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**UNITED STATES BANKRUPTCY COURT**
**FOR THE NORTHERN DISTRICT OF TEXAS**
(Dallas Division)

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| **IN RE:** | |
| **ERICKSON RETIREMENT COMMUNITIES, LLC *et al.*** | **Chapter 11**<br>**Case No. 09-37010-SGJ**<br>(Jointly Administered) |
| *Debtors* | |

**LOUDOUN COUNTY'S RESPONSE TO DEBTORS' MOTION FOR DETERMINATION OF TAX LIABILITY AND REQUEST FOR ABSTENTION**

The COUNTY of LOUDOUN, VIRGINIA, by counsel ("the County"), files this Response to Debtors' Motion for Determination of Tax Liability filed on April 2, 2010 (the "Motion"), and this Request for Abstention, and in support hereof states as follows:

**PRELIMINARY STATEMENT**

1. The Debtors filed for bankruptcy protection on October 19, 2009 (the "Petition Date").

2. The Debtors are debtors in possession authorized to operate their business pursuant to 11 U.S.C. §1107 and 11 U.S.C. §1108.

3. The County is a political subdivision of the Commonwealth of Virginia and is empowered to levy taxes on real estate and business tangible personal property situated therein. VA. CODE ANN. §58.1-3000.

4. Liability for *ad valorem* real estate and tangible business personal property taxes exists as of January 1st of each year pursuant to VA. CODE ANN. §58.1-3281 and §58.1-3515 (1950, as amended).[1]

5. On October 28, 2009 the County timely filed its Proof Claim for 2009-second-installment-unpaid-pre-petition real estate taxes and 2009-second-installment-delinquent-pre-petition business personal property taxes (the "Claim"). The total amount of the Claim is $513,860.66, of which $511,413.01 corresponds to real estate taxes (without penalty or interest because Claim was filed before the second installment of 2009 real estate tax was due)[2] and $2,447.65 corresponds to business personal property taxes ($2,206.82 taxes, $220.68 late payment penalty and $20.15 interest, because Claim was filed after the second installment of 2009 business personal property tax was due).

6. The County's ad valorem real estate and personal property taxes are fully secured[3]. Since the date the County filed its Claim, interest at the rate of 10% per annum have accrued. The County is entitled to payment of interest on its Claim, pursuant to 11 U.S.C. §§506 and 511, VA. CODE ANN. §58.1-3916 and §860.03 CODIFIED ORDINANCES OF LOUDOUN COUNTY (L.C.C.O.).[4]

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[1] "The beginning of the tax year for the assessment of taxes on real estate shall be January 1…" VA. CODE ANN. §58.1-3281. "[T]angible personal property…shall be returned for taxation as of January 1 of each year, which date shall be known as the effective date of assessment or the tax day." VA. CODE ANN. §58.1-3515.

[2] "The governing body of any county…may…by ordinance establish due dates for the payment of local taxes; may provide that payment be made…in two equal installments…" Va. Code Ann. §58.1-3916. "[R]eal estate, taxes are due on June 5 and December 5, annually; for tangible personal property, taxes are due on May 5 and October 5 annually." Section 860.01 of the Codified Ordinances of Loudoun County, Virginia (L.C.C.O). Business tangible personal property taxes are due on June 5 and October 5 annually. Section 860.04 of L.C.C.O.

[3] "There shall be a lien on real estate for the payment of taxes and levies assessed thereon prior to any other lien or encumbrance". VA. CODE ANN. §58.1-3340. "Taxes specifically assessed either per item or in bulk shall constitute a lien against the property so assessed and shall have priority over all security interest…" VA. CODE ANN. §58.1-3942.

[4] "Interest may commence not earlier than the first day following the day such taxes are due by ordinance…at a rate not to exceed ten percent per year…" VA. CODE ANN. §58.1-3916. "...[F]ailure to pay the taxes on time, interest at the rate of ten percent per year…computed on a monthly basis beginning the first

7. On April 23, 2010, the County filed its Administrative Expense Claim (the "Administrative Claim"), for 2010 unpaid real estate and business personal property taxes that shall be paid when due "in the ordinary course of business" pursuant to 11 U.S.C. §§503(b) and 507(a)(2), and section 2.1 of the Debtors' Plan confirmed on April 16, 2010. The total amount of the Administrative Claim is $1,183,588.07, of which $1,133,902.90 corresponds to real estate taxes (without penalty or interest because Administrative Claim was filed before the 2010 real estate taxes are due) and $49,685.17 corresponds to business personal property taxes (without penalty or interest, because Administrative Claim was filed before the 2009 real estate and business personal property taxes are due.

