IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	Chapter 11
SC HEALTHCARE HOLDING, LLC *et al.*	Case No. 24-10443 (TMH)
Debtors.[1]	Jointly Administered
	Hearing Date: April 23, 2024 at 11:00 a.m. (ET)
	Ref. Docket Nos. 59, 60, 110

DEBTORS' OMNIBUS OBJECTION TO (A) THE EMERGENCY MOTION FOR AN ORDER (I) DISMISSING THE SUBJECT CHAPTER 11 CASES, (II) FOR ABSTENTION, OR (III) APPOINTMENT OF RECEIVER AS THE CHAPTER 11 TRUSTEE AND (B) THE EMERGENCY MOTION TO EXCUSE RECEIVER'S COMPLIANCE WITH 11 U.S.C. § 543(a) & (b)

The above-captioned debtors and debtors in possession (each, a "Debtor" and collectively, the "Debtors") hereby submit this omnibus objection (this "Omnibus Objection") to (a) the *Emergency Motion for an Order (I) Dismissing the Subject Chapter 11 Cases, (II) For Abstention, or (III) Appointment of Receiver as the Chapter 11 Trustee* [Docket No. 60] (the "Motion to Dismiss") and (b) the *Emergency Motion to Excuse Receiver's Compliance with 11 U.S.C. § 543(a) & (b)* [Docket No. 59] (the "543 Motion," and together with the Motion to Dismiss, the "Motions") filed by X-Caliber Funding LLC, in its capacity as servicer for U.S. Bank, N.A., as trustee of XCAL 2019-IL-1 MORTGAGE TRUST, as lender ("X-Caliber"). In support of this Omnibus Objection, the Debtors rely on the *Declaration of David R. Campbell in Support of*

[1] The last four digits of SC Healthcare Holding, LLC's tax identification number are 2584. The mailing address for SC Healthcare Holding, LLC is c/o Petersen Health Care Management, LLC 830 West Trailcreek Dr., Peoria, IL 61614. Due to the large number of debtors in these Chapter 11 Cases, whose cases are being jointly administered, a complete list of the Debtors and the last four digits of their federal tax identification numbers is not provided herein. A complete list of such information is available on a website of the Debtors' claims and noticing agent at www.kccllc.net/Petersen.

Chapter 11 Petitions and First Day Pleadings [Docket No. 44] (the "First Day Declaration"),[2] the further declaration of David R. Campbell in support of this Omnibus Objection, filed concurrently herewith (the "Campbell Declaration"), the *Amended Declaration of Luke Andrews in Support of Debtors' Motion for Entry of Interim and Final Orders (I) Authorizing Debtors to Obtain Secured Superpriority Postpetition Financing, (II) Granting Liens and Superpriority Administrative Expense Status, (III) Authorizing the Non-Consensual use of Cash Collateral, (IV) Granting Adequate Protection, (V) Scheduling a Final Hearing, and (VI) Granting Related Relief* [Docket No. 68] (the "Andrews Declaration"), the *Declaration of David R. Campbell in Support of Debtors' Motion for Entry of Interim and Final Orders (I) Authorizing the Debtors to Obtain Postpetition Financing, (II) Granting Security Interests and Superpriority Administrative Expense Status, (III) Granting Adequate Protection to Certain Prepetition Secured Credit Parties, (IV) Modifying the Automatic Stay, (V) Authorizing the Debtors to Enter Into Agreements with JMB Capital Partners Lending, LLC, (VI) Authorizing Non-Consensual Use of Cash Collateral, (VII) Scheduling a Final Hearing, and (VIII) Granting Related Relief* [Docket No. 40] (the "Campbell DIP Declaration"), and the Declaration of Carrie V. Hardman in support of this Omnibus Objection, filed concurrently herewith (the "Hardman Declaration"), and respectfully state as follows:

INTRODUCTION

1. The Debtors, including the Receivership Debtors,[3] sought relief under chapter 11 of the Bankruptcy Code as part of a specific effort to proceed in an efficient and cohesive

[2] Capitalized terms used but not otherwise defined in this Motion have the meanings ascribed to them in the First Day Declaration.

[3] The "Receivership Debtors" are the following Debtors: El Paso HCC, LLC; El Paso HCO, LLC; Flanagan HCC, LLC; Flanagan HCO, LLC; Kewanee AL, LLC; CYE Kewanee HCO, LLC; Knoxville AL, LLC; CYE Knoxville HCO, LLC; Legacy Estates AL, LLC; Legacy HCO, LLC; Marigold HCC LLC; Marigold HCO, LLC; Monmouth AL LLC; CYE Monmouth HCO LLC; Polo LLC; and Polo HCO, LLC.

reorganization (including a streamlined, strategic, and coordinated sale process) intended to best serve the interests of not just one lender, but all stakeholders. The Debtors did not commence these cases lightly. The Debtors and their advisors went to great effort before filing their bankruptcy petitions to make proper arrangements, including post-petition financing, and making sure all filings were made with proper authorization.

2. X-Caliber was well aware of the Debtors' intention to seek chapter 11 relief. In fact, they even facilitated introductions to potential DIP Lenders as part of a contemplated bankruptcy process in December, 2023. Yet, by the Motions, X-Caliber cherry-picks certain facts, ignoring the known justifications and/or reasons for the Debtors' decisions, according to X-Caliber, warrant dismissal for cause, abstention dismissal, or appointment of the Receiver as the chapter 11 trustee.

3. By an examination of the totality of the circumstances, it is evident that creditors and stakeholders as a whole (including, but not limited to, X-Caliber) would be best served by a methodical and efficient sales process and a solicited and confirmed plan, with full transparency to all constituents, which includes the various built-in protections unique to bankruptcy, including the assistance of the Official Committee of Unsecured Creditors (the "Committee") and Patient Care Ombudsman. As noted in detail below, the Debtors believe there is significant value to be realized to the Debtors' estates over and above the amounts owed to X-Caliber. Which, among other reasons, justifies pursuing a coordinated bankruptcy process via these Chapter 11 Cases. The Debtors have a fiduciary duty to maximize value for all stakeholders, including, but not just X-Caliber. For these and other reasons, the Motions should be denied.

BACKGROUND

4. As noted in the First Day Declaration, the Debtors are a company comprised of a number of small businesses, all attempting to succeed in and provide services to residents of small communities all over Illinois and in parts of Missouri and Iowa. *See* First Day Declaration, ¶ 11. As a result of the downward market pressures and trends in the elder care space, inflationary pressures from food, drugs and medical supplies, difficulty recruiting experienced staff, and lingering effects of COVID-19, the Company faced liquidity issues and subsequently fell into default with its various credit facilities. *See id.* ¶ 104. Given the Debtors' need to continue providing care to their residents, the Debtors, in consultation with their advisors, deemed it necessary to forego principal and interest payments owed to their lenders and ensure that critical resident care continue. *See id*. As these defaults mounted, the receivership cases were filed, and the Debtors' liquidity issues worsened. *See id*. The filing of these Chapter 11 Cases became necessary after the Debtors' existing lenders—including X-Caliber—declined to provide additional financing. *See id.* ¶¶ 21, 42.

5. In addition to the foregoing, on or about October 20, 2023, the Company suffered a ransomware attack. *See* First Day Declaration, ¶ 29. While the Debtors are back "online" with new servers, email addresses, and replacement software, a significant amount of the Debtors' books and records were lost in the attack, leading to incredible difficulty and delay in pursuit of the Debtors' accounts receivable, which is a crucial part of the Debtors' income. *See id.*

6. The Debtors' liquidity crisis was exacerbated by a cyberattack on Change Healthcare, a division of UnitedHealth Group, that impacted a crucial service provider for certain of its payors' revenue processes (the "Change Cyberattack"). *See* First Day Declaration, ¶ 30. After the Change Cyberattack was reported in the media, the Debtors noticed reimbursements from

certain payors slowing and subsequently heard affirmatively from payors that amounts owed to the Debtors were being suspended due to the Change Cyberattack. *See id*. While the Debtors continue to assess the impact of the Change Cyberattack, there is no question that it has had a material impact on the Debtors' liquidity profile. *See id.*

7. On or about September 6, 2023, the Debtors engaged Winston & Strawn LLP ("Winston") as restructuring counsel. On December 13, 2023, the Debtors similarly engaged Getzler Henrich & Associates LLC ("Getzler Henrich") as financial advisors to assist in providing restructuring advice and guidance. When it became apparent that a restructuring of the Debtors' obligations was necessary, the Debtors, with the aid of Getzler Henrich and Winston, began the process of identifying potential providers of financing, whether as part of a refinancing out of court or post-petition financing. *See* First Day Declaration, ¶ 42.

8. On December 29, 2023, X-Caliber notified the respective Debtors that an Event of Default had occurred under the X-Caliber Bridge Facility (as Event of Default is defined therein) and accelerated the underlying loans. At the time of the notice, X-Caliber indicated that $34,486,093.91, plus fees, costs, and interest, was due and owing under the X-Caliber Bridge Facility.

9. The Debtors—directly and by and through their advisors—engaged repeatedly with X-Caliber and their other lenders to attempt to restructure their debt and right-size their balance sheets. *See* First Day Declaration, ¶ 21, 42. Ultimately, the various factors leading to financial distress made filing for bankruptcy (and the straightforward sale process contemplated in these Chapter 11 Cases) the best option for the Debtors to maximize value for their constituents.

