

ENTERED

TAWANA C. MARSHALL, CLERK
THE DATE OF ENTRY IS
ON THE COURT'S DOCKET



The following constitutes the ruling of the court and has the force and effect therein described.

Signed November 6, 2009


United States Bankruptcy Judge

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

In re:

**ERICKSON RETIREMENT
COMMUNITIES, LLC, *et al.*,¹**

Debtors.

§
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§

Case No. 09-37010

Chapter 11

Jointly Administered

**INTERIM ORDER (I) AUTHORIZING BORROWERS TO OBTAIN
POSTPETITION FINANCING ON A SENIOR SECURED
SUPERPRIORITY BASIS PURSUANT TO 11 U.S.C. §§ 105, 361, 362, 363,
AND 364; (II) GRANTING ADEQUATE PROTECTION TO
PREPETITION SECURED LENDERS PURSUANT TO 11 U.S.C. §§ 361,
363 AND 364; AND (III) GRANTING RELATED RELIEF**

Upon the motion (the "**Motion**"), dated October 22, 2009, of Erickson Retirement Communities, LLC and certain of its affiliates (collectively, the "**Borrowers**")² and each of their

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, Warminster Campus, LP.

² The Borrowers under the DIP Credit Agreement are each of the Debtors in these Cases (all terms as defined

affiliated debtors, each as debtor and debtor in possession (collectively, the "**Debtors**"), in the above-captioned cases (the "**Cases**") pursuant to sections 105, 361, 362, 363(b), 363(c)(2), 364(c)(1), 364(c)(2), 364(c)(3), 364(d)(1) and 364(e) of title 11 of the United States Code, 11 U.S.C. §§ 101, *et seq.* (the "**Bankruptcy Code**"), Rules 2002, 4001, 6004 and 9014 of the Federal Rules of Bankruptcy Procedure (the "**Bankruptcy Rules**") and the Local Bankruptcy Rules for the Northern District of Texas (the "**Local Rules**"), seeking, among other things, entry of an interim order (the "**Interim Order**") and a final order (the "**Final Order**");

(i) authorizing the Borrowers to obtain postpetition financing (the "**Financing**") with superpriority claims and first priority priming liens senior to any prepetition liens, pursuant to sections 105, 361, 362, 363, and 364 of the Bankruptcy Code from ERC Funding Co. LLC (the "**Lender**");

(ii) authorization for the Borrowers to execute and deliver final documentation substantially in the form of the Super-Priority Debtor-in-Possession Loan Agreement (attached hereto as **Exhibit A**, the "**DIP Credit Agreement**")³ and any other document requested by the Lender in connection with the Financing including, without limitation, security agreements, pledge agreements, mortgages, financing statements, deeds of trust and other security documents (along with the DIP Credit Agreement and all of the forgoing whenever executed, collectively, the "**DIP Documents**");

(iii) granting adequate protection to prepetition secured creditors of the Borrowers (together with any of their administrative agents, collateral agents, indenture trustees or similar agents, and any entity with a Lien as of the date hereof, collectively, the "**Prepetition Secured**

herein), except Columbus Campus, LLC; Warminster Campus GP; and Warminster Campus, LP.

³ All capitalized terms not otherwise defined herein shall have the meaning ascribed in the DIP Credit Agreement.

Lenders") under the prepetition facilities (collectively, the "**Prepetition Secured Loans**") pursuant to Bankruptcy Code sections 361, 363 and 364;

- (iv) scheduling a final hearing pursuant to Bankruptcy Rules 4001(b), (c) and (d); and
- (v) granting related relief.

This Court having considered the Motion, examined the exhibits attached thereto, and having completed the Interim Hearing (defined below) as provided for under section 364 of the Bankruptcy Code, Bankruptcy Rule 4001(c), and applicable Local Bankruptcy Rules and finding the Debtors provided notice as set forth below to all necessary parties and that no further notice is required:

BASED UPON THE RECORD ESTABLISHED AT THE INTERIM HEARING, THE COURT HEREBY MAKES THE FOLLOWING FINDINGS OF FACT AND CONCLUSIONS OF LAW:

A. **Petition Date.** Commencing on October 19, 2009 (the "**Petition Date**"), the Debtors each filed voluntary petitions under chapter 11 of the Bankruptcy Code with the United States Bankruptcy Court for the Northern District of Texas (the "**Bankruptcy Court**" or this "**Court**"). The Debtors have continued in the management and operation of their business and property as debtors in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in the Cases.

B. **Jurisdiction.** This Court has core jurisdiction over the Cases, the Motion and the parties and property affected hereby pursuant to 28 U.S.C. §§ 157(b) and 1334. The statutory predicates for the relief sought herein are sections 105, 361, 362, 363 and 364 of the Bankruptcy Code and Bankruptcy Rules 2002, 4001, 6004 and 9014 and the Local Bankruptcy Rules.

C. **Notice.** Due and appropriate notice of the Motion, the relief requested therein and the Interim Hearing having been served by the Debtors on: (i) the Office of the United States

Trustee for the Northern District of Texas; (ii) the Debtors' 30 largest unsecured creditors on a consolidated basis; (iii) counsel to the Lender; (iv) counsel to the Prepetition Secured Lenders; and (iv) any known lienholders whose liens are being primed under the Financing in compliance with Bankruptcy Rule 4001(b) and (c) and the Local Bankruptcy Rules.

D. **Opportunity to be Heard.** Pursuant to Bankruptcy Rule 4001, that an interim hearing (the "**Interim Hearing**") on the Motion was held before this Court to consider entry of the proposed Interim Order on or about October 29, 2009.

E. **Disposition.** The Motion is granted on an interim basis in accordance with the terms of this Interim Order. Any objections to the Motion with respect to the entry of this Interim Order that have not been withdrawn, waived or settled, and all reservations of rights included therein, are hereby denied and overruled for purposes of this Interim Order.

