IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

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

UNITED STATES' REPLY IN FURTHER SUPPORT OF UNITED STATES' EMERGENCY MOTION FOR STAY PENDING APPEAL OF FINAL ORDER (1) AUTHORIZING DEBTORS IN POSSESSION TO OBTAIN POST-PETITION FINANCING; (2) AUTHORIZING DEBTORS IN POSSESSION TO USE CASH COLLATERAL; (3) PROVIDING ADEQUATE PROTECTION; AND (4) GRANTING LIENS, SECURITY INTERESTS AND SUPERPRIORITY CLAIMS

The United States of America (the "United States"), on behalf of the United States Department of Housing and Urban Development ("HUD"), hereby replies to the joint objection of the Debtors and UMB Bank [Dkt. No. 323] (the "Objection") and the Committee's joinder therein [Dkt. No. 324] (the "Joinder," and together with the Objection, the "Objections") and respectfully states as follows in further support of the United States' emergency motion [Dkt.

[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 of Southern Illinois, LLC [7209], (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].

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No. 315] (the "Motion") for a stay pending appeal, solely as applied to the HUD Debtors and their property, of the Final DIP Order:[2]

INTRODUCTION

1. Perhaps most telling about the Objections is what is **not** said. Initially, they assert Lument, the current holder of the HUD Notes and mortgagee under the HUD Mortgages, "does not seek to appeal this Court's ruling." Object., ¶ 9. The filing of an appeal is not a prerequisite to seeking a stay pending appeal. Federal Rule of Bankruptcy Procedure 8007(a)(2) permits a party to move for a stay pending appeal "either before or after the notice of appeal is field." All that can be gleaned from the record is that Lument has not yet sought a stay pending appeal from this Court.

2. On the merits of the United States' motion stay pending appeal, while the Debtors and UMB Bank contend that the United States failed to establish that its appeal of the Final DIP Order is likely to succeed, they fail to address several of the United States' objections to the DIP Facility and Final DIP Order. They, for example, assert the United States relies exclusively on Housing Act's definition of "mortgage" (12 U.S.C. § 1715w(b)(4)), when the United States has urged, consistent with Supreme Court and Circuit precedent, that this Court must follow a holistic approach to construing the Housing Act with the Bankruptcy Code. They also do not address that the "first mortgage" and other requirements of the Housing Act, its regulations, and the Regulatory Agreements are consistent with section 364(d)(1) of the Bankruptcy Code nor that section 364(d)(1)'s language is merely permissive. The Debtors and UMB Bank similarly do not challenge the United States' argument that the DIP Facility and Final DIP Order terms

[2] Capitalized terms not otherwise defined herein have the meanings ascribed to such terms in the Motion.

violate the requirements of the Housing Act, its regulations, and the Regulatory Agreement that assets and income of the HUD Debtors only be used for the payment of permitted project expenses and repairs and not distributed to other unless a HUD Debtor has "surplus cash," which is indisputably absent here.

3. Narrowly focusing on whether the United States is likely to experience economic loss if no stay is issued, the Debtors and UMB Bank ignore the less quantifiable irreparable harm that HUD will endure without a stay. When, as here, the absence of a stay is likely to destroy any meaningful right the United States has for appellate review of serious legal issues of public importance, numerous courts – including several in this Circuit – have recognized the loss of such appeal rights is irreparable harm.

4. Next, the Debtors and UMB Bank (joined by the Committee) overstate the risk that UMB Bank will deny Debtors access to the postpetition financing should a stay as to the HUD Debtors and their property be granted. The record before the Court clearly demonstrates the Debtors filed these Chapter 11 Cases to liquidate UMB Bank's collateral. While the welfare of the residents of the Debtors' facilities is also paramount to the United States, the possibility that UMB would withdraw all postpetition funding and that facilities would cease operations are remote since the facilities ceasing operation would destroy any going concern value and significantly reduce UMB's recovery from any sale.

5. Finally, the limited stay sought here plainly is in the public interest, given this Court's ruling may significantly disrupt the public-private partnership system of lending that the American public has long relied upon to supply credit to healthcare entities that might not otherwise have access to it. As the requested stay is limited to the HUD Debtors and their

property, the Chapter 11 Cases are free to move forward as is in the best interest of each Debtor's estate.

