

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

In re:)
)
ERICKSON RETIREMENT) Case No. 09-37010 (SGJ)
COMMUNITIES, LLC, *et al.*,)
) Chapter 11
Debtors.)
) (Jointly Administered)

**JOHNSON COUNTY'S
(1) OBJECTION TO DEBTORS' AMENDED MOTION FOR
DETERMINATION OF TAX LIABILITY AND
(2) REQUEST FOR ABSTENTION**

COMES NOW the Board of County Commissioners of Johnson County, Kansas ("Johnson County"), by and through its counsel, and files its Objection to Debtors' Amended Motion for Determination of Tax Liability and its Request for Abstention. In support of its Objection and Request, Johnson County respectfully states as follows:

I. PRELIMINARY STATEMENT

1. Johnson County is a political subdivision of the State of Kansas which possesses the authority under the laws of the State to assess and collect taxes on real and personal property.
2. Johnson County filed a pre-petition secured proof of claim for 2009 *ad valorem* taxes assessed against real property ("Kansas Campus") owned by Debtor Kansas Campus, LLC and certain of its affiliates (collectively, the "Debtors"). The general *ad valorem* real property tax

portion of Johnson County's 2009 claim is \$445,785.67.^{1 2} Johnson County has not filed a proof of claim for any 2010 taxes against Kansas Campus. Although Johnson County has determined the 2010 property valuation for Kansas Campus, taxes have not yet been assessed against Kansas Campus for the tax year 2010. For 2009 and 2010, Johnson County authorities valued the Kansas Campus property at \$35,096,120 and \$32,643,120 respectively.

3. Upon payment of the 2009 *ad valorem* taxes, Debtors will have the opportunity to appeal Johnson County's 2009 property valuation by paying the taxes under protest, pursuant to K.S.A. 2009 Supp.79-2005. If Debtors' payment under protest is successful, Debtors are entitled to full reimbursement plus lost interest of the amounts paid under protest. K.S.A.2009 Supp. 79-2005(1)(l).

4. Currently, Debtors have a property valuation appeal pending before local authorities regarding Johnson County's 2010 valuation of Kansas Campus.³ This appeal is to be heard on or before May 14, 2010.

5. Debtors contend that a prior finding of this Court⁴ allocating sale proceeds of the bulk asset sale transaction in this matter should be applied as representative of value for purposes of determining tax liability. Debtors further contend that the sales allocation value that should be applied for purposes of determining tax liability is based upon:

¹ Johnson County filed a Secured Tax Claim against Debtor Kansas Campus, LLC in the amount of \$ 1,729,323.11, Claim No. 1318, ("Secured Tax Claim") for 2009 prepetition real property taxes and special assessments on Parcel No. NP18660000 0001 (the "Property"). Johnson County's claim for \$1,729,323.11 is a valid perfected statutory superpriority secured claim against the Kansas real property of Debtor Kansas Campus, LLC. Pursuant to the Amended Order Confirming the Debtors' Fourth Amended Joint Plan of Reorganization, approved April 21, 2010, once Debtors fulfill their obligation to pay the undisputed 2009 special assessments portion of Johnson County's claim, Johnson County's claim will be reduced to \$445,785.67, the remaining outstanding general *ad valorem* real property tax obligations plus statutory interest.

² Johnson County filed a duplicative claim in Case No. 09-37010 against Debtor Erickson Retirement Communities, LLC, Claim No. 1754. On March 26, 2010 Debtors' filed their Second Omnibus Objection Cross-Debtor Duplicate Claims and Redundant Claims to disallow and expunge the Cross-Debtor Duplicate Claims of Johnson County, moving to disallow Johnson County Claim No. 1318 and to allow Johnson County Claim No. 1754 as the surviving claim.

³ See Valuation Appeal filed by Debtors' representative on March 16, 2010 attached as "Exhibit A"

⁴ Order of the Court Approving Valuation Allocation, Document No. 1289, signed 04/09/2010.