10. Beginning in January 2024, the Debtors, with the assistance of Getzler Henrich, implemented a marketing process to determine potential debtor-in-possession financing options.

See Andrews Declaration, ¶ 8. The Debtors and their advisors worked diligently to evaluate financing opportunities from the Debtors' existing secured lenders and potential third-party lenders. *Id.*

11. A complicating factor in seeking debtor-in-possession financing was the sheer number of the Debtors' prepetition secured lenders. *See* Andrews Declaration, ¶ 9. The Debtors own a large pool of assets with approximately fifteen secured lenders, and none expressed any interest or desire in providing funding, particularly to finance potential chapter 11 cases outside each lender's own prepetition collateral pool. *See id.* Thus, even were it possible to obtain financing from the Debtors' many prepetition lenders, on an aggregate basis, negotiating a separate postpetition financing proposal with every prepetition secured lender, or even with the largest prepetition secured lenders, would have been inefficient, burdensome, and unrealistic. *See id.*

12. Contemporaneously with soliciting financing interest from the Debtors' existing secured lenders, Getzler Henrich approached third parties to gauge interest in alternative financing proposals. *See* Andrews Declaration, ¶ 11. Getzler Henrich initially solicited proposals for DIP financing from twenty-seven potential third-party lenders. *See id.* At first, Getzler Henrich focused on lenders with a reputation for providing financing to skilled nursing facilities. *See id.* However, these traditional skilled nursing lenders declined to participate in the process, and consequently, Getzler Henrich looked at a broader group of lending partners. *See id.*

13. Of the twenty-seven potential DIP lenders solicited by Getzler Henrich, thirteen executed non-disclosure agreements. *See* Andrews Declaration, ¶ 12. Each of these thirteen potential DIP lenders received access to the Debtors' diligence materials, five ultimately provided term sheets for a potential DIP financing, and two were deemed viable by the Debtors, in

consultation with their advisors. *See id*. The Debtors, with the assistance of their advisors, analyzed each proposal. *See id.* ¶ 13.

14. As is further discussed below, the eventual DIP lender was selected due to the advantageous terms and structure proposed and its ability to close and fund on a timeline that would preserve the Debtors' assets and maximize value for all interested parties. *See* Andrews Declaration, ¶ 13. Ultimately, the Debtors concluded that the DIP Facility proposed by JMB Capital Partners Lending, LLC was the best offer. *See id.* ¶¶ 13-15.

15. Amidst the Debtors intended restructuring and after the ransomware attack, three receivership proceedings were commenced against certain Debtors and non-debtor affiliates.[4] Directly relevant to the Motions is the receivership proceeding commenced on January 23, 2024, when X-Caliber commenced an action by filing a Verified Complaint in the United States District Court for the Northern District of Illinois, Rockford Division (the "*El Paso* Court") against the Receivership Debtors, the owners and/or operators of the facilities known as the Courtyard Estates of Kewanee, Courtyard Estates of Knoxville, Courtyard Estates of Monmouth, El Paso Health Care Center, Flanagan Rehabilitation & Health Care Center, Legacy Estates of Monmouth, Marigold Rehabilitation & Health Care Center, Polo Rehabilitation & Health Care Center (collectively, the "Receivership Facilities"), asserting claims for breach of contract, foreclosure of their respective mortgages, and UCC lien enforcement as to rents due thereunder. Such action is fashioned *X-Caliber Funding LLC v. El Paso HCC, LLC, et al.* (Case No. 3:24-cv-50034) (N.D.

[4] The other receiverships (the "Non-Debtor Receiverships") involve non-Debtor entities. On January 31, 2024, Capital Funding, LLC commenced the case captioned *Capital Funding, LLC v. Batavia, LLC, et al.* (Case No. 1:24-cv-00888) (N.D. Ill.) (the "*Batavia* Receivership Case"). On February 8, 2024, the district court in the *Batavia* Receivership Case appointed the Receiver as receiver in that case. *See* 1:24-cv-00888, Docket No. 15. On February 6, 2024, X-Caliber Capital commenced the case captioned *X-Caliber Capital LLC v. Charleston HCC, LLC, et al.* (Case No. 2:24-cv-02034) (N.D. Ill.) (the "*Charleston* Receivership Case"). On February 13, 2024, the district court in the *Charleston* Receivership Case appointed the Receiver as receiver in that case. *See* 2:24-cv-02034, Docket No. 13.

Ill.) (the "*El Paso* Receivership Case"). With the Verified Complaint, X-Caliber filed an emergency motion for the appointment of a receiver. *See* 3:24-cv-50034, Docket No. 5.

16. On January 25, 2024, the *El Paso* Court appointed Michael F. Flanagan as receiver (the "Receiver") over the assets that comprise the Receivership Facilities (the "Receivership Assets"). *See* 3:24-cv-50034, Docket No. 8.

17. The *El Paso* Receivership Case court noted on multiple occasions an anticipation that bankruptcy would be filed by the Receivership Debtors (and not the Receiver). *See El Paso* Receivership Case, Feb. 12, 2024 Hr'g Tr. at 6:3-7:20, attached to the Hardman Declaration as Exhibit A (Judge Johnston anticipating that the Receivership Debtors could all end up end a coordinated proceeding before a bankruptcy judge); *See El Paso* Receivership Case, Feb. 23, 2024 Hr'g Tr. at 11:10-14, attached to the Hardman Declaration as Exhibit B (Judge Johnston noting that by March 29, 2024, the *El Paso* Court and parties to the *El Paso* Receivership Case would "know if there is a bankruptcy proceeding that's filed," and that the bankruptcy filing would "affect[] everything" relative to the *El Paso* Receivership Case).

18. On March 12, 2024, the Debtors appointed David R. Campbell to serve as their Chief Restructuring Officer ("CRO"). *See* First Day Declaration, ¶ 1. Pursuant to the resolutions appointing Mr. Campbell, he is and was authorized, *inter alia*, (a) to assist the Debtors in their operations and in making all strategic decisions including whether to file bankruptcy petitions; (b) to file on behalf of the Debtors all petitions and other documents necessary to commence the Debtors' Chapter 11 Cases; and (c) to take further actions in connection with the Chapter 11 Cases, including retaining counsel and other professionals, obtaining post-petition financing, obtaining consent to the use of cash collateral, and conducting a sale of all or substantially all of the Corporation's assets pursuant to section 363 of the Bankruptcy Code.

19. Since Mr. Campbell's appointment as CRO, he has focused on increasing order and efficiency at the Debtors. Namely, Mr. Campbell has been diligently working with the Debtors' management team and employees to reinstate lapsed insurance, consolidate the Debtors' expansive vendor base, update prepetition lenders on the financial status of the Debtors, engage and negotiate with potential third party lenders and interested buyers, negotiate and engage with he Debtors' key employees, and to reassure the Debtors' staff about the chapter 11 process in an effort to improve morale of the Debtors' employees. *See* Campbell Declaration, ¶¶ 8-14.

20. Moreover, with the managing member and/or sole members' charge, Mr. Campbell authorized the filing for bankruptcy relief for the Debtors, including the Receivership Debtors.

21. On March 20, 2024 (the "Petition Date"), the Debtors each commenced with the Court a voluntary case (the "Chapter 11 Cases") under the Bankruptcy Code. The Debtors, with the exception of some inactive entities, are authorized to operate their businesses and manage their properties as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

22. As of the date of this Objection no trustee or examiner has been appointed in the Chapter 11 Cases. On or about April 9, 2024, the Office of the United States Trustee for the District of Delaware (the "U.S. Trustee") appointed an official committee of unsecured creditors (the "Committee"). *See* Docket No. 131. On April 10, the Court entered *Order Pursuant to 11 U.S.C. § 333 and Fed. R. Bankr. P. 2007.2 Directing the Appointment of a Patient Care Ombudsman* [Docket No. 137].

23. Additional factual background regarding the Debtors, including their business operations, capital and debt structure, the events leading to the filing of these Chapter 11 Cases, including factual background relevant to the Motions and the Receivership Debtors, is set forth in more detail in the First Day Declaration.

OBJECTION

I. The Motion to Dismiss Should Be Denied in Its Entirety.

24. The Motion to Dismiss asserts that the Receivership Debtor's Chapter 11 Cases (the "Receivership Debtor Cases") should be dismissed: (1) for cause, because the Receivership Debtor Cases were unauthorized; (2) for cause, as bad faith filings pursuant to section 1112(b) of the Bankruptcy Code; and (3) as an exercise of the Court's abstention power pursuant to section 305(a)(1) of the Bankruptcy Code. For the following reasons, each of X-Caliber's arguments fails to justify the requested relief.

a. Dismissal Is Inappropriate Under Section 1112(b) of the Bankruptcy Code.

25. Section 1112(b) of the Bankruptcy Code requires, upon a showing of cause, dismissal or conversion of a bankruptcy case "whichever is in the best interests of creditors and the estate" unless the Court determines a trustee or examiner is "in the best interests of creditors and the estate." 11 U.S.C. § 1112(b). Section 1112(b)(4) of the Bankruptcy Code enumerates a non-exclusive list of factors that constitute "cause." X-Caliber essentially concedes that there is no "cause" for dismissal on the enumerated grounds, and instead argues that the Debtors lacked authority to file and that the Receivership Debtors were filed in bad faith. As will be described further herein, the Motion to Dismiss fails to establish "cause" sufficient to warrant dismissal. More than that, as described herein, applicable exceptions to such alleged dismissal are present here.

i. The Receivership Debtors Were Authorized to File Their Bankruptcy Petitions.

