Vincent P. Slusher
State Bar No. 00785480
vince.slusher@dlapiper.com
DLA Piper LLP (US)
1717 Main Street, Suite 4600
Dallas, Texas 75201
Telephone: (214) 743-4572
Facsimile: (972) 813-6267

-and-

Thomas R. Califano
thomas.califano@dlapiper.com
Jeremy R. Johnson
jeremy.johnson@dlapiper.com
DLA Piper LLP (US)
1251 Avenue of the Americas
New York, New York 10020-1104
Tel: (212) 835-6000
Fax: (212) 835-6001

Attorneys for the Plan Administrator

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

In re:	§	**CASE NO. 09-37010 (SGJ)**
	§	
ERICKSON RETIREMENT COMMUNITIES, LLC, *et al.*[1]	§	**CHAPTER 11**
	§	**Jointly Administered**
	§	
Debtors.		

MOTION OF PLAN ADMINISTRATOR, PURSUANT TO RULE 9019 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE, FOR APPROVAL OF SETTLEMENT

[1] 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, LLC, Warminster Campus, LP.

NO HEARING WILL BE CONDUCTED HEREON UNLESS A WRITTEN RESPONSE IS FILED WITH THE CLERK OF THE UNITED STATES BANKRUPTCY COURT AT U.S. BANKRUPTCY COURT NORTHERN DISTRICT OF TEXAS, 1100 COMMERCE STREET, 14TH FLOOR, DALLAS, TX 75242-1496 BEFORE CLOSE OF BUSINESS ON OCTOBER 12, 2011, WHICH IS TWENTY (20) DAYS FROM THE DATE OF SERVICE HEREOF.

ANY RESPONSE MUST BE IN WRITING AND FILED WITH THE CLERK, AND A COPY MUST BE SERVED UPON COUNSEL FOR THE MOVING PARTY PRIOR TO THE DATE AND TIME SET FORTH HEREIN. IF A RESPONSE IS FILED A HEARING WILL BE HELD WITH NOTICE ONLY TO THE OBJECTING PARTY.

IF NO HEARING ON SUCH NOTICE OR MOTION IS TIMELY REQUESTED, THE RELIEF REQUESTED SHALL BE DEEMED TO BE UNOPPOSED, AND THE COURT MAY ENTER AN ORDER GRANTING THE RELIEF SOUGHT OR THE NOTICED ACTION MAY BE TAKEN.

Paul Rundell, as the Plan Administrator (the "**Plan Administrator**") for the above captioned reorganized debtors (the "**Debtors**"), by its attorneys DLA Piper LLP (US), hereby moves, under Rule 9019(a) of the Federal Rules of Bankruptcy Procedure (the "**Bankruptcy Rules**"), for entry of an order approving a settlement (the "**Settlement**") of a tax dispute between the Debtors and Harris County, Texas (the "**Tax Dispute**"). The Tax Dispute includes, and the Settlement resolves, the issues raised in Debtors' Motion for Determination of Tax Liability as it related to real property taxes levied against one or more of the Debtors by Harris County, Texas for the years 2007, 2008, and 2009 [Dkt. No. 1211] (as amended by docket numbers 1287 and 1471, the "**Tax Motion**"). Specifically, and as set forth more fully below, the proposed Settlement is an agreement between HCP ER6, LP, Houston Campus, LP, and the Harris County Appraisal District (collectively the "**Parties**") to resolve the 2007, 2008 and 2009 ad valorem real property taxes assessed by Harris County, Texas against Debtor Houston Campus, LP. The

Debtors now seek the Court's approval of such Settlement. In further support of this Motion, the Debtors respectfully state as follows:

INTRODUCTION AND JURISDICTION

1. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 1334(b) and 157 and the general order of reference in effect in this District. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2) and arises out of the Debtors' bankruptcy cases.

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

BACKGROUND

3. On October 19, 2009 (the "**Petition Date**"), the Debtors commenced these cases by each filing voluntary petitions for relief under chapter 11 of the Bankruptcy Code.

4. The Debtors remained in possession of their assets and continued to operate and manage their businesses as debtors-in-possession pursuant to Bankruptcy Code sections 1107 and 1108.

5. On November 2, 2009, the Office of the United States Trustee (the "**U.S. Trustee**") appointed an Official Committee of Unsecured Creditors (the "**Committee**") in these cases [Docket No. 258]. No trustee or examiner has been appointed in these chapter 11 cases.