[W]hat Redwood believed, at the time of the Auction, to be the market value of the Assets, including the Taxed Properties. Therefore, the Allocation is a reflection of the Sale Price and thus the market value of the Assets, including the Taxed Properties. Thus the values in the Allocation are a reflection of the market value of the Taxed Properties and should guide the Court in valuing the Taxes Properties and determining the property amount of applicable taxes.⁵

6. Pursuant to 11 U.S.C. §505, Debtors seek to have this Court apply the sales allocation of proceeds value of \$0 to the determination of value for tax purposes for the Kansas Campus property for the 2009 and 2010 tax years, resulting in \$0 tax liability.

II. ARGUMENT

Pursuant to 11 U.S.C. §505 of the Bankruptcy Code, Debtors seek to have the Court re-determine the tax valuation and related taxes payable for their properties located within a number of states and within numerous taxing jurisdictions. §505(a) provides in relevant part:

[T]he court may determine the amount or legality of any tax...whether or not previously assessed, whether or not paid, and whether or not contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction.

In reading §505, a bankruptcy court is *permitted* but not required to determine the amount of a tax.

Debtors seek to have this Court impose one standard of market value across all the properties in question, a standard developed through a bulk asset sales allocation proceeding, a value determined following an auction with no cash purchase or allocation of value to the Kansas Campus property. Johnson County asserts that Debtors' proposed standard of market value is

⁵ Debtors' Amended Motion for Determination of Tax Liability, ¶30.

entirely inappropriate for a determination of value for tax liability purposes pursuant to Kansas law. If a Court decides to re-determine taxes pursuant to 11 U.S.C.§505, it must apply substantive applicable non-bankruptcy law. *In re Fairchild Aircraft Corp.*, 124 B.R. 488, 492-493 (Bankr.W.D.Tex. 1991); *In re Metromedia Fiber Network*, 299 B.R. 251, 270 (Bankr.S.D.N.Y. 2003). In this case, if the Court permits redetermination, because each tax authority involved has its own method of determining the value of property for tax purposes, the Court must sit as a local tribunal for each taxing jurisdiction and apply to each the different state laws, rules and procedures used for the determination of property values and taxation that are applicable under local law.

In contrast, the Debtors Motion requests the Court re-determine the valuation of properties that are located in different jurisdictions and subject to different statutory procedures based on a bulk-sale auction of distressed assets that does not comport with the requirements dictated by local law (at least for Kansas) and a subsequent allocation of the proceeds to individual assets that is based solely on what Redwood arbitrarily “believed” the value of such assets to be at the time of the Auction. Further, it is obvious from reading the Motion for Order Determining Allocation of Sales Proceeds and the subsequent Order that was filed in these proceedings that the sole purpose of the allocation was to attempt to equitably divide the proceeds derived from the bulk-sale among the various bankrupt entities and the process had no relevance at all to determination of fair market value of the individual assets for tax purposes. Local taxing authorities were not provided notice or an opportunity to participate in the allocation process. By seeking a different standard than that used uniformly within each jurisdiction, Debtors bring uniformity of assessment of taxes to the forefront. If this Court were to substitute its judgment for the independent process of each jurisdiction required by the laws of

each state as requested by the Debtors, the Court would be interfering with the uniform assessment of property within each jurisdiction.

Johnson County therefore asks the Court to recognize the need and requirement for the uniformity of assessment and requests that the Court exercise its power of discretionary abstention pursuant to 28 U.S.C. §1334(c)(1) which provides:

[N]othing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

Courts have held abstention is appropriate in §505 matters where “[a]d valorem property taxation is governed by local law, and there is compelling local interest in ‘uniformity of assessment’ in fairly allocating the local tax burden.” *In re Metromedia Fiber Network, Inc.*, 299 B.R. 251, 284 (Bankr.S.D.N.Y. 2003). By calling into question the valuation of the property, Debtors are questioning the underlying valuation methods applied and evidence considered by each taxing jurisdiction. In such cases where each jurisdiction’s entire property taxation scheme is called into question, abstention is appropriate. “In the context of section 505, abstention is often used where the uniformity of assessment is an issue.” *In re ANC Rental Corp.*, 316 B.R. 153, 159 (Bankr.D.Del. 2004); *In re Metromedia Fiber Network*, 299 B.R. at 281-283. “Each tax authority must enjoy and apply a uniformity of assessment within its tax jurisdiction.” *In re Cable & Wireless U.S.A., Inc.*, 331 B.R. 568, 578 (Bankr.D.Del. 2005). Congress did not intend to set up the bankruptcy courts as super-assessment tribunals over state taxing agencies. 11 U.S.C. §505; *See, Arkansas Corporation Commission v. Thompson*, 313 U.S. 132, 145, 61 S.Ct. 888, 85 L.Ed. 1244 (1941).

In *In re ANC Rental Corp.*, 316 B.R. 153, 159 (Bankr.D.Del. 2004) the Court cited a six-factor test for determining whether to abstain from hearing §505 cases:

- (1) the complexity of the issue under tax law,
- (2) the exigency of the matter,
- (3) the burden on the bankruptcy court's docket,
- (4) the length of time required to a trial and to render a decision,
- (5) the debtor's asset and debt structure, and
- (6) the actual or potential prejudice to either party.

See, also, In re Pilgrim's Pride Corp., 2009 Bankr. LEXIS 2222 at *11 (Bankr.N.D.Tex. Aug. 17, 2009).

Regarding the first factor, the valuation of a number of properties located in different states, for tax purposes, is a complex tax issue to be decided. Kansas law as well as all the other states' laws, including their constitutions must be examined to determine the value. The complex nature of the assessment process in Kansas has been recognized through the establishment of the Kansas Court of Tax Appeals, a specialized court with jurisdiction to handle appeals of ad valorem property tax assessments disputes. Regarding the need to administer the bankruptcy case, the burden on the Court's docket and the length and time required for trial and decision, for the Court to hear this motion will require it to hear from a number of states and numerous jurisdictions with different laws, rules and procedures for the valuation of property and payment of taxes. Foreseeably, a separate hearing would be required with respect to each of the properties at issue. Further, the local taxing jurisdictions involved would be unduly burdened by litigating local matters in the state of Texas.

Considering the asset and liability structure of the Debtors, the monies for payment of any potential liability to Johnson County have been escrowed by the Debtors for payment once a Court determination of actual liability has been made.⁶

Lastly, reducing or disallowing the secured *ad valorem* real property tax would severely prejudice Johnson County. Reducing the tax base by thirty-five million dollars to a value of \$0 would greatly impact the budgets of all local taxing jurisdictions currently relying on the existing valuation. Furthermore, Debtors would not be prejudiced in continuing the pursuit of their pending valuation appeal at the local level. Debtors' pending valuation appeal proceedings at the local level will not delay the administration of the bankruptcy estate. The 2010 valuation issue for the subject property is currently being addressed by the local taxing authorities. On March 16, 2010, Debtors' filed an appeal of Johnson County's 2010 valuation of Kansas Campus. That matter is scheduled to be heard for on or before May 14, 2010. Regarding the 2009 valuation, Debtors have the opportunity to pay their taxes under protest, pursuant to K.S.A. 2009 Supp. 79-2005. If Debtors' payment under protest is successful, Debtors are entitled to full reimbursement plus lost interest of the amounts paid under protest. K.S.A. 2009 Supp. 79-2005(1)(1).

Furthermore, no bankruptcy issue needs be decided by the Court to determine Debtors' liability to Johnson County. Debtors' liability to Johnson County depends entirely on Kansas law and the Court's abstention in the case at bar will not delay or impair the Debtors' reorganization because determination of the question of Debtors' liability to the County is not a part of the Debtors' reorganization. Because Debtors' plan for reorganization has already been confirmed, the issues of tax liability determination before the Court are not determinative of Debtors' ability to confirm a plan.

⁶ Amended Order Confirming Debtors' Amended Fourth Amended Plan of Reorganization, ¶15 and ¶41.

To summarize, each of these factors weighs heavily in favor Johnson County. The issues to be decided are fact intensive and involve solely the issue of a number of states' laws and local jurisdictions.