26. X-Caliber argues that, as a matter of federal receivership law, appointment of a receiver divests a company's management of the power to file for bankruptcy on its behalf. *See* Motion to Dismiss, ¶¶ 47-48 (arguing that "[o]nce a receiver is appointed under federal law, the

authority of company's managers and officers is removed and vested in the receiver" and that "courts have made clear that corporate entities that are subject to a federal receivership lack authority to seek bankruptcy protection"). However, the proper, inquiry as to whether a filing is authorized starts with "local law," *Price*, 324 U.S. at 106, *i.e.*, state law. *In re 3P Hightstown, LLC*, 631 B.R. 205, 210 (Bankr. D.N.J. 2021).

27. Each Receivership Debtor is organized as a limited liability company under the laws of Illinois. Under Illinois law, a limited liability company may either be member-managed or, if the operating agreement so provides, manager-managed. 805 ILCS 180/15-1(a). In a member-managed company, matters related to the management of the company are decided majority vote of the members. 805 ILCS 180/15-1(b)(2).

28. In a manager-managed company, such matters may be decided by the sole manager, or a majority of managers if there is more than one manager. 805 ILCS 180/15-1(c)(2). Such management powers include the authority to file for bankruptcy. *See Dearborn Process Serv., Inc. v. Storner*, 149 B.R. 872, 878 (Bankr. N.D. Ill. 1993) (applying parallel provision in Illinois Business Corporation Act); *In re Curare Lab'y LLC*, 642 B.R. 787, 803 (Bankr. W.D. Ky. 2022) (applying management provisions of Kentucky LLC Act).

29. The commencement of each of the Receivership Debtors' Chapter 11 Case was in accordance with their respective operating agreements and Illinois law. Specifically, each Receivership Debtor has one member—Mark B. Petersen—who serves as the sole and managing member. And, pursuant to all relevant operating agreements for each Receivership Debtor, any

decisions requiring the authorization of a majority of the membership or by the managing member are satisfied by Mr. Petersen's consent. That is exactly what happened here.

30. For example, the operating agreement of El Paso HCC, LLC (the "*El Paso* Operating Agreement") requires the "affirmative vote of all general partners, managing members, or directors of the Company including the Managing Member." *See* Campbell Declaration at Exhibit A (El Paso HCC Operating Agreement, Article 16, section (xvi)). Such vote can be obtained by written consent. *Id*. at § 5.7. Consistent with these requirements, the petition for El Paso HCC, LLC included a resolution with approval from the Managing Member. The management of each Receivership Debtor followed a substantially similar procedure, approving the resolution by the same procedure as is described in the *El Paso* Operating Agreement where applicable, or by the approval of the Manager or Managing Member alone, where applicable. Accordingly, the bankruptcy petitions for the Receivership Debtors were filed in conformity with the requirements of Illinois law.

31. As evidenced by the resolutions appended to each of the Receivership Debtors' chapter 11 petitions, Mr. Petersen—or one with the authority to act in Mr. Petersen's stead—executed a consent to appoint David R. Campbell as Chief Restructuring Officer with certain authority typically reserved for the managing and/or sole member. *See* Campbell Declaration, Exhibit B.

32. The *El Paso* Receivership Case did not alter the normal operation of Illinois law or the proper result thereunder. Under certain circumstances, an order appointing a federal receiver may implicate the authority of a board of directors, manager, or other party generally empowered to authorize a bankruptcy filing.[5] Courts require explicit provisions regarding the power to

[5] *See, e.g.*, *Adams v. Marwil (In re Bayou Group, LLC)*, 363 B.R. 674, 682-83 (S.D.N.Y. 2007), *aff'd sub nom. In re Bayou Grp., LLC*, 564 F.3d 541 (2d Cir. 2009) (holding that provisions of receivership that granted the receiver

authorize a bankruptcy filing when examining whether the receivership order divests management of this power and/or confer such a power on the receiver.[6]

33. The *El Paso* Receivership Order lacks such a provision, and instead enumerates a list of powers related to the day-to-day operations of the Receivership Debtors. *See El Paso* Receivership Order, ¶ 4. The *El Paso* Receivership Order further directs management not to interfere with the Receiver's "rights, powers, and duties," *see id.* ¶ 5, but the Receiver's "rights, powers, and duties" did not extend, pursuant to the *El Paso* Receivership Order, so far as to include general corporate control or authority to commence bankruptcy proceedings. Simply put, the *El Paso* Receivership Order did not divest each Receivership Debtors' management of its corporate authority, including its ability to seek bankruptcy relief through an agent of their respective sole/managing member. Accordingly, such authority remained with the Receivership Debtors.[7]

34. For example, in *In re Whittaker, Clark & Daniels, Inc.*, a South Carolina state court appointed a receiver over a corporation organized under New Jersey law. After reviewing hearing

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the "exclusive managing member" conferred authority over decision to file for bankruptcy on behalf of debtor companies).

[6] Compare *In re Whittaker, Clark & Daniels, Inc.*, No. 23-13575 (MBK), 2023 Bankr. LEXIS 1600, at *4 (Bankr. D.N.J. June 20, 2023) (holding that power to authorize bankruptcy filing remained with management where the receivership order contained no explicit provisions barring managing or empowering only the receiver) with *In re Apex Brittany MO, LP*, No. 23-11463 (CTG), 2023 Bankr. LEXIS 2811, at *1 (Bankr. D. Del. Nov. 27, 2023) (dismissing case commenced by management where receivership order contained provisions explicitly authorizing receiver to file for bankruptcy *and* barring management from filing for bankruptcy on behalf of the debtor). Accordingly, in the Receivership Debtor Cases, the Manager or Managing Member of the Receivership Debtors has a fiduciary obligation to act in the best interests of the company and all of its creditors, including consideration as to whether bankruptcy is appropriate and necessary. Here, the Manager or Managing Member did just that when appointing the CRO with sole/managing member authority to authorize the BK for the Receivership Debtors.

[7] X-Caliber argues that paragraph 28 of the *El Paso* Receivership Order, which provides that "[n]o legal actions, administrative proceedings, self-help remedies, or any other acts or proceedings under any federal, state or municipal statute, regulation or by-law shall be taken or continued against Receiver or the Receivership Assets, or any part thereof, without leave of this Court first having been obtained" also prohibited Debtors' bankruptcy filings. *See* Motion to Dismiss ¶ 50. In light of the foregoing discussion, the Debtors submit that this general language did not divest management of its authority to file the bankruptcy petitions. Moreover, the Debtors submit this language, in conjunction with paragraph 27, is properly understood as prohibiting parties from pursuing remedies such as attachment, foreclosure, or similar legal process against the Receivership Assets. *See El Paso* Receivership Order ¶ 27 (giving notice to parties that Receivership Assets are "under the protection of this court,

transcripts, the bankruptcy court concluded that the receiver and the judge in the South Carolina state court proceedings understood the effect of the entered receivership order as divesting the debtor's board of directors of its authority to file for bankruptcy. After a review of relevant South Carolina law regarding the authority of receivers and New Jersey law about corporate authority to file for bankruptcy, the bankruptcy court concluded that notwithstanding the understanding of the receiver and the South Carolina state court judge, the appointment of a receiver, on its own, did not have that effect:

> [T]his Court addresses the South Carolina Court's expectations, albeit erroneous and shared by plaintiffs' counsel, that placing the Debtor's assets under the courts' control through the appointment of a receiver implicitly precludes the Debtor's bankruptcy filing, undertaken in a manner consistent with applicable state law and the Debtor's organizational documents. It is the province of this Court to question whether such expectations, standing alone, suffice to achieve such a result. Simply put, the Bankruptcy Code—specifically 11 U.S.C. § 543—answers the question in the negative.

In re Whittaker, Clark & Daniels, Inc., No. 23-13575 (MBK), 2023 Bankr. LEXIS 1600, at *4. In particular, the court noted that under state law and the applicable receivership order, the receiver's role did not act in place of the debtor's board, and "absent a court order affording him such status, he is not the entity authorized to file for bankruptcy." *Id.* at *22. Similarly, the *El Paso* Receivership Order, unlike the orders in the Non-Debtor Receiverships, does not confer the powers of the members or managers of the Receivership Debtors on the Receiver. Absent such language, the natural reading of the *El Paso* Receivership Order is that management retained the power to authorize bankruptcy filings, even if the Receiver or X-Caliber thought otherwise.

35. This natural reading is also consistent with events in the *El Paso* Receivership Case and in the Non-Debtor Receiverships. As noted above, in the *El Paso* Receivership Case, Judge

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[and] immune from attachment or other legal process," and "enjoining [parties] from commencing or continuing to prosecute any action against the Receivership Assets outside of this action.").

Johnston noted on multiple occasions an anticipation that bankruptcy would be filed by the Receivership Debtors (and not the Receiver). *See El Paso* Receivership Case*,* Feb. 12, 2024 Hr'g Tr. at 6:3-7:20 (Judge Johnston anticipating that the Receivership Debtors could all end up end a coordinated proceeding before a bankruptcy judge); *El Paso* Receivership Case, Feb. 23, 2024 Hr'g Tr. at 11:10-14 (Judge Johnston noting that by March 29, 2024, the *El Paso* Court and parties to the *El Paso* Receivership Case would "know if there is a bankruptcy proceeding that's filed," and that the bankruptcy filing would "affect[] everything" relative to the *El Paso* Receivership Case). Such statements from the *El Paso* Court are inconsistent with the notion that the *El Paso* Court's appointment of a receiver was a legal conclusion that the Receivership is superior to bankruptcy relief, or that the filing of the Receivership Debtor Cases undermines the *El Paso* Receivership Order.

