Trinitee G. Green (SBN 24081320)
Polsinelli PC
2950 N. Harwood, Suite 2100
Dallas, Texas 75201
Telephone: (214) 397-0030
Facsimile: (214) 397-0033
tggreen@polsinelli.com

Jeremy R. Johnson (Admitted *Pro Hac Vice*)
Brenna A. Dolphin (Admitted *Pro Hac Vice*)
Polsinelli PC
600 3rd Avenue, 42nd Floor
New York, New York 10016
Telephone: (212) 684-0199
Facsimile: (212) 684-0197
jeremy.johnson@polsinelli.com
bdolphin@polsinelli.com

COUNSEL TO THE DEBTORS AND
DEBTORS IN POSSESSION

**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) |
| | **Re: Docket No. 541** |

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

The debtors and debtors-in-possession (the "**Debtors**") in the above-captioned cases (the "**Chapter 11 Cases**") respectfully submit this 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] ("**Motion**") filed by Intercity Investment Properties, Inc. (the "**Landlord**"). The Debtors further respectfully submit that the Motion should be denied for the reasons set forth in the *Debtors' Preliminary Objection to Motion to Dismiss Chapter 11 Cases under 11 U.S.C. § 1112(b)*

[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.



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[Docket No. 564] (the "**Preliminary Objection**"), which is incorporated herein by reference in full, and stated below.

## PRELIMINARY STATEMENT

1. The Motion is one of many pleadings through which the Landlord makes irresponsible, inaccurate and misleading assertions that not only impact relationships with current residents but make it significantly more difficult to market Edgemere to prospective residents.[2] Curiously, the Motion was filed shortly after the Debtors filed their Plan (as defined below). A Plan that proposes to restructure existing secured debt to a serviceable level, preserve the life savings of residents of approximately $150 million, and commitments of substantial new capital from bondholders and the Debtors' sponsor, Lifespace Communities, Inc. ("**Lifespace**").

2. The Motion was filed to drive up cost, cause further disruption, and make it harder for the Debtors to restructure. If the Chapter 11 Cases were dismissed, it would destroy hundreds of millions in value for creditors and result in windfall for the Landlord. Dismissal would be a catastrophic and dangerous result to the detriment of virtually every creditor in these Chapter 11 Cases.

## JURISDICTION AND VENUE

3. The Court has jurisdiction over this case pursuant to 28 U.S.C. § 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2), and the Debtors confirm that they consent to the entry of a final order or judgment by the Court in connection with this Response

[2] In addition to the ever-present incendiary rhetoric, in *Intercity Investment Properties, Inc.'s Reply In Support of Motion to Stay Hearing on Debtors' Disclosure Statement* [Docket No. 615] (the "**Motion to Stay DS Hearing**"), the Landlord makes additional assertions relating to the Debtors' finances that are fundamentally flawed, including asserting that the Debtors will be administratively insolvent by the week ending November 13, 2022.

if it is determined that the Court, absent consent of the parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution.

4. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

5. The statutory and other predicates for the relief requested herein are Bankruptcy Code sections 105(a) and 1112(b).

## BACKGROUND

6. On April 14, 2022 (the "**Petition Date**"), the Debtors filed voluntary petitions commencing the Chapter 11 Cases in the United States Bankruptcy Court for the Northern District of Texas (the "**Court**").

7. The Debtors continue to operate and manage their business as debtors in possession pursuant to Bankruptcy Code sections 1107(a) and 1108.

8. On April 28, 2022, the Office of the United States Trustee (the "**U.S. Trustee**") filed a *Notice of Appointment of the Official Unsecured Creditors' Committee* [Docket No. 135]. On April 29, 2022 and May 2, 2022, the U. S. Trustee filed amended notices of appointment. [Docket Nos. 142, 150.]

### I. Adversary Proceeding

9. On the Petition Date, Debtor Northwest Senior Housing Corporation ("**Edgemere**") filed the *Complaint* [Docket No. 8; Adv. Pro. 22-03040] (the "**Adversary Proceeding**") against the Landlord and Kong Capital LLC ("**Kong**" and together with Landlord, the "**Defendants**"), wherein, in pertinent part, Edgemere alleged the Landlord committed breach of contract, promissory fraud, tortious interference with existing contractual and business relations, tortious interference with prospective contractual and business relations, and civil conspiracy with Kong, and also sought equitable subordination and reformation of lease against the Landlord.

