicare Act's "reasonable cost" provisions.

Germantown, 590 F.Supp. at 30–31. *See also Greater Dallas Home Care All. v. United States*, 10 F. Supp. 2d 638, 647 (N.D. Tex. 1998) ("Plaintiffs argue that the Medicare participation agreements ... are essentially contracts. The Court disagrees and finds that the participation agreements are not contracts, for the right to receive payments under the Medicare Act is a manifestation of Government policy and, as such, is a statutory rather than a contractual right.").

Similarly, in *Guzman v. Shewry*, the Ninth Circuit held that a Medi-Cal Provider Agreement was not a contract. 552 F.3d 941 (9th Cir. 2009). In *Guzman*, a physician sought a preliminary injunction to prevent the DHCS from temporarily suspending him from the Medi-Cal program. *Id.* at 946. Among other things, the physician argued that because his suspension deprived him of the ability to receive reimbursement for treating Medi-Cal patients, he had been deprived of his right to contract with the state. *Id.* at 954. Rejecting this argument, the court held that "[p]articipation in the Medi-Cal program entitles Guzman to reimbursement for treating patients who receive Medi-Cal benefits; it does not involve bidding on government contracts." *Id.*

In addition, the Provider Agreements lack a key feature found in all contracts—obligations imposed on both parties to the agreements. The Provider Agreements impose no obligations upon the DHCS. The only obligations spoken of in the Provider Agreements pertain to the Debtors. Even these obligations do not constitute consideration for contract purposes, since they

merely restate the Debtors' pre-existing legal obligations.⁸ As this Court has previously held, "an agreement to comply with applicable law is a gratuitous promise which does not provide the consideration necessary to make a contract enforceable." *Gardens II*, 569 B.R. at 797.

DHCS cites a number of cases in which courts have held that Medicare Provider Agreements are executory contracts. These authorities are not persuasive, because the issue of whether the provider agreements were executory contracts versus statutory entitlements was not litigated. Instead, the courts simply assumed, without meaningful analysis, that the provider agreements were executory contracts.

For example, in *In re University Medical Center*, 973 F.2d 1065 (3d Cir. 1992), the Third Circuit assumed that a Medicare Provider Agreement was an executory contract, even though the Third Circuit had ruled eight years prior in *Germantown Hosp. & Med. Ctr. v. Schweiker*, 738 F.2d 631, 632 (3d Cir. 1984) that Medicare Provider Agreements are statutory entitlements, not contracts. In *Germantown*, the court rejected the argument that a reduction in Medicare reimbursement rates impaired the contract rights of the Medicare providers. *Id.* The *University Medical Center* decision contained no discussion of *Germantown* and made no attempt to reconcile *Germantown*'s holding that reductions to Medicare reimbursement rates did not amount to a breach of contract. Similarly, in *In re Heffernan Memorial Hospital District*, 192 B.R. 228, 231 n.4 (Bankr. S.D. Cal. 1996), the issue was not litigated and the debtor appeared to concede that the provider agreement was an executory contract. Likewise, in *In re St. Johns Home Health Agency, Inc.*, 173 B.R. 238 (Bankr. S.D. Fla. 1994), the debtor conceded that the provider agreement was an executory contract, and the Bankruptcy Court disregarded prior binding Eleventh Circuit precedent rejecting the contention that a provider agreement gave the provider "a vested contractual right to Medicare reimbursement." *Mem'l Hosp. v. Heckler*, 706 F.2d 1130, 1136 (11th Cir. 1983).

⁸ DHCS cites a number of provisions within the Provider Agreement that it claims constitute consideration sufficient to render the Provider Agreements contractual in nature. But all of the following the provisions cited by DHCS are restatements of legal obligations imposed upon the Debtors by federal law, federal regulations, state law, or state regulations:

- 1) Debtors will be subject to the sanctions available to DHCS if they fail to comply with applicable law.
- 2) To submit a treatment authorization request, the Debtors must use a National Provider Identifier ("NPI") that is appropriately registered and is compliant with all NPI requirements.
- 3) Debtors cannot engage in conduct inimical to public health, morals, welfare, or safety.
- 4) Debtors cannot refuse healthcare services based upon race, color, ancestry, marital status, national origin, gender, age, economic status, or physical or mental disability.
- 5) Only qualified medical personnel may provide healthcare services.
- 6) Any overpayments must be repaid by the Debtors in accordance with applicable statutes and regulations.
- 7) Debtors are subject to certain automatic and permissive suspensions and mandatory and permissive exclusions.

B. The Provider Agreements Can Be Sold Free and Clear of Liens, Claims, and Interests Pursuant to § 363(f)(5)

Having found that the Provider Agreements are not contracts and therefore are not subject to assumption and assignment under § 365, the Court must determine whether the Provider Agreements can be sold free and clear of liens, claims, and interests under § 363(f).

Courts have held that interests such as the Provider Agreements constitute “property of the estate” under § 541 that may be sold under § 363. In *Matter of Fugazy Exp., Inc.*, 124 B.R. 426, 430 (S.D.N.Y. 1991), the court held that a license issued by the Federal Communications Commission was property of the estate, notwithstanding a provision within the Federal Communications Act providing that the Act did not create ownership rights in licenses. The holding is consistent with Ninth Circuit precedent stating that “[g]overnment licenses, as a general rule, are considered to be ‘general intangibles’ under the Uniform Commercial Code, ‘i.e., personal property interests in which security interests may be perfected.’” *MLQ Inv’rs, L.P. v. Pac. Quadracasting, Inc.*, 146 F.3d 746, 749 (9th Cir. 1998).

The Court finds that the Provider Agreements are akin to a license issued by a government agency, and therefore that the Provider Agreements may be sold under § 363. The Provider Agreements create a statutory entitlement to bill the Medi-Cal program for providing Medi-Cal services. *See Guzman*, 552 F.3d at 954 (stating that “[p]articipation in the Medi-Cal program entitles [physician] Guzman to reimbursement for treating patients who receive Medi-Cal benefits”). This right to receive reimbursement for providing healthcare services is a property interest.

DHCS contends that the Hospitals hold no property interest in the Provider Agreements and that as a result, the Provider Agreements cannot be sold under § 363. In support of its position, DHCS cites *Erickson v. U.S. ex rel. Dep’t of Health & Human Servs.*, 67 F.3d 858, 862 (9th Cir. 1995), in which the court held that a physician convicted of submitting false claims to Medicare did “not possess a property interest in continued participation in Medicare, Medicaid, or the federally-funded state health care programs.” *Id.*

DHCS ignores the difference between a property interest in the right to *continue* to participate in Medi-Cal and a property interest in the *existing* right to bill Medi-Cal for providing services. *Erickson* stands for the unremarkable proposition that a provider who engages in criminal conduct has no right to continue as a provider. No one disputes that if the Hospitals violated Medi-Cal statutes or regulations, their right to continue as Medi-Cal Providers could be suspended. But at present, the Provider Agreements are in good standing and the Hospitals have the right to receive reimbursements for providing services to Medi-Cal beneficiaries. It is this right that amounts to a property interest.

