UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

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

O R D E R

The matter before the Court is Debtors' Motion For Interim and Final Orders (1) Authorizing 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 (Doc. 11); Preliminary Objection And Reservation Of Rights Of Lument Real Estate Capital, LLC To Debtors' Motion For Interim And Final Orders (1) Authorizing The Debtors To Obtain Postpetition 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 (Doc. 133); Limited Response And Reservation Of Rights Of The Official Committee Of Unsecured Creditors To Debtors' Motion For A Final Order (1) Authorizing The Debtors 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 (Doc. 264); Objection Of Lument Real Estate Capital, LLC To Debtors' Motion For Interim And Final Orders (1) Authorizing The Debtors To Obtain Postpetition 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 (Doc. 268); United States' Objection To Debtors' Motion For Interim And Final Orders (1) Authorizing 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 (Doc. 271); Joint Omnibus Reply Of Debtors And DIP Lender In Support Of Entry Of The Final DIP Financing Order (Doc. 287); and Stipulated Facts and Admitted Documents (Doc. 292). An evidentiary hearing was held September 11, 2024, with counsel for Debtors, counsel for the Master Trustee, counsel for Lument, counsel for the United States, counsel for the Unsecured Creditors Committee, and counsel for the United States Trustee appearing in person. After consideration of the record as a whole, including the testimony of Shawn O'Conner, Debtors' Chief Restructuring Officer, and arguments of counsel, the Court makes the following **FINDINGS OF FACTS[1] AND CONCLUSIONS OF LAW:**[2]

On July 16, 2024, the above-captioned Debtors[3] filed Voluntary Petitions under Chapter 11 of the Bankruptcy Code. Many of the Debtors have been in business for over 60 years providing senior living facilities as part of their Christian faith based not for profit mission. Stipulated Facts and Admitted Documents (hereinafter "Stipulated Facts") ¶ 1. Debtors operate a combination of independent, assisted, and skilled senior living facilities and nursing campuses

[1] The facts are as stipulated by the parties. *See* Stipulated Facts and Admitted Documents, Doc. 292.
[2] The capitalized terms in this Order are used and as defined in Debtors' Motion For Interim and Final Orders (1) Authorizing 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 (Doc. 11); Preliminary Objection And Reservation Of Rights Of Lument Real Estate Capital, LLC To Debtors' Motion For Interim And Final Orders (1) Authorizing The Debtors To Obtain Postpetition 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 (Doc. 133); Limited Response And Reservation Of Rights Of The Official Committee Of Unsecured Creditors To Debtors' Motion For A Final Order (1) Authorizing The Debtors 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 (Doc. 264); Objection Of Lument Real Estate Capital, LLC To Debtors' Motion For Interim And Final Orders (1) Authorizing The Debtors To Obtain Postpetition 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 (Doc. 268); United States' Objection To Debtors' Motion For Interim And Final Orders (1) Authorizing 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 (Doc. 271); Joint Omnibus Reply Of Debtors And Dip Lender In Support Of Entry Of The Final DIP Financing Order (Doc. 287); and Stipulated Facts And Admitted Documents (Doc. 292).
[3] Safe Haven Hospice, LLC later filed its Voluntary Petition under Chapter 11 on August 21, 2024.

to over 1,000 residents in 10 locations across the Midwest. See First Day Declaration of Kathleen (Kate) Bertram, Doc. 3 ¶ 10. Debtors operate a pharmacy that currently serves nearly all of Debtors' entities along with 11 facilities outside of Christian Horizons. Stipulated Facts ¶ 3. Debtors also employ approximately 960 employees and acquire individuals from staffing agencies to run their operations.

