

**WALLER LANSDEN DORTCH & DAVIS, LLP**  
Blake D. Roth  
Ryan K. Cochran (admitted *pro hac vice*)  
511 Union Street, Suite 2700  
Nashville, Tennessee 37219  
Telephone: 615.244.6380  
Email: blake.roth@wallerlaw.com  
ryan.cochran@wallerlaw.com

*Counsel for the Receiver*

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY**

**SECURITIES AND EXCHANGE  
COMMISSION,**

**Plaintiff,**

**v.**

**DWAYNE EDWARDS; TODD BARKER;  
SENIOR SOLUTIONS OF SOCIAL  
CIRCLE, LLC; OXTON PLACE OF  
DOUGLAS, LLC, d/b/a OXTON REAL  
ESTATE OF DOUGLAS, LLC; ROME  
ALF, LLC; SAVANNAH ALF, LLC;  
GAINESVILLE ALF, LLC; WATERFORD  
PLACE ALF, LLC; MONTGOMERY ALF,  
LLC; COLUMBUS ALF, LLC; and  
OPELIKA ALF, LLC,**

**Defendants,**

**-and-**

**OXTON SENIOR LIVING, LLC; MANOR  
HOUSE SENIOR LIVING, LLC; SUSAN  
EDWARDS, a/k/a SUSAN ROGERS;  
SHARON NUNAMAKER, a/k/a SHARON  
HADDEN; and SDH DESIGN, LLC,**

**Relief Defendants.**

**Case No. 2:17-cv-393-ES-SCM**

**BRIEF IN SUPPORT OF THE  
RECEIVER'S MOTION FOR ORDER:  
(I) AUTHORIZING AND APPROVING  
BIDDING PROCEDURES FOR THE  
SALE OF SUBSTANTIALLY ALL OF  
THE ASSETS OF WATERFORD  
PLACE ALF, LLC; (II) AUTHORIZING  
THE SALE OF SUBSTANTIALLY ALL  
OF THE ASSETS OF WATERFORD  
PLACE ALF, LLC FREE AND CLEAR  
OF ALL LIENS, CLAIMS,  
ENCUMBRANCES, AND OTHER  
INTERESTS; (III) APPROVING  
STALKING HORSE PURCHASER,  
BREAK-UP FEE, AND OVERBID  
PROTECTIONS; (IV) SCHEDULING A  
HEARING TO APPROVE THE SALE  
OF SUBSTANTIALLY ALL ASSETS  
OF WATERFORD PLACE ALF, LLC;  
AND (V) GRANTING RELATED  
RELIEF**

**MOTION DAY:**

**January 3, 2018 @ 3:30 p.m. (Eastern)**

**OBJECTION DEADLINE:**

**January 2, 2018**

Derek Pierce, as the court-appointed receiver (the “**Receiver**”), files this brief in support of the *Receiver’s Motion for Order: (I) Authorizing and Approving Bidding Procedures for the Sale of Substantially All of the Assets of Waterford Place ALF, LLC; (II) Authorizing the Sale of Substantially All of the Assets of Waterford Place ALF, LLC Free and Clear of All Liens, Claims, Encumbrances, and Other Interests; (III) Approving Stalking Horse Purchaser, Break-Up Fee, and Overbid Protections; (IV) Scheduling a Hearing to Approve the Sale of Substantially All Assets of Waterford Place ALF, LLC; and (V) Granting Related Relief* (the “**Motion**”)<sup>1</sup> and, in support of the Motion, the Receiver respectfully states as follows:

#### **RELIEF REQUESTED**

1. By the Motion, the Receiver seeks:

a. entry of an order, substantially in the form attached to the Motion as **Exhibit A** (the “**Bidding Procedures Order**”), (i) authorizing and approving the Bidding Procedures, (ii) authorizing and approving the Proposed Stalking Horse and Bid Protections, (iii) authorizing and approving the form and manner of notice of the Motion and Sale Hearing, (iv) scheduling a hearing to approve the Sale Transaction (the “**Sale Hearing**”), and (v) granting other and further related relief; and

b. after conducting the Sale Hearing, entry of an order, substantially in the form attached to the Motion as **Exhibit B** (the “**Sale Order**”), (i) authorizing, approving, and directing the sale of substantially all assets of Waterford Place ALF to the Successful Bidder and Backup Bidder in accordance with the Bidding Procedures free and clear of all liens, claims, encumbrances, and other interests, (ii) authorizing and approving the Waterford Place APA or a substantially similar asset purchase agreement applicable to the Successful Bidder or Backup Bidder, as applicable, (iii) approving the Receiver’s marketing and sale process, and (iv) granting other and further related relief.

#### **JURISDICTION AND AUTHORITY TO GRANT REQUESTED RELIEF**

2. This court had the authority to appoint the Receiver and to enter an order authorizing the Receiver to sell the Proposed Purchased Assets subject to this court’s approval.

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<sup>1</sup> Capitalized terms used in this brief and not otherwise defined shall have the meanings ascribed to them in the Motion.

**THIS COURT SHOULD APPROVE THE FORMS AND MANNER OF NOTICE**

3. The Receiver has proposed specific provisions in the Bidding Procedures intended to provide notice of the Bidding Procedures, notice of the Receiver's plan to sell the Proposed Purchased Assets pursuant to the terms of the Waterford Place APA, notice of the potential for third parties to submit competing bids, and notice as to the procedures and deadlines for parties to submit competing bids or otherwise present objections to the relief contemplated by the Motion.

4. The Receiver proposes to provide between thirty (30) and forty (40) days' notice of the Auction.

5. There is good cause to conduct the Auction on forty-five (45) to fifty (50) days' notice.

6. The Receiver's proposals provide more notice than is required by the applicable laws imposed by the Bankruptcy Code (title 11 of the United States Code) and chapter 127, Executions and Judicial Sales, of title 28. *See* Fed. R. Bankr. P. 2002 (requiring no less than 28 days' notice); 28 U.S.C. § 2002 (requiring notice of a sale be published once a week for four consecutive weeks).

7. Therefore, there is no statute requiring a longer period of time.

8. In addition, within two (2) business days following entry of the Bidding Procedures Order, the Receiver will serve copies of the Bidding Procedures Order (including the Bidding Procedures) and the Notice of Sale, substantially in the form attached to the Motion as **Exhibit F**, upon: (a) the parties set forth on the certificate of service for the Motion; (b) all parties known to have asserted liens against the Proposed Purchased Assets; (c) all federal and state taxing authorities or offices that have a reasonably known interest in the relief requested in

the Motion; (d) counsel to the Proposed Stalking Horse; (e) prospective buyers who signed a confidentiality agreement and all parties who submitted a bid; and (f) any other party that has entered an appearance in this case or otherwise requested notice in this case.

9. Further, within two (2) business days following entry of the Bidding Procedures Order, the Receiver will cause the Indenture Trustee to publish the Bidding Procedures Order and Notice of Sale at EMMA (the Electronic Municipal Market Access).

10. Publishing the Bidding Procedures Order and Notice of Sale at EMMA is the best available way to provide bondholders with notice of the Receiver's plan to sell the Proposed Purchased Assets pursuant to the terms of the Waterford Place APA, of the potential for third parties to submit competing bids, and the procedures and deadlines for parties to submit competing bids or otherwise present objections to the relief contemplated by the Motion.

11. Further, the Receiver will publish the Notice of Sale once a week for four consecutive weeks in the *Montgomery Independent*.

12. The foregoing notice procedures are reasonably calculated to provide notice of the intended sale, notice of the terms of the proposed sale and the procedures for submitting competing bids, and notice to parties in interest of the relevant objection and other deadlines associated with the sale.

13. Accordingly, the Receiver submits that the notice procedures set forth in the Bidding Procedures provides sufficient and adequate notice of the relief sought in the Motion and that no other or further notice is necessary or should be required.

