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Hearing Date and Time:
January 31, 2025, at 11:30 a.m.
Objection Deadline:
January 24, 2025, by 4:00 p.m.
Related to ECF No.:
ECF No. 1

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	Chapter 11
	:	
COLD SPRING ACQUISITION, LLC, d/b/a COLD SPRING HILLS CENTER FOR NURSING AND REHABILITATION,	:	Case No. 25-22002 (SHL)
	:	
Debtor.	:	

UNITED STATES TRUSTEE'S MOTION, PURSUANT TO 11 U.S.C. § 1104, FOR AN ORDER DIRECTING THE APPOINTMENT OF A CHAPTER 11 TRUSTEE

Table of Contents

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

RELIEF SOUGHT 1

FACTS 2

The Chapter 11 Case 2

The AG's Suit Against the Debtor, Its Members, Bent Philipson, Debtor Affiliates and Others for Fraud and Resident Neglect 5

The Civil Contempt Order Against the Debtor for Failure to Make Required Payments to the Funds for Employee Health Insurance 8

Events Leading to the Bankruptcy 8

ARGUMENT 10

I. Statutory Framework 10

II. Cause Exists for the Appointment of a Chapter 11 Trustee Because the Debtor and its Management or Ownership Have a Proven Record of Dishonesty, Incompetence and Gross Mismanagement in the Affairs of the Debtor 11

III. Appointment of a Chapter 11 Trustee is in the Interests of Creditors and Other Interests of the Estate 15

IV. The Bankruptcy Code Does Not Authorize the Retention of a Chief Restructuring Officer or a Temporary Receiver to Manage the Affairs of the Debtor or Sale of its Assets 17

CONCLUSION 18

TABLE OF AUTHORITIES

Cases

In re Adelphia Communication Corp., 336 B.R. 610 (Bankr. S.D.N.Y. 2006).....15, 17

In re Altman, 230 B.R. 6 (Bankr. D. Conn. 1999) 12

In re Ashley River Consulting, LLC, No. 14-13406 (MG), 2015 WL 1540941 (Bankr. S.D.N.Y. 2015) 11

In re China Fishery Grp. Ltd. (Cayman), No. 16-11895 (JLG), 2016 WL 6875903 (Bankr. S.D.N.Y. Oct. 28, 2016) 16

In re Euro-American Lodging Corp., 365 B.R. 421 (Bankr. S.D.N.Y. 2007).....15, 16

In re Eurospark Indus., 424 B.R. 621 (Bankr. E.D.N.Y. 2010) 10

In re Futterman, 584 B.R. 609 (Bankr. S.D.N.Y. 2018) 11

In re Ionosphere Clubs, Inc., 113 B.R. 164, (Bankr. S.D.N.Y. 1990) 10

In re Sharon Steel Corp., 86 B.R. 455 (Bankr. W.D. Pa. 1988), *aff'd*, 871 F.2d 1217 (3d Cir. 1989) 10

In re Sillerman, 605 B.R. 631 (Bankr. S.D.N.Y. 2019) 10

In re Taub, 427 B.R. 208 (Bankr. E.D.N.Y. 2010) 15

In re V. Savino Oil & Heating Co., Inc., 99 B.R. 518 (Bankr. E.D.N.Y. 1989).....10, 12

In re Wings Digital Corp., 2005 WL 3789334 (Bankr. S.D.N.Y. May 16, 2005) 12

People of the State of New York v. Cold Spring Acquisition, LLC, et al., in the Supreme Court of New York, County of Nassau (Index No. 617709/2022) 5

Schuster v. Dragone, 266 B.R. 268 (D. Conn. 2001) 10

The 1031 Tax Group, LLC, 374 B.R. 78 (Bankr. S.D.N.Y. 2007) 12, 15

Statutes

11 U.S.C. § 101.....2

11 U.S.C. §1007.....10

11 U.S.C. § 1008.....10

11 U.S.C. § 1104(a)(1).....11, 12, 13

11 U.S.C. § 1104(a)(2).....11, 13

Other Authorities

Code Fed. Regs. Tit. 42 § 483.356 n.5

Code Fed. Regs. Tit. 42 § 483.60…… 6 n.5

N.Y. Comp. Codes R. & Regs. Tit. 10 § 415.13 ……6 n.5

N.Y. Comp. Codes R. & Regs. Tit. 10 § 415.13(a)……..... 6 n.5

N.Y. Comp. Codes R. & Regs. Tit. 10 § 415.14……. 6 n.5

N.Y. Comp. Codes R. & Regs. Tit. 18 § 515.2……... 5 n.4

N.Y. Civ. Prac. L. & R. § 5222……..9

TO THE HONORABLE SEAN H. LANE,
UNITED STATES BANKRUPTCY JUDGE:

William K. Harrington, the United States Trustee for Region 2 (the "United States Trustee"), files this motion (the "Motion") for an order, pursuant to 11 U.S.C. § 1104, directing the appointment of a Chapter 11 trustee. In support thereof, the United States Trustee represents and alleges as follows:

Relief Sought

The United States Trustee seeks the appointment of a Chapter 11 trustee, pursuant to sections 1104(a)(1) and (a)(2) of the Bankruptcy Code. The Debtor is the owner and operator of what may be the second largest nursing home on Long Island. Conditions at the nursing home – both in terms of patient care as well as financial operations – have been unacceptable. The level of patient care and gross mismanagement in a variety of ways has resulted in action being taken by the New York State Attorney General as well as the New York State Department of Health. For example, following a trial, a state court judge admonished the Debtor for its "utter disregard" of state court orders, resulting in a finding of civil contempt. Further, based on competent evidence, the state court judge found that the Attorney General had demonstrated inadequate levels of patient care warranting the appointment of an Independent Health Monitor. Finally, the Debtor has been unable to comply with certain requirements regarding monetary payments to be made to the unions that service it. Clearly, and as further discussed below, there is cause for the appointment of an independent fiduciary under either section 1104(a)(1) or (2) of the Bankruptcy Code.

Moreover, the Debtor's attempt to enter bankruptcy with "independent management" by appointing its own Chief Restructuring Officer does not assure the Court or the creditors of the type of independence and financial transparency that a court-appointed, independent fiduciary

such as the Chapter 11 trustee will. And similarly, the "temporary receivership" that the Debtor proposes also does not afford the independence or financial transparency that a Chapter 11 trustee will. The receivership in this circumstance is, in essence, nomenclature that is attached to the proposed purchaser during the time needed for the proposed purchaser to obtain the various approvals from regulators, including the DOH, to become the operator of the facility. For all these reasons, there is sufficient cause under either 1104(a)(1) and (a)(2) requiring the appointment of a Chapter 11 trustee in this case.

Facts

The Chapter 11 Case

1. On January 2, 2025 (the "Petition Date"), Cold Spring Acquisition, LLC, d/b/a Cold Spring Hills Center for Nursing and Rehabilitation (the "Debtor") commenced this case by filing a voluntary petition (the "Bankruptcy Petition") under chapter 11 of title 11, United States Code, 11 U.S.C. § 101 *et seq.* (the "Bankruptcy Code"). [ECF No. 1].

2. The Debtor operates a skilled nursing and rehabilitation facility with 588 beds located in Woodbury, New York (the "Facility"). *See* Declaration of Martin A. Cauz in Support of Debtor's Chapter 11 Petition and First Day Pleadings dated January 2, 2025 [hereinafter "Cauz Declaration"] at ¶ 6. The Facility provides long-term care and rehabilitative services to many senior patients, and also runs a senior day program. *Id.* The Debtor employs approximately 500 people. *Id.*

3. Upon information and belief, as of December 23, 2024, the Debtor had 317 residents, including seven ventilator reliant residents, and 65 adult day care residents.

4. According to the Debtor's Operating Agreement dated as of July 8, 2014 (and revised January 4, 2016) (the "Operating Agreement"), the Debtor's members and their percentage interests were as follows:

Name of Member	Percentage Interest
Esther Farkovits	25%
Avi Philipson	25%
Joel Leifer	25%
Rochel David	12.5%
Leah Friedman	12.5%

A copy of the Operating Agreement is annexed to the Declaration of Andrea B. Schwartz, dated January 14, 2025 [hereinafter "Schwartz Declaration"], which is being filed contemporaneously herewith, at Ex. A.

5. According to the Operating Agreement, Avi Philipson and Joel Leifer were the Managing Members. *Id.* at 11.2.

6. On April 1, 2019, Joel Leifer assigned his 25% membership interest to Avi Philipson, increasing Avi Philipson's membership interest to 50%. A copy of the Assignment of Membership Interest Agreement effective as of April 1, 2019, is annexed to the Schwartz Declaration at Ex. B.

