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**COUNSEL FOR THE OFFICIAL
COMMITTEE OF UNSECURED CREDITORS**

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

In re:

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

Debtors.

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Chapter 11

Case No. 22-30659 (MLV)

Jointly Administered

**OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS'
TO THE DEBTORS' MOTION TO EXTEND PLAN EXCLUSIVITY**

[Relates to Docket No. 534]

¹ The Debtors in these chapter 11 cases (the “**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) (together, the “**Debtors**”). The Debtors’ mailing address is 8523 Thackery Street, Dallas, Texas 75225.



The Official Committee of Unsecured Creditors (the “**Committee**”) hereby files its Objection (the “**Objection**”) to the *Debtors’ Motion for Entry of an Order Extending the Exclusivity Period for the Filing of a Chapter 11 Plan* [Docket No. 534] (“**Exclusivity Motion**”)² and respectfully states as follows:

I.
PRELIMINARY STATEMENT

1. These bankruptcy proceedings are at a very difficult stage. There are no attractive paths forward. Unsecured creditors, including the former and current residents, currently find themselves faced with three (3) less-than-perfect plan options.

A. The Debtors’ Plan

2. The Debtors filed their proposed Plan of Reorganization (the “**Debtors’ Plan**”) on August 3, 2022. The Debtors’ Plan essentially provides for the Landlord Litigation to be tried first and, if there is a “Successful Outcome” (defined in paragraph 20 hereof) and the Debtors’ Ground Lease is materially modified, Edgemere will reorganize, continue operating utilizing an entrance fee model, and will refund existing residents’ entrance fees (i.e. deposits) from new resident deposits. The Committee would, of course, love to see the Landlord Litigation tried, a Successful Outcome obtained, and the Debtors’ Plan confirmed before the DIP Loan matures on December 31, 2022. Regretfully, putting aside the risk of litigation, it does not currently appear possible for the Debtors to try the lawsuit, to obtain a Successful Outcome, and to confirm their Plan before their DIP Loan matures on December 31, 2022.

3. Since a “Successful Outcome” is a condition precedent to the Plan, the Debtors originally requested and obtained an expedited trial setting for the Landlord Litigation in December 2022. The Debtors also agreed to a December 31, 2022 maturity date of their DIP Loan.

² Capitalized terms not defined herein shall have the meanings ascribed to them in the Motion.

The Debtors have recently announced that they are not prepared to go to trial in December and, accordingly, have filed a motion to reschedule the trial for February 13, 2023. The Landlord has requested the trial to be rescheduled for April 2023.

4. The Debtors have also filed the Exclusivity Motion asking this Court to extend their plan exclusivity period by 180 days through February 8, 2023 (which is not long enough if the trial commences February 13, 2023). As a result, the Debtors need: (i) DIP Loan maturity date extended from December 31, 2022 to at least March 31, 2023, and (ii) to borrow an additional \$6 million to fund the three (3) month extension.

5. The DIP Lenders have refused to extend the maturity date, and refused to advance an additional \$6 million to fund an extension. Accordingly, the Debtors must either (i) find a new lender to take out the existing DIP Lenders and to advance an additional \$6 million, or (ii) go to trial in December (which they admit they are not prepared to do), obtain a Successful Outcome, and confirm their Plan before December 31, 2022.³ Since neither of those alternatives are possible, the Debtors will not be able to confirm their Plan by December 31, 2022 when they lose their DIP financing.

6. Even if the Debtors could locate a new DIP lender, extending exclusivity for six (6) months is not in the best interest of creditors and these estates. The Debtors' occupancy (currently approximately 65%) will continue to drop the longer Edgemere is in Chapter 11. The Debtors have only added one (1) new resident since filing bankruptcy in April, and they continue to lose residents in the normal course due to natural attrition. Competition and negative publicity will only make it more difficult to attract new residents while in bankruptcy. Accordingly, the Committee

³ When the Landlord Litigation is tried, the Bankruptcy Court will issue proposed Findings of Facts and Conclusions of Law, which must then be sent to the District Court for review and entry of a judgment. The Landlord then has an opportunity to appeal, thereby potentially delaying the finality of any judgment for many months or years.

believes that exclusivity should be allowed to terminate and all parties should be allowed to propose plan that will allow Edgemere to operationally exit bankruptcy as soon as possible.

B. The Bondholders' Plan

7. The Committee understands that the Debtors' secured/DIP lenders (the "**Bondholders**") have refused to extend the DIP Loan maturity and to advance an additional \$6 million to finance an extension of the Landlord Litigation trial date and the bankruptcy cases for another three (3) months. The Committee further understands that the Bondholders intend to oppose the Debtors' request to extend exclusivity, and are therefore interested in filing a Bondholder sponsored plan (the "**Bondholder Plan**"). Exclusivity should not be extended, thereby allowing competing plans to be filed.

