EXHIBIT V-F

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

In re:	:	
	:	**Chapter 11**
LRGHEALTHCARE,	:	
	:	**Case No. 20-10892 (MAF)**
Debtor.[1]	:	

DEBTOR'S REPLY TO THE
OBJECTION OF THE STATE OF NEW HAMPSHIRE
TO SALE OF THE DEBTOR'S ASSETS

LRGHealthcare ("LRG" or the "Debtor") respectfully submits this Reply to the *Objection of the State of New Hampshire to Sale of the Debtor's Assets* (the "State Agencies Objection" or "State Objection") (ECF no. 332) filed by the New Hampshire Department of Justice's Director of the Charitable Trusts Unit (the "Director"), the New Hampshire Department of Health and Human Services ("DHHS"), and the New Hampshire Department of Revenue Administration ("DRA"), (collectively the "State Agencies" or the "State"). In support thereof, the Debtor states the following:

BACKGROUND

1. On October 19, 2020 (the "Petition Date"), the Debtor commenced a voluntary case under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in this Court. The Debtor continues to operate its business and manage its properties as debtor in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

[1] The last four digits of the Debtor's federal taxpayer identification number are 2150. The address of the Debtor's headquarters is 80 Highland Street, Laconia, NH 03246.

2. As the Court is aware, the Debtor is a not-for-profit healthcare charitable trust operating Lakes Region General Hospital ("LRGH"), Franklin Regional Hospital ("FRH"), and numerous other affiliated medical practices and service programs. LRGH is a community based acute care facility with a licensed capacity of 137 beds, and FRH is a 25-bed critical access hospital with an additional 10-bed inpatient psychiatric unit. In 2002, Lakes Region Hospital Association and Franklin Regional Hospital Association merged, and have operated under the name LRGHealthcare.

3. On October 19, 2020, the Debtor filed a Motion for Orders *(A) (I) Approving Procedures for Selling Substantially All Property of the Debtor's Estate Free and Clear of All Interests, (II) Approving Procedures for Assuming and Assigning Certain Executory Contracts and Unexpired Leases, (III) Authorizing the Debtor to Enter into the Stalking Horse Agreement, (IV Authorizing the Payment of the Stalking Horse Payment as Administrative Expenses, and Granting Related Relief, and (B) (I) Approving the Sale of Substantially All Property of the Debtor's Estate Free and Clear of All Interests, (II) Approving the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases, and (III) Granting Related Relief* (the "Sale Motion") (ECF no. 45). As discussed in the Sale Motion, its filing represents the culmination of extensive marketing efforts and an open sale process conducted on notice to all interested parties.

4. On November 2, 2020, this Court, having overruled all unresolved objections, entered an Order *(I) Approving Procedures for Selling Substantially all Property of the Debtor's Estate Free and Clear of all Interests, (II) Approving the Debtor's Estate Free and Clear of All Interests, (III) Authorizing the Debtor to Enter into the Stalking Horse Agreement, (IV) Authorizing the Payment of the Stalking Horse Payment as an Administrative Expense, and (V) Granting Related Relief* (the "Sale Procedures Order"). (ECF no. 152). Concord Hospital, Inc.

("Concord") is the "Stalking Horse" potential acquirer of the Debtor's assets under the Sale Procedures Order.

5. Pursuant to the Sale Procedures Order, a hearing on the Sale Motion is scheduled before this Court on December 21, 2020 (the "Sale Hearing"), following which, with the Court's approval, the Debtor expects to sell substantially all of its assets to Concord, as the successful bidder (the "Sale").

6. On December 11, 2020, the State Agencies filed their Objection to the Sale Motion.

REPLY

7. The State Objection contains the following contentions, which are essentially lengthy reservations of rights that have already been agreed to in the context of the Sales Procedures Order, premature assertions of State claims, or arguments that are overruled by Section 363: (a) the Sale Order and Asset Purchase Agreement ("APA") should not alter the police and regulatory powers of the Director and DHHS (State Obj. ¶¶ 7-27), (b) the State has recoupment or setoff rights, administrative expense status for the tax year ending in 2021, and entitlement to adequate protection, regarding (*as-yet-undetermined*) claims of the State for the Medicaid Enhancement Tax (the "MET") (State Obj. ¶¶ 28-52, 56-59), (c) any buyer of the Debtor's assets will have successor liability for the MET under state law if the Debtor cannot pay (State Obj. ¶¶ 53-55), and (d) DHHS also requests certain reservations of rights to ensure there will be no interruption to its ability to administer the Medicaid program (State Obj. ¶¶ 60-65). The State Agencies' arguments, to the extent they actually advance a substantive, ripe and justiciable matter, should be overruled.