F. **Lender's Protections.** The Lender is willing to lend money and provide other financial accommodations to the Borrowers only on the terms and conditions and with the protections provided herein and in the DIP Documents and are relying on such terms, conditions, and protections in agreeing to lend money and provide financial accommodations to the Borrowers hereunder.

G. **Immediate Entry of the Order.** The Debtors have requested that this Interim Order become immediately effective and enforceable upon entry, notwithstanding any provisions that may apply in Bankruptcy Rules 6004(h), 6006(d), 7062, or 9014 or any other Bankruptcy Rule, or Rule 62(a) of the Federal Rules of Civil Procedure. The Borrowers have demonstrated good cause for the entry of this Interim Order and for this Interim Order to become immediately effective and enforceable upon entry. Among other things, entry of this Order and the immediate effectiveness and enforceability of this Interim Order upon entry will minimize the disruption of

the Borrowers' business operations and permit the Borrowers to satisfy their operating expenses, will increase the possibilities for confirmation of a successful chapter 11 plan for the Borrowers, and is in the best interests of the Borrowers, their creditors, and the Borrowers' bankruptcy estates. The terms of the borrowings and other financial accommodations authorized hereby are fair and reasonable under the circumstances and reflect the Borrowers' exercise of prudent business judgment consistent with their fiduciary duties.

H. Findings Regarding the Financing.

- i. Good cause has been shown for the entry of this Interim Order;
- ii. The Borrowers have an immediate need to obtain the Financing, to the extent set forth in the Budget (defined herein), to (a) to fund the postpetition operating expenses of the Borrowers incurred in the ordinary course of business; (b) to fund the postpetition operating expenses of the affiliated not-for-profit entity in the ordinary course of business through the Working Capital Loan (as defined in the DIP Credit Agreement); (c) to pay interest and expenses in respect of the Financing to the Lender in accordance with the DIP Documents; and (d) to pay certain other costs and expenses of administration of the Cases. The access of the Borrowers to sufficient working capital and liquidity through the incurrence of new indebtedness for borrowed money and other financial accommodations is vital to the preservation and maintenance of the going concern values of the Borrowers and to a successful reorganization of the Borrowers;
- iii. The Borrowers currently are unable to obtain financing on more favorable terms from sources other than the Lender under the DIP Documents and are unable to obtain adequate unsecured credit allowable under section 503(b)(1) of the Bankruptcy Code as an administrative expense. The Borrowers are also unable to obtain secured

credit allowable under sections 364(c)(1), 364(c)(2) and 364(c)(3) of the Bankruptcy Code for the purposes set forth in the DIP Documents without the Borrowers granting to the Lender, subject to the Carve-Out as provided for herein, the DIP Liens (as defined below) and the Superpriority Claims (as defined below) under the terms and conditions set forth in this Interim Order and in the DIP Documents;

iv. The terms of the Financing are fair and reasonable, reflect the Borrowers' exercise of prudent business judgment consistent with their fiduciary duties and constitute reasonably equivalent value and fair consideration;

v. The Financing has been negotiated in good faith and at arm's length among the Borrowers and the Lender, and all of the Borrowers' obligations and indebtedness arising under, in respect of or in connection with the Financing and the DIP Documents, including without limitation, all loans pursuant to the DIP Documents, and any other expenses or obligations under the DIP Documents (all of the foregoing collectively, the "**DIP Obligations**"), shall be deemed to have been extended by the Lender and its affiliates in good faith, as that term is used in section 364(e) of the Bankruptcy Code and in express reliance upon the protections offered by section 364(e) of the Bankruptcy Code, and the DIP Obligations, the DIP Liens (as defined below) and the Superpriority Claims (as defined below) shall be entitled to the full protection of section 364(e) of the Bankruptcy Code in the event that this Interim Order or any provision hereof is vacated, reversed or modified, on appeal or otherwise;

vi. Entering into the Financing and the DIP Documents reflects the Borrowers' exercise of prudent business judgment consistent with their fiduciary duties; and

vii. The Debtors have requested entry of this Interim Order pursuant to

Bankruptcy Rules 4001(b)(2) and 4001(c)(2) and the Local Bankruptcy Rules. Absent granting the relief sought by this Interim Order, the Borrowers' estates will be immediately and irreparably harmed. Consummation of the Financing in accordance with this Interim Order and the DIP Documents is therefore in the best interests of the Borrowers' estates consistent with their fiduciary duties.

viii. The Official Committee of Unsecured Creditors reserves the right to object to any of the inclusion of any of the above findings in a final order.

ACCORDINGLY, IT IS HEREBY ORDERED THAT:

1. Authorization of the Financing and DIP Documents.

(i) The Borrowers are hereby authorized to execute and enter into the DIP Documents, and the DIP Documents are hereby approved -- on an interim basis and to the extent consistent with the terms of the Interim Order and the term sheet attached to the Motion -- and incorporated herein by reference, including, without limitation:

- a. the execution, delivery and performance of the DIP Credit Agreement, any notes, security and pledge agreements, mortgages contemplated thereby and the other agreements referred to as and in the DIP Documents; and
- b. the execution, delivery and performance of one or more amendments, waivers, consents or other modifications to and under the DIP Documents not inconsistent with the terms of this Order for, among other things, the purpose of adding additional financial institutions as Lenders and reallocating the commitments for the Financing among

any Lender (and any assignees or successors), in each case in such form as the Lender may decide (it being understood that no further approval of the Court shall be required for amendments, waivers, consents or other modifications to and under the DIP Documents (or any reasonable fees paid in connection therewith).

(ii) The Borrowers are hereby authorized to borrow money pursuant to the DIP Documents and any related promissory notes, and the Borrowers are hereby authorized to incur indebtedness up to an aggregate principal amount of \$5,000,000 (the “**Interim Amount**”), which shall be used as permitted under the DIP Documents and in accordance with the Budget (as defined in the DIP Credit Agreement), and to enter into any and all other and further agreements and arrangements in connection therewith and to pay interest and expenses and incur DIP Obligations all in accordance with this Interim Order and the DIP Documents, including, without limitation, the non-refundable payment to the Lender of reasonable costs and expenses as may be due from time-to-time, including, without limitation, fees and expenses of the professionals retained as provided for in the DIP Documents.

