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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 COMMUNITIES, LLC, <i>et al.</i><sup>1</sup></b>	§	<b>CHAPTER 11</b>
	§	
<b>Debtors.</b>	§	<b>(Jointly Administered)</b>
	§	

**DEBTORS' AMENDED MOTION FOR AN ORDER AUTHORIZING DEBTORS  
TO AMEND POSTPETITION FINANCING PURSUANT  
TO 11 U.S.C. §§ 105, 361,362, 363, AND 364 AND  
BANKRUPTCY RULE 4001**

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<sup>1</sup> The Debtors in these chapter 11 cases are Erickson Retirement Communities, LLC, Ashburn Campus, LLC, Columbus Campus, LLC, 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, Warminster Campus, LP.

The above-captioned debtors and debtors in possession (collectively, the "Debtors"), by their attorneys, DLA Piper LLP (US), hereby amend their prior Motion for an Order Authorizing Debtors to Amend Postpetition Financing [Doc. No. 1338] and move (the "Motion") this Court for entry of an order, substantially in the form of Exhibit A attached hereto, (i) authorizing the Debtors to enter into the First Amendment to Amended and Restated Super-Priority Debtor-In-Possession Loan Agreement (the "Amendment"), which, among other things, extends the maturity date of the postpetition financing until April 30, 2010 (the "Maturity Date") pursuant to sections 105, 361, 362, 363, and 364 of title 11 of the United States Code (the "Bankruptcy Code") and Bankruptcy Rule 4001; and (ii) approving a reasonable extension fee in the amount of \$25,000.00. In support of this Motion, the Debtors respectfully represent as follows:

#### **JURISDICTION**

2. The Court has jurisdiction over 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).
3. Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.
4. The statutory bases for the relief requested herein are Bankruptcy Code sections 105, 361, 362, 363, and 364 and Bankruptcy Rule 4001.

## **BACKGROUND**<sup>2</sup>

5. 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.

6. 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.

7. On November 2, 2009, the Office of the United States Trustee appointed a committee of unsecured creditors in these cases. No trustee or examiner has been appointed.

8. 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 Rundell Affidavit, and is incorporated herein by reference.

## **RELIEF REQUESTED**

9. By this Motion, Debtors request the entry of an order in substantially the same form as the order attached hereto as Exhibit A (i) authorizing the Debtors to enter into the Amendment pursuant to sections 105, 361, 362, 363, and 364 of title 11 of the United States Code (the "Bankruptcy Code") and Bankruptcy Rule 4001; and (ii) approving a reasonable extension fee in the amount of \$25,000.00.

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<sup>2</sup> Debtors' Motion for Interim and Final Orders (I) Authorizing Debtors to Obtain Postpetition Financing on a Senior Secured Superpriority Basis Pursuant to 11 U.S.C. §§ 105, 361, 362, 363, and 364; (II) Granting Adequate Protection to Prepetition Secured Lenders Pursuant to 11 U.S.C. §§ 361, 363, and 364; (III) Scheduling a Final Hearing Pursuant to Bankruptcy Rule 4001(b) and (c); and (IV) Granting Related Relief (the "DIP Motion") [Doc. No. 82], incorporated herein by reference, provides background information on the capital structure of the Debtors.

## **BASIS FOR RELIEF**

### **A. Applicable Authority for Amending DIP Financing**

10. Bankruptcy Code section 364(c) and (d) provides:

(c) If the trustee is unable to obtain unsecured credit allowable under section 503(b)(1) of this title as an administrative expense, the court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt -

(1) with priority over any or all administrative expenses of the kind specified in section 503(b) or 507(b) of this title;

(2) secured by a lien on property of the estate that is not otherwise subject to a lien; or

(3) secured by a junior lien on property of the estate that is subject to a lien.

(d)(1) The court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt secured by a senior or equal lien on property of the estate that is subject to a lien only if

(A) the trustee is unable to obtain such credit otherwise; and

(B) there is adequate protection of the interest of the holder of the lien on the property of the estate on which such senior or equal lien is proposed to be granted.