A. The MET claims by the State are premature

8. The MET is an annual tax based on "net patient services revenues" during the taxpayer's fiscal year that ends during the State's June 30 – July 1 fiscal year.[2] The State Objection goes on at length regarding the MET and the DSH (defined below), including discussing the material problems that the program has had over the years, and which led to now-settled litigation (State Obj. ¶¶ 31-37), but – importantly – the State *admits* that the amounts in the State Objection are, at best, only what the State Agencies "anticipate". (State Obj. ¶ 38). Neither the MET nor the DSH is presently even close to being liquidated in amount.[3]

9. This is because the MET due on April 15, 2021 and April 15, 2022 (State Obj. ¶¶ 38-40) is based on the Debtor's fiscal years ending on September 30, 2020 and September 30, 2021, respectively. Any MET payment determined to be due in April, 2021 thus is, at best, an unsecured pre-petition tax claim that is a Bankruptcy Code Section 507(a)(8) priority tax claim, because such tax is incurred on revenue from LRG's fiscal year ending 9/30/20, a tax period prior to the Petition Date, which was October 19, 2020. Likewise, any audit obligation for 2011 through 2016, if any (State Obj. ¶ 39), is a pre-petition claim which may be at best a priority unsecured claim depending on the year.

[2] To the Debtor's understanding, the "filing period" as defined by the State is for the year ending 6/30, consistent with the State's fiscal year (7/1 – 6/30). The return must be filed and the MET remitted on or before April 15 of the year of the filing period. The MET due on 4/15 is calculated using the net patient revenue subject to the MET (not all is) for each hospital's fiscal year that ended within the State filing period. For example, the filing period for the MET due in 2021 will be the State fiscal year ending 6/30/2021. However, the return must be filed and the MET remitted on or before 4/15/2021. In the case of LRGHealthcare's two hospitals, that MET return and remittance will be based on the net patient revenue subject to the MET for each hospital's fiscal year ended 09/30/2020.

[3] The Debtor notes that the settlement agreement (ECF no. 332-2, Exhibit B, the "Settlement Agreement") between the State and the New Hampshire hospitals is executory and could be rejected, and that the Debtor has not yet made a decision on whether to reject or accept, as it has until confirmation of a plan to do so under Section 365(d)(2).

10. Any MET payment determined to be due in April, 2022 relates to "net patient services revenues" for the period between October 1, 2020 and September 30, 2021, or until LRG ends revenue production – which would be on the date the Debtor anticipates closing the Sale. DRA's contention that it will have a claim is thus extraordinarily premature at this point, because (i) the revenue is highly speculative, (ii) the initial return for reporting an estimate for this tax period is not due until January 15, 2022, and (iii) between now and then the Debtor expects to sell all the assets producing patient revenue.

11. Moreover, a portion of all MET taxes collected from taxpayers is required to be used to pay hospitals, including the Debtor, as provided in RSA Section 167:64 and under the Settlement Agreement. These payments, called "disproportionate share hospital payments" ("DSH Payments") have exceeded the Debtor's MET payments over the last 4 years (the "Net Benefit"). The Net Benefit arises because the Debtor provides a greater amount of uncompensated care relative to other hospitals.

12. The Debtor's position is that this Net Benefit will continue for payments due in April 2021 and April 2022; thus, any MET obligation of the Debtor, if history is a guide, will be exceeded on a net basis by the DSH Payments owed to the Debtor and, hence, there is no need for the Debtor to reserve for the MET even were there an obligation to do so, although the Debtor has no such obligation.

13. Finally, as a foundational matter of procedure, any claim of the State for the MET (whether for the Debtor's fiscal year 2020 or fiscal year 2021) is subject to both determination under Section 502(i) and disallowance under Section 502(d), given the Debtor's right of setoff of DSH payments. In other words, the Debtor will likely have no obligation to the State for MET until, at the earliest, this Court has ruled on the claim and determined at a minimum setoff rights related thereto.

