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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:

MAYFLOWER COMMUNITIES, INC.¹

Debtor.

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CHAPTER 11

CASE NO. 19-30283 (HDH)

**MOTION OF DEBTOR FOR AN ORDER AUTHORIZING
THE USE OF THE DEBTOR’S CASH**

The above-captioned debtor (the “Debtor”), by and through its proposed counsel, DLA Piper LLP (US), hereby submits this motion (the “Motion”) for entry of an order authorizing the Debtor to use cash against which it believes UMB Bank, N.A. (the “Trustee,” as defined herein) will assert a security interest. While the Debtor believes serious questions exist as to whether the Trustee does in fact have a perfected security interest in the Debtor’s cash, the Debtor does not seek a determination of those issues at this point. The Debtor requires the use of the cash it holds as of the Petition Date and revenues generated post-petition pursuant to section 363(c)(3) of title 11 of the United States Code (the “Bankruptcy Code”) and Rules 4001 and 9014 of the Federal

¹ The last four digits of the Debtor’s federal tax identification number is 6350.

Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) and Rule 9014-1 of the Local Bankruptcy Rules of the United State Bankruptcy Court for the Northern District of Texas (the “Local Rules”). In support of the Motion, the Debtor relies upon, and incorporates by reference, the *Declaration of Louis E. Robichaux IV in Support of Chapter 11 Petition and First Day Pleadings* (the “Robichaux Declaration”), filed with the Court contemporaneously herewith. In further support of this Motion, the Debtor respectfully represents as follows:

INTRODUCTORY STATEMENT

1. As is described in greater detail herein, the Debtor operates The Barrington of Carmel, a continuing care retirement community (“CCRC”) in Carmel, Indiana. In the ordinary course of its operations, the Debtor requires cash on hand and cash flow from its revenues to fund operations including the care of the residents in its community. In addition, the Debtor requires cash on hand to fund this chapter 11 case and to maintain its going concern value towards an anticipated sale. As described below, the Debtor had certain cash on hand as of the Petition Date and expects to generate certain revenue postpetition. The Debtor holds the cash it receives in several bank accounts at Bank of America, N.A., Old National Bank, and Commerce Bank as set forth herein and in the *Motion of the Debtor for Entry of Interim and Final Orders Authorizing (I) Continued Use of Existing Cash Management System, (II) Maintenance of Existing Bank Accounts, (III) Continued Use of Existing Business Forms, and (IV) an Extension of Time to Comply With 11 U.S.C. § 345(b) Deposit and Investment Requirements*, filed contemporaneously herewith.

2. Pursuant to the Mortgage, Assignment of Leases and Rents, Security Agreement and Fixture Filing, dated as of August 1, 2012 (the “Mortgage and Security Agreement”), the Master Trust Indenture dated as of August 1, 2012 (the “Master Trust Indenture”), and as

explained further below, as part of the bond financing used in the acquisition and development of its community, the Debtor granted the Trustee, as successor to The Bank of New York Mellon Trust Company, N.A. ("BNYM"), a security interest in its real and personal property, including "[a]ny and all other property of every kind and nature from time to time hereafter owned" by the Debtor, including its land, "all buildings, structures, improvements and appurtenances now standing, or at any time hereafter constructed or placed upon" the land, all machinery, equipment, furniture, spare parts, inventory and other personal property" as well as "all receipts, revenues, rentals, income" therefrom (collectively, the "Collateral"). As set forth herein, the Debtor believes that the Trustee does not have a perfected security interest in either the Debtor's prepetition cash held in its operating accounts ("Prepetition Cash") nor the revenues it expects to receive postpetition (the "Postpetition Cash," together with the "Prepetition Cash," the "Cash"). The Debtor believes that any security interest asserted by the Trustee is subject to avoidance. However, in the interim period until the Court can make a determination as to the rights of the Trustee, the Debtor proposes to segregate and account for all cash in excess of its operating needs as are set forth in the annexed 13-Week Budget, attached hereto as Exhibit A.

3. The Debtor has an emergency need for the immediate use of the Cash to, among other things, maintain ongoing day-to-day operations, fund its working capital needs, and satisfy its payroll obligations. Absent the use of the Cash, the Debtor will be forced to cease operations of its business, thereby putting in jeopardy the care, health and safety of its residents. Such an abrupt cessation of the Debtor's business would have devastating effects on its elderly residents. In addition, absent the use of the Cash, the Debtor cannot fund payroll for its employees or satisfy other routine payable obligations. Further, an inability to use such Cash would result in an immediate loss of value if the Debtor were forced to implement an emergency liquidation.

4. While the parties address the issue of the perfection and validity of the Trustee's security interest, whatever interests the Trustee may have will be preserved through the segregation and accounting for all cash not needed for operations. Should the Court determine that Cash is, in fact, part of the Collateral, the Debtor believes that there will be no diminution in the value of the Collateral because the Debtor will continue operations, thereby preserving the value of the Collateral. Without the use of Cash, the Debtor, its estate and creditors will suffer immediate and irreparable harm, resulting in diminution much worse than any diminution that could result from normal operations using the Cash. Given these circumstances, the Court should authorize the use of Cash on the terms and conditions set forth herein, while the Court determines to what extent the Cash is subject to perfected security interests in favor of the Trustee.

