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

**In re:**

**ERICKSON RETIREMENT  
COMMUNITIES, LLC, *et al.*<sup>1</sup>**

**Debtors.**

§  
§      **Case No. 09-37010**  
§  
§      **CHAPTER 11**  
§  
§      **(Jointly Administered)**  
§  
§

**LIMITED OBJECTION OF BANK OF AMERICA, N.A., TO DEBTORS'  
MOTION FOR AN ORDER AUTHORIZING DEBTORS  
TO ESCROW INITIAL ENTRANCE DEPOSITS**

Bank of America, N.A., ("Bank of America") in its capacity as administrative

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<sup>1</sup> The Debtors in these chapter 11 cases are Erickson Retirement Communities, LLC, Ashburn Campus, LLC, Columbus Campus, LLC, Concord Campus GP, LLC, Concord Campus, LP, Dallas Campus GP, LLC, Dallas Campus, LP, Erickson Construction, LLC, Erickson Group, LLC, Houston Campus, LP, Kansas Campus, LLC, Littleton Campus, LLC, Novi Campus, LLC, Senior Campus Services, LLC, Warminster Campus GP and Warminster Campus, LP.

agent for the Dallas Campus, LP (“Dallas Campus”) senior secured prepetition revolving lenders (the “Dallas Campus Prepetition Revolving Lenders”) (in such capacity, the “Prepetition Agent”), by and through its undersigned attorneys, hereby files this limited objection (this “Objection”) to the Debtors’ Motion for an Order Authorizing Debtors to Escrow Initial Entrance Deposits [Docket No. 38] (the “Motion”)<sup>2</sup>. As the Motion was filed only nine days before the expedited hearing, the Prepetition Agent had limited time to prepare this Objection and, therefore, reserves the right to supplement it at or in connection with any hearing on the Motion or in connection with any similar efforts by the Debtors to use, encumber or otherwise deal with initial entrance deposits (“IEDs”) or any other form of the Dallas Prepetition Revolving Lenders’ collateral. In support of this Objection, the Prepetition Agent respectfully states as follows:

#### **Preliminary Statement**

Bank of America is the administrative agent for the benefit of the Dallas Campus Prepetition Revolving Lenders under that certain Second Amended and Restated Loan Agreement, dated as of April 28, 2006 (as may have been amended, restated, supplemented or otherwise modified from time to time, the “Dallas Campus Prepetition Revolving Credit Agreement”) pursuant to which Bank of America, as agent on behalf of the Dallas Campus Prepetition Revolving Lenders and as a Dallas Campus Prepetition Revolving Lender, and the Dallas Campus Prepetition Revolving Lenders agreed to extend a revolving credit facility to, and issue letters of credit for, Dallas Campus from time to time, including, *inter alia*, the Revolving Loan (as defined in the Dallas Campus Prepetition Revolving Credit Agreement) in an aggregate principal committed amount of up to \$70,000,000 (the “Dallas Campus Prepetition Revolving

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<sup>2</sup> Unless otherwise provided herein, all capitalized terms used but not defined herein shall have the meaning ascribed thereto in the Motion.

Credit Facility”). The Dallas Campus Prepetition Revolving Credit Agreement, along with any other agreements, guarantees, instruments, notes and other documents executed in connection therewith are collectively referred to herein as the “Dallas Campus Prepetition Revolving Credit Documents.” All obligations of Dallas Campus, Erickson Retirement Communities, LLC (“ERC”), Erickson Construction, LLC (“Erickson Construction”) and Dallas Campus, GP, LLC (“Dallas Campus GP”) arising under the Dallas Campus Prepetition Revolving Credit Agreement or any other Dallas Campus Prepetition Revolving Credit Document, including all loans, advances, debts, liabilities, principal, interest, fees, charges, expenses and obligations for the performance of covenants, tasks or duties, or for the payment of monetary amounts owing to the Prepetition Agent or the Dallas Campus Prepetition Revolving Lenders by Dallas Campus, of any kind or nature, whether or not evidenced by any note, agreement or other instrument, shall hereinafter be referred to as the “Dallas Campus Prepetition Obligations.”

