

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re:

MODIVCARE, INC., *et al.*,

Debtors.

Chapter 11

Case No. 25-90309 (ARP)

(Jointly Administered)

**SURREPLY OF HEALTHSPRING, INC. TO DEBTORS' REPLY TO OBJECTION TO
MOTION FOR ENTRY OF AN ORDER AUTHORIZING THE DEBTORS TO
REJECT CERTAIN EXECUTORY CONTRACTS**

(Relates to Docket Nos. 1133, 1188, and 1213)

TO THE HONORABLE ALFREDO R. PÉREZ,
UNITED STATES BANKRUPTCY JUDGE:

HealthSpring, Inc., submits this *Surreply to Debtors' Reply to Objection to Motion for Entry of an Order Authorizing the Debtors to Reject Certain Executory Contracts* ("Surreply") in support to correct misstatements of fact and misapplication of law in the Debtors' Reply filed at Docket No. 1213 ("Reply"). In support of its Objection, HealthSpring will present evidence that:

- Throughout its many changes of position on the Contract and rejection, the latest at Monday's status conference, ModivCare has been acting in bad faith in furtherance of a plan to hold hostage the health of plan members;
- There is no available economic solution should the Court permit ModivCare to terminate the services on short notice, as no amount of money would allow HealthSpring to put in place an effective replacement provider within the next few weeks.
- The proposed rejection presents genuine issues of health and safety of plan members, potentially triggering violations of federal healthcare law.

Finally, HealthSpring will discuss ModivCare's continuing withholding of information that the contract (still in force) requires and that is necessary for HealthSpring to onboard a new NEMT provider. A temporary restraining order is needed to compel ModivCare to comply with its obligations and enable a stable transition to a new provider.



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A. Throughout this Bankruptcy, ModivCare Has Improperly Shifted its Position on the Contract and on the Basis for Rejection.

1. At Friday’s hearing, HealthSpring will demonstrate ModivCare’s plan to hide, and then to spring, a threat to deny critical services to plan members—knowing full well that HealthSpring would be unable to find an immediate replacement. This plan serves to leverage an improper settlement of a payment dispute that ModivCare now concedes is irrelevant to the issue of rejection. While this might be excused as mere “sharp practice” in the context of an “ordinary executory contract” for commercial services, ModivCare’s scheme threatens the provision of essential healthcare services and requires heightened scrutiny.

2. As was explained in the Objection, until December 18, ModivCare regularly assured HealthSpring that the Contract would not be rejected. As early as August 21, 2025 (the day after ModivCare filed its petition) and as late as December 5, 2025, ModivCare consistently, in writing and in meetings, assured HealthSpring that it would continue to comply with its obligations under the Contract notwithstanding the bankruptcy and through to the end of its term on December 31, 2026.

3. But on December 18, 2025, three days after it obtained plan confirmation, and without any prior warning, ModivCare sent a notice of termination of the Contract and indicated that it might ask this Court’s permission to reject the contract. That termination notice, whether legitimate or not, pushed the parties into the Wind-Down Period of the Contract. This changed the obligations under the Contract, including the required payments to ModivCare for providing what the MSA calls “run-Out Services” (“run-out services”).

4. Eleven days later ModivCare moved to reject the Contract without any factual explanation of the basis for rejection or to support a finding of reasonable business judgment beyond generic conclusions and a vague reference to an inability to “resolve certain issues.”

Motion to Reject ¶ 8, Docket No. 1133 at 3. When challenged by the Objection, counsel for the Debtor on January 25 assured that no emergency hearing was necessary and that “you will see the evidence and the arguments we put forward in our papers and we are making our witness available for a deposition.” Exhibit A (attached). When the Debtor’s Reply and the Shepard Declaration were filed, no documentary evidence was included to support rejection. The Shepard Declaration asserted that due to the dispute about “Costs” in the past, the Contract was “burdensome, unprofitable, [and] loss-making.” Shepard Declaration ¶ 9, Docket No. 1214 at 4. These past Costs were the entire focus of the Shepard Declaration even though the MLR calculation that led to the Costs dispute no longer had any bearing once the Contract entered the period of run-out services. Mr. Shepard admitted at deposition that ModivCare had not done any analysis of the Contract going forward for the run-out services.

