SO ORDERED.

SIGNED this 7th day of August, 2018.

BENJAMIN A. KAHN
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

IN RE:	)	
	)	**Case No. 17-10775**
MOREHEAD MEMORIAL HOSPITAL,	)	
	)	**Chapter 11**
Debtor.	)	
	)	

ORDER APPROVING MOTION (I) TO APPROVE COMPROMISE AND SETTLEMENT OF CLAIM OF BERKADIA COMMERCIAL MORTGAGE LLC AND (II) FOR AUTHORITY TO MODIFY PLAN CONSISTENT WITH TERMS OF COMPROMISE AND SETTLEMENT WITHOUT FURTHER DISCLOSURE OR RESOLICITATION

Upon the *Motion (I) to Approve Compromise and Settlement of Claim of Berkadia Commercial Mortgage LLC and (II) for Authority to Modify Plan Consistent with Terms of Compromise and Settlement Without Further Disclosure or Resolicitation* (the "Motion") [Dkt. No. 883] filed by Morehead Memorial Hospital, the above-captioned debtor and debtor-in-possession (the "Debtor"), wherein the Debtor sought, (i) to approve the proposed settlement of the claim of Berkadia Commercial Mortgage LLC (the "Berkadia Claim") by and between the Debtor and the United States Department of Housing and Urban Development ("HUD") and (ii)

authorize the Debtor and the Official Committee of Unsecured Creditors (the "Committee") to modify the *First Amended Joint Chapter 11 Plan of Orderly Liquidation* (the "Amended Plan") [Dkt. No. 771] consistent with the terms of the settlement without further disclosure or resolicitation; due and sufficient notice of the Motion having been given; and the Court having jurisdiction to consider the Motion and the relief requested therein; and the Court, having reviewed the Motion and considered the arguments made by counsel at the hearing held on July 26, 2018 (the "Hearing"); and, after due deliberation, it appearing that the relief requested by the Motion is in the best interest of the Debtor's estate, the Debtor's creditors, and other parties in interest, the Court hereby finds and concludes as follows:

FINDINGS OF FACT

I. *The Bankruptcy Filing, the Sale of Hospital, and the Chapter 11 Plan*

1. On July 10, 2017 (the "Petition Date"), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code.

2. The Debtor is a North Carolina non-profit corporation that, among other things, owned and operated a 108-bed general acute care community hospital formerly known as "Morehead Memorial Hospital" (the "Hospital") on a 22-acre campus located at 117 East Kings Highway, Eden, North Carolina.

3. On July 24, 2017, the Office of the United States Bankruptcy Administrator for the Middle District of North Carolina (the "Bankruptcy Administrator") appointed the Committee in this Chapter 11 case [Dkt. No. 74].

4. On November 30, 2017, the Court entered the *Order (a) Authorizing and Approving the Sale of Assets Free and Clear of All Liens, Claims, Encumbrances, and Other Interests, (b) Approving the Asset Purchase Agreement, and (c) Granting Related Relief* (the "Sale Order") [Dkt.

No. 445], which approved the sale (the "Sale") of substantially all the Debtor's assets to the University of North Carolina Health Care System.

5. The Sale closed on January 1, 2018.

6. On March 21, 2018, the Debtor and the Committee filed a *Joint Chapter 11 Plan of Orderly Liquidation* (the "Plan") [Dkt. No. 698] and accompanying *Disclosure Statement for Joint Chapter 11 Plan of Orderly Liquidation Pursuant to Section 1125 of the Bankruptcy Code* (the "Disclosure Statement") [Dkt. No. 697].

7. On April 25, 2018, the Court held a hearing on the Disclosure Statement.

8. On May 2, 2018, the Debtor filed the *Amended Disclosure Statement for First Amended Joint Chapter 11 Plan of Orderly Liquidation Pursuant to Section 1125 of the Bankruptcy Code* (the "Amended Disclosure Statement") [Dkt. No. 770] and the Amended Plan.