ARGUMENT

I. THE UNITED STATES' APPEAL ISSUES HAVE SIGNIFICANT MERIT.

6. The Objection fails to demonstrate sufficient, if any, faults in the United States arguments that cast doubt on the likelihood that the United States will succeed on appeal. Importantly, the Objection does not address the merits of the arguments the United States intends to pursue. The United States has demonstrated a likelihood of success in demonstrating the Final DIP Order's priming liens and cross-collateralization provision violate the Housing Act, its regulations and the Regulatory Agreement. It has also shown a likelihood of success in establishing the DIP Facility is neither fair or reasonable to the HUD Debtors.

A. The DIP Facility and Final DIP Order impermissibly (1) prime the existing HUD Mortgages and (2) Cross-Collateralize liens and obligations with those of the non-HUD Debtors.

7. The United States agrees that the Housing Act and its related regulations can and should be construed to co-exist with section 364 and other provisions of the Bankruptcy Code. The co-existence of these two statutory schemes does not yield that the Debtors and UMB Bank have an absolute right to subject to the HUD Debtors and their property to priming liens and cross-Debtor cross-collateralization. As discussed more fully in the Motion, the Court must approach this statutory interpretation as a holistic endeavor that considers, *inter alia,* the text of the purpose of sections of the Housing Act (12 U.S.C. §§ 1715w(b)(4), 1715w(d)(1), & 1715z-4a) and the Bankruptcy Code (11 U.S.C. § 364(d)) and, in the case of the Housing Act, also its regulations (*e.g.,* 24 C.F.R. §§ 200.71 & 232.3) and the Regulatory Agreements (*e.g.,* Reg. Agrees., ¶¶ 6(a), 6(e)(1) – (4), 6(f), and 13(n)) that continue to bind the HUD Debtors. *See, e.g.,* Motion, ¶¶ 27-29.

8. The objectors ignore that section 364(d)(1) of the Bankruptcy Code does not affirmatively mandate the granting of a priming lien for postpetition financing whenever the trustee (or DIP) meets the section's requirements. Had Congress intended that result, it would have used language such as "the court . . . [***shall***] authorize the obtaining of credit or the incurring of debt secured by a senior or equal lien on property of the estate that is subject to a lien . . . " in section 364(d).[3] Instead, Congress used the permissive language "may authorize."

9. Accordingly, even assuming the Debtors have satisfied the requirements of subsections (A) and (B) of section 364(d)(1), the statute creates no entitlement to priming liens when, as is the case here, doing so would violate other bankruptcy law requirements or the Housing Act's statutory and regulatory scheme. Here, taken as a whole, the Housing Act's applicable statutory and regulatory provisions contain Congress's expressed intention, either in the text of the statute itself or in the regulations promulgated under Congressionally delegated authority to the HUD Secretary, that: (a) the HUD-insured mortgage be first priority in the borrower's fee simple real property (NHA § 1715w(b)(4)); (b) the borrower be a special purpose entity (NHA § 1715w(d)(1); 24 C.F.R. § 232.3);[4] and (c) the borrower under a HUD loan "use" (including through incurring other encumbrances) the assets of the project only for the project's

[3] *See, e.g., Lopez v. Davis,* 531 U.S. 230, 241 (2001) ("Congress' use of the permissive 'may' in § 3621(e)(2)(B) contrasts with the legislators' use of a mandatory 'shall' in the very same section. Elsewhere in § 3621, Congress used 'shall' to impose discretionless obligations . . . ."); *Kingdomware Techs, Inc., v. U.S.,* 579 U.S. 162, 172 (2016) ("When a statute distinguishes between 'may' and 'shall,' it is generally clear that 'shall' imposes a mandatory duty."); *LeMay v. U.S.P.S.,* 450 F.3d 797, 799 (8th Cir. 2006) ("[A]s a general rule of statutory construction, 'may' is permissive, whereas 'shall' is mandatory.").