5. Last Friday, ModivCare’s counsel withdrew the basis for the business-judgment analysis presented in the Reply, stating that “[w]e agree that the MLR dispute, and the question of which party is correct as to the costs owed, is not relevant to business judgment and the motion to reject.” ModivCare Emergency Motion, Ex. F, at 4 (Docket No. 1262-6). At Monday’s status conference, while backtracking and claiming that the Contract needed to be viewed “holistically,” Counsel nevertheless pivoted to a new third rationale: that ModivCare does not want to provide the run-out services because it knows it will not have a long-term relationship with HealthSpring. This was not the basis of the Motion, Reply, or Shepard Declaration, nor did Mr. Shepard disclose such a desire in his deposition. The Court should not accept a newly concocted business-judgment story that was not disclosed in the papers.

B. No Amount of Economic Commitment Could Provide a Replacement Provider of Critical Healthcare Services in Response to ModivCare’s Sudden Rejection.

6. At Monday’s Status Conference, the Court raised the question of whether the rejection decision presents a purely “economic” issue. HealthSpring understands that concern but it cannot address ModivCare’s immediate termination of services simply by spending more money to arrange a replacement vendor. At the hearing, Ms. Kayla McKenzie will explain why that is *not* the case—that HealthSpring *cannot* onboard a provider, for what are critical (if non-emergency) nationwide healthcare services by February 13, and could not have done so under any circumstances in the handful of weeks since ModivCare created this crisis. As Ms. McKenzie stated in her Declaration:

HealthSpring’s Medicare Advantage program is a nationwide program. It is difficult to onboard a national NEMT provider, as doing so requires significant technology investment, data transfer, and regulatory compliance considerations.

Kayla McKenzie’s Declaration (“McKenzie Decl.”) at ¶ 11-12. Ms. McKenzie explained that the necessary processes simply cannot be obtained in short order, and “[d]ue to the complexity of onboarding a new provider, NEMT service contracts require a long off-ramp provision.” *Id.*

7. The Reply did not dispute this evidence. Indeed, it is undisputed that when ModivCare replaced an earlier provider to HealthSpring’s predecessor, it needed *six months* after being awarded the contract before it was ready to provide services. And it is undisputed that the parties’ contract, as is common in the industry, provides for a 180-day transition period to accommodate this need.

8. ModivCare tries to downplay the importance of its services (contrary to its representations to the public and this Court), by emphasizing that the Contracts “do not involve the provision of any emergency medical transportation and acute medical care to the Members.” Reply ¶ 3. But the Debtors do not dispute HealthSpring’s showing in the Objection that (i) the

Members are generally elderly and many of their appointments involve life-saving treatments, such as dialysis, infusion, and chemotherapy, *see* McKenzie Decl. at ¶¶ 8, 30-36, and (ii) the transportation service provided by ModivCare can be the difference between life and death for the Members, *see id.* at ¶¶ 6-10. Ms. McKenzie will provide further testimony on this point.

C. The Interests Established in Federal Healthcare Law Governing Medicare Advantage Plans Require Heightened Scrutiny of Rejection Here.

9. HealthSpring has already explained how long-standing authority provides that the general powers of a trustee or debtor-in-possession are limited by public policy concerns as manifested in other federal or state law. Objection at 13-15. ModivCare has argued that such limitations on the bankruptcy power are only confined to a few narrow areas such as hazardous waste (*Midlantic*), power contracts regulated by FERC (*Mirant*), or collective bargaining agreements (*Bildisco*). But ModivCare misreads the fundamental basis of those decisions, which do not place such limitations on this Court. When faced with a question of whether rejecting a contract will impact public interest, a court is empowered to require *and should require* that rejection be supported by a more rigorous standard than the debtor's business judgment:

[T]he teachings of *Bildisco* and *Mirant* are not that a Bankruptcy Court should ignore public policy considerations. Far from it. Instead, both *Bildisco* and *Mirant* authorize a bankruptcy court to conduct a fact specific inquiry into whether the specific rejection at issue has significant public interest implications.

In re Ultra Petroleum Corp., 621 B.R. 188, 199 (S.D. Tex. 2020)(citing the Fifth Circuit in the *Mirant* case).

