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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:	)	Chapter 11
NORTHWEST SENIOR HOUSING CORPORATION, *et al.*[1]	)	Case No. 22-30659 (MVL)
Debtors.	)	(Jointly Administered)

INTERCITY INVESTMENT PROPERTIES, INC.'S MOTION TO DISMISS CHAPTER 11 CASES UNDER 11 U.S.C. § 1112(b)

Intercity Investment Properties, Inc. (the "Landlord") hereby files this motion (the "Motion") seeking an order under section 1112(b) of title 11 of the United States Code (the "Bankruptcy Code") dismissing these Chapter 11 Cases. [2]

PRELIMINARY STATEMENT

1. The Debtors continue to engage in a campaign of deception before this Court and the Edgemere's residents by obscuring the facts and creating unrealistic expectations for both. The Debtors' recently filed Plan and Disclosure Statement (each as defined below) are predicated on a

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are Northwest Senior Housing Corporation (1278) (the "Edgemere") and Senior Quality Lifestyles Corporation (2669) ("SQLC"). The Debtors' mailing address is 8523 Thackery Street, Dallas, Texas 75225.

[2] Capitalized terms used but not defined in this Motion shall have the meaning attributed to such terms under the Plan.

Successful Outcome that is untethered to legal (or economic) realities, making it apparent that the Debtors and their Sponsor (Lifespace Communities, Inc. ("Lifespace")) are promoting a fantasy. Because there is no chance of a Successful Outcome as a matter of law, the Plan is unconfirmable and the Chapter 11 Cases must be dismissed immediately.

2. While like any good story, there are figments of truth, but the Plan reads more like a Disney fairy tale—describing a fictional world in which the Debtors *wish* to live, rather than the *real* world in which the Debtors operate. The Plan gives residents of the Edgemere a false sense of security that their deposits are "safe," based upon the flawed premise that the Lease (as defined herein) can be modified by the Plan. It cannot. The Lease cannot be modified by the Plan. In fact, the Bankruptcy Code unequivocally requires that the Lease be assumed (or rejected) *as is* in its entirety. Once the projections attached as Exhibit 4 to the Disclosure Statement (the "Projections") are modified to reflect this reality, it becomes instantly clear that the Plan is not feasible. Moreover, neither the obligation to pay postpetition rent nor the obligation to pay the post Effective Date obligations to the counterparty of an assumed lease can be equitably subordinated.

3. Dismissal is also appropriate when, as here, the ability to consider confirmation of the Plan is entirely speculative. The Debtor's Successful Outcome disregards (a) the pending motion to dismiss the Adversary Proceeding (as defined herein); (b) to the extent not dismissed in its entirety, the possibility that the Court does not have jurisdiction to enter a final order in such proceeding; and (c) the probability of appeal in the unlikely event of an adverse ruling against the Landlord. With respect to the last point, a confirmation hearing may not take place for years, rendering it nearly impossible to satisfy the feasibility standards of § 1129(a)(11) of the Bankruptcy Code.

4. Landlord further notes that the Debtors propose to pay their unsecured creditors **nothing** while at the same time allowing Lifespace, its *de facto* equity holder, to both retain its equity interest and get paid approximately **$20,000,000.00 in Deferred Sponsor Fees** through the proposed assumption of the Management Agreement, a clear end around the absolute priority rule.[3]

5. The grim reality is that the Debtors are hemorrhaging cash, squandering resources and lack sufficient funds to operate in chapter 11 under their current DIP Loan until the entry of a final order in the Adversary Proceeding. Despite this reality, the Debtors continue spending inordinate amounts of time, money, and judicial resources prosecuting frivolous litigation claims against the Landlord and pushing a fallacious narrative regarding their prospects for reorganizing. This charade must end now. Given that the Successful Outcome cannot be achieved as a matter of law, the Chapter 11 Cases should be dismissed immediately.

JURISDICTION

6. This Court has jurisdiction over the Motion under 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b). Venue of this proceeding and the Motion is proper in this District under 28 U.S.C. §§ 1408 and 1409.

7. The statutory bases for the relief sought in this Motion are section 1112 of the Bankruptcy Code, Bankruptcy Rule 2002, and Rules 2002-1 and 9007-1(h) of the *Local Bankruptcy Rules of the United States Bankruptcy Court for the Northern District of Texas*.

BACKGROUND

A. General Background

8. Northwest Senior Housing Corporation and Senior Quality Lifestyles Corporation (collectively, the "Debtors") filed voluntary petitions for relief under chapter 11 of the Bankruptcy

[3] While the Debtors are non-profits and technically do not have equity holders, Lifespace, as "Sponsor" and the sole corporate member of each of the Debtors, is the non-profit equivalent of an equity holder.

