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ATTORNEYS FOR WELLS FARGO BANK
NATIONAL ASSOCIATION AS INDENTURE TRUSTEE

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

In re:	:	CASE NO. 10-34179
MONARCH LANDING, INC.,	:	CHAPTER 11
Debtor.	:	(joint administration pending) [1]

LIMITED REPLY OF WELLS FARGO BANK NATIONAL ASSOCIATION, AS INDENTURE TRUSTEE TO DEBTOR'S MOTION TO APPROVE INTERIM AND FINAL ORDERS (I) AUTHORIZING THE USE OF CASH COLLATERAL, (II) GRANTING ADEQUATE PROTECTION TO SECURED LENDERS, AND (III) SCHEDULING A FINAL HEARING
[Relates to Docket No. 12]

Wells Fargo Bank National Association, not individually but as indenture trustee for the bonds described more particularly below (the "Trustee") makes this limited reply in connection with the emergency motion filed by Monarch Landing, Inc. ("Monarch" or the "Debtor")

1/ The Debtors in these Chapter 11 cases are (a) Lincolnshire Campus, LLC, Case No. 10-34176, (b) Naperville Campus, LLC, Case No. 10-34177, (c) Monarch Landing, Inc., Case No. 10-34179, and (d) Sedgebrook, Inc., Case No. 10-34178. A motion seeking joint administration of the Debtors' cases was filed on June 15, 2010.

requesting the approval of interim and final orders (i) authorizing the use of cash collateral, (ii) granting adequate protection to secured creditors, and (iii) scheduling final hearing (the "Monarch Cash Collateral Motion").

BACKGROUND

1. On June 15, 2010 (the "Petition Date"), Naperville and Monarch, two of the above-captioned debtors, each filed a voluntary petition for relief under Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code"). The Debtors have filed a motion to have these cases jointly administered, which motion has not yet been acted upon.

The Bonds

2. Naperville owns certain land in Naperville, Illinois upon which a continuing care retirement community ("CCRC") was constructed. The construction and development of this CCRC facility (the "Facility") was supported through the issuance of publicly traded tax-exempt bonds in the aggregate original face amount of $178,745,000 issued by the Illinois Finance Authority (the "Issuer").

3. This bond financing was evidenced by, among other documents, a Loan Agreement, dated as of December 1, 2007 (the "Loan Agreement") between the Issuer and Monarch.

4. In connection with the issuance of the Bonds, an Indenture of Trust dated as of December 1, 2007 (the "Indenture") was entered into by and between the Issuer and the Manufacturers and Traders Trust Company (the "Original Trustee"). The Trustee replaced the Original Trustee and is the current Trustee under the Indenture. The Indenture, among other things, assigned to the Original Trustee substantially all of the rights of the Issuer under the Loan Agreement.

5. As part of the bond financing, Monarch also applied to Fifth Third Bank (the "Credit Bank") for the issuance of a certain letter of credit (the "Letter of Credit") as additional security for a portion of the Bonds which constituted variable rate debt. The Trustee was authorized to draw upon the Letter of Credit in amounts equal to the principal amount of the Series 2007B Bonds outstanding, and up to 45 days' interest thereon, calculated at the rate of 10% per annum. The Indenture, the Loan Agreement, the Letter of Credit, the Mortgage (as defined below), and the other documents entered into as part of the bond financing are referred to herein as the "Bond Documents".

6. Pursuant to the Bond Documents, the Trustee has a lien and security interest in all of Monarch's right, title and interest in personal property and all other tangible and intangible property of Monarch used in connection with or relating to the Facility, and pursuant to a Fee and Leasehold Mortgage, Security Agreement, Assignment of Leases and Rents and Fixture Filing dated as of December 1, 2007 (the "Mortgage"), the Trustee has a lien and security interest in all of Monarch's right, title and interest in its leasehold interest in the real property and certain personal property, as well as all of Naperville's right, title and interest in real property.