The Provider Agreements may be sold free and clear of the liabilities which DHCS contends attach to the Provider Agreements. This includes the alleged liabilities for approximately \$30 million in unpaid HQA Fees and \$25 million in Medi-Cal overpayments (collectively, the “Liabilities”).⁹

⁹ The Debtors object to declaration testimony submitted by Hanh Vo with respect to the amount of the Liabilities. As a result of its determination that the Provider Agreements may be sold free and clear of the Liabilities, it is not necessary for the Court to adjudicate the amount of the Liabilities at this time. Because the Court has not considered the Vo declaration in reaching its decision, the Court does not rule upon the Debtors’ evidentiary objection. *See Operating Engineers’ Pension Trust Fund v. Clark’s Welding & Mach.*, 688 F. Supp. 2d 902, 907 (N.D.

Section 363(f)(1) provides that a sale of estate property may be “free and clear of any interest in such property of an entity other than the estate” if certain conditions are satisfied. As this Court has previously explained:

The Bankruptcy Code does not define the phrase “interest in ... property” for purposes of § 363(f). The Third Circuit has held that the phrase “interest in ... property” is “intended to refer to obligations that are connected to, or arise from, the property being sold.” *Folger Adam Sec., Inc. v. DeMatteis/MacGregor JV*, 209 F.3d 252, 259 (3d Cir. 2000). That conclusion is echoed by *Collier on Bankruptcy*, which observes a trend in caselaw “in favor of a broader definition [of the phrase] that encompasses other obligations that may flow from ownership of the property.” 3 Alan N. Resnick & Henry J. Sommer, *Collier on Bankruptcy* ¶ 363.06[1] (16th ed. 2017).

Courts have held that interests in property include monetary obligations arising from the ownership of property, even when those obligations are imposed by statute. For example, in *Mass. Dep’t of Unemployment Assistance v. OPK Biotech, LLC (In re PBBPC, Inc.)*, 484 B.R. 860 (1st Cir. BAP 2013), the court held that taxes assessed by Massachusetts under its unemployment insurance statutes constituted an “interest in ... property.” The taxes were computed based on the Debtor’s “experience rating,” which was determined by the number of employees it had terminated in the past. *Id.* at 862. Because the Debtor had terminated most of its employees prior to selling its assets, its experiencing rating, and corresponding unemployment insurance tax liabilities, were very high. *Id.* The PBBPC court held that the experience rating was an interest in property that could be cut off under § 363(f). *Id.* at 869–70. Similarly, in *United Mine Workers of Am. Combined Benefit Fund v. Leckie Smokeless Coal Co. (In re Leckie Smokeless Coal Co.)*, 99 F.3d 573, 581, the court held that monetary obligations imposed by the Coal Industry Retiree Health Benefit Act of 1992 constituted an “interest in ... property” within the meaning of § 363(f).

In re Gardens Reg’l Hosp. & Med. Ctr., Inc., 567 B.R. 820, 825–26 (Bankr. C.D. Cal. 2017), appeal dismissed, No. 2:16-BK-17463-ER, 2018 WL 1229989 (C.D. Cal. Jan. 19, 2018).

The Liabilities are an “interest in property” within the meaning of § 363(f). The Liabilities arise because the Hospitals have elected to exercise their statutory entitlement to provide medical services, and receive reimbursement for providing such services, under the Provider Agreements. As such, the Liabilities are a monetary obligation arising from the ownership of property (the property being the reimbursement rights associated with the Provider Agreements).

The Provider Agreements may be sold free and clear of the Liabilities only if one or more of the conditions specified in § 363(f)(1)–(5) is satisfied. Here, the Court finds that § 363(f)(5) is satisfied. Under § 363(f)(5), property may be sold free and clear of an interest, if the entity holding the interest “could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.”

The interest that DHCS holds in the Provider Agreements is its right to receive payment of the Liabilities. DHCS could be compelled to accept a money satisfaction of its interest in a legal or equitable proceeding. In fact, receiving a money satisfaction is and has been DHCS’ objective

Cal. 2010) (“Because the Court does not rely on the statements in this declaration, it is not necessary for the Court to rule on these objections.”).

all along. Throughout these cases, DHCS has withheld funds payable to the Hospitals to recover the Liabilities.¹⁰ That DHCS would accept a money satisfaction is apparent in its briefing. DHCS states that the Debtors must “pay the debt through the proceeds of the sale” or “within five days of the closing of the sale,” and that the Debtors “must establish and maintain a trust account in the amount of \$70 million for 36 months for potential reimbursement to [DHCS] of any Medi-Cal overpayment”¹¹

The case of *In re P.K.R. Convalescent Centers, Inc.*, 189 B.R. 90, 91 (Bankr. E.D. Va. 1995) is directly on point. In *In re PKR Convalescent Centers*, the court approved the sale of a nursing home, free and clear of the interest held by the Virginia Department of Medical Assistance Service (the “DMAS”), pursuant to § 363(f)(5). The interest in question was DMAS’ right under Virginia law to recapture, upon the sale of the nursing home, depreciation payments it had previously made to the operators of the nursing home. The court held that DMAS’ interest would be extinguished if it received the \$1.7 million in depreciation recapture payments it was owed under the statute, and that accordingly, DMAS could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of its interest. *Id.* at 94.

As was the case in *PKR Convalescent Centers*, DHCS’ interest in the Provider Agreements would be extinguished if it received the payments it contends it is owed on account of the Liabilities. Consequently, DHCS could be compelled to accept a money satisfaction of its interest. The Provider Agreements may be sold free and clear of DHCS’ interest under § 363(f)(5).

The Debtors request that the order on the Motion state that DHCS’ recoupment rights against SGM, if any, must be first exercised against payments due to the Debtors from Medi-Cal, then against funds held by the Debtors generated by past interim Medi-Cal payments, and then against any sale proceeds generated by the sale of the Provider Agreement. The issue of the applicability of recoupment subsequent to the sale of the Provider Agreements free and clear of claims and interests has not been sufficiently briefed. The Court declines to decide the issue at present, without prejudice to the ability of interested parties to raise the issue by way of motion.