Code in the United States Bankruptcy Court for the Northern District of Texas (the "Court") on April 14, 2022 (the "Petition Date"). The Chapter 11 Cases are being jointly administered before the Court, [Docket No. 88] and the Debtors continue to operate their businesses and manage their properties as debtors-in-possession under §§ 1107(a) and 1108 of the Bankruptcy Code.

9. The Edgemere is a Texas non-profit corporation that operates a continuing care retirement community ("CCRC") facility located on 16.25 acres near Northwest Highway and Thackery Street in Dallas. The Landlord owns the real property, which includes both the land and all improvements thereon ("Property"). Landlord leased the use and occupancy of the Property to Edgemere for a term of fifty-five (55) years through a ground lease dated as of November 17, 1999 ("Lease") by and between the Edgemere and the Landlord.

10. On the Petition Date, the Debtors filed an adversary proceeding against the Landlord and Kong Capital LLC ("Kong" and collectively with Landlord, the "Defendants"), styled *Northwest Senior Housing Corp. v. Intercity Investment Properties Inc., et al.*, Case No. 22-03040-mvl (the "Adversary Proceeding").

11. On June 1, 2022, Defendants filed their *Motion to Dismiss for Failure to State Claim* (the "Adversary Motion to Dismiss") and Brief in Support thereof. [Adv. Docket Nos. 36 and 37] The foregoing pleadings, along with the *Defendants' Reply in Support of Motion to Dismiss* [Adv. Docket No. 72] are referred to collectively as the "Adversary Motion to Dismiss Pleadings."[4]

[4] A hearing on the Adversary Motion to Dismiss was held on July 20, 2022. *See* AP Docket No. 88.

B. The Unconfirmable Plan

12. The Debtors filed drafts of the *Debtors' Plan of Reorganization*, (the "Plan") [Docket No. 508] and *Disclosure Statement for Debtors' Plan of Reorganization* (the "Disclosure Statement") [Docket No. 509] on August 3, 2022 (both documents are unsigned).

13. The Plan contains numerous provisions that render it unconfirmable under § 1129 of the Bankruptcy Code, most pertinent to this Motion are:

(a) Section 4.1, which states in pertinent part:

> The proposed Refinancing Transaction assumes and is contingent upon the achievement of a Successful Outcome with respect to the Landlord Litigation, which requires the occurrence of one of the following
>
> (a) equitable subordination of the Landlord's rights and Claims, to the extent allowable, under the Lease such that the Landlord is entitled to Distributions of no more than $20,000,000 in total for the remaining term of the Lease, with such amount being paid to the Landlord over a period of years; **or**
>
> (b) an extension of the term of the Lease by at least 25 years and reduction of the contractual rent amount to no more than $2,200,000 per year.

See Plan at § 4.1 (emphasis added); and

(b) Section 9.1(c), which states that:

> It shall be a condition precedent to the confirmation of the Plan, such that the Confirmation Order shall not be entered, until each of the following conditions precedent have been satisfied or waived pursuant to the provisions of this Plan.
>
> (c) The Landlord Litigation shall have resulted in a successful outcome (i) equitable subordination of the Landlord's rights and Claims, to the extent allowable, the Lease such that the Landlord is entitled to Distributions of no more than $20,000,000 in total for the remaining term of the Lease with such amount being paid to the Landlord over a period of years; or (ii) an extension of the term of the Lease by at least 25 years and reduction of the contractual rent amount to no more than $2,200,000 per year."

See Plan at § 9.1(c). In other words, achieving a Successful Outcome is a condition precedent to *Confirmation* itself, as opposed to merely a condition to the Effective Date.

14. As set forth below, taken together, these provisions violate §§ 365, 1124(2), and 1129(a)(1), (2), (3), and (11) of the Bankruptcy Code. While unnecessary for this Motion, the Landlord also notes that Sections 3.2, 3.2.6 and 4.3.3 of Plan violate the absolute priority rule by allowing Lifespace, the Debtors' *de facto* equity holder, to retain its equity interest (and get paid millions of dollars) while not paying anything to unsecured creditors. *See* Plan at §§ 3.2 3.2.6, 4.2.3. In exchange, the Plan describes a commitment from Lifespace to provide financial assistance for the Debtors' exit from chapter 11, in the form of a Sponsor Contribution and a Liquidity Support Agreement ("LSA") totaling $19,500,000.00. Lifespace is really funding the Plan to repay itself.[5]

C. Continued Negative Cash Flow & Concealed Administrative Insolvency

15. The Debtors' monthly operating reports show that the Debtors have not yet had positive cash flow in these Chapter 11 Cases. [Docket Nos. 21, 338, 413, 414, 472, 473].