(2) In any hearing under this subsection, the trustee has the burden of proof on the issue of adequate protection.

11. Debtors who exercise sound business judgment, within the confines of the policies underlying the Bankruptcy Code, in obtaining postpetition financing are afforded deference by courts. See In re Ames Dep't Stores, Inc., 115 B.R. 34, 40 (Bankr. S.D.N.Y. 1990). As demonstrated below, the Debtors' entry into the Amendment is a reasonable exercise of its business judgment.

### **B. The DIP Lenders Are Entitled to Priming Liens as Set Forth in the DIP Facility**

12. Pursuant to Bankruptcy Code section 364(c), if a debtor is unable to obtain postpetition credit on an unsecured basis, a court may authorize the debtor to obtain postpetition credit or incur postpetition debt which entitles the postpetition lender to priming liens, a first-priority lien on unencumbered property of the debtor, and superpriority administrative expense status. 11 U.S.C. § 364(c)(1), (2), and (3). A debtor seeking postpetition financing must make reasonable efforts to seek credit on an unsecured basis, but the debtor is granted deference by the court if the court finds the debtor acted within its business judgment when seeking out alternative sources of financing. See, e.g., Bray v. Shenandoah Fed. Sav. & Loan Ass'n (In re Snowshoe Co.), 789 F.2d 1085 (4th Cir. 1986). Moreover, a debtor is not required to exhaustively seek out every potential source of postpetition financing. See id.; see also In re Mid-State Raceway, Inc., 323 B.R. 40, 58 (Bankr. N.D.N.Y. 2005); In re Baxco Corp., 148 B.R. 855, 860 (Bankr. N.D. Ill. 1992).

13. In October 2009, the Debtors negotiated with ERC Funding Co. LLC (the "DIP Lender") to obtain postpetition financing. These negotiations culminated in the DIP Lender's agreement to provide the Debtors with postpetition financing (the "DIP Facility").

14. On October 22, 2009, the Debtors filed Debtors' Motion for Interim and Final Orders (I) Authorizing Debtors to Obtain Postpetition Financing on a Senior Secured Superpriority Basis Pursuant to 11 U.S.C. §§ 105, 361, 362, 363, and 364; (II) Granting Adequate Protection to Prepetition Secured Lenders Pursuant to 11 U.S.C. §§ 361, 363, and 364; (III) Scheduling a Final Hearing Pursuant to Bankruptcy Rule 4001(b) and (c); and (IV) Granting Related Relief (the "DIP Motion") [Doc. No. 82],

incorporated herein by reference. Through the DIP Motion, Debtors sought approval of the DIP Facility.

15. On December 18, 2009, the Court entered the Final Order (I) Authorizing Borrowers to Obtain Postpetition Financing on a Senior Secured Superpriority Basis Pursuant to 11 U.S.C. §§ 105, 361, 362, 363, and 364; (II) Granting Adequate Protection to Prepetition Secured Lenders Pursuant to 11 U.S.C. §§ 361, 363, and 364; and (III) Granting Related Relief (the "Final DIP Order"), dated December 17, 2009 [Doc. No. 542], granting approval of the DIP Facility. The Debtors' efforts to obtain necessary postpetition financing satisfied the requirements of Bankruptcy Code section 364(c). The Debtors now request authorization to enter into the Amendment.

**C. Debtors Could Not Obtain Alternative Financing and the Prepetition Senior Secured Lenders' Interests Are Adequately Protected**

16. Bankruptcy Code section 364(d) allows postpetition financing that provides a postpetition lender a senior or equal lien on a debtor's encumbered property (a "priming" lien) if (i) the debtor could not obtain alternative financing and (ii) the interests of the secured parties whose security interests are being primed are adequately protected. See 11 U.S.C. § 364(d)(1).