(iii) In no event will the Borrowers use any of the Interim Amount at the non-Debtor landowners at Linden Ponds, Sedgebrook, Monarch Landing and Ann’s Choice or the Debtor landowners at Columbus Campus, LLC, Warminster Campus GP and Warminster Campus, LP.

(iv) For purposes of this Interim Order only, the Lender has agreed to waive all fees in the DIP Documents and reserves rights to assert such fees at the final

hearing on this Motion, but for the avoidance of doubt, shall be entitled to such expense reimbursement as provided in Section 4.11(d) of the DIP Credit Agreement; and

(v) In furtherance of the foregoing and without further approval of this Court, each Borrower is authorized and directed to perform all acts, to make, execute and deliver all instruments and documents (including, without limitation, the execution or recordation of security agreements, mortgages and financing statements) that may be reasonably required or necessary for the Borrowers' performance of their obligations under the Financing and under the DIP Documents.

2. **Valid, Binding, Non-Avoidable Obligations.** Upon execution and delivery of the DIP Credit Agreement and the other DIP Documents, such DIP Documents shall constitute and represent valid, binding and non-avoidable obligations of the Borrowers enforceable against each Borrower party thereto jointly and severally in accordance with their terms and subject to the terms of this Interim Order for all purposes during the Cases, any subsequently converted case of any Borrower under chapter 7 of the Bankruptcy Code or after the dismissal of any Case. No obligation, payment, right, transfer or grant of security or lien under the DIP Credit Agreement, the other DIP Documents or this Interim Order shall be stayed, restrained, voidable, avoidable or recoverable under the Bankruptcy Code or under any applicable law (including without limitation, under sections 502(d), 548 or 549 of the Bankruptcy Code or under any applicable state Uniform Fraudulent Transfer Act, Uniform Fraudulent Conveyance Act or similar statute or common law), or subject to any defense, reduction, setoff, recoupment or counterclaim.

3. **Superpriority Claims.** Pursuant to section 364(c)(1) of the Bankruptcy Code, all of the DIP Obligations approved under this Interim Order shall constitute allowed senior administrative expense claims against each of the Borrowers (the "**Superpriority Claims**") with priority over any and all administrative expenses, adequate protection claims, diminution claims and all other claims against the Borrowers, now existing or hereafter arising, of any kind whatsoever, including, without limitation, all administrative expenses of the kind specified in sections 503(b) and 507(b) of the Bankruptcy Code, and over any and all administrative expenses or other claims arising under sections 105, 326, 328, 330, 331, 503(b), 506(c), 507(a), 507(b), 546, 726, 1113 or 1114 of the Bankruptcy Code, whether or not such expenses or claims may become secured by a judgment lien or other non-consensual lien, levy or attachment, which allowed claims shall for purposes of section 1129(a)(9)(A) of the Bankruptcy Code, be considered administrative expenses allowed under section 503(b) of the Bankruptcy Code, and which shall be payable from and have recourse to all pre- and postpetition property of the Borrowers and all proceeds thereof (provided, however, that no party shall have recourse to Avoidance Actions (defined below) and proceeds thereof pursuant to this Interim Order), subject only to the payment of the Carve-Out to the extent specifically provided for herein.

4. **DIP Liens.** As security for the DIP Obligations, effective and perfected upon the date of, and through, this Interim Order and without the necessity of the execution, recordation of filings by the Borrowers of mortgages, security agreements, control agreements, pledge agreements, financing statements or other similar documents, or the possession or control by the Lender of, or over, any DIP Collateral (defined below), the Lender shall have a DIP Lien (as defined below) in the DIP Collateral, subject, only in the event of the occurrence and during the continuance of an Event of Default (as defined in the DIP Documents), to the payment of the

Carve-Out:

- (a) DIP Collateral. Lender shall have DIP Liens on all assets (tangible, intangible, real, personal and mixed) of the Borrowers, whether now owned or hereafter acquired, including, without limitation, management contracts, accounts, inventory, equipment, receivables, capital stock or other ownership interest in subsidiaries, investment property, instruments, chattel paper, real estate, leasehold interests, contracts, patents, copyrights, trademarks, Corporate Cash (as defined in the DIP Credit Agreement), all Initial Entrance Deposits (as defined in the DIP Credit Agreement), and other general intangibles, and all products and proceeds thereof (collectively, all of the foregoing is defined herein as the "**DIP Collateral**"), but the DIP Collateral shall not include the Debtors' claims and causes of action that arise as on or subsequent to the Petition Date under chapter 5 of the Bankruptcy Code including sections 544, 545, 547 and 548 and any other avoidance actions under the Bankruptcy Code and the proceeds thereof and property received thereby whether by judgment, settlement or otherwise (collectively, "**Avoidance Actions**"); and
- (b) First Priority Priming Lien on Collateral. The Lender shall be secured by a perfected security interest pursuant to section 364(c)(2), section 364(c)(3) and section 364(d) of the Bankruptcy Code with a valid, binding, continuing, enforceable, fully-perfected, first priority priming lien that is senior to any and all security interests in and liens on the DIP Collateral (which is expressly senior in priority to, without limitation, any Prepetition Secured Lenders with respect to the Prepetition Secured Loans) (collectively, the "**DIP Liens**"). The DIP Liens shall

be senior in priority to any lien, right of setoff or recoupment or any similar right (whether arising by common law, statute or contract) of any party, including, without limitation, the Prepetition Secured Lenders, regardless of whether such party is in possession of the DIP Collateral or otherwise. Notwithstanding anything herein, the DIP Liens shall be subject to the Carve Out, but, for the avoidance of doubt, payment of the Carve Out shall not reduce the amounts payable to the Lender hereunder or under the DIP Documents.