10. Such public interest implications are strongly at issue here. The federal government, in promulgating the regulations that govern the Medicare Advantage plans administered by HealthSpring, has expressed the importance that the benefits remain consistently available to the plan members who rely upon them. If the contract is rejected and ModivCare fails to provide run-out services expressly negotiated for this very purpose, HealthSpring will not be able to ensure

that its members receive the NEMT services. As NEMT services are a supplemental benefit that has been approved by CMS, HealthSpring is required to offer it to all enrollees.¹ HealthSpring must also provide 30 days' prior written notice of any termination of a contracted provider.² If

¹ 42 CFR 422.102(b) Supplemental benefits:

(b) Optional supplemental benefits. Except as provided in § 422.104 in the case of MSA plans, each MA organization may offer (for election by the enrollee and without regard to health status) services that are not included in the basic benefits as described in § 422.100(c) and any mandatory supplemental benefits described in paragraph (a) of this section. Optional supplemental benefits are purchased at the discretion of the enrollee and must be offered to all Medicare beneficiaries enrolled in the MA plan.)

42 CFR 422.112 Access to services:

(a) **Rules for coordinated care plans.** An MA organization that offers an MA coordinated care plan may specify the networks of providers from whom enrollees may obtain services if the MA organization ensures that all covered services, including supplemental services contracted for by (or on behalf of) the Medicare enrollee, are available and accessible under the plan. To accomplish this, the MA organization must meet the following requirements:

(1) **Provider network.**

(i) Maintain and monitor a network of appropriate providers that is supported by written agreements and is sufficient to provide adequate access to covered services to meet the needs of the population served. These providers are typically used in the network as primary care providers (PCPs), specialists, hospitals, skilled nursing facilities, home health agencies, ambulatory clinics, and other providers. The network must include providers that specialize in behavioral health services.

(ii) **Exception:** MA regional plans, upon CMS pre-approval, can use methods other than written agreements to establish that access requirements are met.

(iii) Arrange for and cover any medically necessary covered benefit outside of the plan provider network, but at in-network cost sharing, when an in-network provider or benefit is unavailable or inadequate to meet an enrollee's medical needs.

² 42 CFR 422.111(e) Changes to provider network:

The MA organization must provide enrollees notice of a termination of a contracted provider, irrespective of whether the termination was for cause or without cause, in accordance with § 422.2267(e)(12). The MA organization must make a good faith effort to provide enrollees notice of a for-cause termination of a contracted provider within the timeframes required by this paragraph (e). For all terminations, the MA organization must meet the following requirements: . . .

(2) For contract terminations that involve specialty types other than primary care or behavioral health:

(i) Provide written notice,

(ii) At least 30 calendar days before the termination effective date, and

(iii) To all enrollees who are patients seen on a regular basis by the provider whose contract is terminating. The phrase "enrollees who are patients seen on a regular basis by the provider whose contract is terminating" means enrollees who are assigned to, currently receiving care from, or have received care

HealthSpring cannot fulfill its regulatory and contractual obligation to offer NEMT services as a supplement benefit to all enrollees, CMS can impose sanctions.³

11. The Supreme Court in *Midlantic* ruled that a bankruptcy trustee could not use abandonment powers to rid the bankruptcy estate of the burdens of property where that act would be “in contravention of state or local laws designed to protect public health or safety.” 474 U.S. at 502. Although ModivCare (here wielding the powers of a trustee) seeks to push HealthSpring into violating federal healthcare law, the principles are the same, and a higher standard for rejection should be applied. As the Supreme Court stated in *Midlantic*:

Congress has repeatedly expressed its legislative determination that the trustee is not to have carte blanche to ignore nonbankruptcy law. Where the Bankruptcy Code has conferred special powers upon the trustee and where there was no common-law limitation on that power, Congress has expressly provided that the efforts of the trustee to marshal and distribute the assets of the estate must yield to governmental interest in public health and safety.

474 at 502. This is principle rings even more true when ModivCare no longer even claims that the run-out services would be unprofitable—as HealthSpring has agreed to pay its 2027 rates to provide run-out services. Despite its late-offered desire to “move on” from the HealthSpring relationship, ModivCare will not be economically harmed by providing the run-out services until a replacement vendor is in place and the public interest would be protected.

