

Melanie L. Cyganowski
Jonathan N. Helfat
James V. Drew
Erik B. Weinick
OTTERBOURG P.C.
230 Park Avenue
New York, New York 10169-0075
Telephone: (212) 661-9100
Facsimile: (212) 682-6104
mcyganowski@otterbourg.com
jhelfat@otterbourg.com
jdrew@otterbourg.com
eweinick@otterbourg.com

*Counsel to Amsterdam Continuing
Care Health System, Inc.*

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

In re:

AMSTERDAM HOUSE CONTINUING CARE
RETIREMENT COMMUNITY, INC.,

Debtor.

Chapter 11

Case No. 23-70989 (AST)

**OBJECTION OF AMSTERDAM CONTINUING CARE HEALTH
SYSTEM, INC. TO MOTION OF UMB BANK, N.A. FOR ENTRY OF
AN ORDER PURSUANT TO BANKRUPTCY RULE 2004 DIRECTING
THE PRODUCTION OF DOCUMENTS BY AND OTHER DISCOVERY OF
AMSTERDAM CONTINUING CARE HEALTH SYSTEM, INC.**

Amsterdam Continuing Care Health System, Inc. (“ACCHS” or “Member”), by and through its undersigned counsel, hereby submits this objection to the *Motion of UMB Bank, N.A. for Entry of an Order Pursuant to Bankruptcy Rule 2004 Directing the Production of Documents by and Other Discovery of Amsterdam Continuing Care Health System, Inc.* [Dkt. No. 169] (the “Motion”), and respectfully represents as follows:

PRELIMINARY STATEMENT

Rather than make any informal inquiry to ACCHS, the Bond Trustee has instead moved for disproportionately burdensome, overbroad, and unfocused discovery unrelated to any potential claims against ACCHS (not that any exist). This approach serves no conceivably valid purpose and may even result in disruptions to the ongoing sale process. Because the Bond Trustee has foregone all cooperative efforts, the requests for discovery are premature, unnecessary, and inappropriate. In sum, although ACCHS is prepared to produce documents and provide information in response to a subset of the requests, for the reasons set forth herein, the Motion should be denied because a meaningful portion of the requests are facially improper, even in the context of Rule 2004.

BACKGROUND

1. On May 8, 2023, UMB Bank, N.A. (as bond trustee for certain Series 2021 Bonds) (“Bond Trustee”) filed the Motion seeking information concerning the corporate relationship between ACCHS and the Debtor, the extent to which ACCHS is supposedly controlling the Debtor’s actions in this Chapter 11 case, potential claims and causes of action by the Debtor’s estate against ACCHS or its affiliated entities (although none exist), and the Nursing Home Sale (defined below). The Motion requests the authority to issue subpoenas compelling document production and depositions of ACCHS officers or representatives on short notice.

2. Prior to the filing of the Motion, neither the Bond Trustee nor its counsel bothered to determine whether there were any documents or information which ACCHS would voluntarily provide. Instead, the Bond Trustee plowed ahead, proposing extremely broad subpoenas, covering a wide range of documents and communications, seeking not just the proverbial “fishing expedition,” but the entire ocean.

3. Importantly, the official committee of unsecured creditors (the “Committee”) has not yet made any requests for documents or information from ACCHS, but it is expected to do so in the coming weeks. Thus, if any Rule 2004 discovery by the Bond Trustee is warranted, it should be narrowed and consolidated, and then held in abeyance to be coordinated with any requests the Committee may make.

OBJECTION

4. Federal Rule of Bankruptcy Procedure 2004 requires a party seeking discovery to demonstrate good cause, and the court must balance parties’ competing interests, taking into account the relevance and necessity of the requested information. *In re SunEdison, Inc.*, 562 B.R. 243, 249; *In re Drexel Burnham Lambert Grp., Inc.*, 123 B.R. 702, 712. Courts also limit Rule 2004 examinations by applying the proportionality principle from Federal Rule of Civil Procedure 26, emphasizing that relevance alone does not demonstrate good cause for requiring production. *In re SunEdison, Inc.*, 562 B.R. at 250. Thus, a court may deny requests for relevant discovery if they are not proportional to the needs of the case.