**THE COURT SHOULD APPROVE THE BID PROTECTIONS**

14. The Waterford Place APA and Bidding Procedures contain certain protections that the Proposed Stalking Horse and Receiver have negotiated at length to incentivize and

compensate the Proposed Stalking Horse for serving as a stalking horse purchaser whose bid will be subjected to higher or better offers.

15. The Proposed Stalking Horse has specifically bargained for the Break-up Fee, which is reasonably calculated to reimburse the Proposed Stalking Horse for the Proposed Stalking Horse's reasonable out of pocket expenses incurred in conducting the diligence necessary to serve as a stalking horse purchaser.

16. In addition, the Proposed Stalking Horse has specifically bargained for a minimum overbid in the amount of \$200,000 (the "***Minimum Overbid***"), which is designed to (a) reasonably protect the Proposed Stalking Horse by encouraging only serious additional and higher bids, and (b) protect the Receivership Estate by ensuring that any overbid covers the cost of the Break-up Fee and results in additional proceeds material enough to justify the risk of closing with a new buyer.

17. Bidding incentives such as the Break-up Fee and Minimum Overbid encourage a potential purchaser to invest the requisite time, money, and effort to negotiate with the Receiver and perform the necessary due diligence attendant to the acquisition of the Proposed Purchased Assets, despite the inherent risks and uncertainties associated with an auction process.

18. Historically, courts have approved bidding incentives, including incentives such as the Break-up Fee and Minimum Overbid, under the business judgment rule. *E.g., In re 995 Fifth Ave. Assocs. L.P.*, 96 B.R. 24, 28 (Bankr. S.D.N.Y.) (bidding incentives "may be legitimately necessary to convince a white knight to enter the bidding by providing some form of compensation for the risks it is undertaking"); *see also In re Bear Island Paper Co., L.L.C.*, No. 10-31202, 2010 Bankr. LEXIS 6046, at \*7 (Bankr. E.D. Va. Sept. 1, 2010) (approving bid protections).

19. Here, the Receiver believes that the Break-up Fee and Minimum Overbid benefit Waterford Place ALF and the Waterford Place Facility, because they: (a) enable the Receiver to maintain the commitment of the Proposed Stalking Horse to continue expending money, time, and effort in connection with purchasing the Proposed Purchased Assets, notwithstanding that its offer is subjected to higher and better offers; and (b) guarantee a minimum bid for the auction process.

20. In addition, the Break-up Fee and Minimum Overbid are the product of good faith, arm's length negotiations between the Receiver and Proposed Stalking Horse, each of whom was represented by counsel.

21. As a result, the Break-up Fee is specifically designed and calculated to reimburse the Proposed Stalking Horse for its reasonable out of pocket expenses incurred in connection with, among other things, reviewing and assessing the potential transaction and the retention of third-party consultants and advisors to perform financial, operational, legal, and regulatory analysis.

22. The Receiver also believes the amount of the Break-up Fee is reasonable in light of the size of the transaction—the Break-up Fee represents four percent (4%) of the overall purchase price, which is within the range of break-up fees approved by courts in similar circumstances. *See e.g., Calpine Corp. v. O'Brien Env'tl. Energy, Inc. (In re O'Brien Env'tl. Energy, Inc.)*, 181 F.3d 527, 536 (3d Cir. 1999) (break-up fee of approximately 4% is reasonable in relation to the purchase price); *In re Daufuskie Island Props., LLC*, No. 09-00389, 2011 Bankr. LEXIS 3265, at \*24 (Bankr. D.S.C. June 17, 2011) (approving approximately 3% break-up fee as fair and reasonable); *Gey Assocs. Gen. P'ship v. 310 Assocs., L.P.*, No. 02 Civ. 0710 (SHS), 2002 U.S. Dist. LEXIS 20759, (S.D.N.Y. Oct. 29, 2002) (3.23% break-up fee of \$

100,000 for a \$ 3.1 million purchase price is reasonable); *In re Kaiser Aluminum Corp.*, Case No. 02-10429 (JFK) (Bankr. D. Del. June 21, 2004) (court approved break-up fee of 4.6% or \$1.05 million in connection with a \$23 million sale transaction); *In re Chi-Chi's, Inc.*, Case No. 03-13063 (CGC) (Bankr. D. Del. Nov. 4, 2003) (court approved break-up fee of 5% or \$200,000 in connection with a \$4 million sale transaction); *In re America Classic Voyages Co.*, Case No. 01-10954 (EIK) (Bankr. D. Del. March 20, 2002) (court approved break-up fee of 6.6% or \$250,000 in connection with a \$3.75 million sale transaction).

