

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

Hearing date: February 12, 2025
at 10:00 am

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In re:

AMSTERDAM HOUSE CONTINUING CARE
RETIREMENT COMMUNITY, INC.,
Debtor.

Case No: 823-70989-ast
Chapter 11

-----X **NOTICE**

To The Debtor, the debtor, his counsel, and All Listed Creditors:

PLEASE TAKE NOTICE THAT:

Upon the application of the United States Trustee for Region 2 dated November 20, 2024 (**ECF Dkt. #897**), a hearing will be held before the Honorable Alan S. Trust, Chief United States Bankruptcy Judge of the Alfonse M. D'Amato US Courthouse, 290 Federal Plaza, Central Islip, New York 11722, Courtroom 960, on **February 12, 2025 at 10:00 a.m.** or as soon thereafter as counsel may be heard, for the entry of an order dismissing this chapter 11 case pursuant to 11 U.S.C. §1112(b) and such other and further relief as may seem just and proper. All attorneys and unrepresented parties are required to register for the hearing at least two business days in advance of the scheduled hearing by using the Court's eCourt Appearances Platform: <https://ecf.nyeb.uscourts.gov/cgi-bin/nyebAppearances>.

The original application is on file with the Clerk of the Bankruptcy Court, Federal Plaza, Room 290, Central Islip, New York and with the United States Trustee, Federal Plaza, Room 560, Central Islip, New York and may be reviewed at either office during regular business hours.

Responsive papers, if any, shall be filed with the Clerk of the Bankruptcy Court, 290 Federal Plaza, Central Islip, New York 11722, shall be in conformity with the Bankruptcy Rules and the Local Rules of the Bankruptcy Court, and filed in accordance with General Order No. 559 (which can be found at www.nyeb.uscourts.gov, the official website for the Bankruptcy Court), by registered users of the Bankruptcy Court's electronic case filing system and, by all other parties in interest, on a CD Rom, preferably in Portable Document Format (PDF), Word or any other Windows-based word processing format (with a hard-copy delivered directly to Chambers), and personally served upon the United States Trustee, 560 Federal Plaza, Central Islip, New York 11722-4456, Attn: Stan Y. Yang, Esq., no later than February 7, 2025

The hearing scheduled herein may be adjourned from time to time by announcement made in open court without further written notice.

Dated: Central Islip, New York
December 19, 2024

WILLIAM K. HARRINGTON
UNITED STATES TRUSTEE FOR REGION 2
Office of the United States Trustee
Long Island Federal Courthouse
560 Federal Plaza
Central Islip, New York 11722
(631) 715-7800

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In re:

AMSTERDAM HOUSE CONTINUING CARE
RETIREMENT COMMUNITY, INC.,
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Case No: 823-70989-ast
Chapter 11

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**NOTICE OF HEARING FOR AN APPLICATION BY
THE UNITED STATES TRUSTEE SEEKING ENTRY OF
AN ORDER DISMISSING THE DEBTOR'S CHAPTER 11 CASE**

PLEASE TAKE NOTICE that William K. Harrington, the United States Trustee for Region 2 (the "United States Trustee") by and through his counsel, Stan Y. Yang, Esq., filed a motion on November 20, 2024 under Bankruptcy Code section 1112(b) seeking entry of an order dismissing the chapter 11 case filed by Amsterdam House Continuing Care Retirement Community, Inc. (the "Debtor") ("Motion") (**ECF Dkt. #897**); and during a December 11, 2024 status hearing on the Motion, the Honorable Alan S. Trust, Chief United States Bankruptcy Judge directed that in the event that the Debtor notifies the Court on January 27, 2025 that a hearing on the sale of the Debtor's assets cannot go forward on February 12, 2025, the Motion will be heard by Judge Trust, on **February 12, 2025, at 10:00 a.m.** or as soon thereafter as counsel may be heard, at the United States Bankruptcy Court, 290 Federal Plaza, Central Islip, New York 11722 in Courtroom 960,

PLEASE TAKE FURTHER NOTICE, that in the event the Debtor notifies the Court on January 27, 2025, that a hearing on the sale of the Debtor's assets will be held on February 12, 2025, the Court will conduct a status hearing of the Motion on February 12, 2025.

PLEASE TAKE FURTHER NOTICE that unopposed motions may be granted by the Court without the need for an appearance provided that the moving party files with the Court a proposed order granting the motion along with a Certificate of No Objection at least **two (2) days prior** to the scheduled hearing date. Following receipt of the Certificate of No Objection, the Court may enter an order granting the motion without further pleading, hearing, or request.