8. On April 2, 2010 the Debtors filed the Motion for Determination of Tax Liability (the "Motion"). It is not clear from the Motion which annual local assessments for tax purposes the Debtors are challenging[5]. What it is clear from the Motion is that the Debtors are asking this Court to (i) determine the fair market value of the Taxed Properties[6] based on the Sale Price and Allocation; and (ii) adjust the Debtors' tax liabilities related to the Taxed Properties (Motion ¶23). The term "Sale Price" is defined in the Motion as "all cash bid price of $365 million" (Motion ¶15). The term "Allocation" is defined in the Motion as Redwood's "valuation of the Assets, allocating the Sale Price to each of the Debtor's Assets…based on Redwood's business judgment." (Motion ¶17).

**ARGUMENT**

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day following the day such payment is due, until the day of actual payment…" Section 860.03 L.C.C.O.

[5] In Paragraph 20 of the Motion, the Debtors state: " Following the Petition Date, various local tax authorities…filed proofs of claim… asserting ad valorem tax claims on a number of the Assets, consisting of both personal and real property of the Debtors…The taxes sought from the Debtors in the Proofs of Claim are based on the LTAs' asserted valuations of the Owned Properties.

[6] Capitalized terms used in this Response that are not defined herein have the meaning as defined in the Motion.

## I. Request for Abstention

A. The Court should exercise its discretion to abstain under 28 U.S.C. §1334(c)(1) or to decline jurisdiction under 11 U.S.C. §505(a)(1) and abstain from hearing the Motion:

> 9. Section 505(a) of the Bankruptcy Code provides, in relevant part: "[T]he court *may* determine the amount of 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." (Emphasis added).

Section 505(a) *permits* a bankruptcy court to determine the amount of a tax, but *does not require* the bankruptcy court to do so. Likewise, 28 U.S.C. section 1334(c)(1) provides that:

> "[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 title11."

10. The United States Supreme Court in 1940 established the principles for abstention in bankruptcy cases when it stated that, under proper circumstances, it is more appropriate to have a state court hear certain matters of state law, and that the bankruptcy court's proper exercise of its control over the bankruptcy estate "may, where the interests of the estate and the parties will best be served, lead the bankruptcy court to consent to submission to state courts of particular controversies involving unsettled questions of state property law and arising in the course of bankruptcy administration." Thompson v. Magnolia Petroleum, Co., 309 U.S. 478, 483 (1940).

11. In Arkansas Corp. Comm'n v. Thompson, 313 U.S. 132, 145 (1941), the United States Supreme Court, addressing the right of power of a federal bankruptcy court to revisit and re-determine for state tax purposes the property value of a debtor railroad in reorganization under the Bankruptcy Act held:

> "There is nothing in the history of bankruptcy or reorganization legislation to support the theory that Congress intended to set the federal court up as super-assessment tribunals over state taxing agencies… And the policy of revising and determining state tax valuation… would be a complete

> reversal of our historic national policy of federal non-interference with the taxing power of states".

The principle enunciated by the Supreme Court -- that Congress did not intend the federal courts to serve as "super-assessment tribunals over state taxing agencies" is still good law.

12. The bankruptcy courts have articulated a multi-factor test to determine whether to abstain from hearing a tax issue under 11 U.S.C. §505. Among those factors are (a) the "extent to which [non-bankruptcy] law issues predominate over bankruptcy issues"; (b) "the complexity of the tax issue to be decided and the length of time which would be required for trial and decision; (c) the complexity of the case; (d) the burden on the bankruptcy court's docket; and (e) any prejudice to the debtor and potential prejudice to the taxing authorities. In re Portrait Corporation of America, Inc., 406 B.R. 637, 641 (SDNY 2009); In re ANC Rental Corporation, 316 B.R. 153, 158 (Del. 2004); In re Lyondell Chemical Company, Case No. 09-10023 (REG), U.S. Bankruptcy Court Southern District of New York, April 19, 2010.