DHCS requests that the order on the Motion be stayed for 14 days, pursuant to Bankruptcy Rule 6004(h). The purpose of Bankruptcy Rule 6004(h) is to provide sufficient time for an objecting party to appeal before an order can be implemented. The sale to SGM is not expected to close until mid-to-late October 2019. Because the Provider Agreements will not be transferred to SGM until the sale closes, the stay imposed by Bankruptcy Rule 6004(h) is not necessary to protect DHCS’ right to appeal.

III. Conclusion

Based upon the foregoing, the Debtors are authorized to sell the Provider Agreements to SGM, free and clear of claims, interests, and encumbrances, pursuant to § 363(f)(5). The Debtors shall submit an order consistent with this Memorandum of Decision.

¹⁰ DHCS asserts that its withholdings are authorized under the equitable principle of recoupment. As the issue is not presently before it, the Court expresses no opinion on whether the withholdings were permissible under recoupment principles.

¹¹ Doc. No. 3043 at 10.

AMERICAN BANKRUPTCY INSTITUTE

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Date: September 26, 2019


Ernest M. Robles
United States Bankruptcy Judge

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UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

In re: Verity Health System of California, Inc.,
et al.,

Lead Case No.: 2:18-bk-20151-ER
Chapter: 11

Debtors and Debtors in Possession.

☒ Affects All Debtors

- ☐ Affects Verity Health System of California, Inc.
- ☐ Affects O'Connor Hospital
- ☐ Affects Saint Louise Regional Hospital
- ☐ Affects St. Francis Medical Center
- ☐ Affects St. Vincent Medical Center
- ☐ Affects Seton Medical Center
- ☐ Affects O'Connor Hospital Foundation
- ☐ Affects Saint Louise Regional Hospital Foundation
- ☐ Affects St. Francis Medical Center of Lynwood Medical Foundation
- ☐ Affects St. Vincent Foundation
- ☐ Affects St. Vincent Dialysis Center, Inc.
- ☐ Affects Seton Medical Center Foundation
- ☐ Affects Verity Business Services
- ☐ Affects Verity Medical Foundation
- ☐ Affects Verity Holdings, LLC
- ☐ Affects De Paul Ventures, LLC
- ☐ Affects De Paul Ventures - San Jose Dialysis, LLC

Debtors and Debtors in Possession.,

**MEMORANDUM OF DECISION
OVERRULING OBJECTIONS OF THE
CALIFORNIA ATTORNEY GENERAL TO
THE DEBTORS' SALE MOTION**

Jointly Administered With:
Case No. 2:18-bk-20162-ER;
Case No. 2:18-bk-20163-ER;
Case No. 2:18-bk-20164-ER;
Case No. 2:18-bk-20165-ER;
Case No. 2:18-bk-20167-ER;
Case No. 2:18-bk-20168-ER;
Case No. 2:18-bk-20169-ER;
Case No. 2:18-bk-20171-ER;
Case No. 2:18-bk-20172-ER;
Case No. 2:18-bk-20173-ER;
Case No. 2:18-bk-20175-ER;
Case No. 2:18-bk-20176-ER;
Case No. 2:18-bk-20178-ER;
Case No. 2:18-bk-20179-ER;
Case No. 2:18-bk-20180-ER;
Case No. 2:18-bk-20181-ER;

Chapter 11 Cases.

Date: December 19, 2018

Time: 10:00 a.m.

Location: Ctrm. 1568
Roybal Federal Building
255 East Temple Street
Los Angeles, CA 90012

To adjudicate objections asserted by the California Attorney General (the “Attorney General”) to the Debtors’ motion for authorization to sell Saint Louise Regional Hospital (“St. Louise”) and O’Connor Hospital (“O’Connor,” and together with St. Louise, the “Hospitals”) to the County of Santa Clara (“Santa Clara”), the Court ordered the Debtors, the Attorney General, Santa Clara, and the Official Committee of Unsecured Creditors (the “Committee”) to respond to the Court’s *Preliminary Findings and Conclusions* (the “Preliminary Findings”).¹ In the Preliminary Findings, the Court stated that it intended to authorize the Debtors to sell the Hospitals to Santa Clara, free and clear of certain conditions imposed by the Attorney General in connection with a 2015 restructuring transaction, pursuant to §363(f)(1).² Having reviewed the briefing submitted in response to the Court’s order,³ the Court maintains its Preliminary Findings, and for the reasons set forth below will authorize the Debtors to sell the Hospitals free and clear of the conditions imposed by the Attorney General in connection with the 2015 restructuring transaction.

I. Background

On August 31, 2018 (the “Petition Date”), Verity Health Systems of California (“VHS”) and certain of its subsidiaries (collectively, the “Debtors”) filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. On August 31, 2018, the Court entered an order granting the Debtors’ motion for joint administration of the Debtors’ Chapter 11 cases.⁴

On October 31, 2018, the Court entered an order establishing auction procedures for the sale of the Hospitals (the “Bidding Procedures Order,” and the motion for entry of the Bidding

¹ See Order Providing Notice of the Court’s Intent to Authorize the Debtors to Sell Hospitals Free and Clear of the 2015 Conditions Asserted by the California Attorney General [Doc. No. 1125] (the “Briefing Order”).

² Unless otherwise indicated, all “Civil Rule” references are to the Federal Rules of Civil Procedure, Rules 1–86; all “Bankruptcy Rule” references are to the Federal Rules of Bankruptcy Procedure, Rules 1001–9037; all “Evidence Rule” references are to the Federal Rules of Evidence, Rules 101–1103; all “LBR” references are to the Local Bankruptcy Rules of the United States Bankruptcy Court for the Central District of California, Rules 1001-1–9075-1; and all statutory references are to the Bankruptcy Code, 11 U.S.C. §§101–1532.

