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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 No. 534**

OBJECTION OF THE TRUSTEE AND DIP LENDER TO THE MOTION OF DEBTORS FOR ENTRY OF AN ORDER EXTENDING THE EXCLUSIVITY PERIOD FOR THE FILING OF A CHAPTER 11 PLAN

UMB Bank, N.A., as successor master trustee and successor bond trustee (together, the "**Trustee**") and debtor-in-possession lender (the "**DIP Lender**") to the above-captioned debtors and debtors in possession (the "**Debtors**"), through its undersigned counsel, files this objection (this "**Objection**") to the Debtors' *Motion of Debtors for Entry of an Order Extending the*

[1] The Debtors in the 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). The Debtors' mailing address is 8523 Thackery Street, Dallas, Texas 75225.

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Exclusivity Period for the Filing of a Chapter 11 Plan [Docket No. 534] (the "**Exclusivity Motion**"), which seeks an extension of the Debtors' chapter 11 plan exclusivity period (the "**Exclusivity Period**") by 180 days. In support of the Objection, the Trustee and DIP Lender respectfully state as follows:[2]

PRELIMINARY STATEMENT

1. The DIP Lender, the Trustee, and the Committee supported the Debtors' Plan when it was filed. However, recent developments threaten the viability of that Plan, including delays that will likely prolong the Adversary Proceeding and exacerbate the Debtors' capital needs. At this point, alternative exits to these cases need to be allowed to proceed. Accordingly, the DIP Lender and the Trustee object to the Debtors' Exclusivity Motion because (a) exclusivity will not materially move these cases forward and instead will hinder progress, (b) parties in interest will benefit from having an alternative chapter 11 plan to consider, especially given the contingent nature of the current Plan and the Debtors' reluctance to explore other potential alternatives, and (c) the Debtors' financial condition necessitate termination of exclusivity and a quicker exit from chapter 11. Given the major constituencies in these cases—the DIP Lender, Trustee, and Committee—object to the extension of exclusivity, the Exclusivity Motion should be denied so that the parties can move toward an alternative path which will resolve the operational challenges facing the Debtors.[3] Alternatively, the DIP Lender, Trustee and Committee, which collectively represent the majority of the creditor interests in these cases, should be granted co-exclusivity with the Debtors.

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

[3] The Landlord objected to the Exclusivity Motion at Docket No. 602 asking that the Exclusivity Period end on the earlier of the Court's ruling on the Motion to Dismiss (August 24, 2022) or December 12, 2022, and the Committee objected to the Exclusivity Motion at Docket No. 634 stating that exclusivity should be allowed to terminate.

ARGUMENT

A. The Debtors Must Demonstrate Cause Exists to Warrant Extending the Exclusivity Period.

2. Section 1121 of the Bankruptcy Code gives a debtor the exclusive right to file a plan within the first 120 days after filing its petition and, if such plan is filed, 180 days (running concurrently) in which to obtain acceptances of the plan. 11 U.S.C. §§ 1121(b)-(c). The legislative history of Section 1121 shows that Congress intended for debtors in most cases to negotiate a chapter 11 plan within 120 days of the petition date to protect creditors' interests and encourage the efficient administration and speedy conclusion of a chapter 11 case:

> [Section 1121] recognizes the legitimate interests of creditors, whose money is in the enterprise as much as the debtor's, to have a say in the future of the company. [Section 1121] gives the debtor an exclusive right to propose a plan for 120 days. In most cases, 120 days will give the debtor adequate time to negotiate a settlement, without unduly delaying creditors.

H.R. Rep. No. 95-595, at 231-32 (1978), as reprinted in 1978 U.S.C.C.A.N. 5963, 6191; *see also In re Tony Downs Foods Co.*, 34 B.R. 405, 407-08 (Bankr. D. Minn. 1983) (observing that Congress intended limited exclusivity to impose pressure on debtors to push the reorganization process forward). "This provision curbs the unfair disadvantage to creditors of giving the debtor perpetual exclusive rights to initiate a plan." *Jasik v. C.S. Conrad (In re Jasik)*, 727 F.2d 1379, 1382 (5th Cir. 1984). In these cases, the Debtors filed the Plan on August 3, 2022, 111 days after the Petition Date, and the 180-day solicitation period is set to expire on October 11, 2022—it is clear the Debtors will not solicit the Plan by such date given the current obstacles.