13. In favor of abstention, the County asserts that the determination of tax liability is a matter of state law. Even when "making its determination under 11 U.S.C. §505 a court's valuation must be consistent with state law principles, and a court must give full faith and credit to the law of the state upon which the tax to be determined is based." In re Blue Cactus Post, L.C. 229 B.R. 379, 386 (Bnkr. N.D. Tex. 1999); In re A WB Assocs., G.P., 144 B.R. 270, 278 (Bnkr. P.A. 1992). Even the Debtors accept that the notion that determination of tax liability is a matter of state law. (Motion ¶ 24).

14. In favor of abstention, the County asserts that the determination of local tax assessment is extremely complex and extensively fact intensive. Each local jurisdiction has its own taxing methodology. As the Delaware court recognized –

> A "trial on this matter could be lengthy. The Court would need to hear evidence not only as to the Debtors' assets, but on the proper method of valuing these assets. Unlike other section 505 cases, the issue to be determined here is not simply whether the tax is due, but whether the proper method for determining what tax is due was used. Trial could require expert testimony by both sides as to

> the market value of the assets. This factor weighs in favor of abstention." *In re ANC Rental Corporation*, 316 B.R. 153 at 159 (Del. 2004).

15. In favor of abstention, the courts have taken into consideration the complexity of the case and the burden on the Court's docket. In Debtors' own words: "There are several unique aspects of these cases that heighten the significance of the allocation process and methodology. First, the complex capital structure of the Debtors and then the bulk-sale nature of the proposed restructuring transactions collectively presenting thorny valuation and allocation issues." (Allocation Motion ¶ 16).

16. In favor of abstention the County states that Debtors have proper forum within the state courts of the Commonwealth of Virginia to resolve their differences with the County as to the valuation of the Taxed Properties located within the County and the subsequent determination of their taxes. Therefore, if the court abstains from hearing the Motion, such abstention will not preclude in any way the rights of the Debtors to appeal to the County or to Virginia state courts and seek remedy there. Also, the Debtors have not alleged, nor established that the courts of Virginia have acted or can be expected to act "in a manner which is arbitrary and capricious, discriminatory, or violative of state or local statutes or rules." In re Lyondell Chemical Company, Case No. 09-10023 (REG), U.S. Bankruptcy Court Southern District of New York, April 19, 2010; In re Metromedia, 299 B.R., 251, 283 (S.D. N.Y. 2003).

17. In favor of abstention, this Court has ruled that:

> "the exigencies of the matter must be taken in context: disposition of the question of debtors' liability to the County is not a significant piece of the reorganization puzzle –even if a decision is delayed past the projected time of plan confirmation, that is unlikely to affect the progress of Debtors' reorganization… Yet the facts on the ground are in state law' and there may be prejudice to the parties to force trial of those facts in so distant a forum as this court…the court is not at this point persuaded that a decision on the particular tax issue is necessary or even of great significance to Debtors' ability to formulate and confirm a plan of reorganization. Thus it is doubtful that it would matter if trial of the issue were deferred." In re Pilgrim's Pride Corporation, Lexis 2222, (Bankr. N.D. Tex., August 17, 2009).

Debtors' Plan was confirmed by order entered on April 16, 2010, the closing

of the Debtors' sale of assets to Redwood is scheduled for April 30, 2010. These are events that did take place or will take place regardless of the ruling of this Court on the Motion. The full amount of the Claim is $513,860.66, and the full amount of the Administrative Expense Claim is $1,183,588.07. The Sale Proceeds amount to $365 million and the Allocation with respect to Ashburn is $68,775 million. It is worth noticing that Schedule F –Recovery Analysis- of the Plan, as confirmed, already includes 2009 local taxes outstanding. Moreover, upon the Plan, as confirmed, Debtors shall pay to the County and the other Local Taxing Authorities the portion of the taxes that is undisputed and escrow the balance until dispute is resolved. Therefore, the financial impact for Debtors of the ruling of this Court on the Motion is much lower than the amount of the Claim and the amount of the Administrative Claim, because such ruling would only refer to the disputed amount of the taxes levied by the County. Therefore, the magnitude of the County's claims should be put in perspective and thus the Court may decide to abstain. In re Lyondell Chemical Company, Case No. 09-10023 (REG), (Bankr. SDNY, April 19, 2010).