³ The following papers were submitted in response to the Briefing Order:

- 1) County of Santa Clara’s Response to Order Providing Notice of the Court’s Intent to Authorize the Debtors to Sell Hospitals Free and Clear of the 2015 Conditions Asserted by the California Attorney General [Doc. No. 1136];
- 2) Official Committee of Unsecured Creditors’ Response to the Court’s Order Providing Notice of the Court’s Intent to Authorize the Debtors to Sell Hospitals Free and Clear of the 2015 Conditions Asserted by the California Attorney General [Doc. No. 1137];
- 3) Debtors’ Response to Order Providing Notice of the Court’s Intent to Authorize the Debtors to Sell Hospitals Free and Clear of the 2015 Conditions Asserted by the California Attorney General [Doc. No. 1139];
- 4) Attorney General Response to the Court’s Preliminary Findings and Conclusions Re: Court’s Order Providing Notice of the Court’s Intent to Authorize the Debtors to Sell Hospitals Free and Clear of the 2015 Conditions Asserted by the California Attorney General [Doc. No. 1140];
 - a) Notice of Errata Re: Attorney General’s Response Filed on December 24, 2018 [Doc. No. 1144];
- 5) Declaration of Douglas M. Press in Response to the Filing by the California Attorney General [Docket No. 1140] and in Support of Entry of the Order (1) Approving Sale of Certain Assets to Santa Clara County Free and Clear of All Encumbrances; (2) Approving of Debtors’ Assumption and Assignment of Certain Unexpired Leases and Executory Contracts and Determining Cure Amounts and Approving of Debtors’ Rejection of Those Unexpired Leases and Executory Contracts Which Are Not Assumed and Assigned; (3) Waiving the 14-day Stay Periods Set Forth in Bankruptcy Rules 6004(h) and 6006(d); and (4) Granting Related Relief [Doc. No. 1141] (the “Press Decl.”).

⁴ Doc. No. 17.

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Procedures Order, the “Bidding Procedures Motion”).⁵ Pursuant to an Asset Purchase Agreement (the “APA”)⁶ dated October 1, 2018, Santa Clara was designated as the stalking horse bidder (the “Stalking Horse Bidder”). The Bidding Procedures Order set a hearing on December 19, 2018 to consider the Debtors’ motion for entry of an order (the “Sale Order”) approving the sale of the Hospitals (the “Sale Motion,” and the hearing on the Sale Motion, the “Sale Hearing”). The Debtors expect that the sale will close no earlier than February 28, 2019.

The Hospitals were vigorously marketed by the Debtors’ investment banker, Cain Brothers, a division of KeyBank Capital Markets, Inc. (“Cain”). Twenty-five parties executed non-disclosure agreements and were granted access to a data room containing information about the Hospitals.⁷ Cain sent a direct e-mail communication to over 170 interested potential purchasers which contained key information about the Hospitals.⁸ Cain actively followed up with two serious potential purchasers, assisting those parties with due diligence and making itself available to answer questions.⁹ Notwithstanding these thorough marketing efforts, no party emerged willing to place a bid for the Hospitals.¹⁰

In 2015, the Debtors’ predecessor, Daughters of Charity Ministry Services Corporation (“Daughters”), sought authorization from the Attorney General, pursuant to Cal. Corp. Code §5914, to implement a *System Restructuring and Support Agreement* (the “Restructuring Agreement”). The Attorney General approved the Restructuring Agreement, subject to various conditions (each, a “Condition,” and collectively, the “Conditions”).¹¹ O’Connor was subject to 21 Conditions; St. Louise was subject to 22 Conditions.

Among other things, the Conditions require the Hospitals to maintain specified levels of emergency services, intensive care services, cardiac services, and various other services. The Conditions purport to be binding upon “any and all current and future owners” of the Hospitals.¹²

On October 10, 2018, the Attorney General filed an objection to the Bidding Procedures Motion.¹³ The Attorney General objected to the Debtors’ proposal to sell the Hospitals free and clear of the Conditions, contending that the Conditions remained binding upon any purchaser of the Hospitals. The Court did not address the Attorney General’s objection when adjudicating the

⁵ See Doc. No. 724 (Bidding Procedures Order) and Doc. No. 365 (Bidding Procedures Motion).

⁶ The APA [Doc. No. 365, Ex. A] defines the assets being sold as follows: “all assets, businesses, real property, personal property, equipment, supplies, software, contracts, leases, licenses/permits, books, records, offices, facilities, and all other tangible and intangible property (a) whatsoever and wherever located that is owned, leased, or used primarily in connection with the Businesses by a Hospital Seller, (b) located in Santa Clara County, California that is owned, leased, or used primarily in connection with the Businesses by Verity Holdings, and (c) whatsoever and wherever located that is owned, leased, or used by Verity primarily in connection with the Businesses, in each case, except for the Excluded Assets.” APA at ¶1.8.

⁷ Decl. of James M. Moloney [Doc. No. 1041] (the “Moloney Decl.”) at ¶6.

⁸ *Id.* at ¶7.

⁹ *Id.* at ¶¶7–8.

¹⁰ *Id.* at ¶9.

¹¹ The Conditions are memorialized in documents captioned *Conditions to Change in Control and Governance of O’Connor Hospital and Approval of the System Restructuring and Support Agreement by and among Daughters of Charity Ministry Services Corporation, Daughters of Charity Health System, Certain Funds Managed by BlueMountain Capital Management, LLC, and Integrity Healthcare, LLC* [Doc. No. 256, Ex. A, at 176–187] (the “O’Connor Conditions”) and *Conditions to Change in Control and Governance of Saint Louise Regional Hospital and Approval of the System Restructuring and Support Agreement by and among Daughters of Charity Ministry Services Corporation, Daughters of Charity Health System, Certain Funds Managed by BlueMountain Capital Management, LLC, and Integrity Healthcare, LLC* [Doc. No. 256, Ex. A, at 261–273] (the “St. Louise Conditions”).

¹² O’Connor Conditions at 176–77 and St. Louise Conditions at 261–62.

¹³ Doc. No. 463.

Bidding Procedures Motion, finding the objection to be premature. The Bidding Procedures Order provided that the Attorney General's objection was "preserved for the Sale Hearing and may be raised at that time."¹⁴

On November 2, 2018, Santa Clara asked the Attorney General to provide clarification regarding his position as to the applicability of certain of the Conditions.¹⁵ Santa Clara asserted that its status as a government entity made it impossible to comply with certain Conditions without violating its obligations under California law and the California Constitution. On November 9, 2018, the Attorney General responded, advising that five of the Conditions would not be enforced against Santa Clara.¹⁶ Specifically, the Attorney General waived enforcement of Conditions requiring the Hospitals to furnish specified amounts of charity care and community benefits, Conditions pertaining to pension obligations, and Conditions pertaining to the composition of the Board of Trustees of each Hospital.

On December 14, 2018, the Attorney General filed a response to the Debtors' memorandum in support of the Sale Motion (the "Response").¹⁷ The Response provided:

The California Attorney General does not object to the sale to the County of Santa Clara, in light of the conditions as clarified in the Attorney General's November 9, 2018 letter to the County of Santa Clara and as may be subsequently further clarified or modified by the Attorney General. The Attorney General and the County are presently engaged in further discussions about the Conditions not addressed by the Attorney General's November 9, 2018 letter, and as such, the Attorney General will continue to consider any further requests for clarification or modification presented by the County.