JURISDICTION AND VENUE

5. The Court has jurisdiction over the Debtor, its estate, and this chapter 11 case (the "Chapter 11 Case") pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2).

6. Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

BACKGROUND

7. On January 30, 2019 (the "Petition Date"), the Debtor commenced this Chapter 11 Case by filing a voluntary petition for relief under chapter 11 of the Bankruptcy Code.

8. The Debtor remains in possession of its assets and continues to operate and manage its business as a debtor in possession pursuant to Bankruptcy Code sections 1107 and 1108.

9. No trustee, examiner or committee of creditors has been appointed in this case.

10. Additional information regarding the Debtor and this Chapter 11 Case, including the Debtor's business operations, capital structure, and the reasons for and objectives of this Chapter 11 Case, is set forth in the Robichaux Declaration.

A. Debtor's Current Business Operations

11. The Debtor is a not-for-profit nonstock corporation which was chartered under the laws of the State of Delaware on November 21, 2007. The Debtor is governed by a Board of Directors who are elected by Senior Quality Lifestyles Corporation ("SQLC"), a non-profit corporation that serves as Barrington's sole corporate non-voting member since May 7, 2012. The day-to-day operations of the Debtor are managed by Seniority, Inc. ("Seniority"), a wholly-owned subsidiary of SQLC.

12. As a CCRC, the Debtor offers its residents a continuum of care in a campus-style setting, providing living accommodations and related health care and support services to a target market of seniors aged sixty two (62) and older. Barrington is a 271 unit facility located in Carmel, Indiana featuring: (i) 141 independent living ("IL") apartments, (ii) 56 assisted living ("AL") units, (iii) 26 memory support ("MS") units, and (iv) 48 skilled nursing ("SNF") beds, all located on a 372,000 square foot, 19-acre campus (the "Facility").

13. The Debtor receives revenue from several sources: (i) entrance fees which are paid when a resident enters the community, and which are refundable when a resident exits subject to certain conditions; (ii) monthly service fees paid by residents in the independent living unit, assisted living unit and memory support unit; (iii) Medicare payments for residents; and (iv) private payor receipts, all as explained more fully herein.

B. Continuing Care Contracts

14. As is common practice in the CCRC industry, a resident interested in occupying an independent living unit in the Facility must enter into a continuing care contract (a

“Continuing Care Contract”) with the Debtor. The Continuing Care Contract sets forth terms and conditions under which the resident will occupy a unit, including outlining the obligations for the payment of an Entrance Fee (as defined below), the amount and timing of the refundable portion of that Entrance Fee, the amount of monthly fees to be charged, and other general matters.

15. In general, a prospective resident must pay an a fee (the “Entrance Fee”) prior to occupying an IL unit. Typically, in order to reserve the residence, the resident is required to provide a fully refundable deposit at the time of executing the Continuing Care Contract.² The remaining balance of the Entrance Fee is due in full on or before the day the prospective resident moves into the Facility (the “Move-In Date”), except in circumstances where a deferred portion of the Entrance Fee is negotiated. Entrance Fees range from approximately \$316,000 to approximately \$650,000, depending on the unit selected by a resident.

16. The Continuing Care Contract also requires residents to pay monthly service fees to the Debtor (the “Monthly Fee,” together with the Entrance Fee, the “Fees”). In consideration for payment of Entrance Fees, Monthly Fees and other fees charged by the Debtor, residents are furnished with a residence and are given access to a wide array of services. Section 2.5 of the Continuing Care Contract provides that the Debtor “will provide the following services covered by the Monthly Fee and Entrance Fee,” which services include: (i) dining service; (ii) housekeeping and laundry; (iii) utilities; (iv) security and emergency alert system; (v) maintenance; (vi) mail; (vii) transportation; (viii) social, educational, and wellness programs; (ix) property taxes and insurance; (x) storage area; (xi) a physician, to serve as a “Medical Director,” as that term is defined under federal and Indiana State Department of Health

² As used herein, “Entrance Fee” includes the fully-refundable deposit.

regulations; (xii) life care benefits. The Debtor uses the Fees to fund its operations, service its debt obligations, and make capital improvements to the Facility.

C. The Debtor's Prepetition Capital Structure

17. As of the Petition Date, the Debtor has approximately \$151.9 million of liabilities, which consists of, among other things, long-term municipal bond debt and support agreements, subordinated debts, trade debt, oversight fees, and resident obligations. The major components of the Debtor's prepetition debt structure and its prepetition debt obligations are highlighted below; a complete description of the Debtor's prepetition capital structure is set forth in the Robichaux Declaration

(a) Municipal Bond Debt

18. Pursuant to a Master Trust Indenture dated as of August 1, 2012 (the "Master Indenture"), between Barrington, as the initial member of the Obligated Group as defined in the Master Indenture, and BNYM, as prior master trustee (the "Master Trustee") and to UMB Bank, N.A. ("UMB"), as the successor bond trustee (the "Bond Trustee"), under that Bond Trust Indenture date as of August 1, 2012 (the "Bond Indenture"), between the City of Carmel, Indiana (the "Issuer") and BNYM, the Issuer issued revenue bonds in the aggregate principal amount of \$119,020,000 (the "Bonds"). As security for the issuance of the Bonds, Barrington issued certain note obligations.³

19. Pursuant to that Loan Agreement dated as of August 1, 2012 (the "Loan Agreement") between Barrington and the Issuer, the Issuer loaned the proceeds of the Bonds to Barrington for the purpose of, among other things, (i) payment or reimbursement for the payment of certain costs of acquiring, constructing, renovating, remodeling, and equipping the

³ Capitalized terms not otherwise defined in this paragraph shall have the definition provided in the Master Indenture.

