

**UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF NEW YORK**

In re:

AMSTERDAM HOUSE CONTINUING CARE
RETIREMENT COMMUNITY, INC.,

Debtor.

Chapter 11

Case No. 23-70989 (AST)

Re: Docket Nos. 12, 107, & 134

**DECLARATION OF CHAD J. SHANDLER
IN SUPPORT OF THE TRUSTEE’S OBJECTION TO THE DEBTOR’S
EMERGENCY MOTION FOR ENTRY OF INTERIM AND FINAL ORDERS
(I) AUTHORIZING THE DEBTOR TO OBTAIN SECURED NON-PRIMING
POSTPETITION FINANCING; (II) GRANTING (A) LIENS AND SUPERPRIORITY
CLAIMS AND (B) ADEQUATE PROTECTION; (III) AUTHORIZING USE
OF CASH COLLATERAL; (IV) MODIFYING THE AUTOMATIC STAY;
(V) SCHEDULING A FINAL HEARING; AND (VI) GRANTING RELATED RELIEF¹**

I, Chad J. Shandler, declare:

1. I am a Senior Managing Director with FTI Consulting, Inc., together with its wholly-owned subsidiaries (“**FTI**”), an international consulting firm that has been retained to serve as the financial advisor to the Trustee in connection with the above-captioned debtor and debtor in possession (the “**Debtor**”). FTI has served as financial advisor to the Trustee since March 2023 in connection with the Debtor’s financial issues. Since that time, I have become familiar with the Debtor’s business and its marketing efforts.

2. I submit this declaration (the “**Declaration**”) in support of (i) the *Preliminary Objection of the Trustee to the Debtor’s Emergency Motion for Entry of Interim and Final Orders (I) Authorizing the Debtor to Obtain Secured Non-Priming Postpetition Financing; (II) Granting (A) Liens and Superpriority Claims and (B) Adequate Protection; (III) Authorizing Use of Cash*

¹ Capitalized terms not defined herein shall have the meanings ascribed to them in the DIP Motion, the Preliminary Objection, the Morton Declaration, and the Kliever Declaration.

Collateral; (IV) Modifying the Automatic Stay; (V) Scheduling a Final Hearing; and (VI) Granting Related Relief [Dkt. No. 94] and (ii) and the contemporaneously filed Supplemental Objection of the Trustee to the Debtor's Emergency Motion for Entry of Interim and Final Orders (I) Authorizing the Debtor to Obtain Secured Non-Priming Postpetition Financing; (II) Granting (A) Liens and Superpriority Claims and (B) Adequate Protection; (III) Authorizing Use of Cash Collateral; (IV) Modifying the Automatic Stay; (V) Scheduling a Final Hearing; and (VI) Granting Related Relief.

3. I specialize in providing corporate restructuring and financial advisory services to financially troubled companies, trustees, secured creditors, and creditor groups. I serve as the co-lead of FTT's Healthcare Restructuring practice. My expertise includes developing and evaluating restructuring alternatives, valuing business enterprises, and negotiating with stakeholders. I am often asked to assess financial performance, compare operating results to industry norms, develop "bottoms-up" multi-year financial forecasts, prepare business valuations, support asset sales and due diligence processes, arrange financing and evaluate marketing plans, marketing efforts, and demographics of primary market areas and otherwise advise with respect to restructuring options. I have been qualified as an expert witness in bankruptcy courts, and I have served as the chief restructuring officer of several entities. I have also served as a liquidating trustee. My industry expertise includes healthcare, telecommunications, retail, manufacturing, publishing, multifamily housing and real estate, distribution, and sports and entertainment. In the past twenty (20) years the majority of my experience has been in the healthcare industry serving as a Chief Restructuring Officer to companies and/or a financial advisor to companies, indenture trustees, secured lenders, unsecured creditors, and residents, particularly focused on senior living and continuing care retirement communities ("CCRCs").

4. A representative list of my current and previous clients includes Westchester Meadows, The Stayton at Museum Way, the Edgemere, Christian Care Communities and Services, American Eagle Delaware Holding Corp., Neighbors Health, Adeptus Health, Henry Ford Village, Arlington of Naples, Kingswood Retirement Community, Inverness Village, St. Francis Hospital and Health Centers, UGHS Senior Living, and Erickson Retirement Communities.

5. Except as otherwise noted, all facts set forth in this Declaration are based on my personal knowledge, my review of the relevant documents filed in this bankruptcy case, my experience and knowledge of the Debtor's industry, and my opinion. In making this Declaration, I have relied, in part, on information and materials that the Trustee's and its advisors have provided to me at my direction and/or for my benefit in preparing this Declaration. If I were called to testify as a witness in this matter, I would testify competently to the facts set forth herein.