7. On December 26, 2024, Leah Friedman assigned 11.5% of her membership interest to Rochel David. A copy of the Assignment of Membership Interest dated December 26, 2024, is annexed to the Schwartz Declaration at Ex. C.

8. At the time this case was commenced, the Debtor's ownership was as follows and Avi Philipson was the sole managing member:

Name of Member	Percentage Interest
Esther Farkovits	25%
Avi Philipson Managing Member[1]	50%
Rochel David	24%
Leah Friedman	1%

9. According to the Cauz Declaration, the Debtor appointed Mr. Cauz as its CRO on December 26, 2025.[2] Cauz Decl. at ¶ 2.

10. On January 3, 2025, the Court held a hearing (the "First Day Hearing") in this case and considered several motions pursuant to which the Debtor sought immediate relief, including among others, wages, insurance and continuation of its cash management system.

11. In addition to these motions, the Debtor sought approval of a debtor in possession loan (the "DIP Loan") from an entity known as CSHACQDIP, LLC (the "DIP Lender"), for which Bent Philipson is the principal.[3] *See* Debtor's Emergency Motion for Post-Petition Financing (the "DIP Motion"), at ¶ 4.

12. According to the DIP Motion, Bent Philipson is a member and principal of Cold Spring Realty Acquisition LLC (the "Cold Spring Realty"), the Debtor's Landlord and affiliate. *Id.*

[1] Pursuant to the First Amendment to Operating Agreement of Cold Spring Acquisitions, LLC, dated as of January 14, 2020, Avi Philipson is the Debtor's sole managing member. A copy of the First Amendment to Operating Agreement of Cold Spring Acquisitions, LLC is annexed to the Schwartz Declaration at Ex. D. Counsel for the Debtor has advised the United States Trustee that Avi Philipson has resigned as the managing member, however, no documentation has been provided to support this position nor to support that Avi Philipson is no longer part of the Debtor's management now that a CRO has been appointed.

[2] The Debtor has not yet provided the U.S. Trustee with a copy of the corporate resolution appointing Mr. Cauz as the Chief Restructuring Officer.

[3] Upon information and belief, Bent Philipson is the father of Avi Philipson and a long-time nursing home operator.

13. By order dated January 13, 2025, the Court approved the DIP Loan on an interim basis.

14. The Court held a second hearing for interim relief on January 14, 2025, at which the Court approved the Debtor's motion to pay insurance on an interim basis, a motion to extend the time by which schedules are to be filed and an application to shorten the time for a hearing on two motions that the Debtor filed on January 13, 2025, the Debtor's: 1) motion authorizing the Debtor to enter into an agreement with the DOH permitting it to appoint a temporary receiver (the "Receiver Motion") and 2) motion to sell all of its assets (the "Sale Hearing"). [ECF Nos. 39 and 40]. The Court granted each motion and scheduled the Receiver Motion and the Sale Motion to be held on January 31, 2025, at 11:30 a.m.

The AG's Suit Against the Debtor, Its Members, Bent Philipson, Other Debtor Affiliates and Others for Fraud and Resident Neglect

15. On December 22, 2022, the New York attorney general (the "AG") filed a verified petition (the "Petition") styled, *People of the State of New York v. Cold Spring Acquisition, LLC, et al.,* in the Supreme Court of New York, County of Nassau (Index No. 617709/2022) against the Debtor, its members, Bent Philipson, the estate of his late wife, Deborah Philipson, Graph Management, LLC, Graph Insurance Company A Risk Retention Group, LLC,[4] Philipson Family, LLC, and others (the "Respondents"), alleging, among other things, fraud, financial loss to the Medicaid and Medicare programs, violations of laws to protect nursing home residents and in fact causing harm to the residents of the Debtor.

16. On March 15, 2024, the Hon. Lisa A. Cairo, Justice of the Supreme Court, issued a decision and order (the "March 15, 2024 Decision and Order") on the Petition, finding that the

[4] Upon information and belief, the Graph entities are owned in whole or in part by Bent Philipson.

AG had established grounds for relief on two causes of action, 1) the Second Cause of Action – *Unacceptable Practices Under the Medical Assistance Program*[5] and 2) the Fourth Cause of Action – *Repeated and Persistent Illegality in the Care of Residents.*[6] A copy of the March 15, 2024 Decision and Order is annexed to the Schwartz Declaration at Ex. E.