16. Under the Court's *Order Establishing Procedures for Interim Compensation and Reimbursement of Expenses of Professionals* (the "Interim Compensation Order") the Debtors' professionals were required to file their first interim fee applications by July 31, 2022. [Docket No. 401]. While FTI has filed two monthly fee statements [Docket Nos. 428, 510], the Debtors'

[5] Landlord notes that the Disclosure Statement omits critical information about the Chapter 11 Cases, continuing the Debtors' pattern of misleading the public regarding their financial condition. By means of example, there is no mention of the Court's order requiring that Lease payments be escrowed or any discussion about the Adversary Proceeding, including the Adversary Motion to Dismiss Pleadings. As set forth in the *Landlord's Brief in Support of its Motion for Adequate Protection*, [Docket No. 61] at ¶¶ 56-65, the Debtors have a history of making materially misleading and false statements in its public disclosures with respect to both the Lease and their financial condition, an issue being investigated by the Texas Attorney General's Office. In any event, the Landlord will be objecting to the Disclosure Statement prior to the objection deadline that more fully sets out its objections.

counsel has not filed any fee statements since the Petition Date and only one professional for the Debtors has filed a fee application.[6]

17. Without fee applications on file, the Court (and creditors) are incapable of assessing whether these Chapter 11 Cases are administratively solvent. But given the immense amount of activity in the first months of these Chapter 11 Cases, the Landlord anticipates that the fees of the Debtors' attorneys may be more than the amounts budgeted under the DIP Order. The Edgemere's monthly operating report for the month ended June 30, 2022 (the "June MOR") [Docket No. 473] indicates an accrual for professional fees in the amount of $2,821,091.00 but does not contain a breakout of such fees by professional. *See* June MOR at 13.

18. Moreover, the June MOR discloses that the Edgemere is accruing an additional $3,146,568.00 in postpetition expenses (*excluding* accrued property taxes and amounts owed to the DIP Lender), for an aggregate amount of nearly $6,000,000.00 in accrued liabilities. *Id*. Without taking the foregoing into account, the Edgemere's net operating margin is ($564,221). *Id*. at 14. In other words, the Debtors have **already lost more than half a million dollars since filing** these Chapter 11 Cases. This negative net operating margin would obviously be significantly higher if the Debtors were timely paying their administrative expenses.

[6] The Debtors have also retained a public relations firm as non-ordinary course professionals during these Chapter 11 Cases. *See Second Monthly Fee Application filed by FTI Consulting, Inc.* [Docket No. 510] (time entries indicating that the Debtors have engaged media and public relations firm, The Point Group, to provide postpetition communications and media services). A review of the docket indicates that the Debtors have not filed an application seeking to employ this firm (whether under §§ 327(a), 363(b), 1108, or otherwise) or have otherwise disclosed the financial terms of this engagement to the Court as required by the Bankruptcy Code. *See generally*, *In re Seven Counties Services, Inc.*, 496 B.R. 852 (Bankr. W.D. Ky. 2013) (court approval of a public relations firm); *In re New Orleans Auction Galleries, Inc*., Case No. 11-11068, 2013 WL 1196680 (Bankr. E.D. La. Mar. 25, 2013) (same).

RELIEF REQUESTED

19. By this Motion, the Landlord requests that the Court enter an order, substantially in the form attached to this Motion, dismissing these Chapter 11 Cases under § 1112(b) of the Bankruptcy Code, and any other further relief the Court deems appropriate under the circumstances.

LEGAL BASIS FOR RELIEF

20. Section 1112(b)(1) of the Bankruptcy Code states that:

> Except as provided in paragraph (2) and subsection (c) . . . the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate.

11 U.S.C. § 1112(b)(1). Where "cause," exists, dismissing a chapter 11 case is mandatory where such result is in the best interests of creditors and the estate, so long as there are no "unusual circumstances" present. *See In re Reserves Resort, Spa & Country Club LLC*, Case No. 12-13316 (KG), 2013 WL 3523289 at *2 (Bankr. D. Del. July 12, 2013). While the party seeking dismissal bears the burden of proving cause exists to dismiss the case, once shown, the case must be dismissed, absent circumstances not normally found in chapter 11 cases.

