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

In re:	)	
	)	Chapter 11
	)	
NORTHWEST SENIOR HOUSING	)	Case No. 22-30659 (MVL)
CORPORATION, <i>et al.</i> <sup>1</sup>	)	
	)	(Joint Administration Requested)
Debtors.	)	
	)	

**INTERCITY INVESTMENT PROPERTIES, INC.’S OBJECTION TO: (I) TRUSTEE  
AND DIP LENDER’S MOTION FOR ENTRY OF AN ORDER AUTHORIZING AND  
APPROVING THE STALKING HORSE ASSET PURCHASE AGREEMENT; AND (II)  
THIRD AMENDED PLAN OF REORGANIZATION OF THE PLAN SPONSORS  
DATED DECEMBER 19, 2022**

Intercity Investment Properties, Inc. (the “Landlord”) files this Objection to: (a) the *Motion of Trustee and DIP Lender for Entry of an Order (I) Authorizing and Approving the Bidding Procedures; (II) Authorizing and Approving the Stalking Horse Asset Purchase Agreement; (III) Approving Procedures Related to the Assumption of Certain Executory Contracts and Unexpired Leases; (IV) Scheduling Combined Confirmation and Sale Hearing; and (V) Granting Related Relief* (the “Sale Motion”) [Dkt. 755] and (b) the *Third Amended Plan of Reorganization of the*

<sup>1</sup> The Debtors in these chapter 11 cases, (the “Bankruptcy”) along with the last four digits of each Debtor’s federal tax identification number, are Northwest Senior Housing Corporation (1278) (the “Edgemere”) and Senior Quality Lifestyles Corporation (2669) (“SQLC”). The Debtors’ mailing address is 8523 Thackery Street, Dallas, Texas 75225.



*Plan Sponsors Dated December 19, 2022* (the “Plan”) [Dkt. 933].<sup>2</sup> In support of the Objection, the Landlord submits the *Declaration of Nicholas P. Hannon in Support of Intercity Investment Properties, Inc.’s Objection to: (I) Trustee and DIP Lender’s Motion for Entry of an Order Authorizing and Approving the Stalking Horse Asset Purchase Agreement and (II) Third Amended Plan of Reorganization of the Plan Sponsors Dated December 19, 2022* (the “Hannon Decl.,” a copy of which is attached hereto as Exhibit A) and the *Declaration of Daniel Polsky in Support of Intercity Investment Properties, Inc.’s Objection to: (I) Trustee and DIP Lender’s Motion for Entry of an Order Authorizing and Approving the Stalking Horse Asset Purchase Agreement and (II) Third Amended Plan of Reorganization of the Plan Sponsors Dated December 19, 2022* (the “Polsky Decl.”)<sup>3</sup> and states as follows:

#### **PRELIMINARY STATEMENT**

In order to allow for the assumption and assignment of the Lease, approve the Sale Motion, and confirm the Plan, the Court must find that the Plan Sponsors and Purchaser have met all applicable burdens and requirements of the Bankruptcy Code, including but not limited to those set forth in sections 365 and 1129.

The Plan Sponsors and Purchaser have failed to meet their burden on these requirements because, among other things:

- Neither Debtors nor Purchaser have demonstrated adequate assurance of future performance of Lease obligations in that Purchaser is a newly-formed and undercapitalized special purpose entity with no evidence of binding, non-discretionary committed capital to fund operating losses, deferred maintenance, or capital expenditures;

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<sup>2</sup> Capitalized terms used but not defined herein shall have the meaning set forth in the Plan or Sale Motion, as the case may be.

<sup>3</sup> The Polsky Decl. is being filed under seal.

- Purchaser does not commit to assume the Lease *cum onere*, choosing instead to “cherry-pick” its obligations through an asset purchase agreement that attempts to exclude the assumption of any liabilities that arise before the “Closing Date;”
- Purchaser has failed to provide any meaningful credit enhancements as requested by Landlord and required under section 365(l) of the Bankruptcy Code, in that (i) Purchaser has offered no obligation or commitment that the Landlord could enforce, such as a security deposit, a letter of credit, an escrow, etc., and (ii) the proposed commitment to Purchaser lacks enforcement mechanisms even for Purchaser and expressly disclaims third-party beneficiaries;
- The Long Hill business model and financial projections are unrealistic (as discussed in greater detail in Appendix A and exhibits, filed under seal);
- Debtors’ estate may not have sufficient resources (primarily in the form of sales proceeds) available for cure of both monetary and non-monetary default—the amount of the total funds that will be necessary to cure is presently unknown, both because further investigation and work is necessary in order to cure the non-monetary property condition defaults, and also because the extent of the pecuniary loss related to the fees and expenses incurred by the Landlord has not yet been determined and continues to accrue;
- The Plan improperly values the Bond Claims at the amount of the net sale proceeds, notwithstanding the fact that the collateral securing such claims is of little or no value; and
- The Plan is not feasible in that it is dependent on a substantial contribution from Lifespace—Lifespace was recently placed on a “Rating Watch Negative” by Fitch Ratings, lost an aggregate \$118,561,000 in the last two years alone, and is unlikely to be able to raise the substantial amounts necessary to fund the requisite settlement contribution.

In short, the Lease cannot be assumed and assigned, the Sale Motion should be denied, and confirmation of the Plan cannot be granted.

## **BACKGROUND**

### **A. The Parties**

1. The Edgemere is a Texas non-profit corporation that is the operator of the Edgemere, a CCRC located in Dallas, Texas. The Edgemere operates its business at the leased premises, located at 8523 Thackery Street, Dallas, Texas 75225 (and more particularly described

in the Lease, the “Property”) pursuant to that certain Ground Lease, effective November, 1999 (the “Lease”), by and between the Edgemere and the Landlord.

2. The Landlord is a Texas corporation, with its primary office in Dallas, Texas.

3. Lifespace Communities, Inc. (“Lifespace”), an Iowa non-profit corporation, is the sole member and, pursuant to the that certain Management Services Agreement (the “Management Agreement”), dated August 15, 2019, by and between the Edgemere and Lifespace, manager of the Edgemere. The Edgemere and Lifespace shall be referred to collectively as the “Obligated Group.”

4. UMB Bank, N.A., is the: (a) successor master trustee (the “Master Trustee”, and collectively with the hereinafter defined Bond Trustee, the “Trustee”) under that certain Amended and Restated Master Trust Indenture, Deed of Trust and Security Agreement, dated as of November 15, 1999 and effective as of April 1, 2006, by and between JPMorgan Chase Bank, National Association, in its capacity as initial master trustee (the “Prior Master Trustee”) and the Edgemere and SQLC,<sup>4</sup> as supplemented by that certain Supplemental Indenture Number 4, dated as of May 1, 2015, and as further supplemented by that certain Supplemental Indenture Number 6, dated as of March 1, 2017 (collectively, as amended and supplemented, the “Master Indenture”); (b) the successor bond trustee (the “2015 Bond Trustee”) under that certain Amended and Restated Master Trust Indenture, Deed of Trust and Security Agreement, dated as of May 1, 2015, (the “2015 Bond Indenture”) by and between the Tarrant County Cultural Education Facilities Finance Corporation (the “Issuer”) and The Bank of New York Mellon Trust Company, National Association, in its capacity as initial bond trustee; and (c) successor bond trustee (the “2017 Bond Trustee,” and together with the 2015 Bond Trustee, the “Bond Trustee”) under that certain

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<sup>4</sup> Lifespace is the successor to SQLC.

Indenture of Trust, dated as of March 1, 2017, (the “2017 Bond Indenture”) by and between the Issuer and The Bank of New York Mellon Trust Company, National Association, in its capacity as initial bond trustee. The forgoing, along with any document executed in connection with the foregoing, shall be referred to collectively as the “Bond Documents” and the Edgemere’s obligations to pay the Bond Trustee under the Bond Documents shall be referred to collectively as the “Bond Obligations.” The Trustee and UMB Bank, N.A., in its capacity as a lender under the DIP Credit Agreement (the “DIP Lender”) shall be referred to herein as the “Initial Plan Sponsors.”

5. Bay 9 Holdings LLC (“Bay 9” or “Purchaser”), a Delaware limited liability company. The sole member of Bay 9 is Grenelle Holding LLC (“Grenelle”). The sole member of Grenelle is Lapis Municipal Opportunities Fund IV LP (“Lapis IV”). Accordingly, for all of its claims of billions of assets and funds under management in its initial offering on December 16, 2022, Lapis Advisors LP, (“Lapis”) previously referred to as “Sponsor,” is making no commitment to Bay 9. In fact, in more recent documentation, provided February 13, 2023, Lapis IV has replaced Lapis as the new offering “Sponsor.”

## **B. The Sale Motion and Plan**

### **1. The Sale Motion**

6. On November 2, 2022, the Initial Plan Sponsors filed the Sale Motion, seeking, *inter alia*, to sell the Property to a third-party purchaser, subject to competitive bidding and to be authorized by a plan of reorganization.<sup>5</sup>

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<sup>5</sup> At first, the Initial Plan Sponsors filed their own plan. Thereafter, the Debtors became co-sponsors of the Plan along with the Initial Plan Sponsors.

7. On December 19, 2022, the Initial Plan Sponsors filed that certain *Asset Purchase Agreement* dated as of December 16, 2022 (the “APA”), by and between Edgemere, as Seller, and Bay 9, as Purchaser [Dkt. 937].