- (c) **Adequate Protection for Prepetition Secured Lenders.** The Prepetition Secured Lenders are granted a lien, to the same extent, validity and priority as such Prepetition Secured Lender's lien (which, for the avoidance of doubt, shall be junior to the DIP Liens) on all of the Borrowers' assets and proceeds thereof to the extent of any diminution (including, without limitation, any diminution on account of any payment of DIP Obligations from collateral that secures such Prepetition Secured Lender's prepetition claims) in the value of their respective collateral from the Petition Date through the date of consummation of a transaction or any payment of DIP Obligations from Borrowers' property which is collateral that secures the prepetition obligations of the respective Prepetition Secured Lenders.

5. **Carve-Out.** means (a) professional fees (including Borrowers' professional fees) incurred and allowed in the Chapter 11 Case, (b) other professional fees and expenses incurred and allowed in the Chapter 11 Case (which, together with the fees set forth in (a) shall not exceed Six Million Dollars (\$6,000,000.00)), (c) the payment of fees pursuant to 28 U.S.C. § 1930, and (d) costs and administrative expenses permitted to be incurred by any Chapter 7

trustee under section 726(b) of the Bankruptcy Code pursuant to an order of the Bankruptcy Court following any conversion of the Chapter 11 Case pursuant to section 1112 of the Bankruptcy Code in an amount not to exceed One Hundred Thousand Dollars (\$100,000.00).

6. Resolution of NSC Concerns.

(a) Reimbursement of expenses for NSC-NFPs. So long as the management agreements between ERC and the NSC-NFPs⁴ remain in place and until such time as a plan of reorganization becomes effective in the Borrowers' cases, on the 15th and 30th day of each month, the Borrowers shall advance the aggregate amount of \$300,000 (\$150,000.00 per payment) to the NSC-NFPs to partially defray the postpetition fees and costs incurred by the NSC-NFPs for professional services related to the Borrowers' reorganization efforts. Every three months, the NSC-NFPs shall provide a reconciliation of the actual fees and expenses incurred and, to the extent there is a surplus, future payments to the NSC-NFPs will be adjusted to account for the surplus payments. To the extent that the payments directed herein are insufficient to defray the full amount of such reasonable fees and expenses incurred by the NSC-NFPs (the "Shortfall"), the NSC-NFPs reserve their rights with respect to any such Shortfall. Neither the NSC-NFPs nor their professionals are required to apply to this Court for allowance or approval for payment of any fees or expenses incurred by the NSC-NFPs for services provided by their professionals whether such fees and expenses are paid by the Borrowers or a buyer or buyers of the Borrowers' assets. However, the reimbursement of such fees and expenses is without prejudice to any party's right to dispute the reasonableness of such fees and

⁴The NSC-NFPs are: (i) Ann's Choice, Inc.; (ii) Ashby Ponds, Inc.; (iii) Brooksby Village, Inc.; (iv) Cedar Crest Village, Inc.; (v) Eagle's Trace, Inc.; (vi) Fox Run Village, Inc.; (vii) Greenspring Village, Inc.; (viii) Hickory Chase, Inc.; (ix) Highland Springs, Inc.; (x) Linden Ponds, Inc.; (xi) Monarch Landing, Inc.; (xii) Oak Crest Village, Inc.; (xiii) Riderwood Village, Inc.; (xiv) Seabrook Village, Inc.; (xv) Sedgebrook, Inc.; (xvi) Tallgrass Creek, Inc.; (xvii) and Wind Crest, Inc.; all of which are Maryland nonstock corporations; and (xviii) Maris Grove, Inc., a Pennsylvania corporation.

expenses. In the event the Successful Bidder, for any reason, ceases or fails to reimburse or pay the NSC-NFPs' fees and expenses, the NSC-NFPs reserve the right to seek payment of any Shortfall.

(b) Reservation of rights of all NFPs. Except as expressly provided herein, nothing in this Order limits, reduces, impairs or alters any of the rights or claims of the NFPs and their communities (the "Communities"), or the residents of those Communities (the "Residents") against or with respect to the Borrowers, the Borrowers' property, the Borrowers' lenders, the Borrowers' lenders' collateral, Redwood or the Successful Bidder. These NFP and Resident rights and claims, to the extent of the validity and priority of such rights and claims, include, but are not limited to: (i) the rights and claims of the Residents to occupy their units, to utilize the facilities of their community, to receive the services promised under their Residence and Care Agreements, and the right to receive a refund of their Initial Entrance Deposit or Entrance Deposit pursuant to said Residence and Care Agreements; (ii) the rights and claims of the NFPs pursuant to their management agreements, lease agreements, licensing agreements, development agreements, loan agreements, working capital agreements, purchase option agreements, guarantee agreements, indemnity agreements, warranty agreements, and any other agreements with the Borrowers; and (iii) any rights of setoff or recoupment and any other common law or statutory rights relating to any of the above arising from the relationship between the NFPs and the Borrowers.

(c) The NFPs and Debtors are authorized and directed to maintain the flow of funds with respect to the Community Loan and the Working Capital Loan (as defined in the DIP Credit Agreement) consistent with past practice, and subject to all orders of this Court, including orders related to escrowing initial entrance deposits. The NFPs also agree to continue to pay all

management fees and pay or reimburse the Borrowers for other services in each as contemplated by the Budget.

(d) **Reservation of Rights.** This Order shall not prejudice or affect in any manner the rights of any party against the NSC-NFPs on account of the use of the proceeds of the financing authorized herein or the use of the Prepetition Secured Lenders' collateral or any other legal or contractual rights, claims or remedies that any party may have against the NSC-NFPs in law or equity, all of which rights, claims or remedies are expressly preserved. To the extent that the NSC-NFPs fail to comply with the terms of their contractual agreements with the Borrowers and the Prepetition Secured Lenders, the Prepetition Secured Lenders reserve their rights to seek a modification of this Order.