[4] In the context of the Section 232 program, a special purpose entity is commonly understood to be an entity that has only a single asset and is responsible for only its own liabilities related to its ownership and operation of that asset. *See* Program Handbook, § II, Ch. 2.5.B ("Single-asset entities (SAE) may also be referred to as single-purpose entities (SPE). The mortgaged healthcare facility must be the only asset of the Borrower; however, the Borrower entity is permitted to operate the project.").

operations and repairs with limited exceptions (not applicable here) (NHA, § 1715z-4a(a)(1)); 24 C.F.R. § 200.71). The Objections fail to address these arguments.[5]

B. The Objectors fail to address their failure to protect the interests of the HUD Debtors and their creditors.

10. In the Objection, despite being central to any approval of postpetition financing, the Debtors and UMB Bank do not defend the fairness or reasonableness of the DIP Facility's terms. *See, e.g., In re Farmland Indus., Inc.*, 294 B.R. 855, 879–80 (Bankr. W.D. Mo. 2003), *appeal dismissed*, No. 03-00472 (W.D. Mo. Jan. 9, 2004) (summarizing elements for approval of postpetition financing as including that it "is an exercise of sound and reasonable business judgment," that it "is in the best interest of the estate and its creditors", and that its terms are "fair, reasonable, and adequate, . . ."") (citing *In re The Crouse Gr., Inc.,* 71 B.R. 544 (Bankr. E.D. Pa. 1987).

11. Ignoring that neither HUD Debtor requires the postpetition financing, the Debtors and UMB Bank baldly assert –with no citation to the record-- that "the Debtors' facilities, shares in a 'central nervous system,' without which none of the Debtors would be able to operate." Object., ¶ 8. While historically using a centralized cash management system and having staff of the parent Debtor (Midwest Christian Villages, Inc.) perform certain back-office functions, the record is scant of any support of the oft-repeated contention that these tasks could not be decentralized or outsourced. In truth, as the Debtors' Chief Restructuring Officer testified at his deposition, the Debtors never considered whether the HUD Debtors could remain out of

[5] The Joint Objection also does not explain how section 106 of the Bankruptcy Code waiving the United States' sovereign immunity as to the entirety of section 364 results in all other Congressionally-enacted statutes yielding to section 364. Bankruptcy is not a license to violate the law. *Cf. O'Loghlin v. County of Orange*¸229 F.3d 871, 875 (9th Circuit) (observing, in deciding whether confirmation discharged continued post-confirmation ADA violations that started prepetition, that the bankruptcy discharge "'fresh start' means only that; it does not mean a continuing licence to violate the law").

bankruptcy or be operated separately.[6] The HUD Debtors filing bankruptcy and having their assets plundered for the benefit of the DIP Lender, the Bondholders, and the non-HUD Debtors was always pre-ordained.

12. The Debtors and UMB Bank similarly ignore the conflicts of interest that resulted in the failure to protect the HUD Debtors and their creditors in connection with the DIP Facility. Neither HUD Debtor having the benefit of independent directors, officers, managers, counsel, or other professionals in connection with the negotiation and drafting of the DIP Facility's terms is undisputed. Bankruptcy law is well settled "that a debtor and its board of directors owe fiduciary duties to the debtor's creditors to maximize the value of the estate, and each of the estates in a multi-debtor case." *In re Innkeepers USA Trust,* 442 B.R. 227, 235 (Bankr. S.D.N.Y. 2010). *See also Commodity Futures Trading Comm'n v. Weintraub,* 471 U.S. 343, 355 (1985) ("if a debtor remains in possession–that is, if a trustee is not appointed–the debtor's directors bear essentially the same fiduciary obligation to creditors and shareholders as would the trustee for a debtor out of possession").

13. Such conflicts would normally warrant that the financing transaction beig validated, if at all, only if it could withstand scrutiny under the rigorous entire fairness standard of review. *See, e.g., In re Latam Airlines Gr., S.A.,* 620 B.R. 722, 770-777 (Bankr. S.D.N.Y. 2020) (collecting cases); *In re Los Angeles Dodgers LLC,* 457 B.R. 308, 313-14 (Bankr. D. Del. 2011). No one has suggested that this transaction could withstand the heightened scrutiny that should be applied here. Actually, the HUD Debtors have no need for the DIP Facility and

[6] *See, e.g., Stipulated Facts and Admitted Documents* [Dkt. No. 292], Admitted Exhibit No. 3 [Deposition of Shawn O'Conner on Sept. 4, 2024 at 41:17-42:17]. Further, as was established during Mr. O'Conner's deposition and then again at the September 11 Final Hearing, it was possible, albeit inconvenient, for the Debtors to separately account for cash flows to and from each HUD Debtor and they, in fact, did so on a postpetition basis after the United States and Lument pressed for such information.

receive nothing from it. Their assets are simply being raided for the benefit of, and eventually transferred to, other entities.