6. As a threshold matter, in the context of competing financing proposals, it is my experience and opinion that a debtor's chief restructuring officer must weigh the benefits and burdens of each proposed financing to determine the overall optimal funding arrangement for the benefit of the estate.

7. Ordinarily, if only one financing transaction is presented, a chief restructuring officer may be inclined to accept terms and conditions that are less than desirable or otherwise risk losing the ability to secure funding necessary for a debtor's operations and restructuring efforts. However, when presented with two or more financing proposals, the chief restructuring officer has a duty to undertake a fulsome analysis to determine which proposal is in the best interests of the debtor's estate and its stakeholders.

8. Based on my review of the Morton Declaration, the DIP Motion, and my experience as serving as a chief restructuring officer or advisor to various stakeholders in chapter

11 proceedings, it is my opinion that the Trustee DIP Financing offers overall superior financing terms than the Parent DIP Financing. As explained more fully herein, the Trustee DIP Financing (a) provides more liquidity to the Debtor than under the terms of the Parent DIP Financing, (b) preserves potential estate assets that are otherwise sacrificed under the Parent DIP Financing, and (c) is economically superior to the Parent DIP Financing. Accordingly, the Parent DIP Financing would be detrimental to the Debtor and its estate and should not be approved.

A. The Debtor Will Have Less Availability Under the Parent DIP Financing than the Trustee DIP Financing.

9. When comparing the competing financing proposals, it is abundantly clear that the availability under the Trustee DIP Financing is greater than under the Parent DIP Financing. While on their face, both proposed financings would appear to provide availability in the amount of \$9 million, requirements under the Parent DIP Financing significantly reduces that amount.

10. The Budget attached to the Morton Declaration earmarks \$750,000 in “Other Professional Fees” which includes (i) \$500,000 for the Parent’s professional fees and (ii) a \$250,000 pre-payment to NELP for due diligence prior to submitting a bid on the Debtor’s assets thereby reducing the availability under the Parent DIP Financing to \$8,250,000. *See* Morton Dec. at Ex. C.

11. In addition, the Parent DIP Financing establishes a professional fee escrow which will be funded in the amount of approximately \$2.67 million during the budget period, of which \$850,000 will remain in escrow as of August 5, 2023.² *Id.* Accordingly, the liquidity under the Parent DIP Financing will be reduced by an additional \$850,000 to pre-fund the estate’s professional fees.

² The Budget attached to the Morton Declaration also budgets \$250,000 for the professional fees incurred by the Official Committee of Unsecured Creditors. It is my understanding the Committee has requested \$1,000,000 to be escrowed, which would further decrease the amount of funding available to the Debtor.

12. Conversely, the Trustee DIP Financing immediately provides the Debtor with access to a full \$9 million to fund its operations and restructuring efforts subject to an approved budget. For the avoidance of doubt, while the Trustee DIP Financing does not establish an escrow for the estate's professional fees and expenses, it does not otherwise differ in the amounts budgeted for such fees and expenses.³ Moreover, the Trustee DIP Financing would obviate the need to pay for the Parent's professional fees and does not include a pre-payment for NELP's due diligence efforts in connection with its expression of interest.

13. It is also important to note that the amount of funds available to the Debtor under the Parent DIP Facility will likely further decrease given the Debtor's indemnification obligations thereunder. Specifically, the Parent Term Sheet provides that "the Debtor shall indemnify and hold harmless the DIP Lender Protected Parties from and against any and all losses, claims, damages, liabilities and related expenses of any kind . . . arising out of or in connection with any claims or causes of action of any kind related to the Debtor arising at any time before, on or after the Petition Date." This Debtor's indemnification obligation under the Parent DIP Financing is not limited or capped to the initial \$500,000 earmarked for the Parent's professional fees.

14. The Budget attached the Morton Declaration runs through August 5, 2023. The proposed Bidding Procedures contemplate an auction to occur on July 25, 2023. Closing dates for CCRCs typically take at least sixty (60) days, if not longer, after court approval due to the various regulatory requirements necessary to effectuate a transfer of ownership. During such time (with an uncertain end date), the Debtor will have to fund its own operations and its bankruptcy case from its available financing.

³ As part of the Trustee DIP Financing, the Trustee has agreed to carve-out from its collateral an amount equal to budgeted but unpaid fees and expenses of estate professionals, among others, up to a termination event. The Trustee believes that this more than adequately protects the estate's professionals.

B. The Parent DIP Financing Compromises Valuable Assets of the Debtor’s Estate.

15. Another concern of the Parent DIP Financing is that it requires the Debtor to waive and fully release certain claims and causes of action that could otherwise be assets to the Debtor’s estate. In addition, the Parent DIP Financing requires the Debtor to indemnify the Parent against any and all claims and causes of action—whether or not such claims are related to the Parent in its capacity as a lender or whether such claims arose prior to the Petition Date. Essentially, the Parent DIP Financing proposes releasing a potential asset of the Debtor’s estate while simultaneously saddling the estate with an unknown (and potentially significant) administrative expense on account of the Debtor’s indemnity of the Parent.