21. Section 1112(b)(4) of the Bankruptcy Code sets forth a list of conditions that constitute "cause," to dismiss a chapter 11 case, but this list is not exhaustive. *See In re Irasel Sand*, LLC, 569 B.R. 433, 439 (Bankr. S.D. Tex. 2017*); In re Strug-Division, LLC*, 375 B.R. 445, 448 (Bankr. N.D. Ill. 2007); *see also In re Timbers of Inwood Forest Assocs., Ltd.*, 808 F.2d 363, 371–72 (5th Cir. 1987) (*en banc*) ("The inquiry under § 1112 is case-specific, focusing on the circumstances of each debtor."); *In re Koerner*, 800 F.2d 1358, 1367 (5th Cir. 1986) (holding that "in acting upon a request for conversion, the bankruptcy court is afforded wide discretion").

22. Section 1112(b)(4)'s list of *per se* conditions establishing cause to dismiss or convert a chapter 11 case includes the requirement that a case be dismissed where there is a "substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation." 11 U.S.C. § 1112(b)(4)(A). To show cause under subsection (b)(4)(A), "the moving party must demonstrate that there is both (1) a substantial or continuing loss to or diminution of the estate and (2) the absence of a reasonable likelihood of rehabilitation." *In re TMT Procurement Corp.*, 534 B.R. 912, 919 (Bankr. S.D. Tex. 2015) (*citing In re Creekside Sr. Apartments, L.P.*, 489 B.R. 51, 61 (B.A.P. 6th Cir. 2013)).

23. Cause exists to dismiss these Chapter 11 Cases under § 1112(b)(4)(A) because there is a substantial and continuing loss to or diminution of the estate, and the Debtors have no hope of rehabilitation.

A. There is No Likelihood of Rehabilitation Because the Successful Outcome is not Permitted by the Bankruptcy Code.

24. Going in inverse order, the second prong of § 1112(b)(4)(A) is satisfied by showing that there is no reasonable likelihood of "rehabilitation" for the Debtors. "Rehabilitation" is not simply a question of whether a debtor can confirm a plan, but whether "the debtor's business prospects justify continuance of the reorganization effort." *TMT*, 534 B.R. at 920 (quoting *In re LG Motors, Inc.*, 422 B.R. 110, 116 (Bankr. N.D. Ill. 2009)). In other words, it refers to a "debtor's ability to restore the viability of its business." *Loop Corp. v. U.S. Tr.*, 379 F.3d 511, 516 (8th Cir. 2004) (citing *In re Gonic Realty Trust*, 909 F.2d 624, 626 (1st Cir. 1990)).

25. Here, the Debtors have no ability to restore their business. The Debtors contend that, to continue their business, the Lease must be extended, and the rent reduced. Alternatively, they contend that future Lease payments must somehow be equitably subordinated. None of the

foregoing are remedies permitted by law. Rehabilitation, therefore, is not possible and the Chapter 11 Cases must be dismissed.

(1) The Required "Successful Outcome" set Forth in the Plan Violates §§ 365, 1124(2), 1129(a)(1), (2), (3), & (11) of the Bankruptcy Code

26. It is black letter bankruptcy law, engraved in stone, that a debtor cannot pick and choose which elements of an unexpired lease to assume or reject. It must assume or reject the lease in its ***entirety***. *See, e.g.*, *In re Senior Care Centers, LLC*, 607 B.R. 580, 586 (Bankr. N.D. Tex. 2019) (citing *N.L.R.B. v. Bildisco and Bildisco*, 465 U.S. 513, 531-32, 104 S.Ct. 1188, 79 L.Ed.2d 482 (1984)); *see also In re ATP Oil & Gas Corp.*, 517 B.R. 756, 759–60 (Bankr. S.D. Tex. 2014) (citing *In re Diamond Head Emporium, Inc.*, 69 B.R. 487, 494 (Bankr. D. Hawai'i 1987) ("A debtor may not pick and choose those portions that it wishes to enforce and reject those that it does not deem desirable. That is black letter law *engraved in stone*.") (emphasis added)).

27. Coded as a "Successful Outcome," the Plan proposes rewriting material terms of the Lease (giving the Court not one, but two illegal options to choose from!) without the Landlord's consent and with no legal precedent, in direct contravention of the ironclad authority set forth above.

28. There is no outcome in the Adversary Proceeding that can change these facts. For reasons stated in the Adversary Motion to Dismiss Pleadings, there is no authority to reformulate the Lease into one the Debtors wish they had negotiated as opposed to the one that they did negotiate. Further, equitable subordination cannot be used to avoid paying postpetition administrative rent claims or the post-effective date obligations under an assumed lease.

