

Hearing Date: January 23, 2018
Hearing Time: 9:30 a.m.
Hearing Place: Utica, NY
Objection Deadline: January 16, 2018

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re:

FOLTS HOME, *et al.*,¹

Debtors.

Case No. 17-60139 (Main Case)
Case No. 17-60140
Chapter 11 Case

Jointly Administered

**MOTION BY DEBTORS FOR THIRD EXTENSION OF THEIR
EXCLUSIVE PERIODS AND ACCEPTANCE PERIODS UNDER 11 U.S.C. § 1121(d)**

Debtors Folts Home (“Folts Home”) and Folts Adult Home, Inc. (“FAH”) (collectively the “Debtors”), by and through their attorneys, Bond, Schoeneck & King, PLLC, respectfully represent to the Court as follows:

1. On February 16, 2017 (the “Petition Date”), the Debtors filed separate, voluntary petitions for relief under chapter 11 of title 11 of the United States Code, U.S.C. §§ 101, et seq., as amended (the “Bankruptcy Code”) with the United States Bankruptcy Court for the Northern District of New York (the “Court”). The chapter 11 cases are being jointly administered pursuant to an order of joint administration entered by the Court on February 16, 2017. The Debtors, through duly-appointed receivers HomeLife at Folts, LLC and HomeLife at Folts-Claxton, LLC (collectively, “HomeLife”), continue to operate their skilled nursing facility and adult residential facility, respectively.

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, are: Folts Home (2183) and Folts Adult Home, Inc. (7237).

2. No request for a trustee or examiner has been made nor has an official committee been appointed or designated in these chapter 11 cases.

Relief Requested

3. Section 1121(b) of the Bankruptcy Code provides for an initial period of 120 days after the date of the order for relief during which the debtor has the exclusive right to file a chapter 11 plan. Section 1121(c) of the Bankruptcy Code provides that if the debtor files a chapter 11 plan within the 120-day exclusivity period, it has a period of 180 days after the date of the order for relief to solicit and obtain acceptances, during which time competing plans may not be filed. In these cases, the Debtors' initial exclusive periods to file chapter 11 plans expired on June 16, 2017, and the attendant solicitation periods expired on August 15, 2017.

4. On June 6, 2017, the Court entered an Order extending the Debtors' exclusive period and acceptance period pursuant to 11 U.S.C. § 1121(d) (the "First Extension Order"). The First Extension Order extended the Debtors' exclusive period within which to file their plan or plans and obtain acceptance thereof until October 14, 2017 and December 13, 2017, respectively.

5. On September 29, 2017, the Court entered an Order further extending the Debtors' exclusive period and acceptance period pursuant to 11 U.S.C. § 1121(d) (the "Second Extension Order"). The Second Extension Order extended the Debtors' exclusive period within which to file their plan or plans and obtain acceptance thereof until February 11, 2018 and April 12, 2018, respectively.

6. By this motion (the "Motion"), the Debtors seek an order pursuant to section 1121(d) of the Bankruptcy Code further extending the Debtors' exclusive periods within which to file and solicit acceptances of their chapter 11 plans (the "Debtors' Exclusive Periods") from

February 11, 2018 and April 12, 2018, respectively, to June 11, 2018 and August 10, 2018, respectively. The Debtors seek these extensions to avoid the necessity of having to formulate a chapter 11 plan or plans prematurely and to ensure that their chapter 11 plans best address the interests of the Debtors, their creditors and estates.

The Debtors' Progress Since the Petition Date

7. Folts Home is a New York not-for-profit corporation and the owner of a 163-bed long-term residential health care and rehabilitation facility located at 100-122 North Washington Street, Herkimer, New York 13350 (the "Nursing Home Facility"). In addition to long-term skilled nursing and residential care, Folts Home provides memory care to residents with dementia, palliative care and respite care and operates an adult day care program. Folts Home also offers rehabilitation services, such as physical, occupational and speech therapy, on both in-patient and out-patient bases.

8. FAH, also known as Folts-Claxton, is a New York not-for-profit corporation and the owner of an 80-bed adult residential center that was constructed in 1998 and is located at 104 North Washington Street, Herkimer, New York 13350 (the "Adult Home Facility", and together with the Nursing Home Facility, the "Facilities"). FAH residents reside in separate apartments and are provided services such as daily meals, laundry, housekeeping and medication assistance.

9. As a result of operating losses in 2011, 2012 and 2013 and the accumulation of significant debt during that period, the Debtors requested that the New York State Department of Health (the "DOH") appoint receivers to operate the Facilities. As a result, receivers have operated the Facilities since October 1, 2013. HomeLife has operated the Facilities as receiver since February 14, 2015 pursuant to Receivership Agreements dated November 1, 2014 signed by the Debtors, HomeLife and the DOH.