Certain of Debtors entered into a Master Trust Indenture on June 1, 2007. Stipulated Facts ¶ 4. The Master Trust Indenture authorizes the Members of the Obligated Group to issue Obligations to secure financing or refinancing of the senior residential and health care facilities and other corporate purposes. *Id*. Washington Villages and Wabash Estates (hereinafter, collectively "HUD Debtors") are not members of the Obligated Group and are thus not obligated on the Obligations. *Id*. at ¶ 5. Christian Homes, Inc., on behalf of itself and on behalf of the other Members of the Obligated Group, as Obligated Group Agent, issued Obligations to evidence and secure the Members' obligations relating to several financings. *Id*. at ¶ 6. As security for the Obligations, the Members of the Obligated Group granted a security interest in favor of the Master Trustee in all Gross Revenues of the Members and certain property of the Members. *Id*. The outstanding Obligations were issued by the Members of the Obligated Group to secure their obligations on certain bonds.[4] *Id*. at ¶ 7.

Washington Villages owns and operates a supportive living facility located in Washington, Illinois. Stipulated Facts ¶ 17. The sole member and manager of Washington

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[4] The bonds include the following:

a. Illinois Finance Authority Revenue Refunding Bonds, Series 2016, outstanding in the aggregate principal among of $27,795,000.00, plus accrued interest;
b. Health and Education Facilities Authority of the State of Missouri Senior Living Facilities Revenue Bonds, Series 2018, outstanding in the aggregate principal amount of $27,685,000.00, plus accrued interest;
c. Illinois Financing Authority Revenue Bonds, Series 2021A, outstanding in the principal amount of $12,860,000.00, plus accrued interest;
d. Illinois Financing Authority Revenue Bonds, Series 2021B, outstanding in the aggregate principal amount of $7,230,000.00, plus accrued interest.

Id. at ¶ 7.

Villages is CH Washington Village Estates, LLC. *Id*. at ¶ 49. The sole member and manager of CH Washington Villages Estates, LLC, is Midwest Christian Villages, Inc.[5] *Id*. All real and personal property owned by Washington Villages is subject to a mortgage and blanket security interest in favor of Lument. *Id*. at ¶ 18. As of the Petition Date, approximately $4,716,225.00 is owed on the Washington Villages Loan. *Id*.

Under HUD and pursuant to §§ 232 to 223(f) of the National Housing Act, the FHA is the mortgage insurer on the Washington Villages Loan. Stipulated Facts ¶ 19. Lument holds the first priority lien and security interest in the real and personal property of Washington Villages. *Id*. at ¶ 20. As of September 4, 2024, Lument held funds in the aggregate amount of $456,481.45 with $18.62 in real estate tax escrows, $30,745.87 in property insurance escrows, $18,930.64 for mortgage insurance premium escrows, and $406,786.32 in replacement and reserve escrows for Washington Villages. *Id*. at ¶ 21. The Washington Villages Escrows are in the possession and control of Lument and are security for the Washington Villages Loan. *Id*.

As of the Petition Date, the Washington Villages Loan was current. Stipulated Facts ¶ 22. Debtors made no payments towards the Washington Villages Loan since the Petition Date. *Id*. at ¶ 23. As of August 1, 2024, the monthly payment amount due to Lument on the Washington Villages Loan is $36,455.31, inclusive of tax and insurance escrows. *Id*. at ¶ 24. The monthly payments due to Lument from September 1, 2024, and beyond on the Washington Villages Loan are each in the amount of $38,129.16, inclusive of tax and insurance escrows. *Id*. at ¶ 25.

Wabash Estates owns and operates a senior living facility located in Carmi, Illinois. Stipulated Facts ¶ 26. The sole member and manager of Wabash Estates is CH Washington Village Estates, LLC. *Id*. at ¶ 50. The sole member and manager of CH Washington Villages

[5] Since at least May 1, 2024, there have been no individuals serving in an officer, director, or managing agent capacity for Washington Villages that were not simultaneously also holding one or more such roles for Midwest Christian Villages, Inc. or an entity that is a member of the Obligated Group. *Id*. at ¶ 51.

Estates, LLC, is Midwest Christian Villages, Inc.[6] *Id*. All real and personal property owned by Wabash Estates is subject to a mortgage and blanket security interest in favor of Lument. *Id*. at ¶ 27. As of the Petition Date, approximately $3,876,349.21 is owed on the Wabash Estates Loan. *Id*.

