

Vickie L. Driver
State Bar No. 24026886
Christina W. Stephenson
State Bar No. 24049535
Christopher M. Staine
State Bar No. 24104576
CROWE & DUNLEVY, P.C.
Spaces McKinney Avenue
1919 McKinney Avenue, Suite 100
Dallas, TX 75201
Telephone: 214.420.2163
Facsimile: 214.736.1762
Email: vickie.driver@crowedunlevy.com
Email: christina.stephenson@crowedunlevy.com
Email: christopher.staine@crowedunlevy.com

PROPOSED COUNSEL FOR THE DEBTORS

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

In re: THE LASALLE GROUP, INC., et al.,¹ DEBTORS.	§ § § § § § § § § §	Chapter 11 Case No. 19-31484-sgj-11 (Jointly Administered)
---	--	---

DEBTORS’ EMERGENCY MOTION FOR ENTRY OF AN ORDER AUTHORIZING THE DEBTORS TO (I) MAINTAIN AND ADMINISTER THEIR RESIDENT REFUND PROGRAM, AND (II) HONOR AND PAY OBLIGATIONS RELATED THERETO

TO THE HONORABLE STACEY G. C. JERNIGAN,
UNITED STATES BANKRUPTCY JUDGE:

The above-captioned debtors (collectively, the “Debtors”), debtors and debtors-in-possession in the above-captioned Chapter 11 cases, pursuant to Sections 105(a), 363, 1107, and 1108 of title 11 of the United States Code (the “Bankruptcy Code”), file this *Emergency Motion*

¹ A list of the Debtors in these Chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, is attached hereto as **Schedule 1**. The Debtors’ mailing address is 545 E. John Carpenter Freeway, Suite 500, Irving, Texas 75062.

for Entry of an Order Authorizing the Debtors to (I) Maintain and Administer their Resident Refund Program, and (II) Honor and Pay Obligations Related Thereto (the “Motion”) for entry of an order, substantially in the form attached as Exhibit “A,” authorizing (but not directing) the Debtors to maintain and administer their existing Refund Program (as defined below), and to honor and pay obligations relating to that program. The Debtors further request authority to honor refund obligations that may accrue under the Refund Program (as defined below) in the ordinary course of the Debtors’ business, on a post-petition basis. In support of this Motion, the Debtors submit and fully incorporate by reference the Declaration of Karen Nicolaou, which is attached as Exhibit “B,” and respectfully state as follows:

I. JURISDICTION, VENUE, AND STATUTORY PREDICATES

1. This Court has jurisdiction over the Motion pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b).
2. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409.
3. The bases for relief requested herein are Sections 105(a), 363(b), 1107, and 1108 of the Bankruptcy Code.

II. BACKGROUND

4. On May 2, 2019 (the “Petition Date”), the Debtors filed their voluntary petitions for relief under Chapter 11 of Title 11 of the United States Code (the “Bankruptcy Code”), commencing the above captioned cases (the “Chapter 11 Cases”). The Debtors continue to manage and operate their business as debtors-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

5. An official committee of unsecured creditors has not been appointed in these Chapter 11 Cases. Further, no trustee or examiner has been requested or appointed in these

Chapter 11 Cases.

6. In general, the Debtors operate forty (40) memory care communities, independent living communities and assisted living communities in several states, three of which are under construction and not currently occupied by residents (collectively, the “Facilities”). The Facilities provide research-based assisted living memory care for over 1400 current residents (each a “Resident” and collectively, the “Residents”) with Alzheimer’s, disease, dementia, or other forms of memory loss. A more detailed description of the Debtors and their business, and the facts and circumstances leading up to the filing of the Chapter 11 Cases are set forth in greater detail in the *Declaration of Karen G. Nicolaou in Support of First Day Motions*, which is fully incorporated by reference in this Motion.

III. RELIEF REQUESTED

7. By this Motion, the Debtors seek the entry of an order, substantially in the form attached as **Exhibit “A,”** authorizing (but not directing) the Debtors to continue to maintain and administer their existing Refund Program (as defined below), and to honor refund obligations that have accrued under that program prepetition. The Debtors further request authority to honor refund obligations that may accrue under the Refund Program (as defined below) in the ordinary course of the Debtors’ business, on a post-petition basis.

The Refund Program.

8. In the ordinary course of the Debtors’ business, the Debtors process refund claims submitted by or on behalf of Residents through a refund program (the “Refund Program”). In general, these refund claims seek a prorated refund for fees that were prepaid to the Debtors for services that could not be provided due to the untimely and unfortunate death of a Resident.

9. In particular, a Debtor and a Resident, through his/her authorized legal

representative (the “Responsible Party”), enter into a Resident Agreement, substantially in the form attached as Exhibit “C,” under which the Debtor agrees to provide the accommodations and services outlined under Section 2 of the Resident Agreement (collectively, the “Resident Services”) in exchange for an agreed-upon fee (“Rent”). Rent is due on the 1st of each month that Resident Services are requested.