36. In a similar vein, X-Caliber's counsel, who are also counsel for the affiliated lenders in the Non-Debtor Receiverships clearly understood that the *El Paso* Receivership Order as entered did not have the effect that X-Caliber now asserts, as they modified the language of the receivership orders in the Non-Debtor Receiverships to provide the Receiver the right to step into the shoes of management.[8] The language of the *El Paso* Receivership Order does not have the effect of divesting the management of the Receivership Debtors of the authority to file bankruptcy petitions on their behalf.

37. The Motion to Dismiss cites several cases for the general proposition that the appointment of a receiver for a corporation confers certain powers on the receiver and deprives

[8] *See Batavia* Receivership Case, 1:24-cv-00888, Docket No. 15, ¶ 4.c and *Charleston* Receivership Case, 2:24-cv-02034, Docket No. 13 ¶ 4.c, each of which provides that:

> Receiver shall be vested with, and is authorized and empowered to exercise, all the powers of each Subject Defendant, their officers, directors, shareholders, and general partners or persons who exercise similar powers and perform similar duties, including without limitation the sole authority and power to file a voluntary petition under Title 11 of the United States Code[.]

management of such powers.[9] Such cases are perfectly consistent with what happened with respect to the Receivership Debtors: the Receiver was authorized to run the day-to-day affairs of the Receivership Debtors, and management was generally prohibited from interfering.

38. However, the appointment of a receiver, without more, does not divest management of its authority with respect to the commencement of bankruptcy proceedings, nor does the receivership appointment otherwise preclude bankruptcy filings. If such were the case, section 543 of the Bankruptcy Code, regarding estate assets held in possession of a custodian, would be superfluous. Given that section 543 contains no exception for federal receiverships, and accordingly, there is no statutory basis for the notion that a federal receivership somehow precludes the commencement of bankruptcy proceedings. *See In re Kreisers, Inc*., 112 B.R. 996, 1000 (Bankr. D.S.D. 1990) ("A requirement of receivers to turn over property exists in 11 U.S.C. § 543. Congress, through this turnover provision, recognizes that circumstances exist whereby an entity operating under a functioning receivership could file bankruptcy and remove the receiver.").[10] In these Chapter 11 Cases, the respective board, managers, or members of the Debtors, as applicable, duly exercised their authority to seek bankruptcy relief via the vesting of such authority in the CRO.

39. In several instances, the Motion to Dismiss mischaracterizes the circumstances under which courts have held the pre-receivership management has been stripped of its authority

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[9] *See Securities Exchange Commission v. Spence and Green*, 612 F. 2d 896, 903 (5th Cir. 1980); *First Savings & Loan Ass'n v. First Fed. Savings & Loan Ass'n.*, 531 F. Supp. 251, 255 (D. Haw. 1981).

[10] The Motion to Dismiss at fn. 3 cites *In re Kreisers, Inc* in support of the claim that federal receiverships preclude the commencement of bankruptcy proceedings. The court in *In re Kreisers*, however, is clear that there is no blanket restriction on such filings, but that bankruptcy filings are inappropriate only when the debtor entity "is involved with a federal receivership *substantially underway.*" 112 B.R. at 1000 (emphasis added). The fact that the *El Paso* Receivership Case has been pending for less than two months as of the Petition Date does not constitute a federal receivership "substantially underway."

to commence bankruptcy proceedings.[11] For example, the Motion to Dismiss cites *Big Shoulders Capital LLC v. San Luis & Rio Grande Railroad*, No. 19 C 9029, 2019 WL 6117578 (N.D. Ill. Nov. 18, 2019), to support the proposition "that corporate entities that are subject to a federal receivership lack authority to seek bankruptcy protection," but *Big Shoulders Capital* involved an involuntary petition by creditors, not a filing by management. Moreover, the court in *Big Shoulders Capital* emphasized the importance of making case-by-case determinations based on the pertinent facts, and did not hold that as a matter of law the appointment of a receiver strips other parties from pursuing bankruptcy with respect to the entity under receivership. *See id.*, 2019 U.S. WL 6117578, at *5 (denying creditors that had filed involuntary petition leave to refile because "[t]he facts in this case align more with *Byers*[12] than *Gilchrist*."[13]). If anything, the facts in *Byers* that led the district court in *Big Shoulders Capital* to conclude that receivership was preferable lead to the opposite result here:

> In *Byers*, the receiver needed to manage hundreds of entities, many of which had co-mingled assets. The court explained that this entails "precisely the situation in which an anti-litigation injunction may assist the district court and receiver who

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[11] The Motion to Dismiss cites *United States v. Royal Business Funds Corp.*, 724 F.2d 12, 16 (2d Cir. 1983), *Securities Exchange Commission v. Bartlett*, 422 F.2d 475 (8th Cir. 1970), and *Securities Exchange Commission v. Lincoln Thrift Asso.*, 577 F.2d 600 (9th Cir. 1978), which hold that "a debtor subject to a federal receivership has no absolute right to file a bankruptcy petition and federal courts have disallowed petitions where a liquidation under a receiver is substantially under way." *Royal Business Funds*, 724 F.2d at 16. But none of these cases stands generally for the proposition that a receivership strips a debtor of the right to file a bankruptcy petition. *See, e.g.*, *id.* at 15 ("We by no means intend to disturb the general rules that a debtor may not agree to waive the right to file a bankruptcy petition, that the pendency of an equitable receivership rarely precludes a petition in bankruptcy, or that equity receiverships should not perform the functions of the bankruptcy court.") (internal quotations and citations omitted). Moreover, in *Royal Business Funds*, the Second Circuit Court of Appeals noted that the receivership was consensual and treated the debtor's subsequent decision to seek bankruptcy relief as inequitable given the benefits it had obtained under the consensual receivership. *Id.* Such is not the case here, and thus the "general rules" regarding a debtor's authority to file for bankruptcy should apply.
X-Caliber also cites *In re Gen-Air Plumbing & Remodeling*, 208 B.R. 426, 430 (Bankr. N.D. Ill. 1997) for the proposition that, "a receiver stands in the place of managers and officers regarding authority to file a bankruptcy petition." However, irrespective of what Illinois state receivership law grants in terms of corporate authority, such is not the case in federal receiverships unless the corporate authority is expressly granted.

[12] *Securities Exchange Commission v. Byers*, 609 F.3d 87 (2d Cir. 2010) (denying involuntary petition where receiver already appointed).

[13] *Gilchrist v. Gen. Elec. Cap. Corp.*, 262 F.3d 295 (4th Cir. 2001) (permitting involuntary position where receiver already appointed).

> will want to maintain maximum control over the assets." *Byers*, 609 F.3d at 93. Ultimately, the court concluded that the "current injunction prevents small groups of creditors from placing some entities into bankruptcy, thereby removing assets from the receivership estate to the potential detriment of all." *Id*. That is precisely the situation here. The Receiver is managing numerous entities that sprawl across the United States, each of which has co-mingled assets. A relatively small group of creditors asserting relatively small claims now seeks to put one of the receivership entities into bankruptcy, potentially to the detriment of every other interested party, and at the possible expense of shutting down the railroad. Allowing them to do so would undermine the purpose of the receivership and prevent the Court from adequately protecting the assets of the estate.

Id. at *5-*6. In *Byers* and *Big Shoulders Capital*, the courts determined that it was inappropriate to permit a group of creditors to carve out their debtor entity from broader proceedings to the detriment of all creditors; instead, the larger proceedings, which involved numerous debtor entities with commingled assets and spanned several jurisdictions, should continue. The same rationale applies here, but with the appropriate result being that the joint administration of all Debtors ought to continue rather allowing the smaller Receivership to proceed independently.

40. The Motion to Dismiss characterizes *Sino Clean Energy, Inc. v. Seiden (In re Sino Clean Energy, Inc.)*, 901 F.3d 1139, 1141 (9th Cir. 2018), as "holding that company's board of directors did not have authority to file the bankruptcy petition because at the time of filing, the board of directors were replaced by the receiver." But in *Sino Clean Energy*, the receiver literally "replaced" the directors by removing them and appointing a new board; the opinion does not stand for the proposition that the receivership itself replaced the board's filing authority. If anything, *Sino Clean Energy* clearly undermines the Motion to Dismiss insofar as the implication of its holding is that the old board of directors would have had authority to file notwithstanding the receiver having had the filing occur before their replacement with a new board of directors.

41. For all of the foregoing reasons, it is clear that the *El Paso* Receivership Order did not divest the management of the Receivership Debtors of the authority to commence bankruptcy

proceedings on their behalf. Because the Receivership Debtors' petitions were authorized and filed in accordance with applicable state law, the Motion to Dismiss should be denied.

ii. The Receivership Debtor Cases Were Filed in Good Faith.

42. The Motion to Dismiss asserts that the Receivership Debtors filed their petitions in bad faith and, thus, that their cases ought to be dismissed for cause. This argument does not stand up to scrutiny.