10. On June 1, 2022, the Defendants filed the *Defendants' Motion to Dismiss for Failure to State a Claim*, asserting, among other things, that Edgemere failed to state claims upon which relief could be granted with respect to Counts 6 (Equitable Subordination) and 7 (Reformation of the Lease). [Docket Nos. 34, 35.]

11. On August 24, 2022, the Court entered the *Order Granting in Part the Defendants' Motion to Dismiss the Complaint for Failure to State a Claim* (the "**August 24 Order**"), finding, among other things, that Edgemere "pleaded plausible allegations as to the equitable subordination count in its Complaint" and Edgemere "sufficiently pleaded reformation." [Docket No. 99, p. 17, 20.]

## II. Debtors' Plan and the Disclosure Statement

12. On August 3, 2022, the Debtors filed the *Debtors' Plan of Reorganization* [Docket No. 508] (the "**Plan**") and the *Disclosure Statement for Debtors' Plan of Reorganization* [Docket No. 509] (the "**Disclosure Statement**").[3] The transactions proposed in the Plan are contingent upon the Debtors achieving one of the following outcomes with respect to the Adversary Proceeding: (i) 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 (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 (either (i) or (ii), a "**Successful Outcome**").

[3] On September 1, 2022, the Debtors filed the *Motion of the Debtors for an Order (A) Approving Disclosure Statement and (B) Granting Related Relief* [Docket No. 603], which is set for hearing on September 29, 2022.

### III. Landlord's Motion to Dismiss Chapter 11 Cases

13. On August 12, 2022, the Landlord filed the Motion, setting it for a status conference on August 24, 2022. [Docket Nos. 541, 542.]

14. Because the Landlord set the Motion for a status hearing without conferring with the Debtors, the Debtors filed the Preliminary Objection out of an abundance of caution wherein the Debtors reserved their rights in full to supplement, modify, amend and/or substitute the preliminary objection with additional filing(s) following the status hearing set for August 24, 2022. [Preliminary Objection, n.2.]

15. On August 24, 2022, the Court set a briefing schedule, establishing September 6, 2022 as the deadline for Debtors to file an objection to the Motion and September 13, 2022 as the deadline for the Landlord to file a reply in support of the Motion, but authorizing the Debtors and the Landlord to agree to extend the briefing deadlines. The Debtors and the Landlord agreed to extend each of the briefing deadlines by seven days. [Docket No. 599.]

## OBJECTION

16. The Debtors request that the Court enter an order denying the Motion and granting such further relief as the Court deems just and appropriate The Landlord has not met its heavy burden of proving that "cause" exists under Bankruptcy Code section 1112(b)(4)(A), which requires the Landlord to demonstrate by a preponderance of the evidence "a substantial or continuing loss to or diminution of the estate[s]" *and* "the absence of a reasonable likelihood of rehabilitation." 11 U.S.C. § 1112(b)(4)(A).

17. In an unsuccessful attempt to meet this burden, the Landlord argues that the Plan, in the Landlord's view, is not confirmable and, thus, rehabilitation is impossible because: (a) neither of the events constituting a Successful Outcome is permitted by the Bankruptcy Code; (b) the Plan and the refinancing transactions proposed therein are conditioned upon a Successful

Outcome in the Adversary Proceeding; and (c) the Plan does not satisfy the absolute priority rule under Bankruptcy Code section 1129(b)(2)(B) (which is inapplicable in these Chapter 11 Cases). Not only is the Landlord wrong on each of these three points, even if the Court were to consider them it should be in the context of the confirmation process, not a motion to dismiss.

18. The August 24 Order makes it clear that a Successful Outcome is a possible outcome. This cannot be disputed. Further, even if a Successful Outcome is not ultimately achieved, the Landlord incorrectly assumes there is no alternative plan that could be confirmed. The Debtors have the right to amend their Plan to propose an alternative path to reorganize the Debtors. Accordingly, the Landlord has failed to demonstrate the absence of a reasonable likelihood of rehabilitation, which is in and of itself a sufficient basis for denying the Motion. *See, e.g.*, *In re Creech*, 538 B.R. 245, 248 (Bankr. E.D.N.C. 2015) ("If the movant fails to satisfy either prong [under Bankruptcy Code section 1112(b)(4)(A)], the court must deny the motion to convert or dismiss.")

