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

IN RE:	§	**CASE NO. 09-37010**
	§	
ERICKSON RETIREMENT COMMUNITIES,	§	**CHAPTER 11**
LLC, *et al.*[1]	§	**Jointly Administered**
	§	
Debtors.	§	

LIMITED OBJECTION OF SOVEREIGN BANK TO 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

[1] 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, and Warminster Campus, LP (the "**Debtors**").

Sovereign Bank, in its capacity as agent, as more fully described below ("**Sovereign**"), by and through its undersigned counsel, submits this limited objection (this "**Objection**") to the *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 "**Motion**"), filed on October 22, 2009 [Doc. 82] and respectfully states as follows:

JURISDICTION

1. This Court has jurisdiction over the Motion and the Objection pursuant to 28 U.S.C. §§ 157 and 1334.[2] This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

2. Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

BACKGROUND

3. On October 19, 2009, the Debtors commenced these cases (the "**Cases**") by each filing a voluntary petition for relief under Chapter 11 of the Bankruptcy Code.

4. The nature of the Debtors' business is described in the *Amended Affidavit of Paul Rundell in Support of First Day Motions* (the "**Rundell Affidavit**"), filed on October 20, 2009 [Doc. 27].

A. The Issuance of Project Bonds by NFPs and the Mortgage Granted by Landowners

5. The Rundell Affidavit provides a detailed description of the creation and life cycle of the CCRCs developed by the Debtors. Rundell Affidavit at ¶¶ 70-94. Of relevance to

[2] Sovereign reserves the right to assert that this Court lacks jurisdiction, generally, over the Non-Debtor Affiliates (as defined herein) who are not Debtors in these Cases and who have not subjected themselves to this Court's jurisdiction.

this Objection is the process described at paragraphs 91-94 whereby the NFPs[3] issue tax-exempt bonds to fund the ongoing operation of the CCRCs and the acquisition of the land underlying the CCRCs from a "Landowner," an entity owned by Erickson Retirement Communities, LLC ("**ERC**").

6. According to the Rundell Affidavit, the NFP secures permanent financing through the issuance of municipal bonds (the "**Project Bonds**") by the NFP. Id. at ¶ 91. These Project Bonds are issued by an NFP and not one of the Debtors or an affiliate of the Debtors. Id. Sovereign agrees; the NFPs are independent third parties unaffiliated with the Debtors or any non-Debtor Landowners. These Project Bonds have a fixed rate component and a variable rate component, with the variable rate component backed by letters of credit provided by commercial banks. Id.

B. The Non-Debtor Affiliates

7. Certain Landowners have not joined the Debtors in seeking chapter 11 relief in this Court. For purposes of this Objection, the relevant non-Debtor Landowners are: (i) Hingham Campus, LLC ("**Hingham**"), which leases the land and campus to Linden Ponds, Inc. ("**Linden Ponds**"), the NFP that operates this campus in Hingham, Massachusetts and (ii) Lincolnshire Campus, LLC ("**Lincolnshire**" and together with Hingham, the "**Non-Debtor Affiliates**"), which leases the land and campus to Sedgebrook, Inc. ("**Sedgebrook**" and together with Linden Ponds, the "**Subject NFPs**"), the NFP that operates this campus in Lincolnshire, Illinois. Id. at ¶¶ 115-16.

[3] Capitalized terms used herein but not defined have the meaning ascribed to them in the Rundell Affidavit and the Motion, as applicable.

