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

In re	)	
	)	CASE NO. 09-37010
ERICKSON RETIREMENT COMMUNITIES, LLC, *et al.*	)	CHAPTER 11
	)	CONTESTED MATTER
Debtors.	)	

SUPPLEMENTAL OBJECTION OF WILMINGTON TRUST FSB AS AGENT TO THE MOTION OF THE CCRC MEZZANINE LENDERS FOR ORDER APPOINTING EXAMINER PURSUANT TO 11 U.S.C.A. § 1104

Wilmington Trust FSB, solely in its capacity as successor administrative agent to PNC Bank, N.A. (the "Agent" or "Wilmington"),[1] on behalf of the lenders (the "Revolver

[1] Wilmington Trust FSB is successor in interest to PNC Bank, N.A in its capacity as Administrative Agent under the Credit Agreement. Accordingly, herein, with respect to the Credit Agreement, defined herein, the term Agent shall refer to both Wilmington Trust FSB and its predecessor PNC Bank, N.A solely

Lenders") under that certain Credit Agreement dated July 27, 2007 as amended or modified from time to time (the "Credit Agreement"), files this supplemental objection (the "Supplemental Objection") to the Motion of the CCRC Mezzanine Lenders for Order Appointing Examiner Pursuant to 11 U.S.C.A. § 1104 [Docket No. 520] (the "Examiner Motion"). In support of this Supplemental Objection, the Agent respectfully submits as follows:

BACKGROUND

1. On October 19, 2009, the above-captioned debtors and debtors-in-possession (the "Debtors") commenced these cases by each filing voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code").

2. On December 14, 2009, Strategic Ashby Ponds Lender LLC, Strategic Concord Landholder, LP, HCP ER6, LP, HCP ER2, LP, HCP ER3, LP, MSRESS III Dallas Campus, L.P., MSRESS III Denver Campus, LLC, and MSRESS III Kansas Campus, L.P. (collectively, the "CCRC Mezzanine Lenders") filed the Examiner Motion.

3. On January 7, 2010, the Agent filed a joinder [Docket No. 640] to the objections of (i) Wells Fargo Bank National Association and U.S. Bank National Association [Docket No. 622], (ii) PNC Bank National Association [Docket No. 627], and (iii) the Debtors [Docket No. 631].

4. On February 5, 2010, a hearing was held on the Examiner Motion (the "Hearing"). At the hearing, counsel for the CCRC Mezzanine Lenders indicated that the primary purpose of the appointment of an examiner would be to assist in analyzing and

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in their capacity as Agent to the Revolver Lenders.

studying the allocation of the proceeds of the proposed sale of substantially all of the Debtors' assets among the Debtors.

SUPPLEMENTAL OBJECTION

5. In addition to the objections joined in the Joinder, which are hereby incorporated by reference, the Agent objects to the Examiner Motion on the following grounds: (a) the Examiner Motion is an inappropriate attempt by the CCRC Mezzanine Lenders to shift the cost of a valuation fight onto the Debtors' estates and, thus in essence, onto the secured lenders; and (b) in the event than an examiner is appointed under the Examiner Motion, the cost of the examiner should be shared among all of the Debtors' estates because the examiner's investigation of valuation and allocation would necessarily concern all of the Debtors.

A. Appointment of an Examiner to Determine Valuation and Allocation Issues Is Not Warranted under the Bankruptcy Code.

6. The appointment of an examiner is governed by section 1104(c) of the Bankruptcy Code, which provides as follows:

> If the court does not order the appointment of a trustee under this section, then at any time before the confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of an examiner to conduct such an investigation of the debtor as is appropriate, including an investigation of any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor of or by current or former management of the debtor, if—
>
> > (1) such appointment is in the interests of creditors, any equity security holders, and other interests of the estate; or
> >
> > (2) the debtor's fixed, liquidated, unsecured debts, other than debts for goods, services, or taxes, or owing to an insider, exceed $5,000,000.

11 U.S.C. § 1104(c).

7. The text of the statute makes it clear that the primary function of an examiner is to investigate "allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor of or by current or former management of the debtor." *See id.*; *see also In re Gliatech, Inc.*, 305 B.R. 832, 835 (Bankr. N.D. Ohio 2005); *In re Gilman Servs., Inc.*, 46 B.R. 322, 327 (Bankr. D. Mass. 1985).

8. The legislative history further clarifies that the "examiner would be appointed to conduct such an investigation of the debtor as is appropriate under the particular circumstances of the case, including an investigation of any allegations of fraud, dishonesty, or gross mismanagement of the debtor of or by current or former management of the debtor." House Report No. 95-595, 95th Cong., 1st Sess. 402 (1977), *reprinted in* 11 U.S.C.A. § 1104 (Collier Pamphlet ed. 2010). It also underscores that, for an examiner to be appointed, "the protection must be needed, and the costs and expenses must not be disproportionately high." *Id.*

9. The burden is on the party moving for the appointment of an examiner to present more than "mere allegations of misconduct;" the movant must provide some factual basis for the appointment. *In re Gilman Servs., Inc.*, 46 B.R. at 327 (citing *In Re Lenihan*, 4 B.R. 209 (Bankr.D.R.I.1980)).