7. Under the terms of the Bond Documents, certain accounts are established and held by the Trustee, including (i) the Operating Reserve Fund, (ii) the Development Fee Account, (iii) the Debt Service Fund, and (iv) the Debt Service Reserve Fund. The provisions of the Bond Documents provide restrictions as well as requirements as to when and how the Trustee may and must make deposits or withdrawals from these accounts.

Events of Default, Acceleration of the Bonds, and Forbearance Agreement

8. On July 1, 2009, Monarch failed to make its scheduled debt service payment (and has failed to make any payments since then). The Trustee notified Monarch that this failure was

one of several existing events of default under the Bond Documents. On December 2, 2009 the Trustee accelerated all of the Bonds and amounts due under the Loan Agreement.[2] /From and after that date, all amounts were immediately due and payable under the Loan Agreement and the Indenture.

9. Following the Trustee's acceleration of all amounts owed by Monarch, the Trustee and Monarch entered into a forbearance agreement dated December 3, 2009 (the "Forbearance Agreement") pursuant to which the Trustee agreed to forbear from making principal and interest payments from amounts available under the Indenture (i.e. from funds held by the Trustee) until the earlier of February 2, 2010 or an event of default under the Forbearance Agreement. The Forbearance Agreement was limited in scope in that, other than the above-referenced provision related to deferring payments, the other rights of the Trustee *were expressly reserved*.[3/] Moreover, under the Forbearance Agreement Monarch *expressly recognized that the Trustee was entitled to exercise remedies* at that time. *See* Forbearance Agreement, at § I(b)

2/ A copy of the Declaration of Acceleration is attached as Exhibit A to the Trustee's objection to the Debtors' requested 2004 examination, which objection is filed in Case No. 10-34176.

3/ Section III of the Forbearance Agreement provides:

> "AGREEMENT TO FORBEAR. (A) The Trustee (acting at the direction of the Holders), hereby agrees to not make payment of principal of and interest on the Bonds from amounts available under the Indenture; provided however that such forbearance shall terminate immediately upon the earlier of (i) the occurrence of any Forbearance Default and (ii) February 2, 2010 (the earlier of such occurrences, a "Termination Date"). Upon the Termination Date, all amounts deferred under Section III(a) and as yet unpaid shall become immediately due and payable. ***Other than expressly described in this Section III(a), no other forbearance, and in any event no waiver, has been provided by the Trustee*** (acting at the direction of the Holders), under this Forbearance Agreement. Without limiting the generality of the previous sentence, the Trustee expressly reserves the right to accelerate the Bonds at the direction of the Holders." (emphasis added).

(providing that "material monetary Events of Default have occurred and continue to exist under the Bond Documents" and that because of such defaults, "the Trustee is now entitled to exercise any and all of its rights and remedies under the Bond Documents").

10. Pursuant to the Forbearance Agreement, among other things, Monarch agreed to cooperate in the sale of the Facility, and to deposit $1,145,000 plus all initial entrance deposits ("IEDs") that it received into a supplemental account ("Supplemental Account") held under the Indenture by the Trustee.

11. The Forbearance Agreement expired by its own terms on February 2, 2010, however, Monarch and the Trustee entered into an Amendment to Forbearance Agreement dated February 22, 2010 pursuant to which the Trustee agreed to extend the February 2, 2010 date in the Forbearance Agreement to April 2, 2010. The Forbearance Agreement (as amended) expired by its own terms on April 2, 2010, and on May 20, 2010, the Trustee notified Monarch that its continued failure to make the monthly debt service payments required by the Bond Documents constituted a continuing default. No additional forbearance agreements have been entered into between the parties, and there is no agreement preventing the Trustee from exercising its rights and remedies in connection with the ongoing defaults by the Debtors.

The Erickson Bankruptcy and Plan

12. Approximately nine months prior to the Petition Date, on October 19, 2009, the parent corporation of Naperville, Erickson Retirement Communities, LLC ("ERC"), and certain of its related entities filed voluntary petitions for chapter 11 protection in this Court (Main case No. 09-37010) (the "ERC Cases"). None of the Debtors in these cases were debtors in the ERC Cases.