6. On April 16, 2010 (the "**Confirmation Date**"), this Court entered its Findings of Fact, Conclusions of Law, and Order (as amended and supplemented, the "**Confirmation Order**") confirming the Debtors' Fourth Amended Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code (as amended or supplemented, the "**Plan**"), pursuant to which the Debtors sold (the "**Sale**") substantially all of their assets to Redwood-ERC Senior Living Holdings, LLC, Redwood-ERC Management, LLC, Redwood-ERC Development, LLC, Redwood-ERC Properties, LLC and Redwood-ERC Kansas, LLC (collectively, "**Erickson Living**").

7. On or about November 17, 2009, Harris County, Texas issued a Property Tax

Statements relating to 2007, 2008, and 2009 ad valorem taxes on a parcel of improved real property owned by Debtor Houston Campus, LP and located in Harris County, Texas, referred to on county tax records as Parcel #126-093-001-0001, (the "**Eagle's Trace Parcel**") which is part of a continuing care retirement community commonly referred to as "**Eagle's Trace**." for the 2007, 2008 and 2009 tax years. The 2007 and 2008 Tax Statements related only to certain improvements on the Eagle's Trace Parcel that Harris County had allegedly inadvertently omitted from prior tax assessments (the "**Omitted Improvements**"). Initially, Harris County placed an assessed value of $12,557,487 on the Omitted Improvements for each of the 2007 and 2008 tax years. The Debtors appealed the 2007 and 2008 assessments on the Omitted Improvements. The 2009 Property Tax Statement included the 2009 ad valorem taxes on the entire Eagle's Trace Parcel, including the Omitted Improvements. In the 2009 Property Tax Statement, Harris County assessed the taxable value of the Eagle's Trace Parcel at $58,754,396. The Debtors timely contested such assessments.

8. The Debtors initially filed the Tax Motion on April 2, 2010, and filed amendments thereto on April 9, 2010 and May 28, 2010. The Tax Motion requested that the Court determine the Debtors' tax obligations to certain taxing authorities, including Harris County, Texas. As of the time of the Confirmation Date, the Tax Appeals and Tax Motion had not yet been decided. As a result, the Debtors entered into the Stipulation and Order Concerning Tax Overpayments [Dkt. No. 1429] (the "**Tax Stipulation**") with PNC National Bank, NA as collateral and administrative agent. The Tax Stipulation provided that, in the event of an overpayment and resulting refund of tax payments, the liens of the Administrative Agent, as defined in the Tax Stipulation and Confirmation Order, would be preserved and attach to the tax refunds to the Debtors. The Tax Stipulation provides that, upon receipt of a tax refund, the Debtors are to promptly pay such tax refund to the Administrative Agent to the extent of, and in satisfaction of, the Administrative Agent's liens on such funds.

9. As a condition of the Sale, and in accordance with the Plan, the Confirmation Order, and the Tax Stipulation, the Debtors paid, under protest, all asserted, previously unpaid ad valorem taxes on the various properties sold to Erickson Living. Accordingly, the Debtors paid Harris County $1,675,546.68 under protest on or about April 30, 2010 in satisfaction of the 2007 and 2008 ad valorem taxes assessed by Harris County related to the Omitted Improvements, and the 2009 ad valorem taxes assessed by Harris County related to the Eagle's Trace Parcel.[2] Additionally, the Debtors escrowed an additional $460,270.33 earmarked as "Houston Tax Escrow" in the event more property taxes or penalties were levied against Eagle's Trace.

10. The Tax Dispute has continued following the Confirmation Date, but has recently settled by agreement of the Parties. On or about March 8, 2010, Harris County informally agreed to reduce the 2007 assessed value of the Omitted Improvements from $12,557,487 to $6,906,618, and the Debtors sought no further appeal of this 2007 reduced assessment. A copy of the informal reassessment is attached hereto as **Exhibit A** (the "**2007 Tax Settlement**"). Harris County also offered a reduction of the 2008 assessed value of Omitted Improvements from $12,557,487 to $9,190,161. However, the Debtors pursued their appeal of the 2008 assessment on the Omitted Parcel, resulting in a cause of action in the 189th Judicial District Court of Harris County, Texas and captioned Houston Campus, LP (Eagle's Trace – 2008 Omitted Improvements) v. Harris County Appraisal District, cause no. 2010-20491 (the "**2008 Tax Appeal**"). However, on April 13, 2011, Harris County and the Debtors agreed to an 2008 assessed value of $4,000,000 of the Omitted Improvements. A copy of the resulting settlement agreement is attached hereto as **Exhibit B** (the "**2008 Tax Settlement**"). The Debtors also pursued the 2009 tax assessment on the Eagle's Trace Parcel resulting in a lawsuit in Harris