10. The primary purpose of the Debtors' chapter 11 cases is to implement the sale of the Facilities as going concerns pursuant to section 363 of the Bankruptcy Code, and to address the numerous significant claims that accrued prior to October 1, 2013. The Debtors sought this relief in light of their financial inability to continue operating the Facilities, the fact that they have encountered operating losses since 2011, and their desire to sell the Facilities to a qualified purchaser who will protect the health, safety and welfare of the Folts Home and FAH residents and preserve the Debtors' long-standing mission to provide quality residential healthcare to members of the Herkimer community.

11. On June 6, 2017, the Debtors conducted an auction sale of substantially all of their assets, including the Facilities, under section 363 of the Bankruptcy Code. The Debtors selected Cedarcare Holdings, LLC ("Cedarcare") as the successful bidder for the assets. On July 21, 2017, this Court entered an Order approving the asset sale (the "Sale Order").

12. Following the entry of the Sale Order, Cedarcare identified a proposed operator for the Facilities and the proposed operator submitted its application to the DOH to be appointed as the substitute receiver in these cases. The proposed operator, however, withdrew its receivership application on December 14, 2017. Cedarcare is in the process of identifying a new proposed operator, and that operator will be required to submit an application to the DOH seeking to be appointed as the substitute receiver of the Facilities. The Debtors anticipate that this process will take approximately three months during early 2018. In accordance with the terms of Cedarcare's Asset Purchase Agreement approved by the Court, the sale closing with Cedarcare will occur no later than 60 days (plus an additional 30 days, if required) following the appointment of Cedarcare's operator as the substitute receiver (the "Closing Date").

13. In light of Cedarcare's renewed search for an operator, on December 22, 2017, the Debtors, HomeLife and the DOH entered into a Fourth Extension of Receivership Agreement for each Debtor, which extend the terms of HomeLife's receiverships through the earlier of (i) July 16, 2018 or (ii) thirty days following the issuance of a written notice of termination of the Receivership Agreements by either the Debtors or the DOH.

14. The Debtors will continue to work with the U.S. Department of Housing and Urban Development ("HUD"), the DOH, the Office of the United States Trustee (the "UST"), Cedarcare and HomeLife on all essential issues relating to the asset sale, identification of a new proposed operator and the development of a joint disclosure statement and liquidating chapter 11 plans in these cases.

Applicable Authority

15. Pursuant to section 1121(d) of the Bankruptcy Code, this Court may extend a debtor's exclusive periods upon a demonstration of cause:

On request of a party in interest made within the respective periods specified in subsections (b) and (c) of this section and after notice and a hearing, the court may for cause reduce or increase the 120-day period or the 180-day period referred to in this section.

11 U.S.C. § 1121(d).

16. The principal goal of chapter 11 is the successful reorganization or liquidation of the debtor's business in order to maximize the benefit to creditors. *See NLRB v. Bildisco*, 465 U.S. 513, 527 (1984); *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 203 (1983). The Congressional intent woven throughout chapter 11 is that the principal means of a successful outcome should be a considered and consensual plan. *In re Perkins*, 71 B.R. 294, 297 (W.D. Tenn. 1987). To promote the formulation of a considered and consensual plan, Congress gave the debtor the exclusive right to propose a plan of reorganization for an initial 120-day period.

See In re Ames Dep't Stores, Inc., 1991 WL 259036, at *3 (S.D.N.Y. Nov. 25, 1991) (“The purpose of the Bankruptcy Code’s exclusivity period is to allow the debtor the flexibility to negotiate with its creditors.”). Pursuant to section 1121(d) of the Bankruptcy Code, this initial period of exclusivity can be extended for “cause”.

17. Whether “cause” exists to extend a debtor’s exclusive periods to file and solicit acceptances of a chapter 11 plan is a decision committed to the sound discretion of the bankruptcy court based upon the facts and circumstances of each particular case. *See In re Texaco, Inc.*, 76 B.R. 322, 326 (Bankr. S.D.N.Y. 1987). Congress intended to give the bankruptcy court maximum flexibility to make such determination. *In re Amko Plastics, Inc.*, 197 B.R. 74, 77 (Bankr. S.D. Ohio 1996).

18. In determining whether cause exists to extend a debtor’s exclusive periods, courts have considered numerous factors, including:

- (i) the size and complexity of the case;
- (ii) the need for more time to allow the debtor to negotiate a consensual chapter 11 plan and prepare adequate information;
- (iii) whether the debtor has made good faith progress toward a chapter 11 plan;
- (iv) whether the debtor has been paying its debts when due;
- (v) whether the debtor has demonstrated reasonable prospects for filing a viable chapter 11 plan;
- (vi) whether the debtor has made progress in negotiating with its creditors;
- (vii) the length of time the case has been pending;
- (viii) whether the debtor is seeking to extend exclusivity to pressure creditors to accede to the debtor’s demands; and
- (ix) whether unresolved contingencies that may affect the viability of a chapter 11 plan exist.