5. The requests here are not proportional to the needs of the case. While some of the requests in the Motion are adequately tailored - - demonstrating the Bond Trustee’s ability to make proper requests - - a number of the requests are facially objectionable. While ACCHS is prepared to produce non-privileged documents responsive to such requests, and for those that also contain confidential information, under the protection of a suitable confidentiality stipulation, ACCHS is not prepared to do so with respect to the objectionable requests.

6. For example, the requests in *paragraphs 46 and 47*,¹ respectively seek “all communications between ACCHS and the Debtor” and “all communications between ACCHS and

¹ References bold and italicized paragraphs refer to those corresponding paragraphs in Exhibit A to the Motion.

NELP.” These requests are unnecessarily broad and far beyond the proper scope of Rule 2004(b), as they cover communications that have no connection to the Debtor’s liabilities, financial condition, estate administration, or right to a discharge.² These irrelevant communications may include sensitive, non-public information about routine operational and personnel matters.

7. Even broader, the requests in *paragraphs 45 and 48*, respectively seek “all documents and communications concerning The Harborside” and “all documents and communications concerning NELP.” And notably, the request in *paragraph 57* demands “[a]ll documents concerning, or communications with, any State or Federal agency, including the New York Attorney General, concerning The Harborside.”

8. Requesting *all* documents and communications related to NELP necessitates a document-by-document review, imposing a significant burden on ACCHS that is patently disproportionate to the potential utility of the information to the administration of the estate, which the Bond Trustee has made no effort to quantify.³ And requests for *any* communications which ACCHS may have had with “any State or Federal agency” concerning The Harborside lack specificity and may encompass completely tangential, irrelevant, and far-reaching subjects that do not pertain to the issues at hand. To align with Rule 2004 requirements, requests should be adequately tailored to information relevant to the administration of the debtor’s estate, liabilities,

² Likewise, the requests in *paragraphs 52–55* seek “all documents concerning, and communications with, OnePoint Partners,” “Senior Care Development,” “Fundamental Advisors,” and “Benchmark Senior Living.” These requests share the same issues of overbreadth, as they do not limit the discovery to potentially relevant topics such as the debtor’s estate administration or financial condition. Instead, they seek ACCHS’s disclosure of information with no ostensible nexus to the proceedings.

³ Even if the Bond Trustee offered an explanation as to the relevance of these documents under the Rule 2004 criteria, the Bond Trustee failed to confer with ACCHS informally on how such a request could possibly be fulfilled, such as though the use of electronic search terms. ACCHS is prepared to meet and confer with the Bond Trustee on how to narrow the requests and implement appropriate electronic searches.

and financial condition, as well as specific transactions or controversies. The requests set out in the Motion are not.

9. While transactions involving the Debtor may have relevance in the abstract, no material transactions, aside from the substantial contributions made by ACCHS to the Debtor (totaling over \$18 million and an expected \$9 million equity contribution in this case), actually occurred between the parties.⁴ Broad and unfettered Rule 2004 discovery is therefore inappropriate, given the information already provided and ACCHS's willingness to comply with any adequately tailored requests for documentation.

10. In the case of claims or causes of action that may be held by the Debtor against ACCHS or its affiliates, imposing such expansive Rule 2004 discovery would be burdensome and unnecessary without first articulating the types of claims that may be asserted and the factual basis supporting them. The Bond Trustee has failed to provide specific information about potential claims. By doing so, focused discovery efforts, or voluntary disclosure efforts can be conducted, minimizing disruption and allowing for a transparent and fair bidding process.