23. Moreover, the Break-up Fee and Minimum Overbid will not hamper the ability of other parties to participate in the auction process.

24. In short, the Receiver's ability to offer the Break-up Fee and Minimum Overbid ensures that the sale of the Proposed Purchased Assets will be to a contractually committed bidder at a price that the Receiver believes is fair, while preserving the ability of the Receiver to potentially obtain higher and better offers for the benefit of the Waterford Place ALF, the Waterford Place Facility, and creditors.

25. Therefore, the Receiver believes the Break-up Fee and Minimum Overbid should be approved.

**THE COURT SHOULD APPROVE THE BIDDING PROCEDURES**

26. In accordance with the Waterford Place APA, the Proposed Stalking Horse's initial bid is subject to higher or better offers for the Proposed Purchased Assets.

27. The Receiver, therefore, requests that this court approve the Bidding Procedures, so the Receiver can market-test the Proposed Stalking Horse's initial bid and determine whether higher or better offers for the Proposed Purchased Assets can be solicited.

28. Due to the time constraints imposed by Proposed Stalking Horse's desire to close the sale expeditiously and the financial condition of the Waterford Place Facility, the Receiver believes the Bidding Procedures permit the Receiver to promptly and prudently determine whether third parties have interest in performing due diligence and evaluating whether to submit a formal and binding bid for the Proposed Purchased Assets.

29. In addition, the Receiver believes that the proposed Bidding Procedures fairly balance the need to market the Proposed Purchased Assets and market test the Waterford Place APA with the desire to minimize the risk of operating losses during any marketing and sale process.

30. The Bidding Procedures provide for the Auction to take place at the courthouse.

31. Property in the possession of a receiver may be sold in the district where such receiver was appointed. *See* 28 U.S.C. § 2001(a).

32. The Bidding Procedures specifically provide that a party or the Proposed Stalking Horse can be a Qualified Bidder (as defined in the Bidding Procedures) for one or more auctions to be conducted by the Receiver.

33. Accordingly, the Receiver requests that the court approve the Bidding Procedures.

**THIS RECEIVER HAS THE POWER TO SELL THE PROPOSED PURCHASED ASSETS**

34. In this case, the Issuer holds legal title to the real property on which Waterford Place Facility is located, and the Issuer leased the real property to Waterford Place ALF, pursuant to the Lease Agreement.

35. The Bonds constitute only a special obligation of the Issuer as therein provided and do not constitute a debt or general obligation or pledge of the faith and credit nor taxing

power of Montgomery County, the City of Montgomery, the State of Alabama, or any political subdivision thereof.

36. The Bonds are payable solely from the proceeds of the Collateral and neither Montgomery County, the City of Montgomery, the State of Alabama, nor any political subdivision thereof, nor the Issuer, shall be obligated to pay the Bonds. *See* Indenture, at § 203.

37. The Lease Agreement has been assigned and pledged to the Indenture Trustee as security for the payment of the Bonds, and Section 6.2(b) of the Lease Agreement provides that the Indenture Trustee may take whatever action at law or in equity may appear necessary or desirable to enforce any agreement of Waterford Place ALF. *See* Lease Agreement at § 6.2(b).

38. The Issuer has also mortgaged the real property, among other collateral, to the Indenture Trustee as security for the payment of the Bonds. *See generally* Mortgage and Security Agreement.

39. As a result, the Indenture Trustee could foreclose on the real property titled in the name of the Issuer and the proceeds of such foreclosure could be used to satisfy bondholder claims.