Facility, (ii) payment or reimbursement for the payment of certain project costs incurred prior to the issuance of the Bonds, (iii) funding a debt service reserve fund, and (iv) paying a portion of the interest of the Bonds.

20. The rights of the Issuer under the Loan Agreement were assigned to the Bond Trustee pursuant to the Bond Indenture. As security for its obligations with respect to the Bonds, the Debtor entered into the Master Indenture and a Mortgage, Assignment of Leases and Rents, Security Agreement, and Fixture Filing dated as of August 1, 2012 between Barrington and the Master Trustee (the “Mortgage and Security Agreement”), pursuant to which the Debtor purportedly granted the Bond Trustee⁴ a security interest in certain assets of the Debtor as described in the Master Indenture and the Mortgage and Security Agreement.⁵

21. The Debtor defaulted on the Series 2012 Obligations by failing to make the required installments of principal and interest on November 10, 2018, December 10, 2018, and January 10, 2019 (collectively, the “Payment Defaults”). The Payment Defaults constitute an event of default under the Bond Documents.

(b) The Liquidity Support Agreement

22. On August 1, 2012, SQLC LSA, LLC, (“SQLC LSA”), a Texas limited liability company whose sole member is SQLC, SQLC, the Debtor and the Master Trustee entered into that certain Liquidity Support Agreement, dated August 1, 2012, (the “Liquidity Support Agreement”). Pursuant to the Liquidity Support Agreement, SQLC LSA agreed to transfer \$2,000,000 to the Master Trustee for deposit into a Liquidity Support Fund, as defined in the Liquidity Support Agreement. Additionally, the Debtor agreed to make the following payments:

⁴ Hereafter, UMB is referred to as the “Trustee.”

⁵ The Bond Indenture, the Loan Agreement, the Master Indenture, and the Mortgage and Security Agreement are collectively referred to as the “Bond Documents”.

(i) \$2,375,000 to the Master Trustee for deposit into the Supplemental Liquidity Support Fund, as defined in the Liquidity Support Agreement, and (ii) \$1,875,000 to the Master Trustee for deposit into the Special Project Liquidity Support Fund, as defined in the Liquidity Support Agreement.

23. Pursuant to that Liquidity Support Agreement dated as of August 30, 2012 (the “SQLC Liquidity Support Funding Agreement”), by and between SQLC LSA, SQLC, and Northwest Senior Housing Corporation (“NSHC”),⁶ NSHC agreed to transfer \$2,000,000 to SQLC, which in turn agreed to transfer said \$2,000,000 to SQLC LSA for the purpose of advancing the amounts, on behalf of the Debtor, that the Debtor agreed to provide pursuant to the Liquidity Support Agreement. In order to secure its obligations under the SQLC Liquidity Support Funding Agreement, Barrington provided SQLC LSA with an unsecured subordinated note dated August 30, 2012 in the amount of \$2,000,000 (the “SQLC LSA Subordinated Note”). The SQLC LSA Subordinated Note is subordinated as to the Series 2012B Bonds, the Series 2012C Bonds, and the Series 2012D Bonds as defined in the Master Indenture.

D. Cash Management System and Bank Accounts

24. As of the Petition Date, the Debtor’s cash management system employed a total of five (5) bank accounts along with several trustee-held accounts (collectively, the “Bank Accounts”) at four (4) financial institutions outlined below (collectively, the “Banks”):

- (a) **Operating Account.** The Debtor maintains an operating account (the “Operating Account”) at Bank of America. Monthly Fees and receipts from Medicare and private payors, totaling between \$1,200,000 and \$1,300,000 each month, are deposited directly into the Operating Account. Approximately \$1,100,000 to \$1,200,000 of total deposits each month is comprised of Monthly Fees paid by the residents. The remaining \$100,000.00 to \$120,000.00 is comprised of receipts from Medicare and private payors. In addition, Reservation Deposits and Entrance Fees are transferred from the Entrance Fee Escrow Account to the

⁶ It is my understanding that NSHC is another CCRC whose sole member is SQLC.

Operating Account, as discussed below. As of the Petition Date, the Operating Account held approximately \$3,500,000.