14. In view of the above, the State's arguments relating to payment, recoupment and setoff of MET and DSH are premature, and thus not ripe or justiciable. They should be overruled.[4]

B. Section 363 authorizes sale free and clear of the State's MET and other claims

15. It is well-settled that

> a bankruptcy court may approve a § 363 sale 'free and clear' of successor liability claims if those claims flow from the debtor's ownership of the sold assets. Such a claim must arise from a (1) right to payment (2) that arose before the filing of the petition or resulted from pre-petition conduct fairly giving rise to the claim.

Matter of Motors Liquidation Co., 829 F.3d 135, 156 (2d Cir. 2016); see also In re Trans World Airlines, Inc., 322 F.3d 283 (3d Cir. 2003) (affirming district court's decision allow 363(f) sale free and clear of employment discrimination claims); Marks Mgmt. Servs., Inc. v. Reliant Mfg., Inc., 74 Fed. Appx. 493 (6th Cir. 2003) (§ 363 sale was free and clear of a sales agent's claim for commissions); United Mine Workers of Am. 1992 Benefit Plan v. Leckie Smokeless Coal Co. (In re Leckie Smokeless Coal Co.), 99 F.3d 573 (4th Cir. 1996); In re All Am. of Ashburn, Inc., 56 B.R. 186, 189–91 (Bankr. N.D. Ga. 1986) (§ 363(f) permitted the sale of assets free and clear and precluded successor liability in product liability suit against purchaser for cause of action that arose prior to date of sale); In re K & D Indus. Servs. Holding Co., Inc., 602 B.R. 16 (Bankr. E.D. Mich. 2019) (sale of chapter 11 debtors' assets free and clear of successor liability claims for ERISA withdrawal liability); Canzano v. Ragosa (In re Colarusso), 280 B.R. 548 (Bankr. D. Mass. 2002) (sale was free of all interests, both monetary and non-monetary).

[4] Given that Concord is the prevailing bidder, the State's reservation of rights, to object on or before December 19, 2020 regarding other bidders is mooted.

16. The State's allegations to the contrary (State Obj. ¶¶ 53-54), i.e., that it can pursue a buyer post-sale based on a Debtor liability notwithstanding Section 363(f), are not supported by any citation to case law, and in fact are against settled principles of Federal law supremacy.

17. Although preemption of RSA 21-J:38's alleged imposition of successor liability is ultimately a constitutional question, the starting point for discerning the "purposes and objectives of Congress" is the plain language of the federal statute itself. See Securities Indus. Ass'n v. Connolly, 883 F.2d 1114, 1118 (1st Cir. 1989), cert. denied, 495 U.S. 956, 109 L. Ed. 2d 742, 110 S. Ct. 2559 (1990). The proper focus then is on the "free-and-clear" language – the very language that conflicts with the State's successor liability argument under RSA 21-J:38.

18. In WBQ P'ship.. v. Va. Dep't of Med. Assistance Servs. (In re WBQ P'ship), 189 B.R. 97 (Bankr. E.D. Va. 1995), the debtor sought to sell substantially all its assets (relating to a nursing home) under Section 363(f). The Virginia Department of Medical Assistance Services (DMAS) objected to, among other things, the sale order's injunction against DMAS pursuing successor liability against the buyer, under a state statutory provision that allows for depreciation recapture from the transferee of a nursing home upon the debtor's failure to reimburse DMAS for such depreciation recapture (the underlying liability of the debtor is triggered by a transfer or sale). The court granted a permanent injunction prohibiting DMAS's pursuit of claims against the buyer, holding:

> The plain terms of § 363(f) provide that a trustee or debtor-in-possession may sell estate property 'free and clear of any interest in such property ….' The Virginia statute mandates the opposite result: if estate property is sold, and the debtor is unable to reimburse DMAS for the recaptured depreciation DMAS may collect from the buyer, using 'any means available by law ….' Va. Code § 32.1-329(C). In this respect, the Virginia statute creates an interest or charge on the property, even though the federal statute, § 363(f), authorizes the property to be sold free and clear of such interests. The Virginia statute thus interferes with the federal

> statute, and accordingly, the federal statute must prevail. See U.S. Const. art. VI, cl. 2.