3. After the debtor's initial exclusive period has expired, any "party in interest" may file a plan, unless the debtor demonstrates "cause" exists to extend its exclusivity period. 11 U.S.C. § 1121(c); *see also In re Cent. Jersey Airport Servs.*, LLC, 282 B.R. 176, 184 (Bankr. D.N.J. 2002) ("While the granting or denial of [an exclusivity extension] request is within the discretion of the

bankruptcy court, the moving party bears the burden of proving that 'cause' exists justifying the grant of an extension."). The Debtors bear the burden of establishing "cause" to extend their exclusivity rights. *In re Mirant Corp.*, Case No. 04-CV-476-A, 2004 WL 2250986, at *2 (N.D. Tex. Sept. 30, 2004). To sustain their burden of proof, the Debtors must make "an affirmative showing of cause, supported by evidence . . . ." *In re R.G. Pharmacy, Inc.*, 374 B.R. 484, 487 (Bankr. D. Ct. 2007) (*citing In re Parker Street Florist & Garden Center, Inc.*, 31 B.R. 206, 207 (Bankr. D. Mass. 1983)); *In re Borders Group, Inc.*, 460 B.R. 818, 821 (Bankr. S.D.N.Y. 2011) (noting that "[f]or the moving party to meet its burden it must produce affirmative evidence to support a finding of cause.").

4. Courts will deny a debtor an extension where, as here, insufficient cause is shown, particularly when an extension will not move the case toward a reorganization or other chapter 11 exit. *See, e.g., In re GMG Capital Partners III, L.P.*, 503 B.R. 596, 601 (Bankr. S.D.N.Y. 2014) (observing that "courts have not hesitated to deny a first motion to extend exclusivity where the circumstances warrant it."); *In re Washington-St. Tammany Elec. Co-op., Inc.*, 97 B.R. 852, 854 (E.D. La. 1989) (finding no cause was shown warranting an extension); *In re Tony Downs Foods Co.*, 34 B.R. at 405 (same); *see also In re Mirant Corp.*, 2004 WL 2250986, at *2 (observing that "[i]n virtually every case where an extension has been granted, the debtor showed ***substantial*** progress has been made in negotiations toward reorganization.") (emphasis added).

5. "Cause" as used in Section 1121(d) is not defined within the Bankruptcy Code. Courts have considered a variety of factors when considering whether "cause" exists to extend a debtor's exclusivity rights, including but not limited to:

(a) the size and complexity of the case

(b) the necessity of sufficient time to permit the debtor to negotiate a plan of reorganization and prepare adequate information;

(c) the existence of good faith progress toward reorganization;

(d) the fact that the debtor is paying its bills as they become due;

(e) whether the debtor has demonstrated reasonable prospects for filing a viable plan;

(f) whether the debtor has made progress in negotiations with its creditors;

(g) the amount of time which has elapsed in the case;

(h) whether the debtor is seeking an extension of exclusivity in order to pressure creditors to submit to the debtor's reorganization demands; and

(i) whether an unresolved contingency exists.

See In re Express One Int'l, Inc., 194 B.R. 98, 100 (Bankr. E.D. Tex. 1996); *see also In re Adelphia Commc'ns Corp.*, 352 B.R. 578, 586-87 (Bankr. S.D.N.Y. 2006) (applying the *Express One* factors to determine whether "cause" exists).

6. The analysis is not "simply a question of adding up the number of factors," and certain factors may be more relevant or important than others based on the facts and circumstances present in each case. *See Bunch v. Hoffinger Indus., Inc. (In re Hoffinger Indus., Inc.)*, 292 B.R. 639, 644 (B.A.P. 8th Cir. 2003). The "primary consideration" is whether termination of the debtor's exclusive periods "would move the case forward materially, to a degree that wouldn't otherwise be the case." *In re Adelphia Commc'ns Corp.*, 352 B.R. at 590.