- (b) **Entrance Fee Escrow Account.** The Debtor maintains a separate account at Bank of America to collect entrance fees and reservation deposits from new residents. Historically, entrance fees are deposited into the Operating Account after a resident signs the residency agreement. After the Move-In Date, Reservation Deposits and Entrance Fees are held in the Entrance Fee Escrow Account for a short period before being transferred into the Operating Account. The Entrance Fee Escrow Account and its deposits, however, are excluded from the Collateral under the Master Trust Indenture as “payments or deposits under a [Continuing Care Contract] that by its terms or applicable law are required to be held in escrow or trust for the benefit of a resident until the conditions for the release of such payment or deposit have been satisfied.” As of the Petition Date, there is approximately \$50,000 to \$60,000 in the Entrance Fee Escrow Account.
- (c) **Investment Account.** The Debtor maintains an investment account at Commerce Bank which currently holds less than \$6,000 (the “Investment Account”).
- (d) **Trustee-Held Reserve Accounts.** A number of reserve accounts are held by UMB Bank, as Bond Trustee, pursuant to the Bond Indenture, Master Indenture, and the Liquidity Support Agreement. All but three of the reserve accounts have no balance. Approximately \$450,000 is held in the liquidity reserve accounts and approximately \$8 million is held in the Debt Service Reserve Fund
- (e) **Resident Trust Account.** The Debtor maintains a resident trust account (the “Resident Trust Account”) at Old National Bank for the benefit of its residents. The Resident Trust Account is an investment account that is made available to all residents if he/she wishes to deposit any of his/her funds for personal use. The Debtor is required to safeguard, manage and account for such resident’s personal funds as federally mandated. When the account was initially opened, the Debtor deposited approximately \$500 into the account and recently, it is has been paying dormant bank fees because there has been no activity in that account, which has approximately \$200 remaining. Any funds deposited in the Resident Trust Account are not property of the Debtor’s estate, but rather property of the Debtor’s residents, and therefore not subject to the Trustee’s security interest.

E. The Security Interest of the Trustee

25. Pursuant the Mortgage and Security Agreement and Master Trust Indenture, the Debtor granted the Trustee a broad security interest in its real and personal property. As described in the Mortgage and Security Agreement, Master Trust Indenture, and related UCC financing statements, this security interest extends to:

All buildings, structures, improvements and appurtenances now standing, or at any time hereafter constructed or placed upon the land described . . . including all building materials, building equipment and fixtures of every kind and nature whatsoever on the Land or in any building, structure or improvement now standing or hereafter constructed or placed thereon, and the reversion or reversions, and remainder or remainders, in and to the Land, . . . it being the intention of the parties hereto that, so far as may be permitted by law, all property of the character hereinabove described, which is now owned or hereafter acquired by the Debtor and affixed to or attached to or placed on the Land shall be deemed to be, and shall be considered as, fixtures and appurtenances to said Land, together with all rents, income, issues and profits therefrom.

All of the machinery, equipment, furniture, spare parts, inventory and other personal property, including all present and future attachments and accessories thereto and replacements thereof . . . owned by the Debtor and located on the Land or used or useful in connection with the Mortgaged Land wherever such machinery, equipment, furniture, spare parts, inventory and other personal property is located.

All judgments, awards of damages, settlements and other compensation heretofore or hereafter made resulting from condemnation proceedings or the taking of the Mortgaged Land.

Any and all other property of every kind and nature from time to time hereafter owned by the Debtor, by delivery or by writing of any kind, mortgaged, pledged, assigned or transferred as and for additional security hereunder by the Debtor or by anyone on its behalf to the Mortgagee, together with all proceeds, including without limitation insurance proceeds with respect to anything referred to [herein].

Any funds or property held by the Trustee under the Master Indenture or under the Mortgage and Security Agreement.

All receipts, revenues, rentals, income, insurance proceeds (including, without limitation, all Medicaid, Medicare and other third-party payments), condemnation awards, Entrance Fees and other moneys received by or on behalf of [the Debtor], including (without limitation) revenues derived from (a) the ownership, operation or leasing of any portion of the Facilities (including, without limitation, fees payable by or on behalf of residents of the Facilities) and all rights to receive the same (other than the right to

receive Medicaid and Medicare payments), whether in the form of accounts, general intangibles or other rights, and the proceeds of such accounts, general intangibles and other rights, whether now existing or hereafter coming into existence or whether now owned or held or hereafter acquired, and (b) gifts, grants, bequests, donations and contributions heretofore or hereafter made that are legally available to meet any of the obligations of the Obligated Group Member incurred in the financing, operation, maintenance or repair of any portion of the Facilities

[T]here shall be excluded from Gross Revenues . . . any moneys received by any Obligated Group Member from prospective residents or commercial tenants in order to pay for customized improvements to those Independent Living Units (as defined in the Master Indenture) or other areas of the Facilities to be occupied or leased to such residents or tenants, (iv) payments or deposits under a Residency Agreement that by its terms or applicable law are required to be held in escrow or trust for the benefit of a resident until the conditions for the release of such payment or deposit have been satisfied, and (v) all deposits and/or advance payments made in connection with any residency of the Independent Living Units or other areas of the Facilities to be occupied by residents or tenants and received prior to receipt of such certificate and licenses for occupancy of such units

26. Notwithstanding these broad descriptions of the Collateral, the Debtor maintains that the Cash is not part of the Collateral and therefore, the Debtor does not need consent from the Trustee or relief under Section 363 of the Bankruptcy Code in order to use the Cash.

RELIEF REQUESTED

27. The Debtor seeks the entry of an order authorizing the Debtor to use the Cash to continue to operate without the need to provide adequate protection to the Trustee.