29. To continue operating the Community, the Debtors must adhere to the requirements of §§ 365 and 1124(2) of the Bankruptcy Code, curing defaults (including Landlord's mounting fees and expenses and compensating Landlord for its other actual, pecuniary losses resulting from

any defaults under the Lease), and giving the Landlord adequate assurance of their future performance under the Lease. *See In re Senior Care Centers, LLC*, 607 B.R. 580, 588 (Bankr. N.D. Tex. 2019). The Projections make crystal clear that they will not be able to do any of the foregoing. The Projections ignore § 365 of the Bankruptcy Code with respect to rent and are entirely unrealistic with respect to EBITDARM.

30. The rent under the Lease will not be discounted to $2,200,000.00 per year as depicted by the Projections. Instead, it will be based on the rent set forth in Section 4.1 of the Lease as increased by the CPI Factor set forth in Section 4.2 of the Lease. The negative impact on Net Operating Income is illustrated by the following chart, which is based on 2022 rent, and does not take into account the CPI Factor:

	2023	**2024**	**2025**
Projections			
EBITDAR	$603	$2,278	$4,433
Ground Lease	(2,200)	(2,200)	(2,200)
Net Operating Income	(1,597)	78	2,233
Actual			
EBITDAR	$603	$2,278	$4,433
Ground Lease	(4,099)	(4,099)	(4,099)
Net Operating Income	(3,496)	(1,821)	334

31. After taking into account the CPI Factor and the dramatic variation in the Projections as compared to the Debtors' past financial performance, it is anticipated that the decrease in Net Operating Income will be even greater. Worse, the next line item in the Projections, Net Entrance Fees, will undoubtedly be negative in the event that the Lease is assumed—nobody will be moving in if there is almost no possibility of repayment of a large entrance fee deposit. In such circumstances, there will be no funds available for debt service, in violation of § 1129(a)(11) of the Bankruptcy Code.

32. The Debtors' efforts to placate current and former residents by assuming their Residency Agreements is a public relations gambit that will go awry. The Court cannot and should not take this bait and should instead see the Plan for what it is: a bad faith proposal to unilaterally alter the terms of the Lease in contravention of §§ 365, 1124(2), 1129(a)(1), (2), and (3) of the Bankruptcy Code and proposing a plan that is not feasible in contravention of § 1129(a)(11). Dismissal is required because, by their own terms, the Plan and Disclosure Statement establish that the Debtors have zero possibility of rehabilitating themselves without violating the Bankruptcy Code.

(2) The Contingent Nature of the Successful Outcome Requires Dismissal

33. Section 9.1(c) of the Plan requires that the Confirmation Order not be entered unless there is a Successful Outcome. Simply stated, a plan dependent on litigation is not feasible and therefore unconfirmable. *See In re American Capital Equipment, LLC*, 688 F.3d 145, 156 (3d Cir. 2012) (plan is not feasible "if its success hinges on future litigation that is uncertain and speculative, because success in such cases is only possible, not reasonably likely"; case dismissed, in part, because the debtors were unable to propose a confirmable plan "that is not contingent on future litigation with an uncertain and speculative outcome."); *In re Biz as Usual, LLC*, 627 B.R. 122, 130 (Bankr. E.D. Pa. 2021) (dismissing case and stating, "[a] plan may not be feasible where the funding source is speculative at best and visionary at worst . . . This is especially true when a plan depends upon litigation for funding") (internal quotations and citations omitted); *In re DCNC N. Carolina I, LLC*, 407 B.R. 651, 667 (Bankr. E.D. Pa. 2009), *aff'd sub nom*. *DCNC N. Carolina I v. Wachovia Bank, N.A.*, No. CIV.A. 09-3775, 2009 WL 3856498 (E.D. Pa. Nov. 13, 2009) (noting that bankruptcy cases should be dismissed where debtors could not "demonstrate a sufficient likelihood of success in the [litigation] to warrant the confirmation of a chapter 11 plan that is dependent on the litigation"); *In re Rey*, Case No. 04B22548, 2006 WL 2457435, at *7

(Bankr. N.D. Ill. Aug. 21, 2006) (converting case and noting that "[a] lawsuit's outcome, though, is always speculative. Without a solid basis for believing litigation is highly likely to generate large sums of money quickly, it cannot provide a sufficiently reliable source of income to support confirmation"); *In re Burford*, Case No. 88-00364-C(T), 1991 WL 237820, at *1 (Bankr. N.D.W. Va. Apr. 15, 1991) (denying plan where it was "dependent almost entirely speculative recovery from various lawsuits currently pending").[7]

34. The Plan assumes (as it must) that at least one of the Debtors' claims will survive the Adversary Motion to Dismiss, which is currently under advisement. If the Court grants the Adversary Motion to Dismiss in its entirety, the Plan immediately buckles under its own weight, and cannot move forward.