C. Sovereign's Role as Agent to Commercial Lenders Providing Letters of Credit Backing Project Bonds Issued by the Subject NFPs

8. Sovereign holds claims against certain of the Debtors as part of various syndicates providing construction loans to those Debtors and reserves all rights and objections in that capacity. This Objection, however, is filed by Sovereign solely in its capacity as agent for Sovereign and certain other banks that have participated in the letters of credit issued by Sovereign for the account of the Subject NFPs.[4] As more fully set forth below, the reimbursement obligations related to these letters of credit are secured by land and improvements owned by the Non-Debtor Borrowers and leased by the NFPs.[5]

9. The Illinois Finance Authority (the "**Authority**") issued tax-exempt Project Bonds, the proceeds of which were loaned to Sedgebrook pursuant to a Loan Agreement between the Authority and Sedgebrook dated as of August 1, 2007. Two series of bonds were issued – fixed rate Series 2007A in the amount of $98,145,000 and variable rate Series 2007B in the amount of $39,000,000. The payment of interest and principal on the Series 2007B bonds is secured by a letter of credit issued by Sovereign Bank pursuant to a Letter of Credit Agreement by and between Sovereign and Sedgebrook dated as of August 1, 2007. The bond obligations and the reimbursement obligations under the Letter of Credit Agreement[6] (the obligations in connection with this Letter of Credit Agreement are referred to as the "**Sedgebrook Obligations**") are secured, on a *pari passu* basis, by a Fee and Leasehold Mortgage, Security Agreement, Assignment of Leases and Rents and Fixture Filing, dated as of August 1, 2007,

[4] In addition, Sovereign objects on the same grounds set forth in this Objection in its capacity as a participant in the letter of credit issued by Fifth Third Bank to support variable rate bonds issued by Monarch Landing, Inc., the non-Debtor NFP that leases the campus from Naperville Campus, LLC, the non-Debtor Landowner that is proposed as the third non-Debtor borrower under the DIP Facility.

[5] In addition, Sovereign holds certain claims against ERC based upon certain guaranties from ERC for the benefit of the Subject NFPs (relating to the Landowner's potential obligation to return purchase option deposit funds) and the Trustee (relating to the purchase option and to construction completion guaranty).

[6] The majority of this letter of credit has been drawn, essentially converting, to the extent drawn, the reimbursement obligations into a fully funded term loan secured by the Sedgebrook Mortgage.

executed by Sedgebrook and Lincolnshire for the benefit of the Authority (the "**Sedgebrook Mortgage**"). The Sedgebrook Mortgage has been assigned by the Authority to Manufacturers and Traders Trust Company, as Trustee for the holders of the bonds. The Sedgebrook Obligations are now in the approximate amount of $39.3 million.[7]

10. The Massachusetts Development Finance Agency (the "**Agency**") issued tax-exempt and taxable Project Bonds, the proceeds of which were loaned to Linden Ponds pursuant to a Loan Agreement between the Agency and Linden Ponds dated as of July 1, 2007. Three series of bonds were issued – fixed rate Series 2007A in the amount of $101,365,000, variable rate Series 2007B in the amount of $45,000,000 and variable rate Series 2007C in the amount of $10,000,000. The payment of interest and principal on the Series 2007B and Series 2007C bonds is secured by letters of credit issued by Sovereign Bank pursuant to a Letter of Credit Agreement by and between Sovereign and Linden Ponds dated as of July 1, 2007. The bond obligations and the reimbursement obligations under the Letter of Credit Agreement (the obligations in connection with this Letter of Credit Agreement are referred to as the "**Linden Ponds Obligations**") are secured, on a *pari passu* basis, by a Fee and Leasehold Mortgage, Security Agreement, Assignment of Leases and Rents and Fixture Filing dated as of July 1, 2007 executed by Linden Ponds and Hingham for the benefit of Manufacturers and Traders Trust Company, as Trustee for the holders of the bonds (the "**Linden Ponds Mortgage**"). The Linden Ponds Obligations are now in the approximate amount of $55.5 million.[8]

[7] This amount is approximate and does not include all amounts owing in connection with the Sedgebrook Obligations.
[8] This amount is approximate and does not include all amounts owing in connection with the Linden Ponds Obligations.

