

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF LOUISIANA
Lafayette Division**

IN RE:

PROGRESSIVE ACUTE CARE, LLC, *et al.*

**CASE NO. 16-50740
Jointly Administered**

DEBTORS

CHAPTER 11

**MOTION FOR ORDER APPROVING IMMATERIAL
MODIFICATIONS TO JOINT PLAN OF LIQUIDATION**

NOW INTO COURT, come Progressive Acute Care, LLC (“PAC”); Progressive Acute Care Avoyelles, LLC; Progressive Acute Care Oakdale, LLC; and Progressive Acute Care Winn, LLC (collectively “the Debtors”) and the Official Unsecured Creditors’ Committee (“the Committee”), as co-proponents of the plan (“Proponents”), who hereby move this Court for entry of an order approving immaterial modifications to their *Joint Chapter 11 Plan of Orderly Liquidation* [Doc. 465]; and, in support of its request, show as follows:

Background

1.

On May 31, 2016, each of the Debtors filed a voluntary petition for relief under chapter 11 of title 11 of the U.S. Code (“Bankruptcy Code”). An Official Committee of Unsecured Creditors (the “Committee”) has been appointed in this case; and, the Debtors continue to operate their businesses as debtors-in-possession, pursuant to §§ 1107 and 1108 of the Bankruptcy Code.

2.

The Debtors and the Committee filed their *Joint Chapter 11 Plan of Orderly Liquidation* [Doc. 465] on March 14, 2017 (“the Plan”).

3.

The Proponents' proposed modifications reflect plan revisions to address informal comments raised by the Office of the U.S. Trustee.

Relief Requested

4.

By this Motion, the Proponents seek approval of this Court of the modifications to the Plan as set forth in Exhibit "A" hereto.

5.

The changes to the Plan, as proposed herein, are technical modifications or those affecting only professionals, who do not oppose the changes. The Proponents believe it is in the best interests of the Debtors' estates and holders of Claims against their estates that will be paid through implementation of the Plan to make such modifications in order to, among other things, clarify any ambiguities or inconsistencies currently contained in the Plan. The holders of Claims and interests against the estates will not receive worse treatment under the Plan as a result of the proposed modifications

Basis for Relief

6.

Section 1127(a) of the Bankruptcy Code provides in pertinent part:

The proponent of a plan may modify such plan at any time before confirmation, but may not modify such plan so that such plan as modified fails to meet the requirements of Section 1122 and 1123 of this title. After the proponent of a plan files a modification of such plan with the court, the plan as modified becomes the plan. 11 U.S.C. § 1127(a).

7.

The proposed Plan Modifications do not alter the classification of Claims of the Plan, and as such, do not implicate the classification rules of Section 1122 of the Bankruptcy Code.

8.

The proposed Plan Modifications comply with all provisions of Section 1123 of the Bankruptcy Code.

9.

Rule 3019 of the Federal Rules of Bankruptcy Procedure provides in pertinent part:

In a chapter 9 or chapter 11 case, after a plan has been accepted and before its confirmation, the proponent may file a modification of the plan. If the court finds after a hearing on notice to the trustee, any committee appointed under the Code, and any other entity designated by the court that the proposed modification does not adversely change the treatment of the claim of any creditor or the interest of any equity security holder who has not accepted in writing the modification, it shall be deemed accepted by all creditors and equity security holders who have previously accepted the plan. Fed. R. Bankr. 3019.

10.

The proposed Plan Modifications do not adversely change the treatment of the Claims of Class 1, 2, 3, 4 or 5 Creditors or Class 6 Interests, nor do they alter in any respect the treatment accorded to such Claims or Interests. As such, the Proponents maintain that the proposed Plan Modifications are non-material, and that no additional solicitation is required as a result of the requested modifications. See *In re Cellular Info. Sys., Inc.*, 171 B.R. 926, 929 n.6 (Bankr. S.D.N.Y. 1994) (nonmaterial modifications to plan do not require resolicitation); *In re American Solar King Corp.*, 90 B.R. 808 (Bankr. W.D. Tex. 1988) (if modification did not materially impact claimant's treatment, the change was not adverse to claimant and court can deem prior acceptance applied to amended plan); *In re Dow Corning Corp.*, (E.D. Mich. 1999) 237 B.R. 374 (if modification does not adversely change treatment of the claim of creditors, no further solicitation is required).