Under HUD and pursuant to §§ 232 to 223(f) of the National Housing Act, the FHA is the mortgage insurer on the Wabash Estates Loan. Stipulated Facts ¶ 28. As of September 4, 2024, Lument held funds in the aggregate amount of $397,838.06, with $22,537.16 in real estate tax escrows, $2,885.16 in property insurance escrows, $15,559.68 for mortgage insurance premium escrows, and $356,856.06 in replacement and reserve escrows for Wabash Estates. *Id*. at 292 ¶ 29. The Wabash Estates Escrows are in the possession and control of Lument and are security for the Wabash Estates Loan. *Id*.

On June 10, 2024, the Bond Trustee accelerated the Bond Obligations and setoff approximately $12,479,117.00 in Trustee-held Setoff Money against the accelerated Bond Obligations. Stipulated Facts ¶ 10; *See* Statement of Financial Affairs. As of the Setoff Date, the Bonds were in payment default. *Id*. at ¶ 11. As of July 15, 2024, the Obligated Debtors[7] owe approximately $76,165,745.48 in Bond Obligations under the Master Indenture. *Id*. at ¶ 9; *See* Schedules of Assets and Liabilities. Thus, as of the Setoff Date, the Obligated Debtors became in covenant default of the Bond Obligations. *Id*. at ¶ 12.

Prior to filing for bankruptcy, Debtors consulted with Health Management Partners (hereinafter "HMP") on strategic marketing efforts to either continue Debtors' operation or sale its assets. Stipulated Facts ¶ 15. HMP is a turnaround and consulting firm that specialized on assisting healthcare organizations experiencing financial challenges. *Id*. After consulting with

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[6] Since at least May 1, 2024, there have been no individuals serving in an officer, director, or managing agent capacity for Wabash Estates that were not simultaneously also holding one or more such roles for Midwest Christian Villages, Inc. or an entity that is a member of the Obligated Group. *Id*. at ¶ 52.

[7] The Obligated Debtors include Christian Homes, Inc., Crown Point Christian Village, Inc., Hickory Point Christian Village, Inc., Hoosier Christian Village, Inc., Lewis Memorial Christian Village, Midwest Senior Ministries, Inc., New Horizons PACE MO, LLC, Risen Son Christian Village, Senior Care Pharmacy Services, LLC and Spring River Christian Village, Inc. Stipulated Facts ¶ 9.

HMP, Debtors retained B.C. Zeigler (hereinafter "Zeigler") to assist Debtors with locating potential buyers for some or all of its facilities. *Id*. Ziegler is a privately held investment bank, capital markets and proprietary investments firm specializing in the healthcare, senior living, and education sectors. *Id*. In April 2024, Debtors, HMP, and Zeigler prepared marketing materials for Debtors' assets. Stipulated Facts ¶ 16. Beginning in May 2024, these materials resulted in the solicited interest by approximately 50 potential buyers for Debtors' assets either individually, in groups, or for all facilities. *Id*. As of the Petition Date, 35 different parties of those solicited signed NDAs and were provided detailed information through a data room to conduct their due diligence. *Id*. Further, as of the Petition Date, Debtors received 7 letters of intent. *Id*.

As of July 16, 2024, the Obligated Debtors had a cash balance of approximately $6,572,000.00; Wabash Estates had an allocated cash balance of $177,916.00; and Washington Villages had an allocated cash balance of $1,081,464.00. Stipulated Facts ¶¶ 31-33. The Obligated Debtors had a payroll which needed to be funded on July 18, 2024, of approximately $999,500.00. *Id*. at ¶ 34. Debtors assert that their consolidated projections show they would have been out of cash the week of July 16, 2024, absent new funding. *Id*. at ¶ 35. As of the Petition Date, Debtors assert it did not have any material unencumbered assets. *Id*. at ¶ 36.