35. If not, the Adversary Proceeding must not only survive summary judgment but also trial, a district court order approving the recommended findings of fact and conclusions of law,[8] and potentially, any appeal of that order. In other words, the two specific "Successful Outcomes," described by the Plan will not be known for years.

36. Based on even a cursory review of the June MOR, without a substantial increase in the DIP Loan, the Debtors will run out of money long before that time. The Debtors and Lifespace

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[7] On August 11, 2022, the Debtors filed their *Motion for Entry of an Order Extending the Exclusivity for the Filing of a Chapter 11 Plan* (the "*Exclusivity Motion*") [Docket No.534] seeking a 180-day extension of time to file a plan, relying on an unpublished decision, *In re Gialamas*, Case No. BR 18-13341, 2019 WL 2714829 (Bankr. W.D. Wis. June 27, 2019). *Gialamas* is not binding on this Court, but even if it were, it is completely distinguishable from these Chapter 11 Cases given that (i) the *Gialamas* matter involved a straightforward preference action to avoid a lien that was already fully briefed for summary judgment; (ii) the debtor was timely paying his bills as they came due; and (iii) the requested extension was limited to 90 days (as opposed to the 180 days requested by the Debtors here). Here, by contrast, the Adversary Proceeding is still at the initial pleading stage, with the Adversary Motion to Dismiss under advisement, in a case where the Debtors seek to rewrite the Bankruptcy Code.

[8] The claims asserted in the Adversary Proceeding are based almost exclusively in state law, meaning that the bankruptcy court cannot issue a final order on these counts even if they survive dismissal. *See In re BP RE, L.P.,* 735 F.3d 279, 286 (5th Cir. 2013) (*citing Stern v. Marshall*, 564 U.S. 462, 481, 131 S. Ct. 2594, 2608, 180 L. Ed. 2d 475 (2011)).

are wasting their precious few dollars promoting a *Disney* Plan that cannot be confirmed, instead of acknowledging that they lack sufficient funds to pay their entrance fee obligations.

37. What happens to the residents if the DIP Lender either refuses to fund any additional draws on the DIP Facility or the Debtors run out of money? While the Debtors seek to manipulate and distort the picture by not timely paying their postpetition liabilities (or the Debtors' counsel not seeking payment of their professional fees), they will not be able to do so forever. When that day comes, who will fund the next stage of the Chapter 11 Cases? Who will pay the $2,057,000.00 for the 2022 real estate taxes? Who will fund the capital expenditures to maintain the building? None of the residents, unsecured creditors, or the Landlord should have to wait to find out. If the Debtors cannot propose a feasible plan, then these Chapter 11 Cases should be dismissed immediately.

(3) The Plan Violates the Absolute Priority Rule

38. The Bankruptcy Code requires that a chapter 11 debtor's reorganization plan either "rest on the agreement of each class of creditors[,] or to protect creditor classes according to the absolute priority rule, which enforces a strict hierarchy of their rights defined by state and federal law." *In re Pac. Lumber Co.*, 584 F.3d 229, 244 (5th Cir. 2009). The absolute priority rule, embodied in § 1129(b)(2)(B)(ii) of the Bankruptcy Code must be satisfied before a court can cram down a plan over the objection of a dissenting class of creditors. *Id.* This requirement applies equally to the Debtors, regardless of their non-profit status. *See In re Boy Scouts of America*, Case No. 20-10343 (Docket No. 10136, p. 242) (Bankr. D. Del. July 29, 2022) (holding that confirmation requirements under § 1129 apply to non-profits, and that non-profit status does not except a debtor from satisfying those requirements).

39. Section 1129(b)(2)(B)(ii) of the Bankruptcy Code provides, in relevant part, that with respect to a class of unsecured claims, "the holder of any claim or interest that is junior to the

claims of such class will not receive or retain under the plan on account of such junior claim or interest any property. . .”

