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HON. FRANK L. KURTZ

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON**

In re:

Case No. 19-01189 FLK
Chapter 11

ASTRIA HEALTH, et.al. 1

RESPONSE TO MOTION
AUTHORIZING POST-PETITION
FINANCING AND CASH
COLLATERAL – FINAL HEARING

Debtors in Possession,

The United States Trustee responds to the Motion Authorizing Post-petition
Financing and Use of Cash Collateral as follows:

SUMMARY:

Certain provisions of the lender’s document overreach, diminishing if not

1 The Debtors, along with their case numbers, are as follows: Astria Health (19-01189), Glacier Canyon, LLC (19-01193), Kitchen and Bath Furnishings, LLC (19-01149), Oxbow Summit, LLC (19-01195), SHC Holdco, LLC (19-01196), SHC Medical Center-Toppenish (19-01190), SHC Medical Center-Yakima (19-01192), Sunnyside Community Hospital Association (19-01191), Sunnyside Community Hospital Home Medical Supply, LLC (19-01197), Sunnyside Home Health (19-001198), Sunnyside Professional Services, LLC (19-01199), Yakima Home Care Holdings, LLC (19-01201), and Yakima HMA Home Health, LLC (19-01200).

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1 outright preventing, the court from performing its statutory role and prematurely,
2 without factual basis, determining aspects of the future of this case which the
3 lender cannot possibly predict, and improperly imposes handcuffs on any future
4 trustee.
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6 1. CAP FOR ANY TRUSTEE IS PREMATURE:

7 Any cap on a trustee's compensation is premature when the debtor is
8 advocating a value between \$120 mil to \$200 (book) of the entity, with secured
9 debts of \$90 mil. The lender wishes to handcuff both the court and any future
10 trustee without regard to the facts which may exist at the time of appointment or at
11 time of any disposition of the lender's collateral. Because no one can predict the
12 future of this case, it is better to prepare and plan for its demise so the estate will be
13 better situated to deal with the facts at that time. To put both the court and any
14 future trustee into financial restraints, now, is to prejudge any business judgment of
15 a trustee and to lock the court into a position where it cannot unlock the handcuffs.
16 Such a provision simply prevents a trustee from a normal exercise of business
17 judgment at that time when good judgment would be needed.
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22 Further provisions of the lender's documents also restrict the use of section
23 506(c)(see below). Section 506(c) provides:
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1 The trustee may recover from property securing an allowed secured claim
2 the reasonable, necessary costs and expenses of preserving, or disposing of,
3 such property to the extent of any benefit to the holder of such claim,
4 including the payment of all ad valorem property taxes with respect to the
5 property.

6 Quite frankly, that statute cannot be factually measured or predicted *today* to set a
7 cap on any fees or costs of any future trustee. If a chapter 11 trustee were
8 appointed or these cases are converted to an operating chapter 7 case, with an
9 enterprise value of \$120,000,000, any price nearly market value would present no
10 risk to the lender. As any sale price approaches the debt amount of the lender, their
11 perception of risk grows. But here, the lender preserves (and thus controls a fair bit
12 of leverage) their right to credit bid, and that militates against pre-set cap if the
13 trustee cannot bring some benefit to the “holder of the claim”.

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15 Ultimately, it is the court that determines preservation, any related value and
16 fees, and the applicability of section 506 on the parties. The underlying facts for
17 those determinations do not yet exist. The court should not permit those provisions
18 to be imposed.
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21 22 2. NO “DROP DEAD” RELIEF FOM STAY ON FIVE DAYS’ NOTICE

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24 The pleadings give the proposed lender an automatic relief from stay upon