The proceeds of the Revolving Loan were used by Dallas Campus for the development and construction of a continuing care retirement community known as Highland Springs in Dallas, Texas (the “Dallas CCRC”). As of the Petition Date, the Dallas Campus Prepetition Obligations for which Dallas Campus was truly and justly indebted to the Dallas Campus Prepetition Revolving Lenders aggregated not less than approximately \$53.7 million, plus all accrued or hereafter accruing and unpaid interest thereon and any additional fees and expenses (including any attorneys’, accountants’, appraisers’ and financial advisors’ fees, costs and expenses that are chargeable or reimbursable under the Dallas Campus Prepetition Revolving Credit Documents) now or hereafter due under the Dallas Campus Prepetition Revolving Credit Documents.

The Dallas CCRC is operated by Highland Springs, Inc. (“Highland Springs”), a

not for profit company which is not a debtor in these chapter 11 cases. Highland Springs leases the Dallas CCRC pursuant to that certain Master Lease and Use Agreement between Dallas Campus, as landlord, and Highland Springs, as tenant, dated November 30, 2005 (as may have been amended, restated, supplemented or otherwise modified from time to time, the “Master Lease”).

One of the most critical components supporting the repayment of the Dallas Campus Prepetition Obligations is the remittance of IEDs to the Prepetition Agent for the benefit of the Dallas Campus Prepetition Revolving Lenders. Highland Springs, the only party with contractual privity (*i.e.* by virtue of any Residence and Care Agreement) with any resident of the Dallas CCRC, would collect the applicable resident’s IED and then, pursuant to Highland Springs’ obligations under the Dallas Campus Community Loan Agreement (as defined hereinafter), would advance such IED to Dallas Campus. In turn, Dallas Campus would remit the IED to the Prepetition Agent for application to the outstanding principal balance of the Dallas Campus Prepetition Obligations under the Dallas Campus Prepetition Revolving Credit Agreement and the Dallas Campus Prepetition Revolving Documents. Should a resident be unable to fulfill his or her obligation to remit an IED as provided under the Residence and Care Agreement, under certain circumstances the resident would execute or otherwise agree upon the terms of a resident promissory note and flex pay arrangement (each a “P-Note” and, collectively, the “P-Notes”). The P-Notes are often used by the Debtors when a resident relocates to a CCRC prior to selling their home and the resident does not have sufficient liquidity to satisfy the IED obligation. Generally, a resident obligated under a P-Note would make periodic interest payments until such time as the P-Note matured, likely in connection with the sale of the resident’s home or other triggering event. For ease of reference in this Objection, IEDs and P-

Notes will be referred to collectively as “IEDs.”

The remittance of IEDs is the only mechanism contemplated under the Dallas Campus prepetition capital structure for the repayment of the Dallas Campus Prepetition Obligations from the conduct of Dallas Campus’ business in the ordinary course (in other words, other than through the exercise of remedial rights against the collateral securing the Dallas Campus Prepetition Obligations, there is no source of repayment of such obligations other than the remittance of IEDs). That said, the Prepetition Agent does not object to the Debtors’ request that the IEDs be held in escrow for some period of time. The Prepetition Agent, however, does object to the Motion on the basis that the form of the escrow, the release triggers for the IEDs from escrow, and the proposed release of the IEDs to Dallas Campus are vague, overly broad and impair the rights of the Prepetition Agent and the Dallas Campus Prepetition Revolving Lenders in the IEDs collected at the Dallas CCRC. At a minimum, any order approving the Motion should require that:

- Dallas Campus and the Prepetition Agent confer and designate an independent escrow agent (the “Escrow Agent”) no later than three (3) days after the entry of an Order approving the Motion, to receive and hold in trust the IEDs in an escrow account (the “Escrow Account”), subject to release only as provided in such Order (to the extent an Escrow Agent cannot be agreed upon the parties would submit their respective choices to the Court for designation);
- Dallas Campus, the Prepetition Agent and the Escrow Agent shall execute a mutually agreeable escrow agreement no later than seven (7) days after the entry of an Order approving the Motion, in compliance with the terms of the Order approving the Motion (to the extent the parties cannot agree they shall be required to submit their respective forms of escrow agreement to the Court for its approval);
- On each date that an IED is available for release to Dallas

Campus as provided under the Dallas Campus Prepetition Revolving Credit Documents, such IED will be delivered to the Escrow Agent forthwith to be deposited into the Escrow Account;

- On not less than a bi-weekly basis, Dallas Campus must provide to the Prepetition Agent an accounting of the IEDs deposit in the Escrow Account, including the name of the resident from whom the IED was collected and the amount of such IED;
- Bank of America, as Agent, shall have a continuing first priority lien against the IEDs, subject to the rights of the residents in such IEDs as set forth below;
- Upon the earlier of (i) a disposition of the assets of Dallas Campus (through sale, transfer of equity interests or otherwise) (other than a Closure Event, as defined below), or (ii) confirmation of a plan of reorganization (each, a “Trigger Event”), the Escrow Agent shall immediately turnover to the Prepetition Agent, for the benefit of the Dallas Campus Prepetition Revolving Lenders, all IEDs held in the Escrow Account by the Escrow Agent, which IEDs shall be applied by the Prepetition Agent to the Dallas Campus Prepetition Obligations owed under the Dallas Campus Prepetition Revolving Credit Agreement and the Dallas Campus Prepetition Revolving Credit Documents; and
- Should any transaction involving Dallas Campus occur that results in a closure of the Dallas CCRC (a “Closure Event”), the IEDs in the Escrow Account shall be returned by the Escrow Agent to the respective residents without further order of this Court.

At the very least, the foregoing provisions should be provided for in any order approving the Motion. Without such provisions, the rights and interests of the Prepetition Agent and the Dallas Campus Prepetition Revolving Lenders with respect to IEDs collected at the Dallas CCCRC will be significantly and substantially impaired.

### **Background Regarding IEDs**

The Prepetition Agent, for the benefit of the Dallas Campus Prepetition Revolving Lenders, holds a first-priority lien and security interest in the IEDs generated in connection with the Dallas CCRC.

As set forth above, to fund the development and construction of the Dallas CCRC, the Prepetition Agent and the Dallas Campus Prepetition Revolving Lenders agreed to extend the Dallas Campus Prepetition Revolving Credit Facility to Dallas Campus. The terms and conditions of the Dallas Campus Prepetition Revolving Credit Facility are more fully set forth in the Dallas Campus Prepetition Revolving Credit Agreement and the Dallas Campus Prepetition Revolving Credit Documents.

Pursuant to certain collateral documents (referred to herein as the “Dallas Campus Prepetition Revolving Collateral Documents”), including that certain Security Agreement, dated as of November 30, 2005, entered into by and among the Prepetition Agent, for the benefit of the Dallas Campus Prepetition Revolving Lenders, and Dallas Campus (as may have been amended, restated, supplemented or otherwise modified from time to time, the “Dallas Campus Prepetition Revolving Security Agreement”), Dallas Campus granted to the Prepetition Agent, for the benefit of itself and the Dallas Campus Prepetition Revolving Lenders, to secure Dallas Campus’ obligations under the Dallas Campus Prepetition Revolving Credit Documents, a first-priority security interest in and continuing lien on substantially all of Dallas Campus’ assets, including, but not limited to, all of Dallas Campus’ interests in the IEDs. Accordingly, and as acknowledged by the Debtors, the Prepetition Agent holds a first priority lien on the IEDs collected at the Dallas CCRC.

