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COUNSEL TO THE DEBTORS AND
DEBTORS IN POSSESSION

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

In re:

Northwest Senior Housing Corporation, *et al.*,¹

Debtors.

Chapter 11

Case No. 22-30659 (MVL)

(Jointly Administered)

Re: Docket Nos. 541 and 542

**DEBTORS' PRELIMINARY OBJECTION TO MOTION TO DISMISS
CHAPTER 11 CASES UNDER 11 U.S.C. § 1112(b)**

The above-captioned debtors and debtors-in-possession (the “**Debtors**”) in the above-captioned cases (the “**Chapter 11 Cases**”) respectfully submit this preliminary objection (the “**Objection**”) in response and opposition to the *Motion to Dismiss Chapter 11 Cases Under 11 U.S.C. § 1112(b)* [Docket No. 541] (the “**Motion**”) filed on August 12, 2022 and set for a status conference on August 24, 2022 [Docket No. 542] by Intercity Investment Properties, Inc. (the “**Landlord**”).² The Debtors further respectfully submit that the Motion should: (i) be denied for

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) and Senior Quality Lifestyles Corporation (2669). The Debtors’ mailing address is 8523 Thackery Street, Dallas, Texas 75225.

² Because Landlord did not file a notice of hearing, as required by Rule 9007-1(c) of the Local Bankruptcy Rules for the Northern District of Texas and the *General Order Regarding Procedures for Complex Chapter 11 Cases*, or



the reasons stated below; and (ii) at a minimum, not be set for hearing until after the Court has ruled on *Defendants’ Motion to Dismiss for Failure to State a Claim* and *Defendants’ Brief in Support of Motion to Dismiss for Failure to State a Claim* [Adv. Dkt. Nos. 34 and 35] (collectively, the “**MTD Adversary**”).

INTRODUCTION

The Motion is a premature, disguised objection to either the approval of the Disclosure Statement or the confirmation of the Plan.³ The Motion was not submitted in good faith, contains inaccurate statements of law and fact, and fails to appropriately assert a legitimate basis to dismiss these Chapter 11 Cases at this early stage.

Like many other pleadings filed by the Landlord in these Chapter 11 Cases, the incendiary rhetoric and intentional misstatements seem designed to drive negative media coverage and further litigate to the press. The Landlord’s baseless attacks are further attempts to frighten and confuse current and prospective residents, complicating the Debtors attempts to successfully reorganize, while improving occupancy and continuing sales. Indeed, although the Landlord’s prepetition plan was to gain control of the community built and operated by the Debtors and operate it for a profit at the expense of the Debtors’ creditors and existing residents, it is (somewhat) shocking that the Landlord is comfortable pursuing that plan, as articulated in the Motion, in these Chapter 11 Cases.

As a legal matter, the Motion is fundamentally flawed. The Motion contains summary (and inaccurate) statements of law and fact and, ultimately, fails to provide a scintilla of evidence to

request an expedited setting with respect to the Motion, the Debtors presume that the Motion has been set for a status conference for purposes of establishing a briefing schedule. Nevertheless, the Debtors file this preliminary Objection out of an abundance of caution and reserve their rights in full to supplement, modify, amend, and/or substitute this Objection, as necessary or appropriate, following the August 24, 2022 status conference.

³ See *Debtors’ Disclosure Statement for Debtors’ Plan of Reorganization*, dated August 3, 2022 [Docket No. 509] (the “**Disclosure Statement**”); *Debtors’ Plan of Reorganization*, dated August 3, 2022 [Docket No. 508] (the “**Plan**”).

support the Landlord's significant burden for showing cause to dismiss exists. For example, the Motion asserts that cause exists because: (a) the Plan is not confirmable, which is not a viable basis for cause to dismiss under the facts of these Chapter 11 Cases, and relies upon plainly inapplicable precedent involving debtors attempting to confirm multiple plans; and (b) the Debtors are losing money while operating in Chapter 11, which, on its own, is simply not a dismissal basis, but a fact of operating in Chapter 11 while responding to specious motion practice from creditors. Neither of these "facts" come close to a basis for cause to dismiss these Chapter 11 Cases. Even if the Court were to assume that either of these claims constituted cause under Bankruptcy Code Section 1112(b), the Motion contains only 9 lines of text addressing whether dismissal is in the best interests of creditors, most of which is simply reciting the legal standard involved. The absence of even an attempt to argue that dismissal is in the best interest of creditors means the Motion is deficient on its face. The Debtors should not be forced to respond to a pleading missing such elemental facts or evidence.

