Docket #0030 Date Filed: 8/31/2021

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

In re: REGIONAL HOUSING & COMMUNITY SERVICES CORP., et al., Debtors.	Chapter 11 PROPOSED Jointly administered under Case No. 21-41034-pwb

OBJECTION OF UMB BANK, N.A., AS TRUSTEE, TO DEBTORS' FIRST DAY MOTIONS, INCLUDING USE OF CASH COLLATERAL AND APPROVAL OF DEBTOR IN POSSESSION FINANCING

UMB Bank, National Association, not individually but as successor trustee for the bonds described more fully below (the "Bond Trustee"), objects (the "Objection") to certain relief requested by the Debtors[1] in their first day motions, including: (i) the proposed priming liens set forth in the *Debtors' Motion for Interim and Final Orders (I) Authorizing (A) Secured Postpetition Financing Pursuant to 11 U.S.C. §§ 105, 361, 362, and 364(c) and (d); and (B) Granting Security Interests, Superpriority Claims, and Adequate Protection, and (II) Scheduling a Final Hearing; and Memorandum of Points and Authorities* (the "DIP Motion") [Docket No. 12], and (ii) the proposed use of the Bond Trustee's cash collateral as set forth in the Debtors' Motion for Authority to Use Cash Collateral (the "Cash Collateral Motion") [Docket No. 11]. In support of this objection, the Bond Trustee states as follows:

PRELIMINARY STATEMENT

The Debtors have seemingly put the Bond Trustee and this Court in a truly unfortunate and uncomfortable position. Based on the papers filed by the Debtors on the first day of these cases, it appears that the Debtors drained the remaining funds in their bank accounts to pay retainers to

[1] Capitalized terms not otherwise defined in this Objection have the meanings given to them in the DIP Motion.

their bankruptcy and restructuring professionals, filed a "free fall" chapter 11 case with no proposed strategy to sell or restructure their assets just before a large insurance payment was due, and discussed financing for the cases with only one entity ("Proposed DIP Lender"), the same entity the Debtors intend to propose as a stalking horse bidder.[2] The Debtors now present that financing as the only way to solve the emergency they created. The proposed financing with the Proposed DIP Lender is not only expensive, but it tilts the yet-to-be identified sale process in favor of the Proposed DIP Lender in the first days of the case by allowing it to credit bid the amounts advanced and by awarding fees that will only be waived if the lender is the successful bidder. By leaving itself with only $150 in its accounts (according to the Debtors' proposed budget) and identifying immediate cash needs for insurance and payroll, the Debtors apparently hoped that the Court would ignore the Bankruptcy Code and approve priming liens and the use of cash collateral even though the Debtors do not have the Bond Trustee's consent and have no ability to provide the Bond Trustee with adequate protection. Undoubtedly the Debtors will argue that this is the only way for the Debtors to protect the interests of the residents and avoid liquidation. It is not.

As discussed in part D below, there is a solution here, but not the one suggested by the Debtors. Specifically, two funds,[3] managed by Ecofin Advisors, LLC, are the holders of 100% of the Bonds (the "Bondholders") and are willing to step-in and solve the Debtors' immediate cash emergency by funding $175,000 to allow the Debtors to pay this week's payroll requirement. This will allow the Bondholders and the Debtors time to discuss a more permanent funding solution

[2] While the Debtors have not filed bidding procedures or sought approval of bidding protections, the DIP Motion indicates that an Exit Fee is waived if the amounts advanced by the Proposed DIP Lender are satisfied pursuant to a successful credit bid by the Proposed DIP Lender or an affiliate. *See* DIP Motion, at p. 2.

[3] The two funds that own the Bonds are Ecofin Direct Municipal Opportunities Fund, LP (f/k/a Tortoise Direct Municipal Opportunities Fund, LP) and Ecofin Tax-Advantaged Social Impact Fund, Inc. Ecofin Advisors, LLC serves as adviser or sub-adviser to each of these funds and is authorized to act on behalf of each of the funds and acts as Bondholder Representative.

that will allow these cases to go forward with appropriate safeguards in place to ensure a fair and transparent sale or restructuring process. The Bond Trustee would consent to this proposed financing by the Bondholders. Unless the Debtors are able to procure alternative funding that does not require providing adequate protection to the Bond Trustee (which the Debtors cannot do), this proposal is the only path forward for these cases as it is the only proposal that will provide the Debtors with adequate funding for operations necessary to protect the residents and comply with the requirements of the Bankruptcy Code.