Under the DIP Agreement, UMB Bank, N.A. as the DIP Lender initially required a priming lien on all assets as part of the interim DIP financing, including both Washington Villages and Wabash Estates, and a 1:1 roll-up on the Bond Obligations. Stipulated Facts ¶¶ 38 and 40. As of August 23, 2024, Washington Villages appraised at $10,600,000.00. *Id.* at ¶ 39. The DIP Lender now requires a priming lien on Washington Villages only to secure new post-petition advances under the DIP Facility and to the extent of value in excess of 120% of the appraised value of Washington Villages. *Id*. at ¶¶ 38 and 41. As of September 10, 2024, $3,000,000.00 was advanced under the DIP Facility. *Id*. at ¶ 42. The interest rate under the DIP Facility is 4.589%. *Id*. at ¶ 43. There is accrued post-petition interest under the DIP Facility however there are no DIP financing commitment fees, availability fees or other DIP lending fees under the DIP Facility. *Id*. at ¶¶ 44-45.

On July 16, 2024, the Petition Date, in addition to filing Voluntary Petitions under Chapter 11 of the Bankruptcy Code, Debtors also filed along with other first day and related motions, Debtors' Motion For Interim and Final Orders (1) Authorizing 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 (hereinafter "DIP Financing Motion") requesting the Court, among other things, enter a final order authorizing post-petition financing with the DIP Lender. Doc. 11; *see* Doc. 43 Ex. A p. 30 and 37. In exchange for funding and use of Cash Collateral to be used towards the DIP Facility, the DIP Lender requires a priming lien to remain senior to the Bond Trustee's Pre-Petition Liens and constitute as first priority in all Post-Petition Collateral, inclusive of the HUD Financed Properties.[8] *Id*. at ¶ 27. Debtors state it is necessary to their capital, administrative, and operational needs as a going concern to obtain post-petition financing under a DIP Facility with the DIP Lender. *Id*. at ¶ 22. Debtors state the DIP Facility is the only means of providing the financing required as Debtors are unable to obtain post-petition financing on an unsecured basis pursuant to §§ 364(c)(1) or 503(b)(1) or secured basis under §§ 364(c)(2), 364(c)(3), and 364(d)(1) from sources other than the DIP Lender. *Id*. at ¶¶ 22-23. The Court granted the DIP Financing Motion on an interim basis at the initial hearing on the first day motions on July 17, 2024, and at subsequent hearings. *See* Docs. 60, 160, 309 and 334.

On August 13, 2024, Lument filed Preliminary Objection And Reservation Of Rights Of Lument Real Estate Capital, LLC To Debtors' Motion For Interim And Final Orders (1) Authorizing The Debtors To Obtain Postpetition Financing, (2) Authorizing Debtors In Possession To Use Cash Collateral, (3) Providing Adequate Protection, (4) Granting Liens,

[8] In the Stipulated Facts and at the evidentiary hearing, Debtors announced the DIP Lender's modified priming terms, which is a priming on Washington Villages and elimination of the 1:1 roll up obligation. *See supra* p. 6; Stipulated Facts ¶¶ 38 and 40.

Security Interests And Superpriority Claims; And (5) Scheduling A Final Hearing (Doc. 133), its preliminary objection to the DIP Financing Motion and on September 9, 2024, filed Objection Of Lument Real Estate Capital, LLC To Debtors' Motion For Interim And Final Orders (1) Authorizing The Debtors To Obtain Postpetition 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 (Doc. 268) (hereinafter "Lument's Objection"). On September 4, 2024, the United States filed United States' Objection To Debtors' Motion For Interim And Final Orders (1) Authorizing 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 (Doc. 271) (hereinafter "United States' Objection"). Both the United States and Lument present similar arguments against the DIP Financing Motion. In their Objections, the United States and Lument request the Court construe § 364(d) of the Bankruptcy Code and § 1715w(b)(4) of the National Housing Act to be consistent with each other. Lument and the United States argue that the HUD Debtors are not subject to Debtors' bankruptcy. They further state (1) that pursuant to § 1715w(b)(4) Lument as a HUD Lender is afforded first priority on Washington Villages and Wabash Estates; (2) the National Housing Act does not permit non-consensual priming of HUD Lenders; (3) under U.S.C. § 1715w(b)(4) and 24 C.F.R. § 232.3 HUD Lenders are subject to HUD regulatory agreements that make it impermissible to cross-collateralize and consolidate; (4) pursuant to § 1715w(b)(4) Lument has first priority on the HUD-insured Loans; (5) the DIP Lender is not entitled to a good faith finding under § 364(e) of the Bankruptcy Code; (6) the DIP Lender should be required to marshal the DIP Collateral; and (7) Debtors fail to meet the requirements under § 364(d) of the Bankruptcy Code including providing adequate protection on the HUD-insured Loans. *See* Doc. 133, 268, and 271.