189 B.R. at 108.[5]

19. Also instructive is the case of Mass. Dep't of Unemployment Assistance v. OPK Biotech, LLC (In re PBBPC, Inc.), 484 B.R. 860 (B.A.P. 1st Cir. 2013), in which the Bankruptcy Appellate Panel adopted a broad definition of the term "any interest" in Section 363(f) of the Bankruptcy Code, and concluded that a 363 sale was free and clear of the seller's unemployment tax experience rating (notwithstanding that is was imposed by a Massachusetts statute) and characterized the state's imposition of the seller's rating on the buyer as a form of successor liability. Id., 484 B.R. at 867-869 (citing and analyzing cases). See also In re ARSN Liquidating Corp., 2017 Bankr. LEXIS 185 at *11-15 (Bankr. D. N.H. Jan. 20, 2017)(debtor's workers' compensation experience rating cannot be imposed upon buyer)(citing, among other decisions, In re PBBPC); In re Verity Health Sys. of Cal., 606 B.R. 843, at 850-52 (Bankr. C.D. Cal. 2019).[6]

[5] Accord Virginia Dep't of Med. Assistance Servs. v. Shenandoah Realty Partners, L.P. (In re Shenandoah Realty Partners, L.P.), 248 B.R. 505, 514 (W.D. Va. 2000)(holding that "similar to Section 363(f), Section 1141(c) contains a "free and clear" provision. Accordingly, Section 1141(c) is also in conflict with Virginia Code Section 32.1-329. As such, . . . the federal statute would preempt the state statute, thus creating a basis for enjoining DMAS from collecting its depreciation recapture claim from Ascend"); P.K.R. Convalescent Ctrs. v. Virginia (In re P.K.R. Convalescent Ctrs.), 189 B.R. 90 94-95 (Bankr. E.D. Va. 1995) ("Under a § 363(f) sale, the purchaser acquires the property free and clear of all interests. Thus, the sale extinguishes DMAS's interest in the property because DMAS's interest attaches to the proceeds of the sale").

[6] The State also asserts, incorrectly, that "[m]ost courts treat provider agreements as subject to cure, assumption, and assignment procedures under § 365 of the Bankruptcy Code." (State Obj. at 6 n.2.) To the contrary, the Verity court found, in determining that Medicare Provider Agreements are not contracts and therefore are not subject to assumption and assignment under § 365, that the same cases cited by the State for this proposition, such as In re Heffernan Memorial Hospital District, 192 B.R. 228 (Bankr. S.D. Cal. 1996), are "are not persuasive, because the issue of whether the provider agreements were executory contracts versus statutory entitlements was not litigated. Instead, the courts simply assumed, without meaningful analysis, that the provider agreements were executory contracts." Id., 606 B.R. at 851.

20. For these very same reasons, under Section 363(f) the State cannot enforce RSA 21-J:38 against the successful bidder for the Debtor's business. Accordingly, the State's Objection should be overruled.

C. 11 U.S.C. § 363(f) overrules the State's remaining objections

21. Section 363(f) of the Bankruptcy Code authorizes a debtor-in-possession to sell property under Section 363(b) "free and clear of any interest in such property of an entity other than the estate" if one of the following conditions is satisfied:

1) applicable nonbankruptcy law permits the sale of such property free and clear of such interest;
2) such entity consents;
3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
4) such interest is in bona fide dispute; or
5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 363(f). In the leading decisions interpreting § 363(f)(5), courts have readily determined that holders of merely monetary claims or interests could be compelled to accept payment of money in satisfaction of the interest. See, e.g., EEOC v. Knox-Schillinger (In re TWA), 322 F.3d 283, 291 (3d Cir. 2003); In re Kellstrom Industries, Inc., 282 B.R. 787, 794 (Bankr. D. Del. 2002); WBQ P'ship, 189 B.R. at 107; In re Healthco International. Inc., 174 B.R. 174, 176-177 (Bankr. D. Mass. 1994).

22. Even secured claims, which the State's are not, are subject to Section 363(f)(5). Accordingly, "a chapter 11 plan proponent can satisfy a secured claim, over the objection of the claimant, by cash payments having a present value equal to the value of the security interest. Such a 'cramdown' proceeding complies with the description of proceedings referred to in [section 363(f)(5)], and many courts have so held." In re Healthco Int'l, Inc., 174 B.R. 174, 176 (Bankr. D. Mass. 1994) (citing In re WPRV-TV, Inc., 143 B.R. 315 (D. P.R. 1991)).