9. Subsequently on May 2, 2018, the Court entered an *Order (I) Approving Disclosure Statement; (II) Establishing Forms and Procedures for Solicitation and Tabulation of Votes to Accept or Reject the Plan; (III) Establishing Deadline and Procedures for Filing Objections to the Confirmation of the Plan; and (IV) Granting Related Relief* (the "Order Approving Disclosure Statement") [Dkt. No. 772], which approved the Amended Disclosure Statement and set the time, date, and place of the hearing to consider confirmation of the Amended Plan (the "Confirmation Hearing").

10. The Confirmation Hearing was rescheduled for July 26, 2018 at 9:30 a.m. [Dkt. Nos. 839, 844].

II. *The Berkadia Claim*

11. Berkadia filed the Berkadia Claim on November 14, 2017, asserting a secured claim in the amount of $26,894,084.84 and an unsecured claim in the amount of $7,321,548.06. Berkadia

asserted a perfected first priority security interest in certain of the Debtor's real and personal property, including the Hospital, the skilled nursing facility, the Wright Diagnostic Center, and the Smith McMichael Cancer Center, as well as "the Debtor's accounts receivable, general intangibles, and health care insurance receivables."

12. As set forth in the *Seventh Interim Order (i) Authorizing Use of Cash Collateral Pursuant to Sections 361 and 363 of the Bankruptcy Code and Bankruptcy Rule 4001, (ii) Granting Adequate Protection, (iii) Scheduling Further Hearing, and (iv) Granting Related Relief* (the "Seventh Cash Collateral Order") [Dkt. No. 480], Berkadia's asserted prepetition collateral is subject and subordinate to, among other things, certain budgeted post-petition expenses:

> [T]he Berkadia Pre-Petition Collateral, the Berkadia Replacement Liens, and the Berkadia Super-Priority Claim shall be subject and subordinate to (collectively, the "Carve-Out"): (1) the post-petition expenses of the Debtor incurred in the ordinary course of the Debtor's operations to the extent such amounts were incorporated into the "Cash Disbursements" category contained in the budgets to the Cash Collateral Orders but not paid during such budget periods, (2) the reasonable and necessary post-petition expenses of the Debtor incurred in the ordinary course of the Debtor's operations that accrued during such budget periods, but were not payable during such budget periods (collectively, the expenses referred to in subclauses (1) and (2) of this paragraph, the "Trailing Expenses") . . . .

(Seventh Cash Collateral Order, Paragraph 22.)

13. The Seventh Interim Cash Collateral Order also preserved and waived certain surcharges of Berkadia's asserted collateral pursuant to Sections 105 and 506(c) of the Bankruptcy Code.

14. The Amended Plan provides for treatment of the Berkadia Claim. Any allowed deficiency claim would be treated as a Class 5 General Unsecured Claim (as defined in the Amended Plan).

15. Berkadia voted its Class 5 General Unsecured Claim in the authorized voting amount of $7,321,548.08 to reject the Amended Plan. (Voting Declaration, Exh. A.) However,

the Debtor obtained sufficient votes from Class 5 to meet the threshold for acceptance of the Amended Plan under Section 1126(c) of the Bankruptcy Code

16. Effective June 22, 2018, Berkadia assigned the Berkadia Claim to HUD [Dkt. No. 877].

III. *Terms of Compromise and Settlement and DOJ Authorization.*

17. The Debtor has agreed to resolve the Berkadia Claim on the terms set forth in the Motion (the "Settlement Terms") and the Modified Plan (as defined below), as follows:

a. The Berkadia Claim will be allowed as a secured claim in the amount of $17,320,000 (the "Allowed Berkadia Claim") as set forth in the modified Amended Plan attached to this Motion as Exhibit A (as same may be further modified or amended, the "Modified Plan"). Within fourteen (14) days after the entry of an order confirming the Modified Plan (the "Confirmation Order"), the Debtor will make an initial distribution (the "Initial Distribution") to HUD on account of the Allowed Berkadia Claim in the amount equal to $14,073,032 less the amount to be mutually agreed by the Debtor, the Committee, and HUD as a reasonable estimate of the payments to the State of North Carolina necessary for the Debtor to be eligible for GAP distributions (the "GAP Reserve"). To the extent that the Debtor, the Committee, and HUD cannot mutually agree to a GAP Reserve amount before the proposed date of the Initial Distribution, the amount of the GAP Reserve will be determined by the United States Bankruptcy Court for the Middle District of North Carolina, in which case the Initial Distribution will be made after such determination.

b. The Liquidating Trustee (as defined in the Modified Plan, the "Liquidating Trustee") will use commercially reasonable efforts to promptly collect certain contingent collateral (the "Contingent Collateral")[1] for the benefit of HUD for a period of ninety (90) days after the Effective Date (as defined in the Modified Plan, the "Effective Date") of the Modified Plan (the "Collection Period").

c. During the Collection Period, to the extent any payment is required to be made on behalf of the Debtor to the State of North Carolina for the Debtor to be eligible to receive any GAP distributions, the Liquidating Trustee is authorized to use the GAP Reserve and the collected proceeds of the Contingent Collateral to make any such required payments.

d. Upon the expiration of the Collection Period, the Liquidating Trustee will distribute to HUD on account of the Allowed Berkadia Claim all proceeds of the collected

[1] For the purposes of this compromise and settlement, "Contingent Collateral" consists of: (i) projected collectible remaining net accounts receivable of $310,698 as of April 30, 2018, (ii) projected return of security deposits of $572,635, and (iii) projected return of pre-paid expenses of $234,908, and (iv) any potential GAP distributions and any potential sales tax refunds payable to the Debtor.

Contingent Collateral net of (i) the proceeds of the Contingent Collateral used to make payments to the State of North Carolina on account of GAP which have not been returned as part of the GAP distributions, (ii) the creation of an appropriate reserve, if necessary, to account for the situation in which collected proceeds of the Contingent Collateral and the GAP Reserve are insufficient to make any such required payments to the State of North Carolina for the Debtor to be eligible to receive any GAP distributions, and (iii) reasonable attorney's fees and costs of collection in an amount not to exceed $50,000 without prior written approval of HUD. The Liquidating Trustee will also provide to HUD upon the expiration of the Collection Period an accounting detailing the sources of collections and collection costs.

e. The United States or its designee (which may be HUD) will be granted standing (in the Confirmation Order or a separate consent order) to pursue collection of any and all Contingent Collateral remaining after the expiration of the Collection Period at its sole cost and expense. The Debtor, its estate, and the Liquidating Trust make no representation or warranty of any kind or nature as to the collectability of any of the Contingent Collateral.

f. The distributions identified above will be deemed to fully and finally satisfy the Allowed Berkadia Claim, and neither Berkadia nor HUD will participate in any other or further distribution to creditors of the Debtor of any kind or nature.

g. Except for the obligations set forth above, the parties will exchange, and the Modified Plan will set forth, general mutual releases, subject to certain limited carveouts set forth in Modified Plan, of any and all claims against each other, including HUD/Berkadia's waiver and release of any general unsecured deficiency claim that they may have against the Debtor or its estate.

h. Berkadia and HUD agree to support confirmation of the Modified Plan.

CONCLUSIONS OF LAW

18. Bankruptcy Rule 9019(a) provides that "[o]n motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement." Fed. R. Bankr. P. 9019(a). Before approving a settlement under Bankruptcy Rule 9019, a court must determine that the proposed settlement is in the best interests of the debtor's estate. St. Paul Fire & Marine Ins. Co. v. Vaughn, 779 F.2d 1003, 1010 (4th Cir. 1985) (upholding bankruptcy court's approval of settlement because it was "in the best interests of the estate as a whole"); In re Babb, Case No. 06-03003, 2009 Bankr. LEXIS 131, at *7 (Bankr. E.D.N.C. Jan. 26, 2009) ("[T]he court must consider the probability of success in litigation and assess the wisdom of the proposed compromise in

determining whether the compromise is fair and equitable and in the best interests of the estate.").