8. The Committee has started very preliminary discussions with the Bondholders about what that plan might entail. Certain aspects of those discussions are appealing—the assumption of the Ground Lease, providing the ability to exit bankruptcy expeditiously to begin rebuilding Edgemere's occupancy rates, as well as a proposal to transfer the Landlord Litigation into a litigation trust that would allow the Landlord Litigation to be tried on a more realistic schedule. The Committee looks forward to engaging the Bondholders in further discussions and negotiations that may ultimately yield a confirmable plan that will protect the residents, preserve the Edgemere's operations, and allow the Debtors to emerge from bankruptcy a stronger enterprise with a sustainable business model.

9. However, whether the anticipated Bondholder Plan will be acceptable to the Committee and other constituents is not certain. For example, if the Landlord believes the proposed reorganized Debtors are over-leveraged, the Landlord may object to the assumption of the Ground Lease, arguing that the proposed reorganized Debtors cannot provide adequate assurance of future performance, as is necessary to assume the Ground Lease.

C. Contingency Plan and an Alternative Landlord Plan

10. While, as stated above, the Committee looks forward to working with the Bondholders on the terms of a Bondholder Plan, the Committee cannot place all its eggs in that basket. Prudence demands that the Committee—as the statutory representative of creditors holding \$159 million in claims against the Debtors’ estates—must explore *all* possible avenues. Included in that is a contingency “safety net” plan for a worst-case scenario where no proposed plan is confirmed, and the estate runs out of money, requiring the Court to allow the Landlord to terminate the Ground Lease and re-acquire possession of its property. This is the Committee’s primary concern, as it should be the primary concern of everyone involved in these Chapter 11 Cases.

11. With that in mind, the Committee has approached the Landlord to begin discussions to formulate a worst-case scenario contingency plan. Unfortunately, but understandably given the substance and allegations of the Landlord Litigation, the Landlord will not engage in such negotiations due to fear that the Debtors and/or the Bondholders will accuse it of improper conduct merely for speaking to the Committee, despite the fact that such discussions are exactly what the Bankruptcy Code was intended to facilitate. To assuage these concerns, the Committee requested that the Debtors and Bondholders agree to hold the Landlord and related parties harmless for any such discussions, with the understanding that the Committee itself has no reason to engage in any improper schemes, regardless what others may think of the Landlord.

12. The Debtors and the Bondholders have, to date, refused to agree to the Committee’s request, leaving the Committee with no choice but to seek Court intervention. The Committee believes it has a fiduciary duty to “hope for the best, but plan for the worst.” In the Committee’s opinion, the Committee must begin negotiations with the Landlord to develop a worst-case scenario contingency plan for the continued operations of the facility. Accordingly, the Committee

has or is in the process of filing a request for this Court to enter an order allowing the parties to discuss alternative and contingency plans in good faith and consistent with the spirit of the chapter 11 bankruptcy process without fear of additional litigation.

II.

BACKGROUND

A. The Bankruptcy Filing

13. On April 14, 2022 (the “**Petition Date**”), the Debtors each filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code and filed the Landlord Litigation. The Debtors are operating their businesses and managing their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No request for the appointment of a trustee or examiner has been made.

14. On April 28, 2022, the United States Trustee for the Northern District of Texas appointed the Committee in these Chapter 11 Cases, as amended on April 29, 2022 and May 2, 2022.

B. The DIP Loan

15. The Debtors have agreed to, and entered into a DIP Loan that matures on December 31, 2022.

C. The Plan and Disclosure Statement

16. On August 3, 2022, the Debtors filed their *Plan of Reorganization* [Docket No. 508] and the *Disclosure Statement* in support thereof [Docket No. 509]. The Disclosure Statement was initially set for hearing on September 29, 2022 but has since been continued indefinitely.⁴

17. The Debtors have stated to this Court:

- a. “Edgemere’s efforts to restructure its financial affairs... hinge upon the resolution of its claims [in the Landlord Litigation].”⁵

⁴ See Docket No. 625.

⁵ See Debtors’ Response to Intercity Investment Properties, Inc.’s Expedited Motion to Extend Answer Deadline [Docket No. 16] (“**Debtor’s Extension Response**”) at 3 ¶5.

- b. The Debtors' Plan is expressly subject to and conditioned upon a "Successful Outcome" of the Landlord Litigation.

18. A "Successful Outcome" is defined in the Debtors' Plan as:

- a. An extension of the lease by at least 25 years and reduction of the rent from \$4.2 million per year to no more than \$2.2 million per year (a reduction of rent over the extended term of approximately \$114 million), or
- b. No extension of the lease term but a reduction of the rent over the remaining term from approximately \$134 million to no more than \$20 million (again, a reduction of rent by approximately \$114 million).