PLEASE TAKE FURTHER NOTICE that all attorneys and unrepresented parties are required to register for appearances at least two (2) business days in advance of the scheduled hearing using the Court's eCourt appearances platform set forth on Chief Judge Trust's homepage <https://www.nyeb.uscourts.gov/content/judge-alan-s-trust>.

PLEASE TAKE FURTHER NOTICE that objections, if any, to the relief sought in the application must conform to the Federal Rules of Bankruptcy Procedure and the Local Rules of the Bankruptcy Court, as modified by any administrative orders entered in this case, and be filed with the Bankruptcy Court electronically in accordance with any Administrative Order of the Court, by registered users of the Bankruptcy Court's case filing system and, by all other parties in interest, on a 3.5 inch disk, preferably in Portable Document Format (PDF), WordPerfect, Microsoft Word, DOS text (ASCII) or a scanned image of the filing, with a hard copy delivered directly to Chambers, and be served in accordance with any Administrative Order of the Court and upon: (i) **The Office of the United States Trustee, 560 Federal Plaza, Central Islip, New York 11722, Attn: Stan Y. Yang, Esq.**; so as to be received by no later than **4:00 p.m. (prevailing Eastern time) January 17, 2025.**

PLEASE TAKE FURTHER NOTICE that only timely objections made be considered by the Court.

Dated: Central Islip, New York
December 19, 2024

William K. Harrington
United States Trustee
Region 2

/S/ Stan Y. Yang
Stan Yang, Trial Attorney

560 Federal Plaza
Central Islip, New York 11722

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

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In re:

AMSTERDAM HOUSE CONTINUING CARE
RETIREMENT COMMUNITY, INC.,

Chapter 11

Case No: 823-70989-ast

Debtor.

-----X

APPLICATION IN SUPPORT OF AN ORDER SEEKING
DISMISSAL OF THIS CHAPTER 11 CASE

TO: THE HONORABLE ALAN S. TRUST,
CHIEF UNITED STATES BANKRUPTCY JUDGE:

William K. Harrington, the United States Trustee for Region 2 (“United States Trustee”) in furtherance of his duties and responsibilities set forth in 28 U.S.C. §586(a)(3) and (5) does hereby make this application in support of an order dismissing this chapter 11 case,

In support therefore, the United States Trustee represents and alleges as follows:

PRELIMINARY STATEMENT

On March 22, 2023 (“Petition Date”), Amsterdam House Continuing Care Retirement Community Inc, (the “Debtor”) filed a voluntary chapter 11 petition. It should be noted that the Debtor has previously sought chapter 11 protection on two prior occasions. The Debtor operates a not-for-profit senior living facility (“Home”) under the Continued Care Retirement Community provision of New York State (“CCRC”). In this present case, the Debtor attempted to sell its business operations to another CCRC operator. Not only was the sale approved, but the plan of reorganization with the proposed sale was confirmed. Unfortunately, New York State Department of Health (“DOH”) denied the proposed purchaser’s application.

and the purchaser terminated the sale. As a result, the Debtor failed to consummate its confirmed plan. Although the Debtor is hopeful that another suitor would purchase the Debtor's business operations, no firm commitment and/or an executed sale agreement has been provided to date. The Debtor's financial position is deteriorating on a daily basis and the Debtor appears to be accruing unpaid post-petition administrative expenses. It is unclear how long the Debtor can sustain business operations or when all of the reserved funds run out. Upon information and belief, at this critical moment, the Debtor has not provided the Home's closure plan to the NYS regulatory authorities. The future of the Home and its ability to provide to the residents are uncertain at this time. Because of a) the Debtor's inability to effectuate substantial consummation of its confirmed Plan, b) the Debtor's material default under the terms of its confirmed Plan, and c) the Debtor's inability to demonstrate, at this time, whether there is a reasonable likelihood that a new financially feasible plan of reorganization can be proposed and confirmed within a short period of time, and d) the Debtor's failure to show that it has sufficient liquidity to continue its operations beyond 2024, cause has been shown under 11 U.S.C. §1112(b) warranting the dismissal or conversion of this chapter 11 case. Because of the limitation of the relief sought under 11 U.S.C. §1112(c), the United States Trustee respectfully requests the Court to enter an order dismissing this chapter 11 case.

BACKGROUND

1. On March 22, 2023, the Debtor commenced this proceeding by filing a voluntary chapter 11 petition. (**ECF Dkt. # 1**). It should be noted that the Debtor had sought chapter 11 protection on two other occasions in 2014 and 2021, under case numbers 814-73348-ast and 821-71095, respectively.

