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ATTORNEYS FOR OAKLAND COUNTY TREASURER
AND THE CITY OF NOVI, MICHIGAN

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

In re:

ERICKSON RETIREMENT
COMMUNITIES, LLC, *et al.*,

Debtors.

Case No. 09-37010 (SGJ)

Chapter 11
(Jointly Administered)

**OBJECTION OF THE OAKLAND COUNTY TREASURER AND THE CITY OF
NOVI TO DEBTORS' SECOND AMENDED MOTION FOR DETERMINATION
OF TAX LIABILITY**

The Oakland County Treasurer is the tax collecting governmental unit for
Oakland County, Michigan. As such, it is the Treasurer's duty to collect past due

property taxes for the county and various cities within the County, which accrue on both real and personal property located within Oakland County, Michigan. The City of Novi is responsible for the assessment of property and the collection of the current year property taxes which accrue on real and personal property located within the City.

The Oakland County Treasurer and the City of Novi have an interest in the property located at 41100 Thirteen Mile, Novi, Oakland County, Michigan (“Novi Property”).

The Oakland County Treasurer and the City of Novi, by and through counsel, Kilpatrick & Associates, P.C., Secrest Wardle, and Sherman & Yaquinto, LLP, and for their

Objection to Debtors’ Second Amended Motion for Determination of Tax Liability [Docket No. 1471] (“Motion”), hereby incorporate the objections filed by the City of

Overland Park, Kansas [Docket No. 1255], Loudon County Government [Docket No. 1387], County of Loudon, Virginia [Docket No. 1439], Douglas County, Colorado

[Docket No. 1447] and the Joinder of the Oakland County Treasurer and the City of Novi to Treasurer of Douglas County, Colorado’s Motion to Bifurcate Claim Objection

Hearing which is filed concurrently with this Objection and say as follows:

Jurisdiction and Venue

1. The Oakland County Treasurer and the City of Novi deny the allegations in Paragraph 1. The property taxes for 2010 on the Novi Property are not due until September 14, 2010, well after confirmation of the plan. The Court does not have subject matter jurisdiction over post confirmation liabilities such as the tax liability for the 2010 tax year. *In re Holly’s Inc.*, 172 BR 545 (Bankr WD MI, 1994) and *In re UAL Corporation*, 336 BR 370 (Bankr ND IL, 2006). The Court should abstain from

deciding the Motion as to the tax liability for the 2009 tax year pursuant to 28 U.S.C. § 1334(c) as more fully stated in Argument, Section D below.

2. The Oakland County Treasurer and the City of Novi deny the allegations in Paragraph 2.

3. The Oakland County Treasurer and the City of Novi state that no response is necessary to Paragraph 3 since it only contains statements of law.

Background

4. The Oakland County Treasurer and the City of Novi admit the allegations in Paragraph 4.

5. The Oakland County Treasurer and the City of Novi deny the allegations in Paragraph 5. The Oakland County Treasurer and the City of Novi further state that the Debtors have sold the Novi Property pursuant to Court order.

6. The Oakland County Treasurer and the City of Novi admit the allegations in Paragraph 6.

7. The Oakland County Treasurer and the City of Novi admit the allegations in Paragraph 7.

8. The Oakland County Treasurer and the City of Novi neither admit nor deny the allegations in Paragraph 8 and leave the Debtors to their proofs.

Property Values and Taxes

A. Marketing of Debtors' Assets

9. The Oakland County Treasurer and the City of Novi neither admit nor deny the allegations in Paragraph 9 since they do not have sufficient information and leave the Debtors to their proofs.

10. The Oakland County Treasurer and the City of Novi neither admit nor deny the allegations in Paragraph 10 since they do not have sufficient information and leave the Debtors to their proofs.

11. The Oakland County Treasurer and the City of Novi neither admit nor deny the allegations in Paragraph 11 since they do not have sufficient information and leave the Debtors to their proofs.

B. The Auction

12. The Oakland County Treasurer and the City of Novi neither admit nor deny the allegations in Paragraph 12 since they do not have sufficient information and leave the Debtors to their proofs.