See Debtor's Proposed Plan, Section 4.1, p. 20.

19. On September 9, 2022, the Debtors filed a Motion to Amend the Scheduling Order to reschedule the trial of the Landlord Litigation from December 2022 to February 2023.

D. The Exclusivity Motion

20. On August 11, 2022, the Debtors filed their *Motion of Debtors for Entry of an Order Extending the Exclusivity Period for the Filing of a Chapter 11 Plan* [Docket No. 534] (the "**Exclusivity Motion**") seeking an extension of 180 days (through February 8, 2023) of the Debtors' exclusive period for obtaining acceptances of and confirming the Debtors' Plan.⁶ The Exclusivity Motion further states that "[T]he Debtors believe the Adversary Proceeding can and should be decided before the Debtors proceed to confirmation on the Plan," acknowledging that, while the Plan has been filed, confirmation cannot occur until after the litigation with the Landlord has been concluded.

⁶ See Exclusivity Motion at 2, ¶ 3.

III.
OBJECTION TO EXCLUSIVITY MOTION

A. Applicable Legal Standard

21. The Bankruptcy Code establishes an initial 120-day period during which only a debtor may file a plan and a corresponding 180-day period for the debtor to solicit acceptances of the plan. *See* 11 U.S.C. § 1121(b), (c). A court may extend this period, but only "for cause." 11 U.S.C. § 1121(d)(1); *see also In re Curry Corp.*, 148 B.R. 754, 756 (Bankr. S.D.N.Y. 1992) ("debtor must make a clear showing of 'cause' to support an extension of the exclusivity period"). It is left to the court to determine whether sufficient "cause" exists to warrant extension of exclusivity. *See In re Timbers of Inwood Forest Assoc., Ltd.*, 808 F.2d 363, 372 (5th Cir. 1987).

22. "The law does not favor extensions of the exclusivity period and courts may not routinely grant an extension." *In re Southwest Oil Co. of Jourdan, Inc.*, 84 B.R. 448, 450 (Bankr. W.D. Tex. 1987). Indeed, it is well established that "a request to either extend or reduce the period of exclusivity is a serious matter" and "such a motion should 'be granted neither routinely nor cavalierly.'" *In re All Seasons Indus., Inc.*, 121 B.R. 1002, 1004 (Bankr. N.D. Ind. 1990) (quoting *In re McLean Indus., Inc.*, 87 B.R. 830, 834 (Bankr. S.D.N.Y. 1987)); *see also In re PineRun Trust, Inc.*, 67 B.R. 432, 434 (Bankr. E.D. Pa. 1986) ("both the language and purpose of [Section 1121(d)] require that an extension not be granted routinely"); *In re Parker St. Florist & Garden Ctr., Inc.*, 31 B.R. 206, 207 (Bankr. D. Mass. 1983) ("the [c]ourt should not routinely grant an extension").

23. The Fifth Circuit has not enumerated specific elements underlying the analysis, but it has opined that:

[A]ny bankruptcy court involved in an assessment of whether "cause" exists should be mindful of the legislative goal behind § 1121 [and] avoid reinstituting the imbalance between the debtor and its creditors that characterized proceedings under the old Chapter XI. Section 1121 was

designed, and should be faithfully interpreted, to limit the delay that makes creditors the hostages of Chapter 11 debtors.

Timbers, 808 F.2d at 372.

24. It is the Debtors' burden to establish cause. *See In re Washington-St. Tammany Elec. Co-op., Inc.*, 97 B.R. 852, 854 (E.D. La. 1989); *see also In re New Millennium Mgmt, LLC*, No. 13-35719, 2014 WL 792115, at *6 (Bankr. S.D. Tex. Feb. 25, 2014). Even where the burden is met, "the Court must also balance potential harm to [other constituents] when determining whether to grant an extension." *Southwest Oil*, 84 B.R. at 453.

25. Although section 1121(d) of the Bankruptcy Code does not define "cause," courts have promulgated a multi-factor balancing test to guide their inquiry in determining whether cause exists sufficient to extend exclusivity. Such factors include:

- i. the size and complexity of the case;
- ii. the necessity of sufficient time to permit the debtor to negotiate a plan of reorganization and prepare adequate information;
- iii. the existence of good faith progress toward reorganization;
- iv. the fact that the debtor is paying its bills as they become due;
- v. whether the debtor has demonstrated reasonable prospects for filing a viable plan;
- vi. whether the debtor has made progress in negotiations with its creditors;
- vii. the amount of time which has elapsed in the case;
- viii. whether the debtor is seeking an extension of exclusivity in order to pressure creditors to submit to the debtor's reorganization demands; and
- ix. whether an unresolved contingency exists.