7. Here, cause does not exist to extend exclusivity because (a) exclusivity will not materially move these cases forward and instead will hinder progress, (b) parties in interest will benefit from having an alternative chapter 11 plan to consider, especially given the contingent nature of the current Plan and the Debtors' reluctance to explore other potential alternatives, and (c) the Debtors' financial condition necessitate termination of exclusivity and a quicker exit from chapter 11. Further, every major party in interest objects to the relief requested in the Exclusivity Motion.

B. Cause does not Exist because Extension will not Materially Move these Cases Forward.

8. Extending the Exclusivity Period will not materially move these cases forward and instead will impair the ability of the Debtors to exit bankruptcy. Approval of the Disclosure Statement and solicitation of the Plan are the clear next steps in these cases, but neither is likely to occur during the proposed extended Exclusivity Period because the Adversary Proceeding will likely remain unresolved.

9. As this Court is aware, the Plan is intimately tied to the result of the Adversary Proceeding. *See* Exclusivity Motion at ¶ 35 (conceding that "the Adversary Proceeding is an unresolved contingency that will affect the Debtors' ability to confirm the Plan.") The Plan's success was always predicated on a tight timeline given the Debtors' precarious financial situation. However, for a variety of reasons, progress in the Adversary Proceeding has slowed, as best demonstrated by the Debtors' request to extend various Adversary Proceeding deadlines. *See Motion to Modify Amended Scheduling Order* [Adv. Docket No. 137] (requesting an extension of the existing litigation schedule by approximately sixty days, with trial to commence on or about February 13, 2023). Further, the Landlord has stated that it will appeal any Successful Outcome (as defined by the Plan) and anticipates that "the two specific 'Successful Outcomes,' described by the Plan will not be known for years." *See Intercity Investment Properties, Inc.'s Motion to Dismiss Chapter 11 Cases Under 11 U.S.C. § 1112(b)* [Docket No. 541]. Therefore, it is possible that the Adversary Proceeding will not be resolved during the proposed extension period, which necessarily impacts the timing of disclosure statement consideration and plan solicitation.

10. As has also been noted, the Adversary Proceeding timeline was partly premised on the Debtors' funding needs, which funding the DIP Lender agreed to provide subject to a December 31, 2022 maturity date. Notwithstanding the maturity date, the Debtors determined that it was necessary to extend the Adversary Proceeding deadlines without any meaningful discussions

with the DIP Lender. Now the Debtors find themselves in a predicament given their funding matures on December 31, 2022 and they are no closer to resolving these bankruptcy cases given the requested extension of the trial date.

11. Further, given the timing issues with the Adversary Proceeding, it is unlikely that the Disclosure Statement will be approved and that the Plan will be solicited prior to the conclusion of the proposed extended Exclusivity Period on February 8, 2023. Therefore, the exclusivity extension will not advance these cases but rather will set the stage for another round of discussions and objections and yet another requested exclusivity extension. *See In re Adelphia Commc'ns Corp.*, 352 B.R. at 588 (observing that where a debtor has filed a plan and disclosure statement, a request to extend exclusivity is concerned with less with "the time to negotiate and file a plan" but rather "the time to solicit acceptances to it."). Given these circumstances, the Exclusivity Motion should be denied.

C. Cause does not Exist because Parties in Interest will Benefit from Having Competing Plans.

12. While the Debtors are focused on obtaining a Successful Outcome in the Adversary Proceeding, the DIP Lender, Trustee and Committee—representing virtually all of the Debtors' remaining creditors—should have the opportunity to negotiate and solicit an alternative chapter 11 plan. Courts have regularly held that "creditors, whose money is invested in the enterprise no less than the debtor's, have a right to a say in the future of that enterprise." *In re Timbers of Inwood Forest Assoc., Inc.*, 808 F.2d 363, 372 (5th Cir. 1987).

13. Courts have further held that the potential for an alternative, confirmable creditor-sponsored plan of reorganization justifies terminating exclusivity. *See, e.g., In re Situation Mgmt. Syst.*, 252 B.R. 859, 865 (Bankr. D. Mass. 2000) (terminating exclusivity to give creditors option to choose between competing plans); *In re Dave's Detailing, Inc.*, 2015 Bankr. LEXIS 2528, at

*65 (Bankr. D. Ind. July 30, 2015) (ordering "termination of exclusivity provides an open market for competition in the form of competing plans"). This is especially true in these cases where the Debtors' Plan is contingent on litigation, the outcome of which is inherently unpredictable.

