Jason Brookner
Monica S. Blacker
Andrews Kurth LLP
1717 Main Street, Suite 3700
Dallas, Texas 75201
Telephone: (214) 659-4400
Facsimile: (214) 659-4401
jasonbrookner@andrewskurth.com
monicablacker@andrewskurth.com

Daniel S. Bleck, Esq.
Adrienne K. Walker, Esq.
Mintz Levin Cohn Ferris Glovsky
and Popeo, PC
One Financial Center
Boston, Massachusetts 02111
Telephone: (617) 542-6000
Facsimile: (617) 542-2241
dbleck@mintz.com
awalker@mintz.com

Attorneys for Capmark Finance, Inc., as collateral and administrative agent

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

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

OBJECTION OF CAPMARK FINANCE, INC., AS COLLATERAL AND ADMINISTRATIVE AGENT TO 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

[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.

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

Capmark Finance, Inc., N.A., successor in interest to GMAC Commercial Mortgage Corporation, as administrative agent and collateral agent (in such capacities, "Littleton Agent") for itself and certain other financial institutions (collectively with the Littleton Agent, the "Littleton Lenders") that have provided construction financing to Littleton Campus, LLC ("Littleton Campus"), by its undersigned counsel, objects 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 (the "Motion"). As of the Petition Date, Littleton Campus was indebted to the Littleton Lenders in the outstanding principal amount of $62,393,218.99, plus interest, costs and expenses.[2] In support of this Objection, Littleton Agent states the following:

I. PRELIMINARY STATEMENT

The only exit strategy contemplated by the Debtors in these chapter 11 cases involves a sale of substantially all of the Debtors' assets. That sale must be done in a fair, neutral, and unbiased manner designed to produce the maximum value for these assets upon the sale. Certain

[2] Attached as Exhibit A hereto is a recitation of the primary financing documents associated with the Wind Crest CCRC. Capitalized terms used herein but not otherwise defined shall have the meaning ascribed to such term as identified at Exhibit A.

of the bidding procedures and other requests contained in the Motion favor Redwood Capital Investment LLC. (together with its affiliates, including the proposed purchasing entities, "Redwood"), the proposed stalking horse, and may have a chilling impact on other bidders. It is of critical importance that all interested parties are provided a fair and complete opportunity to participate in an auction sale on the same terms and conditions.

II. ARGUMENT

The Bidding Procedures Must Preserve The Right To Credit Bid

Under the terms of the bidding procedures, it appears that the Debtors are seeking to strip the credit bid rights of the senior secured creditors. Section 363(k) of the Bankruptcy Code grants a secured creditor the right to credit bid the full face amount of its claim when the collateral securing its claim is sold outside the ordinary course of business. The right to credit bid is a fundamental protection of the secured creditor's constitutional property rights. The right "gives the secured creditor protections against attempts to sell the collateral too cheaply; if the secured party thinks the collateral is worth more than the debtor is selling it for, it may effectively bid its debt and take title to the property." 7 Lawrence P. King, Collier on Bankruptcy, ¶ 1129.05[2][b] (15th Ed. Rev. 2009).

Congress' "bankruptcy power is subject to the Fifth Amendment's prohibition against taking private property without compensation." *United States v. Sec. Indus. Bank*, 459 U.S. 70, 75 (1982). The right to credit bid cannot be impaired without running afoul of the Fifth Amendment. *See Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 589 (1935) (recognizing the right to credit bid among those rights subject to Fifth Amendment protection).

In order to preserve their right to credit bid, secured creditors must be deemed "Qualified Bidders" under the bidding procedures. In addition, the following aspects of the

bidding procedures impair the right of the secured creditors to credit bid and should not be applicable to secured creditors: (a) the $5 Million Dollar cash deposit, (b) the consent requirement, (c) the requirement for written representations concerning availability of cash or financing, financial wherewithal and ability to close, (d) the requirement for written submission of a Qualified Bid, and (e) the overbid requirements. The Court should modify the bidding procedures to eliminate the applicability of these provisions to secured creditors exercising their right to credit bid.

The Bidding Procedures Must Be Fair And Must Level The Playing Field

The sale process should include "an intensive effort to drum up the best price obtainable for the creditors." *In re Bidermann Indus. U.S.A., Inc.*, 203 B.R. 547, 552 (Bankr. S.D.N.Y. 1997). Under a Section 363 sale of assets outside of the ordinary course of business, the trustee or debtor "has an obligation to maximize revenues for the estate." *In re S.N.A. Nut Co.*, 186 B.R. 98, 104 (Bankr. N.D. Ill. 1995) (internal citations omitted). "The purpose and goal of any asset sale is to maximize the recovery of value for the benefit of the bankruptcy estate." *In re Jon J. Peterson, Inc.*, 411 B.R. 131, 137 (Bankr. W.D.N.Y. 2009). The bidding process must remain fair and equitable or "competitors will refrain from the type of full participation that is needed to assure bids for the highest reasonable value." *Id.* "For these reasons, the court will not approve bidding procedures that undermine principles of fair play." *Id.*

The procedures proposed in the Motion leave far too much in the discretion of the Debtors. The bidding procedures should be proposed in such a manner to maintain a level playing field. The same rules must apply to all bidders. The proposed bidding procedures grant excessive discretion to the Debtors and fail to maintain a level playing field and thus, should be denied as requested.