ARGUMENT

A. The Debtors cannot grant liens that prime those of the Bond Trustee or use the Bond Trustee's cash collateral without the consent of the Bond Trustee or by providing the Bond Trustee with adequate protection.

The Debtors concede that they owe the Bond Trustee approximately $55.4 million and that there is no realistic hope that their assets are sufficient to pay the Bonds in full. See Declaration of Katie S. Goodman in Support of First Day Applications and Motions ("Goodman Aff."), Docket No. 17, at ¶¶ 9, 16. The amounts owed to the Bond Trustee are secured by first priority liens on substantially all of the Debtors' assets. As such, the Debtors do not have an equity cushion, have no unencumbered assets on which they can provide replacement liens to the Bond Trustee as adequate protection, and do not have any cash (which is why the Debtors need to borrow the funds requested by the DIP Motion).

Notwithstanding the Debtors' inability to provide adequate protection to the Bond Trustee, the Debtors have requested use of the Bond Trustee's cash collateral in the Cash Collateral Motion and authority to grant liens to secure up to $5 million that would prime the liens of the Bond Trustee pursuant to the DIP Motion. The Bankruptcy Code makes clear that the Debtors requests are impermissible without the consent of the Bond Trustee (which the Debtors do not have) or by

providing the Bond Trustee with adequate protection (which the Debtors cannot do). See 11 U.S.C. § 364(d) (senior liens may be authorized only if "there is adequate protection of the interest of the holder of the [prior] lien . . . ."); 11 U.S.C. § 363(e) (use of cash collateral only permitted if conditioned on provision of adequate protection).

The Debtors bear the burden on this issue. *See*11 U.S.C. §§ 363(p), 364(d)(2) (providing that the debtor "has the burden of proof on the issue of adequate protection"); *Wells Fargo Bank, N.A. v. Sonora Desert Dairy, L.L.C. (In re Sonora Desert Dairy, L.L.C.)*, 2015 Bankr. LEXIS 18, at *30- 31 (B.A.P. 9th Cir. Jan. 5, 2015); *see also In re Plabell Rubber Prods., Inc.*, 137 B.R. 897, 899 (Bankr. N.D. Ohio 1992) ("Section 36[4](d)(1)(B) requires the movant to prove that the lender who is subject to being primed will be adequately protected in the face of the loan transaction"). The Debtors can only meet their adequate protection burden by showing on a "firm evidentiary basis" that the Bond Trustee's liens will be adequately protected from the decrease in value that will be caused if the Debtors impose the requested priming liens and use their collateral as requested in the DIP Motion and the Cash Collateral Motion. *See In re Windsor Hotel, L.L.C.*, 295 B.R. 307, 314 (Bankr. C.D. Ill. 2003).

B. The Debtors fail to offer any meaningful adequate protection for the significant reduction in the Bond Trustee's collateral position that will result from the DIP Motion and the Cash Collateral Motion.

Section 361 of the Bankruptcy Code provides guidance as to what constitutes adequate protection for the use of cash collateral under Section 363(e) or in connection with the granting of priming liens under Section 364(d)(1)(B). Specifically, Section 361 provides three examples of adequate protection. The first two of these examples – cash payments and the granting of additional or replacement liens – have no applicability here for the reason that the Debtors have no funds available and the Bond Trustee's liens already fully encumber all of the Debtors' assets. The third

example set forth in Section 361, the realization of the indubitable equivalent of the Bond Trustee's interest, requires the Debtors to preserve the *status quo* for affected secured creditors. *See In re 354 E. 66th St. Realty Corp., 177 B.R. 776, 781-782 (Bankr. E.D.N.Y. 1995)* (noting that the purpose of adequate protection payments was to preserve the *status quo* for a secured creditor); *see also Associates Commercial Corp. v. Rash (In re Rash), 90 F.3d 1036, 1050 n. 17 (5th Cir. 1996), rev'd on other grounds, 520 U.S. 953 (1997)* ("The adequate protection provisions. . . were included in the Bankruptcy Code in 1978, reflecting a few prior decisions inthe case law that sought to protect secured creditors from a decline in the value of the collateral during the pendency of the stay").