1 default and upon five days' notice, without further order of the court ("drop dead"
2 relief from stay). See paragraph 23 of the proposed order. That provision should
3 not be approved.
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5 First, five days' notice is too short. It should be no shorter than 10 days'
6 notice to the debtor in possession, any appointed committee, the Washington
7 Attorney General's representative, and the United States Trustee, and be filed with
8 the court.
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10 Second, this is a hospital case, with patients in the facilities, with business
11 records of thousands of former and current patients, and with a significant number
12 of jobs in this community and down the lower Yakima Valley. Relief from stay on
13 five days' notice, and complete freedom by the lender to take whatever collection
14 course it desires in its sole discretion simply is ill-advised and practicably
15 unworkable. Because of this case is multi-faceted with some non-economic
16 interests, and with the unknown future factors regarding any claimed default, its
17 materiality, and the scope of any steps to be taken by a lender without this court's
18 oversight, whether by progressive steps towards full relief from stay and the
19 respect for the laws of Washington related to patient care and available beds, this
20 court should retain the final review of any default, its materiality and any final
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1 granting of relief from stay.

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3 **4. LENDER’S AVOIDANCE OF SECTION 506 AND COURT’S**
4 **REVIEW OF FEES.**

5 The proposed Final Order in paragraph 7 asks that the lender be allowed to
6 submit its attorney’s fee bills to the debtor, UST and Committee, with no court
7 review unless an objection is made in five days. As an interim modality, this
8 works. As an exclusive methodology for the review of fees, it does not. The
9 provision inappropriately changes applicable law and the burden of proof. The
10 provisions should not be approved. The presentation of the bills for interim
11 payment as part of the lending package is fine, however, the right and opportunity
12 of the parties in this case to challenge the reasonableness of the lender’s attorney’s
13 fees and costs should be reserved for resolution by the court, should such a
14 controversy arise.
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19 Section 506(b) provides that:

20 To the extent that an allowed secured claim is secured by property the value
21 of which, after any recovery under subsection (c) of this section, is greater
22 than the amount of such claim, there shall be allowed to the holder of such
23 claim, interest on such claim, and any reasonable fees, costs, or charges
24 provided for under the agreement or State statute under which such claim
arose.

1 A creditor must satisfy four elements to be eligible for attorneys' fees under
2 § 506(b): (1) the creditor's claim is an allowed secured claim; (2) the creditor is
3 oversecured; (3) the fees are reasonable; and (4) the fees are provided for under the
4 agreement. *In re Kord Enterprises II*, 139 F.3d 684, 689 (9th Cir.1998). The
5 determination of what is reasonable within section 506(b) is one reserved to the
6 court. *In re Wanechek*, 349 B.R. 836 (Bankr. E.D. WA 2006).
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9 Finally, the lender seeks to shift the burdens in these documents. The burden
10 of proof on the reasonableness of an oversecured creditors' claim for attorneys is
11 upon the creditor. *In re Atwood*, 293 B.R. 227, at 233 (9th Cir. BAP 2003). The
12 presentation of a bill to a limited set of parties is not the same as the burden of
13 proof to show reasonableness to the court.
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15 The reasonableness of the lender's attorney's fees and costs should be
16 reserved for future resolution by the court, should such a controversy arise.
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20 **5. THE LENDER SEEKS TO PREMATURELY AND IMPROPERLY**
21 **LIMIT 11 U.S.C. § 506(c).**

22 Section 506(c) provides:

23 The trustee may recover from property securing an allowed secured claim
24 the reasonable, necessary costs and expenses of preserving, or disposing of,
25 such property to the extent of any benefit to the holder of such claim,

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1 including the payment of all ad valorem property taxes with respect to the
2 property.

3 Here, the loan documents (and paragraphs 10 and 15 of the proposed order) refer to
4 the debtor's waiver of any rights under 506(c) saying:

5 Debtors irrevocably waive and shall be prohibited from asserting (i) any
6 surcharge claim, under section 506(c) of the Bankruptcy Code or otherwise,
7 for any costs and expenses incurred in connection with the preservation,
8 protection or enhancement of, or realization by the DIP Lender upon the DIP
9 Collateral and no costs or expenses of administration that have been or may
10 be incurred in any of the Chapter 11 Cases at any time shall be charged
11 against the DIP Lender or its claims or liens (including any claims or liens
12 granted pursuant to this Interim Order), and (ii) the "equities of the case"
exception under section 552(b) of the Bankruptcy Code in connection with
the DIP Facility."