8. The deadline to submit competing bids was February 3, 2023 (the “Bid Deadline”) [Dkt. 946]. No party submitted a competing bid and, as a result, Bay 9 is the “Purchaser” as defined in the Plan and Sale Motion.

## 2. The Plan

9. On December 19, 2022, the Debtors and the Initial Plan Sponsors (collectively, now, the “Plan Sponsors”) filed the Plan [Dkt.933]. The Plan is not confirmable for the following reasons:

### (a) Assumption and Assignment of the Lease – Cure and Adequate Assurance

10. The Sale Motion and the Plan are both predicated on the assignment and assumption of the Lease. To assume and assign the Lease, section 365(b) of the Bankruptcy Code requires that the Debtors cure all monetary and nonmonetary defaults and provide the Landlord adequate assurance. Under sections 2.3(a) and 5.5(a) of the APA, the Debtors and the Purchaser agreed that the Debtors would be responsible for satisfying the cure requirements of section 365(b) and the Purchaser would be responsible for satisfying the adequate assurance requirements of section 365(b). Regardless of delegation of duties, neither party has satisfied its burden.

11. The Court has already heard evidence of numerous defaults<sup>6</sup> at the bifurcated cure hearing on both property condition and pecuniary loss. The existence and numerosity of these

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<sup>6</sup> Debtors have been in default under the Lease from the Petition Date through the date hereof given their failure to: (i) include rent in the initial cash collateral budgets [Dkts. 35 and 303]; (ii) timely pay rent for the period May 1, 2022 through December 31, 2022 (the “Late Rent Period”); (iii) pay (and continued failure to pay) late fees associated during the Late Rent Period; (iv) maintain the property as required by section 5.8 of the Lease; and (v)

Existing Lease Defaults demonstrate how challenging it has been for Debtors to operate the Edgemere.

12. On December 23, 2022, the Landlord filed its *Notice of Intercity Investment Properties, Inc.'s Statement Regarding Lease Cure Amount* (the "Initial Cure Statement") [Dkt. 965] on account of the Existing Lease Defaults. On January 2, 2023, the Initial Plan Sponsors filed their *Emergency Motion to Strike Intercity Investment Properties, Inc.'s Statement Regarding Lease Cure Amount and for Extension of Sale and Confirmation Deadlines* [Dkt. 982].

13. On January 6, 2023, the Initial Plan Sponsors filed their *Objection to Intercity Investment Properties, Inc.'s Statement Regarding Lease Cure Amount* [Dkt. 1007]. On January 9, 2023, the Debtors filed their *Joinder to The Initial Plan Sponsors' Objection to Intercity Investment Properties, Inc.'s Statement Regarding Lease Cure Amount* [Dkt. 1009].

14. On January 10, 2023, the Landlord filed its *Amended Statement of Cure Claims With Respect to Existing Defaults Under Lease Pursuant to 11 U.S.C. § 365(b)(1)(A)* (the "Amended Cure Statement") [Dkt. 1023]. On January 19, 2023, the Initial Plan Sponsors filed their *Supplemental Objection to Intercity Investment Properties, Inc.'s Amended Statement of Cure Claims with Respect to Existing Defaults Under Lease Pursuant to 11 U.S.C. § 365(b)(1)(A)* (the "Supplemental Cure Objection") [Dkt. 1066] and the Debtors filed their *Joinder to The Initial Plan Sponsors' Supplemental Objection to Intercity Investment Properties, Inc.'s Amended Statement*

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provide a tenant estoppel certificate required by section 9.14 of the Lease. The foregoing shall be referred to collectively as the "Specific Lease Defaults." Further, the Debtors have caused the Landlord to incur millions in professional expenses through their failed attempts to, among other things: (i)(a) rewrite the terms of the Lease in the Debtors' Plan of Reorganization filed on August 3, 2022 [Dkt. 508] and in Counts VI and VII of the Landlord Litigation and (b) clearly and unequivocally commit to timely pay real estate taxes (before paying such taxes on the deadline); and (ii) defend against unsubstantiated claims that the Landlord and Kong violated a nondisclosure agreement that was required by the Debtors in order to provide information to Landlord in connection with the Debtors' attempt to rewrite the Lease. The foregoing shall be referred to collectively as the "Lease Enforcement Expenditures" and collectively with the Specific Lease Defaults, the "Existing Lease Defaults."

*of Cure Claims with Respect to Existing Defaults Under Lease Pursuant to 11 U.S.C. § 365(b)(1)(A)* (the “Debtor Cure Joinder”) [Dkt. 1067].

15. On January 20, 2023, the Landlord filed its *Response to Cure Claim Objections* (the “Cure Response”) [Dkt. 1078], replying in support of the Initial Cure Statement and Amended Cure Statement and in opposition to, among other filings, the Supplemental Cure Objection and the Debtor Cure Joinder.

16. On January 17, 2023, the Court entered its *Amended Plan and Sale Deadlines* [Dkt. 1056]. Pursuant to the Amended Plan and Sale Deadlines, the Court trifurcated the Cure and Adequate Assurance process as follows:

1. The Property Condition Cure.

17. Over the last four (4) years, the following entities have had at least partial access to the Property to perform a property assessment: The Building Consultant (“TBC”), Plante Moran Living Forward (“Plante”), Terracon Consultants, Inc. (“Terracon”), and ARCH Consultants, Ltd. (“Arch” and together with TBC, Plante, and Terracon shall be referred to collectively as the “Property Consultants”).

18. On January 23-24, 2023, the Court conducted a hearing on the existence of nonmonetary defaults caused as a result of property condition of the Edgemere. On February 6, 2023, the Court issued its oral decision (the “Property Condition Ruling”) (*see* February 6, 2023 Transcript of Proceedings at 21:13-30:14; a copy of which is attached hereto as Exhibit B) finding that the following repairs defaults and conditions must be addressed as part of the cure:

- (a) corroded copper pipe (Tr. 21:17-20);
- (b) structural support beams to the cooling tower (Tr. 22:16-17);
- (c) severely dented gutter (Tr. 23:6-9);
- (d) calibration carbon monoxide detectors (if needed) (Tr. 24:15:25:20); and



- (e) repair the torn membrane and remove the sheet metal and related debris from the roofs (Tr. 27:20-21).

(collectively, the “Required Property Cure”). Other property issues must be further investigated:

- (a) garage expansion joint (Tr. at 25:13:26:10) (“I’m going to allow for the option of the Debtor or the winning bidder to retain such an expert. The Court will review a copy of the expert’s findings and determine if a default exists under the lease or if this is perhaps an adequate assurance issue”); and
- (b) stucco: (Tr. at 29:4-8) (“I’m going to order the Debtor to hire an EIFS or stucco expert to examine the stucco façade of each building on the property and investigate the cause of the cracking and staining and to determine whether there is any delamination, soil shifting, or water intrusion”); (Tr. 29:14-30:3) (“This investigation shall include destructive testing if the expert finds it appropriate and necessary. Once that investigation is performed, the Court would like to see a summary of the expert’s findings so as to ascertain if the issues are simply cosmetic or symptomatic of more serious problems. At that point, if an agreement cannot be reached between the estate and the winning bidder as to next steps and/or an appropriate reserve for repairs or restoration, the Court will order the parties to get two or more guaranteed maximum price estimates from contractors to do the work based on the expert report. The parties can then set a follow-up hearing and I will decide whether a default exists such that a cure reserve is appropriate and the amount of any reserve for the façade repair or restoration”).

The foregoing shall be referred to as the “Potential Property Cure,” and collectively with the Required Cure, the “Property Cure.” A third bucket of property conditions were determined not to be presently existing nonmonetary defaults required to be cured in order to assume or assign the Lease:

- (a) cooling tower (“cooling towers as a functional mechanical system are in a poor state. They function, but...They are not in a state of failure because the cooling towers themselves still function.”) (Tr. 21:21-25);
- (b) gutters and splash guards (“The Court recognizes that the absence of splash guards could eventually cause damage to the roofs or façade.”) (Tr. 23:3-5);
- (c) uneven sidewalks (Tr. 23:10-20);
- (d) retaining wall (Tr. 23:25-24:14); and
- (e) roof issues except as set forth above (Tr. 26-9:27:18).

(collectively, and together with any other repairs that arose prior to the Effective Date and are not repaired prior to the Effective Date, regardless of whether or not identified by the Property Consultants, the “Future Repairs”). Importantly, the Court did not find the Future Repairs or other repairs identified by the Property Consultants were not necessary, but rather that the Debtors do not have to repair (or reserve for the repairs) as a part of the cure required under section 365(b) of the Bankruptcy Code.

2. The Pecuniary Loss Cure.

19. On February 7, 2023, the Initial Plan Sponsors filed their *Pretrial Brief Objecting to Fees and Expenses Asserted by Intercity Investment Properties, Inc. as Section 365(b) Pecuniary Damages* [Dkt. 1166] and Debtors filed their *Joinder to the Initial Plan Sponsors' Pretrial Brief Objecting to Fees and Expenses Asserted by Intercity Investment Properties, Inc. as Section 365(b) Pecuniary Damages* [Dkt. 1177] (collectively, the “Plan Sponsors Pecuniary Loss Briefs”), attempting to completely disavow themselves of the millions of dollars of legal and other fees and expenses that they caused Landlord to incur in order to enforce the Lease.

20. On February 9, 2023, the Landlord filed its *Pre-Hearing Brief on Pecuniary Cure Claim* [Dkt.1181], refuting the Plan Sponsors’ Pecuniary Loss Briefs and demonstrating why all of its fees and expenses were incurred on account of the Debtors’ ongoing breach (since September 2021) of the Lease and the Plan Sponsors’ unyielding (and unsuccessful) efforts to re-write the Lease.

