

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

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: Chapter 11
: :
In re : Case No. 09-14378 (BLS)
: :
Fairfield Residential LLC, *et al.*,¹ : (Jointly Administered)
: :
Debtors. : **Proposed Objection Deadline: 1/7/2010 @ 4:00**
: **p.m. (EST)**
: **Proposed Hearing Date: 1/13/2010 @ 1:00 p.m.**
: **(EST)**
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**TWELFTH OMNIBUS MOTION OF DEBTORS AND DEBTORS-IN-POSSESSION
FOR AN ORDER AUTHORIZING THE ASSUMPTION OF EXECUTORY
CONTRACTS AND LEASES PURSUANT TO SECTION 365 OF THE
BANKRUPTCY CODE AND BANKRUPTCY RULES 6004 AND 6006**

The above-captioned debtors and debtors-in-possession (collectively the “Debtors”), hereby move the Court for entry of an order (the “Order”), pursuant to section 365 of title 11 of the United States Code (the “Bankruptcy Code”) and rules 6004 and 6006 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), authorizing the Debtors to assume the executory contracts and unexpired leases described in Exhibit A (the “Motion”). In support of the Motion, the Debtors respectfully state as follows:

¹ The Debtors are the following 15 entities (the last four digits of their respective taxpayer identification numbers follow in parentheses): Fairfield Residential LLC, a Delaware limited liability company (8277), Fairview Homes, Inc., a Delaware corporation (9930), FF Development L.P., a Delaware limited partnership (2310), FF Properties L.P., a Delaware limited partnership (5355), Fairview Residential LLC, a Delaware limited liability company (5416), FF Realty LLC, a Delaware limited liability company (5941), Fairfield Financial A LLC, a Delaware limited liability company (7014), FF Investments LLC, a Delaware limited liability company (7066), Fairview Investments LLC, a Delaware limited liability company (9605), Fairfield Affordable Housing LLC, a Delaware limited liability company (7111), FF Development, Inc., a Delaware corporation (2308), FF Properties, Inc., a Delaware corporation (5354), Fairview Residential L.P., a Delaware limited partnership (9788), Fairview Residential WA LLC, a Delaware limited liability company (9703) and Fairview Residential CA L.P., a Delaware limited partnership (9972). The mailing address of each of the Debtors is 5510 Morehouse Drive, Suite 200, San Diego, California 92121.

Jurisdiction and Venue

This Court has jurisdiction over this Motion under to 28 U.S.C. § 157 and § 1334.

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

Background

1. On December 13, 2009 (the "Petition Date"), the Debtors each filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. The Debtors are authorized to operate their businesses and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

2. On December 15, 2009, the Court entered an order directing joint administration of these cases pursuant to Rule 1015(b) of the Bankruptcy Rules. On December 23, 2009, the Office of the United States Trustee (the "UST") appointed an official committee of unsecured creditors (the "Committee") in these cases.

3. Fairfield Residential LLC ("FFR") is a fully integrated multifamily housing company that through its various subsidiaries provides a diverse mix of services to a wide range of investors, joint venture partners and clients. In addition, FFR either directly or indirectly, acts as a general partner or managing member of, and owns varying stakes in, a number of project level operating companies, none of which is a debtor in these chapter 11 cases. In total, the Debtors, along with wholly owned and certain non-wholly owned non-debtor subsidiaries (collectively, with the Debtors, the "Company") have an interest in approximately 200 separate multifamily properties in stages varying from "raw land," to under construction and finally to fully operational new construction and redevelopment communities.

4. With approximately 2,000 employees, the Company currently operates in 40 diverse markets across the United States, including Boston, Massachusetts; Washington, D.C.; Charlotte, North Carolina; Atlanta, Georgia; Dallas, Texas; Denver, Colorado; Las Vegas,

Nevada; Phoenix, Arizona; Los Angeles, California; San Francisco, California; and Seattle, Washington. For 2008, the Company had total revenues of \$952.9 million and \$107.5 million in net losses. As of December 31, 2008, the Company had approximately \$1.2 billion in total assets and approximately \$978 million in total liabilities, exclusive of approximately \$3 billion of contingent guaranty liabilities. Additional information regarding the Company's financial performance and debt situation is set forth in the Affidavit of Andrew Hinkelman in Support of First Day Pleadings (the "Hinkelman Affidavit").

