

<b>In re:</b>	)	Chapter 11
	)	
<b>ERICKSON RETIREMENT</b>	)	Case No. 09-37010 (SGJ)
<b>COMMUNITIES, LLC, et al.,</b>	)	
	)	Jointly Administered
<b>Debtors</b>	)	Hearing Date: May 25, 2010 at 9:30 a.m.
	)	
	)	

Creditor Westchester Fire Insurance Company, a member of the ACE group of companies (hereinafter "ACE"), by and through its undersigned attorneys, hereby files this Motion to Compel Debtors to Remove Its Surety Bond from the Debtors' Contract Assumption List, and for Attorney's Fees, and in support thereof, aver as follows:

1. ACE is compelled to file this Motion because Debtors have failed to comply with the parties' agreement resolving ACE's objections to the confirmation of the Plan and have inexplicably refused to amicably resolve this matter with ACE.

2. Prior to the Petition Date, ACE issued a construction performance bond No. K07621899 (the “ACE Bond”) naming Concord Campus, L.P., c/o Erickson Retirement Communities, LLC ("ERC") as principal and Concord Township, Pennsylvania as the obligee. The Bond pertains to the construction of a retirement community campus in the Concord Township.

3. On March 25, 2010, Debtors filed a Notice of (I) Possible Assumption of Executory Contracts and Unexpired Leases, (II) Fixing of Cure Amounts, and (III) Deadline to Object Thereto (the "Notice"). *See* Doc. No. 1073.

4. The Amended Contract Assumption List was filed on April 10, 2010 (the "Amended List"). *See* Doc. No. 1288.

5. Pursuant to the original Contract Assumption List attached to the March 25, 2010 Notice and the Amended List, Debtors ERC and Concord Campus, LP sought to assume the ACE Bond.

6. On April 9, 2010, ACE filed objections to the confirmation of the Plan and to the purported assumption and assignment of the ACE Bond on the grounds, *inter alia*, that the (i) the ACE Bond is not an executory contract that can be assumed pursuant to 11 U.S.C. §365; (ii) even if the ACE Bond were an executory contract, it cannot be assumed or assigned because it is a non-assignable financial accommodation under 11 U.S.C. §365(c)(2); and (iii) the ACE Bond cannot be assumed or assigned because it is not property of the Debtors' Estates. *See* Docket Nos. 1266 and 1267.

7. On April 14, 2010, Debtors agreed to remove the ACE bond from the Contract Assumption List to resolve ACE's objections.

8. At the Plan confirmation hearing, Debtors stated on the record that they agreed to remove the ACE bond from the Contract Assumption List.

9. The Court confirmed the Plan on April 16, 2010.

10. On April 15, 2010, Debtors filed their Second and Third Amended Contract Assumption Lists. *See* Docket Nos. 1335 and 1341.

11. Although the Debtors have previously agreed to remove the ACE Bond from their Contract Assumption List and have represented so the Court, the Third Amended Contract Assumption List still lists the ACE Bond as one of the contracts being assumed by the Debtors.<sup>1</sup>

12. On April 16, 2010, ACE requested Debtors to file a corrected Contract Assumption List without any listings of the ACE Bond. *See* e-mail string attached hereto as Exhibit A on page 2.

13. The Debtors did not respond to this request.

14. On April 19, 2010, ACE again requested Debtors to promptly file a revised Contract Assumption List and advised Debtors that ACE intends to pursue a motion to compel and to seek attorney's fees if the Debtors continue to ignore their obligation to promptly remove the ACE Bond from the list. *See* Exh. A at p. 1.

15. In response, Debtors' counsel stated as follows:

Michael we had an agreement it was announced on the record and we will take care of it. I have had many things to deal with and frankly your rantings are a little far down the list. It will get addressed. However, if you would like to file a motion be my guest. [*Id.*]

16. Debtors' counsel failed to respond to ACE's repeated inquiries as to when the Debtors intend to "address" this matter.

17. Given Debtors' response to date, ACE has no choice but to bring this Motion to compel Debtors to remove the ACE Bond from the Contract Assumption List, as agreed by the parties and as represented to the Court.

18. ACE further respectfully requests that the Court award ACE attorney's fees and costs for preparing, filing, and arguing this Motion which was necessary given the Debtors'

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<sup>1</sup> The Amended Contract Assumption List filed on April 10, 2010, listed the same ACE Bond four times. Although one of the listings was removed from the lists filed on April 15, 2010, the ACE Bond is listed three times on the Third Amended Contract Assumption List, the last list filed on the record.

inexplicable refusal to promptly and amicably resolve this matter without the Court's involvement.

WHEREFORE, for all the foregoing reasons, Westchester Fire Insurance Company respectfully requests that the Court enter an Order compelling Debtors to remove the ACE Bond from the Contract Assumption List, to award it attorney's fees and costs for preparing, filing, and arguing this Motion, and to grant such other relief as the Court deems just.

Respectfully submitted,

GLAST, PHILLIPS & MURRAY PC

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Attorneys for Westchester Fire Insurance Company

Dated: April 20, 2010

## **CERTIFICATE OF SERVICE**

I certify that on this 20th day of April, 2010, I caused copies of the foregoing Creditor Westchester Fire Insurance Company's Motion To Compel Debtors to Remove Its Surety Bond from the Debtors' Contract Assumption List, and for Attorneys Fees to be served upon the following individuals in the matter indicated below:

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