10. Under Section 7 of the Resident Agreement, the Responsible Party may terminate the Resident Agreement by giving the Debtor written notice of termination, specifying an effective termination date that is at least thirty (30) days after the notice date. Alternatively, in the event of a Resident’s death, the Resident Agreement will terminate effective ten (10) days after the date of death.

11. Once the Resident Agreement is terminated, the Responsible Party or the Resident’s estate is responsible for vacating the Resident’s room, for removing all of the Resident’s belongings, and for returning all of the room keys to the Debtor (collectively, the “Move-Out Process”). Unless otherwise prohibited by applicable law, the Responsible Party and/or the Resident’s estate remain contractually liable for additional fees until the Move-Out Process is completed.

12. In the event the Resident Agreement is terminated due to a Resident’s death, then subject to the Responsible Party and/or Resident’s estate completing the Move-Out Process in the manner required under the Resident Agreement, the Debtors are contractually required to pay a pro-rated refund for any prepaid (but unearned) Rent within thirty (30) days of the effective termination date of the Resident Agreement.

13. As part of the Debtors’ Refund Program, the Debtors maintain a balance account (the “Resident Account”) for each Resident that is subject to a Resident Agreement. The

Resident Account is monitored in the Debtors' accounting system for billing purposes. Upon termination of the Resident Agreement, the Resident's Account is audited and reconciled to determine what, if any, Rent refund is owed by the Debtor to the Resident's estate. Any refund owed is recorded as a refund liability in the Debtors' accounting system.

14. As of the filing of this Motion, the Debtors estimate their obligations under the Refund Program to be approximately \$36,486.11--1,200.00 of which accrued post-petition. An accounting of each Debtor's estimated Refund Program obligation is scheduled in **Exhibit "D"**.

IV. BASIS FOR RELIEF

A. PAYMENT OF THE REFUND PROGRAM OBLIGATIONS IS APPROPRIATE UNDER SECTIONS 363(B) AND 105(A) OF THE BANKRUPTCY CODE AND UNDER THE NECESSARY PAYMENT DOCTRINE.

15. Section 363(b)(1) of the Bankruptcy Code authorizes the trustee, after notice and a hearing, to use property of the estate, other than in the ordinary course of business. 11 U.S.C. § 363(b)(1). In addition, the Court, pursuant to section 105(a) of the Bankruptcy Code, "may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [Title 11 of the Bankruptcy Code]." 11 U.S.C. § 105(a).

16. Under applicable case law in this and other jurisdictions, if a debtor's proposed use of its assets pursuant to section 363(b) of the Bankruptcy Code represents a reasonable exercise of the debtor's business judgment, such use should be approved. *See United Retired Pilots Benefit Prot. Ass'n v. United Airlines, Inc. (In re UAL Corp.)*, 443 F.3d 565, 571 (7th Cir. 2006); *Fulton State Bank v. Schipper (In re Schipper)*, 933 F.2d 513, 515 (7th Cir. 1991); *see also In re Delaware & Hudson Ry. Co.*, 124 B.R. 169, 175-76 (D. Del. 1991) (noting that courts have applied the "sound business purpose" test to evaluate motions brought pursuant to section 363(b) of the Bankruptcy Code); *Comm. of Equity Sec. Holders v. Lionel Corp. (In re*

Lionel Corp.), 722 F.2d 1063, 1071 (2d Cir. 1983) (“The rule we adopt requires that a judge determining a § 363(b) application expressly find from the evidence presented before him at the hearing a good business reason to grant such an application.”).

17. Once a debtor articulates a valid business justification for a particular form of relief, that relief “should be approved by the court unless it is shown to be ‘so manifestly unreasonable that it could not be based upon sound business judgment, but only on bad faith, whim, or caprice.’” *In re Aerovox, Inc.*, 269 B.R. 74, 80 (Bankr. D. Mass. 2001) (citation omitted).

18. Courts have authorized payment of prepetition obligations under Section 363(b) of the Bankruptcy Code where a sound business purpose exists for doing so. *See, e.g., In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989) (finding that a sound business justification existed to justify payment of certain claims); *see also In re Tropical Sportswear Int’l Corp.*, 320 B.R. 15, 20 (Bankr. M.D. Fla. 2005) (“Bankruptcy courts recognize that section 363 is a source for authority to make critical vendor payments, and section 105 is used to fill in the blanks. After all, the Bankruptcy Code does not contemplate every business crisis that could arise in a bankruptcy case, and this Court is of the opinion that Congress intended that the Code accommodate the economic realities faced by debtors in reorganization cases.”).

19. Courts have also authorized payment of prepetition obligations under the doctrine of necessity when payment of certain creditors’ prepetition claims is necessary or appropriate to preserve or enhance the value of a debtor’s estate for the benefit of all creditors. *See In re CoServ, LLC*, 273 B.R. 487, 497 (Bankr. N.D. Tex. 2002) (noting that “it is only logical that the bankruptcy court be able to use section 105(a) of the Code to authorize satisfaction of the prepetition claim in aid of preservation or enhancement of the estate.”). Although the “necessity

of payment” doctrine has not been codified in the Bankruptcy Code, “courts have used their equitable power under section 105(a) of the Code to authorize the payment of pre-petition claims when such payment is deemed necessary to the survival of a debtor in a chapter 11 reorganization.” *In re Just for Feet*, 242 B.R. 821, 824 (Bankr. D. Del. 1994); *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 985 (2017) (noting that courts have approved orders that allow payment of prepetition debt when necessary for the debtors to reorganize, restructure their debts and maximize the value of the bankruptcy estate).