23. The State goes on to contend (State Obj. ¶ 51), nonetheless, that the Debtor has not shown that DRA and DHHS could be compelled to accept a money satisfaction of their claims. To the extent the latter proposition was not already obvious, given that the MET and DSH matters, as purely monetary obligations, have already been discussed at length before the Court in connection with the proceedings on the Debtor's use of cash collateral, we have addressed the issue above in paragraphs 21 and 22 in this Section C. Further, as the State admits (State Obj. ¶ 57-58), the MET "is an income tax based on 'net patient services revenues'". Thus, the State's alleged unliquidated and unsecured MET claim and its purported successor liability claim are (a) interdependent and (b) both subject to monetary satisfaction. Accordingly, Section 363(f)(5) clearly applies, and the Sale Order should provide that any MET claim by the State is limited to being asserted against the Debtor only and cannot be asserted against a buyer.[7]

i.) The State's recoupment rights are not affected by the sale

24. The State devotes twenty paragraphs to recoupment (State Obj. ¶¶ 28-49). However, as the State Objection makes clear (State Obj. ¶ 48), the referenced provisions of the Sale Order concern claims relating to "operation of the Debtor's business . . . before the effective time of Closing." These provisions are typical, and necessary for any buyer to have clarity that pre-closing operations are not its responsibility unless specifically assumed.[8] Accordingly, this objection by the State should be overruled.

[7] See, e.g., WBQ P'ship.. v. Va. Dep't of Med. Assistance Servs. (In re WBQ P'ship.), 189 B.R. at 107 ("If the sale goes forward, DMAS's right of recapture will arise through a onetime transaction. In exercising this right, DMAS would collect a payment – either from the debtor or from the transferee, Gilron, Inc. The only threat confronting DMAS is the loss of money that would result from selling the assets free and clear of DMAS's interest. Accordingly, we conclude that DMAS's interest can be reduced to a claim, and is therefore subject to a hypothetical money satisfaction under 11 U.S.C. § 363(f)(5)").

[8] See, e.g., In re B.D.K. Health Mgt., 1998 Bankr. LEXIS 2031 *15 (Bankr. M.D. Fla. Nov. 16, 1998) ("Because HHS' recoupment claims remain with the provider numbers and licenses, the sale of those numbers and licenses, together with the goodwill attendant thereto, would be used to satisfy those claims.

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25. The State also cites (State Obj. ¶¶ 41-45) Holyoke Nursing Home, Inc. v. Health Care Fin. Admin. (In re Holyoke Nursing Home, Inc.), 372 F.3d 1 (1st Cir. 2004), and Gardens Reg'l Hosp. & Med. Ctr. Liquidating Tr. v. Cal. (In re Gardens Reg'l Hosp. & Med. Ctr., Inc.), 975 F.3d 926 (9th Cir. 2020), for general authority regarding recoupment. However, these decisions are not on point, because neither involved a sale or the potential assertions of recoupment or setoff against a buyer, either directly or through a licensing process.[9]

ii.) The State cannot assert direct or indirect setoff rights against a buyer

26. As the State admits, its own case law stands for the proposition that a sale is free and clear of setoff rights. Folger Adam Sec., Inc. v. DeMatteis/MacGregor, J.V., 209 F.3d 252, 263 (3d Cir. 2000) (even if the requirements of Section 553 "are met, the right of setoff will be extinguished if either sections 362 or 363 are invoked"). See State Obj. ¶ 50.

27. Further, though the State has circumscribed authority to review approve the transaction, it cannot discriminate against Concord if a denial is based solely on the Debtor's failure to make any payments to the State. In other words, if a state law conditions transfer or issuance of a license, permit or other authorization on payment of a debt of LRG, that condition would not apply. In fact, any attempt by the state to enforce that type of requirement would

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Accordingly, under 11 U.S.C. § 363(f) the Court is empowered to sell these particular assets free and clear of HHS' recoupment interest in the Movants' property").

