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PROPOSED ATTORNEYS FOR THE DEBTORS  
AND DEBTORS IN POSSESSION

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

<b>In re:</b>	§	<b>CASE NO. 09-37010</b>
	§	
<b>ERICKSON RETIREMENT</b>	§	<b>CHAPTER 11</b>
<b>COMMUNITIES, LLC, <i>et al.</i><sup>1</sup></b>	§	
	§	<b>Jointly Administered</b>
<b>Debtors.</b>		

**MOTION OF DEBTORS PURSUANT TO 11 U.S.C. §§ 105(a)  
AND 363(b) FOR AN ORDER AUTHORIZING PAYMENT OF  
PREPETITION EMPLOYEE SEVERANCE BENEFITS**

The above-captioned debtors and debtors in possession (collectively, the “Debtors”) by  
their proposed attorneys, DLA Piper LLP (US), hereby move (the “Motion”), pursuant to

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<sup>1</sup> The Debtors in these Chapter 11 cases are Erickson Retirement Communities, LLC, Ashburn Campus, LLC, Columbus Campus, LP, Concord Campus GP, LLC, Concord Campus, LP, Dallas Campus GP, LLC, Dallas Campus, LP, Erickson Construction, LLC, Erickson Group, LLC, Houston Campus, LP, Kansas Campus, LLC, Littleton Campus, LLC, Novi Campus, LLC, Senior Campus Services, LLC, Warminster Campus GP, LLC, Warminster Campus, LP.

sections 105(a) and 363(b) of title 11 of the United States Code (the “Bankruptcy Code”), for an order authorizing payment of prepetition employee severance benefits. In support of this Motion, the Debtors respectfully represent as follows:

### **Jurisdiction and Venue**

1. This Court has jurisdiction to consider this Motion pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b).
2. Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.
3. The statutory bases for the relief requested herein are Bankruptcy Code sections 105(a) and 363(b).

### **Background**

4. On October 19, 2009 (the “Petition Date”), the Debtors commenced these cases by each filing voluntary petitions for relief under chapter 11 of the Bankruptcy Code.
5. The Debtors remain in possession of their assets and continue to operate and manage their businesses as debtors in possession pursuant to Bankruptcy Code sections 1107 and 1108.
6. No trustee, examiner or committee of creditors has been appointed in these cases.
7. The factual background regarding each of the Debtors, including their current and historical business operations and the events precipitating these chapter 11 filings, is set forth in detail in the Affidavit of Paul B. Rundell in Support of First Day Motions (the “Rundell Affidavit”), and is incorporated herein by reference.

### **The Debtors’ Terminated Employees**

8. On a consolidated basis, the Debtors presently employ approximately 794 employees – 723 employees are full-time salaried, 65 employees are full-time hourly and 6 employees are temporary hourly (collectively, the “Employees”). None of the Employees are

subject to a collective bargaining agreement. Over the past year, Debtors have engaged in significant efforts to cut corporate costs and close down divisions in response to economic conditions necessitating changes in the business model. As a result, during this period, Debtors have gone through multiple reductions in force resulting in approximately 450 laid-off employees (collectively "Laid-Off Employees"). Debtors began initiating reductions in force in January 2009 primarily to close down construction activities at all managed communities. Subsequent reductions in April 2009 were aimed at consolidating corporate service functions and reducing corporate overhead.

9. In July 2009, Debtors initiated an additional reduction in force to be implemented in phases. The reductions primarily involved the remaining development division and regional operations staff. The reductions were phased to eliminate some personnel immediately in July but to retain essential personnel through the fall in order to complete necessary projects.

10. At that time, retained personnel were advised that, if they continued as employees through their respective target dates, they would then receive severance payments after their last day worked, in accordance with the separation agreements. All of the retained employees signed separation agreements with Debtors, agreeing to stay through the target date, with the assumption that severance would be paid. All Laid-Off Employees executed similar agreements describing their termination dates, severance benefits and releases of the Debtors from any claims arising under state and federal employment discrimination and/or benefit statutes.

11. For communities where new buildings were to be delayed, the development personnel were essential to close down projects, cancel orders, permits, and contracts, and close out open letters of credit that would otherwise be pending obligations against the estate. If the retained personnel had not completed their work, the Debtors and therefore the bankruptcy estates would be in a materially worse position than they are today. For example, two

communities had new residential buildings due to open this year. Development personnel were critical to completing the necessary inspections and obtaining occupancy permits, all of which was necessary in order to open the these new buildings. The opening of these projects has already attracted the following cash entrance deposits for the bankruptcy estate: Ashby Ponds RB 1.4 and 1.5 – combined total of \$19.2 million (buildings opened in phases through July 2009); Maris Grove RB 2.2 and 2.4 – combined total of \$24.2 million (buildings opened in phases through July 2009). Both of these projects are popular communities with a strong waiting list of prospective residents and available inventory should continue to attract new residents with deposits.