7. Protection of Lender's Rights.

(a) All DIP Collateral shall not be subject to any liens, claims and encumbrances, except for those liens, claims and encumbrances expressly permitted under the DIP Documents or this Interim Order;

(b) So long as there are any outstanding DIP Obligations under the Financing which have not been indefeasibly paid and the Borrowers are entitled to request any borrowing under the Financing, all persons or entities, including, without limitation, the Prepetition Secured Lenders shall (i) be prohibited from taking any action to foreclose upon or recover in connection with any lien granted thereto pursuant to the Prepetition Secured Loans or any other lien or security interest or this Interim Order, or otherwise exercise remedies against any DIP Collateral, except to the extent authorized by an order of this Court, and (ii) be deemed to have consented to any release of DIP Collateral as may be required under the DIP Documents. The Debtors shall not pay any amounts or

transfer any property on account of such lenders claims or otherwise, without the written consent of the Lender;

(c) On five (5) business days notice to the Debtors, the official committee of unsecured creditors (“**Creditors’ Committee**”), Prepetition Secured Lenders and the United States Trustee, the automatic stay provisions of section 362 of the Bankruptcy Code will be deemed vacated and modified to the extent necessary to permit the Lender to exercise immediately upon the occurrence of an Event of Default (as defined in the DIP Documents), all rights and remedies under the DIP Documents absent an order of this Court to the contrary. In any hearing regarding any exercise of rights or remedies, the only issue that may be raised by any party in opposition thereto shall be whether, in fact, an Event of Default has occurred and is continuing, and the Debtors and the Prepetition Secured Lenders hereby waive their right to seek relief, including, without limitation, under section 105 of the Bankruptcy Code, to the extent such relief would in any way impair or restrict the rights and remedies of the Lender set forth in this Interim Order or the DIP Documents, absent an order of this Court to the contrary. Subject to the payment provisions described below, in no event shall the Lender be subject to the equitable doctrine of "marshaling" or any similar doctrine with respect to the DIP Collateral or otherwise. The delay or failure to exercise rights and remedies under the DIP Documents or this Interim Order by the Lender shall not constitute a waiver of the Lender's rights hereunder, thereunder or otherwise, unless any such waiver is pursuant to a written instrument executed in accordance with the terms of the applicable DIP Documents. The Debtors waive and shall not be entitled to any right of setoff against the Lender relating to the DIP Obligations; and

(d) The Lender hereby agrees to accept payment in cash in full of all DIP Obligations at any time prior to a hearing on a Final Order, without prepayment penalty.

8. **Limitation on Charging Expenses Against Collateral.** So long as, and to the extent that, any DIP Obligations remain outstanding, except to the extent of the Carve-Out, no costs or expenses of administration of the Cases or any future proceeding that may result therefrom, including liquidation in bankruptcy or other proceedings under the Bankruptcy Code, shall be charged against or recovered from the DIP Collateral pursuant to section 506(c) of the Bankruptcy Code or any similar principle of law without the prior written consent of the Lender, and no such consent shall be implied from any other action, inaction, or acquiescence by the Lender.

9. **Adequate Protection/Cash Collateral.** The following shall be deemed adequate protection for the Prepetition Secured Lenders and other lien holders pursuant to sections 361, 363(e) and 364(d)(1) of the Bankruptcy Code. Until the Final Hearing, the Debtors reserve their rights to seek from the Bankruptcy Court authority to use of the Corporate Cash and, consistent with the obligations in the DIP Credit Agreement, agree to maintain all covenants provided therein.

As Adequate Protection, the Lender has agreed to be repaid as provided below:

(a) **Sale Transaction.** Upon consummation of a Sale (as defined in the DIP Credit Agreement), the Financing and other DIP Obligations shall be repaid as follows:

(i) First, from Corporate Cash (as defined in the DIP Credit Agreement) to the extent of Corporate Borrowings (as defined in the DIP Credit Agreement);

- (ii) Second, from Net Cash Proceeds of the Sale (as defined in the DIP Credit Agreement);
- (iii) Third, from each Project, the Initial Entrance Deposits (as defined in the DIP Credit Agreement) made at that Project, subject to any applicable escrow agreements in place with respect to such Initial Entrance Deposits or otherwise applicable state law, to the extent of Project Borrowings (as defined in the DIP Credit Agreement) at that specific Project
- (iv) Fourth, from all or any portion of the DIP Collateral, jointly and severally, in such manner and order as Lender may elect with no obligation to marshal or look to any particular asset of any Borrower; provided, that to the extent the Financing and other DIP Obligations are repaid from Prepetition Collateral (as defined in the DIP Credit Agreement) of a Prepetition Secured Lender, such Prepetition Secured Lender shall have rights of subrogation and contribution against any other Prepetition Secured Lender.

The foregoing priority of recovery shall occur in the order set forth above in clauses (a)(i) through (iv); provided, however, that if any of the collateral listed above is unavailable on demand for any reason, the Lender shall be free to immediately move to the next level of priority without delay.

- (b) Non-Sale. After the exercise of remedies provided for in Section 11.1 of the DIP Credit Agreement (or after the Financing has automatically

become immediately due and payable), the Financing and other DIP Obligations shall be repaid as follows:

- (i) First, from Corporate Cash to the extent of Corporate Borrowings;
- (ii) Second, from each Project, the Initial Entrance Deposits (as defined in the DIP Credit Agreement) made at that Project, subject to any applicable escrow agreements in place with respect to such Initial Entrance Deposits or otherwise applicable state law, to the extent of Project Borrowings (as defined in the DIP Credit Agreement) at that specific Project; and
- (iii) Third, from all or any portion of the DIP Collateral, jointly and severally, in such manner and order as Lender may elect with no obligation to marshal or look to any particular asset of any Borrower; provided, that to the extent the Financing and other DIP Obligations are repaid from Prepetition Collateral of a Prepetition Secured Lender, such Prepetition Secured Lender may assert any right of subrogation or contribution against any other Prepetition Secured Lender.