28. Therefore, the Debtor respectfully requests that the Court set a briefing and hearing schedule to allow the Debtor and the Trustee to provide the Court with the relevant facts and law to support their respective positions so that the Court can make a determination as to the Trustee's rights in and to the Debtor's Cash.

29. The Debtor is willing to operate under a cash collateral budget, attached hereto as Exhibit A, and to preserve the status quo until the parties can be heard by the Court. The segregation and use of cash only to preserve the going concern value of the Debtor's assets and to pay the costs of this Chapter 11 Case, provides the Trustee with ample adequate protection to the extent it has any interest in the Debtor's Cash.

30. The relief requested herein is in the best interests of the Debtor, its estate and creditors. Absent such relief, the Debtor will experience immediate and irreparable harm, its reorganization efforts will be jeopardized, and the Collateral will decrease in value at the expense of the Trustee and the residents who are also contingent creditors of the Debtor.

BASIS FOR RELIEF

31. The Debtor's use of property of its estate is governed by Bankruptcy Code section 363, which provides that if the business of the debtor is authorized to be operated under section 1108, the debtor may use, sell, or lease cash collateral with the consent of the secured party or if authorized by the bankruptcy court after notice and a hearing. 11 U.S.C. § 363(c)(1)-(2).

32. Bankruptcy Code section 363(e) requires a debtor to protect the secured party's interest from any diminution in value of such interest resulting from the Debtor's use of the property during the chapter 11 case by providing adequate protection.

33. The Debtor contends that the Cash is not Collateral and therefore, the Debtor does not need the Trustee's consent or authorization from this Court to use the Cash and does not need to provide the Trustee with adequate protection. To maintain the status quo until the Court makes a final ruling regarding the Cash, the Debtor seeks interim authority to use the Cash until these issues are addressed.

A. The Debtor Needs the Cash Immediately in Order to Continue Operations

34. A debtor's cash "is the life's blood of the business," and the bankruptcy court must ensure that cash "is available for use even if to a limited extent." *In re Mickler*, 9 B.R. 121, 123 (Bankr. M.D. Fla. 1981). Courts typically authorize a debtor to use cash collateral to continue its operations so long as the interest asserted by any affected secured creditor in such cash collateral is adequately protected. Thus, courts are required to balance the Debtor's need to use cash collateral in its reorganization effort against the secured creditor's need for adequate protection. *Stein v. U.S. Farmers Home Admin. (In re Stein)*, 19 B.R. 458, 459 (Bankr. E.D. Pa. 1982). When the debtor needs cash immediately in order to continue operations, courts will authorize debtors to use cash so as to avoid harming the debtor. *In re Pro-Health LLC*, No. 09-34484-BJH-11, 2009 Bankr. LEXIS 5153, at *3 (Bankr. N.D. Tex. Dec. 1, 2009) (concluding that "[a]n immediate and critical need exists for the Debtor to use cash collateral . . . [and without it] the Debtor will not have the funds necessary to pay post-petition payroll, payroll taxes, overhead, and other expenses necessary for the continued operation of its business and reorganization, and the Debtor will, as a result, suffer irreparable harm").

35. Here, the Debtor has a vital need to use the Cash because it has no ability to operate its business without the Cash. If the Debtor has to cease operations, the estate, including the Collateral, would suffer immediate and irreparable harm, which harm can be prevented only by allowing the Debtor to continue funding operations with the Cash.

B. Except for the Trustee-Held Funds, the Prepetition Cash is not a Part of the Collateral

36. As described previously, the Debtor's Prepetition Cash is held in the Bank Accounts. The Debtor maintains that because the Trustee's security interest in the Prepetition Cash (other than the Trustee-held funds) has attachment or perfection issues under the Uniform

Commercial Code (the “UCC”).⁷ Outlined below are the several issues that apply to the Bank Accounts, either collectively or individually.

37. Collectively, the Prepetition Cash is not Collateral because the Trustee’s security interest does not attach to the Prepetition Cash. Under Section 9.1-108(b) of the UCC, a security agreement’s “description of collateral reasonably identifies the collateral if it identifies the collateral by (1) specific listing; [or] (2) category” but a description of collateral “as ‘all the debtor’s assets’ or ‘all the debtor’s personal property’ or using words of similar import does not reasonably identify the collateral.” Ind. Code Ann. § 26-1-9.1-108(b). The Mortgage and Security Agreement, Master Trust Agreement, and related UCC financing statements do not mention any relevant categories, such as “money,” “cash,” or “deposit account.” While the Trustee’s security interest in “Gross Revenues” extends to revenues of several kinds, “whether in the form of accounts, general intangibles or other rights,” these forms do not include deposit accounts, cash, or money under the UCC. The definitions of account and general intangible each expressly exclude deposit accounts. § 9.1-102(a)(2)(iii), (a)(42). Moreover, the catch-all, “any and all other property of every kind and nature,” does not adequately describe the Prepetition Cash under the UCC, either.