[9] The State makes the sweeping assertion (State Obj. ¶ 45) that:

> DRA and DHHS have certain rights and obligations to recover unpaid MET and DSH Audit Obligations as part of multi-year, interdependent stream of transactions that are part of a comprehensive program to fund uncompensated care costs for all hospitals in New Hampshire

To the contrary, particularly regarding setoff, it is not clear which State entity has the right to recover the DSH as part of the DSH Audit. There certainly could be issues, including mutuality, if that entity is not DHHS or if the recovery right is outside the contract.

violate Section 525 of the Bankruptcy Code.[10] Accordingly, it is not correct to say, without qualification by reference to Section 525, that licensure matters are solely pursuant to state law. See, e.g., Hiser v. Blue Cross of Greater Phila. (In re St. Mary Hosp.), 89 B.R. 503, 512 (Bankr. E.D. Pa. 1988).[11]

28. In that connection, the State objects (State Obj. ¶ 65) to paragraph 25 of the Sale Order, contending that the Sale Order cannot, without further proceedings, prohibit the State or other entities under Section 525 from "conditioning its entry into a provider agreement with any Buyer for participation by such Buyer in the Medical Assistance Program on such Buyer's payment, to be subject to offset for payment, or such Buyer's assumption of liability with respect to any overpayments made by" DHHS. The State also invites the Court (State Obj. ¶ 65) to defer this point – and thus the issue will lie in wait for the Debtor and Concord ("The Court should address such issues if or when they arise in the future (and hopefully they will not)").

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[10] Section 525 provides in relevant part:

> a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act, or another person with whom such bankrupt or debtor has been associated, solely because such bankrupt or debtor is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.

11 U.S.C. § 525(a) (emphasis supplied).

[11] "Although other creditors may be entitled to payment of pre-petition debts in exchange for a debtor's assumption of an executory contract, we believe that § 525(a) changes this as to a governmental unit. . . . . [W]e conclude that, although § 365(b)(1) would otherwise appear to require the Debtor to allow HHS its recoupment rights as a condition for utilization of its Medicare provider contract in the future, § 525(a) eliminates that condition." Id., 89 B.R. at 512.

29. The State's argument should be rejected. The burden of time and expense (and potential frustration of the Sale) should not be on Concord and the Debtor, potentially forcing them to bring further proceedings. Section 525 and case law interpreting it is clear, and such counterparties should be directed by this Court now, in the Sale Order, to conduct themselves properly, just as, for example, county recorders and other officials are directed to accept 363 orders as evidence of clear title and sale. See Kings Terrace Nursing Home & Health Related Facility v. N.Y. State Dep't of Soc. Servs. (In re Kings Terrace Nursing Home & Health Related Facility), 1995 Bankr. LEXIS 157 at*45-46 (Bankr. S.D.N.Y. Jan. 26, 1995); see also In re Verity Health Sys. of Cal., Inc., 2019 Bankr. LEXIS 3321 at *54-55 (Bankr. C.D. Cal. Oct. 23, 2019), vacated at request of the parties, In re Verity Health Sys. of Cal., 2019 Bankr. LEXIS 3514 (Bankr. C.D. Cal. Nov. 13, 2019).

iii.) Adequate Protection

30. For the proposition that it is entitled to adequate protection, the State cites (State Obj. ¶ 52) the decision in Szymanski v. Wachovia Bank, N.A. (In re Szymanski), 413 B.R. 232, 241-42 (Bankr. E.D. Pa. 2009), a chapter 13 case involving bank account setoff. Szymanski is not on point with the facts here, given that the MET and DSH claims are unliquidated.[12]

[12] The State cites to generalized discussion of secured claims in the decision, 413 B.R. at 241-242 (State Obj. ¶ 52), without making any effort to point out how it is remotely applicable here:

> The turnover statute states: 'an entity that owes a debt that is property of the estate . . . shall pay such debt . . . except to the extent that such debt may be offset under section 553 of this title against a claim against the debtor.' 11 U.S.C. § 542(b).
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> Moreover, by virtue of section 506(a), a setoff right gives rise to an allowed secured claim. *See, e.g.*, In re Patterson, 967 F.2d 505, 509 (11th Cir. 1992); In re Rehab Project, Inc., 238 B.R. 363, 375 (Bankr. N.D. Ohio 1999) ("Congress bestowed upon creditors having a valid right of setoff, the status of an allowed secured [*242] claim, thus giving that creditor the highest priority under the Bankruptcy Code. § 506(a)."); In re Koch, 224 B.R. 572, 575 (Bankr. E.D. Va. 1998). Creditors treated as holding secured claims under section 506 may have no duty to turn over collateral unless their secured claim is