The foregoing priority of recovery shall occur in the order set forth above in clauses (b)(i) through (iii); provided, however, that if any of the collateral listed above is unavailable on demand for any reason, the Lender shall be free to immediately move to the next level of priority without delay.

Notwithstanding anything in this Interim Order to the contrary, each Prepetition Secured Lender reserves all rights and defenses against all other Prepetition Secured Lenders as to the allocation of Net Cash Proceeds of the Sale.

10. **Reservation of Rights of Adequate Protection Parties.** Under the circumstances and given that the above-described adequate protection is consistent with the Bankruptcy Code, including section 506(b) thereof, the Court finds that the adequate protection provided herein is reasonable and sufficient to protect the interests of the Prepetition Secured Lenders. However, Prepetition Secured Lenders may request further or different adequate protection, and the Debtors or any other party may contest any such request; *provided* that any such further or different adequate protection shall at all times be subordinate and junior to the claims and liens of the Lender granted under this Interim Order and the DIP Documents.

11. **Monitoring of DIP Collateral.** The Lender reserves the right, in consultation with the Debtors, to retain expert consultants, financial advisors or other professionals at the expense of the Borrowers, which consultants and advisors shall be given reasonable access for purposes of monitoring the business of the Debtors and the value of the DIP Collateral.

12. **Financial Reporting.** The Borrowers shall provide the Lender and the project and corporate lender agents with financial and other reporting as described in the DIP Documents, with copies simultaneously provided to the Creditors' Committee.

13. **Perfection of DIP Liens.**

(a) The Borrowers, the Lender and the Prepetition Secured Lenders are hereby authorized, but not required, to file or record financing statements, trademark filings, copyright filings, mortgages, notices of lien or similar instruments in any jurisdiction, or take possession of or control over, or take any other action in order to

validate and perfect the liens and security interests granted to them hereunder; provided however, the Borrowers shall perform any act in furtherance thereof if requested by the Lender or the Prepetition Secured Lenders. Whether the Lender or the Prepetition Secured Lenders, in their sole discretion, chooses to file such financing statements, trademark filings, copyright filings, mortgages, notices of lien or similar instruments, or take possession of or control over, or otherwise confirm perfection of the liens and security interests granted to them hereunder, such liens and security interests shall be deemed valid, perfected, allowed, enforceable, non-avoidable and not subject to challenge dispute or subordination, at the time and from the date of entry of this Interim Order forward. Upon the request of the Lender or the Prepetition Secured Lenders, without any further consent of any party (including the Debtors, Prepetition Secured Lenders (in the case of the Lender) or any Official Committee) the Lender and Borrowers are each authorized to take, execute, deliver and file such instruments (in each case without representation or warranty of any kind) to enable the Lender and the Prepetition Secured Lenders to validate, perfect, preserve and enforce DIP Liens. By this Interim Order, the Lender and Prepetition Secured Lenders shall be deemed to have executed all such agreements, financing statements, instruments and other documents as the may reasonably be requested to more fully evidence, confirm, validate, perfect, preserve and enforce the DIP Liens;

(b) A certified copy of this Interim Order may, in the discretion of the Lender or the Prepetition Secured Lenders, be filed with or recorded in filing or recording offices in addition to or in lieu of such financing statements, mortgages, notices of lien or similar instruments, and all filing offices are hereby authorized to accept such certified copy of

this Interim Order for filing and recording; and

(c) Any provision of any lease or other license, contract or other agreement that requires (i) the consent or approval of one or more landlords or other parties or (ii) the payment of any fees or obligations to any governmental entity, in order for any Borrower to pledge, grant, sell, assign or otherwise transfer any such leasehold interest, or the proceeds thereof, or other postpetition collateral related thereto, is hereby deemed to be inconsistent with the applicable provisions of the Bankruptcy Code. Any such provision shall have no force and effect with respect to the transactions granting postpetition liens, in such leasehold interest or the proceeds of any assignment and/or sale thereof by any Borrower, in favor of the Lender or the Prepetition Secured Lenders in accordance with the terms of the DIP Documents or this Interim Order.

14. Preservation of Rights Granted Under the Order.

(a) No claim or lien having a priority superior to or *pari passu* with those granted by this Interim Order to the Lender shall be granted or allowed while any portion of the Financing (or any refinancing thereof) or the commitments thereunder or the DIP Obligations remain outstanding, and the DIP Liens shall not be (i) subject or junior to any lien or security interest that is avoided and preserved for the benefit of the Borrowers' estates under section 551 of the Bankruptcy Code or (ii) subordinated to or made *pari passu* with any other lien or security interest, whether under section 364(d) of the Bankruptcy Code or otherwise;

(b) Unless all DIP Obligations shall have indefeasibly been paid in cash in full, the Debtors shall not seek, and others shall not seek, and it shall constitute an Event of Default (as defined in the DIP Documents), if there is, (i) any modification or

extension of this Interim Order without the prior written consent of the Lender, and no such consent shall be implied by any other action, inaction or acquiescence, or (ii) an order converting or dismissing any of the Cases. All of the Creditors' Committee's rights to contest the Final Order at the Final Hearing are reserved in full;

(c) If an order dismissing any of the Cases under section 1112 of the Bankruptcy Code or otherwise is at any time entered, such order shall provide (in accordance with sections 105 and 349 of the Bankruptcy Code) that (i) the Superpriority Claims, priming liens, security interests and replacement security interests granted to the Lender and the adequate protection superpriority claims and adequate protection liens granted to the Prepetition Secured Lenders pursuant to this Interim Order shall continue in full force and effect and shall maintain their priorities as provided in this Interim Order until all DIP Obligations shall have been indefeasibly paid in cash in full and any claims for diminution have been satisfied (and that such Superpriority Claims, priming liens, replacement security interests, adequate protection superpriority claims and adequate protection liens shall, notwithstanding such dismissal, remain binding on all parties in interest); and (ii) this Court shall retain jurisdiction, notwithstanding such dismissal, for the purposes of enforcing the claims, liens and security interests referred to in (i) above;