PRELIMINARY OBJECTION

1. This Preliminary Objection will briefly address the Landlord's attempts to mischaracterize the terms of the Plan and applicable law. First, there are many situations in which this Court can issue either monetary or equitable relief that would fundamentally alter the economics of the underlying lease obligations. For example, if the Court enters a significant damages award in favor of Edgemere, Edgemere would be entitled to setoff such damages against future rent obligations, which would have the practical effect of restructuring the Ground Lease, dated November 5, 1999 between Edgemere and the Landlord (the "**Lease**"). Likewise, following trial in December 2022, the Court can determine the Landlord's claims (to the extent allowed) should be equitably subordinated. Equitable subordination is a possible outcome. In addition, the

litigation is still at an early stage, no answer has been filed, document discovery is in process but depositions have yet to begin, and the Landlord is taking the position it does not have to produce substantial categories of highly relevant documents under specious claims of privilege.⁴

2. Despite the Landlord's implications to the contrary, it is simply too early to assert that, as a matter of law, the Landlord's claims cannot be equitably subordinated. Nevertheless, the Motion includes such bald assertions.⁵

3. Although the Landlord accuses the Debtors of engaging in a "campaign of deception" (Motion, ¶ 1) and describes the Plan as a "public relations gambit" (Motion, ¶ 32), the Debtors proposed the Plan in an honest and zealous attempt to provide current and former residents, as well as other creditors and parties in interest, with the best possible outcome. The Plan, as proposed and negotiated, provides for, *inter alia*, significant new funds being made available by the bondholders and a reduction and restructure of the current bond obligations. The Plan further provides for substantial support from the Debtors' current nonprofit sponsor. If the Plan is confirmed, the Debtors will also be able to satisfy refund obligations to residents. Most importantly, if the Plan is confirmed, Edgemere will continue to be the place residents call home, where they will receive exceptional services and healthcare long after the Chapter 11 Cases have closed.

4. As explained in the Disclosure Statement, the Adversary Proceeding involves inherent risks and the Debtors can offer no guaranty of success with respect thereto. Of course, this is exactly the type of objection a party acting in good faith might file as an objection to a

⁴ The Debtors will imminently file a motion to compel the Landlord (and Kong Capital, LLC) to respond to discovery requests.

⁵ The Debtors' Plan does not offer the Court "illegal options to choose from[.]" notwithstanding the Landlord's colorful language in paragraph 27 of the Motion.

disclosure statement. The Plan is the Debtors' optimal path to a successful emergence from Chapter 11 with the best long-term solution to the problems that drove Debtors into Chapter 11. Although the Adversary Proceeding is critical to the Debtors' Plan, if a Successful Outcome is not accomplished, there are several alternatives that the Debtors can propose. Thus, it is simply disingenuous to state that the Plan is the only basis for the Debtors' rehabilitation and successful exit.

5. Second, the Landlord incorrectly argues dismissal is required because the occurrence of a Successful Outcome is a condition precedent to confirmation. [Motion, p. 12.] The Landlord cites authority that is distinguishable and inapposite. Indeed, not a single case cited by the Landlord supports dismissal of the Chapter 11 Cases. Rather, the precedent cited in paragraph 33 of the Motion only serves to demonstrate that the Motion is irrefutably and incredibly premature.

6. Lastly, the Landlord incorrectly argues that the Plan violates the absolute priority rule, an issue that Landlord concedes "need not be resolved" in connection with the Motion. [Motion, ¶ 40, p. 15.] The Landlord is correct as to the latter point. Plan objections, no matter how meritless, need not be addressed at this stage in the Chapter 11 Cases. Yet, the Landlord incorrectly asserts violations of the absolute priority rule, which does not apply in these Chapter 11 Cases.⁶

⁶ Because the Debtors are indisputably Texas non-profit corporations with no shareholders, there can be no equity interests inferior to secured creditors and, thus, the absolute priority rule is inapplicable. *See, e.g., In re Otero County Hospital Assoc., Inc.*, 2012 WL 5376623, Case No. 11-11-13686-JA (Bankr. N.M. 2012) (confirmation of nonprofit corporation's cramdown plan); *In re Gen. Teamsters, Warehouseman and Helpers Union Local, 890*, 225 B.R. 719, 736-37 (Bankr. N.D. Cal. 1998) ("The Absolute Priority Rule does not, by its terms, prohibit a debtor entity from retaining its own assets, and cannot, by its terms, apply to a situation such as this where the debtor has no equity security holder."); *In re Wabash Valley Power Assoc.*, 72 F.3d 1305 (7th Cir. 1995) (absolute priority rule did not apply to non-profit cooperative); *In re Independence Village, Inc.*, 52 B.R. 715, 726 (Bankr. E.D. Mich. 1985) (absolute priority rule did not apply to non-profit corporation with no shareholders).

7. No matter how unattractive the Plan is to the Landlord, the Debtors should be afforded a full and fair opportunity to accomplish their goals in these Chapter 11 Cases. Residents, who have been the Debtors' primary concern at all times in these Chapter 11 Cases, will remain so even after the Debtors have reorganized and emerged from Chapter 11. Therefore, the Debtors will continue to work toward a Successful Outcome (as defined in the Plan and Disclosure Statement) and confirmation of the Plan that, *inter alia*, proposes to assume unexpired Residency Agreements and pay refund obligations to residents in the ordinary course of business. [See Plan, §§ 4.6 and 5.1.] Just as the Debtors should be afforded a fair chance to have the Plan confirmed, the Landlord will be provided with ample opportunity to object to confirmation of the Plan. Clearly, now is not the time.