[2] The Debtors actually paid Harris County a total of $1,683,409.36 at closing, which was based on a tax total tax bill of $1,482,784.68 relating to the 2007 and 2008 taxes on the Omitted Improvements, the 2009 taxes on the Eagle's Trace Parcel, an additional $6,958.12 relating to the remainder of Eagle's Trace, and penalties and interest of 13%.

County District Court captioned HCP ER6, LP and Houston Campus, LP (Eagle's Trace) v. Harris County Appraisal District, cause number 2009-54309 (the "**2009 Tax Appeal**", and together with the 2008 Tax Appeal, the "**Tax Appeals**"). However, the 2009 Tax Appeal was also recently settled by the Debtors and Harris County, whereby Harris County and the Debtors agreed to an assessed 2009 value of $32,500,000 of the Eagle's Trace Parcel. A copy of the resulting Settlement Agreement is attached hereto as **Exhibit C** (the "**2009 Tax Settlement**"). To facilitate this resolution, the 2008 and 2009 Tax Settlements provide that the Debtors will waive the interest accrued pursuant to Section 42.43 of the Texas Tax Code on any refund from Harris County if such refund is paid within sixty days. As required by the 2008 and 2009 Tax Settlements, the Board of Directors of the Harris County Appraisal District approved the terms of these settlements on or about June 15, 2011, as set forth in the correspondence from Robert P. McConnell, attorney in charge for Harris County Appraisal District, and attached hereto as **Exhibit D**. Therefore, the Settlement, which includes the 2007 Tax Settlement stemming from the informal reassessment by Harris County, and the 2008 and 2009 Tax Settlements stemming from the Tax Appeals, if approved by this Court, will resolve the Tax Dispute, including the Tax Appeals and the issues raised in the Tax Motion as it applies to Harris County.

THE PROPOSED SETTLEMENT[3]

11. After significant arms-length negotiations, and the Parties' recognition concerning the complexity of the factual and legal issues associated with the Tax Dispute, and the time cost and delay that a continuing contested resolution process might entail, the Parties agreed to, subject to the Court's approval, the Settlement.

12. Upon the Court's approval, the proposed Settlement will fully and finally resolve all issues that were raised or adjudicated in the Tax Dispute. Subject to the entry of an order

[3] This description is for illustration and convenience only; in the event this description conflicts with the actual settlement documents or the form of order filed herewith, the settlement documents and order control.

granting this Motion (the "**Settlement Order**"), the proposed form of which has been submitted as **Exhibit E** to this Motion, the 2007 Tax Settlement would reduce the 2007 taxes due on the Omitted Improvements to $174,648.75, the 2008 Tax Settlement would reduce the 2008 taxes on the Omitted Improvements to $100,948.00, and the 2009 Tax Settlement would reduce the 2009 Taxes on the Eagle's Trace Parcel to $820,202.50. As the Debtors have previously paid Harris County $1,675,546.68 under protest in connection with the 2007 and 2008 taxes on the Omitted Improvements and the 2009 taxes on the Eagle's Trace Parcel, the Debtors, if the Court approves the Settlement, will be due a refund of $572,789.31 from Harris County. Moreover, the escrowed funds earmarked as Houston Tax Escrow would be released to the Debtors, resulting in an additional $446,270.33 being returned to the Debtors. In total, the Settlement will result in $1,019,059.60 being refunded to the Debtors.

13. In accordance with the Confirmation Order and Tax Stipulation, the Debtors' refund will be forwarded to the Administrative Agent in the amount of the Administrative Agent's liens on such refund.

THE COURT SHOULD APPROVE THE SETTLEMENT

14. The Debtors, in their business judgment, believe it is in the best interests of the Debtors' estates, creditors and other parties in interest to resolve the Tax Dispute pursuant to the terms of the Settlement and Settlement Order, that this Motion should be allowed, and that the Settlement should thus be approved. The Debtors, in their business judgment, also believe that the Settlement is fair, equitable, and falls into the range of reasonableness. The Debtors reached these conclusions after weighing, among other factors, (a) the probability of success of any further litigation, (b) the inconvenience and delay necessarily attendant to continuing the dispute, and (c) the best interests of the Debtors, their estates, and their creditors.

