UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In re: **MIDWEST CHRISTIAN VILLAGES, INC.** ***et al.*,**[1] **Debtors.**	**Chapter 11** **Case No. 24-42473-659** **Jointly Administered** Related Docket Nos. 11, 60, 160

JOINT OBJECTION OF DEBTORS AND DIP LENDER IN OPPOSITION TO HUD'S ORAL AND WRITTEN MOTION FOR STAY PENDING APPEAL OF FINAL DIP FINANCING ORDER

The above-captioned debtors and debtors-in-possession (the "Debtors") and UMB Bank, N.A., in its capacity as DIP Lender (together, the "Opponents"), by and through respective counsel, submit this objection (the "Joint Stay Opposition")[2] to the oral motion at a hearing on September 13, 2024, and an emergency written motion filed on September 16, 2024, [Docket No. 315] requesting a stay pending appeal (collectively, the "Stay Motion") asserted by the United States of America (the "United States") on behalf of the United States Department of Housing and Urban Development ("HUD" or the "Movant") of the effectiveness of the *Final Order (1) Authorizing*

[1] The address of the Debtors headquarters is 2 Cityplace Dr, Suite 200, Saint Louis, MO 63141-7390. The last four digits of the Debtors' federal tax identification numbers are: (i) Midwest Christian Villages, Inc. [5009], (ii) Hickory Point Christian Village, Inc. [7659], (iii) Lewis Memorial Christian Village [3104], (iv) Senior Care Pharmacy Services, LLC [1176], (v) New Horizons PACE MO, LLC [4745], (vi) Risen Son Christian Village [9738], (vii) Spring River Christian Village, Inc. [1462], (viii) Christian Homes, Inc. [1562], (ix) Crown Point Christian Village, Inc. [4614], (x) Hoosier Christian Village, Inc. [3749], (xi) Johnson Christian Village Care Center, LLC [8262], (xii) River Birch Christian Village, LLC [7232], (xiii) Washington Village Estates, LLC [9088], (xiv) Christian Horizons Living, LLC [4871], (xv) Wabash Christian Therapy and Medical Clinic, LLC [2894], (xvi) Wabash Christian Village Apartments, LLC [8352],(xvii) Wabash Estates, LLC [8743], (xviii) Safe Haven Hospice, LLC [6886], (xix) Heartland Christian Village, LLC [0196], (xx) Midwest Senior Ministries, Inc. [3401]; (xxi) Shawnee Christian Nursing Center, LLC [0068]; and (xxii) Safe Haven Hospice, LLC [6886].

[2] The Official Committee of Unsecured Creditors, who is filing a joinder to this Joint Stay Opposition, supports the Opponents' positions stated herein.

the Debtors To Obtain Post-Petition Financing, (2) Authorizing Debtors In Possession to Use Cash Collateral, (3) Providing Adequate Protection, (4) Granting Liens, Security Interests and Superpriority Claims, and (5) Scheduling a Final Hearing (the "DIP Financing Order").[3] In support of the Joint Stay Opposition, the Opponents state as follows:[4]

PRELIMINARY STATEMENT

1. Movant seeks extraordinary relief that threatens to cause irreparable harm to the Debtors, the thousand residents under their care, their employees, and the entire creditor body. Yet Movant fails to satisfy the onerous standard for a stay pending appeal of this Court's ruling approving the DIP Motion because: (i) it is unlikely to succeed on the merits of any appeal, including because it merely rehashes arguments this Court already considered and dismissed; (ii) it fails to produce *any evidence* of irreparable injury absent a stay; (iii) it ignores the irreparable harm a stay would cause the Debtors and other parties in interest; and (iv) it does not establish that public policy favors a stay.

2. Based on the extensive record in these chapter 11 cases, which are incorporated herein by reference, the Court's ruling approving the DIP Financing Order on a final basis should stand and, for the reasons set forth below, the Court should deny the Stay Motion.

ARGUMENT

A. Movant Fails to Meet Any of the Factors for Granting a Stay of the DIP Financing Order Pending Appeal, Much Less the Balance of All Four (4) Factors.

3. A stay pending appeal is "an intrusion into the ordinary processes of administration and judicial review." *Nken v. Holder*, 556 U.S. 418, 427 (2009). Thus, it is an "extraordinary

[3] Capitalized terms used but not otherwise defined herein shall have the meaning set forth in the First Day Declaration, the DIP Motion, or the DIP Credit Agreement (each as defined herein), as applicable.