2. The Debtor has continued its business operations as a not-for-profit CCRC since the inception of this case.

3. By an order dated December 27, 2023, the asset purchase agreement (“APA”) between the Debtor and Life Care Services Communities, LLC d/b/a LCS Real Estate, a for-profit CCRC operator (“LCS”) (“Sale”), was approved (**ECF Dkt. # 607**),

4. On March 28, 2024, a plan of reorganization (“Plan”) (**ECF Dkt. #690**) and a disclosure statement (**ECF Dkt. # 691**) were filed by the Debtor.

5. Pursuant to an order dated May 13, 2024, the Plan was **confirmed** (**ECF Dkt. # 733**).

6. On July 25, 2024, the Court entered an order amending the APA (**ECF Dkt. #789**).

7. On August 20, 2024, LCS gave notice of termination of the APA (the “Notice of termination”). On October 3, 2024, the Court entered a further order approving a letter agreement between the Debtor and LCS regarding the Sale (**ECF Dkt. #849**).

8. A review of the Debtor’s September 2024 balance sheet that was attached to its September 2024 monthly operating report (“Sept. MOR”) (**ECF Dkt. #869**) shows the Debtor was behind in excess of \$6.6 million with its post-petition administrative obligations. A request for explanation was made and no answers have been provided.

9. On November 15, 2024, the Debtor filed a status letter (“Status Letter”) advising the Court that the Top Term Sheets had been circulated among the Consultation Parties and the Prospective Purchasers, but no consensus has been reached (**ECF Dkt. #890**). The Status Letter did not provide any timeline when an executed APA, if any, could be submitted for Court approval.

10. To date, the Debtor has not filed any alternative plan of reorganization.

APPLICABLE LEGAL AUTHORITY

11. 28 U.S.C. §586(a)(8) states that “in any case in which the United States Trustee finds material grounds for relief under §1112 of Title 11, the United States Trustee shall apply promptly after making that finding to the court for relief.” Under 11 U.S.C. §307, the United States Trustee has standing to be heard on any issue, in any bankruptcy case or proceeding. Pursuant to 28 U.S.C. §586(a)(3), the United States Trustee is charged with the duty of supervising the administration of cases in chapter 11. This Court has jurisdiction over this matter, pursuant to 28 U.S.C. §157.

I. Cause exists to convert or dismiss the Debtor’s case

12. Conversion of chapter 11 cases is governed by 11 U.S.C. §1112(b) of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”), which states in relevant part as follows:

(1) Except as provided in paragraph (2) of this subsection . . . on request of a party in interest . . . absent unusual circumstances specifically identified by the court that establish that the requested conversion or dismissal is not in the best interests of creditors and the estate, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, if the movant establishes cause.

(2) the relief provided in paragraph (1) shall not be granted absent unusual circumstances specifically identified by the court that establish that such relief is not in the best interests of creditors and the estate, if the debtor or another party in interest objects and establishes that –

(A) there is a reasonable likelihood that a plan will be confirmed within the timeframes established in §§ 1121(e) and 1129(e) of this title . . .; and

(B) the grounds for granting such relief include an act or omission of the debtor other than under paragraph (4)(A) --

- (i) for which there exists a reasonable justification for the act or omission; and
- (ii) that will be cured within a reasonable period of time fixed by the court . . .

(4) for purposes of this subsection, the terms ‘cause’ includes –

(A) Substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation;

(M) inability to effectuate substantial consummation of a confirmed plan;

(N) material default by the debtor with respect to a confirmed plan.

13. Stated differently, with limited exceptions, §1112(b) mandates that the court dismiss or convert a chapter 11 case where any of the acts or omissions identified in §1112(b)(4) exist. The mandatory language of §1112(b) is a substantial departure from the former law, which left dismissal or conversion entirely in the court’s discretion. “Congress has purposefully limited the role of this Court in deciding issues of conversion or dismissal, such that this Court has no choice, and no discretion, in that it ‘shall’ dismiss or convert a case under Chapter 11 if the elements for ‘cause’ are shown under 11 U.S.C. §1112(b)(4).” *In re TCR of Denver, LLC*, 338 B.R. 494, 498 (Bankr. D. Colo. 2006). There are only two exceptions to mandatory conversion or dismissal. The first is found in §1112(b)(1), and it restores the court’s discretion over dismissal or conversion in cases involving “unusual circumstances specifically identified by the court.” The second exception is found in §1112(b)(2), and it operates to enable a debtor to avoid dismissal or conversion where “reasonable justification” exists for the deficiencies in the case, those deficiencies “will be cured within a reasonable period of time,” and there is a

reasonable likelihood that the debtor will confirm a plan. However, this second exception is inapplicable if cause exists under §1112(b)(4)(a) (substantial or continuing loss to the estate).