In order to fund Highland Springs’ working capital needs, Dallas Campus and

Highland Springs entered into that certain Working Capital Loan Agreement, dated as of November 30, 2005 (as may have been amended, restated, supplemented or otherwise modified from time to time, the “Dallas Campus Working Capital Loan Agreement”), whereby Dallas Campus agreed to extend a revolving credit facility to Highland Springs from time to time in an aggregate principal amount of up to \$33,657,000 (the “Working Capital Loan”). Pursuant to that certain Pledge and Assignment, dated as of November 30, 2005, entered into by and among Highland Springs, as assignor, and Dallas Campus, as assignee (as may have been amended, restated, supplemented or otherwise modified from time to time, the “Dallas Campus Prepetition Highland Springs Pledge and Assignment”), Highland Springs granted to Dallas Campus, to secure Highland Springs’ obligations under the Dallas Campus Working Capital Loan Agreement, the Master Lease and the Dallas Campus Community Loan Agreement (as defined hereinafter), a first-priority security interest in and continuing lien on the Collateral (as defined in the Dallas Campus Prepetition Highland Springs Pledge and Assignment), including, but not limited to, all of Highland Springs’ right, title and interest in, to and under all Residence and Care Documents (as defined in the Dallas Campus Prepetition Highland Springs Pledge and Assignment), all future and present IEDs, the Escrow Account (as defined in the Dallas Campus Prepetition Highland Springs Pledge and Assignment) and all proceeds of any of the foregoing.

Pursuant to that certain Community Loan Agreement, dated as of November 30, 2005, entered into by and among Highland Springs, as lender, and Dallas Campus, as borrower (as may have been amended, restated, supplemented or otherwise modified from time to time, the “Dallas Campus Community Loan Agreement”), Highland Springs agreed to loan to Dallas Campus all IEDs paid to or to be paid by the Residents (as defined in the Dallas Campus Community Loan Agreement) to Highland Springs up to the aggregate principal amount of



\$483,000,000 (the “Community Loan”). As explained above, Dallas Campus in turn remits the IEDs to the Prepetition Agent for application against amounts owed under the Dallas Campus Prepetition Revolving Credit Agreement.

Pursuant to that certain Subordination of Deed of Trust, dated November 30, 2005, executed by Highland Springs for the benefit of the Prepetition Agent and the Dallas Campus Prepetition Revolving Lenders (as may have been amended, restated, supplemented or otherwise modified from time to time, the “Dallas Campus Prepetition Highland Springs Subordination Deed of Trust”), Highland Springs agreed to subordinate that certain Deed of Trust, Security Agreement and Fixture Filing, dated as of November 30, 2005, entered into by and among Dallas Campus, as grantor, and Highland Springs, as grantee in connection with the Community Loan Agreement (as may have been amended, restated, supplemented or otherwise modified from time to time, the “Dallas Campus Prepetition NFP Deed of Trust”) to that certain Amended and Restated Deed of Trust, Security Agreement and Fixture Financing Statement, dated as of November 30, 2005, entered into by and among the Prepetition Agent, for the benefit of the Dallas Campus Prepetition Revolving Lenders, and Dallas Campus in connection with the Dallas Campus Prepetition Revolving Credit Agreement (as may have been amended, restated, supplemented or otherwise modified from time to time, the “Dallas Campus Prepetition Deed of Trust”). Furthermore, pursuant to that certain Subordination and Standstill Agreement, dated as of November 30, 2005, entered into by and among the Prepetition Agent, for the benefit of the Dallas Campus Prepetition Revolving Lenders, and Highland Springs (as may have been amended, restated, supplemented or otherwise modified from time to time, the “Dallas Campus Prepetition Highland Springs Subordination Agreement”), Highland Springs agreed to subordinate any and all indebtedness of Dallas Campus to Highland Springs then or thereafter

existing, together with any interest thereon, to Dallas Campus' obligations under the Dallas Campus Prepetition Revolving Credit Documents.