18. In favor of abstention this Court ruled on a motion to determine post petition tax liability that "Once a debtor files for bankruptcy, it must manage and operate its property according the requirements of valid non-bankruptcy law just as would an owner of the property out of bankruptcy. See 28 U.S.C. §959(b)." In re The Village at Oakwell Farms, Ltd., Case No. 09-52932-C-, (Bankr. WD Tex, April 16, 2010.) In this case, Redwood, the purchaser, should be able to run its business as would an owner of a similar business out of bankruptcy. The 2010 taxes will be pro-rated between the Debtors and Redwood (Exhibit F of Debtors' Plan, as confirmed). Thus, Real and personal property taxes for 2010 would be mainly paid by Redwood. There is no reason why Redwood should benefit from the tools that the Bankruptcy Code provides to the Debtors.

B. The Court may abstain from determining local tax assessments in order to preserve the uniformity of tax assessments required by the Virginia Constitution:

19. In the present case, where the assessment methodology is established by state law, uniformity of assessment would be at risk should the bankruptcy court apply national standards and not state law to the assessment of the Taxed Properties within the County. In similar cases, the Second Circuit Court of Appeals has stated that "…a bankruptcy court has the discretion to abstain from re-determining a debtor's tax liability where uniformity of assessment is of significant importance." *See* In re New Haven Projects Ltd. Liability Co., 225 F3d. 283, 288 (2000); In re Fairchild Aircraft Corp., 124 B.R. 488, 491 (W.E. Tex. 1991); In re Metromedia Fiber Network, Inc., 299 B.R. 251, 281 (S.D. N.Y. 2003).

20. Should this Court accept the method of valuation for tax purposes urged by Debtors, then the Taxed Properties will be valued differently from the assets of other businesses located in Virginia, thus impairing the uniformity of assessment and taxation within the County, in violation of the Constitution of Virginia (Article X, §1)[7]. "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. Del. 2005). "The problem with the debtor's "streamlined" unified approach to determining the "fair market value" of all of their Taxable Property in multiple taxing jurisdictions using a single methodology or combination of methodologies is that the resulting uniform valuation may produce results which are highly anomalous and discriminatory vis-à-vis other similarly situated taxpayers in the various taxing jurisdictions…Nothing in the Constitution or the Bankruptcy Code entitles a debtor to uniform property tax determinations in different jurisdictions, and nothing in federal law entitles the federal courts to impose uniform taxation schemes or methodologies on state and local governments." In re Metromedia Fiber Network, Inc., 299 B.R. 251, 283 (S.D. N.Y. 2003).

[7] "All property, except as hereinafter provided, shall be taxed. All taxes shall be levied and collected under general laws and shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax…" Va. Constitution Art. X, §1.

## II. In the alternative, the Motion is improper and without merit and should be denied

C. The Motion is improper:

21. **The Motion's lack of fairness:** In the Motion for Order Determining Appropriate Allocation of Sales Proceeds (the "Allocation Motion") (Docket No. 906), the Debtors did not advise the County and other Local Taxing Authorities, that the Allocation would be determinative of the value of the Taxed Properties for purposes of tax claims. The Allocation Motion did not express that the Allocation, if approved by the Court, would be used as conclusive evidence of the incorrectness of the assessments made for tax purposes by the County and the Taxing Authorities.

22. **The Motion does not define the scope of Debtors' petition**: The Motion does not clearly establish Debtors' petition, and therefore it is impossible for the County and the other local taxing authorities to properly defend themselves. The Motion only states that the Sale Price and the Allocation shall determine the fair market value of the Taxed Properties for tax purposes. The Motion, however, does not define which assessments are challenged by Debtors. As to the County: Is the 2009 assessment challenged? Is the 2010 assessment challenged? Are both 2009 and 2010 assessments challenged? The Motion has no answer to these questions and thus the County cannot properly answer to the Motion. Moreover, Debtors have real estate (the "Real Estate") as well as business tangible personal property (the "Personal Property") located in the County. The Motion does not define the scope of the tax determination: Does it cover the Real Estate only? Does it include the Personal Property as well? The Motion provides no answers to these questions either.