40. While this issue need not be resolved in connection with this Motion, it should be noted that the Plan attempts to impermissibly circumvent this requirement with respect to Lifespace, the Debtors’ respective sole corporate member, by (a) requiring that the Debtors cure and assume their Management Agreement with Lifespace and pay Lifespace approximately **$20,000,000.00** in Deferred Sponsor Fees; (b) allows Lifespace to retain its interests in the reorganized debtors; and (c) proposes that general unsecured creditors be paid **nothing** on account of their claims in these Chapter 11 Cases. *See* Plan §§ 3.2.5-7.

41. Landlord points out the foregoing to make clear that Lifespace is the long term, primary beneficiary of the Plan at the expense of creditors in these Cases, and that it must not be permitted to enrich itself at the expense of the Debtors’ unsecured creditors under the guise of contract assumption, particularly when it appears that the Sponsor Contribution and LSA called for under the Plan will simply flow back into Lifespace’s pockets on account of its management fees and the Deferred Sponsor Fees.

B. The Estates are Suffering Substantial, Continuing Losses that Cannot be Remedied by the Chapter 11 Process

42. Returning to the first prong of § 1112(b)(4)(A), this prong is satisfied by demonstrating loss that is either “substantial” or “continuing.” *Creekside*, 489 B.R. at 61 (citing 7 Collier on Bankruptcy, ¶ 1112.04[6][a][i] (16th ed. 2014) (“7 Collier”)). A loss is “substantial” if it “is sufficiently large given the financial circumstances of the debtor as to materially negatively impact the bankruptcy estate and interest of creditors.” *TMT*, 534 B.R. at 918 (citing 7 Collier ¶ 1112.04[6][a][i]).

43. To determine whether there is a "continuing loss," a court must "look beyond a debtor's financial statement and make a full evaluation of the present condition of the estate." *Irasel*, 569 B.R. at 441 (quoting *In re Moore Constr., Inc.*, 206 B.R. 436, 437–38 (Bankr. N.D. Tex. 1997)).

44. This can be satisfied by "demonstrating that the debtor is experiencing a negative cash flow or declining asset values following the order for relief." *TMT*, 534 B.R. at 918; *see also Irasel,* 569 B.R. at 440 (citing *TMT*, 534 B.R. at 918); *Loop Corp. v. U.S. Tr.*, 379 F.3d 511, 515-16 (8th Cir. 2004) ("Under the interpretation of § 1112(b)(1) consistently used in bankruptcy courts, this negative cash flow situation alone is sufficient to establish 'continuing loss to or diminution of the estate.'"); *In re Kanterman*, 88 B.R. 26, 29 (S.D.N.Y. 1988) ("All that need be found is that the estate is suffering some diminution in value."); 7 Collier ¶ 1112.04[6][a] ("[Section 1112(b)(4)(A)] tests whether, after the commencement of the case, the debtor has suffered or continued to experience a negative cash flow, or, alternatively, declining asset values.").

45. Without providing the requisite details, the June MOR states that the Debtors are accruing $2,821,091.00 of professional fees through June 30, 2022. The June MOR further discloses that the Edgemere is accruing $3,146,568.00 in additional postpetition expenses (*excluding* accrued property taxes and amounts owed to the DIP Lender), for an aggregate amount of nearly $6,000,000.00 in accrued liabilities. *See* June MOR at 13. The undrawn balance of the DIP Loan is approximately $9,100,000.00. It does not take a financial expert to see the writing on the wall that the Debtors will soon be unable to meet their postpetition obligations and that day will occur well in advance of a "Successful Outcome." The Debtors simply do not have enough

funding under the DIP Loan to reach confirmation, much less operate a reorganized business outside of chapter 11.

46. In addition to what the Debtors *have* reported regarding administrative expenses in these Chapter 11 Cases, it is particularly significant to discuss what has *not yet* been reported. Namely, the complete picture of fees and expenses of the Debtors' professionals.

47. Debtors' counsel has not filed any monthly fee statements under the Interim Compensation Order and none of the Debtors' professionals, other than the Debtors' tax consultant, have filed their first interim fee applications required under such order. It should also be noted that the Debtors have retained a public relations firm without filing an employment application. It is unknown how much this firm has been paid.

48. In addition to these issues, the Edgemere does not appear to be accruing the amounts necessary to satisfy its cure obligations, including reimbursing the Landlord for the significant amount of attorneys' fees and expenses it has incurred enforcing the Lease, which will be necessary to assume the Lease. *See* Lease at ¶ 5.16.

49. Lastly, it must also be noted that *without* taking the foregoing into account, the Edgemere's net operating margin is ($564,221.00). June MOR at 14. This negative net operating margin would obviously be significantly higher if the Debtors were timely paying their administrative expenses. The Debtors' negative cash flow is sufficient to demonstrate the Debtors' substantial and continuing losses, warranting dismissal of these Chapter 11 Cases.