The Debtors' showing must establish verifiable compensation to the Bond Trustee to offset the decline in the Bond Trustee's collateral position that would be caused by the use and priming of the Bond Trustee's collateral that is contemplated here. *See Resolution Tr. Corp. v. Swedeland Dev. Group, Inc. (In re Swedeland Dev. Group, Inc.)*, 16 F.3d 552, 567 (3d Cir. 1994); *see also In re St. Petersburg Hotel Assocs., Ltd*., 44 B.R. 944, 946 (Bankr. M.D. Fla. 1984) (denying motion to incur financing on a priming basis, observing that "to permit the Debtor to saddle this property with an additional encumbrance which is superior to the interest of the Mortgagee would clearly operate to further deteriorate the position of the Mortgagee"); *In re Windsor Hotel, LLC*, 295 B.R. 307, 314 (Bankr. C.D. Ill. 2003) (denying request to incur financing on a priming basis; "Where the debtor proposes a priming lien, the proposal should provide the prepetition secured creditor with the same level of protection it would have had if there had not been post-petition superpriority financing"); *In re Martin*, 761 F.2d 472, 474 (8th Cir. 1984) ("The concept of adequate protection was designed to insure that the secured creditor receives the value for which he bargained") (internal quotation marks omitted); *In re Buttermilk Towne Center, LLC*, 442 B.R. 558, 566 (B.A.P. 6th Cir. 2010) (finding no adequate protection for use of cash collateral where "the record does not

indicate that Debtor possesses any unencumbered asset with which it can offer … adequate protection") (citations omitted); *Suntrust Bank v. Den-Mark Constr., Inc.*, 406 B.R.683, 702 (E.D.N.C. 2009) (holding that the pre-petition secured creditor's interest was not adequately protected by the debtor's continued operations).

It should be evident that there is no way that the Debtors can claim to preserve the Bond Trustee's *status quo* since the Debtors' proposal would prime the Bond Trustee with up to $5 million. Knowing this to be the case, the Debtors have offered only illusory adequate protection for their proposed priming liens and use of cash collateral. Specifically, the Debtors offer the following as adequate protection:

- A replacement lien on all of the Debtors' assets and proceeds thereof to the same extent and priority as existed pre-petition, except that the Bond Trustee's liens will be subordinated to the liens securing the proposed $5 million in favor of the DIP Lender (Cash Collateral Motion, at ¶ 8; DIP Motion at p. 14);

- Cash collateral may only be used for items set forth in the proposed Budget (Cash Collateral Motion, at ¶ 8; DIP Motion at 14-15); and

- Without the proposed financing the Debtors would need to close operations and relocate the residents which would destroy value (DIP Motion, at p. 13).

No part of the Debtors' proposed adequate protection package comes close to compensating the Bond Trustee for or offsets the decline in the Bond Trustee's collateral position that would result from the proposed expenditures in the budget and subordinating the Bond Trustee to $5 million in new financing. *See Resolution Tr. Corp. v. Swedeland Dev. Group, Inc. (In re Swedeland Dev. Group, Inc.)*, 16 F.3d 552, 567 (3d Cir. 1994). As such, it falls far short of requirement that adequate protection should maintain the *status quo* and provide the prepetition secured creditor with the same level of protection it would have had if there had not been post-petition superpriority financing. *Id.*

The Debtors representation that the liens it proposes to grant to the Bond Trustee are

replacement liens is exceedingly disingenuous. First, the Bond Trustee already has liens on all of the Debtors' assets and therefore, unlike the cases cited by the Debtors which deal with situations where a debtor granted new liens on otherwise unencumbered property, the Debtors' offer of adequate protection is illusory and deficient. *See In re LTAP US, LLLP,* 2011 Bankr. LEXIS 667 at *9 (Bankr. D. Del. Feb. 18, 2011) (a grant of replacement liens on assets already subject to a secured party's liens is not adequate protection). Indeed, the replacement liens offered by the Debtors would put the Bond Trustee in a far worse position than it was in prior to these cases since the liens the Debtors propose as adequate protection would be subordinated to the $5 million in new financing.