12. With the continuing financial uncertainty, Debtors have also experienced a loss of critical talent which the company hoped to retain. In 2009, several long-term, key managers in the Finance Department and the Chief Information Officer resigned for other opportunities. The company needs to restore and maintain the confidence of its Employees, whose cooperation and continued loyalty are essential to the continuation of the business.

13. Although Debtors' management has stated that further reductions in force are not planned, indications are that key management staff are anxious and continuing to seek new positions. If the current staff is advised that the company cannot comply with the signed severance agreements with the Laid-Off Employees, this will only increase Employee uncertainty about the company's ability to meet its obligations and speed the loss of essential personnel. Compliance with the signed separation agreements for laid-off personnel will reduce the incentive for current Employees to seek new positions.

14. Finally, Debtors' inability to retain or hire back a qualified work force would inhibit the estates' ability to move beyond bankruptcy. The Debtors or their successor hope to continue development of certain projects in the future in order to attract new residents and

continue to add value to the projects. The proposed sale to Redwood Capital specifically contemplates a \$50 Million facility for future construction, which will be necessary to stabilize the developing communities. If Debtors are unable to retain or hire back employees due to a lack of confidence in Debtors' ability to fulfill their employee agreements with individuals who have development expertise, the ability to conduct that future development that is essential to both the potential purchaser, Redwood, and the National Senior Campuses, Inc. Board which holds the management contracts is put at risk.

**Relief Requested**

15. By this Motion, the Debtors seek authority pursuant to Bankruptcy Code sections 105(a) and 363(b) to pay certain prepetition severance payment obligations of the Debtors owed to Laid-Off Employees listed on Exhibit A (collectively, the "Prepetition Obligations").

16. The Debtors seek authority to honor the Prepetition Obligations because payment of these obligations is critical and essential to the morale of the remaining Employees and the Debtors' future business needs. If the Prepetition Obligations are not honored in the ordinary course, the morale of current Employees would suffer, which would adversely impact the Debtors' business. Failure to honor the Prepetition Obligations could also result in extreme hardship to the Laid-Off Employees depending on the payments as their sole remaining source of income. This would inevitably result in lowered Employee morale and lead to unmanageable Employee turnover. Indeed, the Debtors may be unable to sustain operations and effectuate a successful reorganization without the ongoing good will of their Employees.

**Prepetition Obligations**

**A. Laid-Off Employees' Unpaid Severance Compensation**

17. The Debtors seek an order authorizing the Debtors to honor a certain amount of their outstanding prepetition severance obligations. In the ordinary course of business, the Debtors pay their Employees severance upon termination.

18. In sum, the Debtors estimate that approximately \$1,789,298.62 in unpaid severance benefits was owing to the Laid-Off Employees as of the Petition Date (approximately \$748,018.23 when limited to \$10,950 per Laid-Off Employee). Given the critical role the Laid-Off Employees played in preserving the now bankrupt estate, and the necessity of maintaining the morale of present Employees, the Debtors seek authority to honor their severance obligations by paying, in the ordinary course, any prepetition amounts owed to the Laid-Off Employees up to the \$10,950 priority limit on account of prepetition severance obligations under Bankruptcy Code section 507(a)(4) (the "Priority Limit").

**Basis For Relief**

19. Bankruptcy Code sections 105(a) and 363(b) and the "necessity of payment" doctrine provide the basis for the relief requested in this Motion. Section 363(b)(1) of the Bankruptcy Code provides that "the trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b)(1).

20. In addition, Bankruptcy Code section 105(a) grants bankruptcy courts broad authority to enter "any order, process or judgment that is necessary or appropriate" to carry out the provisions of the Bankruptcy Code. 11 U.S.C. § 105(a). Accordingly, the Debtors submit that this Court is authorized to grant the relief requested herein.

21. Courts have recognized the applicability of the "necessity of payment" doctrine with respect to the payment of prepetition employee compensation and benefits. See, e.g., In re

CoServ, L.L.C., 273 B.R. 487, 494 (Bankr. N.D. Tex. 2002) (noting that “wage claims typically are payable out of necessity as well as by virtue of their priority”); Mich. Bureau of Workers’ Disability Comp. v. Chateaugay Corp. (In re Chateaugay Corp.), 80 B.R. 279, 285-86 (S.D.N.Y. 1987), appeal dismissed 838 F.2d 59 (2d Cir. 1988) (approving lower court order authorizing payment of prepetition wages, salaries, expenses, and benefits).