13. ERC's Fourth Amended Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Plan (the "ERC Plan") was confirmed on April 16, 2010 and went effective on April 30, 2010. Earlier versions of the ERC Plan proposed that Redwood-ERC Senior Living Holdings, LLC ("Redwood") would have the exclusive right to purchase ERC's membership interest in Naperville. This provision would have been a clear violation of the Bond Documents. In resolving this dispute, the following language was provided for under the ERC Plan:

> "***6.2.3.1***
>
> * * *
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> *(b) Disposition*. During the 90-day period immediately following the Plan Confirmation Date, Redwood will negotiate (non-exclusively) in good faith with the applicable NFPs and Bond Trustees for the Bond Communities to reach a resolution regarding such Bond Communities. During such 90-day period, the applicable NFP, with the consent of the applicable Bond Trustee, may market the applicable Bond Community for sale and with the consent of the applicable Bond Trustee and letter of credit provider, may consummate such sale. At the conclusion of this 90-day period, if the parties have reached a resolution with respect to a particular Bond Community, then the Debtors will facilitate a definitive agreement regarding such a resolution for such Bond Community. If Redwood does not reach an agreement with respect to resolution of a particular Bond Community during this 90-day period that is acceptable to Redwood, the applicable NFP, the letter of credit provider and the applicable Bond Trustee, then promptly at the end of such 90-day period, ERC's interest in the entity related to such Bond Community (Naperville Campus, LLC,

> Lincolnshire Campus, LLC and/or Hingham Campus, LLC, as applicable) will be transferred to the applicable NFP.

See Amended Plan Supplement, at § 6.2.3.1. [4/] While this language places certain obligations on Redwood, *it places no affirmative burdens on the Trustee*. There can be no actual forbearance or "implied forbearance" read into this document as the Debtor has alleged in its pleadings.

14. In contrast to the Debtors' claim of an "implied" forbearance, in no fewer than four places, the ERC Plan *expressly* recognizes and preserves the rights and claims of the Trustee against all non-debtor third parties, including Monarch:

> "***Notwithstanding the above, neither the foregoing terms nor any other provision of the Disclosure Statement, the Plan or any order on the Disclosure Statement and/or Plan shall release or in any manner limit*** (i) the obligations of any NSC-FFP or other party not a Debtor in these cases under the Bond Documents; (ii) ***any rights or claims by any Bond Trustee or beneficial bondholder against any NSC-NFP[5/] or other party not a Debtor based on obligations under any Bond Documents***; or (iii) any rights or claims by any NSC-NFP against any party not a Debtor in these cases based on obligations under any Bond Documents."

ERC Plan, at § 12.2 (in connection with injunction) (emphasis added); *see* ERC Plan, at § 12.5 (identical language, in connection with release); § 12.6 (identical language, in connection with releases by holders of claims); § 12.7 (identical language, in connection with exculpation provision). Considering the multiple, express provisions in the ERC Plan where the Trustee unambiguously reserved all of its rights against Monarch, it is simply not plausible or reasonable for the Debtors to read an "implied" forbearance into the ERC Plan. In fact, there was an express indication that the Trustee would not forbear.

4/ The Amended Plan Supplement is at Docket No. 1353 in the ERC Cases, Case No 09-37010.

5/ The definition of "NSC-NFP" in the ERC Plan includes Monarch. *See* ERC Plan, at § 1.149.

Foreclosure of the Bond Funds

15. On May 27, 2010, approximately eleven months after Monarch failed to make the July 1, 2009 bond payment, nearly six months after acceleration of the Bonds, and almost two months after expiration of the Forbearance Agreement by its terms, the Trustee exercised its rights under the Bond Documents to foreclose on certain Trustee-held funds (the "May 27 Funds Foreclosure"). This right is expressly provided for in Section 7.04 of the Indenture.[6/] *See* Indenture, at § 7.04.[7/] Pursuant to this section, the Trustee transferred $12,983,209.22 to DTC for distribution to the holders of the Bonds.[8/] This transfer reduced the principal amount of the Bonds from $145,665,000 to $133,440,108.38. In addition, the Trustee transferred $2,183,528.47 to a contingency reserve fund established by the Trustee which amount was applied by the Trustee against amounts due and unpaid under the Loan Agreement.