19. The United States Supreme Court has stated that, in determining the fairness of a compromise, a judge should:

> [F]orm an educated estimate of the complexity, expense and likely duration of such litigation, the possible difficulties of collecting on any judgment which might be obtained, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise. Basic to this process in every instance, of course, is the need to compare the terms of the compromise with the likely rewards of the litigation.

Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424-25 (1968). Courts within the Fourth Circuit applying the TMT Trailer case in the context of evaluating a settlement pursuant to Bankruptcy Rule 9019(a) have identified several factors to be considered, including the probability of success in litigation, the complexity of the litigation involved and the expense, inconvenience and delay attending it, and the interests of the creditors. Crawford v. CIT Group/Commercial Servs., Inc. et al. (In re Southern Hosiery Mill, Inc.), Case No. 07-50997, Adv. Pro. No. 09-5042, 2012 Bankr. LEXIS 802, at *4 (Bankr. W.D.N.C. Jan. 26, 2012); Maloy et al. v. Sigmon et al. (In re Maloy), Case No. 07-30813, 2009 Bankr. LEXIS 4010, at *10-11 (Bankr. W.D.N.C. Dec. 7, 2009); Babb, 2009 Bankr. LEXIS 131, at *7.

20. As courts have noted, it is not for the bankruptcy court "to decide the numerous questions of law and fact [presented] but rather to canvass the issues and see whether the settlement fall[s] below the lowest point in the range of reasonableness." Maloy v. Sigmon, 2009 Bankr. LEXIS 4010, at *11 (citations omitted); see also Crawford v. CIT Group, 2012 Bankr. LEXIS 802, at *5; Flinn et al. v. FMC Corp. and Local 9 Textile Workers Union of Am., AFL-CIO, 528 F.2d 1169, 1172-73 (4th Cir. 1975).

21. Section 1127(a) of the Bankruptcy Code provides as follows:

> 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 sections 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.

22. Although Section 1127(c) provides that the "proponent of a modification shall comply with Section 1125 of this title with respect to the plan as modified[,]" further disclosure and resolicitation of a modified plan is not always necessary. Section 1127(d), for example, provides for deemed acceptance of the modified plan by holders of claims that have previously accepted the unmodified plan where such holders do not change their votes, obviating the need for resolicitation:

> Any holder of a claim . . . that has accepted or rejected a plan is deemed to have accepted or rejected, as the case may be, such plan as modified, unless, within the time fixed by the court, such holder changes such holder's previous acceptance or rejection.

Section 1127(d) is supplemented by Bankruptcy Rule 3019(a), which obviates the need for the opportunity to change votes where the modified plan does not adversely change claimholders' treatment:

> In . . . a 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 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 or any creditor . . . who has not accepted in writing the modification, it shall be deemed accepted by all creditors . . . who have previously accepted the plan.

23. Courts have interpreted Sections 1127(c) and (d) and Bankruptcy Rule 3019(a) as requiring further disclosure and resolicitation of a modified plan that meets the requirements of Sections 1122 and 1123 of the Bankruptcy Code only where the modification "materially and adversely" affects parties who previously accepted the plan. See, e.g., In re Willow Creek Apt.,