19. Even if the Landlord had met its burden with respect to the "rehabilitation" prong of Bankruptcy Code section 1112(b)(4)(A), the Landlord incorrectly (and irresponsibly) asserts that the Debtors will soon be administratively insolvent. Operating losses are not atypical in chapter 11 and these Chapter 11 Cases are no different in that regard, especially with a highly litigious creditor that is determined to steal destroy the Debtors' business. As discussed more fully below, the Landlord's purported "insolvency analysis" is incomplete and misleading and does not demonstrate substantial and continuing losses to justify dismissal of the Chapter 11 Cases. The effect of these assertions, however, is further harm to the Debtors' business operations and ability to market Edgemere to prospective residents and to scare current residents.

20. Because the Landlord failed to establish cause under Bankruptcy Code section 1112(b)(4)(A), the Court need not consider whether dismissal (versus conversion) would be in the best interest of all creditors. However, there can be no dispute that the Motion fails to include any argument that dismissal would be in the best interest of creditors. Simply put, dismissal would only be beneficial to one creditor, the Landlord, so it could proceed with its plan to take control of the Debtors' community and business and operate it for the Landlord's sole benefit. Every other creditor constituency (secured creditors, current residents, prepetition and administrative creditors) would stand to lose hundreds of millions and the Landlord would receive a windfall.

## I. A Successful Outcome Is Not Prohibited by the Bankruptcy Code and, even if it is, Debtors May Pursue Alternative Paths toward Emergence as Reorganized Debtors.

### A. *The Landlord has failed to show the Debtors have no chance of rehabilitation without violating the Bankruptcy Code.*

21. Rehabilitation of the Debtors is possible, whether through a Successful Outcome or otherwise. In the August 24 Order, the Court rejected similar arguments from the Landlord and found that the Debtors sufficiently pleaded claims for equitable subordination and reformation with respect to the Lease. As such, the Court can quickly dismiss arguments made in paragraphs 26 through 32 of the Motion. [Adv. Dkt. No. 99.]

22. For example, the Court can determine the Landlord's claims (to the extent allowed) should be equitably subordinated on account of the Landlord's intentional and outrageous misconduct. Edgemere must ultimately show that equitably subordinating the Landlord's claim (if allowed) would not be inconsistent with the provisions of the Bankruptcy Code. *See, e.g., Benjamin v. Diamond (In re Mobile Steel Co.)*, 563 F.2d 692, 700 (5th Cir. 1977). Clearly, equitable subordination is a remedy expressly provided for by the Bankruptcy Code, and, thus, is

not an "illegal option" as the Landlord emphatically asserts in paragraph 27 of the Motion. *See* 11 U.S.C. § 510(c).

23. Even if the Debtors are not ultimately able to achieve a Successful Outcome, the Debtors can and will propose an alternative path toward confirmation in these Chapter 11 Cases. For example, if the Court awards a substantial judgment against the Landlord as a remedy to the Debtors for the damage caused by the Landlord's brazen attempts to destabilize Edgemere, any award from such judgement can be used to fund an alternative Chapter 11 plan. Accordingly, the Landlord's attempts to demonstrate, by a preponderance of the evidence, that rehabilitation is not possible in these Chapter 11 Cases have completely failed and the Motion can be denied without further consideration.

B. *The contingent nature of the Successful Outcome does not require dismissal of the Chapter 11 Cases.*

24. Dismissal is not required simply because the occurrence of a Successful Outcome is a condition precedent to confirmation of the Plan proposed by the Debtors. A review of the case law relied upon by the Landlord makes it abundantly clear that the Landlord is overreaching in its assertions set forth in paragraphs 33 through 37 of the Motion. To illustrate, the Landlord relies on the following cases, which only highlight that the Motion is irrefutably and incredibly premature:

- In *In re American Capital Equipment, LLC,* the debtors sought confirmation of a plan that incorporated asbestos claim settlements, and the court denied confirmation and converted the case to chapter 7 because the debtors, after ***five*** bites at the apple, had failed to resolve the express concerns of the court that included, ***among other things***, speculative litigation proceeds as a source of funding for the fourth amended plan. 688 F.3d 145, 158-61 (3d Cir. 2012).

- In *In re Biz as Usual, LLC,* the court granted a United State Trustee's motion to dismiss a "troubled case" commenced by a debtor that had missed deadlines, among other things, because the debtor's ***fifth*** amended plan was not confirmable where, ***among other things***, the Plan depended on highly contested and undeveloped

litigation (that the debtor had delayed prosecuting, without justification). 627 B.R. 122, 130-33 (Bankr. E.D. Pa. 2021).