In conclusion, without offering any relevant evidence that would be a basis for relief against Johnson County, and without any evidence before this Court that indicates why Johnson County's value is incorrect, Debtors would have this Court re-determine the valuation of the Kansas property using a bulk-sale method of valuation and arbitrary allocation of proceeds that is clearly not appropriate for determining values for taxation purposes under Kansas law. The inappropriateness of using Debtors bulk-sale valuation method is clearly illustrated by the fact Debtors seek to have the value of Kansas Campus reduced from over thirty-five million dollars to a value of zero, resulting in no tax liability to the County.

WHEREFORE, based on the foregoing, Johnson County respectfully requests that the Court abstain from re-determination of the subject property tax valuation and related taxes in the interest of preserving uniformity of assessment and respectfully requests that this Court enter an Order denying the relief requested by Debtors' Motion based on the reasons cited above and granting such other and further relief as to which the Court finds Johnson County is entitled.

Respectfully submitted this 23rd day of April, 2010.

BY: /s/ Lisa R. Wetzler
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COMMISSIONERS, JOHNSON COUNTY, KS

CERTIFICATE OF SERVICE

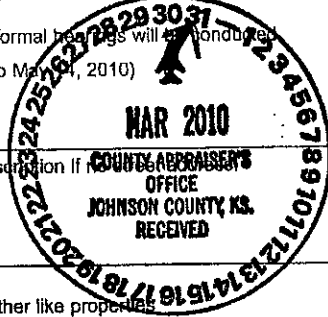

I hereby certify that on April 23, 2010, a true and correct copy of the foregoing document was filed electronically with the Court using the CM/ECF system, which sent notification to all parties of interest participating in the CM/ECF system.

/s/ Lisa R. Wetzler _____

EXHIBIT A

2010 INFORMAL APPEAL FORM

IF YOU DO NOT AGREE WITH THE ESTIMATE OF VALUE, USE THIS FORM TO APPEAL. DO NOT DUPLICATE THIS FORM FOR OTHER PROPERTIES YOU MAY OWN.

NOTICE OF APPEAL	INSTRUCTIONS FOR APPEALING: (ONE APPLICATION PER PROPERTY) Print your name and address. List telephone numbers where you can be reached during the daytime hours. State reason for your appeal. List your estimate of value. Sign and date form. Mail the appeal form. THIS FORM MUST BE POSTMARKED ON OR BEFORE 3/31/2010. The county will send a confirmation letter of the date and time of the informal hearing at least 10 days prior to the scheduled date.		RETURN THIS NOTICE TO: Jo. Co. Appraiser's Office Hearing Coordinator 11811 S. Sunset Dr., Suite 2100 Olathe, Kansas 66061-7060
1. OWNER'S NAME AND ADDRESS	Last Name: <i>Kansas Campus, LLC</i> First Name: _____ Telephone number: Work: <i>(972) 788-1668</i> Home: <i>(214) 451-4080</i> cell _____ <input type="checkbox"/> CHECK THIS BOX IF YOUR MAILING ADDRESS HAS CHANGED FROM THE ONE SHOWN ON THIS FORM. (Change will not correct permanent records. To change permanent records, contact the Records & Tax Admin. (913) 715-0775)		
2. REPRESENTATIVE	Name of Representative or Attorney (If Applicable): <i>David Dodd, Brazos Tax Group, LLP</i> Address: <i>12750 Merit Drive, Suite 601, Dallas, TX 75251</i> (If applicable a Declaration of Representative form MUST be filed before the hearing can take place)		
3. PARCEL IDENTIFICATION NUMBER	Parcel Number: <i>046-079-31-0-10-08-001.00-0 R214623 400 1210</i>		
4. INDICATE (A) TYPE, (B) DAY/TIME AND (C) UNAVAILABLE DATES FOR HEARING	(A) Type of Hearing: (check one) <input type="checkbox"/> IN PERSON (you come to our office) ----- OR ----- <input checked="" type="checkbox"/> TELEPHONE (we call you) Indicate telephone number to be used for telephone hearing here: <i>(972) 788-1668</i>	(B) Day / Time: (check one): <input type="checkbox"/> Monday - Friday 8 a.m. to 5 p.m. Special scheduling <input type="checkbox"/> Tuesday or Thursday evenings after 5:00 p.m. (Limited availability) <input type="checkbox"/> Saturday 8 a.m. to 5 p.m. (Limited availability)	(C) List UNAVAILABLE dates: If possible we avoid scheduling these dates. (All informal hearings will be conducted prior to May 14, 2010) 
5. DESCRIBE PROPERTY UNDER APPEAL	Indicate the street address and city for this property. If different from above, or a brief legal description if different from above: <i>013750 Metraff Avenue, Overland Park, KS</i>		
6. CHECK REASON FOR APPEAL	<input checked="" type="checkbox"/> Value is over market value <input type="checkbox"/> Agricultural Use <input type="checkbox"/> Value is unequal compared with other like properties <input type="checkbox"/> Classification <input type="checkbox"/> Other		
7. OWNER'S ESTIMATE OF VALUE	Owner's Estimate of Value: <i>0</i>	Basis of Estimate: <i>Pending Sale Transaction</i>	
8. SIGN AND DATE	Owner's or Representative/Attorney's Signature: 	Date: <i>3/16/10</i>	