13. The Oakland County Treasurer and the City of Novi neither admit nor deny the allegations in Paragraph 13 since they do not have sufficient information and leave the Debtors to their proofs.

14. The Oakland County Treasurer and the City of Novi neither admit nor deny the allegations in Paragraph 14 since they do not have sufficient information and leave the Debtors to their proofs.

15. The Oakland County Treasurer and the City of Novi neither admit nor deny the allegations in Paragraph 15 since they do not have sufficient information and leave the Debtors to their proofs.

C. The Recharacterization Adversary Proceedings

16. The Oakland County Treasurer and the City of Novi neither admit nor deny the allegations in Paragraph 16 since they do not have sufficient information and leave the Debtors to their proofs.

D. Redwood's Valuation and Allocation of the Debtors' Assets

17. The Oakland County Treasurer and the City of Novi neither admit nor deny the allegations in Paragraph 17 since they do not have sufficient information and leave the Debtors to their proofs.

E. Court's Acceptance of Redwood's Valuations

18. The Oakland County Treasurer and the City of Novi neither admit nor deny the allegations in Paragraph 18 since they do not have sufficient information and leave the Debtors to their proofs.

19. The Oakland County Treasurer and the City of Novi neither admit nor deny the allegations in Paragraph 19 since they do not have sufficient information and leave the Debtors to their proofs.

F. Taxing Agencies' Proofs of Claim and Valuations

20. The Oakland County Treasurer and the City of Novi neither admit nor deny the allegations in Paragraph 20 since they do not have sufficient information and leave the Debtors to their proofs. On or about October 23, 2009, the Oakland County Treasurer filed a secured Proof of Claim in the amount of Two Million Eight Hundred Two Thousand Three Hundred Eighty Three and 10/100 Dollars (\$2,802,383.10) as a result of the Debtors' failure to pay real property taxes for the Summer of 2009 on the Novi Property. As of April 20, 2010, the Debtors owe the amount of Three Million Three Thousand Four Hundred Ninety and 17/100 Dollars (\$3,003,490.17) for the unpaid 2009 taxes on the Novi Property. At closing, the taxes were paid.

21. The Oakland County Treasurer and the City of Novi deny the allegations in Paragraph 21.

G. Treatment of Secured Taxes Under the Plan

22. The Oakland County Treasurer and the City of Novi neither admit nor deny the allegations in Paragraph 22 and leave the Debtors to their proofs.

Relief Sought

23. The Oakland County Treasurer and the City of Novi request that the Court dismiss the Motion since the Debtors are seeking to have this Court determine the extent of the Oakland County Treasurer's lien in the Novi Property, and such relief must be sought via an adversary proceeding pursuant to Fed. R. Bankr. P. 2001(2). Alternatively, the Oakland County Treasurer and the City of Novi seek denial of the Motion as to the Novi Property to permit the Debtors and the City of Novi to continue the proceedings before the Michigan Tax Tribunal.

Arguments and Authorities

A. The Court Should Not Exercise Its Discretion to Determine the Tax Liabilities as to the Novi Property and Should Abstain

24. Section 505(a) provides that the Bankruptcy Court's jurisdiction over tax valuation is permissive not mandatory and this Court has broad discretion under § 505(a)(1) to abstain from such a determination. *In re New Haven Projects Ltd.*, 225 F.3d 283 (2d Cir. 2000), *In re Luongo*, 259 F.3d 323 (5th Cir, 2001). On or about May 29, 2009, Debtor Novi Campus LLC ("Petitioner") timely filed a Petition with the Michigan Tax Tribunal appealing the valuation of the Novi Property seeking a true cash value of \$40,000,000 with an SEV of \$20,000,000, Docket No. 0370558. On June 3, 2009, the City of Novi filed a Response to the Debtor's Petition in the Michigan Tax Tribunal. On November 18, 2009, counsel for the City of Novi served Interrogatories on the Petitioner since the Petitioner had not informed the Michigan Tax Tribunal or counsel for the City

of Novi that it had filed bankruptcy. Only after obtaining an extension of time to respond to the Interrogatories did counsel for the Petitioner inform counsel for the City of Novi that the Petitioner would not respond because it had filed bankruptcy.