38. Even if the Trustee’s security interest attached to the Prepetition Cash, the security interest would be unperfected with respect to the Operating Account and Investment Account as deposit accounts and as to the cash within those accounts under the UCC. A deposit account is a “demand, time, savings, passbook, or similar account maintained with a bank” (§ 9.1-102(a)(29)) and may be perfected only by control of the account. § 9.1-312(b)(1). There are

⁷ Unless otherwise noted, all references to “the UCC” mean the Uniform Commercial Code as enacted in Indiana. *See* U.C.C. § 9-301 (“While collateral is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a possessory security interest in that collateral.”)

three ways in which a security interest in a deposit account can be perfected by control: (1) the secured party is the bank with which the deposit account is maintained; (2) the debtor, secured party, and bank have agreed in an authenticated record that the bank will comply with instructions originated by the secured party directing disposition of the funds in the deposit account without further consent by the debtor; or (3) the secured party becomes the bank's customer with respect to the deposit account. § 9-104. Under Section 9.1-313(a) of the UCC, a security interest in money may be perfected only through possession. Here, the Trustee has neither possession of the cash nor control of the Bank Accounts, other than the Trustee Reserve Accounts. There are no agreements with Bank of America, Commerce Bank, or Old National Bank and the Trustee that allow the Trustee to direct the disposition of funds in those accounts, and the Trustee is not a customer of any of these banks with respect to the Operating Account, Entrance Fee Escrow Account, Investment Account, and Resident Trust Account. All of the Debtor's bank accounts are held at banks other than UMB, thus the Trustee does not have "actual, physical possession" of the money. *In re Wright Group, Inc.*, 443 B.R. 795, 804 (Bankr. N.D. Ind. 2011). Therefore, under the UCC, the Trustee's security interest would not be perfected, to the extent that the security interest would even attach to the Operating Account, Entrance Fee Escrow Account, Investment Account, and Resident Trust Account or the cash therein.

39. Payments from Medicare. The Debtor maintains that Medicare receipts, to the extent they are held in the Operating Account, are not subject to the Trustee's security interest. In the financing statements, the Trustee is granted a security interest in all "receipts, revenues, rentals, income, insurance proceeds (including, without limitation, all Medicaid, Medicare . . .)." However, unless the Trustee has a perfected security interest in cash (which it does not), it can

only have a security interest in “proceeds” if it has a perfected security interest in the source of those proceeds. The Trustee does not have a perfected security interest by the plain language of the relevant financing statements. It carves out from the grant “the right to receive Medicaid and Medicare payments.” Without a grant of the right to receive Medicare payments, the Trustee cannot have a security interest in the proceeds of such Medicare payments without a perfected interest in the cash.

40. Operating Account. At least a portion of the Prepetition Cash in the Operating Account is not proceeds of the Collateral—funds which are arguably the proceeds of the Trustee’s pre-petition collateral (*i.e.*, Monthly Fees) have commingled with amounts not subject to the grant of a security interest to the Trustee (*i.e.*, Medicare receipts). Furthermore, additional amounts were transferred into the Debtor’s Operating Account pursuant to the Liquidity Support Agreement. Under Section 9.1-315(a)(2), a security interest attaches to any identifiable proceeds of collateral, but cash proceeds that have been commingled are only identifiable “to the extent that the secured party identifies the proceeds by a method of tracing” § 315(b)(2). The burden is on the Trustee to trace the proceeds. *See In re Ledis*, 259 B.R. 472, 478 (Bankr. D. Mass. 2001) (“[W]hen a secured creditor seeks to enforce a security interest in a debtor’s property, the enforcing creditor bears the burden of proving it has a security interest in the property sought pursuant to applicable non-bankruptcy law.”). *In re Quisenberry*, 295 B.R. 855 (Bankr. N.D. Tex. 2003) (“ASB must first establish that it held a valid prepetition security interest in the checking account. State law governs whether ASB held a security interest in Debtor’s checking account.”); *HCC Credit Corp. v. Springs Valley Bank & Tr.*, 712 N.E.2d 952, 955 n.3 (Ind. 1999) (stating that “a secured party may trace ‘identifiable proceeds’ through a commingled bank account and into the hands of a recipient who lacks the right to keep them”).

To the extent that the Bank Accounts are located in Indiana, Indiana law governs. *See* U.C.C. § 9-304 (“The local law of a bank’s jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in a deposit account maintained with that bank.”) It is up to the Trustee to trace the proceeds in the Bank Accounts, and until then, the Prepetition Cash is unidentifiable.

H. The Trustee-Held Reserve Accounts are Property of the Estate, Subject to the Trustee’s Security Interest

41. The cash deposited in the Trustee-Held Accounts is held by the Trustee in order to make debt service payments in the event the Debtor is unable to make them. Once all of the Debtor’s obligations are paid, the Trust Indenture and Liquidity Support Agreement provide that any remaining funds in these accounts shall be returned to the Debtor.

42. Debt Service Reserve Fund. Section 406 of the Trust Indenture requires the Debtor to “establish with the Bond Trustee and maintain so long as any of the Bonds are outstanding . . . [the Debt Service Reserve Fund].” Pursuant to Section 406, a “deposit to the credit of the Debt Service Reserve Fund shall be made from the proceeds of the Bonds in accordance with the provisions of [the Trust Indenture].” Section 408 provides that “[a]ll moneys received by the Bond Trustee under the provisions of this Bond Indenture shall[] be trust funds under the terms hereof . . . and shall not be subject to lien or attachment of any creditor of the [Debtor]” Finally, Section 1101 governs the distribution of funds in the Debt Service Reserve Fund once the Debtor’s outstanding obligations are paid in full. Pursuant to Section 1101, “[a]ny moneys, funds, securities, or other property remaining on deposit in the . . . Debt Service Reserve Fund . . . shall, upon the full satisfaction of this Bond Indenture, forthwith be transferred, paid over, and distributed to the [Debtor].”