5. The Company was built around providing a core group of complementary services to its investors and customers, including:

Development and New Construction – Relying upon a skilled team of professionals, the Company is one of the largest developers and builders of market rate and affordable multifamily apartment home properties, as well as student housing properties and for-sale condominium homes. Since inception in late 1997, the Company has started over 200 new construction projects consisting of over 68,000 attached homes and representing approximately \$8.5 billion in total project costs.

Acquisitions and Redevelopment – As a core element of its strategy, the Company has a well-defined program of acquiring and redeveloping multifamily properties in markets that are either supply-constrained or in which redevelopment costs are substantially below new construction costs. In addition, the Company has had a strategy focused on acquiring properties in markets that appear to be emerging from economic displacement. Since 1997, the Company has acquired nearly 300 properties, consisting of almost 78,000 attached homes and representing approximately \$8.2 billion in project costs.

Affordable Housing – Since its inception, the Company has been developing, building, redeveloping and managing affordable and workforce housing. The Company is an experienced authority in the intricacies of using Low Income Housing Tax Credits (LIHTCs) and tax exempt municipal bonds to finance affordable apartment homes communities.

The Company has created/ managed over 12,000 affordable apartment homes in over 100 properties throughout the U.S.

including almost 6,400 apartment homes in 28 properties financed through Low Income Housing Tax Credits.

Property Management – The Company is also one of the largest, full service property management companies in the United States and was ranked by the National Multi Housing Council as the 11th largest apartment manager and 17th largest apartment owner in the country as of year end 2008. As of November 1, 2009, the Company managed over 55,000 apartment homes in new construction, stabilized, turnaround properties and fee-managed properties.

Asset Management and Disposition – The Company's internal Asset Management group is responsible for the execution and monitoring of the full business plan of an asset, from the point of acquisition to the sale and realization of the maximum value of the asset and, in turn, the returns to investors. The Company maintains an in-house sales team that, in conjunction with selected brokerage firms, markets and sells properties to maximize the return to the Company's investors.

Since inception, including assets in which it had an ownership interest and those in which it did not, the Company has sold over 360 properties totaling more than 102,000 attached homes for a sales value in excess of \$11.7 billion.

6. Historically, the Company's diverse business lines have allowed the Company to pursue a wide range of opportunities and to respond quickly to changes in the real estate and finance markets. Because the multifamily development, construction, lease-up and asset disposition cycles have been complementary, the Company has been able to include each of its business units as part of a comprehensive group of services to its investors focusing on investment profitability.

7. Needless to say, the chaos in the domestic and international real estate and finance markets has had a deleterious effect on FFR and each of its operating businesses. While the demand for multifamily homes remains generally strong and FFR's operating businesses continue to perform well, the Company has become ensnared in the collapse of the real estate finance markets. The unprecedented shuttering of these markets has prevented the Company

from refinancing its significant debt that has matured (or will shortly mature) and has choked off the market for potential purchasers of the Company's properties.

8. In late 2008, the Company recognized the need to restructure its parent-level debt and began working with the lenders at FFR on an individual basis. By early 2009, those negotiations came to include, both on an individual basis and, later, through a steering committee of project lenders (the "Steering Committee"), those lenders at the non-debtor project level entities who hold contingent guarantees from certain of the other Debtors. These efforts continued throughout 2009, and recently concluded with the Debtors reaching agreement with their core creditor constituencies on the framework of a consensual plan of reorganization that should allow the Debtors to emerge from chapter 11 during early 2010, as one of the leading multifamily home operating companies.