D. The Motion

11. The Motion seeks authority, *inter alia*, for not just the Debtors, but also the Non-Debtor Affiliates as borrowers (the "**Borrowers**"), to obtain $20 million in debtor-in-possession financing (the "**DIP Financing**") from ERC Funding Co., LLC (the **"DIP Lender**"), an affiliate of the various Redwood entities serving as the stalking horse bidders (collectively, "**Redwood**"), according to the *Debtors' Motion for an Order (i) Approving Commitment Fee, Break-up Fee, Expense Reimbursement Payments to Plan Sponsor and Shop Provisions; (ii) Approving Bidding Procedures for the Sale of Substantially All of the Debtors' Assets; (iii) Approving Procedures for the Cure, Assumption and Assignment of Contracts; (iv) Scheduling Hearings to Consider (a) Approval of the Disclosure Statement and Approval of Solicitation Procedures and (b) Confirmation of Plan of Reorganization; (v) Establishing Deadlines to Object to the Disclosure Statement and Plan of Reorganization; and (vi) Granting Related Relief*, filed on October 26, 2009 [Doc. 119] (the "**Sale Motion**"). See Motion at ¶ 3.

12. According to the Motion, the purposes of the provision of DIP Financing by the DIP Lenders include "funding of the Borrowers' postpetition operating expenses incurred in the ordinary course of business" and "funding of the postpetition operating expenses of the affiliated NFPs ... in the ordinary course of business pursuant to a Working Capital Loan ... between the respective NFP and Landowner." Motion at p. 5.

13. The Debtors also propose to allow the DIP Lender to credit bid 110% of the amount of DIP Financing drawn down by the Borrowers in support of Redwood's acquisition of certain assets of the Debtors pursuant to the Sale Motion. Id. at p. 7.

14. The Debtors also appear to propose that (a) all amounts owed by the Borrowers (which term includes Debtor and non-Debtor borrowers) under the DIP Facility be joint and

several liabilities of the Borrowers; and (b) that the Borrowers' obligations under the DIP Facility be secured by a perfected security interest (the "**Priming Lien**") pursuant to sections 364(c)(2) and (3) and 364(d) of the Bankruptcy Code **with priority over the security interests and mortgages securing the Borrowers' existing senior secured credit facilities – which would include the Sedgebrook Mortgage and the Linden Ponds Mortgage** – pursuant to section 364(d)(1) of the Bankruptcy Code in all assets of the Borrowers. Id. at p. 7; and Exhibit A to Motion – Summary of Terms and Conditions (the "**Term Sheet**") at p. 3.

15. The Debtors also propose that "the DIP Lender may exercise its rights with respect to any asset or grouping of assets, through foreclosure or otherwise." Id. at p. 8; Term Sheet at p. 4. Furthermore, the Borrowers would be prohibited from seeking the remedy of marshalling. Id.

16. Under the DIP Facility, the Borrowers would be prohibited from, *inter alia*, disposing of their assets out of the ordinary course of business or paying any amounts not contained within the DIP Budget (as defined and discussed further below). Id. at pp. 11-12.

17. Among the various events of default under the DIP Facility would be "the filing of any motion, pleading or proceeding by any of the Borrowers that could reasonably be expected to result in a material impairment of the rights of the DIP Lender...." Id. at p. 13.

18. According to the Debtors, the Landowners generally maintain their own bank accounts, into which rent paid by NFPs under Master Leases, advances of IEDs and repayment of Working Capital Loans to NFPs are deposited. Id. at ¶ 18.

19. The Motion states, without any supporting evidence, that "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." Id. at ¶ 60.

20. The Debtors very recently provided their various pre-petition lenders with a debtor-in-possession budget (the "**DIP Budget**"). A copy of the DIP Budget is attached hereto as Exhibit A. According to the DIP Budget, the Debtors do not show funds being drawn under the DIP Facility by any of the Non-Debtor Affiliates during the entire period of the DIP Budget (through February 26, 2010). The only draws on the DIP Facility at the Landowner level are for Landowners that are Debtors in these Cases.