WHEREFORE, the Debtors and the Committee respectfully request that this Court find, as part of the hearing on Confirmation scheduled for June 27, 2017, that the proposed Plan Modifications, attached as Exhibit "A", are non-material within the meaning of Federal Rule of

Bankruptcy Procedure 3019; authorize the Plan Modifications to the Plan without requiring the Proponents to resolicit votes respecting the Plan, as modified; and find that the “Plan” shall mean the Plan, as modified by the attached Plan Modifications; and for any and all other relief this Court deems necessary and proper .

Respectfully submitted,

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Exhibit "A"

Proposed Modifications to the Joint Plan of Liquidation

Modification No. 1:

"1.1.52 Exculpated Parties means all Persons that are or were at any time on or after the Petition Date, and whether or not any such Person currently retains such capacity or position, (i) the Debtors; or (ii) the Committee or a member of the Committee; ~~or (iii) Professional Persons, to the extent such parties are or were acting in such capacity on behalf of any of the Persons identified in (i) or (ii) above on or after the Petition Date.~~"

Modification No. 2:

"3.4 Treatment of Claims Against and Equity Interests in the Debtors.

The classes of Claims against and Equity Interests in the Debtors shall be treated under the Plan as follows:

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(a) Class 3 – BFB Secured Claim.

The holder of the BFB Secured Claim shall be treated as follows:

(1) on the Effective Date, the BFB Secured Claim shall be Allowed in the amount of ~~\$10~~ 11,151,183.42, per Proof of Claim No. 44-2 (principal plus interest and attorneys' fees through the Confirmation Date);

(2) on the Effective Date, BFB shall fully and irrevocably assign its rights to distributions in connection with the BFB Secured Claim and the BFB Dauterive Claim *other* than the BFB Distribution Amount to the Liquidation Trust;

(3) BFB shall receive distributions pursuant to this Plan in the maximum amount of the BFB Distribution Amount according to the terms and conditions of this Plan and the Settlement Agreement, including the following:

- i. as of January 30, 2017, BFB has received payment of \$9,500,000 on account of the BFB Distribution Amount, and such payments shall not be subject to dispute, claim, contest or challenge;
- ii. to the extent the BFB Distribution Amount remains unpaid, upon the Liquidation Trustee's receipt of the FMP Payments, the first \$100,000 of such funds received by the Liquidation Trustee will be

distributed to BFB on account of the BFB Distribution Amount (to the extent not otherwise paid prior to the Effective Date);

- iii. to the extent the total amount of Allowed Administrative Expense Claims, Allowed Priority Tax Claims, Allowed Priority Non-Tax Claims, and Allowed Non-Lender Secured Claims is less than \$1 million, one half of the remaining balance in the Priority Reserve will be distributed to BFB on account of the BFB Distribution Amount and the remainder to the Liquidation Trust;
- iv. one half of each distribution made from the Liquidation Trust shall be paid on account of the BFB Distribution Amount until the BFB Distribution Amount has been paid in full
- v. any net recovery based on the Guarantees will be applied on account of the BFB Distribution Amount;
- vi. one half of any net recovery based on the BFB Dauterive Claim will applied on account of the BFB Distribution Amount and the remainder will be allocated to the Liquidation Trust; and
- vii. any payments received by BFB under subsections (i) through (vi) above which in the aggregate exceed the BFB Distribution Amount will be promptly turned over by BFB to the Liquidation Trust.

(4) During the period between the Confirmation Date and the Effective Date, the BFB Adversary Proceeding will be stayed and held in abeyance. On the Effective Date, the BFB Adversary Proceeding will be dismissed with prejudice;

(5) On the Effective Date, the Committee and the Debtors' Estates shall be deemed to have fully and irrevocably waived and released any right to seek recovery of payments made to BFB pursuant to the consent orders regarding conditional disbursements of funds, entered on December 7, 2016 [Docket No. 408] and January 5, 2017 [Docket No. 429]."

Modification No. 3:

"7.5.1 Responsibilities of Liquidation Trustee.

The responsibilities of the Liquidation Trustee shall include, but shall not be limited to: (a) prosecuting through judgment and/or settling the Liquidation Trust Assets and any defense asserted by the Liquidation Trust in connection with any counterclaim or crossclaim asserted against the Liquidation Trust; (b) calculating and making distributions required under the Plan to be made from the Liquidation Trust Assets; (c) filing all required tax returns, and paying obligations on behalf of the Liquidation Trust from the Liquidation Trust Assets; (d) otherwise administering the Liquidation Trust; (e) filing quarterly reports with the Bankruptcy Court with respect to the expenditures, receipts, and distributions of the Liquidation Trust **and the substantively consolidated Chapter 11 Cases**; and (f) such other responsibilities as may be vested

in the Liquidation Trustee pursuant to the Liquidation Trust Agreement, the Confirmation Order, or as may be necessary and proper to carry out the provisions of the Plan relating to the Liquidation Trust.