On September 4, 2024, the Official Committee of Unsecured Creditors filed Limited Response And Reservation Of Rights Of The Official Committee Of Unsecured Creditors To Debtors' Motion For A Final Order (1) Authorizing The Debtors 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 (Doc. 264) in response to the DIP Financing Motion stating its support of the DIP Agreement. The Creditors Committee also states it does not object to the priming liens proposed by the DIP Lender so long as it does not compromise the HUD Debtors' ability to maintain HUD-insured status. *Id*. at p. 3.

On September 9, 2024, Debtors and the DIP Lender filed Joint Omnibus Reply Of Debtors And DIP Lender In Support Of Entry Of The Final DIP Financing Order (Doc. 287) (hereinafter "Joint Reply"), its reply to Lument's Objections and the United States' Objection. Debtors and DIP Lender argue that there is no conflict between the Bankruptcy Code and the National Housing Act regarding priming lien priority. *Id*. at p. 2. Debtors and the DIP Lender state that § 364(d) provides a plain on its face test for courts to use when faced with the priming issues in bankruptcy court. *Id*. at ¶¶ 19-20. Debtors and the DIP Lender state that they have satisfied the requirements under § 364(d)(1) because (1) the DIP Lender is the only one who can provide the necessary financing given the conditions of Debtors in exchange for the value in Washington Villages and Wabash Estates as entities of Debtors and (2) Lument is adequately protected. *Id*. at ¶¶ 20, 28, 29-33.

An evidentiary hearing was held on September 11, 2024. The Court issued its ruling from the bench on September 13, 2024.

There are two issues before the Court: the first and preliminary issue is whether the HUD Debtors are debtor-parties to Debtors' jointly administered Chapter 11 bankruptcy cases, and the second and primary issue is whether the HUD-insured mortgages of the HUD Debtors are subject to priming.

I.

The Court will address the preliminary issue first. In determining this question, the Court looks to the purpose of Chapter 11. The purpose of Chapter 11 is "reorganization with the aim of rehabilitating the debtor and avoiding forfeitures by creditors." *Contrs., Laborers, Teamsters & Eng'rs Health & Welfare Plan v. Killips (In re M & S Grading, Inc.)*, 526 F.3d 363, 367 (8th Cir. 2008) (quoting *Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd. P'ship*, 507 U.S. 380, 389, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993)); *see also United States v. Whiting Pools, Inc.*, 462 U.S. 198, 203, 103 S. Ct. 2309, 76 L. Ed. 2d 515 (1983) (under Chapter 11 "a troubled enterprise may be restructured to enable it to operate successfully in the future"). A Chapter 11 debtor can be a railroad, corporation, or qualifying individual. 11 U.S.C. § 109(d). In support of the Chapter 11 purpose, Chapter 11 corporations who intend to continue operating in possession at times obtain DIP financing to fund and ensure liquidity of their operations during the bankruptcy process. DIP Financing: Overview, Practical Law Practice Note Overview 1-383-4700. Lument and the United States argue that the HUD Debtors should not be debtors to these Chapter 11 cases. Lument and the United States argue that the HUD Debtors are separate entities that do not need DIP financing.