17. Regarding the second count, the court determined that Cold Spring Realty, through an alter ego called Lending Partners LLC (beneficially owned by Bent Philipson and Benjamin Landa), included an undisclosed promissory note as part of the financing relating to the Lease Agreement which the Debtor had submitted as part of its Certificate of Need ("CON") application with the DOH. The court found that the DOH had required there be no interest charged in connection with the financing and that Bent Phillipson and Benjamin Landa submit sworn affidavits that they would invest certain equity contributions disproportionate to their equity interests if necessary. The court found that the fact that the Debtor's and Messrs. Philipson's and Landa's inclusion of the undisclosed promissory note which ensured interest payments were made to themselves through Cold Spring Realty or Lending Partners LLC and passed through to the Debtor "demonstrated the misleading nature in which certain Respondents presented the anticipated financing of the Facility to the DOH."

18. In addition, the court found the Debtor's position, that Cold Spring Realty, as a private entity, had the right to enter into any loan agreement it deemed appropriate to be "somewhat disingenuous" when the Debtor was ultimately responsible for paying the interest

[5] This Cause of Action alleged violations of (18 NYCRR § 515.2).

[6] This Cause of Action alleged violations of the following statutes and laws: 42 CFR § 483.35 (requiring adequate staffing to ensure resident safety), 42 CFR § 483.60 (requiring sufficient staff for food and nutrition services), 10 NYCRR § 415.13 (requiring sufficient staff to provide nursing and related services to attain or maintain the highest practicable physical, mental and psychosocial well-being of each resident), 10 NYCRR § 415.13(a) (requiring sufficient personnel on a 24-hour basis to provide nursing care to all residents) and 10 NYCRR § 415.14 (requiring sufficient competent staff to carry out functions of dietary services), among others.

included as part of the loan in accordance with the loan terms.

19. The Court ordered restitution of approximately $2 million be made to the Debtor by members of Lending Partners, and that the restitution be contributed by individuals and entity members from the Philipson Family, LLC, ZBL Management, Lifestar, and Benjamin Landa.[7]

20. Regarding the allegations of repeated and persistent illegality in the care of the residents, the Court agreed with the AG "… to the extent that the examples of lack in care that were properly included in the Petition clearly establishes [the Debtor's] failure to meet the standard of care, the examples of lack of care required and expected under the [PHL] and governing regulations."

21. Some of these failures to meet the standard of care included:

- Failure to bathe or shower residents on a regular basis in accordance with their respective care plans and in some instances not for several weeks at a time;
- Leaving residents unattended for lengthy periods of time; and
- Incidents reported by family members in sworn affidavits detailing the worsening of decubitus ulcers, urinary tract infections likely caused by delay in diaper changing, grossly inadequate hygiene practices and inadequate dental care.

22. The Court agreed with the AG that the only way to deal with the Debtor's neglect was to install an independent health monitor.

[7] Upon information and belief, Benjamin Landa was an owner of Cold Spring Realty and a partner with Bent Philipson at the time the CON application was made. Upon further information and belief, Benjamin Landa and Bent Philipson are no longer business partners.

23. Thereafter, Lisa Wickens-Alteri of Capital Health Consulting was established to serve as the independent health monitor (the "Independent Health Monitor").[8]

The Civil Contempt Order Against the Debtor for Failure to Make Required Payments to the Funds for Employee Health Insurance

24. On April 19, 2024, the Court entered an order (the "Civil Contempt Order") finding the Debtor in civil contempt relating to its failure "to make all required payments in a timely manner to the 1199 Union Funds to ensure that all employee benefits, including but not limited to, hospital, health, prescription drug, dental and disability benefits, remain available for CSH union employees" as directed by prior order of the court.[9] A copy of the April 19, 2024 Civil Contempt Order is annexed to the Schwartz Declaration at Ex. G.

25. The Civil Contempt Order, among other things, was premised on the NY Supreme Court's finding of the Debtor's "utter disregard for the court's orders directing payments to the Fund to ensure continued benefits."