21. On February 13-14, 2023, the Court held a hearing on the pecuniary loss cure. The Court has not issued a ruling on the pecuniary loss cure as of the date hereof. Assuming the Court finds that the Debtors must pay all or a portion of the Landlord’s fees and expenses, such amount shall be referred to as the “Pecuniary Loss Cure” and together with the Property Cure, the “Cure.”

22. The amount of the Cure will not be known until: (i) the Debtors are able to quantify the amount of the costs necessary to address the Required Property Cure; (ii) the Debtors and/or Purchaser provide the Court with the information it requested in connection with the Potential Property Cure and the Court determines what amounts, if any, must be added to the Required Property Cure; and (iii) the Court determines the amount of the Pecuniary Loss Cure. The Lease, therefore, cannot be assumed and assigned under section 365(b) of the Bankruptcy Code unless the full amount of the potential Cure including each of those three components is adequately reserved for in the Cure Escrow.

3. Adequate Assurance.

23. On December 16, 2022, Purchaser provided Landlord with its initial adequate assurance package (the “Initial Adequate Assurance Package”). On December 30, 2022, the Landlord filed its *Objection to Adequate Assurance Provided by Stalking Horse Bidder* (the “Adequate Assurance Objection”) [Dkt. 980]. Thereafter, in response to Landlord’s Requests for Production and Interrogatories, Purchaser provided additional information, including the information described on Appendix A. Appendix A has been filed under seal because the financial information provided by Bay 9 APA and was provided to Landlord on a confidential basis.

24. On February 9, 2023, Bay 9 filed its *Response to Intercity Investment Properties, Inc.’s Objection to Adequate Assurance Provided by Stalking Horse Bidder and in Support of the Sale Transaction* (the “Bay 9 AA Response”) [Dkt. 1175], the Debtors filed their *Joinder to Bay 9 Holdings LLC’s Response to Intercity Investment Properties, Inc.’s Objection to Adequate Assurance Provided by Stalking Horse Bidder and in Support of the Sale Transaction* [Dkt. 1176], and the Initial Plan Sponsors filed their *Limited Response and Joinder to Bay 9 Holdings LLC’s Response to Intercity Investment Properties, Inc.’s Objection to Adequate Assurance Provided by*

*Stalking Horse Bidder and in Support of the Sale Transaction* (“Initial Plan Sponsors AA Response”) [Dkt. 1177].

25. It was not until the filing of the Bay 9 AA Response that the Landlord learned for the *first time* that Lapis IV:

- (a) intends on transferring \$55 million to Purchaser to (as opposed to \$48.5 million) to fund the acquisition and “operating shortfalls or capital expense needs at The Edgemere” (the difference between \$55 million and 48.5 million shall be referred to as the “Alleged Acquisition Commitment”);
- (b) made a “permanent capital commitment...to fund up to \$15,000,000 to address capital expense needs identified by Bay 9, including any repairs to The Edgemere that *impact life safety* or to fund any unfunded operating expenses (the “Alleged Capital Expense Commitment”) (emphasis added); and
- (c) made a “three (3) year irrevocable capital commitment... to fund up to \$1,000,000, solely to be used to pay any of unanticipated shortfalls in Bay 9’s ability to meet its rent obligations under the Lease” (the “Alleged Rent Commitment” and collectively with the Alleged Acquisition Commitment and the Alleged Capital Expense Commitment, the “Alleged Lapis IV Commitments”).

See Bay 9 AA Response at ¶¶ 3(a), (i), and (j); 19.<sup>7</sup> None of the foregoing constitute an enforceable tenant enhancement in favor of Landlord.

26. Despite repeated requests and, ultimately, a Court order compelling its production, on the afternoon of the February 13, 2023, Bay 9, through its counsel, produced a three (3) page letter (the “Lapis IV Letter,” attached hereto as Exhibit C) purporting to substantiate the “Alleged Rent Commitment” and “Alleged Capital Expense Commitment” referenced in the Bay 9 Response. Regrettably, this much-anticipated letter provides scant additional detail but for (i) expressly disclaiming any third-party beneficiary status, beyond that of Lapis IV and Bay 9, and (ii) providing for no mechanism for enforcement. The Lapis IV Letter provides Landlord, which

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<sup>7</sup> The Bay 9 AA Response also refers to “Supplemental Assurances” (Bay 9 AA Response at ¶¶ 6, 33) but does not define such term. Landlord has not been made aware of any Supplemental Assurances other than the Lapis IV Letter disclosed for the first time in the Bay 9 AA Response three business days ago and provided yesterday.

is not in privity with Lapis IV, with no enforceable obligations or remedies should Bay 9 default or Lapis IV fail to honor its offered “commitments” to contribute. Considering that Bay 9 is controlled and indirectly owned by Lapis IV, it is highly questionable whether any meaningful action would ever be taken by Bay 9 against its newly named “Sponsor.”

27. Bay 9 also makes numerous grandiose statements about its senior living experience and its diligence efforts. Unfortunately, the deposition of Purchaser is not scheduled to take place until after the filing of this Objection. Landlord reserves its right to supplement this Objection following completion of this deposition. In the interim, Landlord notes:

- (a) While focusing on its investment experience, Bay 9 does not identify any senior living facilities that it has *owned or operated*; and
- (b) Despite allegations of extensive diligence (Bay 9 AA Response at ¶ 3(f)), neither Bay 9 nor the Long Hill Company (“Long Hill”), as its proposed manager, had access the data room until December 28, 2022 (*see* BAY000015 attached hereto as Exhibit D), six weeks *after* the filing the initial asset purchase agreement on November 2, 2022 [Dkt. 755], three weeks after its December 6, 2022 disclosure of Long Hill as its manager [Dkt. 870 at p. 19], and 9 days after the executed APA was filed [Dkt. 937].

28. A hearing on adequate assurance is scheduled to commence on February 21, 2023. In addition to the foregoing, at that hearing the Court will hear evidence that Purchaser has failed to satisfy its (and the Debtors’) burden to provide adequate assurance for the reasons set forth in Appendix A.

29. On February 9, 2023, David Lawlor, President and Chief Executive Officer of Long Hill, testified that: (i) there was no specific marketing plan in place to increase the Edgemere’s occupancy; (ii) Long Hill has not conducted a marketing study to determine whether there was sufficient demand in the Dallas senior housing market to determine the reasonableness of the Long Hill Revenue Assumptions; (iii) was unaware that the rent under the Lease could increase by up to 5% (as opposed to the 3% included in the Long Hill Expense Assumptions); (iv) Long Hill did

not have any experience managing the proactive conversion of an entrance fee model CCRC to a rental model CCRC; (v) there is no finalized management services agreement between Bay 9 and Long Hill; (vi) there is no written transition agreement with Lifespace, Edgemere's current manager; and (vii) Long Hill does not have any experience managing capital expenses. *See* Transcript of Deposition of David Lawlor ("Lawlor Tr.") at 130:11-136:11; 149:1-150:10; 22:22-29:15; 49:21-54:6; 84:4-87:14. A copy of the Lawlor Tr. is attached hereto as Exhibit E.

(b) Payment of Administrative Expenses, Classification, and Feasibility

30. Section 1129(a)(1) requires that a plan comply with the applicable provisions of the Bankruptcy Code and section 1129(a)(2) requires a plan proponent to comply with the applicable provisions of the Bankruptcy Code. This Plan, as currently proposed, cannot be confirmed because: (i) until the total and final Cure is known, the Plan may not provide for the payment of all administrative expenses as required under section 1129(a)(9); (ii) the Plan fails to properly classify the secured and unsecured portions of the Bond Claims by including all such claims in a single class thereby violating sections 506(a), 1122, and 1129(a)(1) and (2) of the Bankruptcy Code; (iii) the Faulty Long Hill Assumptions (defined in Appendix A) render it likely that confirmation of the Plan will be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the Plan (including, for these purposes only, the Purchaser) in contravention of section 1129(a)(11) of the Bankruptcy Code.

**OBJECTION**

31. As set forth below in greater detail, the Plan cannot be confirmed for several reasons.

32. In the first instance, the Plan is premised on the approval of the Sale and on the assumption and assignment of the Lease to the Purchaser. Section 365(a) of the Bankruptcy Code

provides that “[e]xcept as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court’s approval, may assume or reject any executory contract or unexpired lease of the debtor.” 11 U.S.C. § 365(a)

33. Section 365(b)(1) of the Bankruptcy Code provides that:

If there has been a default in an executory contract or unexpired lease of the debtor, the trustee **may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee —**

**(A) cures, or provides adequate assurance that the trustee will promptly cure, such default other than a default that is a breach of a provision relating to the satisfaction of any provision (other than a penalty rate or penalty provision) relating to a default arising from any failure to perform nonmonetary obligations under an unexpired lease of real property, if it is impossible for the trustee to cure such default by performing nonmonetary acts at and after the time of assumption, except that if such default arises from a failure to operate in accordance with a nonresidential real property lease, then such default shall be cured by performance at and after the time of assumption in accordance with such lease, and pecuniary losses resulting from such default shall be compensated in accordance with the provisions of this paragraph;**

**(B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and**

**(C) provides adequate assurance of future performance under such contract or lease.**

11 U.S.C. § 365(b)(1) (emphasis added).

34. Notwithstanding the plain language of the Bankruptcy Code, the Debtors (see §§ 4.1.1 of the Plan) and Purchaser (see §§ 2.1, 2.5(d) of the APA), seek to assume and assign the Lease without complying with section 365(b). Specifically:

- (a) The Debtors and the Purchaser are impermissibly modifying section 5.8 of the Lease to eliminate any responsibility to repair known (or unknown) defects of the Property;

- (b) It is uncertain whether the Cure Escrow will be sufficient to pay the Cure because:
  - (i) the Potential Property Cure will not be known as of the Confirmation Hearing;
  - and (ii) the Pecuniary Loss Cure will not be known until after the Effective Date;
- (c) The Purchaser has not provided adequate assurance of future performance because:
  - (i) it has not provided a capital expenditure budget to address the issues identified by the Property Consultants that are not included in the Property Cure; (ii) it refuses to provide credit enhancements, in contravention of clear case law and in violation of section 365(l) of the Bankruptcy Code (“If an unexpired lease under which the debtor is the lessee is assigned pursuant to this section, the **lessor of the property may require a deposit or other security for the performance of the debtor’s obligations under the lease substantially the same as would have been required by the landlord upon the initial leasing to a similar tenant.**” 11 U.S.C. § 365(l) (emphasis added)).