43. Liquidity Support Fund and the Supplemental Liquidity Support Fund. In terms similar to the Trust Indenture, the Liquidity Support Agreement gives the Debtor reversionary interests in the Liquidity Support Fund and the Supplemental Liquidity Support Fund, created in Sections 437 and 438 of the Master Trust Indenture. Sections 3.2(a)(i) and (ii) require SQLC, as the “Liquidity Provider,” to deposit cash with the Trustee, thereby establishing the Liquidity Support Fund and the Supplemental Liquidity Support Fund. Section 3.2(c) provides that all money deposited in the Liquidity Support Fund and the Supplemental Liquidity Support Fund “shall be held by the [Trustee] in trust” Under Section 3.3(f), upon closure of (i) the Liquidity Support Fund, “any moneys remaining therein shall be transferred to the Liquidity Provider,” SQLC; and (ii) the Supplemental Liquidity Support Fund, “any moneys remaining therein shall be transferred to GDS.”

44. Under the foregoing provisions, the Debtor’s estate holds a contingent right to whatever funds remain. *See Mid-Island Hosp., Inc. v. Empire Blue Cross & Blue Shield (In re Mid-Island Hosp., Inc.)*, 276 F.3d 123, 128 (2d Cir. 2002) (“[T]he Hospital’s ‘speculative’ and ‘intangible’ interest in the funds, which was contingent on the satisfaction of its obligations to the State, was property of the estate.”); *Sterling Vision, Inc. v. Sterling Optical Corp. (In re Sterling Optical Corp.)*, 371 B.R. 680, 691 (Bankr. S.D.N.Y. 2007) (“The Debtor’s right to the surplus held or that might thereafter accumulate in the Reserve—although it may have been contingent at the time of the filing of Debtor’s chapter 11 petition—would constitute property of the Debtor’s estate under § 541 of the Bankruptcy Code.”); *In re Glob. Outreach, S.A.*, No. 09-15985 (DHS), 2009 Bankr. LEXIS 1602, at *20 (Bankr. D.N.J. June 8, 2009) (“Here, the right to excess proceeds under the Trust Agreement is a contingent interest of the Debtor placing the interest within Section 541’s definition of property of the estate.”). It does appear that the

Trustee has a perfected security interest in the Trustee-held funds, however in light of the Debtor's reversionary interest, these funds are property of the Debtor's estate and subject to the automatic stay.

C. Cash Generated by the Debtor's Post-Petition Operations is not Subject to the Trustee's Security Interest

45. Under Section 552 of the Bankruptcy Code, property acquired by the estate or by the debtor postpetition is not subject to any lien resulting from any security agreement entered into by the debtor prepetition. 11 U.S.C. § 552(a). Thus the Trustee's security interest does not attach to the Monthly Fees, Entrance Fees, or private insurer receipts deposited in the Bank Accounts after the Petition Date, unless such deposits fit within one of the exceptions to the general rule which are set forth in Section 552(b).

46. The exceptions under Section 552(b) extend prepetition security interests to the "proceeds, products, offspring or profits" of prepetition collateral, or "amounts paid as rents of such property or the fees, charges, accounts, or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties" to such amounts received postpetition. While the Trustee may have a blanket security interest in "receipts, revenues, rentals, income . . .," the exceptions under 552(b) do not apply. The Monthly Fees paid by residents are not "rents." Section 9.1 of the Continuing Care Contract provides that residents do not have any proprietary interest in The Barrington, and the "Contract does not create a tenancy. [Residents] have only a revocable license to use your residence in compliance with this Contract." The Monthly Fees relate to the myriad of services provided by the Debtor to its residents and not the occupant of a particular unit. To the extent that the Monthly Fees, Entrance Fees, and private payor receipts are revenues generated on account of services provided by the Debtor, the Section 552(b) exception does not apply. Bankruptcy courts, including this

Court, have found that based on “a plain reading of § 552, revenues generated post-petition solely as a result of the debtor’s labor are not subject to a pre-prepetition secured lender’s security interest.” *In re Cafeteria Operators, L.P.*, 299 B.R. 400, 405 (Bankr. N.D. Tex. 2003); *see also Official Comm. of Unsecured Creditors v. UMB Bank, N.A. (In re Capital)*, 501 B.R. 549, 612 (Bankr. S.D.N.Y. 2013) (“Section 552(b) is intended to cover after-acquired property that is directly attributable to prepetition collateral, without addition of estate resources.”). Finally, as discussed above, the Trustee’s security interest does not extend to Medicare, therefore there are no proceeds of Medicare to which Section 552 could apply.

NOTICE

47. Notice of this Motion has been provided to: (a) the Office of the United States Trustee for the Northern District of Texas; (b) each of the Debtor’s twenty (20) largest unsecured creditors; (c) counsel to UMB Bank, N.A. as Bond Trustee; (d) the Internal Revenue Service; (e) the Office of the Attorneys General for Texas and Indiana; (f) the State of Indiana Department of Health; (g) the Indiana Secretary of State, Securities Division; and (h) the Banks.