16. Conversely, the Trustee DIP Financing requires a narrow indemnity of the Trustee in its capacity as DIP lender on account post-petition claims only. Moreover, the Trustee DIP Financing preserves the Debtor’s ability to pursue the Parent Support Obligation. Accordingly, the Trustee DIP Financing presents a value-maximizing alternative to the Parent DIP Financing that may result in increased returns for the benefit of the Debtor’s estate.

The Parent Release.

17. The Parent DIP Financing requires that the Parent be released from “all claims and causes of action of any kind related to the Debtor arising at any time through and including the Petition Date” after a sixty-day challenge period subsequent to the entry of a final order approving the financing. *See* Morton Dec. ¶16.

18. However, in this case, the Parent is not a typical lender—it is an *insider* of the Debtor. Thus, there needs to be an investigation of the pre-petition relationship the Parent and the Debtor, and it is unlikely that the Debtor has conducted such an investigation. Accordingly, it is unknown what value the estate may lose based upon this release language.

19. Alternatively, the Trustee DIP Financing would preserve these potential claims against the insider Parent.

Reduction of the Parent Support Obligation.

20. The Parent DIP Financing requires that the Parent Support Obligation due under the LSA be reduced on a dollar-for-dollar basis up to \$9 million. *See* Morton Dec. Ex. ¶10. However, the LSA is an unencumbered asset of the estate and is otherwise preserved under the Trustee DIP Financing, and it would not be a sound business decision to exchange the Parent Support Obligation for the Parent DIP Financing.

C. The Pricing of the Trustee's DIP Financing is Superior to that of the Parent DIP Financing.

The Interest Rate.

21. The Trustee DIP Financing provides for the accrual of interest in the amount of 2% per annum, which amounts to \$180,000 if the Debtor borrows the maximum \$9,000,000 available on Day 1 of the financing and remains outstanding for one (1) full year. This interest rate is not only well below market for similar debtor-in-possession facilities, is not conditioned upon the standard fees and expenses that a traditional lender may require to be paid under similar circumstances, is only due and payable upon maturity, but does not otherwise reduce the \$9 million availability.

22. While the Parent DIP Financing does not require any interest, the Debtor is obligated to (i) pay the Parent's professional fees, (ii) indemnify the Parent, and (iii) advance \$250,000 to NELP. While these obligations alone dwarf the 2% interest associated with the Trustee DIP Financing, it directly reduces availability under the Parent DIP Financing and is not a sound exercise of the Debtor's business judgment.

Adequate Protection.

23. I understand that the Trustee, as part of the Objection, asserts that the Debtor is required to provide the Trustee with adequate protection payments for the use of its collateral. At this time, it is unknown what the amount of such adequate protection payments would be or the costs and expenses that the estate would incur in litigating such claims.

24. In light of the fact that the Trustee is waiving adequate protection payments in connection with the Trustee DIP Financing, this further supports the notion that the Trustee DIP Financing is economically superior. As a result, the Debtor will have access to more available funds than it would if it is required to make adequate protection payments in connection with the Parent DIP Financing.

The Illusory Waiver of the Parent's DIP Financing Claim.

25. Given the Trustee's senior lien in substantially all assets of the Debtor, which was confirmed in the Chapter 22 Case, in order for any value to be ascribed to the Parent's possible waiver of its claim arising under the Parent DIP Financing, 100% of the principal, interest, and costs and expenses of the Trustee's claim would have to be paid in full.

26. At this time, it is uncertain that this condition will be achieved.

D. The Parent DIP Financing is Contingent Upon Bidding Procedures that Chill the Sale Process.

27. Based on my review of the *Declaration of Andrew Turnbull in Support of Trustee's Objection to Debtor's Motion for Entry of Orders (I) Approving Bidding Procedures, (II) Authorizing the Debtor to Designate a Stalking Horse Bidder, (III) Approving Procedures for the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases, (IV) Authorizing (A) the Sale of the Debtor's Assets Free and Clear of All Liens, Claims, Interests and Encumbrances, and (B) the Assumption and Assignment of Certain Executory Contracts and*

Unexpired Leases, (V) Approving the Forms of Notices Related to the Sale, and (VI) Granting Related Relief and my experience overseeing numerous marketing processes, it is my opinion that the Parent DIP Financing requires a marketing process that is not designed to foster meaningful bidding on the Debtor's assets. Conversely, I believe the bidding procedures proposed by the Trustee and which are required under the terms of the Trustee DIP Financing, establish a sale process that appears to be designed to ensure a fulsome and competitive process to yield a meaningful recovery for the benefit of the Debtor and its creditors.

[Remainder of page intentionally left blank.]

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 25th day of April, 2023



Chad J. Shandler