APPEAL PROCESS - PLEASE READ THE FOLLOWING

You have the right to appeal the appraised value and the classification (the use) assigned to your property. Each year is a new valuation. If you have an appeal pending for the prior tax year, to preserve your rights for the current tax year, you must appeal the current year's valuation. A resolution of a prior tax year may not affect a subsequent tax year. Should you decide to appeal, follow these instructions. Please note the filing deadline:

1. If you want to schedule an informal hearing on the valuation and/or classification of your property, please mail this form to the appraiser's office. **To be a valid appeal, this form must be postmarked on or before 3/31/2010.** On receipt of this form, you will receive a confirmation letter stating the date and time of the hearing to be sent to you at the address shown on the front of this form (unless you have indicated a different address above), at least 10 days in advance of your scheduled hearing.
2. If you plan to be represented by someone other than yourself, you must file a "Declaration of Representative" form with the appraiser's office prior to the date of the hearing. An immediate family member may represent you without filing a declaration. To obtain the representative form, contact the appraiser's office.
3. All informal hearings will be conducted prior to May 14, 2010. Results of the hearings stating the county's final determination will be mailed to you no later than May 20, 2010.
4. For more assistance, visit our website, <http://appraiser.jocogov.org/>



046-079-31-0-10-08-001.00-0

R214623

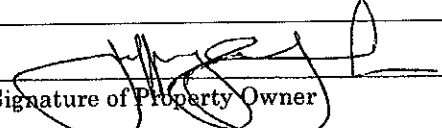
DECLARATION OF REPRESENTATIVE

<u>Property Owner(s) Name(s) as it appears on the Change of Value Notice</u> Kansas Campus, LLC
<u>Property Owner's Mailing Address (Street, PO Box, City, State, Zip Code)</u> 701 Maiden Choice Lane Baltimore, MD 21228-5968
<u>Property Owner's Telephone Number</u> (410) 402-2407

hereby appoints the following individual, corporation, limited liability company, organization, firm or partnership

<u>Individual Representatives Name and Title</u> David Dodd
<u>If applicable, provide Corporation, Limited Liability Company, Organization, Firm or Partnership Name</u> Brazos Tax Group, LLP
<u>Representative's Mailing Address (Street, PO Box, City, State, Zip Code)</u> 12750 Merit Drive, Suite 801 Dallas, TX 75251
<u>Representative's Telephone Number</u> (972) 788-1668 (214) 454-4080

To represent the above named property owner before the State Court of Tax Appeals pursuant to the Court's rules and regulations for property located in Johnson County for the 2010-2012 tax year(s).

 Signature of Property Owner	<u>3/12/10</u> Date
<u>Jeffrey Jacobson</u> Printed Name	<u>CFO Treasurer</u> Title