II. THE UNITED STATES WILL SUFFER IRREPARABLE INJURY ABSENT A STAY.

14. Contrary to the Objection's contentions, the United States will suffer irreparable injury absent a stay. The Objection argues the United States could not conceivably suffer irreparable injury absent this particular transaction presenting imminent risk to the United States of significant economic loss. However, what constitutes irreparable injury is not, and has never been, so limited.

15. While some contrary authority exists, courts consistently conclude that an appellant satisfies the irreparable harm requirement when the appellant's right would be vitiated absent a stay. *See., e.g., ACC Bondholder Group v. Adelphia Commc'ns Corp. (In re Adelphia Commc'ns Corp.)*, 361 B.R. 337, 347-48 (S.D.N.Y. 2007) (granting a stay and emphasizing the loss of appellate review is a "quintessential form of prejudice"); *Manges v. Seattle-First Nat'l Bank (In re Manges*), 29 F.3d 1034, 1039 (5th Cir. 1994); *CWCapital Asset Mgmt., LLC v. Burcam Cap. II, LLC,* No. 5:13-CV-278-F, 2013 WL 3288092, *7 (E.D.N.C. June 28, 2013) ("The court agrees that the loss of appellate rights alone constitutes irreparable harm."); *In re Cujas,* 376 B.R. 480, 487 (Bankr. E.D. Pa. 2007) ("I accept the proposition that the potential loss of a party's appellate rights through the mootness doctrine may constitute irreparable harm."); *In re Texas Equip. Co., Inc.*, 283 B.R. 222, 228 (Bankr. N.D. Tex. 2002) (unless the party obtains a stay of a sale order, there would be no effective remedies). Indeed, the authorities recognizing that the mooting of a party's opportunity for appellate review is irreparable harm include multiple decisions from courts in this Circuit. *See, e.g., Ratcliff v. Rancher's Legacy Meat Co.,* No. 20-CV-1343 (NEB), 2020 WL 4048509, *13 (D. Minn. July 20, 2020) (concluding that

irreparable injury established for stay where section 363(m) of the Bankruptcy Code would operate to moot appellant's appeal from the avoidance of his lien without a stay); *In re Grandview Ests. Assocs., Ltd.,* 89 B.R. 42, 43 (Bankr. W.D. Mo. 1988) (although ultimately denying a stay on other grounds, finding irreparable harm element "clearly shown" where enforcement of the order would moot the appeal).

16. The authorities cited in the Joint Objection are not contrary. *In re Peabody Energy Corp.,* No. 4:17-CV-01053-AGF, 2017 WL 1177911, at *6 (E.D. Mo. Mar. 30, 2017), does not hold, as implied by the Joint Objection, that the mooting of appeal rights is not irreparable harm. Citing *Adelphia,* the *Peabody Energy* court acknowledged that loss of appeal rights might constitute irreparable harm, but ultimately concluded that, even assuming irreparable harm existed, "the Court's findings as to the other factors, on balance, weigh[ed] decidedly against granting a stay." *Id.*

17. *Stockdale v. Stockdale,* No. 4:08-CV-1773 CAS, 2009 WL 2151159, at *3 (E.D. Mo. July 16, 2009), upon which the Joint Objection also relies, likewise does not support the Debtors' and UMB Bank's position. The *Stockdale* court denied a preliminary injunction because it found no evidence of irreparable harm on the record before it. The likely loss of appellate rights was not at issue. Further, as was more recently recognized in *CitiMortgage, Inc. v. Just Mortg., Inc.,* No. 4:09 CV 1909 DDN, 2013 WL 6538680 (E.D. Mo. Dec. 13, 2013), *Stockdale* does not support the proposition that the movant must offer specific evidence of irreparable harm in every case where an injunction is sought. Rather, the existence of irreparable harm can be implied from the existing record and the context in which the injunction is sought. *Id.* at *4-5 (noting that existing record of defendants' history of suspected fraudulent transfers to avoid paying judgment was sufficient, without more, to establish irreparable harm).