It is undisputed that the HUD Debtors do not need DIP financing. The HUD Debtors are part of the Non-Obligated Group in that they are not the Obligated Debtors subject to the Master Trustee Indenture. In fact, the HUD Debtors are in a good financial condition: for Washington Villages, as of September 4, 2024, Lument is holding $456,481.45 in real estate tax escrows, property insurance, mortgage insurance premium escrows, and replacement and reserve escrows; and for Wabash Estates, as of September 4, 2024, Lument is holding $397,838.06 in real estate tax escrows, property insurance escrows, mortgage insurance premium escrows, and replacement and reserve escrows. The replacement and reserve escrows for Washington Villages is $406,786.32. The replacement and reserve escrows for Wabash Estates is $356,856.06. As of July 16, 2024, Wabash Estates had an allocated cash balance on hand of

$177,916.00 and Washington Villages has an allocated cash balance on hand of $1,081,464.00. Further, Washington Villages appraised for $10,600,000.00 as of August 23, 2024. The original loan amount was $5.84 million (something less than that is owed now) so there is an equity cushion.

However, despite their financial condition, the HUD Debtors are necessary to provide cash collateral to maximize return to all creditors and secure the DIP financing to continue the DIP Facility and operation of Debtors. It is generally known that DIP lenders need some form of material unencumbered assets to provide funding. Here, the HUD Debtors have excess value that affords the Master Trustee the necessary assets to secure the loan.[9] Also, the HUD Debtors may be separate entities in shape but not in form. As stated in the Stipulated Facts, Wabash Estates relies on Debtors' headquarters for all support functions; neither of the HUD Debtors were represented by counsel in negotiating the terms of the DIP Facility; and both HUD Debtors are managed by a single member.[10] Therefore, Debtors have established that the HUD Debtors are debtors who are properly subject to Debtors' bankruptcy.

II.

The primary issue before the Court is whether the HUD-insured loans can be primed under § 364 of the Bankruptcy Code. Section 364(d) sets the standard for priming a first priority mortgage in bankruptcy:

> (1) The court, after notice and a hearing, may 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 only if—
> (A) the trustee is unable to obtain such credit otherwise; and
> (B) there is adequate protection of the interest of the holder of the lien on the property of the estate

[9] The Bond Obligations are not secured by the HUD Debtors or their assets.
[10] Lument and/or the United States, themselves could have moved to dismiss the HUD Debtors' bankruptcy cases. As of the date of the Evidentiary Hearing, no motions to dismiss were filed regarding Wabash Estates and Washington Villages.

> on which such senior or equal lien is proposed to be granted.
> (2) In any hearing under this subsection, the trustee has the burden of proof on the issue of adequate protection.

11 U.S.C. § 364(d).

Lument and the United States argue that the National Housing Act forbids the non-consensual priming of HUD-insured mortgage liens. Lument and the United States cite to the National Housing Act for this proposition. Section 1715w(b)(4) of the National Housing Act defines certain terms for mortgage insurance involving senior care facilities:

> The term "mortgage" means a first mortgage on real estate in fee simple, or on the interest of either the lessor or lessee thereof (A) under a lease for not less than ninety-nine years which is renewable, or (B) under a lease having a period of not less than ten years to run beyond the maturity date of the mortgage. The term "first mortgage" means such classes of first liens as are commonly given to secure advances (including but not limited to advances during construction) on, or the unpaid purchase price of, real estate under the laws of the State in which the real estate is located, together with the credit instrument or instruments, if any, secured thereby, and any mortgage may be in the form of one or more trust mortgages or mortgage indentures or deeds of trust, securing notes, bonds, or other credit instruments, and, by the same instrument or by a separate instrument, may create a security interest in initial equipment, whether or not attached to the realty. The term "mortgagor" shall have the meaning set forth in section 207(a) of this Act.

12 U.S.C. § 1715w(b)(4).

Essentially, Lument and the United States argue that through § 1715w(b)(4) HUD mortgages are afforded superiority and cannot be subordinated. However, Debtors assert that the Bankruptcy Code controls here as § 364 specifically answers the priming question and the legislature intentionally created § 364 to level the playing field in that every secured creditor is given equal treatment when priming is considered.

The issue the parties have presented to the Court is an issue of first impression – whether HUD mortgages, which are given first priority under the National Housing Act, are subject to priming under section 364(d).