A. No Bidder (Other Than Redwood) Will Be Able to Meet the Qualified Bidder Consent Requirement.

All bidders should have to meet the same requirements in order to be deemed "Qualified Bidders." The proposed bidding procedures require, as a condition to being deemed a Qualified Bidder, that the prospective bidder obtain consents from all lender groups, the NSC and the NFPs. Redwood, however, is not bound by this requirement. By imposing this requirement on other bidders, the proposed procedures virtually guarantee a sale to Redwood, because other potential "Qualified Bidders" will be shut out.

This artificial barrier should be eliminated. Bidders should be qualified and permitted to bid without having to obtain the consent of any party.

B. Requirements to Keep Bids Open or Act as a Back-Up Bidder Should Apply to All or to None.

The proposed bidding procedures require all bidders – except Redwood – to keep their bid open until a transaction is consummated. This forces bidders – other than Redwood – to tie up significant credit and reserves for months, even if their bids were rejected. The proposed procedures also require all bidders – except Redwood – to agree in advance to be a back-up bidder. Only the winning bidder and the bidder that is selected and agrees to be a back-up bidder should be required to hold their bids open through closing. By imposing these provisions, Redwood can be seen as having an unfair advantage.

C. The Provisions Related to the Bidders' Deposits Should be Changed.

Similarly, under the proposed procedures all prospective bidders – other than Redwood – must keep a $5 Million deposit in place until the consummation of a transaction. In contrast, the Debtors must return Redwood's deposit once its bid is rejected. All deposits should be returned

after the auction except for those of the winning bidder and the bidder that is selected and agrees to be a back-up bidder.

In addition, the required deposit should be pro-rated for those potential bidders that desire to bid on some, but not all, of the assets. Requiring bidders interested in only one campus to post the entire $5 Million deposit will eliminate such bidders and substantially decrease the pool of potential purchasers.

D. Bidders Need More Time to Submit Bids.

Bidders need more than 20 days from the date that they receive the details of the Redwood proposal (including the proposed plan) to submit a competitive bid. Bidders should be provided at least forty-five (45) days from the date that they receive the complete Redwood proposal to submit their initial qualifying bids.

Assumption Of The Redwood Purchase Agreement Is Premature And Unnecessary

The Motion does not affirmatively state, but the proposed order provides, that the Redwood Purchase Agreement would be assumed. The Debtors have not moved to assume the Redwood Purchase Agreement in the Motion, nor have they given sufficient notice if that is their intention. Assumption of the Redwood Purchase Agreement exposes the estates to significant liability and is premature and unnecessary. Indeed, the Redwood Purchase Agreement is incomplete and references 21 disclosure schedules – none of which are attached to the Redwood Purchase Agreement filed with the Motion.[3]

[3] The Redwood Purchase Agreement provides that the parties will attempt to agree on final versions of schedules and exhibits within ten days of execution of the agreement – which is the same date that the Debtors ask the Court to permit them to "assume" the Redwood Purchase Agreement. Redwood Purchase Agreement, Article 7.13.

In addition, the Redwood Purchase Agreement requires the Debtors to pay fees to Redwood in circumstances that go well beyond a typical break up fee. For example, the Debtors will be obligated to pay Redwood a $1.5 Million fee even if an alternate transaction does not close. Indeed, the mere fact that the schedules to the proposed Redwood Purchase Agreement are not completed within ten (10) days from execution date, or the fact that certain timing milestones are not met (which may be completely out of the Debtor's control) will trigger the $1.50 million fee. Clearly, this goes beyond a traditional break-up fee.

III. CONCLUSION

Given the Debtors' stated exit strategy of a sale of substantially all of its assets, the Court should ensure that the bidding procedures foster a competitive process and maintain a level playing field. Based upon the foregoing objection, there is a significant risk that this may not occur.

WHEREFORE, the Littleton Agent respectfully requests that the Court enter an Order (i) denying the Motion or, in the alternative, modifying the proposed bidding procedures as set forth in this objection, and (ii) granting Littleton Agent such other and further relief as may be just and proper.

Respectfully submitted,

/s/ Monica S. Blacker
ANDREWS KURTH LLP
Jason Brookner
Monica S. Blacker
1717 Main Street, Suite 3700
Dallas, Texas 75201
Telephone: (214) 659-4400
Facsimile: (214) 659-4401
jasonbrookner@andrewskurth.com
monicablacker@andrewskurth.com

MINTZ LEVIN COHN FERRIS GLOVSKY AND POPEO, PC
Daniel S. Bleck, Esq.
Adrienne K. Walker, Esq.
One Financial Center
Boston, Massachusetts 02111
Telephone: (617) 542-6000
Facsimile: (617) 542-2241
dbleck@mintz.com
awalker@mintz.com

Attorneys for Capmark Finance, Inc., as collateral and administrative agent

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of October, 2009, a true and correct copy of the foregoing was served via email through the Bankruptcy Court's Electronic Case Filing System on those parties that have consented to such service, including the movant-Debtors.

By: */s/ Monica S. Blacker*
Monica S. Blacker, Esquire