Response at 2.

The APA provides that Santa Clara is not required to accept a Sale Order that does not provide for the sale of the Hospitals free and clear of all liens, claims, and interests (including the Conditions).¹⁸ The Attorney General's Response did not state that the Attorney General objected to sale of the Hospitals free and clear of the Conditions.

At the Sale Hearing, the Attorney General stated that the Response was "inartfully drafted," and that the Attorney General did in fact object to sale of the Hospitals free and clear of the Conditions. The Debtors and Santa Clara asked the Court to approve the sale free and clear of the Conditions, asserting that the Attorney General had waived its objections and/or was estopped from asserting such objections. Santa Clara's counsel explained that in order for the County to be able to proceed with the closing—anticipated to occur at the end of February 2019—it was necessary for any uncertainty regarding the applicability of the Conditions to be immediately resolved. Santa Clara stated that if an order providing for a sale free and clear of the Conditions was not entered by the January 2, 2019 deadline set forth in the APA, it would be Santa Clara's position that a breach of the APA had occurred.

¹⁴ Bidding Procedures Order [Doc. No. 724] at ¶3.

¹⁵ Doc. No. 1066, Ex. 1.

¹⁶ Doc. No. 1066, Ex. 2.

¹⁷ Doc. No. 1066.

¹⁸ APA at ¶6.2.6.

II. Findings and Conclusions

A. The Attorney General Has Waived His Ability to Contest a Sale Free and Clear of the Conditions

“Waiver is the voluntary relinquishment of a known right or conduct such as to warrant an inference to that effect. It implies knowledge of all material facts and of one’s rights, together with a willingness to refrain from enforcing those rights.” *Hauk v. JP Morgan Chase Bank USA*, 552 F.3d 1114, 1119 (9th Cir. 2009). Waiver also occurs when a “party’s acts are so inconsistent with an intent to enforce the right as to induce a reasonable belief that such right has been relinquished.” *Salyers v. Metro. Life Ins. Co.*, 871 F.3d 934, 938 (9th Cir. 2017).

The Response filed by the Attorney General on December 14, 2018 waived the Attorney General’s right to object to a sale free and clear of the Conditions. The Response provided: “The California Attorney General *does not object* to the sale to the County of Santa Clara” (emphasis added).¹⁹ It contained no reservation of the Attorney General’s right to object in the event that the contemplated “further requests for clarification or modification presented by the County”²⁰ did not yield results acceptable to the Attorney General. The Attorney General knew that the Debtors were seeking approval of a sale free and clear of the Conditions, because the APA contained unequivocal language to that effect. By filing the Response, the Attorney General voluntarily relinquished his right to object to a sale free and clear.

In addition, the filing of the Response was so inconsistent with an intent to continue to enforce the Conditions against Santa Clara as to induce Santa Clara to reasonably believe that the Attorney General had abandoned his position as to the enforceability of the Conditions. *See Salyers*, 871 F.3d at 938.

In support of his contention that the Response did not waive his objections, the Attorney General points to conversations between the Attorney General’s counsel and Santa Clara’s counsel that took place contemporaneously with the filing of the Response. Angela Sierra, Chief Assistant Attorney General of the Public Rights Division at the California Department of Justice, testifies that she had a short conversation with Douglas M. Press, Santa Clara’s Assistant County Counsel, on December 14, 2018.²¹ According to Ms. Sierra:

Shortly before the Attorney General Office’s filing of the AG Response, my Office had proposed incorporating our previously lodged objections into [the] AG Response by way of a footnote. After further consideration of an issue raised by the County, I determined that such incorporation was not necessary, given that we had not withdrawn our objections. Approximately ten minutes before the noon filing deadline on December 14, 2018, I had a short conversation with Assistant County Counsel Doug Press, during which I explained that the language that my Office was poised to file meant that we did not object to the sale as long as the conditions as currently or subsequently clarified remained in place. Doug Press stated that he disagreed with that interpretation.

I participated in several discussions with Assistant County Counsel Doug Press regarding the AG Conditions following the filing of the AG Response on December 14, 2018. These discussions continued through December 18, 2018. At no time during those

¹⁹ Response at 2.

²⁰ *Id.*

²¹ Declaration of Angela Sierra [Doc. No. 1144] (the “Sierra Decl.”) at ¶6.

discussions did our Office communicate that we had waived the applicability of the AG Conditions.²²

Mr. Press disputes Ms. Sierra's characterization of the December 14, 2018 conversation. Mr. Press' account of the conversation is as follows:

On ... December 14, 2018, the California Attorney General's Office proposed language to be inserted in a response that day that would have asserted that its approval of the sale was conditional, but we agreed to remove that conditional language. Instead, we agreed to the unconditional language that appears in the Attorney General's response ... that ... "[t]he California Attorney General does not object to the sale to the County of Santa Clara, *in light of* the conditions as clarified in the Attorney General's November 9, 2018 letter to the County of Santa Clara and as may be subsequently further clarified or modified by the Attorney General." [Emphasis Added.] The unconditional "in light of" language was meant, as the County understood it, to reflect that the California Attorney General would no longer object to the sale, although we also agreed to continue to discuss, post-sale, how to address the other conditions under a variety of approaches. But the message to the Court and the community was meant to be clear, that the California Attorney General, in its Response, ... was expressing that it was not opposed to the sale even though ongoing discussions with the County about the other conditions were contemplated outside the Court process.²³

The Court declines to consider the testimony of Ms. Sierra and Mr. Press in determining whether the filing of the Response effected a waiver of the Attorney General's objections. When litigating with a sophisticated party such as the Attorney General, the Debtors, Santa Clara, and other interested parties are entitled to presume that representations made by the Attorney General in papers filed with the Court accurately reflect his position. Allowing the Attorney General, or any other party, to qualify statements made in papers through the subsequent introduction of parol evidence would unduly hamper the Court's ability to adjudicate matters arising in this case. More than 63 separate papers have been filed in connection with the Bidding Procedures Motion and Sale Motion. The papers raise multiple discrete and complicated issues, including whether the sale could be free and clear of obligations imposed in connection with various collective bargaining agreements; whether the Debtors sufficiently marketed the Hospitals; whether the bidding procedures proposed by the Debtors would yield the maximum price for the estate; whether the Debtors had articulated sufficient business justification for the sale; whether the sales price is fair and reasonable; whether the APA was negotiated in good faith and at arms-length; whether the Debtors' Medicare and Medi-Cal Provider Agreements are properly characterized as an executory contract or a statutory entitlement; and whether the Debtors are entitled to assume and assign various unexpired leases and executory contracts.²⁴ Even if only a fraction of the parties who have filed papers were allowed to introduce supplemental evidence establishing what their papers really meant, the adjudicative process would grind to a halt.