When a statute is not plain on its face or when presented with differing statutory interpretations, courts must apply the principles of statutory construction. *N.L.R.B. v. Bildisco*. 465 U.S. 513, 104 S.Ct. 1188 (1984); *see also, Conn. Nat. Bank v. Germain*, 503 U.S. 249, 253, 112 S.Ct. 1146, 1149 (1992). Section 1715w(b)(4) provides the definitions for certain mortgages that are eligible for HUD insurance while also speaking to the superiority status of HUD insured mortgages. Section 364(d) addresses the priming standard under bankruptcy. The two statutes speak to different aspects of bankruptcy and the lending process – security and priming. However, section 364 is the path the Court must take in answering the first priority priming inquiry.

The Court rules there is no facial conflict between § 1715w of the National Housing Act and § 364 of the Bankruptcy Code. Section 364 specifically allows for priming if the debtor (1) shows it was unable to find a better DIP lender to finance given the situation and terms and (2) the primed secured lender is adequately protected. Despite the superiority status given to HUD under the National Housing Act, the federal government is not afforded any special considerations or superiority interest over other creditors in priming instances under the Bankruptcy Code. If Congress wanted to exclude federal government contracts or any other credit from the Bankruptcy Code's priming provision, Congress would have done so.[11]

Despite the facial premise of the Bankruptcy Code, this Court, given the circumstances, will acknowledge that the request of Debtors is extraordinary, and the Court will afford the

[11] *See Chicago Title Ins. Co. v. Sherred Vill. Assocs.,* 708 F.2d 804 (1st Cir. 1983). As Debtors and the DIP Lender provide in the Joint Reply, there are instances in the Bankruptcy Code where Congress provides government limits and privileges. See 11 U.S.C. §§ 362 and 363. Also, Congress knew that the secured creditor in the priming instance may "not receive his bargain in kind" under § 364(d). Nevertheless, Congress' stated purpose for § 364(d) is "to ensure that the secured creditor receives in value essentially what he bargained for." H.R. Rep. No. 95-595, 339 (citations omitted).

government special consideration. Thus, the Court will weigh the policy considerations and balance of harms in addition to the § 364(d) requirements.

There are two requirements Debtors must meet under section 364(d): (1) there was no other DIP lender available to finance given the situation and terms and (2) the primed secured lender is adequately protected.

Debtors have proven that the DIP Lender here is the only lender. HMP conducted a prepetition process to identify interested postpetition lenders. Of these efforts, HMP contacted three potential lenders. As Shawn O'Conner testified and as stated in the pleadings, Debtors contacted three potential lenders including Lument. Under Debtor's business judgment, Debtors decided to proceed with the Master Trustee for DIP Financing.[12] The Master Trustee's terms suited Debtors' needs the best. Under the DIP Agreement, the Master Trustee proposed the same interest rate as that on the bonds at 4.589% and, in exchange, the Master Trustee requires a limited interest in Washington Villages as an asset to the loan. In terms of Washington Villages, Debtors believe the excess value in Washington Villages was necessary in obtaining this, or any other, DIP financing.

Lument and the United States argue that the HUD Debtors are not part of the Obligated Debtors and thus should not be subjected to the DIP Facility or its terms and the interest rate is double the interest rate in the HUD Debtors loan, i.e., 2.95%. The Court finds the interest rate is sufficient at 4.589%. The Court already determined that the HUD Debtors are debtors despite not being part of the Obligated Group. The Court is unconvinced that the June 10th Setoff negatively affected Debtors obtaining DIP lending from other lenders.[13] Therefore, Debtors have satisfied the first element under section 364(d).

Debtors next must prove that the HUD Lienholder is adequately protected. Under the DIP Agreement, Lument will have a 120% equity cushion due to Debtors only requesting

[12] Debtors state the three perspective financers did not provide the liquidity for Debtors' current and future needs.
[13] The Court will defer to Debtors' business judgment.

priming of the Washington Villages lien, which is exclusive of the approximate $1.5 million in cash reserves for the HUD Debtors. Courts have found that a 20% cushion is appropriate adequate protection. *See Equitable Life Assurance Soc. v. James River Assocs.*, 148 B.R. 790, 796 (E.D. Va. 1992) (citations omitted); *see also In re Rogers Dev. Corp.*, 2 B.R. 679, 685 (Bankr. E.D. Va. 1980); *In re Pitts*, 2 B.R. 476, 478 Bankr. C.D. Cal. 1979). Notably, Lument will be adequately protected because of the substantial equity cushion and its status as a secured creditor. Further, the priming requested in the DIP Agreement is durational with an end point in early January 2025.