SUMMARY OF OBJECTION[9]

21. Sovereign objects to the Debtors' effort to fund their reorganization efforts with the assets of the Non-Debtor Affiliates, by designating the Non-Debtor Affiliates as Borrowers under the DIP Facility – especially on a joint and several basis – and by attempting to use section 364(c)(2) and (3) and (d)(1) of the Bankruptcy Code to grant liens, including liens that prime Sovereign's interests, in the assets of the Non-Debtor Affiliates. Sovereign also objects to the effort by Redwood to use Sovereign's collateral to effectively finance its acquisition of some, but not all, of the Debtors' assets (and none of the Non-Debtor Affiliates' assets). What the Debtors, Redwood and the DIP Lenders are asking this Court to do is to ignore the independence of the Non-Debtor Affiliates and to read any limitations on the borrowing and security provisions of section 364(c) and (d) (including the limitations on priming under section 364(d)(1)) out of the Bankruptcy Code. This Court should not condone these efforts. The Court should deny the Motion unless the Non-Debtor Affiliates and their assets are removed from the DIP Facility.

[9] Under the circumstances, and in the interests of brevity and minimizing repetitive objections, Sovereign has focused its Objection on those features of the DIP Facility that implicate the Non-Debtor Affiliates and their assets in particular. In so doing, Sovereign does not waive other bases of objection, and reserves the right to adopt objections that other parties are likely to assert. In addition, the Debtors have not filed a proposed DIP credit agreement, and Sovereign reserves all rights with respect to any issues that may be generated by that agreement and related documents.

A. The Proposed Borrowing and Related Granting of Liens With Respect to the Non-Debtor Affiliates are Impermissible under the Bankruptcy Code

22. Section 364(c)(2) and (3) of the Bankruptcy Code authorize the "**trustee**" (in this context meaning of course, a chapter 11 **debtor-in-possession**) – **and not a non-debtor**, to obtain credit secured by a lien on "**property of the estate**" (either with a lien on unencumbered estate property or with a junior lien on already-encumbered estate property). Section 364(d)(1) of the Bankruptcy Code authorizes a debtor to obtain credit that primes (or is *pari passu* with) a pre-existing lien on "**property of the estate**" if (a) "the trustee is unable to obtain such credit otherwise" and (b) the debtor provides the party subject to priming with adequate protection of its interest in the collateral. 11 U.S.C. § 364(d)(1). Here, the Debtors' proposal for secured borrowing under the DIP Facility by the Non-Debtor Affiliates is contrary to the plain language of the foregoing provisions of section 364 and cannot be authorized. First, the Non-Debtor Affiliates are **not debtors-in-possession** entitled to incur debt under section 364. Second, the assets of the Non-Debtor Affiliates upon which the liens are proposed to be granted are **not property of the Debtors' estates**. These plain and simple facts are really all that the Court needs to consider to disapprove the DIP Facility to the extent that it includes the Non-Debtor Affiliates. In addition, however, the Debtors have failed to establish that the Non-Debtor Affiliates actually *need* DIP financing – the DIP Budget itself shows that they do not. Finally, the Debtors have failed to provide Sovereign with any form of adequate protection of its liens on the assets of the Non-Debtor Affiliates.

(i) *Section 364(c)(2) and (3) and (d)(1) are Limited to Property of the Estate and the Assets of the Non-Debtor Affiliates are Not Property of the Estate*

23. In order to provide a potential debtor-in-possession lender with a lien secured by collateral, the debtor must first establish that the collateral in question is "property of the estate."

See In re Hickey Properties, 181 B.R. 173, 175 (Bankr. D. Vt. 1995) ("By its express terms, § 364(d)(1) only authorizes a superpriority lien on 'property of the estate.'").

24. The term "property of the estate" is defined by reference to section 541 of the Bankruptcy Code which, in relevant part, defines "property of the estate" as "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). Although given a broad interpretation, the term "property of the estate" is not properly read to encompass rights in property that the debtor did not possess as of the commencement of the bankruptcy case. *See, e.g., In re Tudor Motor Lodge Associates Ltd. Partnership*, 102 B.R. 936, 948 (Bankr. D.N.J. 1989) ("Although the language of § 541 is broad, Congress clearly did not intend to 'expand the debtor's rights against others more than they exist at the commencement of the case.' HR. Rep. No. 595, 95th Cong. 1st Sess. 367 (1977)."). Property of the estate also does not encompass property in which a debtor merely holds a lien interest. *See The Farmers Bank v. March (In re March)*, 140 B.R. 387, 389 (D. E.D. Va. 1992) *aff'd* 988 F.2d 498 (4th Cir. 1993).