43. The Third Circuit Court of Appeals has instructed that in determining whether a bankruptcy petition was filed in good faith:

> Two inquiries are particularly relevant: (1) whether the petition serves a valid bankruptcy purpose; and (2) whether it is filed merely to obtain a tactical litigation advantage. Valid bankruptcy purposes include preserving a going concern or maximizing the value of the debtor's estate. Further, a valid bankruptcy purpose assumes a debtor in financial distress.

See LTL Mgmt., LLC v. Those Parties Listed on Appendix A to Complaint (In re LTL Mgmt., LLC), 64 F.4th 84, 100-01 (3d Cir. 2023) (internal punctuation and citations omitted).

44. The indicia of good faith are clearly present here. As set forth in the First Day Declaration, the Debtors, including the Receivership Debtors, filed the Chapter 11 Cases with the goal of preserve value for all creditors (not just one) by effectuating a reorganization or transaction that maximizes the going concern value of all of the Debtors' estates. *See* First Day Declaration, ¶¶ 21, 94, 105. The Debtors commenced the Chapter 11 Cases based on their belief that a concerted resolution involving all the Debtors would be more effective than a piecemeal process at maximizing value, including for the Receivership Debtors and their unsecured creditors. In fact, as Mr. Campbell notes, the potential value of the Debtors' properties, including in particular the Receivership Debtors, far exceeds the value of X-Caliber's claims. *See* Exhibit A to the Campbell DIP Declaration. Additionally, it has not and cannot be disputed that the Debtors, including the

Receivership Debtors, were experiencing financial distress; such distress formed the basis of X-Caliber's request for the appointment of the Receiver.

45. Contrary to X-Caliber's position, the Chapter 11 Cases were not filed merely to obtain a tactical litigation advantage; the Debtors, including the Receivership Debtors, had been contemplating and preparing to commence the Chapter 11 Cases well before and independently of X-Caliber's motion to appoint a receiver. X-Caliber was well aware of the Debtors' intentions and, instead, opted to gain a litigation advantage themselves by filing the receivership cases. *See* Campbell Declaration at ¶ 11. In fact, as far back as December, 2023, X-Caliber's counsel approached and ultimately introduced the Debtors' to a potential DIP Lender.

46. Courts in the Third Circuit examine several factors to determine whether a bankruptcy filing was made in bad faith, including (1) whether case is a single-asset case; (2) whether the case has few unsecured creditors; (3) whether the debtor has no ongoing business or employees; (4) whether the petition was filed on the eve of foreclosure; (5) whether the case is a two-party dispute that can be resolved in pending state court action; (6) whether the debtor has no cash or income; (7) whether the debtor has no pressure from non-moving creditors; (8) whether the debtor has a previous bankruptcy petition; (9) whether there was improper prepetition conduct; (10) whether there is no possibility of reorganization; (11) whether the debtor was formed immediately prepetition; (12) whether the petition was filed solely to create automatic stay; and (13) the subjective intent of the debtor. *See Primestone Inv. Partners L.P. v. Vornado PS, L.L.C. (In re Primestone Inv. Partners L.P.)*, 272 B.R. 554, 557 (D. Del. 2002).

47. As described below, almost none of these factors weighs against the Debtors in these Chapter 11 Cases, which further demonstrates that the Debtors, including the Receivership

Debtors, commenced the Chapter 11 Cases in good faith. Nevertheless, the Debtors review the factors that X-Caliber addressed in its Motion to Dismiss.[14]

a. Factor 1 (Single-Asset Case), Factor 4 (Filed on the Eve of Foreclosure), and Factor 12 (Petition Filing Solely to Create Automatic Stay): X-Caliber asserts that "the bankruptcy filing was clearly intended to circumvent the *El Paso* Receivership Order, and to avoid the imminent foreclosure of Subject Debtors' assets." Motion to Dismiss, ¶ 62. This argument fails for several reasons. *First*, foreclosure of the Receivership Assets was not imminent when the Debtors, including the Receivership Debtors, filed their petitions. No notice of a potential auction has been served, no indication from the Receiver has been conveyed that gives the impression that the Receiver intends to foreclose shortly. *Second*, the evidence in this case demonstrates that the Debtors' Chapter 11 Cases were not filed to circumvent the *El Paso* Receivership Order. Rather, the Debtors had been contemplating chapter 11 relief before X-Caliber sought appointment of the receiver. *See* First Day Declaration ¶ 42. In fact, the Debtors' intention to seek bankruptcy relief was communicated to the *El Paso* Court at the hearing on X-Caliber's request to appoint a receiver; the filings were not an afterthought or response to the appointment of the Receiver. *See* Tinkham Declaration, Ex. B (*El Paso* Receivership Case, Jan. 25, 2024 Hr'g Tr. at 18:2-30:10, 33:21-38:15).[15] Rather, the constant litigation by X-Caliber slowed the

[14] There appears to be no dispute that factor 3 (no ongoing business or employees), factor 8 (previous bankruptcy petition), and factor 11 (debtor formed immediately prepetition) are irrelevant to this analysis.

[15] The Tinkham Declaration is referred to herein as the *Declaration of Paige B. Tinkham in Support of X-Caliber Funding LLC's (A) Emergency Motion for an Order (I) Dismissing the Subject Chapter 11 Cases, (II) for Abstention, or (III) Appointment of Receiver as the Chapter 11 Trustee, (B) Emergency Motion to Excuse Receiver's Compliance with 11 U.S.C. § 543(a) & (b); and (C) Objection to Debtors' Motion for Entry of Interim and Final Orders (I) Authorizing the Debtors to Obtain Postpetition Financing, (II) Granting Security Interests and Superpriority Administrative Expense Status, (III) Granting Adequate Protection to Certain Prepetition Secured Credit Parties, (IV) Modifying the Automatic Stay, (V) Authorizing the Debtors to Enter Into Agreements*

Debtors' already active preparation for filing these Chapter 11 Cases. The Debtors filed not just bare petitions, but a methodically planned bankruptcy case for 141 Debtors, including pre-negotiated post-petition financing.[16] And, as is evidenced by the *Order Approving Stipulation to Retain Receiver for Subject Receivership Debtors Pending Further Court Order* [Docket No. 110], the Debtors clearly had no intention of upending the status quo at the Receivership Debtors unless or until there was a methodical return of operations to the Debtors from the Receiver. Thus, for these and other reasons, the facts simply demonstrate that all 141 Chapter 11 Cases were filed not as cover for a scheme to circumvent the *El Paso* Receivership Case, but as a coordinated effort to effectuate a value-maximizing process in the context of chapter 11 proceedings. *Third*, and finally, exactly (and only) half of the Receivership Debtors are single asset real estate entities. But these Chapter 11 Cases are not a collective of single asset real estate cases; rather these cases are intended to reorganize and restructure the Petersen enterprise including its real estate and operations. Thus, this factor simply does not weigh against the Debtors here.

b. Factor 2 (Few Unsecured Creditors) Factor 5 (Two-Party Dispute), and Factor 7 (Pressure from Other Creditors): X-Caliber acknowledges that the Receivership Debtors have numerous unsecured creditors and repeatedly notes that "critical vendors were owed over $4.6 million, $3.5 million of which was over 90 days old" as of the commencement of the Receivership. Motion to Dismiss, ¶¶ 3, 30, 60. Accordingly, the Receivership Debtors are obviously not engaged in a two-party dispute only with X-Caliber. Yet X-Caliber inexplicably asserts that "by virtue of its status as the first priority

with JMB Capital Partners Lending, LLC, (VI) Authorizing Non-Consensual Use of Cash Collateral, (VII) Scheduling a Final Hearing, and (VIII) Granting Related Relief [Docket No. 64].

[16] *See* Dkt Nos. 2, 3, 6, 7, 8, 10, 26, 27, 38, 40, 41, 44, 68.

secured lender, [it] has priority over claims by any such creditors and, in light of Subject Debtors' status, it is unlikely that any other creditors will receive a recovery in the bankruptcy," and that because of the Receivership Debtors' "bleak financial and operational outlook, this is effectively a two-party dispute between Subject Debtors and Lender, their first priority secured lender." *Id.*, ¶¶ 60, 63. The self-serving claim, presented with no evidentiary basis, that unsecured creditors are unlikely to receive a recovery and therefore the Receivership Debtor Cases are effectively two-party disputes, is incorrect. The Debtors expect they can realize proceeds well beyond that of the debt owed to X-Caliber, value of which would inure to the Debtors' creditors other than X-Caliber. *See* Campbell DIP Declaration at ¶¶ 16-17. Unlike the *El Paso* Receivership, the Debtors are not beholden just to X-Caliber here, they owe a duty to maximize returns to all creditors. Thus, there is no two-party dispute here. In addition to the foregoing, the Debtors submit that because of the numerous vendors with outstanding prepetition claims as well as other creditors (including plaintiffs in litigation) involved in these Chapter 11 Cases, Factor 7 weighs against dismissal because the interests of all these non-moving creditors must be considered and are best protected in this Court.