40. Thus, the Receiver in seeking to convey fee title to the property is doing no more than what the Indenture Trustee could do upon a default.

41. The Receiver's conveyance of fee title to the real property is also consistent with the Receiver Order. *See* Receiver Order, at ¶ 37 (“[T]he Receiver shall be authorized to sell, and transfer clear title to, all *real property* and the Facilities in the Receivership Estate”) (emphasis added).

42. Further, other United States District Courts in Alabama have approved a receiver's sale of the fee title to real property, when the real property was similarly leased. *See*

*Order (A) Approving Asset Purchase Agreement By and Between Receiver and Ball Healthcare Services, Inc., (B) Approving the Sale of Substantially All of the Assets of the Receivership Estate Free and Clear of Liens, Claims, Encumbrances, and Other Interests, and (C) For Related Relief, The Bank of New York Mellon Trust Co. v. Med. Clinic Bd. Of the City of Tuskegee, Ala., et al., No. 3:14-CV-59-WKW, Dkt. # 67 (M.D. Ala. June 2, 2014); Order (A) Approving Asset Purchase Agreement By and Between Receiver and Traylor-Porter Health Care Management, Inc., (B) Approving the Sale of Substantially All of the Assets of the Receivership Estate Free and Clear of Liens, Claims, Encumbrances, and Other Interests, and (C) For Related Relief, The Bank of New York Mellon Trust Co. v. Salem Nursing & Rehab Center of Reform, Inc, et al., No. 2:11-cv-01509, Dkt. # 79 (N.D. Ala. Sept. 12, 2014).*<sup>2</sup>

43. The Receiver has served the Issuer with a copy of this Motion.

44. Further, the Issuer has informed the Receiver that the Issuer does not object to the Receiver conveying fee simple title to the real estate on which the Waterford Place Facility is located through the process contemplated in the Bidding Procedures.

45. Therefore, it is proper for the Receiver to convey that portion of the Proposed Purchased Assets consisting of the real property on which the Waterford Place Facility is located.

**THIS COURT SHOULD APPROVE THE SALE OF THE PROPOSED PURCHASED ASSETS**

46. The proposed sale of the Proposed Purchased Assets pursuant to the Waterford Place APA (as may be modified at the auction in accordance with the Bidding Procedures) is supported by sound business justifications and, at the Sale Hearing, should be approved.

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<sup>2</sup> In both these cases The Medical Clinic Board was a party to the case.  
4846-6940-0911.5

47. Given consideration to the significant and robust marketing efforts undertaken by Mr. Pardoll, the Receiver believes that the pool of potential purchasers for the Proposed Purchased Assets has been adequately identified, and the delay of any sale of the Waterford Place Facility would not increase the likelihood of identifying any additional potential purchasers.

48. The Proposed Stalking Horse is also currently the proposed stalking horse for the proposed sale of substantially all assets of Savannah ALF, LLC, Oxtan Place of Douglas, LLC, Rome ALF, LLC, and Montgomery ALF, LLC (collectively with the Proposed Purchased Assets, the “*Portfolio of Properties*”).

49. The Waterford Place APA provides that, among other things, if the Proposed Stalking Horse and/or its assigns is not the Successful Bidder (as defined in the Bidding Procedures) or the court does not enter the Sale Order in favor of the Proposed Stalking Horse and/or its assigns for the Portfolio of Properties, the Proposed Stalking Horse shall have the right, in its sole and absolute discretion, to terminate the Waterford Place APA by written notice to the Receiver before the close of the Auction or upon the court’s failure to enter the Sale Order in favor of the Proposed Stalking Horse. For avoidance of doubt, the Proposed Stalking Horse may elect, in its sole and absolute discretion, to terminate, under Section 16.16 of the Waterford Place APA, its agreement to purchase any of the Portfolio of Properties or to proceed to a Closing of any of the Portfolio Properties. If the Proposed Stalking Horse exercises its right to terminate the Waterford Place APA as provided in Section 16.16 of the of the Waterford Place APA, the Purchaser’s Deposit shall be returned to Purchaser. If the Proposed Stalking Horse exercises its right, as provided in Section 16.16 of the Waterford Place APA, to terminate the purchase agreement for any of the Portfolio of Properties, the Proposed Stalking Horse shall not

be entitled to a Break Up Fee on any of the Portfolio of Properties. For this reason, the Receiver requests that auctions be held on the same day for the Portfolio of Properties.