[4] A detailed description of the Debtors' business and the events leading up to the filing of these chapter 11 cases can be found in the *Declaration of Kathleen (Kate) Bertram in Support of the Debtors' Chapter 11 Petition and First Day Motions* [Docket No. 3] (the "First Day Declaration"), incorporated by reference herein.

remedy" that is "never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). A request for a stay requires application of a four-factor test laid out by the Supreme Court:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits;
>
> (2) whether the applicant will be irreparably injured absent a stay;
>
> (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and
>
> (4) where the public interest lies.

Nken, 556 U.S. at 434 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)); *see also Arkansas Peace Ctr. v. Arkansas Dep't of Pollution Control*, 992 F.2d 145, 147 (8th Cir. 1993) (also citing *Hilton*).

4. The first two factors "are the most critical." *Nken*, 556 U.S. at 435; *see also Brady v. Nat'l Football League*, 640 F.3d 785, 789 (8th Cir. 2011) ("The most important factor is the appellant's likelihood of success on the merits," but ultimately, the court must consider the relative strength of each of the four factors, "balancing them all.") (citations omitted). Where the balance of the equities (factors two, three, and four) weighs against granting relief, courts have found that a stay pending appeal may be denied outright. *See, e.g., Ledesma v. Garland,* 850 F. App'x 84, 89-90 (2d Cir. 2021) ("[W]e need not resolve whether [movant] has actually met th[e] [merits] factor because, even if he has, his motion still fails on the other remaining *Nken* prongs.").

5. The party requesting a stay bears the heavy burden of showing that the circumstances justify an exercise of discretion. *See Nken*, 556 U.S. at 433 (citation omitted); 10 COLLIER ON BANKRUPTCY P 8007.03 (16th 2024); *see also United States v. Priv. Sanitation Indus. Ass'n of Nassau/Suffolk, Inc.*, 44 F.3d 1082, 1084 (2d Cir. 1995) (describing the burden as

"difficult"); *In re Terrestar Corp.*, No. 11-10612 SHL, 2012 WL 1028218, at *2–3 (Bankr. S.D.N.Y. Mar. 26, 2012) (stating that "[t]he moving party faces a heavy burden.").

6. Because Movant cannot meet that "heavy burden," the DIP Financing Order should not be stayed pending appeal.

I. Movant is Not Likely to Succeed on the Merits of the Appeal.

7. An applicant for a stay pending appeal must show that it has a "substantial possibility" of success on the merits of its appeal, an "intermediate level between 'possible' and 'probable.'" *In re 473 West End Realty Corp.*, 507 B.R. 496, 501 (Bankr. S.D.N.Y. 2014); *see also Hirschfeld v. Bd. of Elections in New York*, 984 F.2d 35, 39 (2d Cir. 1993). Moreover, to succeed on a motion for a stay pending appeal, the applicant must do more than regurgitate its already-rejected arguments. *See In re Sabine Oil & Gas Corp.*, 548 B.R. 674, 684-84 (Bankr. S.D.N.Y. 2016) (where appellants failed to cite new case law in support of arguments presented to bankruptcy court in support of previously presented arguments, such appellants failed to satisfy this prong); *Daly v. Germain* (*In re Norwich Historic Pres. Tr., LLC*), No. 3:05CV12 (MRK), 2005 WL 977067, at *4 (D. Conn. Apr. 21, 2005) (where movant "merely repeat[ed] his assertion, previously pressed in the Bankruptcy Court," court found movant failed to show substantial possibility of winning appeal).

8. The record is clear and undisputed. The proposed DIP Facility is a package deal, contingent on the narrowly-tailored priming lien being approved. Movant ignores this fundamental fact, instead seeking to substitute its judgment for that of the Debtors and the DIP Lender, and asserting, *without evidence*, that funding will be available to the Debtors regardless of whether the stay is granted. The record demonstrates the opposite. In the absence of the DIP Financing, the Debtors' facilities would have to be shuttered in relatively short order. The resultant

harm to the residents of the facilities would be significant, immediate, and perhaps life-threatening. The sales process would be completely derailed, significantly diminishing the recovery to creditors, and the estates would have little viable path forward. The Washington Estates facility and its residents would not be immune to this outcome, because it, like all of the Debtors' facilities, shares in a "central nervous system," without which none of the Debtors would be able to operate.[5]