25. The Oakland County Treasurer and the City of Novi admit the allegations in Paragraph 25.

26. The Court should abstain from deciding the Motion pursuant to 28 U.S.C. § 1334(c). The Debtors sought the jurisdiction of the Michigan Tax Tribunal to resolve the issues of tax liability and valuation of the Novi Property for the 2009 tax year prior to seeking the jurisdiction of this Court. The proceeding before the Michigan Tax Tribunal has not been concluded due to the Debtors' failure to respond to the Interrogatories propounded by the City of Novi and pursue a counsel conference. The amount of the 2009 taxes on the Novi Property was contested before commencement of the case in the Michigan Tax Tribunal, but the matter was not fully adjudicated prior to commencement of the case. Therefore, only one of the two elements of Section 505(a)(2)(A) has been met.

B. The Sale Price and Allocation are Not Evidence of True Cash Value as Required Under Michigan Law

27. The Oakland County Treasurer and the City of Novi neither admit nor deny the allegations in Paragraph 27 since they do not have sufficient information and leave the Debtors to their proofs.

28. The applicable value under Michigan law is true cash value. The true cash value statute, MCL 211.27, et seq., in Michigan reads as follows, in pertinent part:

(1) As used in this act, "true cash value" means the usual selling price at the place where the property to which the term is applied is at the time of assessment, being the price that could be obtained for the property at private

sale, and not at auction sale except as otherwise provided in this section, or at forced sale. The usual selling price may include sales at public auction held by a nongovernmental agency or person if those sales have become a common method of acquisition in the jurisdiction for the class of property being valued. The usual selling price does not include sales at public auction if the sale is part of a liquidation of the seller's assets in a bankruptcy proceeding or if the seller is unable to use common marketing techniques to obtain the usual selling price for the property. A sale or other disposition by this state or an agency or political subdivision of this state of land acquired for delinquent taxes or an appraisal made in connection with the sale or other disposition or the value attributed to the property of regulated public utilities by a governmental regulatory agency for rate-making purposes is not controlling evidence of true cash value for assessment purposes. In determining the true cash value, the assessor shall also consider the advantages and disadvantages of location; quality of soil; zoning; existing use; present economic income of structures, including farm structures; present economic income of land if the land is being farmed or otherwise put to income producing use; quantity and value of standing timber; water power and privileges; and mines, minerals, quarries, or other valuable deposits known to be available in the land and their value. In determining the true cash value of personal property owned by an electric utility cooperative, the assessor shall consider the number of kilowatt hours of electricity sold per mile of distribution line compared to the average number of kilowatt hours of electricity sold per mile of distribution line for all electric utilities. MCL § 211.27(1).

Sale price alone is not sufficient to determine the true cash value as held by the Michigan Tax Tribunal in the case of *Arath III, Inc. v. City of Grand Rapids*, 2001 Mich Tax LEXIS 5 (2001) attached hereto as Exhibit 1. Intangible business enterprise value, or value in use, or value influencers must also be considered. In order to comply with statutory requirements, a valuation by the Michigan Tax Tribunal would require no less than 4 separate analyses: 1) apartments; 2) assisted living; 3) medical care facilities; and 4) vacant land. Each of these 4 types of property has a separate set of developed case law in Michigan regarding true cash value.

29. Pursuant to Michigan law, an auction sale pursuant to a bankruptcy is not to be used for assessment purposes. MCL § 211.27(1). Should the Court decide to take jurisdiction to determine the tax liability for 2009 regarding the Property, the value set by

an auction in a bankruptcy at the end of 2009 is not relevant for the valuation of the Property as of December 31, 2008. The auction of substantially all of the Debtors' assets did not occur until December 22, 2009.

30. The Oakland County Treasurer and the City of Novi deny the allegations in Paragraph 30 and leave the Debtors to their proofs.

31. The Oakland County Treasurer and the City of Novi deny the allegations in Paragraph 31 and leave the Debtors to their proofs.