50. The Receiver accepted the negotiation of this provision because limiting the number of stalking horse purchasers and sales proceedings saves the Receivership Estate time and expense, and it permitted the Receiver to obtain higher and better offers for the Portfolio of Properties.

**I. The sale of the Proposed Purchased Assets is in the best interests of bondholders.**

51. The proposed sale of the Proposed Purchased Assets, in accordance with the proposed Bidding Procedures, is in the best interests of the holders of the Bonds.

52. The Proposed Purchased Assets have been adequately marketed, and the proposed sale process is permissible under 28 U.S.C. § 2001.

53. A sale of the Proposed Purchased Assets will reduce the costs and professional fees currently being incurred to maintain and administer the Proposed Purchased Assets.

54. A sale of the Proposed Purchased Assets is the most practical way for the bondholders to realize a recovery in this case.

55. The Initial Bid should permit the Indenture Trustee to realize net proceeds in an amount greater than would be realized by any reasonable, practical alternative.

**II. Sound business justification for the sale exists.**

56. There is more than adequate business justification to sell the Proposed Purchased Assets to a Successful Bidder.

57. Absent a sale of the Proposed Purchased Assets to a third party, the Waterford Place Facility would likely be forced to liquidate its assets piecemeal and wind down the operations of the Waterford Place Facility.

58. Further, if the Waterford Place Facility is not sold as a going concern, the value obtained for the assets of Waterford Place ALF would be significantly less, which would decrease any potential recovery for creditors of Waterford Place ALF and the Waterford Place Facility.

**III. The Waterford Place APA provides fair and reasonable consideration.**

59. The Receiver, in the Receiver's sound business judgment, has determined that the proposed sale of the Proposed Purchased Assets in accordance with the Bidding Procedures will enable the Receiver to obtain the highest or best offer for the Proposed Purchased Assets and maximize the value of the Proposed Purchased Assets for the creditors of the Waterford Place Facility.

60. As set forth above, Mr. Pardoll and the Receiver have engaged in a robust marketing process and, to date, the Waterford Place APA and offers from the Proposed Stalking Horse represents the highest and best offer for the Proposed Purchased Assets.

61. Based upon the Receiver's experience and sound business judgment, the Waterford Place APA and offer from the Proposed Stalking Horse represent fair and reasonable consideration for the Proposed Purchased Assets, and any higher or better offers obtained through the Bidding Procedures would, therefore, also constitute fair and reasonable consideration for the Proposed Purchased Assets.

**IV. The sale of the Proposed Purchased Assets is in good faith.**

62. The Receiver has fully disclosed and requested the court's approval of all of the terms and conditions of the proposed sale.

63. The Receiver will further provide notice of the Bidding Procedures and opportunity to present higher or better offers for the Proposed Purchased Assets.

64. The Bidding Procedures are both substantively and procedurally fair and are designed to solicit the highest and best offers for the Proposed Purchased Assets.

65. To date, there has been no collusion between any parties regarding the Proposed Purchased Assets, and the Receiver is requiring all parties participating in the Bidding Procedures to certify that they have not colluded in any way in connection with the potential purchase of the Proposed Purchased Assets.

66. The Proposed Stalking Horse is not an insider of any defendants in this action.

67. The Waterford Place APA and offer by the Proposed Stalking Horse have been negotiated by the Receiver and the Proposed Stalking Horse at arms' length.

68. Accordingly, the Receiver submits that the conduct of the negotiations and potential sale of the Proposed Purchased Assets has been in good faith.

