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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

RECEIVER’S MOTION FOR ORDER
AUTHORIZING PARTIAL
DISTRIBUTION OF GAINESVILLE ALF,
LLC SALE PROCEEDS TO INDENTURE
TRUSTEE

MOTION DAY:
October 15, 2018

OBJECTION DEADLINE:
October 1, 2018

Derek Pierce, as the court-appointed receiver (the “*Receiver*”), by and through his undersigned counsel, files this motion seeking entry of an order authorizing a partial distribution

to BOKF, N.A., as indenture trustee (the “*Indenture Trustee*”), and, in support of this motion, states as follows:

BACKGROUND

1. Since his appointment pursuant to the *Order Appointing Receiver* (Dkt. No. 7) (the “*Receiver Order*”), the Receiver has segregated the revenues and expenses attributable to the facility owned by Gainesville ALF, LLC (the “*Receivership Entity*”).

2. On January 5, 2018, this court entered the *Order: (I) Authorizing and Approving for Gainesville ALF, LLC (A) Stalking Horse Purchaser, Bidding Procedures, and Bid Protections and (B) the Form and Manner of Notice of the Bidding Procedures and Sale Hearing; (II) Scheduling a Hearing to Consider the Sale of Substantially All Assets of Gainesville ALF, LLC; and (III) Granting Related Relief* (Dkt. No. 197) (the “*Bidding Procedures Order*”).

3. On March 6, 2018, this court entered the *Order: (I) Authorizing, Approving, and Directing the Sale of Substantially All Assets of Gainesville ALF, LLC 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 Gainesville APA; (III) Approving the Receiver’s Marketing and Sale Process; and (IV) Granting Related Relief* (Dkt. No. 244) (the “*Sale Order*”).¹

4. Pursuant to and in accordance with the Sale Order, on April 6, 2013, the Receiver closed the sale of the Proposed Purchased Assets to the Successful Bidder (the “*Closing*”).

5. The Receiver received net proceeds in the approximate amount of \$4,339,346 (the “*Sale Proceeds*”) from the sale of substantially all of the Receivership Entity’s assets.

¹ Capitalized terms used in this motion and not otherwise defined shall have the meanings ascribed to them in the Sale Order or Receiver Order, as applicable.
4846-1411-1333.2

6. Paragraphs 45-46 of the Receiver Order direct the Receiver to “conduct an investigation into the commingling of funds by and between the Receivership Entities with respect to the Facilities . . . to determine the net gain or loss to each Facility as a result of the commingling,” and “to seek and obtain Court approval as to the Receiver’s proposal to resolve the commingling-related claims between and among the Facilities and Offerings” before the Receiver disburses any funds to bondholders. (Receiver Order, ¶¶ 45-46.)

7. On May 10, 2018, this court entered the *Order Approving Receiver’s Motion for Order Authorizing Proposed Unwinding of Commingled Funds* (Dkt. No. 266) (the “*Commingling Order*”).

8. As authorized and directed by the Commingling Order, the Receiver will make distributions to the Receivership Entity in the aggregate amount of \$174,257,² to unwind certain pre-receivership commingling of assets. (Commingling Order, ¶ 3.)

9. In addition, the Receiver Order provides for the payment of the Receiver and Retained Personnel (as defined in the Receiver Order) from the Receivership Estate. (Receiver Order, ¶ 61.)

10. Fee applications are filed on a quarterly basis. As of June 30, 2018, the Court has approved fees, costs, and expenses, including attorneys’ fees and costs attributable to the Receivership Entity of the Receiver and Retained Personnel (as defined in the Receiver Order) as follows:

² The Receivership Entity will pay \$0 to other Receivership Entities, while receiving \$174,257 from other Receivership Entities.
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	Fees and Expenses Paid or Payable	Amt. of Approved Fees Being Held Back Pursuant to Court Order (20%)
Receiver	\$115,295	\$27,611
Waller (General Counsel)	\$86,438	\$20,218
Elliott Davis (Accounting)	\$7,424	\$1,856
Total	\$209,175	\$49,685

11. In conjunction with the Receiver's general counsel, Waller, and special counsel, Whiteford Taylor, the Receiver has identified certain claims of the Receivership Estate ("**Claims**"), which the Receiver, in his business judgment, believes should be explored.