CONCLUSION

WHEREFORE, the Debtor respectfully requests that the Court enter an order granting the relief requested herein and such other and further relief as the Court may deem just and appropriate.

Dated: January 31, 2019
Dallas, Texas

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Proposed Counsel for the Debtor

Exhibit A

PROPOSED BUDGET

Mayflower Communities, Inc. - The Barrington of Carmel

Cash Collateral Budget

As of January 30, 2019

(\$ amounts presented in thousands)

Week	Interim Relief Requested													Total
	1	2	3	4	5	6	7	8	9	10	11	12	13	
Date	2/1/19	2/8/19	2/15/19	2/22/19	3/1/19	3/8/19	3/15/19	3/22/19	3/29/19	4/5/19	4/12/19	4/19/19	4/26/19	
<i>Operating Cash Receipts</i>														
Resident Receipts	\$ -	\$ 282	\$ 855	\$ 146	\$ 9	\$ 282	\$ 855	\$ 146	\$ 9	\$ 146	\$ 980	\$ 146	\$ 9	\$ 3,864
Medicare Receipts	-	-	-	21	83	-	-	21	83	-	-	21	83	310
Entrance Fee Receipts	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Other	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Total Operating Receipts	-	282	855	166	92	282	855	166	92	146	980	166	92	4,174
<i>Operating Cash Disbursements</i>														
Payroll, Payroll Taxes, & Benefits	-	-	(256)	-	(376)	-	(256)	(36)	(256)	(60)	(256)	(36)	(256)	(1,786)
Dining Services	-	(5)	(40)	(17)	(40)	(17)	(40)	(17)	(40)	(17)	(17)	(40)	(17)	(306)
Administrative & Marketing	-	(1)	(159)	(5)	(62)	(5)	(159)	(5)	(61)	(5)	(5)	(159)	(51)	(678)
Buildings, Grounds, & Utilities	-	(15)	(35)	(4)	(19)	(49)	(35)	(4)	(4)	(19)	(49)	(35)	(4)	(271)
Ancillary & Therapy Services	-	(1)	(4)	(4)	(77)	(4)	(4)	(4)	(4)	(77)	(4)	(4)	(4)	(188)
Capital Expenditures	-	-	(10)	(10)	(10)	(5)	(5)	(5)	(5)	(5)	(5)	(5)	(5)	(70)
Management Fees	-	(103)	-	-	(103)	-	-	-	-	(103)	-	-	-	(308)
Entrance Fee Disbursements	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Other Disbursements	-	(15)	(37)	(11)	(29)	(51)	(37)	(11)	(29)	(20)	(42)	(37)	(29)	(350)
Total Operating Disbursements	-	(140)	(541)	(50)	(716)	(130)	(536)	(81)	(400)	(306)	(376)	(316)	(365)	(3,958)
Debt Service	-	-	-	-	-	-	-	-	-	-	-	-	-	-
<i>Non-Operating Disbursements</i>														
Debtor Counsel - DLA	-	-	-	-	-	-	-	(126)	-	-	-	-	(210)	(336)
Debtor Chief Restructuring Officer	-	-	-	-	-	-	-	(14)	-	-	-	-	(23)	(36)
Debtor Financial Advisor - Ankura	-	-	-	-	-	-	-	(66)	-	-	-	-	(110)	(176)
Debtor Accounting Advisor - Larx	-	-	-	-	-	-	-	(71)	-	-	-	-	(101)	(172)
Debtor Special Counsel - Thompson Knight	-	-	-	-	-	-	-	(2)	-	-	-	-	(4)	(5)
Claims Agent - Donlan Recano	-	-	-	-	-	-	-	(24)	-	-	-	-	(33)	(56)
Resident Counsel / UCC	-	-	-	-	-	-	-	(31)	-	-	-	-	(51)	(82)
Independent Board Member	-	(8)	-	-	(8)	-	-	-	-	(8)	-	-	-	(23)
Patient Ombudsman	-	-	-	-	(10)	-	-	-	-	(10)	-	-	-	(20)
US Trustee and Filing Fees	-	(2)	-	-	-	-	-	-	-	-	-	-	(30)	(32)
Adequate Assurance - Utilities	-	-	(25)	-	-	-	-	-	-	-	-	-	-	(25)
Total Non-Operating Disbursements	-	(9)	(25)	-	(18)	-	-	(333)	-	(18)	-	-	(561)	(963)
Net Cash Flow	\$ -	\$ 134	\$ 289	\$ 116	\$ (642)	\$ 152	\$ 319	\$ (247)	\$ (308)	\$ (177)	\$ 604	\$ (150)	\$ (835)	\$ (746)
(+) Beginning Book Cash Balance	3,355	3,355	3,489	3,777	3,893	3,252	3,404	3,723	3,475	3,167	2,990	3,593	3,444	3,355
Ending Book Cash Balance	\$ 3,355	\$ 3,489	\$ 3,777	\$ 3,893	\$ 3,252	\$ 3,404	\$ 3,723	\$ 3,475	\$ 3,167	\$ 2,990	\$ 3,593	\$ 3,444	\$ 2,609	\$ 2,609