35. Next, the Plan improperly values the Bond Claims at the amount of the Net Sale Proceeds, notwithstanding the fact that the collateral securing such claims is of little or no value.

36. Lastly, the Faulty Long Hill Assumptions render the Plan not feasible in contravention of section 1129(a)(11) of the Bankruptcy Code.

37. For the foregoing reasons, and as set forth below, both the Sale Motion and confirmation of the Plan must be denied.

**A. Both the Releases in the Plan and the Free and Clear Terms of the APA Violate Section 365(b) of the Bankruptcy Code, as the Purchaser is not Assuming the Lease *Cum Onere*.**

38. Section 5.8 of the Lease requires that the Edgemere, at its own expense and at all times during the term of the Lease, “substantially restore, repair, maintain, amend and keep all Improvements on the Land with all necessary reparations and amendments whatsoever in good and safe repair, order and condition, reasonable wear and tear and destruction by unavoidable casualty not herein required to be insured against excepted . . . .” Lease at § 5.8.

39. The Court’s failure to include certain items within the Property Cure does not, however, absolve the Purchaser from complying with section 5.8 of the Lease. Yet, this is precisely



what the Debtors and Purchaser propose in both the Plan and the APA, in clear violation of section 365(b) of the Bankruptcy Code.

40. Section 365(b) requires assumption and assignment of the lease *cum onere* and not subject to modifications. *Schokbeton Indus., Inc. v. Schokbeton Prod. Corp.*, 466 F.2d 171, 175 (5th Cir. 1972) (It is a “universally recognized rule that a trustee cannot accept the benefits of an executory contract without accepting the burdens as well.”); *see also In re Pin Oaks Apartments*, 7 B.R. 364, 367 (Bankr. S.D. Tex. 1980) (noting that a debtor can “assign a lease to a third party **who becomes fully liable thereunder**”) (emphasis added); *Covington v. Covington Land L.P.*, 71 F.3d 1221, 1226 (6th Cir. 1995) (“When a debtor assumes the lease or contract under § 365, it must assume both the benefits and the burdens of the contract. Neither the debtor nor the bankruptcy court may excise material obligations owing to the non-debtor contracting party.”); *In re Buffets Holdings, Inc.*, 387 B.R. 115, 119 (Bankr. D. Del. 2008); *In re Downtown Properties, Inc.*, 162 B.R. 244, 247 (Bankr. W.D. Mo. 1993).

41. As one court has held, “[s]ection 365(b)(1) is intended to provide protection to the non-debtor lessor to insure that he receives the **full benefit of his bargain** in the event of assumption.” *In re Bon Ton Restaurant & Pastry Shop, Inc.*, 53 B.R. 789, 793 (Bankr. N.D. Ill. 1985) (emphasis added). The purpose of section 365(b)(1) is to restore the debtor-creditor relationship to a pre-default condition and bring it back into compliance with the terms of the contract. *In re DBSI, Inc.*, 405 B.R. 698, 704 (Bankr. D. Del. 2009); *see also In re Texas Health Enterprises, Inc.*, 246 B.R. 832, 836 (Bankr. E.D. Tex. 2000) (denying ability to assume contract where “[a]lthough at the hearing [debtor] offered to cure any monetary default, no offer to cure the non-monetary defaults was extended.”).

42. Section 365(b)(1) measures defaults as of the “time of assumption.” *See, e.g., In re Rachels Industries, Inc.*, 109 B.R. 797, 811-12 (Bankr. W.D. Tenn. 1990). Section 365(b)(1)(A) of the Bankruptcy Code “clearly and unambiguously” requires the cure of all defaults before an unexpired lease of real property may be assumed. *In re Building Block Child Care Centers, Inc.*, 234 B.R. 762, 765 (9th Cir. BAP 1999); *accord, In re Fifth Taste Concepts Las Olas, LLC*, 325 B.R. 42, 49 (Bankr. S.D. Fla. 2005) (“The purpose of § 365(b)(1)(A) is to preserve the **entirety** of an unexpired lease upon assumption and cure any defaults”) (emphasis in original). As set forth in the Amended Cure Statement and Cure Response, the Lease imposes an ongoing maintenance and repair obligation on the Edgemere under, among others, section 5.8 of the Lease and the Edgemere defaulted on these obligations.

43. Critically, the duty under section 5.8 is ongoing, not temporal. Lease at § 5.8. (“Lessee will at Lessee’s own expense from time to time and **at all times** during the Term well and substantially restore, repair, maintain...” (emphasis added)). For example, if there is a broken window and it is not repaired pre-assignment, it must be repaired post-assignment, regardless of whether it was included as a part of Property Cure. Notwithstanding the foregoing, taken together, the APA and the Plan currently create a “donut hole” whereby no party is responsible for complying with section 5.8 of the Lease requiring the tenant to maintain the premises.

44. Purchaser seeks to avoid its obligation to repair that hypothetical broken window (and any current unperformed repair and maintenance obligations not required to be part of the Property Cure), thereby creating an unlawful exception to the requirement that it assume the Lease *cum onere* through the following sections of the APA: (i) section 2.1 (“Seller shall sell, assign, transfer, deliver and convey to Purchaser, ...***free and clear of all Encumbrances and Liens***, except Permitted Liens, including, without limitation...(a) ***the Ground Lease*** [ . . .]” (APA at §

2.1) (emphasis added); (ii) section 2.5(d) (permits “the assumption and assignment of the Ground Lease to Purchaser **free and clear** of any Encumbrances and Liens”) (APA at § 2.5(d)) (emphasis added); and (iii) section 5.5 (a) (permits “***the assumption and assignment of the Ground Lease to Purchaser free and clear of any Encumbrances and Liens, effective as of the Closing Date.***” (APA at § 5.5(a)) (emphasis added)).

45. Based on the foregoing, the Purchaser will refuse any further request from the Landlord to “repair the window” (or any other of the many deferred maintenance items) as the window was in disrepair before the Closing Date. Under the terms of the APA, Purchaser could conceivably refuse to make many of the Future Repairs.

46. Section 3.4 of the APA requires that “[a]s of the Closing Date, all such Purchased Assets are **free and clear** of Liens and Encumbrances[.]” APA at § 3.4(a) (emphasis added). If the window is not repaired pursuant to the Property Condition Ruling or otherwise, the Purchaser could choose to terminate the APA or close over that exception and rely on sections 2.1(a), 2.5(d) and 5.5(a) of the APA to avoid repairing the window post Effective Date.

47. If repairing the window is not required by the Property Condition Ruling, then, when combined with section 365(k) of the Bankruptcy Code, an (“[a]ssignment by the trustee to an entity of a contract or lease assumed under this section relieves the trustee and the estate from any liability for any breach of such contract or lease occurring after such assignment.”) and the release<sup>8</sup> (§ 8.3), exculpation (§ 8.4), discharge (§ 8.5), and injunction (§ 8.6) provisions of the Plan, then, impermissibly, no party is responsible for repairing the window. In case the foregoing were

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<sup>8</sup> “Purchaser” is also a “Released Party” under the Plan. Plan at § 1.135.

not clear enough, section 8.5 of the Plan crystalizes that the Landlord will have **no remedy** to compel the Debtors to repair the window:

- (a) “THE DISTRIBUTIONS, RIGHTS, AND TREATMENT THAT ARE PROVIDED IN THIS PLAN SHALL BE IN FULL AND FINAL SATISFACTION, SETTLEMENT, RELEASE, AND DISCHARGE, EFFECTIVE AS OF THE EFFECTIVE DATE, OF ALL CLAIMS AND CAUSES OF ACTION OF ANY NATURE WHATSOEVER... ANY DEFAULT BY THE DEBTORS WITH RESPECT TO ANY CLAIM THAT EXISTED BEFORE OR ON ACCOUNT OF THE FILING OF THE CHAPTER 11 CASES SHALL BE DEEMED CURED ON THE EFFECTIVE DATE...”

Plan at § 8.5.

48. Combined with the free and clear provisions of the APA, the Property and the Edgemere’s residents could be harmed if any required maintenance or repairs are not made by the Debtors or Purchaser, exposing the Landlord to potential liability if the failure to properly maintain the Property causes injury, notwithstanding section 5.8 of the Lease, section 365(b) of the Bankruptcy Code, and the uncontroverted case law interpreting this section.