Lument argues that the National Housing Act require the security interest for HUD Lenders, like Lument here, to be separate and distinct – not cross-collateralized. However, this Court has determined that there is no conflict among the statutes and that the Bankruptcy Code is clear – § 364(d) controls the priming issue before the Court. The HUD Debtors are subject to priming. As Debtors and DIP Lender state in its Joint Reply, bankruptcy courts have approved DIP loans where multiple debtors are jointly and severally liable. Doc. 287 ¶ 43; *see e.g., In re Apex Oil Co.*, 118 B.R. 683, 709 (Bankr. E.D. Mo. 1990). Debtors are not required under the Bankruptcy Code to prove substantive consolidation. So long as the entities are jointly administered with other debtors, collective postpetition financing is proper. Debtors have met their burden in proving Lument and the United States will be adequately protected in their interest in the HUD Debtors. Thus, Debtors have proven under § 364(d) that the HUD-insured loans of the HUD Debtors can be primed in accordance with the DIP Agreement.

The Court does take into account the policy implications and balance of harms. HUD and the implications of the National Housing Act are imperative to our federal economy and democracy. However, Congress is clear on its priming stance in the bankruptcy context – § 364 prevails. Further, in measuring the balance of harms, the scales weigh in Debtors' favor. Debtors collectively house over 1,000 patients and employ approximately 960 employees. If DIP funding is not provided, those patients could be displaced, employees let go, and Debtors are placed in a worse financial and bargaining position for DIP lenders and the sale that is the backbone of Debtors' reorganization. Simply put, Debtors would face immediate and irreparable harm.

In conclusion, in keeping with the purpose of Chapter 11, the HUD Debtors are debtors in these bankruptcy cases. Their value is needed to better position Debtors in its Chapter 11 cases. Finally, the HUD-insured loans here can be primed because there is no other DIP lending available and Lument and the United States are adequately protected under the terms of the DIP Agreement. In these limited circumstances only, where Debtors have no other DIP financing options, Debtors are providing adequate protection to Lument and HUD through the equity cushion, Debtors are priming only above the additional 20% equity cushion, and Debtors are seeking the DIP financing for a very limited time only through early January, the Court will allow the priming of Washington Estates loan and will grant the DIP Financing Motion. Therefore,

IT IS ORDERED THAT Debtors' Motion For Interim and Final Orders (1) Authorizing 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 (Doc. 11) is **GRANTED ON A FINAL BASIS**; and

IT IS FURTHER ORDERED THAT Preliminary Objection And Reservation Of Rights Of Lument Real Estate Capital, LLC To Debtors' Motion For Interim And Final Orders (1) Authorizing The Debtors To Obtain Postpetition 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 (Doc. 133) is **OVERRULED**; and

IT IS FURTHER ORDERED THAT Objection Of Lument Real Estate Capital, LLC To Debtors' Motion For Interim And Final Orders (1) Authorizing The Debtors To Obtain Postpetition 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 (Doc. 268) is **OVERRULED**; and

IT IS FURTHER ORDERED THAT the United States' Objection To Debtors' Motion For Interim And Final Orders (1) Authorizing The Debtors To Obtain Post-Petition Financing, (2) Authorizing Debtors In Possession To Use Collateral, (3) Providing Adequate Protection, (4) Granting Liens, Security Interests And Superpriority Claims; And (5) Scheduling A Finale Hearing (Doc. 271) is **OVERRULED.**

Kathy A. Surratt-States
KATHY A. SURRATT-STATES
United States Bankruptcy Judge

DATED: September 27, 2024
St. Louis, Missouri

Copies to:
All Creditors and Parties in Interest.