c. Factor 9 (Prepetition Conduct) and Factor 13 (Subjective Intent of Debtors): The Motion to Dismiss cites a litany of accusations of mismanagement—including commingling of funds, ignoring applicable regulations, mismanaging Receivership Debtors' financials, and putting the safety of residents of the Receivership Debtors' facilities at risk—largely without factual or evidentiary basis. Motion to Dismiss, ¶ 61. Such unsubstantiated accusations do not justify dismissal of the Receivership Debtor Cases. In addition, the Motion to Dismiss misleadingly refers to the commingling of assets

as a form of mismanagement. However, as set forth, *inter alia*, in the First Day Declaration and the Debtors' Cash Management Motion [Docket No. 41], the Petersen enterprise operated as a complex organization, and the flow of funds as part of its cash management is consistent with regulatory requirements. While it may be complex, the Debtors' cash flow is not wrong (or evidence of mismanagement). Furthermore, as X-Caliber well knows, the Debtors have been assisted with their operations since December 13, 2023, including through the appointment of the CRO. Thus, X-Caliber's allegations of prior mismanagement—however unfounded—should have no import. *See, e.g., In re 1031 Tax Grp., LLC*, 374 B.R. 78, 86 (Bankr. S.D.N.Y. 2007) (in context of appointment of chapter 11 trustee, noting that emphasis is on conduct of current management, not earlier management). Accordingly Factor 9 weighs in the Debtors' favor. Similarly, the Debtor's actions since the retention of Getler Henrich and Winston reflect a clear the subjective intent of the Debtors was to seek to restructure their debts, culminating in the filing of these Chapter 11 Cases to maximize value for stakeholders in a coordinated effort involving both Receivership Debtors and non-Receivership Debtor. Accordingly, Factor 13 weighs against dismissal.

d. Factor 6 (No Cash or Income) and Factor 10 (No Possibility of Reorganization): X-Caliber asserts that "there is no real possibility of reorganization, and, consistent with the *El Paso* Court's decision, the receivership provides the best chance to maintain the value of Subject Debtors' and Subject Facilities, thereby maximizing value for all key constituents." Motion to Dismiss, ¶ 63. If X-Caliber's position were true, the Receiver would be struggling to operate the Receivership Debtors. In any case, even if there is no possibility of reorganization for the Receivership Debtors, the Debtors submit

that the best means of maximizing value for all key constituents—including creditors with claims against both Receivership and non-Receivership Debtors—is a coordinated effort among all Debtors to effectuate a transaction or transactions.

48. For these reasons, the Debtors submit that the Chapter 11 Cases were not filed in bad faith.

iii. Dismissal Is Inappropriate Pursuant to Section 1112(b)(2).

49. Not only is there no cause for dismissal pursuant to section 1112(b)(1), but the circumstances of this case compel the conclusion that dismissal would affirmatively be inappropriate and not in the best interests of creditors and the Debtors' estates. The Court may not dismiss the Chapter 11 Cases if the Court:

> [F]inds and specifically identifies unusual circumstances establishing that dismissal is not in the best interests of creditors and the estate, and the Debtors or any other party in interest establishes that –
>
> (A) there is a reasonable likelihood that a plan will be confirmed within the time frames established [by the Bankruptcy Code or, if inapplicable, within a reasonable period of time]; and
>
> (B) the grounds for [dismissal] include an act or omission of the [Debtors] other than under paragraph (4)(A)—
>
> (i) for which there exists a reasonable justification for the act or omission; and
>
> (ii) that will be cured within a reasonable period of time fixed by the court.

11 U.S.C. § 1112(b)(2). For the following reasons, the factors enumerated in section 1112(b)(2) apply in these Chapter 11 Cases.

50. Unusual Circumstances Are Present: The Debtors are in a unique situation wherein prepetition they were operated, effectively, as an extensive and complex sole proprietorship for decades. Then, toward the end of 2023, the confluence of several issues resulted in the Debtors'

financial distress, as set forth in the First Day Declaration. The data breach made collections of accounts receivable nearly impossible, and at the same time, the Debtors experienced staffing shortages. Adding to these difficulties, the lack of funds made it impossible to secure insurance when no lender would extend credit. Finally, management experienced health issues at a crucial time in the company's financial distress. All of these issues became too much for the company to bear, and these are all issues of which X-Caliber is well aware, as they were raised at the January 25, 2024 hearing in the *El Paso* Court. *See generally El Paso* Receivership Case, Jan. 25, 2024 Hr'g Tr. Since that time, however, the Debtors have obtained the assistance of the CRO, and their professionals have begun to put themselves back on the proper course.

51. These Chapter 11 Cases Are in the Best Interest of Creditors and the Estates: As set forth in the Campbell Declaration, among other reasons, the best interests of creditors, including unsecured creditors and patients, are best served in these Chapter 11 Cases, where they have the institutional knowledge and management of the Debtors' management team, protections afforded by the Bankruptcy Code, and the presence of the Committee and Patient Care Ombudsman, who look at the interests of creditors beyond X-Caliber's interest as a senior lender. *See* Campbell Declaration ¶¶ 8–19. Unsecured creditors and residents—or anyone beyond X-Caliber—do not enjoy similar protections in receivership. Moreover, the interests of creditors as whole are clearly best served by a streamlined sale process of the assets of all the Debtors for values exceeding the obligations owed to X-Caliber and other secured creditors. "In analyzing these issues [to dismissal pursuant to section 1112(b)], the bankruptcy court 'must consider the interests of *all* of the creditors.'" *Baroni v. Seror (In re Baroni)*, 36 F.4th 958, 968 (9th Cir. 2022) (quoting *Shulkin Hutton, Inc., P.S. v. Treiger (In re Owens)*, 552 F.3d 958, 961 (9th Cir. 2009)) (emphasis in

original). Accordingly, the unique benefits of afforded by the Bankruptcy Code weigh heavily against dismissal.

52. There Is a Reasonable Likelihood of the Timely Confirmation of a Plan: The Debtors have received and continue to receive significant interest in the purchase of the various facilities and will proceed expeditiously to effectuate a transaction or transactions with the goal of filing a confirmable plan shortly thereafter. *See* Campbell Declaration at ¶ 12. X-Caliber's Motion to Dismiss asserts with no basis that the Debtors cannot successfully reorganize but provides no grounds for believing that confirmation of at least a plan of liquidation is unlikely. Accordingly, at present, there is no reason to believe that the Debtors will not achieve this goal, especially in light of their new management under the CRO and post-petition financing. *See* Campbell Declaration ¶¶ 8–14; *see also In re Delta AG Grp., LLC*, 596 B.R. 186, 197 (Bankr. W.D. La. 2019) ("In the early stages of a Chapter 11 case, the prospects for confirming a plan are not evaluated as stringently as they are later on."); *In re Sterling WH Co.*, 475 B.R. 481, 485 (Bankr. E.D. Va. 2012) ("The standard in § 1112(b)(2)(A) is lower than the confirmation standard in § 1129. Section 1112(b)(2)(A) only requires that there be a reasonable likelihood that a plan will be confirmed. It is not a confirmation hearing. It is an evaluation of the likelihood of achieving confirmation."). Accordingly, the likelihood of confirmation after accomplishing the proposed transactions weighs against dismissal.

53. Any Deficiencies Can Be Timely Resolved: For the reasons discussed above, there is no "cause" for dismissal; the Debtors (including the Receivership Debtors) were authorized to file their petitions; the petitions were filed in good faith; and the specifically enumerated bases for "cause" in section 1112(b)(4) do not apply. Nevertheless, to the extent that certain of the deficiencies discussed in this Omnibus Objection, or the issues alleged in the Motions, could be

construed as acts or omissions that might be grounds for dismissal, the Debtors note that under the direction of the CRO, remediation of such issues has begun with respect to the non-Receivership Debtors, and, in consultation with the Patient Care Ombudsman and the Committee, will continue. There is no basis to believe that such efforts cannot be brought to a reasonable resolution in a timely manner as directed by the Court.

54. For all the foregoing reasons, the Court should find that dismissal is inappropriate pursuant to section 1112(b)(2) of the Bankruptcy Code.

1. Dismissal Abstention Under Section 305(a) Is Also Inappropriate.

55. X-Caliber requests in the alternative dismissal of the Receivership Debtors Cases pursuant to section 305(a)(1) of the Bankruptcy Code, which authorizes a court to dismiss or suspend a bankruptcy case if the interests of creditors and the debtor would be better served by dismissal or suspension. For the reasons described above and herein, the Court should deny X-Caliber's request for dismissal under section 305(a)(1) as well.

56. "Abstention in a properly filed bankruptcy case is an extraordinary remedy. Therefore, dismissal is appropriate under section 305(a)(1) *only where a court finds that both the debtor and its creditors would be better served*." *In re AIG Fin. Prods. Corp.*, 651 B.R. 463, 476 (Bankr. D. Del. 2023) (citing *In re* AMC *Investors, LLC*, 406 B.R. 478, 487 (Bankr. D. Del. 2009)) (emphasis added). To determine whether dismissal is in the interest of both the debtor and its creditors, courts consider the following factors: (1) the economy and efficiency of administration; (2) whether another forum is available or there is already a pending proceeding in state court to protect the interests of all parties; (3) whether federal proceedings are necessary to reach a just and equitable solution; (4) whether there is an alternative means of achieving an equitable distribution of assets; (5) whether the debtor and creditors are able to work out a less expensive out-of-court

arrangement that better serves all interests in the case; (6) whether a non-federal insolvency case has proceeded so far that it would be costly and time-consuming to start afresh with the federal bankruptcy process; and (7) the purpose for which bankruptcy jurisdiction has been sought. *See id.* (citing *In re AMC Investors, LLC*, 406 B.R. at 488). As described below, nearly all of these factors weigh against dismissal of the Receivership Debtor Cases.