14. Whether cause exists to convert or dismiss a case is a determination that rests within the sound discretion of the court. *In re Levinsky*, 23 B.R. 210, 217 (E.D.N.Y. 1982). In fact, the Bankruptcy Court has broad discretion to determine whether conversion or dismissal of a chapter 11 case, so long as its decision is made based upon the best interest of creditors. *See In re Gonic Realty Trust*, 909 F. 2d 624, 626-27 (1st Cir 1990). While the burden of showing cause rests with the moving party, *In re Pensignorkay, Inc.*, 204 B.R. 676, 680 (Bankr. E.D. Pa. 1997); *In re Earth Services, Inc.*, 27 B.R. 698, 700 (D. Vt. 1983), that burden can be met either by demonstrating the existence of one or more of the statutory grounds enumerated in section 1112(b) or by showing other cause. *Levinsky*, 23 B.R. at 217; *see also, In re Santiago Vela*, 87 B.R. 229, 231 (D. P.R. 1988); *In re 3868-70 White Plains Road, Inc.*, 28 B.R. 515, 519 (S.D.N.Y. 1983).

15. 11 U.S.C. §1112(b)(4) sets forth a list of examples of “cause.” For purposes of the instant motion, under 11 U.S.C. §1112(b)(4) “cause” includes:

(F) unexcused failure to satisfy timely any filing or reporting requirement established by this title or by any rule applicable to a case under this chapter;

(M) inability to effectuate substantial consummation of a confirmed plan;

(N) material default by the debtor with respect to a confirmed plan.

16. The list set forth at 11 U.S.C. §1112(b)(4) is illustrative and not exhaustive; a court may find that “cause” for conversion exists based on circumstances which are not among those enumerated in 11 U.S.C. §1112(b)(4). *See In re C-TC 9th Ave. P’ship*, 113 F.3d 1304,

1311 (2nd Cir. 1997). Although BAPCPA significantly altered 11 U.S.C. §1112(b), the revised statute did not impact the nonexclusive nature of 11 U.S.C. §1112(b)(4). *See In re Springs Hospitality, Inc.*, 2006 WL 2458679, *3 n.6 (Bankr. D. Idaho 2006) (concluding that the list set forth at 11 U.S.C. §1112(b)(4) is non-exhaustive, like its pre-BAPCPA corollary at 11 U.S.C. §1112(B)(1)); *In re 3 RAM, Inc.*, 343 B.R. 113, 117 (Bankr. E.D. Pa. 2006) (“[w]hile the enumerated examples of ‘cause’ to convert or dismiss a chapter 11 case now listed in §1112(b)(4) have changed under BAPCPA, the fact that they are illustrative, not exhaustive has not”).

17. Among the considerations frequently cited by courts, in determining to dismiss or convert a Chapter 11 case, is whether a debtor has filed his petition in bad faith. *See, e.g. C-TC 9th Ave. P’ship*, 113 F.3d at 1310 (“[t]he good faith standard applied to bankruptcy petitions furthers the balancing process between the interests of debtors and creditors which characterizes so many provisions of the bankruptcy laws and is necessary to legitimize the delay and costs imposed upon parties to a bankruptcy”) (citation and internal quotations omitted).

ARGUMENT

I. Cause exists for Court to enter an order converting or dismissing this chapter 11 case

Substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation

18. Since this third bankruptcy filing, the Debtor has been operating its business. Upon information and belief, the Debtor has not been successful in recruiting new residents, without which the Debtor’s cash flow was severely compromised. The Debtor’s exit strategy for reorganization at the outset of this bankruptcy filing, was to sell its assets. Although the Sale

was approved and the Debtor's Plan was confirmed, LCS, the successful purchaser, terminated the APA which prevented the Debtor from consummating the confirmed Plan.

19. The Debtor's attempts to pursue an alternative purchaser to acquire its business operations has not been successful. On November 15, 2024, although the Debtor filed a Status Letter advising the Court that the Top Term Sheets had been exchanged among the Consultation Parties and the Prospective Purchasers, there was no consensus reached among the parties and there is no timeline or commitment as to whether or when an executed APA would be forthcoming.

20. While the parties are hopefully waiting for the miraculous intervention in the form of a new sale to take place, the Debtor's financial situation has continued to deteriorate causing the Debtor to accrue a significant amount of unpaid post-petition administrative obligations. The Debtor's Sept MOR shows it has accrued post-petition "Accounts Payable" of \$2,038,089 and "Accrued Operating Expense" of \$4,681,448 ("Unpaid Post-Petition Admin"). On November 6, 2024, the United States Trustee sent an email to the Debtor's counsel inquiring about the Unpaid Post-Petition Admin, to date, no response has been provided to date.