(d) To the extent of applicable law, if any or all of the provisions of this Interim Order are hereafter reversed, modified, vacated or stayed, such reversal, stay, modification or vacation shall not affect (i) the validity, priority or enforceability of any DIP Obligations, DIP Liens and adequate protection liens incurred prior to the actual receipt of written notice by the Lender of the effective

date of such reversal, stay, modification or vacation or (ii) the validity or enforceability of any lien or priority authorized or created hereby or pursuant to the DIP Credit Agreement with respect to any DIP Obligations. Notwithstanding any such reversal, stay, modification or vacation, DIP Obligations incurred by the Borrowers prior to the actual receipt of written notice by the Lender of the effective date of such reversal, stay, modification or vacation shall be governed in all respects by the original provisions of this Interim Order, and the Lender shall be entitled to all the rights, remedies, privileges and benefits granted in section 364(e) of the Bankruptcy Code, this Interim Order and pursuant to the DIP Documents with respect to all uses of DIP Obligations. The Debtors shall not seek to modify, vacate, or amend this Order without the written consent of the Lender; and

(e) Except as expressly provided in this Interim Order or in the DIP Documents, the DIP Liens, the Superpriority Claims, the adequate protection liens and the adequate protection superpriority claims granted by the provisions of this Interim Order and the DIP Documents shall survive, and shall not be modified, impaired or discharged by (i) the entry of an order converting any of the Cases to a case under chapter 7, dismissing any of the Cases, terminating the joint administration of these Cases or by any other act or omission or (ii) the entry of an order confirming a plan of reorganization in any of the Cases and, pursuant to section 1141(d)(4) of the Bankruptcy Code, the Debtors have waived any discharge as to any remaining DIP Obligations. The terms and provisions of this Interim Order and the DIP Documents shall continue in these Cases, in any successor cases if these Cases cease to be jointly administered, or in any superseding chapter 7 cases under the Bankruptcy Code, the DIP

Liens, the Superpriority Claims and all other rights and remedies of the Lender, and the adequate protection liens and the adequate protection superpriority claims granted by the provisions of this Interim Order and the DIP Documents shall continue in full force and effect until the DIP Obligations are indefeasibly paid in cash in full and any claims for diminution have been satisfied.

15. **Limitation on Use of Financing Proceeds and Collateral.** Notwithstanding anything herein or in any other order by this Court to the contrary, no DIP Collateral, portion of the proceeds of the Financing or part of the Carve-Out may be used for any of the following (each, a "**Lender Claim**") without the prior written consent of the Lender : (a) to object, contest or raise any defense to the validity, perfection, priority, extent or enforceability of any amount due under any DIP Document, or the liens or claims granted under this Interim Order, any DIP Document, (b) to assert any claim or cause of action against the Lender or its respective agents, representatives, attorneys or advisors with respect to the DIP Documents, (c) except to contest the occurrence or continuation of an Event of Default, to prevent, hinder or otherwise delay the Lender's assertion, enforcement or realization on the DIP Collateral in accordance with the DIP Documents or this Interim Order, (d) to assert or prosecute any action for preferences, fraudulent conveyances, other avoidance power claims or any other claims, counterclaims or causes of action, objections, contests or defenses against the Lender or its respective representatives, attorneys or advisors in connection with matters related to the Financing or the DIP Documents to the extent approved under this Interim Order, or (e) to seek to modify any of the rights granted to the Lender hereunder.

16. **Enforcement of Remedies.**

(a) Upon an Event of Default or the occurrence of the Maturity Date, the

Borrowers shall immediately make payment in full in cash of all of the outstanding non-contingent DIP Obligations. In the absence of immediate and full payment in cash of all of the outstanding DIP Obligations the automatic stay is hereby deemed vacated as provided in this Interim Order, and the Lender shall be permitted to exercise such rights and remedies under such agreements, documents, and applicable law as to all or such part of the DIP Collateral as the Lender shall, in its sole discretion, elect, including, but not limited to, the Lender's right to foreclose on the mortgages and seek to take possession of any cash of the Borrowers. Upon such enforcement by the Lender, the Borrowers shall cooperate with the Lender in the disposition of the Collateral and shall not otherwise interfere or actively encourage others to interfere with the Lender's enforcement of its rights; and

(b) Upon an Event of Default of any of the DIP Obligations, as applicable, the Default Rate set forth in the DIP Documents shall immediately be applicable.

17. **Enforcement of Remedies in the Bankruptcy Court.** In addition to the remedies set forth in the DIP Documents and to provide for an orderly disposition of the DIP Collateral, upon an occurrence and during the continuation of an Event of Default, the Borrowers shall, at the sole expense of the Borrowers' bankruptcy estates and on such terms as set forth by the Lender, file: (i) a motion or motions seeking to sell, assume and assign, or otherwise dispose of any or all of the DIP Collateral as the Lender may direct pursuant to sections 363 and 365 of the Bankruptcy Code; and (ii) any further motions necessary to maximize the value received from the sale or disposition of the DIP Collateral, including, but not limited to, motions to retain any additional professionals to assist the Borrowers in the sale of the DIP Collateral. The Borrowers shall file any such motions within five (5) business days after the Lender's request and

shall diligently prosecute all such motions. If the Debtors fail to so file or diligently pursue such motions, the Lender may file and prosecute such motions in the name of and at the expense of the Borrowers, and the Lender is hereby specifically given such authority and standing. In the event of any sale or disposition of the DIP Collateral in accordance with this paragraph or otherwise, the Lender shall have the right to credit bid any or all of the Obligations under section 363(k) of the Bankruptcy Code or otherwise.

18. Effect of Stipulations on Third Parties.

(a) Each stipulation, admission and agreement contained in this Interim Order shall be binding upon the Borrowers or Debtors as applicable, and any successor thereto (including, without limitation, any chapter 7 or chapter 11 trustee appointed or elected for any of the Debtors or Borrowers as applicable) under all circumstances and for all purposes, and the Borrowers are deemed to have irrevocably waived and relinquished all Lender Claims as of the date of entry of this Interim Order; and

(b) Nothing in this Interim Order vests or confers on any person (as defined in the Bankruptcy Code), including the Creditors' Committee, standing or authority to pursue any cause of action belonging to the Debtors or their estates.