- In *In re DCNC N. Carolina I, LLC*, the court dismissed a single asset real estate case that was filed for litigation tactics on the eve of foreclosure, and the court acknowledged chapter 11 plans are not *per se* infeasible simply because success is contingent on the outcome of litigation. 407 B.R. 651, 667 (Bankr. E.D. Pa. 2009). The court accepted "for purposes of argument" that "in appropriate circumstances, the proceeds or other relief requested in pending litigation can provide the means to effectuate a chapter 11 plan" but found this unhelpful to the debtor because the lawsuit had been "dismissed on the merits." *Id.*

- In *In re Rey*, the court found cause existed for a host of reasons, including the debtors having no income to fund a plan, notwithstanding litigation listed on their schedules but indicated that the outcome would be different if there was a "solid basis for believing [such] litigation [was] highly likely to generate large sums of money quickly[.]" No. 04-B-35040, 2006 WL 2457435 at *7 (Bankr. N.D. Ill. Aug. 21, 2006).

- In *In re Burford*, the individual debtor's plan was not confirmed because it was dependent "almost entirely [on] speculative recovery from various lawsuits[,]" No. 88-00364-C(T), 1991 WL 237820 (Bankr. N.D. W. Va. Apr. 15, 1991).[4]

C. *The Absolute Priority Rule is inapplicable in these Chapter 11 Cases.*

25. 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. *See* Motion ¶ 40, p. 15. Setting aside that objections to the Plan are premature and improper at this juncture, the absolute priority rule does not apply in these Chapter 11 Cases. 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)

[4] *Burford* is a 1-page written decision that offers essentially no analysis as to the court's feasibility finding much less the underlying facts of the case and, therefore, is not particularly meaningful precedent.

("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).

26. Further, the proposed treatment of the claims held by Lifespace, is wholly appropriate and will be addressed at Plan confirmation.

**II. The Debtors' Estates Are Not Suffering Substantial, Continuing Losses Such that the Debtors Cannot Successfully Reorganize in these Chapter 11 Cases and the Landlord's Irresponsible Assertions of Administrative Insolvency Are Unfounded and Inaccurate.**

27. To justify dismissal of an "embryonic reorganization proceeding" like these Chapter 11 Cases, the Landlord was required to show that the Debtors "would continue to sustain losses or diminish the estate if the reorganization effort is permitted to proceed and that there exists no reasonable likelihood of rehabilitation." *See In re Garland Corp.*, 6 B.R. 456 (1st Cir. BAP 1980) (rejecting committee request to convert even though "the debtor's own projections clearly evidenced the near certainty of short-term operating losses" because there "existed a reasonable likelihood that the debtor could be rehabilitated."). Even if the Landlord had satisfied its burden to show "the absence of a reasonable likelihood of rehabilitation," which it has not, the Landlord's assertions of "administrative insolvency" are unfounded and inaccurate. Such assertions are not only misleading to the Court, but they serve to alarm current residents and deter prospective residents.

28. The Landlord contends, based largely on speculation and flawed assumptions, that the Debtors lack sufficient resources to reach a Successful Outcome *See* Motion, ¶ 45; Motion to

Stay DS Hearing, ¶ 11.[5] In support of the Motion, the Landlord offers no insolvency analysis whatsoever. Instead, the Landlord focuses primarily on professional fees, and, in particular, the professional fees of Debtors' counsel. It is true that Debtors' counsel has not taken advantage of the ability to file monthly fee statements that would permit Polsinelli PC to receive monthly payments on account of services rendered in these Chapter 11 Cases.[6] Counsel for Debtors will submit the first interim fee application as required and any issues relating to professional fees will be addressed under applicable orders of this Court and in the context of Plan confirmation. The reality is that the Debtors are paying their postpetition liabilities to creditors in the ordinary course as such amounts come due and owing.[7] Even the Landlord implicitly concedes as much in arguing that the Debtors "will soon be unable to meet their postpetition obligations." *See* Motion, ¶ 45.