8. The Landlord simply asserts that the Chapter 11 Cases should be dismissed pursuant to Bankruptcy Code section 1112(b) "[w]here 'cause' exists, dismissing a chapter 11 case is mandatory **where such result is in the best interests of creditors and the estate . . .**" [See Motion, ¶¶ 19-20 (emphasis added).] The Landlord notes that Bankruptcy Code section 1112(b)(4) provides a non-exhaustive list of conditions that constitute cause and attempts to argue that because the Landlord believes a Successful Outcome is impossible, that constitutes "cause" to dismiss at this time. [See Motion, ¶¶ 29-41.] The attempted creation of an alternative type of "cause" is inappropriate because: (a) the Court has not yet decided whether equitable subordination is possible or the extent of monetary damages; (b) the Debtors' potential claims against the Landlord have not otherwise been resolved; and (c) even if equitable subordination is unavailable, the Debtors have other avenues of potential reorganization.

9. The Landlord further asserts that the fact the Debtors are suffering what the Landlord characterizes as "substantial, continuing losses" justifies dismissal. [See Motion, ¶¶ 42-

51.] The Landlord provides a laundry list of speculative losses, none of which rise to the level of cause required under Bankruptcy Code section 1112(b)(1). The Debtors will not dispute the fact that most debtors in possession lose money, especially in cases where debtors are forced to respond to baseless, bad-faith motion practice. However, the proposed Plan provides for, *inter alia*, the repayment of the DIP financing obligations and a consensual restructuring of the outstanding bond obligations. Excessive administrative expenses caused by the Landlord's litigation tactics can be addressed in a number of ways that will resolve additional (and objectionable) claims in the context of Plan confirmation.

10. Finally, the Landlord glosses over a rather significant component of Bankruptcy Code section 1112(b)(1) by summarily asserting that dismissal is in the best interest of creditors. [See Motion, ¶¶ 52-54.] The Landlord merely posits it is important to consider the “impact on the 375 residents of the Edgemere”. [See *id.*] The Debtors agree. Dismissal of these Chapter 11 Cases would put the residents (and all other creditors and parties in interest) at the mercy of the scorched-earth tactics of the Landlord to obtain control over the community the Debtors financed, built and have operated since inception. Indeed, if the Landlord is successful in its attempts to steal the Debtors' business, operations and improvements thirty-three years before it it is entitled to possession under the Lease, the Debtors' creditors and residents would receive nothing on account of the over \$260 million owed to them. [See Motion, ¶ 2.] There can be no greater peril to the Debtors' creditors and residents than permitting this Landlord to exercise purported remedies under a Lease that could not only eradicate the life savings of residents and the claims of creditors but could result in the immediate displacement of hundreds of senior citizens during a global pandemic.

CONCLUSION

11. The Motion is not only a premature, disguised objection to confirmation of Plan, it is another intentional attack on Edgemere's business. The Landlord will use any means – including the judicial system and the docket in these Chapter 11 Cases – to intentionally inflict additional distress on Edgemere and its residents. Presumably, the Landlord, represented by counsel, understood it was asserting Plan objections and presumably the Landlord knew what it was required to demonstrate that cause for dismissal exists under Bankruptcy Code section 1112. Although the Landlord utterly failed to meet its burden, the Landlord continued its campaign to damage the Debtors' reorganization prospects.⁷ The Landlord is proving the truth of Edgemere's assertions in the Complaint by continuing to inflict distress on residents and their families – and ultimately, to damage Edgemere's reputation and its business. Additionally, in doing so, the Landlord continues to incur unnecessary legal fees and force the Debtors to do the same, including responding to specious pleadings like the Motion. Accordingly, the Court should deny the Motion.

WHEREFORE, the Debtors respectfully request that the Court deny the Motion and grant any further relief that the Court deems just and appropriate.

Signature on the following page.

⁷ The following is a non-exhaustive list of media coverage that the Landlord accomplished by filing the Motion: Consistent with the Landlord's prepetition conduct, the Motion has resulted in such negative coverage including, but not limited to: (i) Senior Housing News (<https://seniorhousingnews.com/2022/08/16/landlord-of-embattled-lifespace-ccrc-likens-communitys-bankruptcy-plan-to-disney-fairy-tale/>); (ii) McKnight's Senior Living (<https://www.mcknightsseniorliving.com/home/news/ccrcs-bankruptcy-plan-is-pure-fantasy-landlord-says/>); (iii) Law360 (<https://www.law360.com/articles/1520871/texas-landlord-blasts-nursing-home-s-fairy-tale-ch-11-plan/>); and (iv) Reorg. (https://app.reorg.com/v3/#/items/intel/16690?item_id=187556).

Dated: August 23, 2022
Dallas, Texas

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