50. Even if that were not the case, the Projections makes it clear that they cannot operate profitably under the Lease's stated terms, now or in the future. This is presumably why the Plan is impermissibly and entirely contingent on obtaining a Successful Outcome.

51. The Debtors' negative cash flow, combined with their deferral of expenses and concealment of the true administrative burden on their estates, satisfies the first prong of § 1112(b)(4)(A), showing that the Debtors' estates are suffering substantial, continued losses. The Debtors' entire Plan is predicated on rewriting the Lease. As this cannot occur as a matter of law, the Chapter 11 Cases must be dismissed.

C. Dismissal is in the Best Interests of Creditors & the Debtors' Estates

52. Dismissal of these Chapter 11 Cases is in the best interests of creditors and the Debtors' estates when considered in relation to the alternatives available to the Court. The Chapter 11 Cases are already administratively insolvent and if not, they will be soon.

53. Further, converting these Chapter 11 Cases and liquidating the Debtors' estates is not in the best interest of creditors, particularly considering the impact on the 375 current residents of the Edgemere.

54. Dismissal, on the other hand, simply allows parties to revert to their state law rights and remedies outside of bankruptcy and will facilitate an orderly transition of the Community to an economically feasible facility.

RESERVATION OF RIGHTS

55. Nothing contained in this Motion is intended or should be construed as a waiver of the Landlord's rights in these Chapter 11 Cases, and the Landlord reserves all of its rights with respect to the Plan and Disclosure Statement and this Motion, including without limitation any objections to the Plan and Disclosure Statement and discovery related thereto; seeking appointment of a chapter 11 trustee under § 1112(b)(1) of the Bankruptcy Code in the event this Motion is not granted; or seeking alternative relief by pursuing a writ of mandamus to compel the Commissioner of the Texas Department of Insurance to request appointment of a trustee pursuant to Texas Health & Safety Code § 246.092.

CONCLUSION

56. The Debtors have already shown that they are operating in bad faith in these Chapter 11 Cases—proposing a Plan that violates the Bankruptcy Code's clear requirements governing lease assumption while simultaneously pursuing the meritless Adversary Proceeding—in the hope that they will be able to reverse engineer a "happily ever after" ending. That is highly unlikely to occur, and the Court should dismiss the Chapter 11 Cases.

WHEREFORE, the Landlord requests that the Court enter an order, substantially in the form submitted with this Motion, granting the relief requested here, and any other further relief the Court deems appropriate under the circumstances.

Dallas, Texas
August 12, 2022

/s/ *Michael S. Held*

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CERTIFICATE OF SERVICE

I hereby certify that on August 12, 2022, a true and correct copy of the foregoing was served electronically on all persons via the Court's CM/ECF system.

/s/ *Michael S. Held*
Michael S. Held

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:	)	Chapter 11
NORTHWEST SENIOR HOUSING CORPORATION, *et al.*[1]	)	Case No. 22-30659 (MVL)
Debtors.	)	

ORDER DISMISSING CHAPTER 11 CASES

This matter came before the Court on *Intercity Investment Properties, Inc.'s Motion to Dismiss Chapter 11 Cases Under 11 U.S.C. § 1112(b)* (the "Motion to Dismiss"), this Court having jurisdiction over this matter under 28 U.S.C. §§ 157 and 1334; and this Court having found that this is a core proceeding under 28 U.S.C. § 157(b)(2); and this Court having found that venue of

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are Northwest Senior Housing Corporation (1278) (the "Edgemere") and Senior Quality Lifestyles Corporation (2669) ("SQLC"). The Debtors' mailing address is 8523 Thackery Street, Dallas, Texas 75225.

this proceeding and the Motion in this District is proper under 28 U.S.C. §§ 1408 and 1409; and this Court having found that dismissal of these Cases is warranted under § 1112(b) of the Bankruptcy Code and that the relief requested in the Motion is in the best interests of the Debtors' estates, their creditors, and other parties in interest; and after due deliberation and it appearing that good and sufficient cause exists to grant the relief requested in the Motion to Dismiss.

IT IS HEREBY ORDERED THAT:

1. The Motion to Dismiss is Granted as set forth in this Order.

2. The Chapter 11 Cases are hereby dismissed.

3. The Court retains jurisdiction with respect to all matters arising from or relating to the implementation, interpretation, and enforcement of this Order.

END OF ORDER # #

SUBMITTED BY:

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