B. CONTINUED USE AND MAINTENANCE OF THE DEBTORS’ REFUND PROGRAM IS IN THE BEST INTERESTS OF THE DEBTORS’ BUSINESS AND ESTATES.

20. The Debtors’ ability to orderly liquidate their business and maintain value is dependent on the continued patronage and loyalty of the Residents and the ability to attract new residents. As a practical matter, Residents expect the Debtors to return fees that were prepaid for Resident Services that could not be provided due to a Resident death. Further, there is already a certain level of uncertainty and disruption that typically accompanies a chapter 11 filing. This is amplified by the highly competitive industry in which the Debtors’ operate. If Residents learn that they are required to pay Rent in advance for Resident Services, but that no refunds will be given for valid claims submitted under the Debtors’ Refund Program, Residents will seek care from one of the Debtors’ competitors, to the detriment of the Debtors. Minimizing such Resident attrition is critical to the Debtors’ ability to preserve and enhance value for the benefit of the Debtors, their estates, and all stakeholders.

21. The Refund Program is also an important marketing tool that is used to attract new residents. The inability to continue to maintain and administer the Refund Program will place the Debtors at a competitive disadvantage in the marketplace. Indeed, prospective residents might be reluctant to do business with the Debtors without the Refund Program in

place--a program that creates the necessary assurance that prepaid (but unearned) Rent will be returned to the Resident's estate, in the unfortunate event of a Resident death.

22. In sum, in order to maintain the continuity of their business, preserve the loyalty and patronage of current Residents, and effectively compete for the business of new residents in a highly competitive industry, it is essential for the Debtors to continue to maintain and administer their Refund Program, to include honoring refund obligations that have accrued prepetition and refund obligations that may accrue post-petition in the ordinary course of the Debtors' business.

V. RESERVATION OF RIGHTS

23. Nothing contained herein is intended or should be construed as: (a) an admission as to the validity of any claim against the Debtors; (b) a waiver of the Debtors' rights to dispute any claim on any basis; or (c) an approval or assumption of any agreement, contract or lease, pursuant to section 365 of the Bankruptcy Code.

VI. NOTICE

24. Notice of this Motion has been provided to the parties listed on the Limited Service List. Further, a copy of this Motion is publicly available on the following website that is hosted by Donlin, Recano & Company, Inc., the Debtors' claims and noticing agent: <https://www.donlinrecano.com/Clients/lasalle/Index>. In light of the nature of the relief requested, the Debtors submit that no other or further notice is necessary or required.

VII. NO PRIOR REQUEST

25. No previous request for the relief sought herein has been made to this Court or any other court.

VIII. CONCLUSION

For these reasons, the Debtors respectfully requests the Court to (a) enter an order authorizing (but not directing) the Debtors (i) to continue to maintain and administer their Refund Program, (ii) to honor refund obligations that have accrued under the Refund Program prepetition, (iii) to honor refund obligations that may accrue post-petition under the Refund Program in the ordinary course of the Debtors' business; and (b) grant such other and further relief as the Court may deem proper.

Dated: June 10, 2019.

CROWE & DUNLEVY, P.C.

By: /s/ Christina W. Stephenson

Vickie L. Driver

State Bar No. 24026886

Christina W. Stephenson

State Bar No. 24049535

Christopher M. Staine

State Bar No. 24104576

Spaces McKinney Avenue

1919 McKinney Avenue, Suite 100

Dallas, TX 7501

Telephone: 214.420.2163

Facsimile: 214.736.1762

Email: vickie.driver@crowedunlevy.com

Email: christina.stephenson@crowedunlevy.com

Email: christopher.staine@crowedunlevy.com

PROPOSED COUNSEL FOR DEBTORS

CERTIFICATE OF CONFERENCE

On June 10, 2019, I certify that I conferred with Stephen McKitt with the U.S. Trustee's office regarding the relief requested herein and the U.S. Trustee's office is not opposed to an expedited hearing on the foregoing matter, nor does he have preliminary objections with regard to the substantive relief sought herein.

/s/ Christina W. Stephenson
Christina W. Stephenson

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading was served by Donlin, Recano & Company, Inc. upon the parties on the Limited Service List via e-mail, U.S. Mail, and/or electronic transmission via the Court's ECF noticing system on this 10th day of June, 2019.

By: /s/ Christina W. Stephenson
Christina W. Stephenson

Schedule 1**List of Debtors**

#	Debtor Name	Case No.	EIN
1	The LaSalle Group, Inc.	19-31484	0143
2	West Houston Memory Care, LLC	19-31485	2760
3	Cinco Ranch Memory Care, LLC	19-31486	2716
4	Pearland Memory Care, LLC	19-31488	5311
5	Riverstone Memory Care, LLC	19-31493	5407