Relief Requested

9. By this Motion, the Debtors seek entry of an order, pursuant to section 365 of the Bankruptcy Code, authorizing the Debtors to assume the contracts and leases described in Exhibit A (the "Contracts and Leases"). As set forth in greater detail below, the Contracts and Leases relate to the Debtors' development and redevelopment construction business, and the Debtors are required under a modification to a loan agreement to assume most of the Contracts and Leases prior to January 27, 2010.

Basis for Relief Requested

10. Section 365(a) provides that a debtor, "subject to the court's approval, may assume or reject any executory contract or unexpired lease." 11 U.S.C. § 365(a). Courts routinely approve motions to assume executory contracts or unexpired leases upon a showing that the debtor's decision to take such action will benefit the debtor's estate and is an exercise of sound business judgment. *See Sharon Steel Corp., v. Nat'l. Fuel Gas Distrib. Corp.*, 872 F.2d 36

(3d Cir. 1989); *In re H.M. Bowness, Inc.*, 89 B.R. 238 (Bkrtcy. M.D. Fla., 1988) (“Ordinarily, the decision to assume or reject an executory contract is left entirely to the debtor. Upon proper motion, the court should give perfunctory approval of the decision subject only to review under the business judgment rule.”); and *Group of Institutional Investors v. Chicago, Milwaukee, St. Paul & Pacific R.R.*, 318 U.S. 523 (1943). (“[T]he question whether a lease should be rejected and if not on what terms it should be assumed is one of business judgment.”).

11. Courts generally do not second guess a debtor’s business judgment concerning the assumption of an executory contract or unexpired lease. See *In re Trans World Airlines, Inc.*, 261 B.R. 103 (Bankr. D. Del. 2001); *Lubrizol Enters., Inc. v. Richmond Metal Finishers, Inc.*, 756 F.2d 1043 (4th Cir.1985); and *In re Health Science Products, Inc.*, 191 B.R. 895 (Bankr. N.D. Ala. 1995) (“The issue thereby presented for determination by the bankruptcy court is whether the decision of the debtor is so manifestly unreasonable that it could not be based on sound business judgment, but only on bad faith, whim, or caprice.”).

12. As mentioned above, the Company is one of the largest developers and builders of market rate and affordable multifamily apartment home properties, as well as student housing properties and for-sale condominium homes. In connection with these development activities one of the Debtors, FF Development L.P. (“Development”) acts as developer and general contractor for a multifamily residential project in DeKalb County, Georgia (the “Project”) being developed by non-debtor Fairfield Clairmont I LLC (“Clairmont”). In its role as developer and general contractor, Development entered into executory contracts and leases for the various goods and services needed for the Project.

13. In connection with a loan modification agreement dated September 1, 2009, in order to avoid a default under the applicable construction loan documents, the Debtors are

required to (i) assume all contracts with architects, contractors and design professionals within forty-five (45) days following the Petition Date, (ii) assume at least 85% of all executed subcontracts for the construction and completion of the Project, based on the total fees and costs remaining to be paid,² (iii) provide adequate assurance for all assumed contracts, (iv) be able to perform under the assumed contracts and (v) not be in default under any assumed contract.

14. Consequently, in order to avoid a default under the construction loan agreement and permit the Project to be completed, thereby enhancing the value of the Debtors' estates, Development must assume the Contracts and Leases by January 27, 2010.

15. Therefore, the Debtors have determined in their business judgment that it is in the best interest of the Debtors and their estates to assume each of the Contracts and Leases set forth on Exhibit A. Assumption of the Contracts and Leases will allow development of the Project to continue unhindered, which will in turn, enhance the overall value of the Debtors' estates.

Payment of Cure Amounts

16. Following entry of an order by the Court approving the assumption of the Contracts and Leases set forth on Exhibit A and the passage of the applicable objection deadline discussed below, the Debtors will pay the Cure Amounts set forth on Exhibit A when such amounts become due and payable pursuant to the terms of the applicable underlying contract or lease.