14. Further, there may be an alternative plan that is in the best interest of the estates that the Debtors are reluctant to propose. Specifically, the Debtors are unlikely to pursue a plan that is not supported by its sponsor, Lifespace. However, the Debtors' and Lifespace's interests are not fully aligned, nor their considerations completely consistent. Lifespace has reputational concerns, as a sponsor for other communities, and other issues that differ from the Debtors and the estates. Therefore, even if such alternative plan maximizes creditor recoveries and preserves and stabilizes the operations of the community, it may not be proposed by the Debtors and therefore will only be available if proposed by a third-party after termination of exclusivity. Given the very unique circumstances of these cases, it is in the best interest of all parties to have alternatives to consider.

15. Finally, the Debtors will not be prejudiced if exclusivity is terminated, as the Debtors will still be permitted to pursue and advocate for their Plan. *See, e.g., In re Tony Downs Food Co.*, 34 B.R. at 407. As stated by one court denying a first request to extend exclusivity, "by denying the extension, the Court does not prejudice the debtors' coexistent right, nor dilute the debtors' duty to file a plan." *In re Southwest Oil Co. of Jourdanton*, 84 B.R. 448, 454 (Bankr. W.D. Tex. 1987); *see also In re Grossinger's Assoc.*, 116 B.R. 34, 36 (Bankr. S.D.N.Y. 1990) ("[L]oss of plan exclusivity does not mean that the debtor is foreclosed from promulgating a meaningful plan of reorganization; only that the right to propose a chapter 11 plan will not be exclusively with the debtor."). Indeed, "the prospect of a competing plan may stimulate movement towards a consensual plan." *In re Henry Mayo Newhall Mem'l Hosp.*, 282 B.R. 444, 453 (B.A.P.

9th Cir. 2002); *see also Bank of Am. v. 302 N. LaSalle Street P'ship*, 526 U.S. 434, 457 (1999) (explaining that permitting competing plans is one method of ensuring that the estate is exposed to the marketplace and may increase creditor dividends).

D. Cause does not Exist because the Debtors' Financial Condition does not Support an Extension.

16. The Debtors' financial condition further justifies denial of the Exclusivity Motion. While the Debtors are not administratively insolvent, they are reliant on the DIP Financing. The current DIP Financing obligations are due and payable on December 31, 2022. *See* Final DIP Order at ¶ 9(iv). As this Court is aware, the Debtors have requested an extension of the DIP Financing maturity date and additional funding for the first quarter of 2023. However, at this time, the DIP Lender is unwilling to modify the maturity date or provide additional funding.

17. Given the Debtors' projected limited funds beyond December 31, 2022, the Debtors' proposed exclusivity extension should be denied to allow the parties to submit an alternative plan. *See In re Southwest Oil Co. of Jourdanton*, 84 B.R. at 453 (denying an extension of exclusivity periods because, among other things, the debtor's financial condition was deteriorating and observing that an extension would jeopardize creditors' interests); *see also In re Pub. Serv. Co. of New Hampshire*, 99 B.R. 155, 176 (Bankr. D.N.H. 1989) (considering "the substantial administrative costs and delay costs being incurred as these proceedings drag on" in denying exclusivity extension); *In re Sharon Steel Corp.*, 78 B.R. 762, 766 (Bankr. W.D. Pa. 1987) (denying a debtor's first request to extend exclusivity period for lack of cause and noting that "[t]he leverage accorded to the debtor by the period of exclusivity must give way to the legitimate interests of other parties in interest so that progress toward an effective reorganization of the debtor may be enhanced before it is too late."). The Debtors have not identified any additional sources of funding beyond December 31, 2022, and the Debtors' estates will deteriorate without additional

funding in place (especially if the Adversary Proceeding is prolonged, as expected). Terminating exclusivity will help ensure that alternative exits to these chapter 11 cases are explored in a timely fashion, before the Debtors run out of funding.