49. Purchaser suggests that there is no such “donut hole.” Bay 9 responds to Landlord’s concerns regarding the scope of assumed obligations by stating, in footnote 4 of Bay 9’s Response, (*See* Bay 9 AA Response at ¶ 22, n.4), that there should be no “debate” about whether a lease must be assumed in its entirety and that “consistent with the Asset Purchase Agreement, the Landlord will be made whole for any past defaults by Debtors, and Bay 9 will be responsible for post-closing performance under the Lease.” This statement is disingenuous at best because, as set forth above, multiple provisions of the APA evidence an effort by Bay 9 to limit the scope of assumed obligations.

50. For example, the scope of “Assumed Liabilities” under Section 2.3(a) of the APA is limited to “all liabilities and obligations *accruing and arising after the Closing*,” except real estate taxes and Cure Amounts. Similarly, Section 2.3(b) limits Assumed Obligations to “all

liabilities and obligations *arising under or related to the Assumed Contracts, from and after Closing.*” The definition of “Excluded Liabilities” is in accord, providing, in pertinent part, that *“Purchaser shall not assume or be able liable to pay, perform or discharge any liability, obligation, debt, claim against or contract of the Seller or any of its Affiliates which, in any case, pertain to the ownership, operation or conduct of the Business or the ownership of the Purchased Assets prior to the Closing Date, at any time existing or asserted, whether or not accrued, fixed, contingent or otherwise.”* These contractual provisions give Bay 9 the opportunity to distance itself from accrued liabilities under the Lease, whether known at time of Closing but not yet asserted or in default, contingent or unknown at that time, contrary to Bay 9’s assertion that it “will be responsible for post-closing performance under the Lease.” Indeed, the more accurate formulation of Bay 9’s position is that it will be responsible for post-closing performance under the Lease *of those obligations it chooses to assume.*

51. It would not be a complete assumption of the Lease, as required by Section 365 of the Bankruptcy Code, if Bay 9 could use its own APA and an order approving the assumption and assignment of the Lease as a “shield” against liabilities under the Lease. The most obvious example of such attempted “shield” is from the deferred maintenance conditions that have been identified to the Court but which have not yet risen to the level of a default. The obligation to maintain and repair the Premises under Section 5.8 is a continuing one and exists regardless of whether those conditions pertain to the ownership, operation and conduct of the Edgemere’s business prior to or after the Closing Date. Bay 9 cannot escape those obligations through the APA in defiance of Bankruptcy Code section 365. The provisions of the APA are also problematic with respect to other potential lease obligations, such as the obligation to indemnify Landlord where a premises liability event (such as a “slip and fall”) occurs prior to the Closing Date but is asserted thereafter.

The obligation to indemnify Landlord under Section 5.15 of the Lease cannot be limited by the terms of the APA or an artificial demarcation of responsibility based on Closing Date, while Debtor simultaneously seeks a release of those obligations under Bankruptcy Code section 365(k), potentially leaving Landlord with “no place to go” to obtain the benefit of the bargain reflected in the Lease.

52. At least with respect to property conditions, Bay 9 appears to assume that the Required Property Cure (and any Potential Property Cures that may in the future be reclassified as Required Property Cure) will be completed prior to the Closing Date and that the Purchaser will commit to making all Future Repairs along with the Potential Property Cures not reclassified as Required Property Cures. Debtors and Purchaser could eliminate such ambiguity by including a provision in the Confirmation Order that provides “Purchaser agrees to perform all of its obligations under the Lease, including section 5.8, notwithstanding any provision in the APA, the Plan, or this Confirmation Order to the contrary regardless of whether such liability or obligation arose, existed or was asserted prior to or after the Closing Date and will not attempt to avoid any such obligations on account of the Debtors nonperformance thereof.”

53. Simply stated, the Sale Motion cannot be granted, and the Plan cannot be confirmed, as a matter of law unless the: (i) Debtors repair the “window” (and all other non-monetary defaults, including pursuant to, but not limited to, section 5.8 of the Lease and the Property Condition Ruling) prior to the Effective Date or (ii) Purchaser agrees to assume all such repair obligations, irrespective of when the underlying conditions arose.

**B. The Debtors May Lack Sufficient Resources to Pay the Cure in its Entirety.**

54. As stated above, while the Property Condition Ruling was illustrative of the Court’s determination of the existing conditions at the Property that constituted nonmonetary defaults in

need of cure, the actual amount funds that will be necessary to effectuate the Property Cure is currently unknown. The Debtors have not yet budgeted for the Required Property Cure and, upon information and belief, have not obtained estimates for the work necessary to address the Potential Property Cure. Based on the presently unknown potential scope and cost of repairs that will be required as a result of the Property Condition Ruling, neither the Court nor the parties know whether the Property Cure will be \$500,000 or \$20 million or more. Moreover, until the nature and scope of certain conditions are identified, actual estimates are procured, and work is scheduled, contrary to the Initial Plan Sponsors AA Response, it is simply unknown, and seemingly unlikely that there will be clarity as to whether “any existing defaults under the Ground lease will be cured prior to or on the effective date of the Plan.” See Initial Plan Sponsors AA Response at ¶ 2.

55. The amount of the Pecuniary Loss Cure has also not been fully determined and, by its nature, is continuing. In addition, if the Debtors are unsuccessful in the Adversary Proceeding, and or the Defendants (including Landlord) are successful on the counterclaims in the Adversary Proceeding and are entitled to their fees (Lease at § 5.16(b)), the Pecuniary Loss Cure will only increase.

56. The dynamic nature of the Pecuniary Loss Cure will undoubtedly have an impact on the amount of Net Sales Proceeds that may be required to be available for distribution. In the event the Cure exceeds the amount of the Net Sale Proceeds less the DIP Facility Claim (such difference shall be referred to the “Proceeds Available to Creditors”), then the Lease cannot be assumed or assigned under section 365(b) of the Bankruptcy Code, at least as currently proposed. 11 U.S.C. § 365(b)(1)(A); *see also* Plan at §§ 2.1, 5.3 (providing, in tandem, that the Landlord shall have an Allowed Administrative Claim for all cure amounts due and that Allowed

Administrative Claims must be paid on the Effective Date or the date that such claim becomes an Allowed Administrative Claim).

57. Thus, adequate provisions should be made to ensure the Cure will be paid or performed (or reserved) in full. All of the Net Sale Proceeds (except those necessary to pay the DIP Facility Claim) should be deposited into the Cure Escrow pending final resolution of the Cure.<sup>9</sup> Otherwise, the Plan cannot be confirmed under section 1129(a)(1) of the Bankruptcy Code.

**C. Debtors and Purchaser Have Failed to Provide Landlord Adequate Assurance of Future Performance.**

58. As set forth above, section 365(b)(1)(C) of the Bankruptcy Code mandates that a debtor seeking to assume and assign an unexpired lease must provide “adequate assurance of future performance under such contract or lease.” 11 U.S.C. § 365(b)(1)(C). Section 365(f)(2) of the Bankruptcy Code provides, in relevant part:

The trustee may assign an executory contract or unexpired lease of the debtor only if—

(A) the trustee assumes such contract or lease in accordance with the provisions of this section; and

(B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

11 U.S.C. § 365(f)(2).

59. The Debtors have the burden of proving adequate assurance of future performance by a preponderance of the evidence. *In re PRK Enterprises, Inc.*, 235 B.R. 597, 602 (Bankr. E.D. Tex. 1999); *In re F.W. Rest. Assocs., Inc.*, 190 B.R. 143, 147 (Bankr. D. Conn. 1995) (“[T]he

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<sup>9</sup> Given that the collateral securing the Bond Claims had little or no value on the Petition Date and the Trustee has not introduced any evidence to the contrary, such collateral could not have diminished in value thereafter. Consequently, the Diminution Claim should be valued at \$0.



Debtor in Possession then bears the burden of proof on the issues of prompt cure and adequate assurance of future performance”); *Rachels Industries*, 109 B.R. at 811-12 (“In a proceeding under § 365, the party moving to assume a lease has the ultimate burden of persuasion that the lease is one subject to assumption and that all requirements for assumption have been met”); *In re C.W. Mining Co.*, No. 08-20105 JAB, 2010 WL 517583, at \*9 (Bankr. D. Utah Feb. 10, 2010) (“The Trustee has the burden to prove that the statutory requirements for assumption and assignment have been met, including the burden to prove adequate assurance of future performance.”).

60. Adequate assurance of future performance is a fundamental statutory right and requirement because “[i]f the Court approves the assignment, the estate is relieved of future-liability for breach, [and] the obligation to perform passes to the assignee. This is precisely why the estate must show the assignee’s ability to perform at the time it seeks the Court’s approval.” *In re Best Payphones, Inc.*, No. 01-15472 (SMB), 2008 WL 2705472, at \*5 (Bankr. S.D.N.Y. July 3, 2008).

61. The emphasis of the analysis is on protection of the lessor, and the intention “is to afford landlord with a measure of protection from having to be saddled with a debtor that may continue to default and return to bankruptcy.” *In re Natco Indus., Inc.*, 54 B.R. 436, 441 (Bankr. S.D.N.Y. 1985). Adequate assurance requires evidence that is “nonspeculative and sufficiently substantive” so as to assure that a landlord will receive the bargained-for performance for the remaining duration of the lease. *In re World Skating Center, Inc.*, 100 B.R. 147, 148-49 (Bankr. D. Conn. 1989). Indeed, courts require a specific factual showing through competent evidence to determine whether adequate assurance of future performance has been provided. *See, e.g., Matter of Haute Cuisine, Inc.*, 58 B.R. 390, 393-94 (Bankr. M.D. Fla. 1986); *In the Matter of CM Systems, Inc.*, 64 B.R. 363, 364-65 (Bankr. M.D. Fla. 1986).