23. **The Motion does not establish the Debtor's alleged fair market value of the Taxed Properties:** Neither the Sale Price nor the Allocation identifies how the Sale Price was allocated between the Real Estate and the Personal Property. The Motion only contends that

from the Sale Price of $365 million, the Purchaser allocated $68.775 million to the Taxed Properties within the County (Ashburn). The Motion does not clarify, however, the portion of the Sale Price that was allocated to the Real Estate or the portion of the Sale Price that was allocated to the Personal Property. Thus, the Motion does not establish what the Debtors believe is the correct fair market value of each one of the Taxed Properties within the County.

24. **The Motion lacks information for the Court to determine the fair market value of the Taxed Properties:** The scope of the Allocation Motion was to "properly determine the allocation of the Transaction Proceeds among the assets being sold…and allocate such proceeds to the applicable Debtors owning such assets" (Allocation Motion's Request of Relief). The Allocation was important for the Debtors because (i) "the Definitive Agreement,…contemplated a "bulk sale of the Debtors' assets for a stated price of $365 million" (Allocation Motion ¶ 6) and (ii) "the Definitive Agreement does not allocate the sales price to any particular asset being purchased." (Allocation Motion ¶ 7). The Allocation Motion had no relation with the valuation of the Taxed Properties for tax purposes because, among other reasons, the same Allocation Motion acknowledges that neither the Debtors nor the Purchasers allocated the Sale Price *to any particular assets being purchased* and that the Sale Price of $365 million was the product of a *bulk sale of Debtors' assets*. On the contrary, the assessment for tax purposes made by the County is asset specific and, therefore, the Allocation Motion (or the Allocation Order) could not be used as determinative of fair market value of the Taxed Properties for tax purposes because neither one specifically allocate a specific value to any of the Taxed Properties within the County. As the Allocation Motion does not determine a fair market value for each of the Taxed Properties, and as the assessments for tax purposes are asset specific, it is impossible for the County, the Local Taxing Authorities or the Court to establish what is the fair market value alleged by the Debtors for each one of the Taxed Properties.

25. **The Debtors need to file an adversary proceeding:** The Motion seeks to reduce the amount and extent of the County's tax lien and determine its validity. Bankruptcy Rule 7001. Therefore, in accordance with the Rules, the issues raised by the Motion should properly be filed as an adversary proceeding. Debtors failed to do so. Moreover, the Motion states that this Court may "use its authority to set the values of the Taxed Properties at their respective fair market values based on Redwood's Allocation and the related Sale Price, and then adjust the corresponding taxes accordingly". (Motion ¶ 26). However, the Motion does not provide for proper time for discovery, or any type of evidentiary hearing. The County respectfully states that the County, and the other Local Taxing Authorities, should have the opportunity to put in front of this Court their own evidence as to their valuation of the Taxed Properties for tax purposes in an evidentiary hearing, within the context of an adversary proceeding.

D. The Motion is without merit:

26. **Under Virginia law, the assessment of the assessor is presumed correct:** The assessments of the County's assessor are presumed correct and the taxpayer challenging an assessment must prove, by a preponderance of the evidence, that the "property in question is valued at more than its fair market value or that the assessment is not uniform in its application, or that the assessment is otherwise invalid or illegal." VA. CODE ANN. §58.1-3984. "To overcome a presumption of correctness, the debtor must apply state law, not national standards." In re: Cable & Wireless USA, Inc. 331 B.R. 568, at 579 (Del. 2005). The Debtors in their Motion failed to properly challenge the assessment of the County's assessor. Motion only states that the Sale Price and the Allocation is lower as compared to the assessments of the County's assessor. (Motion ¶ 20). "It is well established in Virginia law that a clear presumption favors the validity of the assessment and can be rebutted only upon a showing of manifest error or a total disregard of controlling evidence. Board of Supervisors v. Donatelly & Klein, 228 Va. 620, 627, 325 S.E.2d 342 (1985). "Manifest error cannot be established merely by evidence of

differing opinions about fair market value but that, instead, a taxpayer must present evidence establishing what information the taxing authority considered and how it arrived at the assessment in question." City of Norfolk v. Snyder, 161 Va. 288, 170 S.E. 721 (1933).

