

Stephen A. McCartin (TX 13344700)
Thomas C. Scannell (TX 24070559)
Mark C. Moore (TX 24074751)
FOLEY & LARDNER LLP
2021 McKinney Avenue, Ste. 1600
Dallas, Texas 75201
Telephone: (214) 999.3000
Facsimile: (214) 999.4667
smccartin@foley.com
tscannell@foley.com
mmoore@foley.com

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

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

In re:	§	Chapter 11
Northwest Senior Housing Corporation, et al.,¹	§	Case No. 22-30659 (MLV)
Debtors.	§	Jointly Administered

**OFFICIAL COMMITTEE OF UNSECURED CREDITORS’
SUPPLEMENT TO RESPONSE TO DEBTORS’ ESCROW MOTION**
[Relates to Docket Nos. 18, 100, 256, and 352]

The Official Committee of Unsecured Creditors (the “Committee”) hereby supplements its Response to the Debtor’s Escrow Motion² due to new arguments raised by the Debtor³ on June 1, 2022 in their *Omnibus Reply in Support of Debtors’ Motion for Entry of an Order (I) Authorizing*

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

² Debtors’ *Motion for Entry of an Order (I) Authorizing the Debtors to Continue (A) Escrowing Entrance Fees in the Ordinary Course and (B) Refunding Certain Entrance Fees During the Chapter 11 Cases and (II) Granting Related Relief* [Docket No. 18].

³ For the purposes of this Response, the “Debtor” means Northwest Senior Housing Corporation, lessee on the Ground Lease (defined below).



the Debtors to Continue (A) Escrowing Entrance Fees in the Ordinary Course and (B) Refunding Certain Entrance Fees During the Chapter 11 Cases and (II) Granting Related Relief [Docket No. 352] (“**Debtor’s Reply**”) and respectfully supplements as follows:

I.
SUPPLEMENT

1. In attempting to justify postpetition payments to *certain* creditors, Debtor’s Reply asserts—for the first time and without any citations to case law or statutory support—that the Higher Level of Care Refunds⁴ are “post-petition obligations of the Debtor’s estates that the Debtor seeks to pay in the ordinary course of business.”⁵ This assertion is incorrect.

2. The Higher Level of Care Refunds arise from prepetition contracts—the Residency Agreements—and are thus contingent prepetition obligations. The Debtor has presumably listed these obligations in their Schedules as prepetition claims, and the mere postpetition satisfaction of a contingency to payment does not change when it actually arose.⁶

3. As described in detail in various places, the obligations arising under the Debtor’s Residency Agreements are subject to various contingencies, one of which is that the applicable Resident must exit the community. For Higher-Care Residents, this necessarily occurs *after* the Resident transitions to a higher level of care, likely after their prior unit is filled by another Resident. For this specific subset of Residents—Higher-Care Residents—that did not exit the community prepetition, that means the prepetition obligation owed under their Residency

⁴ Capitalized terms not defined herein shall carry the meanings ascribed to them in the Debtor’s Reply.

⁵ See Debtor’s Reply at 9, ¶17.

⁶ Moreover, to the extent the Debtors are arguing that these claims may be entitled to administrative-expense status, that issue that is not properly before this Court. See Committee’s *Omnibus Response to the Debtors’ Rent Abatement Motion and the Landlord’s Adequate Protection Motion* [Docket No. 235] at 12-13, ¶¶24-25.

Agreement may come due if they exit now, postpetition.⁷

4. The mere fact that a prepetition obligation comes due postpetition does not transform or alter the nature of the obligation; rather, what was a contingent obligation merely becomes fixed.⁸ It is axiomatic that obligations that arise out of prepetition contracts are prepetition debts.⁹ Courts look to the time an agreement was made, not the time of performance on the agreement, to determine whether the obligation arose prepetition or postpetition.¹⁰ Case law from this District is clear that “the mere happenstance of performance on a pre-petition contract neither creates a post-petition contract nor entitles a claimant to an administrative claim.” Obligations which arise out of prepetition contracts, but are due postpetition, are prepetition debts.¹¹ The Debtor should not be authorized to prefer one set of prepetition claimants—Higher-Care Residents—over others.

II. CONCLUSION

5. The Escrow Motion should be granted in part and denied in part. Specifically, the

⁷ Similarly, but for the existence of the escrow arrangement (which the Committee agrees should continue), it is possible that a former Resident’s contingent prepetition claim could become noncontingent during the Chapter 11 Cases. Other Resident claims may exist where all contingencies have already been satisfied. However, the Debtors are proposing to pay *only* the Higher-Care Residents from operating cash, not all such claimants that have or will have non-contingent claims, despite the fact that all such obligations would be prepetition claims.

⁸ *In re East Texas Steel Facilities, Inc.*, 117 B.R. 235, 242 (Bankr. N.D. Tex. 1990) (noting that post-petition payments due on the claim “merely acted to change the character of the claim by converting a contingent claim to a fixed claim”) (citing *In re Briggs Transportation Co.*, 37 B.R. 76 (Bankr. D. Minn. 1984)).

⁹ *See, e.g., Ogle v. Fid. & Deposit Co. of Maryland*, 586 F.3d 143, 147 (explaining that a claim will be deemed to have arisen prepetition if the relationship between the debtor and the creditor contained all of the elements necessary to give rise to a legal obligation, that is, a right to payment, under the relevant non-bankruptcy law); *See, e.g., East Texas Steel*, 117 B.R. at 242–43; *accord In re Mandel*, No. 4:12-CV-313, 2017 WL 1197117 (E.D. Tex. Mar. 31, 2017), *aff’d in part, vacated in part on other grounds, remanded sub nom. Matter of Mandel*, 747 Fed. Appx. 955 (5th Cir. 2018).

¹⁰ *East Texas Steel*, 117 B.R. at 242–43; *see also In re BCE W., L.P.*, 319 F.3d 1166, 1173 (9th Cir. 2003) (holding that where the source of the contractual obligation originates pre-petition, any payments made or damages under the contract arose pre-petition and are not entitled to priority).

¹¹ *East Texas Steel*, 117 B.R. 235, 242–43 (citing *In re Coast Trading Co., Inc.*, 31 B.R. 677, 679 (Bankr. D. Ore. 1983) and *In re Ryan*, 100 B.R. 411, 415 (Bankr. N.D. Ill. 1989)).

Debtor should be authorized to: 1) continue escrowing entrance fees from new Residents as they enter the Edgemere and 2) make payments to any Resident that departs the Edgemere from funds held for their benefit *in escrow* now or in the future. The Debtor should not be allowed to prefer certain prepetition claimants over others by paying refund claims to Higher-Care Residents from operating funds. Finally, the Debtor's assertions about what the order does or does not do aside, issues relating to DIP or postpetition liens should be addressed in any order entered on such matters and not in connection with the Escrow Motion. The Court should strike any language from any final order on the Escrow Motion that grants or ratifies any alleged liens on the Debtor's contractual or other rights in the escrow funds or any proceeds thereof.

Dated: June 2, 2022

Respectfully submitted,

FOLEY & LARDNER LLP

/s/ Mark C. Moore

Stephen A. McCartin (TX 13344700)

Thomas C. Scannell (TX 24070559)

Mark C. Moore (TX 24074751)

2021 McKinney Avenue, Suite 1600

Dallas, Texas 75201

Telephone: (214) 999-3000

Facsimile: (214)999-4667

Email: smccartin@foley.com

Email: tscannell@foley.com

Email: mmoore@foley.com

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

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading was served electronically by the Court's PACER system on June 2, 2022.

/s Mark C. Moore

Mark C. Moore