29. Although the Landlord offers no insolvency analysis in support of the Motion, to correct the disinformation in the Landlord's purported projections attached to the Motion to Stay DS Hearing as Exhibit A, the Landlord's analysis is incorrect because, among other things, the purported "insolvency analysis"

(i) does not take into account that management fees due to Lifespace, the Plan sponsor, are being deferred under the Plan;

(ii) disregards net entrance fees of approximately $6,500,000 through July 2022 (and an additional $648,562 in projected net entrance fees through November);

[5] The Landlord's litigation tactics in these Chapter 11 Cases (and the Adversary Proceeding) are clearly designed to make the process as expensive and lengthy as possible for the Debtors. To express concern about the Debtors' continued ability to fund the Chapter 11 process is undoubtedly disingenuous and self-serving.

[6] The *Order Establishing Procedures for Interim Compensation and Reimbursement of Expenses of Professionals* [Docket No. 401]] does not obligate Polsinelli PC (or any other professional) to file monthly fee statements, which permits monthly payments to be made on account of services rendered prior to the filing and approval of interim fee applications pursuant to Bankruptcy Code sections 330 and 331.

[7] Any payments that have not been made timely has been the result of invoices being improperly or untimely submitted for payment and/or the result of human error in submitting paperwork through the Debtors' accounting and cash management system.

(iii) accrues the full amount of real estate taxes that will not be due until January 2023;

(iv) assumes the full amount of escrowed rent, which is the subject of dispute with the Debtors, will ultimately be allowed;

(v) provides a baseless value of only $500,000 for furniture, as no appraisal has been conducted and the book value is approximately three times the purported value amount;

(vi) fails to take capital expenditures into account to the extent they increase the value of furniture;

(vii) overstates November expenses by approximately $300,000; and

(vii) includes $585,000 due to residents that relate to postpetition entrance fees received and deposited in the escrow.[8]

30. As the Court is aware from other pleadings in these Chapter 11 Cases, the Landlord destabilized the Debtors' operations to gain access to the Debtors' buildings and run the business for its own benefit thirty-three years before it was entitled to do so. Postpetition, the Landlord has doubled down on their prepetition tactics to continue to damage the Debtors ability to operate. The Landlord has continued to file pleadings containing inflammatory language apparently designed to obtain negative press coverage.[9] Each of these pleadings is designed to make it more difficult for the Debtors to operate their business and stabilize the Debtors' community.

31. The Debtors have secured DIP financing through December 31, 2022 and are negotiating additional financing with UMB Bank, N.A., the Debtors' DIP lender. The proposed Plan proposed provides substantial funding to enable the Debtors to reorganize in these Chapter

[8] The "insolvency analysis" is not a real solvency analysis and this is intended to be only a nonexhaustive list of inaccuracies with respect thereto.

[9] The Court will further recall that, at the very outset of these Chapter 11 Cases, the Landlord filed a confidential report as an exhibit to *Intercity Investment Properties, Inc.'s Motion for Adequate Protection* [Docket No. 60] that included confidential information. In a disturbing coincidence, that confidential information was then used by the Dallas Morning News in an article critical of the Edgemere and the entrance fee CCRC model.

11 Cases, and, ultimately, to overcome and survive the damage that the Landlord has done to the Debtors' business.

### III. The Court Should Not Dismiss (or Convert) the Chapter 11 Cases Because the Landlord Has Failed to Demonstrate Cause, as Required by Bankruptcy Code section 1112(b), And To Dismiss (or Convert) Would Not Be in the Best Interest of Creditors and the Debtors' Estates.

32. Section 1112(b) provides for conversion or dismissal, whichever is in the best interests of creditors and the estate, once "cause" has been established. *See* 11 U.S.C. § 1112(b). For the reasons discussed above, the Landlord has failed to overcome the initial hurdle of establishing cause exists under Bankruptcy Code 1112(b)(4). Accordingly, neither dismissal nor conversion of the Chapter 11 Cases is appropriate and the Court need not consider whether dismissal (rather than conversion) would be in the best interest of the creditors and the Debtors' estates.