**D. Purchaser Fails to Provide any Credit Enhancements to Landlord.**

62. A primary determining factor of adequate assurance of future performance is whether rent will be paid. *In re Bygaph, Inc.*, 56 B.R. 596, 605 (Bankr. S.D.N.Y. 1986) (“The chief determinant of adequate assurance of future performance is whether the rent will be paid”). In determining whether assurance of future rent payment is adequate, courts in this district:

[...] consider whether the debtor’s financial data indicated its ability to generate an income stream sufficient to meet its obligations, the general economic outlook in the debtor’s industry, and the presence of a guarantee. A debtor does not need to show that it will thrive, make a profit or provide a guarantee of performance. Rather, a debtor must show that it can meet its rental and ***other lease obligations***. Courts have also considered a number of other factors including: (1) the debtor’s payment history; (2) presence of a security deposit; (3) evidence of profitability; (4) plan that would earmark money exclusively for the landlord; and (5) whether the unexpired lease is at, or below, the prevailing rate.

*In re Senior Care Centers, LLC*, 607 B.R. 580, 596 (Bankr. N.D. Tex. 2019) (internal quotations and citations omitted) (emphasis added; “other lease obligations” includes obligations to maintain the property); *see also In re Hub of Military Circle, Inc.*, 19 B.R. 460, 461 (Bankr. E.D. Va. 1982) (factors to consider include present status of existing obligations under lease, remaining term of lease, and what landlord can look to for sufficient adequate assurance of future performance). The best form of adequate assurance of future performance is “rent paid in advance or a deposit.” *Hub of Military Circle*, 19 B.R. at 461.

63. Purchaser’s reading of *Bygaph* (Bay 9 AA Response at ¶ 34-35) effectively writes section 365(b)’s adequate assurance requirement out of the Bankruptcy Code. The requirement of adequate assurance is intended to compensate landlords who are having a new tenant forced upon it, depriving Landlord of the benefit of bargain to consent to such assignments. Further, Landlord also loses its right to hold the original tenant liable after the assignment of the Lease. This is

precisely why the cases cited to herein and in the Adequate Protection Objection often require something in addition to what was set forth in the original lease as adequate assurance.

64. When analyzing adequate assurance of undercapitalized entities, like Bay 9 here, courts generally look to credit enhancements to secure performance of lease obligations. *In re Res. Tech. Corp.*, 624 F.3d 376, 384 (7th Cir. 2010) (denying assignment to third party). In *Res. Tech.*, like this case, assignee needed financing to perform under the lease but the assignee had “no enforceable right to demand this financing” from the party that intended to provide the financing. *Id.* The debtor testified that he would be unlikely to sue to enforce the funding commitment because the loan party could replace the debtor. *Id.* At the time of the Adequate Assurance Objection, the Capital Commitment Letter (as defined in the Adequate Assurance Objection) executed by Lapis IV is substantially similar to the one that the *Res. Tech* court deemed unsatisfactory. Based on the Lapis IV Letter, Lapis IV purports to offer a commitment to Bay 9 but it is questionable whether Bay 9 has a meaningful right to pursue adequate remedies in the event Lapis IV later determines not to adhere to its offer.

65. Purchaser misleadingly argues that Landlord’s reliance on *Sea Harvest Corp. v. Riviera Land Co.*, 868 F.2d 1077 (9th Cir. 1989) is misplaced. Bay 9 AA Response at ¶ 33. First, at the time the Adequate Assurance Objection was filed, the Initial Adequate Assurance Package was remarkably similar to those rejected by the *Sea Harvest* court.

66. Second, it was only in response to the Adequate Assurance Objection, that Purchaser for the first time even offered the Alleged Lapis IV Commitments. There is simply no support for Purchaser’s contentions in the Bay 9 AA Response that the Alleged Lapis IV Commitments cure the deficiencies of the Initial Adequate Assurance Package, nor does the Lapis IV Letter meaningfully cures such deficiencies. As with the Initial Adequate Assurance Package,

given that Lapis IV is a parent of Purchaser, with the same principals, it cannot be expected that Purchaser could or would seek to enforce the Lapis IV Letter. What we do know now with certainty, as demonstrated by the Lapis IV Letter, is that Landlord will not have any enforcement rights as it would in the case of a security deposits, letters of credit, rent escrows and guaranties. For this reason alone, the Sale Motion and confirmation of the Plan should be denied.

67. Indeed, these credit enhancements have been endorsed by numerous bankruptcy courts, including security deposits (*In re Gold Standard at Penn, Inc.*, 75 B.R. 669, 674 (Bankr. E.D. Pa. 1987) (denying assignment to third party finding that adequate assurance may include “sufficient financial backing, escrow deposits or other forms of security or guaranty”); letters of credit (*In re Alipat, Inc.*, 36 B.R. 274, 278 (Bankr. E.D. Mo. 1984) (letter of credit in favor of the landlord “in an amount equal to the lease payments remaining under the original lease” constituted adequate assurance); and guarantees (*Richmond Leasing Co. v. Cap. Bank, N.A.*, 762 F.2d 1303, 1311 (5th Cir. 1985) (approving assumption by the debtor when parent had guaranteed the debtors performance under the lease).

68. None of Purchaser, Lapis IV, nor Lapis have offered any of the foregoing, and even if any of the foregoing were offered, it could not be a token offer—it must be sufficient under the circumstances. *In re RadioShack Corp., et al.*, Case No. 15-10197 [Dkt. 2548], \*2 (Bankr. D. Del. June 25, 2015) (letter ruling denying assignment to third party where Assignee’s offer to provide a security deposit of one month’s rent and personal guarantee for one year’s rent, or, alternatively, three months’ prepaid rent and six-month guarantee, plus unaudited financial statements and projections, was insufficient adequate assurance under circumstances); *In re Washington Cap. Aviation & Leasing*, 156 B.R. 167, 173-74 (Bankr. E.D. Va. 1993) (denying assignment to third

party financial information that did not conform to GAAP and proposed \$25,000 payment into escrow as insufficient to show adequate assurance of future performance).<sup>10</sup>

69. Lastly, in combination with the foregoing evidence, adequate assurance of future performance may be based on: (a) purchaser's experience in the industry (*In re Fleming Companies, Inc.*, No. 03-10945(MFW), 2004 WL 385517, at \*4 (Bankr. D. Del. Feb. 27, 2004) (assignee "established that it had the size, expertise, and experience in the wholesale grocery distribution business")); (b) financial strength of parent (*In re Serv. Merch. Co.*, 297 B.R. 675 (Bankr. M.D. Tenn. 2002)); or (c) whether the assignee would be considered suitable by Landlord outside of bankruptcy (*In re RadioShack Corp.*, Case No. 15-10197, at p. 2 (Bankr. D. Del. June 25, 2015) [Dkt. 2548] (denying assignment to third party where landlord credibly testified that assignee's proposed adequate assurance would not be sufficient in non-bankruptcy setting to assure landlord that it could perform under the lease)).

70. Once again, in this case, none of the foregoing are present. While Lapis IV's parent claims to have billions under management, there is no showing that its financial investments have any bearing on the day-to-day management and operation of a facility like the Edgemere. Lapis is nothing more than a "rich relative" unwilling to make a firm, enforceable commitment that any of those billions are available to fund the Purchaser post-closing or to ensure that Lapis IV honors its purported funding commitment.

71. Next, as set forth in the Adequate Assurance Objection at ¶ 8, neither Purchaser nor Lapis have significant experience in the CCRC industry. Lapis' limited experience in the senior

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<sup>10</sup> Purchaser suggests that the test for determining whether it can perform under the Lease is less the stringent than the feasibility standard of 11 U.S.C §1129(a)(11) (Bay 9 AA Response at ¶ 23). That may be the case outside of the plan context but is not applicable in the context, as here, where a lease is being assumed and assigned under a plan.

living space is primarily as an *investor* not as an operator of such facilities. *Id.* In an attempt to overcome these deficiencies, Bay 9 has identified Long Hill as the prospective manager of the Edgemere. However, the testimony of its President and Chief Executive Officer, David Lawlor, clarified that Long Hill has never overseen or managed the proactive conversion of an entrance fee deposit refund model CCRC (the Seller’s current model) to a monthly rental model CCRC (as proposed by the Purchaser). Lawlor Tr. at 22:22-29:15. Nor has Long Hill demonstrated any experience in addressing deferred maintenance issues along the lines presented here. Lawlor Tr. at 84:4-87:14.

72. Further, as set forth in the Hannon Decl., the Purchaser’s proposed adequate assurance would not be sufficient for a hypothetical tenant in a non-bankruptcy setting to assure the Landlord that it could perform under the lease. Hannon Decl. at ¶¶ 16-23.

73. Finally, the proposed adequate assurance does not satisfy section 365(l) of the Bankruptcy Code, which permits a lessor of the property to “require a deposit or other security for the performance of the debtor’s obligations under the lease substantially the same as would have been required by the landlord upon the initial leasing to a similar tenant.” 11 U.S.C. § 365(l).