As summarized above, an IED is created when Highland Springs enters into a Residence and Care Agreement. As set forth in the various Dallas Campus prepetition credit documents, Highland Springs is contractually obligated to deposit the IED into an escrow account (unrelated to the escrow proposed in the Motion) where it is held until such time as the resident under the Residence and Care Agreement takes occupancy. At that point, the IED is released from the initial escrow account, transferred to Dallas Campus and deposited into Dallas Campus' collateral account maintained with the Prepetition Agent. At periodic intervals, the funds in Dallas Campus' collateral account are applied to reduce Dallas Campus' obligations under the Dallas Campus Prepetition Revolving Credit Agreement. The IEDs are the primary source of repayment of Dallas Campus' obligations under the Dallas Campus Prepetition Revolving Credit Agreement and the Dallas Campus Prepetition Revolving Credit Documents.

#### **Limited Objection to Motion**

Pursuant to the Motion, the Debtors are seeking to alter the contractual obligations established under the Dallas Campus prepetition loan documents (as described above) and otherwise impair the rights of the Prepetition Agent in the IEDs collected at the Dallas CCRC. The Debtors, in overly broad terms, seek to escrow all IEDs, including those collected at the Dallas CCRC, and otherwise impinge upon the Prepetition Agent's rights with respect to such IEDs without offering any form of adequate protection.

Section 363(e) of the Bankruptcy Code provides that "on request of an entity that has an interest in property used ... or proposed to be used by a debtor in possession, the court ... shall prohibit or condition such use ... as is necessary to provide adequate protection of such

interest.” 11 U.S.C. § 363(e). Section 361 of the Bankruptcy Code delineates the forms of adequate protection, which include periodic cash payments, additional liens, replacement liens and other forms of relief. 11 U.S.C. § 361. What constitutes adequate protection must be decided on a case-by-case basis. *See MNBankDallas, N.A. v. O’Connor (In re O’Connor)*, 808 F.2d 1393 (10th Cir. 1987); *In re Mosello*, 195 B.R. 277, 288 (Bankr. S.D.N.Y. 1996) (“the goal of adequate protection is to safeguard the secured creditor from diminution in the value of its interest during the [c]hapter 11 reorganization”) (*quoting In re 495 Cent. Park Ave. Corp.*, 136 B.R. 626, 631 (Bankr. S.D.N.Y. 1992)). The Motion fails to provide any adequate protection to the Prepetition Agent and the Dallas Campus Prepetition Revolving Lenders.

The Debtors assert that the primary purpose of the Motion is to protect residents’ interests in IEDs generated after the Petition Date. The relief requested in the Motion, however, is vague, overly broad, impairs the rights of stakeholders and may do little to protect such residents. The Motion fails to establish the terms and conditions of any escrow agreement, including (i) an acknowledgment of the Senior Secured Project Lenders’ rights to and liens against the IEDs held in escrow, (ii) whether the IEDs will be segregated, and if so, the terms of such segregation, and (iii) the procedures for release of the IEDs if the Debtors fail to confirm a plan of reorganization in these chapter 11 cases.

The Prepetition Agent does not object to an escrow of the IEDs received after the Petition Date; however, any escrow account must be (i) controlled by an independent Escrow Agent, (ii) provide and recognize the rights and priority liens of the Prepetition Agent against the IEDs collected at the Dallas CCRC, subject to the rights of the residents; and (iii) provide for IEDs to be released from escrow upon a Trigger Event or Closure Event, as defined herein. The Prepetition Agent’s modifications to the relief requested in the Motion are appropriate, necessary

to the parties in interest in these chapter 11 cases and required under applicable law.

First, the Motion must be denied to the extent it attempts to alter the Prepetition Agent's lien in the IEDs collected at the Dallas CCRC by providing that the IEDs collected at the Dallas CCRC will be returned to Dallas Campus upon confirmation of a plan. Any Order providing for the escrow of IEDs must be clear that, except for a Closure Event, the Prepetition Agent, for the benefit of the Dallas Campus Prepetition Revolving Lenders, shall receive all IEDs collected at the Dallas CCRC forthwith upon a Trigger Event.