33. Even if the Court is inclined to consider the Landlord's conclusory assertions at the end of the Motion, dismissal of these Chapter 11 Cases would not be in the best interest of the Debtors' creditors and estates. *See* Motion, ¶¶ 52-54. Dismissal would further only the Landlord's interests while leaving residents (and all other creditors and parties in interest) in peril. *See In re Superior Siding & Window, Inc.*, 14 F.3d 240 (4th Cir. 1994) (In determining what is in the best interest of creditors for purposes of Bankruptcy Code section 1112(b) once a "cause" is established, courts must "consider the interests of *all* of the creditors."); *In re Kearney*, 625 B.R. 83 (B.A.P. 10th Cir. 2021) (same); ***see also*** Alan N. Resnick & Henry J. Sommer, 7 *Collier on Bankruptcy* ¶ 1112.04[7] (16th ed. 2011) (**"**[T]he court should evaluate and choose the alternative that would be most advantageous to the parties and the estate as a whole."). Indeed, courts have "an independent obligation under § 1112 to consider what would happen to all creditors on dismissal and, in light of its analysis, whether dismissal or conversion would be in the best interest

of all creditors, not just the largest and most vocal creditor." *In re Bowers Investment Company*, LLC, 553 B.R. 762, 777 (Bankr. D. Alaska 2016).

34. Here, the Landlord requests dismissal so that it can attempt to enforce provisions in the Lease that are void and unenforceable as against public policy and the result of a mutual mistake, as alleged in the Complaint. Said differently, the Landlord asks this Court to dismiss the Chapter 11 Cases so that it can: (a) obtain possession of the Debtor's CCRC complex that was built by the Debtors and financed by UMB Bank, N.A. and a home to nearly 400 people; and (b) operate the business (or convert it to another use) free and clear of approximately $120 million in secured debt and $150 million in refund obligations to residents, which in many cases represents their life savings. Dismissal or conversion of these Chapter 11 Cases would be devastating to virtually every creditor constituency except the Landlord, who would receive a windfall and be rewarded for its tortious attacks on its not for profit tenant.

35. In deciding what will best serve the interests of creditors, courts often consider a combination of numerous factors. *See, e.g., In re Green Box NA Green Bay, LLC*, 579 B.R. 504 (Bankr. E.D. Wis. 2017) (10 factors) (citation omitted); *In re Sandia Resorts, Inc*., 562 B.R. 490 (Bankr. D. N.M. 2016) (13 factors). The Landlord did not discuss the standard for determining whether dismissal (or conversion) is in the best interest of the creditors and, similarly, did not mention a single one of the factors typically considered by courts in making such a determination. The Landlord did not even cite to any legal authority in support of the bald assertion that dismissal of these Chapter 11 Cases would be in the best interest of the Debtors' creditors and estates. Thus, the argument cannot be considered and should be deemed forfeited. *See e.g., In re Khan*, 2021 WL 5121894 (Bankr. N.D. Ill. Sept. 7, 2021) ("Parties moving for relief must provide a legal argument warranting that relief, and the argument must be 'bolstered by relevant legal

authority' . . . . Arguments a party makes with no supporting legal authority are forfeited.") (citation omitted).

36. A plan of reorganization need not be "attractive to be effective." *In re Independence Village, Inc*., 52 B.R. 715, 726 (Bankr. E.D. Mich. 1985) (rejecting argument that facility had "no hope of reorganization" since a "severe cramdown" was possible because the absolute priority rule did not apply). No matter how unattractive the Plan is to the Landlord, the Debtors should be afforded a full and fair opportunity to confirm the Plan (or such other plan that the Debtors negotiate with their stakeholders), which the Debtors submit is in the best interest of the creditors and the Debtor's estates. Nothing in the Motion supports the Landlord's attempt to cut off the Debtors' rights to try the Adversary Proceeding and proceed toward confirmation.

**RESERVATION OF RIGHTS**

37. The Debtors reserve all rights, claims and causes of action against the Landlord (and Kong) in the Chapter 11 Cases, the Adversary Proceeding, or otherwise. Without limiting the foregoing, the Debtors reserve the right to request an evidentiary hearing with respect to the Motion and, in particular, issues relating to the Debtors' solvency in these Chapter 11 Cases.

**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 following page*]

Dated: September 13, 2022
Dallas, Texas

**POLSINELLI PC**

/s/ *Trinitee G. Green*

Trinitee G. Green (SBN 24081320)
2950 N. Harwood, Suite 2100
Dallas, Texas 75201
Telephone: (214) 397-0030
Facsimile: (214) 397-0033
tggreen@polsinelli.com

– and –

Jeremy R. Johnson (Admitted *Pro Hac Vice*)
Brenna A. Dolphin (Admitted *Pro Hac Vice*)
600 3rd Avenue, 42nd Floor
New York, New York 10016
Telephone: (212) 684-0199
Facsimile: (212) 684-0197
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AND DEBTORS IN POSSESSION