74. In footnote 5 of its Response, Bay 9 asserts that it “has found no authority and limited secondary sources analyzing Bankruptcy Code section 365(l), suggesting this subsection is used in limited circumstances. The Landlord has equally failed to demonstrate that Section 365(l) is applicable to the Lease.”

75. It is well-established, however, that “[t]he plain meaning of legislation should be conclusive, except in the ‘rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.’” *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989); *see also Lamie v. United States Trustee*, 540 U.S. 526,

534 (2004) (“[W]hen the statute’s language is plain, the sole function of the courts . . . is to enforce it according to its terms.”) The language of Bankruptcy Code section 365(l) is clear, providing in straightforward terms that, “[i]f an unexpired lease under which the debtor is the lessee is assigned pursuant to this section, the lessor of the property may require a deposit or other security for the debtor’s obligations under the lease substantially the same as would have been required by the landlord upon the initial leasing to a similar tenant.” The Lease is an unexpired lease sought to be assumed and assigned by Debtor. Section 365(l) makes no distinction between residential and nonresidential leases. Simply put, Bay 9 has suggested no substantive reason why Section 365(l) does not apply here.

76. Section 365(l) has been part of the Bankruptcy Code since the 1984 amendments to Section 365. *See 3 Collier on Bankruptcy* (LexisNexis 16th Ed. 2022) ¶ 365.LH[2][a], pp. 365-122. Indeed, Section 365(l) is part of the comprehensive statutory scheme governing assignment of a lease by a debtor that balances the interests of the debtor-tenant and the affected landlord, to be read along with the provisions of Section 365(b)(1)(a) (requiring cure), 365(b)(1)(c) (providing for adequate assurance of future performance), 365(f)(1) (invalidating certain lease provisions that might prohibit or restrict assignment), 365(f)(2) (requiring adequate assurance in event of assignment), and 365(k) (granting debtor a release following assignment). Bay 9 cannot “cherry pick” the subsections of Section 365 it wishes to apply to it, while discarding others. Landlord will present evidence of the deposit or other security it would require on the hypothetical initial leasing to a tenant similar to Bay 9, in accordance with the plain provisions of Section 365(l).

77. Unlike Purchaser or Lapis, Greystone Communities, Inc., the original joint venture partner of the Debtors, had decades of experience in the CCRC industry as the developer of over forty (40) senior living centers prior to entering into a joint venture agreement to develop the

Edgemere. *See* Exhibit F;<sup>11</sup> Our Experience, <https://www.greystonecommunities.com/experience> (last visited Feb 12, 2023).<sup>12</sup> Prerequisites to enter into the Lease included the following:

- (a) \$3.0 million in equity capital (ICI 0000025);
- (b) Completion of \$118.080 million in bond financing that included public reporting requirements (*id.*; ICI 000632);
- (c) References (ICI 0003756); and
- (d) Prior years audited financial statements (*Id.*).

*See* Hannon Decl. at ¶ 11.

78. Purchaser has provided none of the foregoing. Based on the Initial Adequate Assurance Package and the Alleged Lapis IV Commitments, Purchaser has: (i) little equity beyond the Purchase Price; (ii) no working capital commitments; (iii) no financial reporting requirements; (iv) provided no references; and (v) no prior year financial statements (for the simple reason that it is a “newco”). Given the foregoing, the Landlord should be provided with a deposit, letter of credit, guarantee, or other security for the performance of the Edgemere’s obligations under the Lease pursuant to section 365(l) of the Bankruptcy Code, as the same as would have been required by the Landlord upon the initial leasing to a similar tenant. To be clear, additional security is required as neither Purchaser nor its equity sponsor has Greystone’s experience in the senior living space, the committed equity capital (as increased to, at a minimum, reflect 2023 dollars), the committed debt capital, nor the quality of references that Greystone had. Hannon Decl. at ¶¶ 11, 23.

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<sup>11</sup> There are certain attachments to the Objection and Hannon Declaration that were produced by Landlord in the adversary marked “confidential” subject to the blanket designation subject to a protective order. Landlord voluntarily waives that designation on these particular exhibits.

<sup>12</sup> The interactive map allows the user to see Greystone senior living facilities by date opened.



79. Moreover, the Faulty Long Hill Assumptions do not constitute adequate assurance.

See Appendix A.

**D. The Bond Claims are Improperly Classified and the Holders of Such Claims Are Being Paid an Amount in Excess of the Value of Their Collateral.**

80. Section 1129(a)(2) requires a plan proponent to comply with the provisions of the Bankruptcy Code. 11 U.S.C. § 1129(a). The Plan Sponsors fail to comply with this section given the improper classification, and proposed overpayment of, the Bond Claims. Section 1122(a) of the Bankruptcy Code provides as follows: “[e]xcept as provided in subsection (b) of this section, a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class.” 11 U.S.C. § 1122(a). This section prohibits the classification of secured and unsecured claims in the same class. *In re 266 Washington Assocs.*, 141 B.R. 275, 285 (Bankr. E.D.N.Y.).

81. Yet this is precisely what the Plan Sponsors propose by placing all of the Bond Claims in Class 2 (*see* Plan at § 3.2), without any evidence that secured portion of the Bond Claim exceeds the Proceeds Available to Creditors. Section 506(a) of the Bankruptcy Code requires that allowed, secured claims are only secured “to the extent of the value of such creditor’s interest in the estate’s interest” in the property securing the claim. 11 U.S.C. § 506 (a)(1). In effect, section 506(a) requires that undersecured claims be bifurcated between: (a) a secured claim equivalent to the *value of the creditor’s interest in the estate’s interest in the property securing the claim*; and (b) an unsecured deficiency claim for the remaining value of the claim. 11 U.S.C. § 506(a) (emphasis added); *In re Seda France, Inc.*, No. 10-12948-CAG, 2011 WL 3022563, at \*4 (Bankr. W.D. Tex. July 22, 2011) (Section 506(a) “takes the amount of the allowed claim under § 502(b) and either treats it as completely secured or bifurcates it into a secured and unsecured amount”).

82. There has been no valuation of the collateral securing the Bond Claims in these cases. In the event that Landlord is successful on its counterclaims in the Landlord Litigation and unsuccessful in having such award classified as a part of the Cure or otherwise classified as an administrative claim, the Court may deem such claim a General Unsecured Claim. In that event, the Landlord would be entitled to its *Pro Rata* share of the distribution to Holders of Allowed General Unsecured Claims, including on account of the Proceeds Available to Creditors (or from any other sources).

83. The only evidence of the potential value of the collateral securing the Bond Claims is the bond indentures themselves, which clearly and unambiguously state that such collateral is of limited value:

**Security Interest Securing the Notes is of Limited Value**

The lien on the leasehold estate and lien on property granted under the Master Indenture **provides limited security**. Little property that is subject to the liens consist of general purpose buildings suitable for industrial or commercial use. Consequently, it could be difficult to find a buyer or lessee for the property, and, upon a default, the Bond Trustee or the Master Trustee may not obtain an amount equal to the aggregate liabilities of the Obligated Group (including liabilities in respect of the Bonds then outstanding) from the sale or lease of the property. . . .

(2017 Series Bond Indenture Official Statement at pp. 17-18); (2015A Series Bond Indenture Official Statement at p. 19); (2015B Bond Indenture Official Statement at p. 19) (emphasis added). Valuing the Bond Claims at \$111,728,919.22 (*see* Plan at § 3.2) massively overstates the value of such claims<sup>13</sup>, and paying 100% of Proceeds Available to Creditors to the holders of Class 2 Claims gives the holders of such claims a windfall at the expense of all other creditors—particularly

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<sup>13</sup> This asserted valuation does not appear to take into account the current condition of the Property, which provides even less security than was described in the 2017 Series Bond Indenture Official Statement.

general unsecured creditors whose claims are paid *Pro Rata* with the Bond Deficiency Claim in Class 4. See Plan § 3.2, n.4.

84. This proposed distribution is prohibited by section 506(a) of the Bankruptcy Code, which requires that Bond Claims be bifurcated according to the actual value of the estate's interest in the collateral as opposed to overpaying a secured creditor when the value of its collateral is less than the total amount of the claim. 11 U.S.C. § 506(a).

85. A secured creditor can, of course, have its undersecured claim treated as unsecured by making an election under section 1111(b) of the Bankruptcy Code.<sup>14</sup> But that option is not available to the holders of Bond Claims for two reasons. First, they waived their right to make such an election by not making it prior to the end of the hearing on the Disclosure Statement. *See* Fed. R. Bankr. P. 3014 (requiring that the election must be made prior to the close of the hearing on the Disclosure Statement in writing, or on the record at the disclosure statement hearing). No such election was timely made.

86. Second, such election is not available to secured creditors (such as the holders of Bond Claims) whose collateral is of inconsequential value. *See In re Baxley*, 72 B.R. 195, 198–99 (Bankr. D.S.C. 1986) (quoting 5 Collier on Bankruptcy, § 1111.02[4]); *In re Body Transit, Inc.*, 619 B.R. 816, 836 (Bankr. E.D. Pa. 2020) (secured creditor's lien of inconsequential value where value of lien was approximately 8.2% of total claim); *In re 500 Fifth Ave. Assocs.*, 148 B.R. 1010, 1016 (Bankr. S.D.N.Y. 1993) (inconsequential value exists where a junior lienholder is completely unsecured); *In re Wandler*, 77 B.R. 728, 733 (Bankr. D.N.D. 1987) (collateral valued at 4% of creditor's claim was inconsequential).