22. Furthermore, Bankruptcy Code section 507(a) provides that the Prepetition Obligations, subject to certain conditions, are afforded priority distribution up to \$10,950. See 11 U.S.C. §§ 507(a)(4), 507(a)(5). In addition, section 507(a)(4) and 507(a)(5) priority claims are entitled to payment in full under a chapter 11 plan of reorganization. See 11 U.S.C. § 1129(a)(9)(B). Section 507(a)(4)(A) specifies that prepetition severance obligations are protected with priority status. Thus, because the Debtors’ Laid-Off Employees listed in Exhibit A are entitled to a priority distribution for prepetition severance amounts owed, the relief requested in this Motion should primarily affect the timing of payment of employee claims rather than their treatment for distribution purposes, and should neither prejudice general unsecured creditors nor materially affect the Debtors’ estates.

23. Federal Bankruptcy Rule of Bankruptcy Procedure (“Bankruptcy Rule”) 6003 was amended in December 2007 to set limits on the relief that may be granted by a bankruptcy court during the initial stage of a bankruptcy case. Bankruptcy Rule 6003 provides, in pertinent part, that:

Except to the extent that relief is necessary to avoid immediate and irreparable harm, the court shall not, within 20 days after the filing of the petition, grant relief regarding . . . a motion to use, sell, lease, or otherwise incur an obligation regarding property of the estate, including a motion to pay all or part of a claim that arose before the filing of the petition, but not a motion under Rule 4001.

Fed. R. Bankr. P. 6003(b) (emphasis added).

24. Application of Bankruptcy Code sections 105(a) and 363(b)(1) and the “necessity of payment” doctrine are warranted here. Additionally, the Debtors satisfy the “immediate and irreparable harm” standard set forth in Bankruptcy Rule 6003. Absent prompt payment of amounts owed in connection with the Prepetition Obligations, it is likely that Employee morale and support will be impaired, the Debtors’ business will be immediately and irreparably harmed, and the reorganization of the Debtors will be impossible.

25. The Debtors’ inability to pay the outstanding Prepetition Obligations will cause employees, past and present, to endure significant stress, hardship and suffering. The effect of this disruption in Employee morale will likely have negative effect on all aspects of the Debtors’ business operations. Many Laid-Off Employees rely exclusively on receiving their severance pay in order to pay their daily living expenses. As a result, these Laid-Off Employees will be exposed to significant financial and health-related problems if the Debtors are not permitted to honor their unpaid Prepetition Obligations.

26. The Debtors’ Employees are an essential component of a successful reorganization. Any deterioration in Employee morale and welfare at this critical time undoubtedly would have a devastating impact on the Debtors, the value of their assets and businesses, and ultimately, the Debtors’ ability to reorganize. Moreover, the efforts of the Laid-Off Employees were vital in preserving the estates assets for the estate’s creditors. Accordingly, the relief sought herein is in the best interests of the Debtors’ estates and creditors, and will allow the Debtors to continue to operate their business with minimal disruption and proceed with the important task of stabilizing their operations.

27. In other chapter 11 cases, courts in this district and other jurisdictions have held that payment of prepetition claims for severance similar to those described herein is appropriate. Lasky v. Phones for All (In re Phones for All, Inc.), 288 F.3d 730 (5th Cir. Tex. 2002); In re

Russell Cave Co., 248 B.R. 301, 304 (Bankr. E.D. Ky. 2000). In Lasky, the court held that severance earned within 180 days of the Petition Date is given priority status. Id. at 731-32. Each of the Laid-Off Employees listed on Exhibit A was laid-off within 180 days of the petition date. Within 180 days of the Petition Date, they signed a severance agreement releasing all claims against the Debtors and agreeing to continue working for a period set forth in the agreement. In return, the Debtors agreed to pay an agreed sum. Thus, the Laid-Off Employees listed on Exhibit A earned their severance within 180 days of the Petition Date.

**Notice**

28. Notice of this Motion has been provided to (a) the Office of the United States Trustee for the Northern District of Texas; (b) the Debtors' thirty largest unsecured creditors on a consolidated basis; and (c) the Debtors' prepetition secured lenders. The Debtors submit that, in light of the nature of the relief requested, no other or further notice is necessary or required.

WHEREFORE, based upon the foregoing, the Debtors respectfully request that the Court enter an order substantially in the form annexed hereto as Exhibit A, granting the relief requested herein and such other relief as may be deemed just and proper.

Dated: October 27, 2009  
Dallas, Texas

**DLA PIPER LLP (US)**

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