12. On March 6, 2018, this court entered the *Order Granting Receiver's Application for Order: (A) Authorizing Receiver to Pursue Claims Against Third Parties; (B) Approving Employment of Whiteford Taylor Preston, LLP As Special Counsel for the Receiver to Pursue Claims Against Third Parties; and (C) Approving Proposed Receiver-Distribution and Cost-Sharing Methodology for Claims Against Third Parties* (Dkt. No. 242) (the "**Claims Order**"), (a) granting the Receiver's motion for approval of the employment of Whiteford Taylor Preston, LLP, to serve as special counsel for the Receiver in order to pursue certain claims of the Receivership Estate against third parties on a contingency fee basis and (b) authorizing the Receiver to pay from the Receivership Estate expenses incurred during the course of any litigation in an amount up to up to \$400,000. (Claims Order, ¶¶ 6-7.)

13. The Receiver has discussed these Claims with its general counsel, its special counsel, the SEC's counsel, and counsel for BOKF, N.A., U.S. Bank, National Association, and UMB Bank, N.A.

14. Given the uncertain nature of any potential recovery, the Receiver has determined that prosecution of the Claims on a contingency fee basis is in the best interest of the Receivership Entities and their creditors. The contingency fee is: (a) twenty percent (20%) of any gross recovery before filing a complaint regarding any Claims, and (b) forty percent (40%) of any gross recovery after filing a complaint regarding any Claims. All settlements of any Claims, including the payment of a contingency fee will be subject to final approval by the court. In either case, costs and expenses to be paid will not be deducted from the contingency fee.

15. Further, the Receiver has determined that upon identifying potential Claims, the Receiver should attempt to reach a consensual resolution of any potential Claim before seeking leave of court to institute legal proceedings. The Receiver has determined that this process will save the time and expense of seeking court approval to initiate legal proceedings for actions that might more efficiently be consensually resolved, with any such resolution being subject to court approval. To that end, the Receiver is examining and pursuing potential Claims. With regards to one particular Claim, the Receiver has: (i) made a demand on the third-party-defendant, (ii) entered into a tolling agreement with the third-party-defendant to suspend the statute of limitations while the parties engage in active discussions regarding the potential Claim, (iii) engaged the assistance of a neutral mediator to assist the parties in determining whether a consensual resolution of the issues can be reached, and (iv) scheduled a mediation with the third-party-defendant.

16. In the Receiver's business judgment and in consultation with its general counsel and special counsel, it is the Receiver's belief that keeping the identity of the potential target of any Claim confidential while the Receiver and any such party engage in discussions to determine whether a consensual resolution of the potential Party-Claim can be reached is in the best

interests of the Receivership Estate because such confidentiality promotes an environment that is most likely to facilitate good-faith discussions that may lead to a consensual resolution of any Claim.

17. If proceeds are recovered by the Receiver, and to the extent that any such recovery is not allocated on a claim-by-claim basis, the distribution of proceeds to each Receivership Entity for which a Claim was settled will be calculated as follows:

a. First, the total damages caused to all Receivership Entities, collectively, will be calculated as the deficiency on the bonds, after deducting the market value of substantially all assets of each Receivership Entity;

b. Second, for each Receivership Entity, the percentage share of proceeds will be calculated by dividing: (i) the deficiency on the bonds for such Receivership Entity; by (ii) the total damages caused to the Receivership Entities (calculated in accordance with the foregoing paragraph);

c. Third, the total distribution to be made to each Receivership Entity will be calculated by multiplying: (i) each Receivership Entity's percentage share of proceeds (calculated in accordance with the foregoing paragraph); by (ii) the (A) proceeds obtained by the Receiver less (B) the costs and expenses incurred by the Receiver pursuing the Claims; and

d. Fourth, the distribution made to each Receivership Entity will be distributed amongst the respective Indenture Trustees based upon the damages incurred by the bondholders.

18. Expenses incurred in connection with any pre-lawsuit negotiations and/or any subsequent formal legal proceedings related to the Claims will be calculated in the same manner

described above and, therefore, charged against a particular distributee in the same percentage as that distributee's ratable share of any distribution.

19. The foregoing methodology has been derived by the Receiver in consultation with each of the Indenture Trustees and the SEC and has been approved by the court. (Claims Order, ¶7).