1996 Bankr. LEXIS 1888, *7-9 (Bankr. M.D.N.C. Apr. 17, 1996) ("Additional disclosure is required only 'when and to the extent that the debtor intends to solicit votes from previously dissenting creditors or when the modification materially and adversely impacts parties who previously voted for the plan.'") (quoting In re American Solar King Corp., 90 B.R. 808, 823 (Bankr. W.D. Tex. 1988)); In re Aleris Int'l, Inc., 2010 Bankr. LEXIS 2997, *97-98 (Bankr. D. Del. May 3, 2010) ("Further disclosure and resolicitation of votes on a modified plan is only required, however, when the modification materially *and* adversely affects parties who previously voted for the plan.") (collecting cases). A "material and adverse" change is a change that would likely cause a creditor to reconsider its acceptance if it knew of the change. In re Enron Corp., 2004 Bankr. LEXIS 2549, *258-260 (Bankr. S.D.N.Y. July 15, 2004) (citing Solar King, 90 B.R. at 826).

24. Here, the Modified Plan satisfies Sections 1122 and 1123 of the Bankruptcy Code for the reasons set forth in the Sanz Declaration and the Davis Declaration, and based on the Voting Declaration, the Debtor does not need to solicit an acceptance from any creditor who previously voted to reject the Amended Plan. Because the Modified Plan does not materially and adversely affect creditors who previously voted to accept the Amended Plan, further disclosure and resolicitation of the Modified Plan is not necessary.

25. The Modified Plan does not materially and adversely affect creditors in Classes 5 and 6 who previously voted to accept the Amended Plan because the Modified Plan does not reduce their disclosed potential recovery or result in any outcome that is inconsistent with the terms of the Amended Plan. Indeed, both the minimum ($14,073,032 less any GAP Reserve) and maximum ($17,320,000) recoveries to HUD on account of the Allowed Berkadia Claim fall within the range of recoveries ($13,256,188 to $17,649,880) previously disclosed in the Amended Disclosure

Statement (Amended Disclosure Statement, Exhibit C). Moreover, the Amended Plan would have granted the Liquidating Trustee the authority to resolve the Berkadia Claim on these same terms upon the Effective Date (Plan, Section VII(D) and (M)(2)).

26. Accepting creditors in Classes 5 and 6 will not be adversely affected by the Modified Plan and would have had no reason reconsider their acceptances if they had known of the changes at the time they cast their ballots. Accordingly, further disclosure and resolicitation of the Modified Plan before confirmation is not necessary and will serve only to delay the resolution of the case and waste estate resources.

27. The Court concludes the Settlement Terms are fair, equitable, and in the best interests of the Debtor's estate, and fall well above the lowest point in the range of reasonableness. Among other things, the proposed settlement will consensually resolve the Berkadia Claim; avoid objections to the Amended Plan and disputes at the Confirmation Hearing from HUD and/or Berkadia; and avoid the expense, delay, and uncertainty associated with litigation of the nuanced Sale purchase price allocation, collateral valuation, and Section 506(c) surcharge issues relating to the Berkadia Claim. It will also result in the waiver of any deficiency claim by Berkadia and/or HUD.

NOW, based upon the Motion of the Debtor and the record before the Court with respect to the Motion, and good cause shown,

IT IS ORDERED, ADJUDTED, AND DECREED as follows:

A. The Motion is **GRANTED** and the findings and conclusions of law above are incorporated herein by reference;

B. The Debtor's proposed Settlement Terms are hereby **APPROVED**;

C. The Debtor, the Committee, Berkadia, and HUD are hereby authorized to take all actions necessary to effectuate the Settlement Terms;

D. The Debtor is hereby authorized to take all action necessary to modify the Amended Plan as set forth in the Modified Plan;

E. To the extent the Settlement Terms outlined in the Motion or this Order conflict with the treatment provided the Berkadia Claim by the Modified Plan or the Confirmation Order, the terms in the Modified Plan or Confirmation Order control the treatment of the Berkadia Claim.

F. The failure to include any specific provisions of the Settlement Terms in this Order shall not diminish or impair the effectiveness of such provisions, and the parties are authorized to perform under this Order with respect to the Settlement Terms in their entirety; and

G. The Court shall retain jurisdiction to enforce the terms of the Settlement Terms.

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