11. Finally, regarding the sale of the Nursing Home, ACCHS has no right to the proceeds, except Amsterdam Nursing Home Corporation (1992)'s commitment to contribute funds required to satisfy ACCHS' contingent \$9 million obligation under a Liquidity Support Agreement associated with the Debtor's 2021 bankruptcy. *See* Declaration of James Davis in Support of Debtor's DIP Financing Motion [Dkt. 138] at ¶ 5. The sale of the Nursing Home remains subject to regulatory approval, and its closing date is uncertain. Conducting extensive Rule 2004

⁴ With respect to prepetition transactions between ACCHS and the Debtor, the Debtor filed statements of financial affairs on April 21, 2023 [Dkt. 127] which indicate a grand total of one transfer to or for the benefit of ACCHS during the year prior to the Petition Date, in the amount of \$32,589.44 to reimburse costs related to the construction of a wellness center. *See* Dkt. 127, item 4, p. 11 of 23.

discovery for this topic from a non-debtor imposes unnecessary burdens that do not appear designed to identify assets of the estate.

12. Additionally, even in the face of the 60-day challenge period (*see* Motion ¶ 10), the Bond Trustee's request for a 14-day deadline for production is overly restrictive and unreasonably burdensome. The Challenge Period was designed to provide parties in interest with a reasonable timeframe to investigate any potential claims and causes of action against ACCHS and its affiliated entities on behalf of the Debtor's estate. However, imposing such a tight deadline of 14 days for production (and five (5) business days' notice for depositions on a broad range of topics) would place significant unwarranted pressure on ACCHS to review and produce potentially voluminous documents and communications, many of which may have no bearing on the issues at hand. This demand for rapid production is disproportionate to the needs of the case.

13. The Bond Trustee should work cooperatively with ACCHS and other interested parties to establish a more reasonable production schedule that enables sufficient time for meaningful review of relevant documents. An unreasonably short deadline for production serves no valid purpose.

14. Moreover, the Bond Trustee's request in *paragraph 37* for responsive documents from June 14, 2021 through the date and time of the production covers both pre-petition and post-petition activities, likely resulting in the inclusion of privileged communications between ACCHS and its counsel. It would be extremely challenging for ACCHS to review all responsive documents in a meaningful way and prepare a sufficiently detailed privilege log on such short notice. Moreover, the effective date of the Debtor's plan in its most recent reorganization was September 8, 2021. *See In re: Amsterdam House Continuing Care Retirement Community, Inc.*, Case No. 8-

21-71095 (AST) (Bankr. E.D.N.Y.) [Dkt. 227]. Therefore, any requests for documents prior to this date are improper.

15. In summary, while it is within the Bond Trustee's right to inquire about transactions and relationships involving the Debtor, extensive Rule 2004 discovery is unwarranted here. The available evidence and documentation already provide sufficient information to address the concerns raised. A more focused and less burdensome approach, and one at which the parties could arrive informally without the Court's involvement, would better serve the efficient and transparent administration of the Debtor's estate.

16. Counsel for ACCHS has had preliminary discussions with the Bond Trustee about some of the issues noted above and is committed to continuing those discussions.

WHEREFORE, ACCHS respectfully requests that the Court deny the Motion in its entirety, or in the alternative, adjourn consideration of the Motion to allow the parties to meet and confer and narrow the issues required to be determined by this Court, and grant any further relief the Court may deem just and proper.

Dated: May 23, 2023
New York, New York

OTTERBOURG P.C.

/s/ Erik B. Weinick
Melanie L. Cyganowski
Jonathan N. Helfat
James V. Drew
Erik B. Weinick
230 Park Avenue
New York, New York 10169-0075
Telephone: (212) 661-9100
Facsimile: (212) 682-6104
mcyganowski@otterbourg.com
jhelfat@otterbourg.com
eweinick@otterbourg.com
jdrew@otterbourg.com

*Counsel to Amsterdam Continuing
Care Health System, Inc.*