32. The Oakland County Treasurer and the City of Novi deny the allegations in Paragraph 32 and leave the Debtors to their proofs.

C. Applicable Michigan Law

Michigan General Property Tax Act

33. Property tax assessment and collection in Michigan is governed by the General Property Tax Act, as amended. MCL § 211.1, et seq. The taxable status of persons and real and personal property is determined as of the tax day, which in Michigan is December 31 of the immediately preceding year. MCL § 211.2(2).

34. The City of Novi has a fiscal year from July 1 to June 30 of the following year. The City of Novi imposes a summer property tax levy each year, which taxes become a lien on July 1 of the year but is due on September 14 of the same year, as permitted by MCL § 211.44a(4). The City of Novi imposes a winter property tax levy each year, which is billed in December of the year but due to be paid by February 14th of the following year pursuant to MCL § 211.44 and City ordinances.

35. If the real property taxes are unpaid on February 15 of the following year, the Local Taxing Authorities return the unpaid taxes as delinquent to the applicable county treasurer. MCL § 211.44(9).

Property Taxes for 2009

36. The Debtors' obligation to pay property taxes in Michigan for the 2009 tax year accrued as of July 1, 2009, prior to the filing of the cases. The Summer 2009 property taxes came due on September 14, 2009, pursuant to City of Novi ordinances. The Winter 2009 property taxes came due on February 14, 2010. The unpaid real property taxes for 2009 in Michigan became statutory liens on the Novi Property as of July 1, 2009, as provided by City of Novi ordinances and pursuant to MCL § 211.40.

37. The Oakland County Treasurer became responsible for the collection of the 2009 real property taxes on the Novi Property after the Debtors defaulted in payment and the City of Novi returned the delinquent taxes to the Treasurer. Pursuant to Michigan law, interest accrues on past due taxes at the rate of 12% per annum. M.C.L. §§ 211.59 and 211.78g.

Michigan Tax Tribunal Act

38. Appeal of a tax assessment is governed by the Michigan Tax Tribunal Act, MCL § 205.701, et. seq. The Michigan Tax Tribunal holds exclusive jurisdiction over a proceeding for review of valuation of property under the property tax laws of the State of Michigan. MCL § 205.731.

39. Discovery is permitted in the pending Michigan Tax Tribunal matter pursuant to Michigan Tax Tribunal Rules 257 and 260. The Petitioner has the burden of proof in establishing the true cash value of the Novi Property. MCL § 705.737(3). The

Petitioner has the responsibility to arrange for a counsel conference with all other parties to discuss the possibility of settlement. Michigan Tax Tribunal Rule 250. All parties are entitled to submit evidence in the hearing before the Michigan Tax Tribunal. MCL § 205.746.

40. All decisions of the Michigan Tax Tribunal are final and conclusive as to all parties unless appealed to the Michigan Court of Appeals. MCL § 205.752.

D. The Applicable Factors Favor the Court Abstaining from Deciding the Motion

41. The Fifth Circuit has utilized the following factors in deciding whether a bankruptcy court should exercise jurisdiction under Section 505(a).

- "(i) the complexity of the issue under tax law,
- (ii) the exigency of the matter,
- (iii) the burden on the bankruptcy court's docket,
- (iv) the length of time required to hold a trial and to render a decision,
- (v) the debtor's asset and debt structure, and
- (vi) the actual or potential prejudice to either party. *In re Luongo*, 259 F.3d 323, 332 (5th Cir, 2001), *In re Davidson*, No. 98-42080, 2002 Bankr. Lexis 1984, (Bankr. N.D. Tex. Oct. 21, 2002); see also *In re Galvano*, 116 B.R. 367, 372 (Bankr. E.D.N.Y. 1990).