16. Notwithstanding these transfers, and express language in the Indenture that provides that no disbursements shall be made to the Debtors following an event of default, the Trustee left undisturbed more than $4.5 million in the Supplemental Account for the operating expenses of Monarch (upon acceptable terms and conditions). In fact, after the Trustee exercised its rights against certain of the funds, on June 9, 2010, the Trustee honored a requisition by

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6/ The Debtors have also alleged that the Trustee impermissibly paid professional fees. *See* 2004 Motion, at ¶ 16. Just as is the case with the May 27 Funds Foreclosure, all of the Trustee's actions were in accordance with the Bond Documents. In the case of payment of professional fees, Section 6.10 of the Indenture allows for payment of such fees and Section 7.04 of the Indenture (which applies following a default) provides that such fees are to be paid before any other payments are made.

7/ A copy of the Indenture is attached as Exhibit B to the Trustee's objection to the Debtors' requested 2004 examination, which objection is filed in Case No. 10-34176.

8/ These funds were transferred from the accounts of the Debt Service Fund, the Monarch 07A Debt Service Reserve Fund and the Monarch 07B Debt Service Reserve Fund.

Monarch in the amount of $634,000. The fact that the Trustee continued to advance its funds to Monarch after declaring events of default and the May 27 Funds Foreclosure directly contradicts the Debtors' attacks against the Trustee. These amounts remain available to Monarch (subject to agreed upon terms and conditions, and an appropriate cash collateral order) and are far in excess of the amount that Monarch itself projected prior to the May 27 Funds Foreclosure would be necessary for the orderly sale of its assets as contemplated both prior to, and as part of, this bankruptcy.[9/]

REPLY

The Trustee is in the midst of negotiations with Monarch regarding use of the Trustee's cash collateral for a limited interim period. The Trustee files this reply to protect its rights under Section 363 of Title 11 of the United States Code to the extent that an agreement for the interim period is not finalized or if Monarch seeks to use the Trustee's cash collateral beyond the interim period expected to expire on July 15, 2010.[10/] The parties have been actively involved in discussions on a possible agreement for use of cash collateral on an interim basis. As of the submission of this reply it is anticipated that such an agreement will be finalized prior to the hearing. However, no such agreement has been reached for use of cash collateral as of the time of the filing of this reply.

The Trustee does not believe that the adequate protection described in the Monarch Cash

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9/ The Trustee expressly reserves all rights, claims, and remedies with respect to such funds.

10/ The Trustee reserves any and all rights to object to the Debtor's statements that it has an interest in the funds held by the Trustee or that such funds constitute cash collateral of the Debtor. It is not necessary to resolve this issue in connection with the relief requested in the Monarch Cash Collateral Motion, however, because the Debtor has only requested to use the funds in the Operating Account. Further, the Debtor asserts that the Trustee does not have a lien against the Operating Account. Given the anticipated consensual order, this matter does not need to be resolved at this time. Rather, the parties shall reserve their respective rights. Additionally, the Debtor suggests that the lien of the Trustee does not extend to post-petition initial entrance deposits. Once again, the Trustee disputes this assertion. However, this issue need not be determined at this time.

Collateral Motion is fair, reasonable or constitutes reasonably equivalent value. However, the Trustee appreciates and understands the need for interim relief, and thus is working with Monarch on an agreement that would permit Monarch to use cash collateral on terms agreeable to the Trustee. Although it appears that an agreement will be reached, as of the time of this filing, no such agreement has been reduced to writing and thus the Trustee reserves any and all rights to file further objections and pleadings in connection with the final hearing on the use of cash collateral.

WHEREFORE, the Trustee respectfully requests that the Court deny the Monarch Cash Collateral Motion except as set forth herein and that it grant the Trustee such other and further relief as the Court deems appropriate.

Dated: June 23, 2010

Respectfully submitted,

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