15. Rule 9019(a) of the Federal Rules of Bankruptcy Procedure provides, in relevant part, that "[o]n motion by the trustee and after notice and a hearing, the court may approve a

compromise or settlement." Fed. R. Bank. P. 9019(a). Settlements and compromises are "a normal part of the process of reorganization." Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424 (1968) (quoting Case v. Los Angeles Lumber Prods. Co., 308 U.S. 106, 130 (1939)).

16. To approve a settlement under Bankruptcy Rule 9019(a), a bankruptcy court should determine whether the settlement is in the best interests of the debtor's estate. See, e.g. Rivercity v. Herpel (In re Jackson Brewing Co.), 624 F.2d 599, 602-03 (5th Cir. 1980); CFB-5, Inc. v. Cunningham, 371 B.R. 175, 181 (N.D. Tex. 2007); In re Interstate Cigar Co., Inc., 240 B.R. 816, 822 (Bankr. E.D.N.Y. 1999); In re Ionosphere Clubs, Inc., 156 B.R. 414 426 (S.D.N.Y. 1993), aff'd 17 F.3d 600 (2d Cir. 1994).

17. When analyzing a potential settlement, the bankruptcy court should canvass the issues and determine whether the proposed settlement falls within the range of reasonableness in the case, but without trying the case or otherwise deciding the issues of law and fact presented. See, e.g., Official Committee of Unsecured Creditors v. Cajun Elec. Power Coop., Inc. (In re Cajun Elec. Power Coop., Inc.), 119 F.3d 349 (5th Cir. 1997); Media Cent., Inc. v. Jackson Family TV, Inc., 190 B.R. 316, 321 (E.D. Tenn. 1994) (citing In re Tennol Energy Co., 127 B.R. 820, 828 (Bankr. E.D. Tenn. 1991); see also In re W.T. Grant Co., 699 F.2d 599, 608 (2d Cir. 1983). In addition, the bankruptcy court may exercise its discretion "in light of the general public policy favoring settlements." In re Hibbard Brown & Co., Inc., 217 B.R. 41, 46 (Bankr. S.D.N.Y. 1998); see also Nellis v. Shugrue, 165 B.R. 115, 123 (S.D.N.Y. 1994) ("the general rule [is] that settlements are favored and, in fact, encouraged").

18. The Settlement is the best option available to resolve the Tax Dispute and preserves value for the benefit of all stakeholders. The Debtors believe, in their business judgment, that the Settlement is a reasonable, fair and economical means to resolve the Tax Dispute in light of the litigation costs and the delays in distribution of reimbursed taxes to the

Debtors' estates and ultimately their creditors that continuing the Tax Dispute would cause. Moreover, the reassessed taxable value agreed to by Harris County is fair and reasonable, and will result in a significant savings to the Debtors. Furthermore, the refund resulting from the Settlement will be used to pay the Debtors' creditors. The Settlement is therefore in the best interest of the Debtors, their estates, and their creditors, and should be approved by this Court pursuant to Bankruptcy Rule 9019(a).

NOTICE

19. Notice of this Motion has been given to the following parties or, in lieu thereof, to their counsel, if known: (a) the U.S. Trustee; (b) the Trustee to the Liquidating Creditor Trust established by the Plan; and (c) all parties that have requested personal notice pursuant to Bankruptcy Rule 2002. In light of the nature of the relief requested herein, the Debtors submit that no further notice of the Motion is necessary or required.

NO PREVIOUS REQUEST

20. No prior motion for the relief requested herein has been made to this or any other Court.

WHEREFORE, the Debtors respectfully request that this Court enter the annexed Order approving the Settlement, and granting such other and further relief as the Court may deem just and proper.

_/s/ Vincent P. Slusher_____
Vincent P. Slusher
DLA Piper LLP (US)
1717 Main Street, Suite 4600
Dallas, Texas 75201
Tel: 214-743-4572
Fax: 972-813-6267
e-mail: vince.slusher@dlapiper.com

-and-

Thomas R. Califano

DLA Piper LLP (US)
1251 Avenue of the Americas
New York, New York 10020
Tel: 212-335-4500
Fax: 212-335-4501
e-mail: Thomas.califano@dlapiper.com

Attorneys to the Plan Administrator