17. Given the timing of this Motion and the varying billing cycles utilized by the counterparties to the Contracts and Leases, the Debtors do not currently know the exact Cure Amounts owed with respect to the Contracts and Leases set forth on Exhibit A. Accordingly, the Debtors propose that the parties on Exhibit A be required to submit in the ordinary course, but in

² The Debtors previously requested authority from the Court to assume the majority of the subcontracts necessary to fulfill this requirement in the eleven omnibus assumption motions that they filed on the Petition Date [Dkt. Nos. 10-20].

any event on or before thirty (30) days following the Court's entry of the order granting this motion, a bill to the Debtors that includes all work performed prior to the Petition Date. At periodic intervals, but in all events, prior to making payment to a counter-party, the Debtors shall file a supplemental Exhibit A (each a "Supplemental Exhibit") setting forth the actual Cure Amounts owed to the parties set forth on Exhibit A. Parties shall file any objections to the amounts set forth on the Supplemental Exhibit within 10 days of the filing of each such Supplemental Exhibit. The Debtors shall be permitted to pay the Cure Amounts for the Contracts and Leases set forth in any Supplemental Exhibit for which no objection is received (so long as the applicable lender has agreed to continue funding the Project to which such contract or lease is related). To the extent that an objection is received with respect to a cure amount set forth in a Supplemental Exhibit, the matter shall be set for hearing on the next regularly scheduled hearing date that is at least five business days after the objection is filed. To the extent the parties reach an agreement regarding any cure objection, the Debtors shall be permitted to file an amendment to the Supplemental Exhibit indicating the agreed upon cure amount.

Requests for Immediate Relief & Waiver of Stay

18. The Debtors further seek any stay of effectiveness of the order approving this Motion. Pursuant to Bankruptcy Rule 6004(h), "[a]n order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise." As the Debtors must assume the contracts prior to January 27, 2009 and as the Debtors must not be in default or breach of any Contract or Lease in order to avoid the triggering of a default under the construction loan agreement, it is imperative that an order approving this motion be effective immediately. Accordingly, the Debtors submit

that ample cause exists to justify a waiver of the fourteen (14) day stay imposed by Bankruptcy Rule 6004(h), to the extent it applies.

Request Pursuant to Bankruptcy Rule 6006

19. To the extent necessary, the Debtors request authority pursuant to Bankruptcy Rule 6006(e) to assume multiple executory contracts or unexpired leases in one motion. Given the emergent nature of the Debtors' need to assume the Contracts and Leases to avoid any disruption to the completion of the Project, as well as the voluminous amount of Contracts and Leases that need to be assumed, the Debtors require expedited relief and believe an omnibus motion is the most expeditious manner in which to achieve this expedited relief. Furthermore, the counterparties to the Contracts and Leases will suffer no prejudice due to the use of an omnibus motion. Exhibit A clearly identifies the names of the contract counterparties, the projects to which the Contracts and Leases relate and the commitment identification. Thus, the Debtors submit that it is appropriate to grant the Debtors permission to file an omnibus assumption motion.

Notice

20. Notice of this Motion has been given to (a) the Office of the United States Trustee for the District of Delaware, (b) counsel to the Committee, (c) counsel to the lenders and agents for the Project, (d) those parties who have requested notice pursuant to Bankruptcy Rule 2002 and (e) the non-debtor parties to the Contracts and Leases. In light of the relief requested, the Debtors respectfully submit that no further notice of this Motion is required.

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Conclusion

WHEREFORE, the Debtors respectfully request that this Court enter an Order substantially in the form annexed hereto as Exhibit B: (a) authorizing the Debtors to assume the Contracts and Leases and (b) granting the Debtors such other and further relief as this Court may deem proper.

Dated: December 30, 2009
Wilmington, Delaware

Respectfully submitted,



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PROPOSED ATTORNEYS FOR DEBTORS AND
DEBTORS IN POSSESSION