The second form of proposed adequate protection -- that expenditures can only be made in accordance with a budget -- is similarly of limited value. First, the documents related to the Bonds already provide similar protections. Moreover, it is unclear how the Debtors' agreement to comply with a budget that the Bond Trustee does not have rights to control provides any further protection to the Bond Trustee, especially since that budget reveals a need for millions of dollars in additional financing that will be secured by liens that prime those of the Bond Trustee.[4]

The third form of adequate protection offered to the Bond Trustee – that if the proposed financing with the Proposed DIP Lender is not approved the Debtors will need to close operations and relocate residents which would destroy value – is also without merit.[5] First, continued

[4] The DIP Lender would seemingly have control over expenditures contained in the budget, but the DIP Lender is not economically motivated to ensure the reasonableness of expenditures since they either get paid back on those dollars advanced, or more likely use those advanced dollars in the form of a credit bid that reduces the Bond Trustee's recovery from the sale of its collateral.

[5] The Debtors cite four cases in support of this argument, *see* DIP Motion, at p. 15, three of which deal with adequate protection in the context of a debtor's proposed use of cash collateral (as opposed to priming DIP liens) and therefore do not support the Debtors' proposed priming of the Bond Trustee. These courts generally found that cash collateral generated from the use of property used to preserve the value of that property may provide a lender with adequate protection if the value of the lender's collateral is maintained. If this were all that the Debtors were proposing – i.e., proposing to use revenues from operations of their facilities to preserve and maintain the value of those facilities – the Bond Trustee would likely consent to such use conditioned on standard protections such that expenditures could only

operations is not what the law requires when there is priming debtor in possession financing. If that were true, then existing lenders could be primed in any bankruptcy case where the debtor elected to operate rather than shut down since shutting down almost always destroys value. Obviously, this is not the case. Moreover, the Debtors statement that they will need to close operations if the proposed financing is denied is false because the Bondholders have indicated a willingness to fund the cases on the terms outlined in part D below.

C. The Debtors have not adequate shopped the proposed loan.

The financing proposed in the DIP Motion is flawed for another reason. Before the Court can approve secured debtor in possession borrowing, the Debtors must establish they are unable to obtain financing on less onerous terms. See 11 U.S.C. §§ 364(c), (d); *see also In re Los Angeles Dodgers*, LLC, 457 B.R. 308, 312 (Bankr. D. Del. 2011) (denying request to obtain financing, "premised upon Section 364(b) of the Bankruptcy Code, 11 U.S.C. § 364(b), which explicitly precludes the [loan] where, as here, Debtors are unable to prove that they are 'unable to obtain unsecured credit allowable under section 503(b)(1) . . . as an administrative expense'*"); In re Seth Co., Inc.* 281 B.R. 150, 153 (Bankr. D. Conn. 2002) (section 364(d) financing requires that the debtor be unable to otherwise obtain credit); *In re. Aqua Assoc.,* 123 B.R. 192, 195-196 (Bankr. E.D. Pa. 1991) (financing should not be approved when funds are available from some other

be made pursuant to a budget. The instant case is unlike these three cases, however, because the Debtors do not seek to simply use the Bond Trustee's cash collateral. Rather, they seek to incur up to $5 million in additional debt and subordinate the Bond Trustee's liens to new liens securing that new debt. Thus, the *status quo* is not maintained as it arguably was in the cases cited by the Debtors. Instead, the Bond Trustee's position is worsened because even if the value of the Debtors' facilities is maintained as a result of the funds borrowed from the Proposed DIP Lender, the Bond Trustee's liens are being subordinated to the liens granted to secure up to $5 million in funding. Nothing in any of the cases cited by the Debtors suggests that preservation and maintenance of an undersecured lender's collateral funded by obligations secured by new senior liens that prime that undersecured lender constitutes adequate protection, yet that is what the Debtors claim they do. The fourth case cited by the Debtors (and the only one of the four that deals with priming liens) was premised on the fact that the lender was oversecured with a significant equity cushion and the new loan would be paid within a reasonable time so that the existing lender would not be harmed. *See In re Snowshoe Co.*, 789 F.2d 1085, 1089-90 (4th Cir. 1986). The key principal in that case was that the collateral position of the existing lender was not harmed, a situation clearly not present in this case since there is no equity cushion and the Debtors seek to prime the Bond Trustee with up to $5 million in new liens.

source).