20. The Receiver believes an appropriate reserve for the potential litigation expenses, administration expenses of the Receivership Estate, payment of professionals and the 20% holdback on professional fees, the risk of any unknown liabilities, and the wind-down of the Receivership Entity's involvement in the Receivership is approximately **\$7888,000** (the "**Reserve**") of which approximately \$49,685 is allocated to the 20% holdback on approved professional fees through the most recent fee application approved by the Court.

21. Therefore, after taking into consideration the Reserve, the Receiver seeks approval of a partial distribution to the Indenture Trustee in the approximate amount of **\$3,586,000** (the "**Distributable Proceeds**").

22. The Receiver has simultaneously filed partial distribution motions related to certain of the other Receivership Entities using the same method to determine the amount of the Distributable Proceeds.

RELIEF REQUESTED

23. By this motion, the Receiver seeks authority to make a partial distribution to the Indenture Trustee.

24. Prior to the Closing, the Indenture Trustee was the holder of senior, first priority liens on and security interests in the Proposed Purchased Assets. (Bidding Procedures Order, ¶ 7.)

25. The Indenture Trustee's first-priority liens and security interests attached to the Sale Proceeds. (Sale Order, at 10.)

26. In making distributions, the Receiver is required to give first priority to the repayment of secured indebtedness of the Receivership Entity. (Receiver Order, ¶ 40.)

27. Because the Indenture Trustee has first priority, senior liens on and security interests in the Sale Proceeds, no party in interest will be harmed by permitting a partial distribution to the Indenture Trustee at this time.

28. Accordingly, the Receiver respectfully requests that this court enter an order authorizing and directing the Receiver to disburse the Distributable Proceeds to the Indenture Trustee.

NOTICE

29. The Receiver is providing notice of this motion to the parties to this receivership and all creditors of the Receivership Entity who timely filed claims in accordance with the claims process approved by this court.

30. Given the relief sought in this motion, the Receiver submits that no other or further notice is necessary or required.

WHEREFORE the Receiver respectfully requests that this court enter an order, substantially in the form attached to this motion as **Exhibit A**, authorizing the Receiver to make a partial distribution to the Indenture Trustee and granting such other and further relief as this court deems just and proper.

Dated: September 21, 2018

Respectfully submitted,

/s/ Blake D. Roth
Blake D. Roth
Ryan K. Cochran (admitted *pro hac vice*)

WALLER LANSDEN DORTCH & DAVIS, LLP

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Counsel for the Receiver

EXHIBIT A
PROPOSED FORM OF ORDER

WALLER LANSDEN DORTCH & DAVIS, LLP
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**UNITED STATES DISTRICT COURT
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SECURITIES AND EXCHANGE
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DWAYNE EDWARDS; TODD BARKER;
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PLACE ALF, LLC; MONTGOMERY ALF, LLC;
COLUMBUS ALF, LLC; and OPELIKA ALF,
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NUNAMAKER, a/k/a SHARON HADDEN; and
SDH DESIGN, LLC,

Relief Defendants.

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

ORDER GRANTING RECEIVER'S
MOTION FOR ORDER AUTHORIZING
PARTIAL DISTRIBUTION OF
GAINESVILLE ALF, LLC SALE
PROCEEDS TO INDENTURE TRUSTEE

Upon consideration of the *Receiver's Motion for Order Authorizing Partial Distribution of Gainesville ALF, LLC Sale Proceeds to Indenture Truste* (the "**Motion**");¹ and upon consideration of any and all filings with respect to the Motion; and upon finding this court has jurisdiction over the relief sought in the Motion and venue is proper in this court; and upon finding that due and sufficient notice of the Motion and relief sought in the Motion has been given and no other or further notice is necessary or required; and upon due deliberation and finding sufficient cause for the relief sought in the Motion, it is hereby

1. **ORDERED** that the Motion is GRANTED; and it is further
2. **ORDERED** that the Receiver is authorized and directed make a disbursement to the Indenture Trustee in the approximate amount of \$3,586,000; and it is further
3. **ORDERED** that the distribution is without prejudice to: (a) the Indenture Trustee's first priority, secured lien on and security interest in the Sale Proceeds or (b) the Indenture Trustee's claims against the defendants; and it is further
4. **ORDERED** that this court shall retain jurisdiction over any and all matters relating to or arising out of this order or its enforcement.

Dated: _____, 2018

Hon. Steven C. Mannion
United States Magistrate Judge

¹ Capitalized terms used in this order and not otherwise defined shall have the meanings ascribed to them in the Motion.
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