18. Here, the United States faces irreparable harm from the elimination of its appeal rights if the Final DIP Order as it relates to the HUD Debtors and their property is not stayed. The Debtors have already borrowed $3 million under the DIP Facility and are budgeted to draw another $1.9 million during the week ending September 21, 2024. Under the terms of the Final DIP Order, the HUD Debtors will be liable for these obligations even though the HUD Debtors have no need for such financing during these cases. Moreover, while the question appears to be undecided in this Circuit, at least one district court in the Seventh Circuit has construed section 364(e) of the Bankruptcy Code "to apply to all loan funds approved by [a postpetition financing] order, whether or not they have been disbursed . . . . ." *In re Olde Prairie Block Owner, LLC,* 460 B.R. 500, 510 (N.D. Ill. 2011). Unconcerned with the harshness of this result, the court observed that prepetition lien-holders are not without a remedy – they can seek "a stay pending appeal." *Id.*

III. THE DEBTORS WILL NOT BE "SUBSTANTIALLY INJURED" BY A STAY.

19. What the Joint Objection labels as speculation is sound logic that follows from the undisputed record. There are approximately 20 non-HUD Debtors in these cases and, among them, they own and operate approximately 10 facilities that are already available sources of collateral for DIP Lender and Bondholders. This Court is not required to ignore the obvious – that, despite a stay as to the HUD Debtors and their property, DIP Lender continuing to supply postpetition financing to these other debtors is in its self-interest.[7] As noted above, Debtors filed these Chapter 11 Cases to sell their assets. UMB Bank and other holders of the Master

[7] HUD and Lument have never opposed granting the DIP Lender and Trustee senior liens on the HUD Debtors' accounts receivable or junior liens on the HUD Debtors' already encumbered real property and other assets.

Obligations are the primary beneficiaries of this value-maximizing sale. UMB Bank denying access to postpetition financing while the Final DIP Order is stayed as to HUD Debtors and HUD Debtors' property would destroy any going concern value of the non-HUD Debtors, reducing UMB Bank's ultimate recovery. Conversely, UMB Bank continuing to provide postpetition financing to the other debtors to allow them to operate maximizes the Debtors going concern value, maximizing UMB's recover.[8]

IV. THE PUBLIC INTEREST IS IN PRESERVING THE EFFICACY OF HUD'S SECTION 232 PROGRAM AND ITS RELATED MORTGAGE-INSURANCE PROGRAMS.

20. Debtors and UMB Bank do not dispute that a significant public interest exists in preserving the efficacy of HUD's public-private lending programs, such as the Section 232 Program. They choose instead to focus on the bankruptcy public interest in the efficient resolution of bankruptcy proceedings. However, the efficient resolution of bankruptcy proceedings is not implicated in the present dispute. As discussed above, the Chapter 11 Cases can continue without delay to their conclusion. The United States does not seek to preclude consummation of the DIP Facility other than as to the HUD Debtors and their property.

[8] *In re Peabody Energy Corp.,* relied upon by the objectors, is not to the contrary. There, the ad hoc noteholders committee sought to stay consummation of the debtors' plan of reorganization and speculated that postpetition financing would remain available to the debtors while they tried to put together some other plan or path to exit bankruptcy. 2017 WL 1177911, at 7. The United States is not asking this Court to prevent the Debtors from moving forward with their sale process or limiting in any way the relief that can be obtained as to the non-HUD Debtors and their assets.

CONCLUSION

WHEREFORE, for all of the foregoing reasons, the United States requests that the Court issue an order granting the United States' Motion and such other and further relief as is just and proper.

Dated: September 18, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 18, 2024, a copy of the foregoing was served by CM/ECF on each of the parties that have filed an appearance in this case.

/s/ Gregory W. Werkheiser
GREGORY W. WERKHEISER