Second, any Order authorizing IEDs to be held in escrow must require the Debtors to turnover IEDs to an independent Escrow Agent, as defined herein. Requiring an independent Escrow Agent and periodic accounting will provide assurances to all stakeholders, including the residents, that the IEDs are held in trust until a Trigger Event or Closure Event.

Third, the Motion suggests that the IEDs will only be released to a resident pursuant to their Residence and Care Agreement or to Dallas Campus, to the extent any postpetition IEDs are collected at the Dallas CCRC, upon confirmation of a plan; however, there are other appropriate times that such IEDs ought to be released from escrow, including any disposition of the Debtors' assets outside of a plan. The IEDs should be released without further order of this Court upon a Trigger Event or a Closure Event as provided herein.

Finally, pursuant to this Court's interim order authorizing the Debtors' use of cash collateral, the Debtors are required to provide the Prepetition Agent with an accounting on or before October 27, 2009 of all IEDs received and not turned over to the Prepetition Agent (whether or not held in escrow) since September 1, 2009. The Prepetition Agent requests that any Order providing for the escrow of IEDs must include not less than bi-weekly accounting of the IEDs, including the names of the residents providing such IEDs and the amounts of such

IEDs received into escrow.

### **Conclusion**

The Prepetition Agent objects to the Motion as overly broad, vague and impairing the rights of the Prepetition Agent and the Dallas Campus Prepetition Revolving Lenders. Should the Court authorize the Debtors to escrow the IEDs, the Prepetition Agent requests that such Order provide the following:

- Dallas Campus and the Prepetition Agent confer and designate an independent escrow agent (the “Escrow Agent”) no later than three (3) days after the entry of an Order approving the Motion, to receive and hold in trust the IEDs in an escrow account (the “Escrow Account”), subject to release only as provided in such Order (to the extent an Escrow Agent cannot be agreed upon the parties would submit their respective choices to the Court for designation);
- Dallas Campus, the Prepetition Agent and the Escrow Agent shall execute a mutually agreeable escrow agreement no later than seven (7) days after the entry of an Order approving the Motion, in compliance with the terms of the Order approving the Motion (to the extent the parties cannot agree they shall be required to submit their respective forms of escrow agreement to the Court for its approval);
- On each date that an IED is available for release to Dallas Campus as provided under the Dallas Campus Prepetition Revolving Credit Documents, such IED will be delivered to the Escrow Agent forthwith to be deposited into the Escrow Account;
- On not less than a bi-weekly basis, Dallas Campus must provide to the Prepetition Agent an accounting of the IEDs deposit in the Escrow Account, including the name of the resident from whom the IED was collected and the amount of such IED;
- Bank of America, as Agent, shall have a continuing first priority lien against the IEDs, subject to the rights of the residents in such IEDs as set forth below;

- Upon the earlier of (i) a disposition of the assets of Dallas Campus (through sale, transfer of equity interests or otherwise) (other than a Closure Event, as defined below), or (ii) confirmation of a plan of reorganization (each, a “Trigger Event”), the Escrow Agent shall immediately turnover to the Prepetition Agent, for the benefit of the Dallas Campus Prepetition Revolving Lenders, all IEDs held in the Escrow Account by the Escrow Agent, which IEDs shall be applied by the Prepetition Agent to the Dallas Campus Prepetition Obligations owed under the Dallas Campus Prepetition Revolving Credit Agreement and the Dallas Campus Prepetition Revolving Credit Documents; and
- Should any transaction involving Dallas Campus occur that results in a closure of the Dallas CCRC (a “Closure Event”), the IEDs in the Escrow Account shall be returned by the Escrow Agent to the respective residents without further order of this Court.

The Prepetition Agent urges the Court to sustain this Objection.

Dated: October 28, 2009  
Dallas, Texas

/s/ Mark Elmore

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