In re Tripodi, No. 04-30793, 2005 LEXIS 1981, at *4 (Bankr. D. Conn. 2005).

19. While not all factors are relevant to every case, the courts have used a subset of the above factors to determine whether cause exists, *In re Hoffinger Indus.*, 292 B.R. 639, 644 (B.A.P. 8th Cir. 2003), and further consider the totality of circumstances of a given case. *In re Dow Corning Corp.*, 208 B.R. 661, 664 (Bankr. E.D. Mich. 1997).

20. An analysis of the various factors noted above demonstrates that sufficient cause exists for extending the Debtors' Exclusive Periods to June 11, 2018 and August 10, 2018, respectively.

21. First, the Debtors' cases are complex, and involve, on a consolidated basis, assets valued on the Petition Date at approximately \$20 million and liabilities totaling approximately \$25 million.

22. In addition, Cedarcare is in the process of identifying a new proposed operator and once that operator is appointed as the substitute receiver of the Facilities, the Debtors will proceed towards the Closing Date.

23. Debtors' counsel is also in the process of preparing and revising a joint disclosure statement and chapter 11 plans for the Debtors which will involve input from counsel for HUD, the DOH and the UST.

24. Further, the Debtors' demonstrated progress in resolving issues that have arisen since the Petition Date also justifies the requested extension of the Debtors' Exclusive Periods. The Debtors have worked with HUD, the DOH, their other prepetition secured creditors, HomeLife, the UST and investment banker CohnReznick Capital Markets Securities, LLC on all issues in order to ensure the proper administration of their cases.

25. Finally, receiver HomeLife, on behalf of the Debtors, has been paying the Debtors' post-petition debts when due. The fact that a debtor has sufficient liquidity to pay its

post-petition debts as they come due supports the granting of an extension of the debtor's exclusive periods, because it suggests that such an extension will not jeopardize the rights of post-petition creditors. The Debtors, through HomeLife, will continue to pay their undisputed post-petition debts as they come due and they anticipate having sufficient liquidity due to the relevant cash collateral orders to do so.

26. The Debtors believe, based on the progress to date and the constructive discussions with their key constituencies, that their prospects for ultimately proposing and filing a viable joint chapter 11 plan are solid, thus warranting an extension of the Debtors' Exclusive Periods.

27. This is the third request for an extension of the Debtors' Exclusive Periods, and it is made eleven months after the Petition Date. The Debtors are actively attempting to close the asset sale, preparing chapter 11 plans and preparing a disclosure statement containing adequate information. Accordingly, extensions of the Debtors' Exclusive Periods are warranted. Rather than requesting the extensions of the Debtors' Exclusive Periods as a negotiating tactic or as a means of maintaining leverage over any group of creditors whose interests may be harmed by such an extension, the Debtors are requesting the extensions simply to give themselves sufficient time to develop chapter 11 plans that maximize creditor recoveries. Allowing the Debtors' Exclusive Periods to terminate at this premature point would defeat one of the primary purposes of section 1121 of the Bankruptcy Code, which is the development of consensual chapter 11 plans. *See Mid-State Raceway, Inc.*, 323 B.R. 63, 68 (Bankr. N.D.N.Y. 2005).

28. Finally, the proposed sale transaction supports extensions of the Debtors' Exclusive Periods. *See In re McLean Indus, Inc.*, 87 B.R. 830, 834 (Bankr. S.D.N.Y. 1987). Cedarcare is currently working to satisfy its obligations under its Asset Purchase Agreement and

the Sale Order. Cedarcare is also in the process of identifying a new proposed operator and obtaining the appointment of this operator as the substitute temporary receiver of the Facilities.

29. Based upon the foregoing, the Debtors respectfully submit that ample cause exists under the Bankruptcy Code and the applicable case law for the requested extensions of the Debtors' Exclusive Periods from February 11, 2018 and April 12, 2018, respectively, to June 11, 2018 and August 10, 2018, respectively.

WHEREFORE, Debtors Folts Home and Folts Adult Home, Inc. request that the Court enter an Order as follows:

- a. granting the Debtors' third request to extend the exclusive periods within which only the Debtors may file a chapter 11 plan or plans until June 11, 2018;
- b. granting the Debtors' third request to extend the period within which the Debtors may solicit acceptances of their chapter 11 plan or plans until August 10, 2018; and
- c. granting such other and further relief as to the Court may seem just and proper.

Dated: January 2, 2018
Syracuse, New York

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