12. Debtors mistakenly rely on *In re Health Plan of Redwoods*, 286 B.R. 779 (Bankr. N.D. Cal. 2002) to suggest that these public policy concerns do not apply to healthcare contracts.

within the past three months from a provider or facility being terminated.

³ 42 CFR 422.752 Basis for imposing intermediate sanctions and civil money penalties:

(a) All intermediate sanctions. For the violations listed in this paragraph, CMS may impose one or more of the sanctions specified in § 422.750(a) of this subpart on any MA organization with a contract. The MA organization may also be subject to other remedies authorized under law. ... (1) Fails substantially to provide medically necessary items and services that are required (under law or under the contract) to be provided to an individual covered under the contract, if the failure has adversely affected (or has the substantial likelihood of adversely affecting) the individual.)

But the *Redwoods* opinion is short and contains little analysis. In that case, the non-debtor contracting party (Centers of Medicare and Medicaid Services) did *not* object to rejection of the executory contract. *Id.* at 780. Rather, a creditor hospital objected because such rejection would hurt it financially. *Id.* With respect to “the welfare of the debtor’s members who are on Medicare,” the court found that “none of those persons will be left without medical coverage.” *Id.* Thus, the court approved rejection of the contract under the business judgment rule *because* there was no loss of services to members covered by Medicare. *Id.* at 780-81.

13. The facts before this Court are significantly different than those in the *Health Plan of Redwoods* case. The Medicare members in *Health Plan of Redwoods* did not lose medical coverage; whereas ModivCare’s proposed rejection of its contract with HealthSpring would result in members being unable to receive medical care if their transportation for such care is interrupted before a new provider is in place. This result violates federal law. To protect the health and safety of the members, the Court should apply a higher standard for rejection.

D. The Court Should Require ModivCare to Provide “Termination Assistance”.

14. In addition to the basic NEMT services ModivCare is obligated to provide even after termination of the contract, ModivCare is required under section 12.4 of the MSA to provide “termination assistance” to allow transition from one NEMT provider to another. A critical part of that assistance is the transfer of data regarding current NEMT operations, one part of which is the transfer of information regarding existing “transport providers” and the health plan members’ preferences in that regard. ModivCare is refusing to provide a transfer of this data, claiming it is “proprietary.” Sections 6.3 and 6.4 of the MSA make it clear that HealthSpring either owns this information or has a license to use it. But in another attempt to increase its leverage relating to the past payment dispute, ModivCare is refusing to provide a transfer of this data, claiming it is “proprietary.” Other transition data still required from ModivCare include data regarding

Members' 2026 NEMT benefits used, certain customer contact information, and complete data sets regarding future scheduled trips and standing orders. This Court should take up the issue of a temporary restraining order to require ModivCare to provide this essential service whether or not the contract may be rejected at some point.

Dated: February 12, 2026

Respectfully submitted,

JONES MURRAY, LLP

/s/ Erin E. Jones

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ATTORNEYS FOR HEALTHSPRING, INC.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 12, 2026, the foregoing was served electronically via CM/ECF for those parties registered to receive such service.

/s/ Erin E. Jones

EXHIBIT A

From: Jon.Weichselbaum@lw.com
Sent: Sunday, January 25, 2026 13:17
To: Koegel, Thomas; TadDavidson@hunton.com; CRankin@hunton.com; BBell@hunton.com; Keith.Simon@lw.com; George.Klidonas@lw.com; Meghana.Koenitzer@lw.com
Cc: erin.jones@jonesmurray.com; Hagen, Randall; Reyna, Ruben; Betsy.Marks@lw.com; Nikhil.Gulati@lw.com
Subject: Re: ModivCare - Rejection Motion Schedule

FRE 408

Thanks, Tom. We have already confirmed with you that we will not terminate services until after a rejection order is entered. There is no need to contact Chambers on this point and there is no emergency – we did not file our motion on an emergency basis nor allege any emergency. That said, we are not in a position to delay this beyond what our proposed schedule contemplates, which is to have a hearing on the rejection motion on February 4 or 5.

Please let us know if those dates work for so we can contact Chambers and ask for a remote hearing on those dates. This would solve your issues with contacting Chambers as they will then know the hearing is being moved etc.