13 While the opening sentence seems to restrict the applicability to the "Debtors," the
14 definition in section 1101(1) belies any possible limitation regarding any
15 successor. Further, the second sentence's language is broader than only the
16 debtors' waiver. The second half of the first sentence after the second word "and"
17 is absolute for "costs or expenses of administration that have been or may be
18 incurred in any of the Chapter 11 Cases at any time...". It is too broad. It would
19 include any chapter 11 trustee even if appointed at the behest and urging of the
20 lender. Further, the facts by which any party or court would measure any benefit
21 to the holder of a secured claim brought by an appointed trustee do not yet exist.
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1 There should be no waiver of section 506(c) for any future trustee.

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3 6. THE LENDER WANTS TO DOUBLE DIP IF SECTION 506(c) IS
4 INVOKED.

5 In Part 9 of the lender's documents provides if any 506(c) surcharge occurs,
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7 it becomes part of the superpriority claim:

8 Each Borrower warrants and covenants that the Obligations of any Borrower
9 under the Loan Documents "Shall, in accordance with section 364(c)(1) of
10 the Bankruptcy Code, constitute allowed senior administrative expense
11 claims against each Borrower and their estates(the "Superpriority Claims")
12 with priority in payment over any and all administrative expenses at any
13 time existing or arising, of any kind or nature whatsoever, including, without
14 limitation, the kinds specified or ordered pursuant to any provision of the
15 Bankruptcy Code, including, but not limited to, Sections 105, 326, 328, 330,
16 331, 503(b), **506(c)** (subject to the entry of the Final Order with respect to
17 Section 506(c) only), 507(a), 507(b), 726, 1113 and 1114 of the Bankruptcy
18 Code or otherwise, including those resulting from the conversion of any of
19 the Chapter 11 Cases pursuant to Section 1112 of the Bankruptcy Code,
20 whether or not such expenses or claims may become secured by a judgment
21 lien or other non-consensual lien, levy or attachment; provided, however,
22 that the Superpriority Claims shall be subject to and subordinate to only the
23 Carve-Out" (for professionals);...[emphasis added]

24 This provision simply defeats section 506(c) and its purpose. The surcharge comes
25 from the benefit brought to the holder of a secured claim, and is charged against
26 that claim because of the benefit. Here, the lender would simply circle the
27 surcharge back into the "superpriority claim" as if it were a separate claim

1 completely, and thus the 506(c) benefit to be realized by the estate is now damage
2 to the estate wrought under a second hat.

3 There is no separate superpriority claim. This is one post-petition loan with
4 superpriority status, subject to the terms of the court's order and its provisions. A
5 lender cannot diminish the debtor's estate in this fashion. *See In re Debbie*
6 *Reynolds Hotel & Casino, Inc.*, 255 F.3d 1061, 1067 (9th Cir. 2001) (noting that a
7 surcharge is not an administrative claim, but an assessment against the secured
8 party's assets which does not diminish the debtor's estate but rather comes from
9 the secured party's recovery). If the lender is allowed to circle any 506(c)
10 surcharge into a separate "superpriority" claim, section 506(c) is undone.
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15 **7. ANY PATIENT CARE OMBUDSMAN (PCO) SHOULD EXPRESSLY**
16 **BE INCLUDED IN THE "CARVE OUT."**

17 The express inclusion of a PCO appointed pursuant to 11 U.S.C. § 333
18 should be added to the professionals within the proposed Carve Out. At the
19 emergency hearing, the PCO was acknowledged as being included in the
20 professionals, but this order does not include any PCO. It should.
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24 The above noted provisions should not be approved in the final order. The court

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1 should not delegate its review of fees nor handcuff any future trustee this court
2 might order appointed.
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5 Dated: June 7, 2019
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7 Respectfully submitted,

8 GREGORY M. GARVIN
9 ACTING UNITED STATES TRUSTEE

10 /s/ Gary W. Dyer
11 Gary W. Dyer
12 Assistant US Trustee
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