Pursuant to FRE 403, the Court may exclude evidence if consideration thereof would result in undue delay. Exclusion of the declarations of Ms. Sierra and Mr. Press is warranted under

²² Sierra Decl. at ¶¶6–7.

²³ Press Decl. [Doc. No. 1141] at ¶5.

²⁴ Adjudication of certain of these issues will take place on January 30, 2019.

FRE 403, particularly where, as here, the consideration of such evidence would require the Court to consider similar evidence submitted by other parties dissatisfied by the Court's rulings. In addition, the Court has the inherent power to "manage [its] own affairs so as to achieve the orderly and expeditious disposition" of matters coming before it. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43, 111 S. Ct. 2123, 2132, 115 L. Ed. 2d 27 (1991). Finally, in the same way that the parol evidence rule bars consideration of extrinsic evidence in connection with the interpretation of an integrated contract, see *Casa del Caffè Vergnano S.P.A. v. ItalFlavors, LLC*, 816 F.3d 1208, 1213 (9th Cir. 2016), the Court finds it appropriate to similarly decline to consider extrinsic evidence when interpreting papers submitted by a sophisticated litigant such as the Attorney General.

B. The Attorney General is Equitably Estopped from Contesting a Sale Free and Clear of the Conditions

A party may be equitably estopped from asserting a position if the following conditions apply:

- 1) [T]he party to be estopped must know the facts;
- 2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended;
- 3) the latter must be ignorant of the true facts; and
- 4) he must rely on the former's conduct to his injury.

Gabriel v. Alaska Elec. Pension Fund, 773 F.3d 945, 955 (9th Cir. 2014).

Under the circumstances, the Attorney General is equitably estopped from contesting the Debtors' ability to sell the Hospitals free and clear of the Conditions. The Attorney General knew that the Debtors and Santa Clara would rely upon the Response's representation that he had no objection to the sale. The Debtors and Santa Clara had no way of knowing that when the Attorney General stated that he did "not object to the sale to the County of Santa Clara,"²⁵ what he really meant was that he did not object except to the extent that he did object. The Debtors and Santa Clara relied upon the Attorney General's representation to their detriment. Had they been aware of the Attorney General's true position, the Debtors and Santa Clara would have more vigorously contested the Attorney General's arguments regarding the binding effect of the Conditions.

Relying upon *Jordan v. California Dep't of Motor Vehicles*, 100 Cal. App. 4th 431, 453, 123 Cal. Rptr. 2d 122 (2002), as modified on denial of reh'g (Aug. 20, 2002), the Attorney General argues that equitable estoppel may not be invoked where, as here, "it would operate to defeat the effective operation of a policy adopted to protect the public." *Id.* at 453. This argument fails because, as discussed in Section II.C., below, the Attorney General has not identified a statutory basis for its assertion that the Conditions remain enforceable against Santa Clara. Consequently, the Attorney General has failed to show that continued enforcement of the Conditions is supported by California law.

²⁵ Response at 2.

C. Even if the Doctrines of Waiver and Equitable Estoppel Did Not Apply, a Sale of the Hospitals Free and Clear of the Conditions is Authorized under §363(f)(1)

Section 363(d)(1) authorizes non-profit entities, such as the Debtors, to sell estate assets only if the sale is “in accordance with nonbankruptcy law applicable to the transfer of property by” a non-profit entity. Section 363(b) permits the Debtors to sell estate property out of the ordinary course of business, subject to court approval. The Debtors must articulate a business justification for the sale. *In re Walter*, 83 B.R. 14, 19–20 (9th Cir. BAP 1988). Whether the articulated business justification is sufficient “depends on the case,” in view of “all salient factors pertaining to the proceeding.” *Id.* at 19–20. Section 363(f)(1) provides that a sale of estate property may be “free and clear of any interest in such property of an entity other than the estate, only if applicable nonbankruptcy law permits sale of such property free and clear of such interest”

I. The Conditions Are an Interest in Property Within the Meaning of §363

As this Court has previously explained:

The Bankruptcy Code does not define the phrase “interest in ... property” for purposes of § 363(f). The Third Circuit has held that the phrase “interest in ... property” is “intended to refer to obligations that are connected to, or arise from, the property being sold.” *Folger Adam Sec., Inc. v. DeMatteis/MacGregor JV*, 209 F.3d 252, 259 (3d Cir. 2000). That conclusion is echoed by *Collier on Bankruptcy*, which observes a trend in caselaw “in favor of a broader definition [of the phrase] that encompasses other obligations that may flow from ownership of the property.” 3 Alan N. Resnick & Henry J. Sommer, *Collier on Bankruptcy* ¶ 363.06[1] (16th ed. 2017).

Courts have held that interests in property include monetary obligations arising from the ownership of property, even when those obligations are imposed by statute. For example, in *Mass. Dep’t of Unemployment Assistance v. OPK Biotech, LLC (In re PBBPC, Inc.)*, 484 B.R. 860 (1st Cir. BAP 2013), the court held that taxes assessed by Massachusetts under its unemployment insurance statutes constituted an “interest in ... property.” The taxes were computed based on the Debtor’s “experience rating,” which was determined by the number of employees it had terminated in the past. *Id.* at 862. Because the Debtor had terminated most of its employees prior to selling its assets, its experiencing rating, and corresponding unemployment insurance tax liabilities, were very high. *Id.* The *PBBPC* court held that the experience rating was an interest in property that could be cut off under § 363(f). *Id.* at 869–70. Similarly, in *United Mine Workers of Am. Combined Benefit Fund v. Leckie Smokeless Coal Co. (In re Leckie Smokeless Coal Co.)*, 99 F.3d 573, 581, the court held that monetary obligations imposed by the Coal Industry Retiree Health Benefit Act of 1992 constituted an “interest in ... property” within the meaning of § 363(f).

In re Gardens Reg’l Hosp. & Med. Ctr., Inc., 567 B.R. 820, 825–26 (Bankr. C.D. Cal. 2017), appeal dismissed, No. 2:16-BK-17463-ER, 2018 WL 1229989 (C.D. Cal. Jan. 19, 2018).

The Conditions are an “interest in property” within the meaning of §363(f). The Conditions provide that any owner of the Hospitals must furnish specified levels of emergency services, intensive care services, cardiac services, and various other services. The required service levels were derived based upon the historical experience of the prior operator. As such, the Conditions are monetary obligations arising from the ownership of property.