Events Leading to the Bankruptcy

26. According to Mr. Cauz's Declaration, the reason that the Debtor commenced this chapter 11 bankruptcy case was because the Union Funds placed restraining notices on the Debtor's cash receivables (including Medicaid funds), and it was unable to make payroll or

[8] It is noted that as of January 1, 2025, the law firm of Abrams Fensterman LLP acquired an indirect 50 percent ownership in the Independent Health Monitor's firm, Capital Health Consulting. The Abrams Fensterman firm represented several Respondents in the AG's suit, and currently represents several of these Respondents, including Benjamin Landa, B&L Consulting LLC and Esther Farkovits (a current member of the Debtor), in their appeals of the March 15, 2024 Decision and Order currently pending before the Appellate Division, Second Department. A copy of a January 2, 2025, letter from Alyssa Friedman, Esq. to Justice Cairo disclosing this is annexed to the Schwartz Declaration as Ex. F.

[9] The Civil Contempt Order was preceded by an earlier order of the New York Supreme Court dated April 9, 2024 (the "April 9, 2024 Order"), wherein the court found that the Debtor was in contempt of the March 15, 2024, Decision and Order. In the April 9, 2024 Order, the court gave the Debtor an opportunity to purge its contempt by payment to the Union Funds sufficient to continue benefits. On April 18, 2024, the Court found that it had not made those payments.

cover necessary expenses.[10] Cauz Decl. at ¶ 30.

27. Following negotiations between the Debtor and the Union Funds, $1,000,000 of the Debtor's Medicaid funds were released on November 26, 2024, to cover payroll. Cauz Decl. at ¶ 32.

28. On December 10, 2024, the New York Supreme Court ordered that the week's payroll expenses of $1.14 million be released by the DOH "upon [the Debtor] demonstrating to [the Union Funds] and the DOH that [the Debtor] had obtained an undertaking in the sum of $1,140,000.00." *Id*.

29. When the Debtor failed to make the required showing, the Debtor issued a Notice of the Emergency Evacuation to the DOH and termination letters were sent to over 500 employees. *Id.* at ¶ 33.

30. On December 18, 2024, the AG sought a temporary restraining order from the New York Supreme Court to prevent the Debtor from evacuating the residents and failing to pay staff. Cauz Decl. at ¶ 34.

31. On December 20, 2024, the court issued an order which, *inter alia*, provided as follows:

> [the Debtor] be restrained from implementing or engaging in a plan to evacuate and/or otherwise involuntarily discharge or transfer its approximately 300 residents at [the Facility], on the basis that [the Facility's] payroll or any other financial obligation cannot be met, until further order of the Court; and it is further
>
> Ordered that pending hearing of the instant application, [the Debtor] arrange for transfer of funds necessary to [the Facility] such that [the Facility] can meet its Thursday, December 19, 2024, payroll obligations, and continuing weekly

[10] According to Mr. Cauz, the Union Funds had obtained judgments against the Debtor following arbitration for unpaid benefits provided. Cauz Decl. at 26. Currently those judgments total $6,355,047.56. *Id.*

thereafter, such that its employees can continue to provide care to the residents of the Facility, until further order of the court.

32. Unable to comply with the court's December 20, 2024, Order, the Debtor commenced this chapter 11 case. Cauz Decl. at ¶ 36.

Argument

I. Statutory Framework

The Bankruptcy Code is designed to allow a debtor-in-possession to retain management and control of the debtor's business operations. *See* 11 U.S.C. §§ 1007, 1008; *see also In re Eurospark Indus*., 424 B.R. 621, 627 (Bankr. E.D.N.Y. 2010). Yet, while there is a "presumption that a debtor should be permitted to remain in possession of its business, that presumption is not absolute." *In re Sillerman*, 605 B.R. 631, 640 (Bankr. S.D.N.Y. 2019).

A debtor-in-possession owes fiduciary duties to the bankruptcy estate and must, among other things, "protect and . . . conserve property in [its] possession for the benefit of creditors" and "refrain [] from acting in a manner which could damage the estate or hinder a successful reorganization of the business." *In re Ionosphere Clubs, Inc*., 113 B.R. 164, 169 (Bankr. S.D.N.Y. 1990) (quoting *In re Sharon Steel Corp*., 86 B.R. 455, 457 (Bankr. W.D. Pa. 1988), *aff'd*, 871 F.2d 1217 (3d Cir. 1989)). "The willingness of Congress to leave a debtor-in-possession is premised on an expectation that current management can be depended upon to carry out the fiduciary responsibilities of a trustee." *In re V. Savino Oil & Heating Co., Inc.*, 99 B.R. 518, 526 (Bankr. E.D.N.Y. 1989). If a debtor-in-possession is unable to fulfill its mandate, the debtor may be dispossessed of its officers and alternative management may be appointed in the form of a Chapter 11 trustee. *See Schuster v. Dragone*, 266 B.R. 268, 271 (D. Conn. 2001).