17. Substantially all of the Debtors' assets are encumbered and, despite the diligent efforts of the Debtors and their financial advisors, the Debtors were unable to procure the required funding absent the proposed super priority claims and priming lines. The Debtors negotiated the best possible terms to obtain the funding they need to maintain sufficient liquidity to preserve their assets over the course of their chapter 11 cases, and the DIP Lender was unwilling to provide the DIP Facility without the priming

liens. Accordingly, the first requirement of Bankruptcy Code section 364(d)(1) is satisfied.

18. Additionally, the Prepetition Senior Lenders' security interests are adequately protected. Although the Bankruptcy Code does not define what constitutes adequate protection, Bankruptcy Code section 361, lists three (3) nonexclusive examples: to the extent of any decrease in value if an entity's interest in property resulting from the grant of a priming lien (i) a cash payment or periodic cash payments; (ii) an additional or replacement lien; or (iii) "granting such other relief, other than entitling such entity to compensation allowable under section 503(b)(1) of [the Bankruptcy Code] as an administrative expense, as will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property." Whether the protection offered by a debtor is adequate protection is determined on a case-by-case basis. See MNBank Dallas, N.A. v. O'Connor (In re O'Connor), 808 F.2d 1393, 1396 (10th Cir. 1987); Martin v. United States (In re Martin), 761 F.2d 472 (8th Cir. 1995). Further, the adequate protection requirement is designed to protect a lienholder from the diminution of the value of its interest due to use of priming. See In re Swedeland Dev. Group, Inc., 16 F.3d 552, 564 (3d Cir. 1994) ("The whole purpose of adequate protection for a creditor is to insure that the creditor receives the value for which he bargained prebankruptcy.") (internal citations omitted).

19. The Prepetition Senior Lenders are entitled, pursuant to Bankruptcy Code sections 361, 363(c)(2) and 363(e), to adequate protection of their interest in the prepetition Collateral, in an amount equal to the aggregate diminution in value of the Prepetition Senior Lenders' respective prepetition Collateral, including, without

limitation, any such diminution resulting from the sale, lease or use by the Debtors (or other decline in value) of the prepetition Collateral, and the imposition of the automatic stay pursuant to Bankruptcy Code section 362.

20. The Corporate Revolver Lenders will receive adequate protection in the form of the preservation of the cash and cash equivalents held by ERC as of the Closing Date. Furthermore, the Landowners' senior secured lenders will receive adequate protection in the form of the preservation of the enterprise value of the Debtors, jointly and severally. These protections are fair and reasonable and will protect the Prepetition Senior Lenders from diminution in value of the Prepetition Senior Lenders' interests in the Collateral. Accordingly, the requirements for priming existing liens are duly satisfied. The Debtors now request authorization to enter into the Amendment.

**D. Debtors' Entry into the Amendment is Necessary to Preserve the Value of the Debtors' Estates**

21. Given the nature of the Debtors' business, the residents', the employees', the NFPs', and the trade creditors' confidence in the viability of the enterprise is key to the Debtors' ability to continue operations without interruption. Therefore, the Debtors' entry into the Amendment will assure the above-listed parties that the Debtors remain vital and have the working capital necessary to continue operations, including payroll and capital expenditures, prior to and leading up to the closing with the ultimate goal of preserving and maximizing the going concern value of the Debtors' business which will inure to the benefit of all creditor constituencies.

**E. Entry into the Amendment Should Be Authorized as Fair and Reasonable and a Sound Exercise of the Debtors' Business Judgment**

22. The Debtors' entry into the Amendment is fair and reasonable. Moreover, approval of Debtors' entry into the Amendment will provide a continuation of Debtors'



immediate and ongoing access to funds to pay its current and ongoing operating expenses, including postpetition wages and salaries and vendor costs. Additionally, the continued availability of credit under the DIP Facility will provide confidence to the residents, employees, and trade vendors, thereby promoting a successful reorganization.

23. The DIP Facility provided that the Maturity Date would in no event be extended beyond April 17, 2010. In deciding upon this date, the Debtors and the DIP Lender took into account the probable length of time necessary to complete an auction, sale, and closing of the Debtors' company.