2. The Debtors May Sell the Hospitals Free and Clear of the Conditions under Applicable Nonbankruptcy Law

Under certain circumstances, the sale of a not-for-profit healthcare facility is subject to review by the Attorney General. Cal. Corp. Code §5914 provides in relevant part (emphasis added):

Any nonprofit corporation that is defined in Section 5046 and operates or controls a health facility, as defined in Section 1250 of the Health and Safety Code, or operates or controls a facility that provides similar health care, regardless of whether it is currently operating or providing health care services or has a suspended license, shall be required to provide written notice to, and to obtain the written consent of, the Attorney General prior to entering into any agreement or transaction to do either of the following:

- (A) Sell, transfer, lease, exchange, option, convey, or otherwise dispose of, its assets to a *for-profit corporation or entity or to a mutual benefit corporation or entity* when a material amount of the assets of the nonprofit corporation are involved in the agreement or transaction.
- (B) Transfer control, responsibility, or governance of a material amount of the assets or operations of the nonprofit corporation to any *for-profit corporation or entity or to any mutual benefit corporation or entity*.

Here, the sale is not subject to Attorney General review because the Hospitals are being sold to Santa Clara, which is a public entity, not a for-profit corporation or mutual benefit corporation. Notwithstanding its inability to review the sale, the Attorney General contends that the Conditions—which were imposed in connection with the Attorney General’s §5914 review authority—nonetheless remain binding upon any subsequent purchaser of the Hospitals. In support of this contention, the Attorney General cites Cal. Corp. Code §5926, which provides: “The Attorney General may enforce conditions imposed on the Attorney General’s consent to an agreement or transaction pursuant to Section 5914 or 5920 to the fullest extent provided by law.”

The Court finds that neither Cal. Corp. Code §5926 nor any of the other provisions set forth in Cal. Corp. Code §§ 5914–30 provide the Attorney General with authority to enforce the Conditions against Santa Clara if Santa Clara acquires the Hospitals. In reaching this conclusion, the Court construes the California Corporations Code consistent with California’s rules of statutory construction. *See Fed. Sav. & Loan Ins. Corp. v. Butler*, 904 F.2d 505, 510 (9th Cir. 1990) (applying California’s rules of statutory construction to interpret Cal. Civ. Proc. Code § 877).

Under California law, the “ultimate task” in statutory interpretation “is to ascertain the Legislature’s intent.” *People v. Massie*, 19 Cal.4th 550, 569, 79 Cal.Rptr.2d 816, 967 P.2d 29 (1998). “Ordinarily, the words of the statute provide the most reliable indication of legislative intent.” *Pac. Gas & Elec. Co. v. Cty. of Stanislaus*, 16 Cal.4th 1143, 1152, 69 Cal.Rptr.2d 329, 947 P.2d 291 (1997). Only where the statutory language is ambiguous may the Court consider “evidence of the Legislature’s intent beyond the words of the statute,” such as the “statutory scheme of which the provision is a part, the history and background of the statute, the apparent purpose, and any considerations of constitutionality” *Hughes v. Bd. of Architectural Examiners*, 17 Cal.4th 763, 776, 952 P.2d 641 (1998). “When statutory language is ... clear and unambiguous there is no need for construction, and courts should not indulge in it.” *Delaney v.*

Superior Court, 50 Cal.3d 785, 800, 268 Cal.Rptr. 753, 789 P.2d 934 (1990) (emphasis in original). However, the “language of a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend.” *Younger v. Superior Court*, 21 Cal.3d 102, 113, 145 Cal.Rptr. 674, 577 P.2d 1014 (1978).

The Legislature enacted Cal. Corp. Code § 5914 to ensure that the public was not deprived of the benefits of charitable health facilities as a result of the transfer of those facilities’ assets to for-profit entities. In enacting § 5914, the Legislature found:

Charitable, nonprofit health facilities have a substantial and beneficial effect on the provision of health care to the people of California, providing as part of their charitable mission uncompensated care to uninsured low-income families and under-compensated care to the poor, elderly, and disabled.

Transfers of the assets of nonprofit, charitable health facilities to the for-profit sector, such as by sale, joint venture, or other sharing of assets, directly affect the charitable use of those assets and may affect the availability of community health care services....

It is in the best interests of the public to ensure that the public interest is fully protected whenever the assets of a charitable nonprofit health facility are transferred out of the charitable trust and to a for-profit or mutual benefit entity.

1996 Cal. Legis. Serv. Ch. 1105 (A.B. 3101) (West).

As discussed, the sale of a nonprofit health facilities’ assets to a public entity (such as Santa Clara) are not subject to Attorney General review. This exception is consistent with the statute’s objective of ensuring that nonprofit health assets are operated consistent with a charitable mission and in the public interest, because public entities are required by law to furnish healthcare services to those in need. Cal. Welf. & Inst. Code §17000 requires public entities to provide support, including healthcare, to indigent members of the public:

Every county and every city and county shall relieve and support all incompetent, poor, indigent persons, and those incapacitated by age, disease, or accident, lawfully resident therein, when such persons are not supported and relieved by their relatives or friends, by their own means, or by state hospitals or other state or private institutions.

As one court has explained, “[s]ection 17000 imposes various obligations on counties with respect to their indigent residents. Among other obligations, courts have interpreted section 17000 as requiring counties to provide indigent residents with emergency and medically necessary care.” *Fuchino v. Edwards-Buckley*, 196 Cal. App. 4th 1128, 1134, 126 Cal. Rptr. 3d 886, 890 (2011).

As set forth above, the Attorney General’s position is that the Conditions remain binding upon Santa Clara, notwithstanding the Attorney General’s inability to review the sale. The Attorney General’s reliance upon Cal. Corp. Code §5926 in support of this position is unavailing. Section 5926 provides only that the Attorney General may enforce the Conditions to the fullest extent provided by law. However, the Attorney General has not identified the specific provisions of California law that permit the continued enforcement of the Conditions.²⁶ This

²⁶ The Attorney General asserts that Art. V, §13 of the California Constitution grants him authority to enforce the Conditions. Art. V, §13 is a general provision stating only that the Attorney General has the authority to “see that the laws of the State are uniformly and adequately enforced”; it contains nothing specifically addressing the situation

omission is particularly glaring in view of the Attorney General's lack of authority to review the sale.

In reaching this conclusion, the Court finds it significant that the Attorney General has failed to identify the statutory basis for its position even after being afforded an opportunity to respond to the Court's Preliminary Findings. The Preliminary Findings advised the Attorney General that because he had failed to identify the statutory authority for continued enforcement of the Conditions, the Court intended to authorize the Debtors to sell the Hospitals free and clear of the Conditions. In response to the Preliminary Findings, the Attorney General cited to provisions in the Conditions that purport to make the Conditions legally binding upon any entity acquiring the Hospitals. Notably, the Attorney General did not cite to any provision of California law entitling him to enforce successorship liability under the circumstances of this case.