42. Because of the nature of the Novi Property and the various types of buildings, the issues surrounding assessment and valuation of the Novi Property for real property tax purposes are complex. State law issues regarding Michigan tax law and the underlying assessment procedures predominate. See the Joinder of the Oakland County Treasurer and the City of Novi to Treasurer of Douglas County, Colorado's Motion to Bifurcate Claim Objection Hearing, filed concurrently with this Objection. Therefore, the interest of comity suggests that the Court should abstain. *In re Montgomery Ward Holding Corp.*, 2000 Bankr. LEXIS 1326 (Bankr Del 2000). The first factor favors this Court abstaining from any determination of the tax liability regarding the Novi Property.

43. Allowing the Michigan Tax Tribunal to decide the tax issues is not likely to delay the administration of the estate. See *In re Luongo*, 259 F3d at 330. The Court has already confirmed the Plan. The Debtors could have obtained relief from the Bankruptcy Court to proceed with the case they filed before the Michigan Tax Tribunal prior to filing bankruptcy. If the Debtors had so acted, it is possible the tax liability issues would be resolved. Therefore, factor 2 favors abstention.

44. The Oakland County Treasurer and the City of Novi acknowledge that the Court is best able to determine the extent to which a lengthy evidentiary hearing will be a burden on the Court.

45. Once the Petitioner responds to discovery and holds the counsel conference, it is possible that the issues regarding the amount of taxes due for 2009 could be resolved quickly with an order from the Michigan Tax Tribunal. See letter from counsel for the City of Novi in the Tax Tribunal matter attached hereto as Exhibit 2. Factor 4 favors abstention.

46. The Debtors' asset and debt structure are not a factor requiring this Court to assert jurisdiction over determining the tax liability. Pursuant to the Debtors' Disclosure Statement, the Novi Campus has assets in the approximate amount of \$238 million and liabilities in the approximate amount of \$252.2 million. The Debtors admit liability for some portion of the \$3 million in 2009 taxes due so the amount in dispute is less than 1% of the liabilities of the pertinent Debtor. If the Debtors are successful as to the Motion, the benefit will inure to the Novi Construction Loan Claimant, not the Debtors. The unsecured creditors will not benefit which weighs in favor of abstention.

See *In re New Haven Projects Ltd. Liability Co.*, 225 F3d 283 (2nd Cir, 2000). Factor 5 favors abstention.

47. The City of Novi will be prejudiced if it is required to have its counsel, assessors, appraisers and expert witnesses travel to Dallas, Texas regarding property leased by the Debtors in Michigan. The Debtors have already availed themselves of the jurisdiction of the Michigan Tax Tribunal and the Novi Property and witnesses are located in Michigan. Factor 6 favors abstention.

48. The case at bar is similar to *In re Pilgrim's Pride Corporation* in which Judge Lynn of the United States Bankruptcy Court for the Northern District of Texas abstained from determining tax liability and allowed the pending matter to proceed before the judicial body established under state law. *In re Pilgrim's Pride Corporation*, 2009 Bankr LEXIS 2222 (Bankr ND TX, 2009). See also *In re Delafield 246 Corp.*, 368 BR 285 (Bankr SD NY, 2007).

49. Abstention will not delay the reorganization since the Court has granted confirmation.

50. The Court should abstain from determining the tax liability related to the Novi Property for the 2009 tax year and grant relief from the automatic stay or post confirmation injunction to permit the parties to proceed before the Michigan Tax Tribunal.

E. Property Taxes for 2010 Tax Year

51. The Debtors are not responsible for the payment of the taxes on the Novi Property for the 2010 tax year.

52. Liability for the taxes on the Novi Property for the 2010 tax year accrues post confirmation.

53. The new owners of the Novi Property have filed a Petition with the Michigan Tax Tribunal regarding the 2010 taxes. A copy of the Petition is attached hereto as **Exhibit 1**.

54. The Court does not have jurisdiction to determine the tax liability related to the Novi Property for the 2010 tax year.

WHEREFORE, the Oakland County Treasurer and the City of Novi pray that the Court deny the Debtors' Second Amended Motion for Determination of Tax Liability [Docket No. 1471] as to the tax liability for 2009 and 2010 as to the property located at 41100 Thirteen Mile, Novi, Oakland County, Michigan and for such other and further relief as is just and necessary.

Respectfully submitted,

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the City of Novi

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