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31. The State also makes a remarkable contention (State Obj. ¶ 55) that, if its successor liability claim against the ultimate buyer is barred, DRA should

> "be provided adequate protection for its interest in the form of a senior lien in any sale proceeds to the extent of any unpaid MET for April 2021. This relief is appropriate because DRA should not be forced to share with parties who hold an interest in property of the estate given that its claim is not property of the estate or an interest in property of the estate. Thus, it should be paid first, prior to distributions to holders of claims or interests in estate assets."

32. The state provides no supporting authority for this suggestion, and our research has likewise revealed none. There is nothing in Sections 361 or 363 that entitles DRA (as the holder of an unliquidated claim) to adequate protection, or otherwise to re-order the priorities to sale proceeds provided in the Bankruptcy Code, simply because DRA is prohibited from pursuing successor liability as a result of bankruptcy. See, e.g., In re Adamson, 312 B.R. 16, 20-21 (Bankr. D. Mass. 2004) (creditor who lacked a lien or attachment against debtor's property, and holding contingent, unliquidated and disputed unsecured claim, not entitled to adequate protection).[13] Accordingly, this claim by the State should be denied.

33. The State further posits, again with reference to the MET (State Obj. ¶¶ 56-59) that somehow the sale process fails to "make provision for administrative expense or priority tax claims." The State does not specify (State Obj. ¶ 56) how a Section 363 sale process generally, or this one, should be conducted differently, nor does it cite any authority for this contention –

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> adequately protected. See 11 U.S.C. § 363(e); United States v. Whiting Pools, Inc., 462 U.S. 198, 103 S. Ct. 2309, 76 L. Ed. 2d 515 (1983).

[13] Even if the State had a lien, "[t]ransfer of the lien to the proceeds provides adequate protection for the lien." In re Healthco International. Inc., 174 B.R. at 177.

the State simply makes this objection and then pivots to mundane tax process and priority matters (State Obj. ¶¶ 57-59), which are not relevant to the Sale Motion.

D. The Debtor is fulfilling its fiduciary duties by conducting the Sale

34. As discussed in the Sale Motion, and as has been made clear throughout these proceedings (and will again be demonstrated at the Sale Hearing), the Debtor has undertaken its sale process to ensure high quality, consistent and stable patient care while at the same time maximizing value for creditors, pursuant to the case law cited in the Sale Motion. (Sale Motion, ECF no. 45, at ¶¶ 65-73, and cases cited.) Modern practice permits a Debtor to sell its business prior to formulation of a plan, based on a sound business purpose.

35. The "sound business purpose test" has four elements: (1) a sound business reason or emergency justifies a pre-confirmation sale; (2) the sale has been proposed in good faith; (3) adequate and reasonable notice of the sale has been provided to interested parties; and (4) the purchase price is fair and reasonable. In re WBQ P'ship, 189 B.R. at 102.

36. The sound business justification for the proposed pre-confirmation sale is straightforward. The Debtor has been experiencing a loss of revenue in recent years resulting from increased outmigration to competing facilities for key specialty services. In addition, the Debtor does not have the financial clout to negotiate higher reimbursement rates from insurance carriers. Net patient revenues have decreased over 23% since 2017. Average inpatient admissions are down 26% and emergency department ("ED") visits for 2020 are down approximately 16.5 % compared to 2019.[14]

[14] The State's own arguments regarding the Debtor's thin capitalization (e.g., State Obj. ¶¶ 52, 67) likewise support the Sale.