The Attorney General's reliance upon provisions purporting to make the Conditions binding upon all successors, regardless of the circumstances under which such successors acquire the Hospitals, is an impermissible attempt to expand his regulatory authority over the Hospitals. Provisions within the Conditions are enforceable only to the extent that they are supported by California law.

Furthermore, the Attorney General's contention that the Conditions remain binding upon Santa Clara is inconsistent with the Cal. Corp. Code §5914 and its legislative history. The concern motivating enactment of the statute was to prevent charitable assets from falling into the hands of for-profit entities who would not continue to use those assets for charitable purposes. The concern has no applicability where the assets are transferred to a public entity, which has independent statutory obligations to maintain the assets' charitable character, as discussed above.

Because the Attorney General has no authority to review the sale of the Hospitals to Santa Clara, and because the Attorney General has identified no statutory provision permitting his continued enforcement of the Conditions under the circumstances, the Court finds that the Debtors may sell the Hospitals free and clear of the Conditions under applicable nonbankruptcy law.

D. The Attorney General's Request for a 14-day Stay of the Sale Order is Denied

Bankruptcy Rule 6004(h) provides that an "order authorizing the ... sale ... of property ... is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise." The Attorney General requests that the stay imposed by Bankruptcy Rule 6004(h) remain in effect. According to the Attorney General, a 14-day stay is necessary because the "proposed sale will have a significant impact on the health and safety of the surrounding communities."²⁷ Debtors assert that the 14-day stay should not apply so that the sale may close as expeditiously as possible. The sale is currently projected to close at the end of February 2019.

The 1999 Advisory Committee Note to Bankruptcy Rule 6004 states that the rule is intended "to provide sufficient time for a party to request a stay pending appeal of an order authorizing the ... sale ... of property under §363(b) of the Code before the order is implemented."

To enable the sale to close expeditiously, the Sale Order shall be effective immediately upon entry, notwithstanding Bankruptcy Rule 6004(h). Because the sale will not close until the end of February 2019, in the Court's view, the Attorney General's appeal of the Sale Order will not

presented here. The Attorney General's reliance upon *D'Amico v. Board of Medical Examiners*, 11 Cal. 3d 1, 14, 520 P.2d 10 (1974) is similarly misplaced. *D'Amico* states that the Attorney General possesses extensive statutory powers to protect the public interest but does not specifically address any of the legal issues presented here.

²⁷ Doc. No. 1140 at 15.

likely be rendered moot by the Court's waiver of the 14-day stay.²⁸ Accordingly, the Attorney General will suffer no prejudice from waiver of the stay. On the other hand, waiving the stay will benefit the Debtors, Santa Clara, and the estate by enabling the parties to immediately begin performing the significant work that is a prerequisite to the closing.

III. Conclusion

Based upon the foregoing, the Attorney General's objections to the Sale Motion are overruled, and the Debtors are authorized to sell the Hospitals free and clear of the Conditions, pursuant to §363(f)(1). The Court will enter the proposed Sale Order submitted by the Debtors.

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Date: December 26, 2018


Ernest M. Robles
United States Bankruptcy Judge

²⁸ Of course, only the appellate court has the authority to determine whether any appeal of the Sale Order is moot.

Faculty

Dawn Federico is the associate director of the Commercial Law League of America in Rolling Meadows, Ill. She previously was group administrator at the National Association of Credit Management Midwest, where she was responsible for national group meetings and activities, and prior to that, she worked for more than 25 years at the Concrete Reinforcing Steel Institute. Ms. Federico received her undergraduate degree from William Rainey Harper College.

Elizabeth A. Green is a partner with BakerHostetler in Orlando, Fla., and chairs its National Bankruptcy and Restructuring Group. She represents debtors, creditors and committees in a wide range of industries and has represented a number of health care-related entities, including skilled nursing facilities, hospitals, pharmacies, health care practices and health care CROs in chapter 11 cases nationally. She also has represented buyers of health care facilities in chapter 11 cases across the country, and has served as an expert witness and mediator in health care cases. Ms. Green is a Fellow in the American College of Bankruptcy and has been recognized in *Chambers USA*, *The Best Lawyers in America*, *Florida's Legal Elite* and *Super Lawyers*. *The Best Lawyers in America* named her “Lawyer of the Year in Orlando” for bankruptcy and restructuring in 2012 and for bankruptcy litigation in 2015 and 2016. She was also selected as one of five *Law360* MVPs in Bankruptcy in 2016. Ms. Green has served as an adjunct professor at the University of Florida Levin College of Law in advanced bankruptcy. She received her B.A. in 1984 from the New College of Florida and her J.D. with honors in 1986 from the University of Florida Levin College of Law, where she was a member of the Order of the Coif.

Samuel R. Maizel is a partner in Dentons US LLP in Los Angeles and focuses his practice on restructuring, insolvency and bankruptcy in and out of court in all industries, and he leads the firm’s health care industry restructuring efforts nationwide. He has served as lead bankruptcy counsel to health care debtors and creditors’ committees in chapter 9 and 11 cases, and has served as counsel to chapter 7 and 11 trustees, and as an examiner, chapter 11 trustee, patient care ombudsman and consumer privacy ombudsman. He is currently lead counsel in the pending chapter 11 bankruptcy of Verity Health System of California, Inc., the second-largest hospital bankruptcy in American history. Before joining Dentons, Mr. Maizel was a partner in a national bankruptcy firm, and before that he represented the federal government in bankruptcy, district and appellate courts nationwide as a trial attorney in the U.S. Department of Justice’s Commercial Litigation Branch. He has also served in the U.S. Army’s Judge Advocate General’s Corps, including service in Operation Desert Shield/Desert Storm, for which he was awarded the Bronze Star Medal. Mr. Maizel has lectured extensively, has been widely published, and been interviewed on television and radio on bankruptcy topics. He has been listed regularly in *Super Lawyers*, is rated AV-Preeminent by Martindale-Hubbell, and was named in *The Best Lawyers in America* for Health Care in its 21st edition. Mr. Maizel received his B.S. in 1977 from the U.S. Military Academy at West Point, his M.A. from Georgetown University in government in 1983 and his J.D. in 1985 from George Washington University School of Law, where he won the Jacob Burns Prize for excellence in appellate advocacy and served as president of the Moot Court Board.