Once you confirm that we can move the hearing to February 4 or 5, we can discuss having the hearing on Wednesday treated as a status conference, but we need an agreement first on the new hearing date.

With respect to the balance of your email, you will see the evidence and the arguments we put forward in our papers and we are making our witness available for a deposition. Nothing else is needed for this type of hearing. We are seeking to reject a contract. The contract does not provide a benefit to the debtors or their estates and this decision was made in the exercise of the debtors' business judgment.

Please let us know if you agree on the hearing date and date for the deposition. Otherwise, we can raise these scheduling issues during the status conference.

Best,
Jon

Jonathan J. Weichselbaum

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From: Koegel, Thomas <TKoegel@crowell.com>
Sent: Saturday, January 24, 2026 2:04 PM
To: Jon.Weichselbaum@lw.com <Jon.Weichselbaum@lw.com>; taddavidson@hunton.com <TadDavidson@hunton.com>; crankin@hunton.com <CRankin@hunton.com>; bbell@hunton.com <BBell@hunton.com>; Keith.Simon@lw.com <keith.simon@lw.com>; George.Klidonas@lw.com <George.Klidonas@lw.com>; Meghana.Koenitzer@lw.com <Meghana.Koenitzer@lw.com>

Cc: erin.jones@jonesmurray.com <erin.jones@jonesmurray.com>; Hagen, Randall <RHagen@crowell.com>; Reyna, Ruben <RReyna@crowell.com>; Betsy.Marks@lw.com <Betsy.Marks@lw.com>; Nikhil.Gulati@lw.com <Nikhil.Gulati@lw.com>

Subject: RE: ModivCare - Rejection Motion Schedule

Jon,

Thanks for this. As you will have seen from my auto-reply yesterday, I was in meetings for most of the day.

We are engaging with our client about your proposed schedule for discovery and a hearing. While we hope to reach agreement on the schedule with you, we suggest that the parties immediately, and no later than Monday morning, jointly contact Judge Pérez's chambers and inform him that (a) ModivCare has agreed not to terminate run-out services prior to obtaining a rejection order, so there is no emergency on that issue; and (b) that the parties request that the Wednesday morning hearing be treated as a status conference to determine the discovery schedule and hearing date. Neither side believes it appropriate to be filing witness and exhibit lists on Monday for an evidentiary hearing on Wednesday. We however will do that if necessary.

Could we hear back from you on this proposal of contacting the Court ASAP, and no later than 9:30 Monday morning Central Time? If not, we will contact the Court with a proposal that the Wednesday hearing be treated as a status conference.

On the discovery schedule, HealthSpring is at a disadvantage as ModivCare has our evidence in support of the objection—but we do not know how ModivCare will support the motion itself since no evidentiary showing was made in the motion and opening brief. From our side, we do not expect that there are substantial facts in dispute on the motion. The two parties may merely disagree about the law that applies—whether the contract is an “ordinary executory contract” for which ModivCare can reject based on the proper exercise of its business judgment. Or whether because of the health/safety/public policy impacts of allowing ModivCare to reject the contract and not perform the run-out services, a higher standard applies and the Court should not permit that.

But for the purposes of planning discovery, we need to know if there are factual disputes. If ModivCare plans to put on affirmative evidence on any of these issues (as opposed to merely cross-examination of our witnesses), we need to know that for the purposes of planning discovery:

1. Parol or other evidence outside the four corners of the contract that HealthSpring's purported breach excuses ModivCare performance of the run-out services. Or whether instead ModivCare merely contends that it may reject and not perform the run-out obligation as a matter of law pursuant to the Court's approval of the rejection of the contract, limiting HealthSpring to a claim for breach.
2. Evidence to contradict HealthSpring's showing that it is not possible to stand up a replacement to ModivCare earlier than May 1 given the challenges of onboarding a new NEMT provider.
3. Evidence that Medicare Advantage enrollees will be harmed by the unavailability of NEMT services.
4. At no point prior to the December 18 letter did ModivCare suggest that it would (a) reject the contract or (b) terminate services and refuse to provide the run-out services required under the agreement.
5. That ModivCare's proposal in the 2027 RFP is the functional equivalent of the acceptance of HealthSpring's position on the underlying MLR dispute—and thus that ModivCare cannot credibly claim that it exercised business judgment in rejecting the contract.