37. The ED is a main source of admissions to LRG. The reduced ED visits and resulting reduction in admissions have impacted, and will impact, the Debtor's cash collections in the January through March, 2021 timeframe. Furthermore, the Debtor continues to experience a net loss from operations and negative cash flow on a monthly basis. The Debtor's cash flow projections demonstrate that it cannot operate much longer on projected cash from revenues without the support of a strong financial partner. With the added burden of restructuring costs, including professional fees, and expected reduced collections consistent with recent downturns in admissions and visits, the Debtor predicts that cash will be nearly depleted prior to the middle of March of 2021 (even assuming no extraordinary event, such as another pandemic-driven full shutdown or the addition of unanticipated receipts such as pandemic relief awards). The expected strong financial and service line support from Concord through this transaction eliminates many, if not all, of these concerns. It not only allows the Debtor's one-hundred twenty-seven tradition of providing accessible quality healthcare to the residents of the Lakes and Three Rivers region to continue, but, to thrive, especially after taking into account all of the future commitments of Concord set out in sections 5.4 and 5.5 of the APA.

38. The remaining three factors of the test are also satisfied. None of the objections to the Sale, including the State's, asserts that the Sale has been proposed in the absence of good faith. Similarly, no objection argues that adequate and reasonable notice of the Sale is lacking. Finally, the purchase price is fair and reasonable because it represents the best result of extensive marketing efforts, combined with an open sale process that provided sufficient notice to all potentially interested parties.

39. The Debtor, through its board, in commencing and completing the Sale process, has undertaken it in good faith, and fully mindful of the unique fiduciary duties that are incumbent in making sound business decisions regarding a financially-troubled non-profit

healthcare institution. See, e.g., In re United Healthcare Sys., 1997 U.S. Dist. LEXIS 5090 *17-21 (D. N.J. March 26, 1997).

40. To carry out these duties, as will be addressed at the Sale Hearing, the Debtor engaged in a vigorous sale process that resulted in multiple, financially substantial parties in the health care industry expressing interest in bidding, and conducting due diligence. Ultimately, however, Concord's was the only formal bid, which, under relevant case law, establishes the fair value of the assets sold. See SB Bldg. Assocs. Ltd. P'ship v. Atkinson (In re 388 Route 22 Readington Holdings, LLC), 2020 U.S. Dist. LEXIS 132217 at *10-11 (D. N.J. July 27, 2020) (upholding finding by the bankruptcy court that "an auction produces the best possible measure of fair value"); Schreiber v. Cereola (In re Jodoin), 208 B.R. 6, 10 (Bankr. D. N.H. 1997) ("There is no evidence before the Court that, at the time of the assignment, the value of the Hayward Street premises was anything other than the amount bid at the auction"); In re Pub. Serv. Co., 114 B.R. 820, 823-24 (Bankr. D. N.H. 1990) ("This bankruptcy has been in effect an auction of PSNH, which has been highly publicized and generated national attention and several substantial and serious bidders .... The liquidation value of the company in a chapter 7 would not be as high as it is for this chapter 11 Reorganization"); Matter of Ohio Corrugating Co., 59 B.R. 11, 12 (Bankr. N.D. Ohio 1985) ("the only avenue available to the Debtor-in-Possession which will accommodate all the concerns set forth herein and which will accord the fullest possible measure of fairness and finality is by way of a public auction"); In re Collins, 180 B.R. 447, 452 (Bankr. E.D. Va. 1995) (after a single buyer sale process, court found "that the price of $100,000 is the best price obtainable under the circumstances").

41. The Court's approval of the Debtor's overall sale process, its implementation of the Sale Procedures Order (especially after taking into consideration the views of all interested parties including the State Agencies), and the ultimate Sale to Concord, would be in keeping

with the "strong policy favoring competitive bidding and finality" in bankruptcy public auction sales. In re Dartmouth Audio, Inc., 42 B.R. 871, 874 (Bankr. D. N.H. 1984).

CONCLUSION

The State Objection is focused singularly on monetary recovery for the State. While the State Agencies have made multiple objections, requests, and assertions of claim priority that have no basis in the well-established law governing these issues, it is notable that neither the DHHS nor the Division of Charitable Trust has articulated any substantive independent concerns with the proposed Sale to Concord. Instead they have reasonably agreed to reserve all their rights to permit the sale to Concord to proceed through to the next step in the bankruptcy process.

The Sale is in the interest of all parties to this case, and of the public at large, including the thousands of employees in the communities served. The Debtor's successful sale efforts here address the ultimate, overriding concern – the health and welfare of the taxpaying citizens of the State of New Hampshire whose lives depend on the continuation of accessible, high quality patient care, especially in this time of pandemic.

WHEREFORE, the Debtor respectfully requests that the Court overrule the State Objection and grant the Sale Motion.

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