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<sup>14</sup> Section 1111(b) allows an undersecured creditor to elect to waive any unsecured deficiency claim in a chapter 11 case, and have the entire face value of its undersecured claim treated as fully secured against the same assets. *See* 11 U.S.C. § 1111(b).

87. Because the value of its collateral is inconsequential in comparison to the total amount of the Bond Claims, the Trustee was not eligible to make a section 1111(b) election (which it presumably understood when formulating the Plan). Nevertheless, the Trustee seeks to circumvent the bifurcation requirements of section 506(a), by classifying the Bond Claims to be partially secured up to the amount of the Proceeds Available to Creditors without any evidence to establish that the collateral securing such claims exceeds this amount. It is the Trustee's burden to establish the value of its secured claim once it is clear that the value is inconsequential and, to date, it has not introduced any evidence to meet this burden. *In re Heritage Highgate, Inc.*, 679 F.3d 132, 140 (3d Cir. 2012).

88. The Plan therefore cannot be confirmed, because the Bond Claims are improperly classified and are receiving a windfall in violation of sections 506(a), 1122(a), and 1129(a)(2) of the Bankruptcy Code.

**E. The Plan is Not Feasible.**

89. Section 1129(a)(11) requires the Court to find that confirmation of the Plan "is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor . . . unless such liquidation or reorganization is proposed in the plan." 11 U.S.C. § 1129(a)(11). Commonly known as the "feasibility" requirement, section 1129(a)(11) requires the Court to determine whether a plan offers a "reasonable assurance of commercial viability." *In re Save Our Springs (S.O.S.) Alliance, Inc.*, 632 F.3d 168, 172 (5th Cir. 2011). When assessing feasibility, bankruptcy courts typically look at the debtor's capital structure and the earning power of the business, among other factors. *In re Geijssel*, 480 B.R. 238, 257 (Bankr. N.D. Tex. 2012).

90. A number of factors should be analyzed in determining whether a plan is feasible. Among these are the capital structure, earning power, management ability, economic conditions,

availability of credit, adequacy of funds for equipment replacement, provisions for adequate working capital, and “any other related matter which determines the prospects of a sufficiently successful operation to enable performance of the provisions of the plan.” *In re M & S Assoc., Ltd.*, 138 B.R. 845, 849 (Bankr. W.D. Tex. 1992); *see also Geijssel*, 480 B.R. at 257. “Where the projections are credible, based upon the balancing of all testimony, evidence, and documentation, even if the projections are aggressive, the court may find the plan feasible.” *In re T-H New Orleans Ltd. P’ship*, 116 F.3d 790, 801 (5th Cir. 1997).

91. On the other hand, “[w]here the financial realities do not accord with the proponent’s projections or where the proposed assumptions are unreasonable, the plan should not be confirmed.” *In re Lakeside Global II, Ltd.*, 116 B.R. 499, 507 (Bankr. S.D. Tex. 1989). “Generally, without proper funding in place or a firm commitment of such funding, the Court cannot find the plan feasible.” *In re Stratford Associates Ltd. Partnership*, 145 B.R. 689, 699 (Bankr. D. Kan. 1992).

92. In this case, the Plan is not feasible in the following ways: (a) the Plan may never go effective, given that Lifespace has not raised the necessary funds to make its required contributions necessary for the Plan to go effective<sup>15</sup> and (b) the Net Sale Proceeds may not be sufficient to pay all of the Debtors administrative expenses as required by section 1129(a)(9) of the Bankruptcy Code; and (c) as set forth in Appendix A, the Faulty Long Hill Assumptions, combined with the Purchaser’s lack of sufficient committed resources to operate the Edgemere,

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<sup>15</sup> To settle all current and former resident claims against it, and to facilitate the sale to Purchaser, Lifespace, in exchange for a release under the Plan and a likely worthless Class 4 Claim, agreed to: (i) provide \$16.5 million in liquidity to the Bond Claim holders on the Effective Date; (ii) provide \$1.5 million in future funding to Purchaser; and (iii) provide \$143.4 million to be paid to residents over a period of 19 years (but only if Lifespace has sufficient liquidity to pay such claims). *See* Disclosure Statement at § V.C.3.

render it reasonably likely that the Edgemere, notwithstanding being under new ownership and management, will be back in chapter 11 in the near term.

i. Lifespace does not have Sufficient Liquidity to Make the Lifespace Initial Settlement Payment

93. In order to for the Plan to go effective, “[a]ll payments and transfers to be made on the Effective Date shall be made or duly provided for.” Plan at § 9.2(e). Under the Plan, Lifespace is required to pay over \$68 million on the Effective Date (the “Lifespace Initial Settlement Payment”). Lifespace, however, lacks sufficient funding to make these payments, as it admitted on January 11, 2023, bondholders call when Nick Harshfield, the CFO of Lifespace, noted:

We anticipate that these annual payments will be funded through a mix of subordinated debt and excess cash flows over the 19-year period. The first payment will total approximately 52 million and would be made upon the effective date of Edgemere’s Chapter 11 plan. We currently plan to fund this initial payment with subordinated debt.

Transcript of Lifespace Community Bondholders Call (January 11, 2023) at 5:4-10. A copy of this transcript is attached here to as Exhibit G. Thereafter, Lifespace stated: “[a]s part of its limited financial support, Lifespace anticipates initially borrowing an amount not to exceed \$100,000,000 with an issuance of tax-exempt and/or taxable subordinate revenue bonds.” *See, e.g.,* Voluntary Notice dated February 3, 2023. A copy of the Voluntary Notice is attached hereto as Exhibit H; *see also Continuing Disclosure Report* for the year ended December 31, 2022 (the “December Disclosure Report”) (Indicating that current cash on hand is only 232 days, less than the 250 days required by its bond indenture). A copy of the December Disclosure Statement is attached hereto as Exhibit I. If cash on hand remains under 250 days in 2024, Lifespace will not be required to make the payments to Participating Residents as required by the Plan.

94. Moreover, on February 9, 2023, Fitch Ratings placed Lifespace’s ‘BBB’ Issuer Default Rating (IDR) and ‘BBB’ Long-Term rating on “rating watch negative,” further casting doubt on Lifespace’s ability to perform under the Plan. *See* Fitch Places Lifespace Communities, Inc. on Rating Watch Negative, FITCH RATINGS: CREDIT RATINGS & ANALYSIS FOR FINANCIAL MARKETS (2023), <https://www.fitchratings.com/research/us-public-finance/fitch-places-lifespace-communities-inc-on-rating-watch-negative-09-02-2023> (last visited Feb 11, 2023) (the “Fitch February 2022 Report”). The reasons for ratings watch negative are:

- (a) Due to Lifespace’s plan to fund approximately \$143 million of entrance fee refunds for residents of Edgemere. Lifespace currently contemplates funding this liability through a combination of the proceeds from subordinate debt to be issued by the Lifespace Obligated Group (“Lifespace OG”) in an amount not to exceed \$100 million (likely about \$82 million) and internal cash flows of the Lifespace OG;
- (b) It is anticipated that should Lifespace’s deposit to the Edgemere Residents Trust result in a reduction of Lifespace’s days cash on hand (DCOH) to below 250 days. It is also anticipated that payments on the subordinate debt will be capped at \$5 million based on audited financial statements for the preceding fiscal year, to the extent after such payment, Lifespace’s DCOH is not less than 250 days and its debt service coverage ratio is not less than 1.2x;
- (c) Fitch nevertheless believes that the payment of these liabilities will materially inhibit Lifespace’s cash flow growth over the next several years. Fitch sees this as a negative, given that Lifespace’s cash flow is already constrained due to recent declines in independent living unit (ILU) occupancy; and
- (d) Moreover, as the subordinate bonds are not being issued in the interest of a revenue-producing project, Lifespace’s incurrence of this additional debt will erode its cash-to-adjusted debt, which is already relatively low for the rating category, due to additional borrowings Lifespace has transacted in order to finance its substantial campus redevelopment plan.

*Id.*

95. The Fitch February 2023 Report not only calls into question whether Lifespace can raise the funds necessary to make the Lifespace Initial Settlement Payment prior to the Effective

Date, but also raises the specter that it will not be able make the other payments due under the Plan.

96. Given that Lifespace has not introduced evidence that it can make the Lifespace Initial Settlement Payment, the Plan is not feasible under section 1129(a)(11) of the Bankruptcy Code.

- ii. It is Reasonably Foreseeable that the Edgemere Will Need Further Financial Reorganization

97. Even if the potential commitments set forth in the Lapis IV Letter are funded and firm, for the reasons set forth in Appendix A, the Edgemere will certainly need further working capital or equity capital. Consequently, the Court should deny confirmation of the Plan.

#### **RESERVATION OF RIGHTS**

98. Nothing contained in this Objection shall constitute a waiver of any rights or remedies of the Landlord under the Bankruptcy Code, the Lease, or applicable law, including, without limitation, the right to: (i) amend, supplement, or otherwise modify this Objection; (ii) to account for any after-acquired information; or (iii) to be heard at any hearing on the Plan and Sale Motion, on any issue.

**WHEREFORE**, the Landlord respectfully requests the entry of an order denying the Plan and Sale Motion as set forth herein and granting such other and further relief as the Court deems appropriate.



Dallas, Texas  
February 14, 2023

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**CERTIFICATE OF SERVICE**

I hereby certify that on February 14, 2023, a true and correct copy of the foregoing was served electronically on all persons via the Court's CM/ECF system.

/s/ Michael S. Held  
Michael S. Held