See In re Express One Int'l, Inc., 194 B.R. 98, 100 (Bankr. E.D. Tex. 1996) (citing *In re Washington-St. Tammany Electric Co-op.*, 97 B.R. at 853).

26. Further, in determining when to extend exclusivity, courts have considered whether "sophisticated and substantial parties who are fully aware of the cost and expense of presenting a plan of reorganization in a complex chapter 11 proceeding ... intend to present alternative plans in this proceeding when permitted to do so." *See In re Pub. Serv. Co. of NH*, 99 B.R. 155, 175 (Bankr. D.N.H. 1989). Indeed, the filing of alternative plans might serve as the "only" force to drive the parties toward consensus. *Id.* at 175 (recognizing that "the only recent movement toward an agreement" was spurred by "activity of alternative plan proponents"); *Cf.* 7/28 H'g Tr. 142:24-143:1 (the adversarial process "is what makes our system better than anybody else's, I just think you get there and you get the right results").

B. Extension of Exclusivity Is NOT IN THE BEST Interest of Creditors

27. The Debtors cannot meet their burden of proof that cause exists to extend exclusivity. A proper analysis of the applicable factors weighs against granting the Exclusivity Motion. The increasing concerns over administrative insolvency, the decline in occupancy, and the inability of the Debtors to timely achieve a Successful Outcome in the Landlord Litigation which they have made a condition precedent to their Plan, clearly dictate that exclusivity should be allowed to terminate to allow competing plans to be proposed and filed.

28. Edgemere cannot afford to remain in bankruptcy for an additional three (3) months (beyond the December 2022 DIP maturity). The financial cloud hanging over Edgemere has and will continue to reduce Edgemere's occupancy, which has and will continue to depress operating revenues. Edgemere must operationally exit bankruptcy as soon as possible in order to begin rebuilding occupancy and revenues.

29. The DIP Lenders' refusal to extend maturity and to loan additional funds to the estates leads to the inescapable conclusion that the Debtors' Plan – to try the Landlord Litigation and obtain a Successful Outcome before its Plan can be confirmed – will simply not work.

30. The Bondholders want exclusivity terminated, presumably so they can file a Bondholder Plan that provides for the assumption of the Ground Lease, which will allow Edgemere to operationally exit bankruptcy before a trial of the Landlord Litigation. The Landlord Litigation can then be tried on a more realistic schedule.

31. If the Landlord is interested in proposing a Landlord Plan, the Committee must be able to discuss and negotiate terms and provisions of a Landlord Plan in accordance with its fiduciary duties and the spirit of the chapter 11 bankruptcy process. In addition, the Committee and the Landlord must be allowed to begin discussions to formulate a worst-case scenario contingency plan in the event the Landlord's Ground Lease is terminated and the Landlord re-acquires possession of the property. The Debtors have refused to provide the Landlord with their consent enabling the Landlord to commence those discussions without the threat of litigation.

32. The Committee is increasingly concerned with the Debtors' refusal: (i) to assist the Committee in negotiating a contingency plan to ensure the continued operation of the facility in a worst case scenario; and (ii) to provide the Committee with information necessary to fulfill its fiduciary duties.⁷ The Committee feels the Debtors' refusal to collaborate with the Committee and to provide information to the Committee are restricting its ability to fulfill its fiduciary duties to creditors. This conduct should not be rewarded by an extension of exclusivity, which holds all parties hostage to the Debtors' Plan.

IV. RESERVATION OF RIGHTS

33. The Committee reserves all rights to present any evidence to establish the contents of this Objection (including any one or more factors cited in the applicable legal standard section) and negate the allegations presented by any party related to this contested matter. The Committee

⁷ See the Committee's Objection to the Debtors' Motion to Amend the Protective Order [Docket No. ____].

reserves all rights to present any additional legal authorities to support the positions asserted in this Objection and disprove the allegations presented by any party related to this contested matter.

V.
CONCLUSION

34. Accordingly, the Committee objects to the Exclusivity Motion and, based on the facts as they currently exist, believes that it is in the best interest of the estates to allow parties in interest, including the Landlord, to negotiate and file competing plans. The threat or actual filing of, alternative competing plans might serve as the only force to drive the parties toward a consensus in these contentious proceedings. The Debtors should not be allowed to use exclusivity, as well as their control of information, to hold creditors hostage to the Debtors' Plan.

Dated: September 22, 2022

Respectfully submitted,

FOLEY & LARDNER LLP

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading was served electronically by the Court's PACER system on September 22, 2022.

/s/ Stephen A. McCartin

Stephen A. McCartin