The Bankruptcy Code sets forth two separate standards for evaluating the necessity of a trustee: Section 1104(a)(1) and (a)(2). These sections provide, in pertinent part:

> (a) At any time after the commencement of the case but before confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of a trustee—
>
> (1) for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar cause, but not including the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor; or
>
> (2) if such appointment is in the interests of creditors, any equity security holders, and other interests of the estate, without regard to the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor.

11 U.S.C. § 1104(a)(1), (a)(2).

II. Cause Exists for the Appointment of a Chapter 11 Trustee Because the Debtor and its Management or Ownership Have a Proven Record of Dishonesty, Incompetence and Gross Mismanagement in the Affairs of the Debtor

A chapter 11 trustee, who is an independent fiduciary with statutory duties, including ensuring the management of the Facility, proper care for patients and financial transparency, is what is needed in this case. Given the findings of the New York Supreme Court, the Debtor has a proven record of dishonesty and gross mismanagement that warrant this Court's direction for the appointment of a chapter 11 trustee.

Section 1104(a)(1) directs the court to order the appointment of a trustee for cause. 11 U.S.C. § 1104(a)(1). "Cause" includes "fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management . . ." *Id.* This list is not exhaustive. *In re Futterman,* 584 B.R. 609, 616 (Bankr. S.D.N.Y. 2018); *see also In re Ashley River Consulting, LLC*, No. 14-13406 (MG), 2015 WL 1540941, at *9 (Bankr. S.D.N.Y. 2015). "[S]ome other '[f]actors relevant to the appointment of a trustee under § 1104(a)(1) include [. . .] misuse of assets and funds; inadequate record keeping and reporting; various instances of

conduct found to establish fraud or dishonesty; and lack of credibility and creditor confidence.'" *Id.* (citing *In re Altman*, 230 B.R. 6, 16 (Bankr. D. Conn. 1999)).

Bankruptcy courts have broad discretion to determine whether the challenged conduct rises to the level of establishing cause such that appointment of a trustee is appropriate. *In re The 1031 Tax Group, LLC*, 374 B.R. 78, 86 (Bankr. S.D.N.Y. 2007); *In re Wings Digital Corp.*, 2005 WL 3789334, at *4 (Bankr. S.D.N.Y. May 16, 2005). However, "once the court makes a finding that cause exists under § 1104(a)(1), 'there is no discretion; an independent trustee must be appointed.'" *In re The 1031 Tax Group, LLC*, 374 B.R. at 86 (quoting *In re V. Savino Oil & Heating Co., Inc.*, 99 B.R. at 525).

Importantly, "it is not necessary to delineate whether the cause consists of fraud, dishonesty, incompetence, gross mismanagement 'or similar cause.'" *Savino Oil,* 99 B.R. at 527. Indeed, any form of cause under "the penumbra of fiduciary neglect . . . mandates the appointment of a trustee." *Id.*

After two years of litigation prosecuted by the New York State Attorney General against a number of individuals and entities that are interconnected and fall directly or indirectly into one large nursing home and healthcare management and insurance enterprise, owned and/or managed by the Philipson family or one of its companies, trusts, partners or other entities, the New York Supreme Court made two significant findings that bear directly on the Motion.

First, the Court found that the owners and managers of the Debtor, including Bent Philipson and his partner Ben Landa, misled the DOH in connection with their acquisition of the CON that enabled them to purchase and operate the Facility and to purchase the real estate upon which it is situated. As set forth above at paragraphs 17-20, the Court found that an express requirement by the DOH with respect to the financing for the Facility and the real estate was