27. **The determination of local tax liability shall be made pursuant to state law, not national standards:** The Debtors' campuses spread nationwide. The Motion requests this Court to apply a national standard to the valuation of the Taxed Properties for tax purposes –the cash bid price obtained from the highest bidder at a bulk auction of assets located in five different jurisdictions and the allocation of such price among the assets upon the business judgment of the successful bidder. Motion ¶ 23. The "[u]se of nationwide appraisal standards is at variance with each state's methodology, and thus is not an appropriate valuation method...To overcome the presumption of correctness of the County's assessment, the Debtors must apply Virginia state law, not national standards. In re Cable Wireless USA, Inc., 331 B.R. 568 at 578-579 (BK Del. 2005).

28. **Under Virginia law the date of the assessment is January 1 of any given year:** "The beginning of the tax year for the assessment of taxes on real estate shall be January 1…" VA. CODE ANN. §58.1-3281. "[T]angible personal property…shall be returned for taxation as of January 1 of each year, which date shall be known as the effective date of assessment or the tax day." VA. CODE ANN. §58.1-3515. The Motion acknowledges that "[t]he Allocation details what Redwood believed, at the time of the Auction, to be the market value of the Assets, including the Taxed Properties." (Emphasis added). (Motion ¶ 30). Although the selling price of property may be indicative of fair market value, it does not impact the current year's annual assessment cycle because the assessment for that year occurred on January 1. Any change in fair market value evidenced by an actual sale of property may be incorporated into the annual

reassessment on the following tax day, for the following tax year. Atty. Gen.'s Opinion, 2007 VA. AG LEXIS 9, March 5, 2007[8].

29. **All assessments for tax purposes must be at fair market value in Virginia:** All assessments of Real Estate and Personal Property shall be at the fair market value. Virginia Constitution Article X, § 2. Fair market value of property in Virginia "is the price which it will bring when it is offered for sale by one who desires, but is not obliged, to sell it, and is bought by one who is under no necessity of having it." In Seaboard Air Line v. Chamblin, 108 Va. 42, 60 S.E. 727; Skyline Swannanoa v. Nelson County, 186 Va. 878, 885, 44 S.E.2d. 437, 441 (1947); Tuckahoe Woman's Club v. City of Richmond, et al., 101 S.E.2d 571, 199 Va. 734 (Va. 1958); Board of Supervisor v. Donatelly & Klein, 228 Va. 620, 627.

> "In determining fair market value, the sales price of a given parcel of real estate is an appropriate factor to consider. If the fair market value is to be determined by sales price, then the transaction must involve a seller who is desirous but not obligated to sell and a buyer who wishes to obtain the property but does not find it necessary to do so. The court also notes that the subject property was sold through foreclosure…and does not find, however, that this was an arms length transaction and in any way indicative of the fair market value of the property…[T]he court finds that the respondent City's assessment value…is the fair market value of this real estate. The Court is not persuaded that the Petitioner's purchase price… is an indication of fair market value through the market place given the following factors:…(4) the failure of the Petitioner to present any kind of appraisal or evaluation of the subject real estate beyond an offer by a purchaser and an acceptance by a seller". (Emphasis added). Mitchell J. Sojack and Rosemary C. O'Grady, v. City of Fredericksburg, 57 Va. Cir. 435, 437 (1997).

The Sale Price was obtained in an auction between only two bidders, with a seller that was already in bankruptcy and was under pressure from multiple creditors. The Sale Price was allegedly the best price the Debtors could get under their specific circumstances and, in that sense, it was a "fair price for the assets." (Allocation Order). However, it but it was not the product of a sale in open market in accordance with Virginia Constitution. Thus, the Sale Price

[8] "The legislature is presumed to have had knowledge of the Attorney General's interpretation of the statutes, and its failure to make corrective amendments evinces legislative acquiescence in the Attorney General's view. Deal v. Commonwealth, 224 Va. 618, 622, 299 s.E.2d 346, 348 (1983).

does not fit within the definition of fair market value for tax purposes, as contemplated in the Virginia Constitution and Virginia statutes, as interpreted by Virginia courts.