24. Prior to the present date, the Debtors believed there would be a plan confirmation in place at the time of entry into the financing and well before the Maturity Date. However, the Debtors confirmation has been delayed on account of issues with multiple creditor constituencies. These disputes delayed the confirmation process, but have now been resolved.

25. While confirmation will occur prior to the Maturity Date, an extension of the Maturity Date will be necessary so that the DIP Facility is still in place upon the effective date of a plan of reorganization.

26. Accordingly, the timely approval of the relief requested herein is imperative.

27. The Debtors submit that the decision to enter the Amendment reflects the exercise of sound business judgment.

### **NOTICE**

11. Notice of this Motion has been provided to (i) the United States Trustee for the Northern District of Texas; (ii) counsel to the creditors' committee; (iii) counsel to the DIP Lender; (iv) counsel to the prepetition secured lenders; and (iv) any known

lienholders whose liens are being primed under the DIP Financing. The Debtors submit that, in light of the nature of the relief requested, no other or further notice is necessary or required.

WHEREFORE, the Debtors respectfully request that the Court enter an order granting the relief requested herein and such other relief as is just and proper.

Dated: April 16, 2010

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ATTORNEYS FOR THE DEBTORS  
AND DEBTORS IN POSSESSION

**EXHIBIT A**

**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 COMMUNITIES, LLC, et a.<sup>1</sup></b>	§	<b>CHAPTER 11</b>
	§	
<b>Debtors.</b>	§	<b>(Jointly Administered)</b>
	§	

**ORDER AUTHORIZING DEBTORS TO EXTEND  
POSTPETITION FINANCING PURSUANT  
TO 11 U.S.C. §§ 105, 361, 362, 363, 364 AND  
BANKRUPTCY RULE 4001**

Upon the motion (the "Motion"), dated \_\_\_\_\_, of the above-captioned debtors and debtors in possession (collectively, the "Debtors"), by their attorneys, DLA Piper LLP (US), for entry of an order (i) authorizing the Debtors to enter into the First Amendment to Amended and Restated Super-Priority Debtor-In-Possession Loan Agreement (the "Amendment"), which, among other things, extends the maturity date of the postpetition financing until April 30, 2010 (the "Maturity Date") pursuant to sections 105, 361, 362, 363, and 364 of title 11 of the United States Code (the "Bankruptcy Code") and Bankruptcy Rule 4001; and (ii) approving a reasonable extension fee in the amount of \$25,000.00; upon all of the pleadings filed with this Court; upon the record made at the Interim Hearing, the Final Hearing, and the hearing on the Motion; and after due deliberation and consideration, and good and sufficient cause appearing therefor:

**IT IS HEREBY ORDERED THAT:**

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<sup>1</sup> The Debtors in these chapter 11 cases are Erickson Retirement Communities, LLC, Ashburn Campus, LLC, Columbus Campus, LLC, 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, Warminster Campus, LP.

1. The Motion is GRANTED.
2. The Debtors are authorized to enter in the Amendment attached hereto, subject to non-material modifications.
3. The Debtors are authorized to pay the DIP Lender an extension fee in the amount of \$25,000.00.
4. This Order shall not modify or amend the Final Order (I) Authorizing Borrowers to Obtain Postpetition Financing on a Senior Secured Superpriority Basis Pursuant to 11 U.S.C. §§ 105, 361, 362, 363, and 364; (II) Granting Adequate Protection to Prepetition Secured Lenders Pursuant to 11 U.S.C. §§ 361, 363, and 364; and (III) Granting Related Relief (the "Final DIP Order"), dated December 17, 2009 [Doc. No. 542], except that each of the terms and provisions of the Final DIP Order shall expressly apply with equal force to the Loan Agreement as amended by the Amendment.
5. The Court retains jurisdiction to hear any dispute arising out of the enforcement or interpretation of this Order.

Dated: \_\_\_\_\_, 2010  
Dallas, Texas

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UNITED STATES BANKRUPTCY JUDGE