These standards mean that postpetition financing should not be approved if there was not an adequate effort to obtain alternative financing. *Plabell Rubber Products, Inc.*, 137 B.R. at 990 (contact with one other bank insufficient); *In re Reading Tube Industries*, 72 B.R. 329, 332 (Bankr. E.D. Pa. 1987) (denying approval of DIP financing where debtor put on no evidence of its efforts to seek alternatives).

Other than bare recitations that the Debtors were unable to obtain credit from other sources on more favorable terms, *see* DIP Motion, at pp. 7, 11, the Debtors fail to make any showing that they made efforts to obtain alternative financing. Indeed, the Debtors do not commit to speaking to any lender other than the Proposed DIP Lender. *See* Goodman Aff., at ¶ 49 ("Prior to the Chapter 11 filing, representatives of the Debtors contacted **one** or more potential lenders, seeking alternative financing sources" (emphasis added)). Most notably, the Debtors, even after retaining a Chief Restructuring Officer, did not reach out to the Bond Trustee to discuss debtor in possession financing for these cases. If they had, working though financing on an emergency basis could have been avoided. The Debtors should not be able to create their own emergency and then impermissible prime the Bond Trustee on the basis that there is no time to discuss alternative solutions.

D. The Bondholders are willing to fund the cases.

As stated throughout this Objection, the Bondholders are willing to fund these cases. They have commenced discussions with the Debtors on what protections would be required for this funding. Most notably, the Bondholders would need to be comfortable that the Debtors' financial projections are accurate and transparent and that the cases were moving forward in an expeditious manner. The Bondholders would also require provisions that are considered standard in any cash

collateral or financing order.

While the Debtors and the Bondholders discuss these provisions, the Bondholders understand that the Debtors have an emergency need for cash to fund payroll by no later than September 2, 2021. To address this need, the Bondholders have indicated that they are ready, willing and able to advance $175,000 for payroll (the Debtors' budget indicates that $159,789 is needed for payroll, plus $12,052 for payroll tax) with no fees and a 7.5% interest rate by no later than September 2, 2021 on the condition that such amounts are advanced on a senior secured basis. This will avoid the priming fight addressed in this Objection for a few days while the Debtors and Bondholders continue discussions on a longer-term solution.

E. Reservation of Rights.

Given the emergency basis on which the DIP Motion and the Cash Collateral Motion were filed and scheduled for hearing, the Bond Trustee files this Objection with a full reservation of rights to supplement or amend its arguments at any future hearings on the DIP Motion or the Cash Collateral Motion, including but limited to any finding that the Proposed DIP Lender would be entitled to the protections of Section 363(e) of the Bankruptcy Code, that certain provisions of the loan documents are not proper, or that certain expenditures under the proposed budget are inappropriate. Further, the Bond Trustee objects to including any finding on an interim or final basis that the Proposed DIP Lender has advanced funds in good faith until the Bond Trustee has had adequate opportunity to fully review the proposed loan documents and conduct discovery into any and all relationships among the Proposed DIP Lender, the Debtors, and ALG Senior, LLC ("ALG"). ALG serves as the manager of the Debtors' facilities (*see* Goodman Aff., at ¶ 6), an affiliate of ALG was the purchaser of the facilities (*see* Goodman Aff., at ¶ 14), and there is significant overlap between the controlling officers of the Debtors and ALG. Given the numerous

hats worn by ALG (or its affiliates and officers) in these cases, the Bond Trustee has significant concerns that ALG is motivated to entrench itself as manager or equity during these bankruptcy cases or thereafter. That is one possible explanation as to why the Debtors would seek to prime the Bond Trustee, rather than seeking to discuss additional financing for the cases with the Bond Trustee.

WHEREFORE, for the reasons set forth herein the Bond Trustee requests that the Court deny the relief requested in the DIP Motion and the Cash Collateral Motion and grant such other relief as may be just and proper.

Dated: August 31, 2021

/s/ *John D. Elrod*
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CERTIFICATE OF SERVICE

I hereby certify that I have this day caused copies of the foregoing document to be served upon all parties registered to receive CM/ECF notices in this case.

Dated: August 31, 2021

/s/ *John D. Elrod*
John D. Elrod