21. On October 10, 2024, Sodexo, Inc, a vendor that provides food service at the Home, sought to compel immediate rejection of the service contract because the Debtor was not making post-petition payments. The financial fiasco was averted because the Debtor's parent company, Amsterdam Continuing Care Health System, Inc. ("the Sponsors"), infused in excess of \$1 million as an unconditional financial contribution to the Debtor's estate, thereby enabling the Debtor to pay Sodexo. The concern is whether Sodexo's unpaid bill is the sole financial issue or indicative of the Debtor's greater post-petition administrative insolvency.

22. With the reserved funds that are currently available, it is unclear whether the

Debtor can financially sustain its business operation past December of 2024. It is also unclear whether the Sponsors have made additional commitments to fund the Debtor's business operations when the Debtor's operating funds are depleted.

23. Based upon the Debtor's substantial financial loss and continuing diminution of its liquidity, it appears doubtful that there is any reasonable likelihood that the Debtor can rehabilitate under chapter 11. Furthermore, the significant amount of unpaid post-petition administrative expenses will only continue to increase as long as the Debtor remains in operation. Based upon the Debtor's current state, the Debtor is administratively insolvent. In light of the foregoing, cause under 1112(b)(4)(A) is shown in support of dismissal or conversion of this chapter 11 case.

B. Inability to effectuate substantial consummation of a confirmed plan

24. Pursuant to the Debtor's confirmed Plan, the Debtor's business operations would have been sold to LCS. Unfortunately, in August 2024, LCS terminated the Sale, so the Debtor was unable to consummate its confirmed Plan. Since August 2024, the Debtor has been unable to secure an executed APA from another purchaser. As a result, there is no likelihood that the Debtor has the financial ability to effectuate any the proposed payment terms under the confirmed Plan. Accordingly, pursuant to 11 U.S.C. 1112(b)(4)(M) "the inability to effectuate a plan, by itself, provides cause for dismissal or conversion of a chapter 11 case," *In re Babyoff*, 445 B.R. 64, 76 (Bankr. E.D.N.Y. 2011), citing *In re DCNC North Carolina I, LLC*, 407 B.R. 651, 665 (Bankr. E.D. Pa. 2009).

C. Material default by the debtor with respect to a confirmed plan

25. When a Debtor fails to comply with its obligations under the Plan and the confirmation order, such a failure constitutes a material default with respect to a confirmed plan under 1112(b)(4)(N). *See* this Court’s holding in *In re JNL Funding Corp.*, 620 B.R. 25, 28 (Bankr. E.D.N.Y. 2020). In the instant case, the Debtor’s inability to close the Sale, or obtain an alternative financial arrangement, to effectuate the confirmed Plan, constitutes a failure to comply with its obligation under the Plan. Accordingly, the Debtor has materially defaulted with respect to its confirmed Plan which constitutes cause under 1112(b)(4)(N), warranting conversion or dismissal of this case.

CONCLUSION

26. This Court often uses the analogy that bankruptcy proceeding is a “triage,” and it is not a “long term care” facility and the debtors only need to answer two questions: 1) **“how much”** will the creditor receive, and 2) **“when”** the creditors will receive it. Unfortunately, this Debtor fails to provide answers to these two important questions after twenty-two (22) months in bankruptcy. This bankruptcy filing is the Debtor’s third attempt to rehabilitate its business. The Debtor’s Plan was confirmed in May of 2024. After LCS sent the Notice of Termination three months after confirmation, the Debtor has failed to provide an alternative exit plan in its third bankruptcy case. Since the Debtor a) failed to consummate its confirmed Plan, b) does not have the ability to effectuate its confirmed Plan, c) has materially defaulted the terms under the confirmed Plan, and d) continues to accrue unpaid post-petition administrative expenses, cause has been shown in support of dismissal or conversion of

this chapter 11 case. Since the Debtor is a not-for-profit entity, the United States Trustee respectfully submits that dismissal is appropriate.

WHEREFORE, the United States Trustee respectfully requests that the Court enter an order:

- A. Dismissing this chapter 11 case, and
- B. Granting such other and further relief as may seem just and proper.

Dated: Central Islip, New York
November 20, 2024

WILLIAM K. HARRINGTON
UNITED STATES TRUSTEE
REGION 2

/S/ Stan Y. Yang
Trial Attorney

Long Island Federal Courthouse
560 Federal Plaza
Central Islip, New York 11722-4456
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