that any disproportionate equity contributions that may be necessary be made interest free. Notwithstanding this requirement, and affidavits presented to the DOH by Bent Philipson and Ben Landa as part of the CON process, the parties entered into an undisclosed promissory note which included interest obligations imposed on the Debtor in favor of an entity known as Lending Partners LLC (owned by Bent Philipson, Ben Landa and others). These obligations, through several refinancings, became a part of the debt service which the Debtor paid as part of its financing loans. The Court found that Bent Philipson, Ben Landa and other related parties had mislead the DOH and ordered them to pay restitution to the Debtor in the approximate amount of $2 million. Notably, although one might argue that this deception was not perpetrated by the Debtor or its management at the time, namely Avi Philipson and Joel Leifer, certainly these managers had a fiduciary duty to make sure that if the loan was refinanced, it had to be in accordance with representations agreed to with the DOH. Thus, not only were the Debtor and its management complicit, they breached their fiduciary duties of care to not pay this illegal interest, particularly at the cost of paying for adequate staffing and patient care, which they did not do as discussed below. Notably, the Court stated in the March 24, 2025 Decision and Order that it found the Debtor's position "somewhat disingenuous" because it would be the Debtor paying this interest. To overpay on a loan by approximately $2 million is a clear example of gross mismanagement by the Debtor and its managers, and dishonesty by its lenders and owners, all of whom have little to no independence. An independent fiduciary such as a Chapter 11 trustee would not be tempted or controlled by such familial and close relationships and would be obligated by court order and the Bankruptcy Code to demonstrate independence and fidelity to the law.

Second, and perhaps more egregious than the dishonesty committed by the Debtor, its management and owners, direct or indirect, is the Court's finding that the Debtor perpetrated repeated and persistent acts of illegality in the care of its residents who are among the most vulnerable individuals in society. The limited examples that the Court included in its March 24, 2025 Decision and Order are merely illustrative of the more detailed accounts included in the AG's Petition. A copy of the Petition is annexed to the Schwartz Declaration at Ex. H. Specifically, Justice Cairo of the Supreme Court cited the following examples of the Debtor's failure to satisfy the standard of care required by the Public Health Law:

- Failure to bathe or shower residents on a regular basis in accordance with their respective care plans and in some instances not for several weeks at a time;
- Leaving residents unattended for lengthy periods of time; and
- Incidents reported by family members in sworn affidavits detailing the worsening of decubitus ulcers, urinary tract infections likely caused by delay in diaper changing, grossly inadequate hygiene practices and inadequate dental care.

To remedy this dangerous situation and ensure a proper standard of care for residents, the Court directed the establishment of the Independent Health Monitor. A Chapter 11 trustee, however, would not only have the obligation to ensure the proper standard of care to the residents of the Debtor but also the financial transparency that is lacking with this Debtor. Moreover, although the Independent Health Monitor may have been "independent" at the time of her appointment, it appears that the entity owned by the Independent Health Monitor may no longer be independent because it was recently acquired by the law firm Abrams Fensterman. Abrams Fensterman represented several Respondents in the AG's suit and upon information and belief, continues to represent them on appeal. In any event, as stated, a Chapter 11 trustee would

be responsible not only for patient care but for the finances of the Debtor and importantly, financial transparency.

In addition to the above findings of the New York Supreme Court, Justice Cairo was also compelled to issue a civil contempt order against the Debtor for failing to make the required payments to the Union Funds to ensure that the Debtor's approximately 500 workers had their health benefits paid for. Although the Debtor appears to argue that when these benefits were terminated, they were able to get their workers health benefits covered at a lower cost (which upon information and belief was from a Philipson owned insurance company), the misconduct and breach of fiduciary duty by the Debtor is not somehow erased. It is well-known that in most courts, especially the bankruptcy courts in this District, only make the findings requisite for a civil contempt citation, after many instances of egregious conduct, here, breaches of fiduciary duties.

For all these reasons, where the dishonesty and gross mismanagement already have been found by another court after a 2-year litigation prosecuted by the AG, cause exists, and indeed warrants, that the Court direct the appointment of a Chapter 11 trustee.

III. Appointment of a Chapter 11 Trustee is in the Interests of Creditors and Other Interests of the Estate

Even if the Court does not find that "cause" exists to appoint a Chapter 11 trustee under § 1104(a)(1), the Court may still appoint a trustee if it is in the "interests of the creditors . . . and other interests of the estate." 11 U.S.C. § 1104(a)(2). "Section 1104(a)(2) envisions a flexible standard and gives the district court discretion to appoint a trustee when doing so would serve the parties' and estate's interests." *In re The 1031 Tax Group, LLC*, 374 B.R. at 90 (internal quotations omitted). In applying § 1104(a)(2), courts "eschew rigid absolutes and look to the practical realities and necessities." *See In re Taub*, 427 B.R. 208, 227 (Bankr. E.D.N.Y. 2010)