30. **The Sale Price and the Allocation is not evidence of the fair market value of the Taxed Properties for tax purposes:** The Sale Price, a cash price obtained by Debtors during a closed bulk auction is not determinative of the fair market value of the Taxed Properties within the County. "It must be reiterated that in order to use the sale of the assessed property or like property to determine the property's value for tax assessment purposes, the sale must be a normal, fair, arm's-length transaction between parties who are willing, but not forced to sell or buy. The price paid for property for which there was a limited market and sold in bankruptcy proceedings, warranted rejection of the sales price in valuing the property for tax assessment purposes)." In re: Cable & Wireless USA, Inc., 331 B.R. 568, at 579 (Del. 2005). An "open market" transaction is one where the sale price is negotiated between the buyer and seller as distinguished from a sale by submission of bids in which the seller agrees to sell to the highest bidder or the buyer buys from the lowest bidder". In re Guild Wineries & Distilleries v. County of Fresno, 51 Cal App 3d 182, 124 Cal Rptr 96 (Cal. 1975); ITT Community Development Corp. v. Seay, 347 So 2d 1024, (Fl. 1977); Board of County Com'rs v. Brookover, 198 Kan 70, 422 P2d 906 (1967). "If the property was placed in the open market for a reasonable period of time, and there was no compulsion either as to the time or circumstances of the sale, generally the market value is the highest price that a willing, prudent and well-informed buyer would be justified in paying, and that a similarly circumstanced seller would be justified in accepting. Nevertheless, that test is subject to being applied in a cautious and realistic manner in the light of the total circumstances. This includes an awareness of the difficulties which may exist in regard to such a comparatively large business property, for which there is in fact a very limited market because so few people deal in such high finances; and also of the exigencies which may exist in a sale in bankruptcy proceedings. In such circumstances we have no doubt that it is fair, realistic

and proper to give consideration to other aspects of valuation. Mary Jean Nelson v. State Tax Commission of Utah, 29 Utah 2d 162; 506 P.2d 437 (Utah 1973).

31. **The sale price is not conclusive evidence in Virginia of a property's fair market value:** The recent sale price of real property is merely one of the factors to be taken into consideration when determining whether such property has been assessed at more than fair market value. "The sale price is not conclusive evidence of a property's fair market value". City of Harrison v. Grace Taubman et al., 212 Va. 28; 181 S.E.2d 654, 1971; West Creek Associates, L LC v. County of Gochland, 276 Va. 393; 665 S.E.2d 834, 2008; American Viscose Corporation v. City of Roanoke, 205 Va. 192; 135 S.E.2d 795; 1964.

E. The Motion is without merit as to the business tangible personal property of Debtors:

32. **County must value tangible personal property by a percentage of original cost**: Pursuant to VA. CODE ANN. §58.1-3503(A)(17), the County must value Debtors' Personal Property by means of a percentage or percentages of original cost. The County then applies the appropriate percentage of the original cost to obtain the assessed value from which the tax levy is calculated. The tangible personal property tax is self-reporting in Virginia. The taxpayer who owns business personal property that is taxable within the County, shall file a tax return with the Commissioner of the Revenue. VA. CODE ANN. §§58.1-3107 and 58.1-3900. The County cannot value the Personal Property by any other means, particularly the means requested by the Debtors –i.e. the cash price obtained by the Debtors during a bulk auction held within bankruptcy proceedings which occurred almost a year after the Personal Property was assessed.

33. **The County values tangible personal property uniformly throughout:** As required by Virginia law, the County applies this methodology, uniformly, to all the taxpayers

who own "tangible personal property employed in a trade or business" within the County. VA. CODE ANN. §58.1-3503()A(17)[9].

34. **The Debtors filed a tax return for the Personal Property both in 2009 and in 2010, which are binding to the Debtors, and any other evidence should be excluded:** The Debtors' own tax returns filed with the Commissioner of the Revenue are not only binding to the Debtors, but they are also the best evidence of the original cost of the Personal Property within the County by the Debtors' own admission. Notably, the Debtors filed their 2010 tax return on March 23, 2010, after petition date and after the auction. Therefore, the return provides a clear indication of the value of the Personal Property.