9. Movant failed to present any facts or law that would support its success on the merits. The testimony, record, and argument all overwhelmingly support this Court's ruling that § 364 of title 11 of the United States Code (the "Bankruptcy Code") permits the priming of a HUD loan. Even Lument Real Estate Capital, LLC ("Lument"), the present holder of the HUD-insured mortgage, does not seek to appeal this Court's ruling.[6]

10. In particular, § 364(d) provides a clear and unambiguous framework for allowing the priming of existing liens to enable debtors to secure necessary post-petition financing to maintain their operations. This provision applies broadly to all secured creditors, including HUD-insured mortgage holders, without exception. Neither the Bankruptcy Code nor the National Housing Act exempts HUD-insured mortgages from being subject to priming liens in bankruptcy cases. Unsurprisingly, Movant cited no cases concluding that any class of secured creditor was automatically exempt from priming under § 364(d) of the Bankruptcy Code.

11. Two sections of the Bankruptcy Code support this conclusion. First, § 106 of the Bankruptcy Code explicitly abrogates sovereign immunity for governmental units with respect to

[5] Not only are the terms of the DIP Financing a package deal (*i.e.*, the Movant cannot selectively choose only the provisions it finds acceptable), but the Debtors' properties are being marketed together. This interconnectedness of the estates is a relevant factor as to whether the DIP Financing should be approved.

[6] Of note, Lument holds the mortgage, loan, and reserves, and is currently the true party in interest. At this juncture, HUD is only a contingent creditor and has no exposure unless and until Lument makes a claim on the HUD insurance. And even in that circumstance, Lument and HUD have suggested that HUD may not be bound to honor its insurance obligation if the priming lien is granted.

§ 364. This reinforces that HUD, as a governmental entity, is subject to the priming provisions of the Bankruptcy Code.

12. Second, §362(d)(8) of the Bankruptcy Code exempts HUD-insured mortgages from the automatic stay, demonstrating that Congress included exceptions for HUD-insured mortgages when it desired. Tellingly, § 364(d) has no such similar exception.

13. In contrast, Movant relies solely on a definitional section of the NHA, which sets forth a condition of HUD's indorsement of a mortgage for insurance, for the proposition that HUD-insured mortgages are endowed with absolute priority in perpetuity. Yet nowhere in the NHA is there a provision that expressly exempts HUD-insured mortgages from being subordinated or otherwise entitles them to ongoing first-priority status in perpetuity. Therefore, the Court properly concluded that there is no conflict between the NHA and the Bankruptcy Code, and that HUD remains subject to priming under § 364 to the same extent as any other secured creditor.

14. Furthermore, the Court properly concluded that the conditions in this case for priming under § 364 were satisfied. Indeed, HUD and Lument failed to present any evidence (i) that other DIP financing was available (nor did Lument or HUD offer any alternative DIP financing proposal of its own, including pre- or post-petition), or (ii) disputing the Debtor's $10.6 million appraisal of Washington Estates, or (iii) that the other adequate protection provided to Movant was insufficient.

15. In considering whether to grant a stay, the single most important factor is likelihood of success on the merits. *Brady*, 640 F.3d at 789.[7] The merits of Movant's Stay Motion are weak,

[7] Movant erroneously cites *James River Flood Control Ass'n v. Watt*, 680 F.2d 543, 544 (8th Cir. 1982) for the proposition that a court can grant a stay without considering the likelihood of success on the merits of the appeal so long as the other three factors weigh in favor of a stay. This simply is not the case. In *Watt*, the appellate court stayed the order because the lower court has not put its decision in declining to grant a preliminary injunction in sufficient detail and was likely to decide the case on its merits shortly. *Watt* is inapposite here as the case here has been decided on its merits and the Court has granted the motion in a fully explained decision.

as evidenced by various findings of this Court, the caselaw cited in the Opponents' pleadings, and the factual record. Further, the Stay Motion merely regurgitates the unpersuasive arguments the Court previously considered and rejected. Consequently, this Court should deny the Stay Motion.

II. Movant will Not Suffer Irreparable Harm Absent a Stay.

16. Movant's Stay Motion should also be denied because Movant has failed to prove it will suffer irreparable harm. HUD asserts that allowing the priming of its liens could set a dangerous precedent for the HUD program and undermine the future insurability of similar loans. However, this argument is speculative and unsupported by any evidence in the record.