E. Alternatively, the Court should Grant Co-Exclusivity to the Trustee and the Committee.

18. Alternatively, if the Court wishes to grant the Exclusivity Motion in part, the DIP Lender and Trustee request that they, along with the Committee, be granted co-exclusivity to submit their own plan of reorganization. The Exclusivity Period is designed to provide a debtor, in the beginning of a chapter 11 case, with "the unqualified opportunity to negotiate a settlement and propose a plan of reorganization without interference from creditors and other interests."" *U.S. Bank Nat'l Assoc. v. Wilmington Trust Co. (In re Spansion, Inc.)*, 426 B.R. 114, 139-140 (Bankr. D. Del. 2010) (citing *In re Texaco, Inc.*, 81 B.R. 806, 809 (Bankr. S.D.N.Y. 1988)). The Exclusivity Period is intended as a shield for the debtor to formulate a confirmable plan of reorganization. To date, the Trustee, the DIP Lender, and the Committee have worked with the Debtors to chart a path forward, including by supporting the Debtors' currently filed Plan. The purpose of the Exclusivity Period has thus been fulfilled.

19. But, given the contingent nature of the Plan, the various Adversary Proceeding delays, and the fact that a reliable long-term plan for the community and its residents is needed, the Trustee, the DIP Lender, and the Committee should be granted co-exclusivity with the Debtors to explore and propose other potential options. Courts have modified a debtor's exclusivity period to allow select parties in interest to file alternative plans of reorganization. *See, e.g., In re Consolidated Land Holdings, LLC*, No. 19-bk-04760 [Docket No. 557] (Bankr. M.D. Fla. July 7, 2020) (order granting a secured creditor's motion to terminate the debtor's exclusivity period); *In re Bi-Lo LLC*, No. 09-02140 HB, 2010 WL 5140036, at *7-8 (Bankr. D. S.C. Aug. 5, 2010)

(granting an exclusivity extension for the debtors and permitting a creditors' committee to file a competing plan of reorganization and disclosure statement); *In re Crescent Mfg. Co.*, 122 B.R. 979, 982 (Bankr. N.D. Ohio) (allowing the debtors an additional five weeks for exclusivity and allowing a creditors' committee to file competing plan after four weeks into the debtors' exclusivity period); *In re Integrated Resources, Inc.*, 135 B.R. 746, 748 (Bankr. S.D.N.Y. 1992), *aff'd*, 147 B.R. 650 (S.D.N.Y. 1992) (observing that "with the desire to ameliorate the then-existing impasse to a consensual plan, [the] Court terminated the application of the exclusive period as to the Creditors' Committees.").

20. For example, in *In re United Press Intern.*, the court adopted a "middle-path" approach to the debtors' exclusivity period to the creditors' committee and one other creditor by "opening up the right to file a plan on a limited basis to those two entities (besides the Debtor itself) that have the most at stake in this case and have shown themselves to be responsible parties, while refraining from opening the floodgates completely." *In re United Press Intern.*, 60 B.R. 265, 271 n. 12 (Bankr. D.C. 1986). The court found Section 105(a) of the Bankruptcy Code permitted this approach. *Id.* at 271, n. 12 (observing that "Section 105(a) authorizes this Court to 'issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of the Bankruptcy Code; § 1107(a) states that the rights and powers of a debtor in possession are '[s]ubject to such limitations or conditions as the court prescribes . . . ' and § 1121(d) authorizes the court to 'reduce or increase' the debtor's exclusivity period 'for cause.'"). Similarly here, permitting the Debtors, the DIP Lender, the Trustee and the Committee (collectively, representing the majority of creditors in these cases) to propose options for all parties in interest to consider will be beneficial to the estates. Therefore, if the Court is inclined to grant the Exclusivity Motion,

the Court should also modify the Exclusivity Period to permit the DIP Lender, the Trustee and the Committee co-exclusivity to pursue and propose alternative exits to these cases.

CONCLUSION

21. For the forgoing reasons, the Trustee and DIP Lender respectfully requests that the Court enter an order (i) denying the relief requested in the Exclusivity Motion or, in the alternative, grant co-exclusivity to the Trustee, the DIP Lender, and the Committee, and (ii) granting such other relief that the Court may deem appropriate.

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Dated: September 23, 2022

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 23, 2022, a true and correct copy of the foregoing Objection was served via electronic notification upon all parties that are registered or otherwise entitled to receive electronic notices in these cases pursuant to the ECF procedures in this District.

/s/ J. Frasher Murphy
J. Frasher Murphy