10. Here, the CCRC Mezzanine Lenders have provided no factual basis to support their request for the appointment of an examiner. Indeed, they have not even alleged misconduct. Counsel for the CCRC Mezzanine Lenders has conceded that they wish to have an examiner appointed simply to perform a valuation and allocation analysis of the Debtors. This is a cost properly borne by the CCRC Mezzanine Lenders

themselves, and they should not be allowed to selfishly straddle the Debtors' estates with that cost through the appointment of an examiner for a role outside of the scope envisioned by the Bankruptcy Code. *See In re Bradlees Stores, Inc.*, 209 B.R. 36, 40 (Bankr. S.D.N.Y. 1997) (denying request for appointment of an examiner where the movants sought a "court-appointed prosecutor, funded by the Debtors' estates, to preserve their own parochial interests"); *c.f. also Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery*, 330 F.3d 548, 578 (3d Cir. 2003) (finding that appointing an examiner to bring derivative suits to be an "inferior" remedy due to the examiner's costs being borne by the estate).

11. Moreover, based on participation in numerous settlement discussions, the Agent believes that a global settlement is imminent and respectfully submits that the appointment of an examiner at this late date is simply inappropriate. *See In re Bradlees Stores, Inc.*, 209 B.R. at 40 (denying motion to appoint examiner to prosecute avoidance actions that would have left examiner with less than two weeks to file such actions before the limitations period expired); *In re Shelter Resources Corp.*, 35 B.R. 304, 305 (Bankr. N.D. Ohio 1983) (denying motion to appoint "an examiner to investigate the allegations made in the shareholders' derivative action and to review the fairness of any settlement, all of which are now moot by reason of the compromise and settlement").

B. <u>If an Examiner Is Appointed for Valuation and Allocation, the Cost Should Be Borne by All of the Debtors' Estates.</u>

12. If an examiner is appointed to value substantially all of the Debtors' assets in connection with a potential sale and/or to allocate the proceeds of such a sale among the Debtors' estates, it is only appropriate for all of the Debtors' estates to share the cost of the appointment. Assuming that there is some benefit to the appointment of an

examiner for the purposes of valuation and/or allocation purposes – and the Agent does not believe or concede that there is – such benefit would flow to all of the Debtors' estates, and forcing only a subset of the Debtors' estates to bear the cost of such an appointment would lead them to bear a disproportionately high cost compared against a benefit shared among all of the Debtors' estates. Thus, if the Court orders the appointment of an examiner, it is appropriate for all of the Debtors' estates to bear the cost of the appointment.

WHEREFORE, for all the foregoing reasons, the Agent respectfully requests that the Court enter an order denying the Examiner Motion, or, in the alternative if the Court grants the Examiner Motion, requiring the cost of such examiner to be borne by all of the Debtors' estates, and/or granting such other and further relief as the Court deems just and appropriate under the circumstances.

Respectfully submitted this 18th day of February 2010.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing pleading was served on the parties set forth below by US First Class Mail on this 18th day of February 2010.

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KANE RUSSELL COLEMAN & LOGAN PC
(RE: WESTSIDE MECHANICAL GROUP, INC)
JOSEPH A. FRIEDMAN
3700 THANKSGIVING TOWER
1601 ELM STREET
DALLAS , TX 75201

G.W. MERRICK & ASSOCIATES, LLC
(RE: CONCRETE FOUNDATIONS & FLATWORK, INC.)
GLENN W. MERRICK
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RIDDELL WILLIAMS P.S.
(RE: MICROSOFT LICENSING, GP)
MARIA ANN MILANO
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LOCKE LORD BISSELL & LIDDELL LLP
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KAPLIN STEWART MELOFF REITER &
(RE: BUILDING SYSTEMS)
ANDREW B. COHN, ESQ.
UNION MEETING CORPORATE CENTE
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BLUE BELL, PA 19422-0765

CONWAY & MROWIEC
(RE: WESTSIDE MECHANICAL GROUP
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CHICAGO, IL 60603

BUCHALTER NEMER
(RE: ORACLE USA, INC)
SHAWN M. CHRISTIANSON, ESQ.
333 MARKET STREET, 25TH FLOOR
SAN FRANCISCO, CA 94105-2126

BARTLETT HACKETT FEINBERG P.C.
(RE: IRON MOUNTAIN)
FRANK F. MCGINN
155 FEDERAL STREET, 9TH FLOOR
BOSTON, MA 02110

EMC CORPORATION
ATTN: RONALD ROWLAND, ESQ.
C/O RECEIVABLE MANAGEMENT SER
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HUNT VALLEY, MD 21094