19. Agent. To the extent the Lender appoints any agent (collateral agent, administrative agent or otherwise) in connection with any DIP Document, such agent may be considered (at the election of the Lender) the Lender for the purposes of any account control agreement, as loss payee under the Borrowers' insurance policies or as the secured party under the Financing, and such agent shall have all rights and powers attendant to that position (including, without limitation, rights of enforcement). Each such agent appointed shall serve as agent for purposes of perfecting Lender's security interests and liens on all DIP Collateral that is

of a type such that perfection of a security interest therein may be accomplished only by possession or control by a secured party.

20. **Order Governs.** In the event of any inconsistency between the provisions of this Interim Order and the DIP Documents, the provisions of this Interim Order shall govern.

21. **Binding Effect; Successors and Assigns.** The DIP Documents and the provisions of this Interim Order, including all findings herein, shall be binding upon all parties in interest in these Cases, including, without limitation, the Lender, the Prepetition Secured Lenders, any Committee appointed in these Cases, and the Borrowers and of the respective successors and assigns of the foregoing (including, with respect to the Borrowers, any chapter 7 or chapter 11 trustee hereinafter appointed or elected for the estate of any of the Borrowers, an examiner appointed pursuant to section 1104 of the Bankruptcy Code or any other fiduciary appointed as a legal representative of any of the Borrowers or with respect to the property of the estate of any of the Borrowers) and shall inure to the benefit of the Lender and its respective successors and assigns, *provided, however*, that the Lender shall have no obligation to permit the use of DIP Collateral or to extend any financing to any chapter 7 trustee or similar responsible person appointed for the estates of the Debtors. In determining to make any loan (whether under the DIP Credit Agreements, a promissory notes or otherwise), or in exercising any rights or remedies as and when permitted pursuant to this Interim Order or the DIP Documents, the Lender shall not (i) be deemed to be in control of the operations of the Debtors, (ii) owe any fiduciary duty to the Debtors, their respective creditors, shareholders or estates or (iii) be deemed to be acting as a "responsible person" or "owner or operator" with respect to the operation or management of the Debtors (as such terms, or any similar terms, are used in the United States Comprehensive Environmental Response, Compensation and Liability Act, 29 U.S.C. §§ 9601, *et seq.*, as

amended, or any similar federal or state statute).

22. **No Impact on Certain Contracts or Transactions.** No rights of any entity in connection with a contract or transaction of the kind listed in sections 555, 556, 559, 560 or 561 of the Bankruptcy Code, whatever they might or might not be, are affected by the provisions of this Interim Order.

23. **Exclusions.** For the avoidance of doubt, nothing herein or in any of the DIP Documents shall operate as a release or waiver of, or a limit on expenditures in pursuit of, any claims or causes of action held or assertable by the Lender (including, without limitation, any of the Debtors or any other party in interest) against any Debtor, any "affiliate" of any Debtor (as such term is defined in the Bankruptcy Code) or any officer, director or direct or indirect shareholder (or affiliate thereof) of any Debtor.

24. **Credit Bid.** In connection with any sale of the Borrowers' assets or stock, under a plan of reorganization or pursuant to 363 of the Bankruptcy Code or in any other form, the Lender shall have the right to credit bid the amount outstanding on the Financing against the purchase price to be paid by Redwood Capital Investments, LLC or any of its affiliate in such transaction, provided that the credit bid amount shall equal 100% of the amount outstanding under the Financing as of the date of such bid.

25. **Effectiveness.** This Interim Order shall constitute findings of fact and conclusions of law and shall take effect and be fully enforceable *nunc pro tunc* to the Petition Date immediately upon entry hereof. Notwithstanding Bankruptcy Rules 4001(a)(3), 6004(h), 6006(d), 7062 or 9024 or any other Bankruptcy Rule, or Rule 62(a) of the Federal Rules of Civil Procedure, this Interim Order shall be immediately effective and enforceable upon its entry and there shall be no stay of execution or effectiveness of this Interim Order.

26. **Headings.** Section headings used herein are for convenience only and are not to affect the construction of or to be taken into consideration in interpreting this Interim Order.

27. **Final Hearing.** The Final Hearing will be held by this Court on December 4, 2009 at 9:30 a.m. (prevailing Central Time) to consider entry of a Final Order. The Debtors shall promptly transmit copies of this Interim Order (which shall constitute adequate notice of the Final Hearing) to the parties having been given notice of the Interim Hearing, to any party that has filed a request for notices with this Court and to the Creditors' Committee. Any party in interest objecting to the relief sought at the Final Hearing shall file a written objection, which shall be served upon (a) DLA Piper LLP (US), 1251 Avenue of the Americas, New York, NY 10020 (attn: Thomas R. Califano), counsel for the Debtors; (b) the Office of the United States Trustee for the Northern District of Texas; (c) the Debtors' 30 largest unsecured creditors on a consolidated basis and Bracewell & Giuliani LLP, 1445 Ross Avenue, Suite 3800, Dallas, Texas 75202 (Attn: Sam Stricklin) and Bracewell & Giuliani LLP, 1177 Avenue of the Americas, New York, New York 10036 (Attn: Mark Joachim), counsel for the Creditors' Committee; (d) counsel to the Lender; (e) counsel to the prepetition secured lenders; and (f) any known lienholders whose liens are being primed under the Financing in compliance with Bankruptcy Rule 4001(b) and (c) and the Local Bankruptcy Rules, and shall be filed with the Clerk of the United States Bankruptcy Court, Northern District of Texas, in each case to allow actual receipt by the foregoing no later than November 30, 2009 at 4:00 p.m. (prevailing Central Time).

###END OF ORDER###