17. First, Movant relies entirely on argument, not on evidence, to support the claim of irreparable harm. HUD chose not to, or could not, make a record on key points. For instance, neither HUD nor Lument had a witness testify that HUD would stop making HUD loans in the future if priming were granted in this specific situation or that the program would be jeopardized by priming in this circumstance. There was absolutely no evidence that the HUD loans in question or even HUD loans, in general, are or would be adversely impacted or affected.

18. The priming of the HUD mortgage in the present cases was specifically tailored to the circumstances and provided substantial adequate protection to HUD and Lument – protection prescribed by the Bankruptcy Code to prevent any harm to parties subordinated to priming liens. It is obvious that for any other case, the priming of any loan, including HUD mortgages, would require a substantial showing that the primed lenders were adequately protected and not harmed, as the Debtors proved in the instant case.

19. In contrast to Movant's evidentiary deficiency, the Opponents clearly established that Lument and HUD are adequately protected by an equity cushion of 120% above the value of

the real estate and additional cash reserves of approximately $1.65 million. In other words, the Washington Estates loan is substantially overcollateralized.

20. Further, the only context whereby Lument (or any other commercial lender) is harmed by priming is if the adequate protection proves insufficient *and* if HUD fails to honor its insurance obligation. There is no evidence that HUD could deny an insurance claim due to the court-ordered priming. In any event, it is the denial (or potential denial) of the insurance claim that could harm the HUD program, which is something HUD could remedy by assuring its commercial partners that it would stand by its commitments in such circumstances.

21. Notwithstanding the foregoing, even if evidence was submitted concerning potential ramifications of the Court's ruling on the HUD program, other courts have considered and rejected such arguments. For instance, in *Chicago Title Ins. Co. v. Sherred Vill. Assocs*., 708 F.2d 804 (1st Cir. 1983), the court allowed a mechanic's lien to prime a pre-existing HUD-insured mortgage, demonstrating that HUD-insured loans are not immune from subordination under bankruptcy law. In that case, HUD made the same arguments that it makes here; namely, that an adverse ruling would trigger the collapse of the HUD program. *Id*. at 807. In rejecting that assertion, the First Circuit cited the district court's consideration of the issue, saying, "The district court considered all of the evidence and was not persuaded that the HUD program would collapse if the linchpin of absolute federal priority were removed." *Id*. at 811. Indisputably, the ruling in *Sherred Village Associates* was more impactful to HUD than the case at hand, because the priming mechanic's lienholder was not required to adequately protect HUD. Notwithstanding that fact, the potential harm to the HUD program did not alter the First Circuit's conclusion. Bottom line,

Movant has not presented sufficient evidence demonstrating that it will be harmed, much less irreparably harmed, if its Stay Motion is denied.

22. Additionally, a majority of courts have found that the potential mootness of an appeal absent a stay does not constitute irreparable harm – otherwise, every party appealing an order under § 364(d) would be able to demonstrate irreparable harm. *See e.g.*, *In re Peabody Energy Corp.*, No. 4:17-CV-01053-AGF, 2017 WL 1177911, at *6 (E.D. Mo. Mar. 30, 2017) (acknowledging that the Eighth Circuit has not decided this issue but finding that other factors weighing against granting a stay can overcome the risk that equitable mootness constitutes some degree of irreparable harm); *see generally In re Adelphia Commc'ns Corp*., 361 B.R. 337, 347 (S.D.N.Y. 2007) ("A majority of courts have held that a risk of mootness, standing alone, does not constitute irreparable harm.") (collecting cases but ultimately finding irreparable harm due to mootness even while acknowledging that the Second Circuit has not decided the issue).

23. As noted above, there is no evidence in the record regarding the alleged harms to HUD. HUD cannot argue harms without an admitted evidentiary record to support those harms. *See e.g.*, *Stockdale v. Stockdale*, No. 4:08-CV-1773 CAS, 2009 WL 2151159, at *3 (E.D. Mo. July 16, 2009) ("There is nothing in the record to evidence [the alleged irreparable harm], so the Court cannot find plaintiff faces a threat of irreparable harm.") (citing *Chevron U.S.A., Inc. v. 11500 Manager, LLC*, No. 09-6070-CV-SJ-HFS, 2009 WL 1974590, at *3 (W.D. Mo. July 7, 2009) ("Nothing confirms Plaintiff's fears . . . , so the Court cannot find Plaintiff faces a threat of irreparable harm.")).

24. Merely admitting into evidence an annual report showing that HUD has made and continues to make a number of HUD loans is insufficient to show that the HUD program will cease

because HUD was primed in this one case. Without evidence of irreparable harm, this Court should deny the Stay Motion.