57. Factors 1 and 7 (Economy and Efficiency; Purpose for Seeking Bankruptcy Jurisdiction): As noted above, the Debtors commenced these Chapter 11 Cases to effectuate a sale process that would maximize value for all the Debtors constituents. Maintaining the Receivership Debtors within the administration of this process is therefore more efficient, not less. While X-Caliber claims that receivership is less expensive, it provides no factual basis for this assertion, nor for any of the other assertions that follow. Motion to Dismiss, ¶¶ 68-72. Moreover, with the economies of scale considered in pursuing a bankruptcy case for 140 or more Debtors, cost savings inure to each of the Receivership Debtors in these Chapter 11 Cases. *See* Campbell Declaration ¶ 8. More than that, rather than acting independently, the Receiver has required significant assistance from the managers of the previous and current managers of the Petersen enterprise. *See* First Day Declaration, ¶ 41; Campbell Declaration, ¶¶ 16-20. In addition, the *El Paso* Receivership Case has served as a major distraction to the Debtors' overall reorganization as the Debtors have had to respond to issues created by the receivership such as addressing police reports and requests, and the receivership's failure to make payments required under federal regulations. *See* First Day

Declaration, ¶ 41. Administration of the Receivership Debtors with the remaining Debtors is therefore in the best interest of efficiency for both the Debtors and their creditors.[17]

58. Factor 4 (Alternative Means of Achieving an Equitable Distribution of Assets): The Motion to Dismiss says little, if anything, about the equitable distribution of assets to ***all*** creditors. And, the Debtors submit that is intentional, as the *El Paso* Receivership is not focused on equitable distribution to all creditors, but rather to X-Caliber. In fact, the Motion to Dismiss characterizes the dispute between X-Caliber and the Receivership Debtors as a two-party dispute and suggests that any distribution of Receivership Assets will be for the benefit of X-Caliber alone. Motion to Dismiss, ¶¶ 60, 63. The Debtors, in contrast, believe that the Receivership Debtors and rest of the Debtors can maximize value for the benefit of all creditors in these Chapter 11 Cases by availing themselves of the tools afforded by the Bankruptcy Code and chapter 11.

59. Factors 2 and 6 (Pending State Proceeding; Substantial Progress in Non-Federal Insolvency Proceeding): Strictly speaking, these factors are irrelevant because X-Caliber commenced a federal receivership. The Debtors note, however, that even applying these factors to the federal receivership, they weigh against dismissal. The receivership does not protect the interests of *all* parties, but as discussed above, is targeted to protect the interests of X-Caliber. Moreover, the pendency of the receivership for under two months on the Petition Date falls short

[17] The Motion to Dismiss characterizes *In re O'Neil Village Care Corp.*, 88 B.R. 76 (Bankr. W.D. Pa. 1988), as "dismissing bankruptcy case where appointed receiver was supervising the operation and management of the debtor, hired professional management to restore administrative stability, was arranging necessary insurance, and was working to provide a financial workout of past-due accounts." Motion to Dismiss, ¶ 68. In *O'Neil Village Care*, there was only a single debtor entity, and it was clear to the court that if the bankruptcy case were not dismissed, control would not be returned to management and a chapter 11 trustee (other than the receiver, who was not approved as a member of the Bankruptcy Trustee Panel), would be appointed. 88 B.R. at 81. Under those circumstances, the court determined that chapter 11 proceedings would be duplicative and inefficient. *Id*. Such circumstances differ greatly from these Chapter 11 Cases, in which (1) numerous debtors operate as and will continue operating as debtors-in-possession regardless of the disposition of the Motions, and (2) denying the Motions would be more efficient due to the streamlined administration of all the Chapter 11 Cases.

of the progress in other cases. *See, e.g.*, *In re Packard Square LLC*, 575 B.R. 768, 770 (Bankr. E.D. Mich. 2017) (receivership pending ten months); *In re Starlite Houseboats, Inc.*, 426 B.R. 375, 389 (Bankr. D. Kan. 2010) (eight months); *In re Michael S. Starbuck, Inc.*, 14 B.R. 134, 135 (Bankr. S.D.N.Y. 1981) (fourteen months).

60. Factors 3 and 5 (Necessity of Federal Proceeding to Reach a Resolution; Ability to Achieve Out-of-Court Arrangement): These factors are also not relevant because X-Caliber commenced the receivership proceeding in federal court. There is no question that the Receivership Debtors will be involved in-court, federal proceeding, only whether that in-court, federal proceeding will occur before this Court or the *El Paso* Court. Moreover, as described in fuller detail above, the Debtors, including the Receivership Debtors, attempted unsuccessfully to reach an out-of-court resolution with their respective lenders. It was only after these attempts failed that the Debtors filed their Chapter 11 Cases. *See* First Day Declaration, ¶ 42. Accordingly, the Debtors submit that at this point there is no dispute as to the necessity of an in-court resolution.

61. In addition to the foregoing analysis, *AIG Financial Products* is an instructive example of the application of section 305(a)(1). In *AIG Financial Products*, certain litigants in state court sought dismissal of the debtor's case under section 305(a)(1), arguing that the administrative cost of chapter 11 proceedings favored dismissal and that the parties' interests would be best addressed in the pending state court litigation. The court rejected movants' argument. Importantly, in concluding that the argument that the parties' interests would be best addressed in the bankruptcy court, the court's analysis was not limited to the debtor and its creditors, but also considered the debtor's parent entity (which was not a party to the state-court litigation) and other stakeholders:

> This bankruptcy case provides the only forum where all issues among the Debtor, AIG [debtor's parent], the CT Plaintiffs [movants], and other stakeholders can be

> adjudicated. Accordingly, it cannot be said that dismissing this case would be in the best interests of the Debtor and any of its creditors, other than perhaps the CT Plaintiffs. Thus, the Court will deny dismissal of this case under section 305.

In re AIG Fin. Prods., 651 B.R. at 477 (emphasis in original). Just as Judge Walrath concluded that the bankruptcy court was the only forum to resolve issues among all parties in *AIG Financial Products*, so too is this Court the only forum to resolve all issues among ***all*** parties, including not only the Receivership Debtors and X-Caliber, but also the non-Receivership Debtors and unsecured creditors, including those holding claims against both Receivership Debtors and non-Receivership Debtors.

62. Moreover, this Court is the best forum for maximizing value for all parties involved. As noted above, X-Caliber, unlike the Debtors, does not believe that there is value to be realized for the Receivership Debtors' unsecured creditors. And it also clear that X-Caliber, unlike the Debtors, has no incentive, or intention, to maximize value for the Receivership Debtors' unsecured creditors. Consequently, it cannot be said that dismissing this case would be in the best interests of the Receivership Debtors and *any* of their creditors, other than perhaps X-Caliber. The Court should therefore deny X-Caliber's alternative request for dismissal under section 305(a)(1) of the Bankruptcy Code.

2. Appointment of the Receiver as Chapter 11 Trustee Is Improper.

63. The Motion to Dismiss further requests, if the Court finds dismissal inappropriate, that the Receiver be appointed as chapter 11 trustee of the Receivership Debtors. Section 1104(a) of the Bankruptcy Code provides in relevant part that a chapter 11 trustee shall be appointed on request of a party in interest or the U.S. Trustee, "for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case" or "if such appointment is in the interests of

creditors, any equity security holders, and other interests of the estate." Neither basis for the appointment of a chapter 11 trustee is applicable here.

64. There is no "cause" to appoint a chapter 11 trustee, either under the bases for dismissal articulated in section 1112(b) or due to "fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management." The Debtors strenuously object to the allegations of wrongdoing by prepetition management, which are not substantiated by any factual support. However, even crediting such allegations, appointment of a chapter 11 trustee is inappropriate because while a court may consider past conduct, "on a motion for the appointment of a trustee, the focus is on the debtor's current activities, not past misconduct." *In re Sletteland*, 260 B.R. 657, 672 (Bankr. S.D.N.Y. 2001) (citing 7 COLLIER ON BANKRUPTCY ¶ 1104.02[3][c][i] (15th ed.)). Accordingly, "[s]peculation that a debtor may do something in the future does not overcome the strong presumption that the debtor should be permitted to remain in possession in a Chapter 11 case or justify the additional costs of a trustee." *Id.* (citations omitted). While the Motion to Dismiss contains broad allegations of prepetition misconduct, the Motion to Dismiss provides no basis to believe that the same state of affairs currently persists post-petition at the non-Receivership Debtors such that the current conduct of management justifies appointment of a chapter 11 trustee.

65. Even if the Court considers and credits X-Caliber's allegations of prepetition management's misconduct, such activities do not support appoint of a chapter 11 trustee. Later courts applying *Sletteland* have further concluded that "[w]hen considering whether to appoint a trustee for cause, a court's focus is on the debtor's *current management*, not the misdeeds of past management." *In re 1031 Tax Grp., LLC*, 374 B.R. at 86 (citing *In re Sletteland*, 260 B.R. at 672)

(emphasis added); *see also In re Marshall*, 653 B.R. 509, 515 (Bankr. N.D.N.Y. 2023) (citing *1031 Tax Grp.* and *Sletteland*).