**V. The sale of the Proposed Purchased Assets should be free and clear of liens, claims, and encumbrances.**

69. The Court has the ability to sell the Proposed Purchased Assets free and clear of liens. *See* 28 U.S.C. §§ 2001 (the receiver may sell “upon such terms and conditions as the court directs”), 2002, and 2004; *see also Regions Bank v. Egyptian Concrete Co.*, No. 4:09-CV-1260-CS, 2009 U.S. Dist. LEXIS 111381, at \*18 (E.D. Mo. Dec. 1, 2009) (“[I]t has long been recognized that under appropriate circumstances, a federal court presiding over a receivership may authorize the assets of the receivership to be sold free and clear of liens and related claims.”); *Spreckles v. Spreckles Sugar Corp.*, 79 F.2d 332 (2d Cir. 1935) (explaining courts have long been able to sell property free and clear of liens and other interests); *see also Van Huffel v. Harkelrode*, 284 U.S. 225 (1931) (explaining federal courts sitting in equity have long exercised the power to sell free and clear).

70. Because the Indenture Trustee's security interests in and liens on the Proposed Purchased Assets are senior to all other liens, claims, and other encumbrances on the Proposed Purchased Assets, the Indenture Trustee could sell the Proposed Purchased Assets pursuant to the powers granted in the Bond Documents and extinguish any liens, claims, encumbrances, or other interests in or on the Proposed Purchased Assets. *See* Ala. Code §§ 35-10-12, 35-10-15; *Bailey Mortg. Co. v. Gobble-Fite Lumber Co.*, 565 So.2d 138, 144 (Ala. 1990) (stating proper foreclosure generally extinguishes junior liens and interests).

71. In addition, common law and Alabama jurisprudence provide that a corporation that purchases the assets of another corporation is not generally liable for the seller's liabilities, with certain exceptions. *E.g.*, *MPI Acquisition, LLC v. Northcutt*, 14 So.3d 126 (Ala. 2009) (summarizing Alabama successor-corporation liability law, stating general rule is purchaser is not liable for liabilities of the seller).

72. None of the exceptions are applicable in this case and, therefore, an assurance that the sale of the Proposed Purchased Assets is free and clear of successor liability is appropriate and warranted.

73. The Proposed Purchased Assets are encumbered by the LURA.

74. The LURA provides that the Waterford Place Facility is to be occupied at least partially by "individuals of low or moderate income" within the meaning of Section 142(d) of the Internal Revenue Code.

75. The LURA does so by encumbering the real property and providing that the covenants in the LURA run with the land and shall be enforceable against any person or entity that has an ownership interest in the Waterford Place Facility.

76. The burden of the LURA covenants renders the Waterford Place Facility less valuable.

77. The Proposed Stalking Horse has conditioned its purchase on the release and discharge of the LURA.

78. Section 5.9 of the LURA provides that the requirements of the LURA automatically terminate in the event of involuntary noncompliance caused by foreclosure, transfer of title by deed in lieu of foreclosure, or similar event, but, only if, within a reasonable period thereafter, either the Bonds are retired or amounts received as a consequence of such event are used to provide a project which meets the requirements of the Internal Revenue Code and Regulations (as defined in the LURA).

79. Section 5.9 of the LURA is consistent with Section 1.103-8(b) of the United States Treasury Regulations (the “*Regulations*”) which sets forth exceptions to residential rent restrictions for involuntary losses.

80. The receivership and the Receiver’s sale of the Proposed Purchased Assets as contemplated by the Motion and the Waterford Place APA are events of involuntary loss contemplated by Section 1.103-8(b)(6)(iii) of the Regulations meant to address situations where the obligor has involuntarily lost control over the project and has no reasonable expectation of receiving back control over the project.

81. The purpose of these residential rent restriction exceptions is to permit creditors to preserve their collateral and maximize the value of their collateral.

82. The receivership and Receiver’s sale are events of involuntary noncompliance.

83. The assets of the Receivership Estate will be liquidated and distributed to holders of the Bonds within a reasonable time after receipt by the Indenture Trustee.