(quoting *In re Adelphia Communication Corp.*, 336 B.R. 610, 658 (Bankr. S.D.N.Y. 2006)); *In re Euro-American Lodging Corp.*, 365 B.R. 421, 427 (Bankr. S.D.N.Y. 2007). Factors that courts have found relevant in making a determination to appoint a Chapter 11 trustee under § 1104(a)(2) include: (1) the trustworthiness of the parties, (2) the debtor's past and present performance and prospects for rehabilitation, (3) the confidence—or lack thereof—of the business community and of creditors in present management, and (4) the benefits derived by the appointment of a trustee, balanced against the cost of appointment. *Euro-American Lodging,* 365 B.R. at 427. While courts consider these factors, "in the final analysis, the decision to appoint a trustee rests in the court's discretion." *In re China Fishery Grp. Ltd. (Cayman)*, No. 16-11895 (JLG), 2016 WL 6875903, at *14 (Bankr. S.D.N.Y. Oct. 28, 2016). Applying the factors to the instant case demonstrates the need for a trustee.

The United States Trustee hereby incorporates by reference his arguments from Section II, *infra*, that demonstrate a lack of trustworthiness in this Debtor and its management, as well as a lack of confidence that would undoubtedly occur should residents become aware of the Debtor's business practices. A cost-benefit analysis weighs in favor of a Chapter 11 trustee, as the Debtor has no viable path to reorganization under the continued oversight by a principal who shows very little ability to manage its business in an honest manner. Accordingly, it is in the best interest of the estate's creditors for the Court to appoint a Chapter 11 trustee to manage this Debtor and direct its reorganization.

IV. The Bankruptcy Code Does Not Authorize the Retention of a Chief Restructuring Officer or a Temporary Receiver to Manage the Affairs of the Debtor or Sale of its Assets

The only express authorization in the Bankruptcy Code for the Court to direct the appointment of a fiduciary who supplants a debtor-in-possession is the Court's authority to direct the appointment of a Chapter 11 trustee under section 1104.[11] *See* 11 U.S.C. § 1104. *See also In re Adelphia Comm. Corp.*, 336 B.R. 610, 664 (Bankr. S.D.N.Y. 2006) (court could not appoint independent fiduciary because no Bankruptcy Code provision authorized such appointment). Chapter 11 trustees have statutorily defined duties, obligations, and limitations under the Bankruptcy Code. *See, e.g.*, 11 U.S.C. § 321 (defining eligibility to serve as trustee); 11 U.S.C. § 322 (imposing bonding requirements for trustee): 11 U.S.C. § 323 (establishing trustee as the representative of the estate and providing that trustee has capacity to sue and be sued); 11 U.S.C. § 324 (establishing mechanism for removal of trustee); 11 U.S.C. § 326 (placing limitations on compensation of a trustee); 11 U.S.C. § 327 (authorizing trustee to employ professionals to represent or assist the trustee in carrying out the trustee's duties); 11 U.S.C. § 1106 (defining duties of a trustee).

The Debtor's attempt to enter bankruptcy with "independent management" by appointing its own Chief Restructuring Officer does not assure the Court or the creditors of the type of independence and financial transparency that a court-appointed, independent fiduciary such as the Chapter 11 trustee will. Similarly, the "temporary receivership" that the Debtor proposes also does not afford the independence or financial transparency that a Chapter 11 trustee will.

[11] A set of amendments to the Bankruptcy Code further demonstrates that the Bankruptcy Code does not countenance the appointment of an independent third party to manage one part of a Chapter 11 case while a debtor-in-possession manages other aspects of the case. The Small Business Reorganization Act of 2019, Pub Law No. 116-54, 133 Stat 1079 (the "SBRA"), 11 U.S.C. §§ 1181 *et seq.* created the first and only statutory scheme in which a debtor-in-possession and trustee serve simultaneously. *See, e.g.,* 11 U.S.C. § 1183. Congress chose to carve out a special exception in the SBRA to the general rule that a debtor-in-possession and an independent third party cannot serve simultaneously. It chose not to sanction the kind of power-sharing agreement at issue here.

Conclusion

WHEREFORE, the United States Trustee respectfully requests that the Court direct him to appoint a Chapter 11 trustee and grant such other and further relief as may be deemed just and proper.

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Respectfully submitted,

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UNITED STATES TRUSTEE

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