66. In these Chapter 11 Cases, the Debtors retained David R. Campbell as CRO prepetition and have sought authority from this Court to retain the CRO and Getzler Henrich to provide interim management services post-petition. [Docket No. 119]. The CRO and Getzler Henrich have extensive experience in the healthcare industry and are supremely qualified to provide management services for the Debtors. *See* First Day Declaration, ¶¶ 4-5; Campbell Declaration, ¶ 5. The CRO has brought significant amounts of order and efficiency to the Petersen enterprise since taking the helm. He is having weekly and otherwise periodic management meetings, constantly reviewing the financials to make appropriate adjustments, and generally taking the necessary steps to address and ameliorate the issues that lead to the filing of these Chapter 11 cases. *See generally* Campell Declaration. Unlike the *El Paso* Receivership Case, chapter 11 provides protection for unsecured creditors (by way of the Committee) and our vulnerable residents (via Patient Care Ombudsman), which the Receivership simply does not and cannot provide.

67. X-Caliber makes no allegations of wrongdoing attributable to the CRO or Getzler Henrich, and in light of the decision to retain a CRO to provide management services, it is inappropriate to appoint a chapter 11 trustee rather than permit the Debtors to remain in possession. *See In re Blue Stone Real Est., Constr. & Dev. Corp.*, 392 B.R. 897, 904 (Bankr. M.D. Fla. 2008) (noting that "the legislative history of section 1104, which prescribes the grounds for appointment of a Chapter 11 trustee, reflects a decided preference for leaving a debtor in possession in place")

(citing House Report No. 95-595, 95th Cong., 1st Sess. (1977), U.S. Code Cong. & Admin. News 1978, at 5963, 6358).

68. X-Caliber claims that appointment of the CRO is insufficient because "the chief restructuring officer is leaving current management in place – the same management that has long neglected the facilities for their own gain and is clearly incompetent to manage affairs." Motion to Dismiss, ¶ 84. Contrary to X-Caliber's assertions, management's decision to appoint a CRO indicates a clear intent on the part of the Debtors to conduct their affairs responsibly. *See In re BR Festivals LLC*, No. 14-10175, 2014 Bankr. LEXIS 1276, at *2 (Bankr. N.D. Cal. Mar. 28, 2014) ("The court does not agree with the U.S. Trustee that the act of seeking a CRO is evidence of mismanagement. Quite the contrary, it is evidence of acting responsibly.")[18] Thus, even if the CRO's activities are considered an extension of prepetition management, it is inappropriate to attempt to discredit the CRO with mere guilt by association without any basis that the Debtors' management under the CRO has continued down the same course.

69. Similarly, as the court in *1031 Tax Group* further explained, "the fact that the debtor's prior management might have been guilty of fraud, dishonesty, incompetence, or gross mismanagement does not necessarily provide grounds for the appointment of a trustee under § 1104(a)(1), as long as a court is satisfied that the current management is free from the taint of prior management." 374 B.R. at 86 (citing *In re Microwave Prods. of Am.*, 102 B.R. 666, 671 (Bankr. W.D. Tenn. 1989)). While the CRO does not have unfettered authority, he is not beholden to prepetition management in making appropriate decisions regarding the management of the

[18] In *In re BR Festivals*, the court denied the U.S. Trustee's motion to appoint a chapter 11 trustee and the debtor's application to retain the chief restructuring officer, but denied the debtor's motion without prejudice to filing a motion to employ the chief restructuring officer pursuant to section 327 of the Bankruptcy Code or as part of a confirmed plan. 2014 Bankr. LEXIS 1276, at *5.

Debtors in these Chapter 11 Cases, has a demonstrated track record of acting in the best interests of chapter 11 debtors, and has continued to be solely responsible for all material decisions in these Chapter 11 Cases, without interference from any other party. *See* Campbell Declaration, ¶¶ 8-14. Therefore, it is appropriate to permit the CRO to manage the Debtors, including the Receivership Debtors, instead of granting X-Caliber's request to appoint a chapter 11 trustee. *See In re Blue Stone Real Est.*, 392 B.R. at 905 ("In these administratively consolidated cases, the protection afforded by a Chapter 11 trustee in containing or overcoming Mr. DeMaria's [current management] alleged conduct would not be needed if a CRO with Mr. Oscher's particular talents is authorized to have sole control over the management of the Debtors without interference by Mr. DeMaria.").

70. Appointment of a chapter 11 trustee is also not in the interests of creditors, any equity security holders, and other interests of the estate. As is with X-Caliber's requests for dismissal of the Receivership Debtor Cases, the appointment of the Receiver as chapter 11 trustee would at best be to the benefit of X-Caliber; as noted above, X-Caliber asserts that the dispute between the Receivership Debtors and itself is a two-way dispute and by extension that unsecured creditors are unlikely to obtain a recovery. As participants in a value-maximizing transaction along with the non-Receivership Debtors as debtors in possession, however, the Receivership Debtors would be acting in the best interest of all creditors and other parties in interest.

71. In addition to the foregoing, the Debtors note that X-Caliber's specific proposal to appoint the Receiver as chapter 11 trustee ignores the procedure set forth in section 1112(b) of the Bankruptcy Code, which does not permit one creditor to handpick a preferred candidate as chapter 11 trustee, but instead provides that "the United States trustee shall convene a meeting of creditors for the purpose of electing one disinterested person to serve as trustee in the case."

Moreover, the *El Paso* Receivership Order did not confer corporate authority, such that the Receiver should assume all corporate control of the Receivership Debtors as debtors in possession as set forth in *Bayou Group.* To the extent that the Motion to Dismiss can be construed as specifically seeking appointment of the Receiver in violation of section 1112(b), it should be denied.

72. In addition, the specific rationales underlying the request for appointment of a chapter 11 trustee are highly dependent on the appointment of the Receiver. *See* Motion to Dismiss, ¶¶ 83, 85 (noting receiver "has decades of experience overseeing distressed nursing home facilities [and] is clearly in the best position to preserve and maximize the remaining value of Subject Debtors' assets for the benefit of its creditors" and concluding that "[a]ppointment of a chapter 11 trustee, especially an independent professional with years of experience of overseeing senior care homes [who] has already been managing these homes as an independent court fiduciary of the United States District Court for the Northern District of Illinois is in the best interest of resident [sic] and creditors"). However, because appointment of the Receiver as chapter 11 trustee is not a foregone conclusion, it would be appropriate to grant such relief on the assumption that the Receiver would be appointed as chapter 11 trustee for the Receivership Debtors.

73. Finally, while the Motions repeatedly assert that the Receiver has made substantial advances in turning around the Receivership Debtors' facilities and operations, these assertions are offered without any evidentiary support. On the contrary, to date, the Receiver has failed to pay creditors and adhere to governmental regulations and other requirements. *See* Campbell Declaration, ¶¶ 16-21. Moreover, employee morale and overall management of the Receivership

Debtors' facilities have not improved. *Id.* Accordingly, there is no basis to appoint the Receiver as chapter 11 trustee in the Receivership Debtors Cases on such grounds.

74. Appointment of a chapter 11 trustee is an "extraordinary remedy," and "the standard for § 1104 appointment is very high[.]" *In re Marshall*, 653 B.R. at 515 (quoting *In re Smart World*, 423 F.3d 166, 176 (2d Cir. 2005)). X-Caliber has failed to satisfy its burden or demonstrate that such an extraordinary remedy is warranted. Accordingly, the request for appointment of a chapter 11 trustee for the Receivership Debtors, as well as all the other relief requested in the Motion to Dismiss, should be denied.

2. The 543 Motion Should Be Denied.

75. In addition to the Motion to Dismiss, X-Caliber has filed the 543 Motion, seeking to be excused under section 543(d) of the Bankruptcy Code from the obligation to deliver estate assets of the Receivership Debtors as required by section 543(b) of the Bankruptcy Code. The Motion to Dismiss and the 543 Motion are intricately intertwined, and the Debtors recognize that resolution of the Motion to Dismiss will either render the 543 Motion moot or ripen the motion for this Court's determination. Pursuant to the *Order Approving Stipulation to Retain Receiver for Subject Receivership Debtors Pending Further Court Order*, the Receiver remains in possession of the Receivership Assets.

76. The Debtors submit that the 543 Motion should be denied. Section 543(d)(1) allows permitting a custodian (including a receiver) to remain in possession of estate assets "if the interests of creditors and, if the debtor is not insolvent, of equity security holders would be better served by permitting a custodian to continue in possession, custody, or control of such property[.]" For the reasons articulated above in the discussion of the Motion to Dismiss, the interests of creditors are best served by continued operation of Debtors, including the Receivership Debtors,

as debtors in possession. Specifically, to maximize the value of any transaction or transactions involving the assets of the Debtors, turnover of the Receivership Assets pursuant to section 543 of the Bankruptcy Code is essential.

77. In addition, if the Court denies the Motion to Dismiss, it defies logic to allow the Receiver to remain in place rather than requiring turnover. Permitting the Receivership Assets to remain segregated depresses the value of the Petersen enterprise—and by extension, any sale efforts—by hindering the Debtors' ability to engage in concerted efforts with respect to the disposition of their assets. At the very least, the redundancy in requiring communication with the Receiver reduces efficiency and increases administrative costs for no apparent gain.

78. For the foregoing reasons, the cases of the Receivership Debtors should not be dismissed.

[*Remainder of page intentionally left blank*]

WHEREFORE, the Debtors respectfully request that the Court deny the Motion to Dismiss and the 543 Motion to Prohibit Turnover in their entirety grant related relief.

Dated: April 17, 2024
Wilmington, Delaware

Respectfully submitted,

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