The Liquidation Trustee shall maintain good and sufficient books and records of account relating to the Liquidation Trust Assets, the management thereof, all transactions undertaken by the Liquidation Trustee, all expenses incurred by or on behalf of the Liquidation Trustee, and all distributions to Liquidation Trust Beneficiaries contemplated or effectuated under the Plan. In addition, the Liquidation Trustee shall maintain the Debtors' organizational or corporate record books, minute books and tax records not sold to the Buyer under the Asset Purchase Agreement (the "Retained Records") until the dissolution of the Liquidation Trust, at which time the Retained Records may be disposed of in the Liquidation Trustee's discretion."

Modification No. 4:

"7.7 Indemnification.

From and after the Effective Date, the Liquidation Trustee, the Debtor Representative, ~~and the members of the Oversight Committee and all Persons retained by the Liquidation Trust~~ (collectively, the "Liquidation Trust Indemnified Parties" and each a "Liquidation Trust Indemnified Party") shall be, and hereby are, indemnified by the Liquidation Trust, to the fullest extent permitted by applicable law, from and against any and all claims, debts, dues, accounts, actions, suits, causes of action, bonds, covenants, judgments, damages, attorneys' fees, defense costs, and other assertions of liability arising out of any such Liquidation Trust Indemnified Party's good faith exercise of what such Liquidation Trust Indemnified Party reasonably understands to be its powers or the discharge of what such Liquidation Trust Indemnified Party reasonably understands to be its duties conferred by the Liquidation Trust Agreement, the Plan, or any order of the Bankruptcy Court entered pursuant to, or in furtherance of, the Plan, applicable law, or otherwise (except only for actions or omissions to act to the extent determined by a Final Order to be due to its own fraud, self-dealing, intentional misrepresentation, gross negligence or willful misconduct), including but not limited to, acts or omissions concerning pursuing or not pursuing the Liquidation Trust Assets, on and after the Effective Date. The foregoing indemnification shall also extend to matters directly or indirectly in connection with, arising out of, based on, or in any way related to (a) the Plan; (b) the Liquidation Trust Agreement; (c) the services to be rendered pursuant to the Plan or Liquidation Trust Agreement; (d) any document or information, whether verbal or written, referred to herein or supplied to the Liquidation Trustee or Debtor Representative; or (e) proceedings by or on behalf of any creditor or Debtor. The Liquidation Trust shall, on demand, advance or pay promptly out of the Liquidation Trust Assets, on behalf of each Liquidation Trust Indemnified Party, reasonable and documented attorneys' fees and other expenses and disbursements to which such Liquidation Trust Indemnified Party would be entitled pursuant to the foregoing indemnification obligation; provided, however, that any Liquidation Trust Indemnified Party receiving any such advance shall execute a written undertaking to repay such advance if a court of competent jurisdiction ultimately determines that such Liquidation Trust Indemnified Party is not entitled to indemnification hereunder due to the fraud, self-dealing, intentional misrepresentation, gross negligence or willful misconduct of such Liquidation Trust Indemnified Party. In any matter covered by the first two sentences of this subsection, any Person entitled to indemnification shall have the right to employ such Person's own separate counsel

reasonably acceptable to the Liquidation Trustee, at the Liquidation Trust's expense, subject to the foregoing terms and conditions.”

Modification No. 5:

“8.4 Limitation on Liability of Liquidation Trustee and Debtor Representative.

Neither the Liquidation Trustee or the Debtor Representative will be liable for any act he may do or omit to do as Liquidation Trustee or Debtor Representative under the Plan and the Liquidation Trust Agreement, as applicable, while acting in good faith and in the exercise of his reasonable business judgment; nor will the Liquidation Trustee or the Debtor Representative be liable in any event, except for willful misconduct, gross negligence, or intentional fraud. ~~The foregoing limitation on liability will also apply to any Person (including any professional) employed by the Liquidation Trustee or the Debtor Representative and acting on behalf of the Liquidation Trustee or Debtor Representative in the fulfillment of their respective duties hereunder or under the Liquidation Trust Agreement.”~~