84. Thus, as provided in the Regulations and Section 5.9 of the LURA, as long as during the Qualified Project Period (as defined in the LURA) Waterford Place ALF or any related person does not obtain an interest in the Project, the Receivership operates to terminate the LURA on its own terms. The Proposed Stalking Horse is not related to Waterford Place ALF, nor is the Proposed Stalking Horse an affiliate of Waterford Place ALF.

85. The termination provisions of the LURA coupled with the court's ability to transfer the property "upon such terms and conditions as the court directs," support authorizing the sale free and clear of the LURA.

86. The court also has the ability to sell the Assets free from any right of redemption.

87. The power of judicial sale conferred by 28 U.S.C. §§ 2001 and 2002 does not provide for the preservation of a right of redemption conferred by execution sales. *See* 28 U.S.C. § 2001–2002; *see also O'Brien v. Kelly*, 597 F. Supp. 17, 19 (D. Alaska 1984) ("The rule against allowing redemption only applies to judicial sales conducted pursuant to 28 U.S.C. §§ 2001 and 2002"); *United States v. Heasley*, 283 F.2d 422, 427 (8th Cir. 1960) ("Unlike the sale of property under the levy and distraint proceeding, where by statute there is a specific provision for redemption of the property. . . Congress has not seen fit to provide that the right of redemption shall exist where property is sold pursuant to judicial decree."); *Chapman v. Schiller*, 83 P.2d 249, 251 (Utah 1938) (noting the court's power to sell on its terms independently of rights, like a right of redemption, that arises under the foreclosure statutes).

88. Authorizing the sale of the Proposed Purchased Assets free and clear of all liens, claims, encumbrances, and other interests—including successor liability—will better enable the Receiver to obtain the highest or best offer for the Proposed Purchased Assets.

89. Lastly, the Indenture Trustee, who has the largest claims secured by a first-priority liens on and security interest in the Proposed Purchased Assets, has agreed to release its liens, claims and encumbrances against the Proposed Purchased Assets, upon a closing of the Sale to the pursuant to the Bid Procedures, so long as such liens, claims, and encumbrances to attach to the Sale Proceeds in the same order of priority.

90. Therefore, the Receiver submits that ordering the sale of the Proposed Purchased Assets free and clear is both warranted and appropriate.

### **CONCLUSION**

Ordering the sale of the Proposed Purchased Assets is both warranted and appropriate. The Proposed Purchased Assets have been adequately marketed, and the stalking horse auction process proposed by the Receiver will provide a transparent process for the Receiver to market-test the Proposed Stalking Horse's Initial Bid, interested parties to participate in the Auction, and an adequate opportunity for any party in interest to object to the auction process or sale. Therefore, the Receiver respectfully requests that this court enter: (a) an order, substantially in the form attached to the Motion as **Exhibit A**, (i) authorizing and approving the Bidding Procedures, (ii) authorizing and approving the Proposed Stalking Horse and Bid Protections, (iii) authorizing and approving the form and manner of notice of the motion and Sale Hearing, (iv) scheduling the Sale Hearing, and (v) granting other and further related relief; and (b) after conducting the Sale Hearing, an order, substantially in the form attached to the Motion as **Exhibit B**, (i) authorizing, approving, and directing the sale of substantially all assets of Waterford Place ALF to the Successful Bidder and Backup Bidder in accordance with the Bidding Procedures, free and clear of all liens, claims, encumbrances, and other interests, (ii) authorizing and approving the Waterford Place APA or substantially similar asset purchase

agreements applicable to the Successful Bidder or Backup Bidder, as applicable, (iii) approving the Receiver's marketing and sale process, and (iv) granting other and further related relief.

Dated: December 19, 2017

Respectfully submitted,

/s/ Blake D. Roth

Blake D. Roth  
Ryan K. Cochran (admitted *pro hac vice*)  
**WALLER LANSDEN DORTCH & DAVIS, LLP**  
511 Union Street, Suite 2700  
Nashville, Tennessee 37219  
Telephone: 615.244.6380  
Email: blake.roth@wallerlaw.com  
ryan.cochran@wallerlaw.com

*Counsel for the Receiver*