III. A Stay would Substantially Harm the Debtors, Their Estates, Their Creditors, and Other Parties in Interest.

25. Although Movant will not be irreparably harmed by the absence of a stay, the Debtors, their estates, their creditors, and other parties in interest will be. Notably, this assertion is not based on argument of counsel, but instead on the direct, uncontested testimony of the Debtors' chief restructuring officer, Shawn O'Conner. Specifically, Mr. O'Conner testified that failure to obtain approval of the DIP Financing Order would harm: (i) residents, (ii) the Debtors and their sale efforts, (iii) employees, and (iv) creditors and the bankruptcy estates.

26. In its Stay Motion, HUD suggests that the DIP Lender may, if the Stay Motion is granted, still fund the DIP Facility. There is zero evidentiary support for that assertion, and HUD was unable to provide any even when this Court asked its counsel that specific question. Likewise, HUD's suggestion that the harm to the residents could be vitiated by the states' stepping in and acting as a stop-gap measure to protect the residents' health and safety is entirely speculative and not supported by any evidentiary record before this.

27. There is simply no evidence that the DIP Lender will lend additional funds absent an order of this Court that provides for (i) Washington Estates and Wabash Estates as joint and several obligors, and (ii) a priming lien on Washington Estates. Indeed, this Court acknowledged that DIP lenders regularly require additional collateral to provide DIP financing. Without additional DIP advances soon, the Debtors are out of money and will have to liquidate most of their facilities, including Washington Estates and Wabash Estates. Even for Washington Estates and Wabash Estates, there will be no support from headquarters if headquarters staff is not being

paid, and there will be a severe disruption at those two facilities as well, though the weight of the evidence shows that even those facilities would close under those circumstances.

28. To overcome potential harm to the Debtors, their estates, their creditors, and other parties in interest, Movant must prove that the balance of harms tips in favor of granting the stay. *Brady*, 640 F.3d at 789 (focusing on the merits but balancing all factors); *see also In re Adelphia*, 361 B.R. at 349. However, as set forth in the record, the Debtors, their estates, their creditors, and other parties in interest would suffer significant harm from even a short-term delay (which will likely become a long-term delay). Any alleged harm to Movant is far outweighed by the very real, immediate, and evidentiary-backed harms to the Debtors and their estates.

29. In short, without the funds available from the DIP Facility and access to cash collateral, the Debtors face immediate and irreparable harm including the inability to continue to provide the necessary care to the residents at the Debtors' campuses. This in turn would irreparably harm efforts to reorganize and to make any meaningful distribution to creditors. As a result, the balance of harms greatly favors the Debtors. *See e.g.*, *In re Peabody Energy Corp.*, at *7 ("Upending the financing would, in turn, jeopardize the Debtors' ability to reorganize, to the detriment of the other creditors and of the Debtors' employees and retirees, who stand to substantially benefit under the Plan. This factor weighs heavily against granting a stay.").

IV. A Stay is Not in the Public Interest.

30. There exists a "strong public interest in the swift and efficient resolution of bankruptcy proceedings" prevails in such circumstances. *In re Peabody Energy Corp.*, at*7 (citing *In re Adelphia Commc'ns Corp.*, 361 B.R. at 367–68).

31. Here, there is a strong public interest in chapter 11 debtors operating as going concerns during the pendency of a chapter 11 bankruptcy and being sold or reorganized as going

concerns.[8] This is particularly true in the instant case, where the Debtors own and operate senior living facilities in underserved rural and smaller town markets.

32. On the other hand, as to any public interest invoked in HUD's request for stay, there is only speculation, and no admitted evidence in this case, that the HUD program will be negatively affected if priming is allowed in these special and limited factual circumstances – *i.e.*, where Lument, as mortgagee, and HUD, as insurer, are adequately protected against any harm. Thus, the public interest factor also weighs against granting a stay.

CONCLUSION

33. For the reasons set forth herein, the Debtors respectfully request that the Court deny the Stay Motion.

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[8] Movant's reference to *United States v. Reed*, No. C07-4087-MWB, 2009 WL 10727786, at *2 (N.D. Iowa May 12, 2009) is erroneous, as the facts there show that the government was the only other party-in-interest in the matter. That is not the case here, where there are the residents, employees, creditors, and parties-in-interest to consider.

Dated: September 17, 2024
St. Louis, Missouri

Respectfully submitted,

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