35. **The County applied proper valuation methodology to the Personal Property:** The County applied statutorily-mandated methodology to the assessment of the Personal Property both in 2009 and 2010. If the Court conducts an evidentiary hearing on the Motion, the County will prove that:

a. the County's records show that Debtors filed a tax return for the Personal Property for both taxable year 2009 and 2010, which included a statement about original cost and a list of assets (the "Original Cost").

b. the County's records show the County valued in 2009 and in 2010 the Personal Property by means of a percentage of its original cost as reported by Debtors (the "Assessed Value"). VA. CODE ANN. §58.1-3503(A)(17).

c. the County's records show the County calculated the 2009 and 2010 taxes on the Assessed Value of the Personal Property based on the tax return as filed by the Debtors.

F. <u>The Motion is without merit as to the real estate of Debtors:</u>

36. **The Assessor could not have considered sales after the valuation date, distant from that date, and such evidence should be excluded**: The County asserts that the Sale Price

[9] "17. All tangible personal property employed by a trade or business…shall be valued by means of a percentage or percentages of original cost." VA. CODE ANN. §58.1-3503()A(17)

obtained at a sale auction that closed after the 2009 assessment date could not be the basis for the Court to declare manifest error on the County's assessment. Thus, the Sale Price should be excluded from the evidence in this matter. Obviously, the assessor could not have utilized such distant, future market data for the 2009 assessment of the Real Estate. The Assessor cannot be held to an impossible standard of considering information not available to him. Here, the Sale Price, to the extent it is even evidence of fair market value, did not exist and could not be considered by the assessor as of January 1, 2009. In Viscose Corp. v. City of Roanoke, 205 Va. 192, 135 S.E.2d 795 (1964), the Court discussed a situation where the taxpayer closed a manufacturing plant eventually selling the property in mid-1961. The taxpayer relied on this sale to challenge the January 1, 1959, 1960 and 1961 assessment. The Court rejected the proposition that this after-the-fact sale was conclusive of the value. The Court explicitly declined to decide whether such evidence was even relevant, that issue being unnecessary. See Viscose, 205 Va. at 196.

37. **The Court should not consider Debtors' or Redwood' testimony of value of the Taxed Properties:** The Motion states that the Allocation is the allocation of the Sale Price to each of the Taxed Properties based on Redwood's business judgment. The Motion alludes to the testimony of the Managing Director of Houlihan, offered by the Debtors at the Allocation hearing. The County respectfully asserts that since January 1, 1993, it has been unlawful to engage in the appraisal of real estate or real property for compensation in the Commonwealth of Virginia without Virginia appraiser's license. VA. CODE §54.1-2011. Lee Gardens Arlington L.P. v. Arlington County, 250 Va. 534, 539 (1995). Therefore the testimony of and the evidence provided to the Court during the hearing on the Allocation Motion should be excluded when the Court hears the Motion. Should an evidentiary hearing on the Motion be scheduled by the Court, Debtors must bring into evidence the testimony of a qualified and licensed appraiser in Virginia.

**WHEREFORE,** the County respectfully asks this Court (i) to exercise its discretion to abstain under 28 U.S.C. §1334(c)(1) or to decline jurisdiction under 11 U.S.C. §505(a)(1) and abstain from hearing the Motion; or in the alternative, (ii) to deny the Motion because it does not define the scope of the petition and make impossible for the County and the Local Taxing Authorities to properly defend themselves, and for the Court to determine the tax liability of Debtors; or in the alternative, (iii) to deny the Motion for lack of merit; or in the alternative, to (iv) schedule an evidentiary hearing for the Court to determine the value of the Taxed Properties for tax purposes according to state law; and (v) to grant the County any other and further relief that seems fair and proper to the Court.

The COUNTY of LOUDOUN, VIRGINIA
By counsel

JOHN R. ROBERTS
COUNTY ATTORNEY

By /s/ *Belkys Escobar*

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**CERTIFICATE OF SERVICE**

I 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 in this case.

/s/ Belkys Escobar