If I am correct that there are no factual disputes on the above, then perhaps we could stipulate to the facts, have streamlined testimony, and then present argument on the issues of law involved. If there are disputes, then we will want a fair opportunity to conduct expedited discovery. If ModivCare believes there are factual issues in dispute and

cannot stipulate, then we believe it appropriate that ModivCare present some sort of statement that lays out the factual support for its motion and position—as the original motion did not do so.

In addition, to plan the discovery schedule we will need to know which HealthSpring witnesses you will need to depose and, if you seek HealthSpring 30(b)(6) testimony the topics on which you would need it. For the schedule of the hearing, we need to know if you anticipate that testimony will be live (rather than by declaration or written direct) and whether cross-examination will be adduced remotely.

Our client too hopes that a business resolution may be reached, and it believes that one regarding at least the run-out services is essential to protect health and safety of the enrollees. You have marked these communications as protected compromise offers and negotiations under FRE 408, and we certainly won't use statements in them regarding the desire for a business resolution to prove or disprove the validity of ModivCare's claims. These communications, though, otherwise don't relate to compromises offers or negotiations—and we reserve the right to present them as necessary should they be helpful to resolving disputes regarding scheduling.

Tom

Thomas F. Koegel

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From: Jon.Weichselbaum@lw.com <Jon.Weichselbaum@lw.com>
Sent: Friday, January 23, 2026 10:50
To: Koegel, Thomas <TKoegel@crowell.com>; taddavidson@hunton.com; crankin@hunton.com; bbell@hunton.com; Keith.Simon@lw.com; George.Klidonas@lw.com; Meghana.Koenitzer@lw.com
Cc: erin.jones@jonesmurray.com; Hagen, Randall <RHagen@crowell.com>; Reyna, Ruben <RReyna@crowell.com>; Betsy.Marks@lw.com; Nikhil.Gulati@lw.com
Subject: RE: ModivCare - Rejection Motion Schedule [FRE 408 / Confidential]

FRE 408

All,

Following up on our call from yesterday, ModivCare intends to rely on Kenneth Shepard as our witness in connection with the contract rejection motion. To the extent you intend on taking a deposition, Mr. Shepard can be available remotely on Monday, February 2, 2026 for a short deposition over Zoom. We can discuss start time and length of such deposition.

Please note, we are discussing with our client whether we need a deposition of HealthSpring to respond to the allegations in its objection, regardless of whether a witness intends to take the stand at the hearing (given the declarations filed in connection with your objection). We will come back to you on this and if needed will file a 30b6 notice early next week (but hoping that won't be necessary).

Lastly, we would propose continuing the hearing on our motion to either February 4 or 5 and that all parties appear remotely. Before we reach out to Chambers, do those dates work for you?

As we discussed yesterday, we understand our clients are in direct discussions and are hopeful they can reach an out-of-court resolution. We believe the above timeline affords the parties sufficient time to both reach such resolution and to prepare for a hearing should a resolution not be obtained.

We are available to discuss any questions you may have.

Thanks,
Jon

Jonathan J. Weichselbaum

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-----Original Appointment-----

From: Weichselbaum, Jon (NY)

Sent: Wednesday, January 21, 2026 10:16 PM

To: Weichselbaum, Jon (NY); Koegel, Thomas; taddavidson@hunton.com; crankin@hunton.com; bbell@hunton.com; Simon, Keith (NY); Klidonas, George (NY); Koenitzer, Meghana (NY)

Cc: erin.jones@jonesmurray.com; Hagen, Randall; Reyna, Ruben; Marks, Betsy (BN); Gulati, Nikhil (NY)

Subject: ModivCare - Rejection Motion Discussion [FRE 408 / Confidential] (LW/HAK/Crowell)

When: Thursday, January 22, 2026 2:30 PM-3:00 PM (UTC-05:00) Eastern Time (US & Canada).

Where: Microsoft Teams Meeting

Microsoft Teams meeting

Join:

<https://teams.microsoft.com/meet/25532559512307?p=7IAzsVmkloiyPp3gRv>

Meeting ID: 255 325 595 123 07

Passcode: VD9EZ2LC

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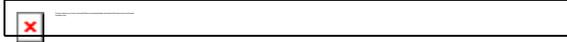
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