25. The Bankruptcy Code does not authorize debtors and their opportunistic DIP lenders to strip prepetition lenders of collateral owned by non-debtor third parties, even third parties affiliated with debtor entities. The plain language of section 364 identified above precludes this result.

26. Moreover, the Debtors cannot rely on section 105(a) of the Bankruptcy Code to accomplish what section 364(c) and (d) would deny them. In order to issue an order pursuant to section 105(a), a bankruptcy court must find support for that order in the Bankruptcy Code and cannot create property rights that do not otherwise exist under non-bankruptcy law. *See In re GGC Assocs.*, 178 B.R. 862, 864 (Bankr. M.D. Fla. 1995) (Section 105 should not be

"interpreted, however, that the power granted by this section is unlimited and grants the Bankruptcy court a carte blanche power to enter orders which otherwise do not have any independent statutory basis or authorization by the Rules."); *In re Schewe*, 94 B.R. 938, 950 (Bankr. W.D. Mich. 1989) ("A bankruptcy court should not create additional property rights or remedies in favor of a debtor (or any other party in interest) where such rights do not exist outside of bankruptcy law unless such rights and remedies are statutorily authorized under the Bankruptcy Code.") (citing *Butner v. United States*, 440 U.S. 48, 54-55 (1979)). As established above, neither section 364 nor 541 supports the Debtors' efforts to use Sovereign's Non-Debtor Affiliate collateral under the DIP Facility. Therefore, the Court should deny the Motion unless the Non-Debtor Affiliates are removed as Borrowers.

(ii) *The Debtors Have Failed to Establish that the Non-Debtor Affiliates Could Not Obtain DIP Financing Without Granting Liens*

27. Even if sections 105(a) and 364(c) or (d) of the Bankruptcy Code authorized the Court to permit the Non-Debtor Affiliates to borrow – which they do not – or to authorize liens on assets the Debtors do not own – which, again, they do not – the Debtors have failed to establish that the Non-Debtor Affiliates even *need* post-petition financing at all. *See* 11 U.S.C. § 364(c) and (d)(1)(A) (to allow secured credit under (c), trustee must show inability to obtain unsecured credit; to allow priming under (d), trustee must show inability to obtain financing otherwise). Rather, all of the statements in the Motion intended to satisfy the requirements of section 364 pertain exclusively to the **Debtors**. See Motion at ¶ 1 ("Postpetition financing is vital to the Debtors' ability to continue to operate their business...."); ¶ 47 (same).

28. Given that the DIP Financing does not appear to be intended for use by the Non-Debtor Affiliates, the Debtors certainly cannot establish that there is a need to borrow by the Non-Debtor Affiliates or that there is a need to grant liens (priming or otherwise).

(iii) *The Debtors Have Neither Offered, Provided Nor Established the Provision of Adequate Protection to Sovereign*

29. Section 364(d)(1)(B) also requires that the debtor provide the secured lender being primed with adequate protection of the secured lender's interest in "property of the estate" on which the priming lien is to be granted. The Debtors have offered absolutely no evidence to support a finding that the senior secured lenders of the Non-Debtor Affiliates will receive adequate protection. Indeed, the best the Debtors could muster to satisfy this requirement is the wholly unsubstantiated statement that 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." Motion at ¶ 60. It is difficult to imagine how the preservation of the enterprise value of the **Debtors** is of any benefit whatsoever to creditors of entities that **are not Debtors**.

30. The Debtors have the burden of satisfying the requirements of section 364(d)(1). *See* 11 U.S.C. § 364(d)(2). They have failed to carry this burden on every salient requirement under section 364(d)(1). Therefore, the Court should deny the Motion unless the Non-Debtor Affiliates are removed as Borrowers.

B. The Collateral of the Non-Debtor Affiliates is Being Wrongfully Used to Fund These Cases

31. The Motion attempts to grant the DIP Lender a priming lien on the assets of the Non-Debtor Affiliates while providing a carve out in favor of counsel for the Debtors and any committee appointed under section 1102 of the Bankruptcy Code. There is no provision of the Bankruptcy Code that supports forcing a non-debtor third party to subsidize the administrative expenses of a bankruptcy proceeding, nor is there any provision of the Bankruptcy Code that authorizes a debtor to use the collateral of a lender to a non-debtor to subsidize the administration of a bankruptcy proceeding.

C. The DIP Lender is Subsidizing its Purchase of Certain Assets of the Debtors at Sovereign's Expense

32. Under the proposed DIP Facility, the DIP Lender, which is an affiliate of the stalking horse purchaser under the Sale Motion, may credit bid up to 110% of any amounts drawn under the DIP Facility in favor of Redwood's bid to purchase those assets. In essence, the Debtors are borrowing against Sovereign's collateral to aid in Redwood's acquisition of some of the Debtors' assets. Under the proposed DIP Facility, Sovereign could suffer a diminution in the value of its collateral, receive absolutely no adequate protection, and would not even have the benefit of having the subject collateral purchased or assumed by an entity that is, presumably, far more solvent than the Debtors.

33. Moreover, this provision of the DIP Facility conflicts with section 363 of the Bankruptcy Code. Section 363(b) of the Bankruptcy Code provides this Court with authority to authorize the use, sale or lease, other than in the ordinary course of business, of **property of the estate**. 11 U.S.C. § 363(b)(1). Section 363(k) applies only to a "sale under subsection (b)" of section 363 of the Bankruptcy Code. 11 U.S.C. § 363(k). As set forth above, the assets of the Non-Debtor Affiliates are not property of the Debtors' bankruptcy estates. The Debtors could not sell those assets under section 363(b) and, therefore, the DIP Lenders should not be allowed to credit bid a claim that is secured by those assets.

D. The DIP Motion Effectively Seeks This Court's Approval of a Fraudulent Conveyance

34. The Non-Debtor Affiliates are Maryland limited liability companies. Under Maryland law, "[e]very conveyance made and every obligation incurred without fair consideration when the person who makes the conveyance or who enters into the obligation intends or believes that he will incur debts beyond his ability to pay as they mature, is fraudulent

as to both present and future creditors." Md. Comm'l L. § 15-206. Furthermore, "[e]very conveyance of limited liability company property and every limited liability company obligation incurred when the limited liability company is or will be rendered insolvent by it, is fraudulent as to creditors of the limited liability company, if the conveyance is made or the obligation is incurred to ... (2) a person not a member, without fair consideration to the limited liability company...." Md. Comm'l L. § 15-208(b)(2). Fair consideration is received for the incurrence of a liability if "[t]he property or obligation is received in good faith to secure a present advance ... in an amount not disproportionately small as compared to the value of the property or obligation obtained." Md. Comm'l L. § 15-203(2).

35. The Debtors would have their obligations under the DIP Facility impressed upon the Non-Debtor Affiliates (apparently on a joint and several basis) without receiving any tangible benefit for their burden. It does not appear that the Non-Debtor Affiliates will actually receive any funds under the DIP Budget. The fact that the Non-Debtor Affiliates have been kept out of these Cases and that they are not being sold to Redwood strongly suggests that their long-term viability may not be linked to that of the Debtors and, therefore, the Non-Debtor Affiliates derive no benefit from the successful restructuring or sale of the Debtors. In short, there is no evidence that the Non-Debtor Affiliates would receive any consideration for undertaking obligations under the DIP Facility or for granting liens on their property to the DIP Lenders.

WHEREFORE, Sovereign Bank respectfully requests that this Court deny the Motion unless the Non-Debtor Affiliates are removed as Borrowers under the DIP Facility.

Dated: October 28, 2009

Respectfully submitted,

By: /s/ Jeffrey A. Marks

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