

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE

IN RE: . Chapter 11  
WCI COMMUNITIES, INC, *et al.*, . Case No. 08-11643 (KJC)  
. (Jointly Administered)  
. .  
. January 20, 2009  
. 11:00 a.m.  
Debtors. . (Wilmington)  
. .

TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE KEVIN J. CAREY  
UNITED STATES BANKRUPTCY COURT JUDGE

Proceedings recorded by electronic sound recording;  
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1 THE CLERK: All rise. Be seated.

2 THE COURT: Good morning all.

3 MR. SCHLERF: Morning, Your Honor. Jeffrey Schlerf  
4 for the Debtors. Your Honor, we submitted an amended agenda,  
5 hopefully you received this morning. And in addition, I gave  
6 a couple of updates to your deputy. But it looks like, Your  
7 Honor, we have a mostly resolved hearing. I think there's  
8 one remaining dispute regarding agenda item no. 9 on the  
9 transfer tax.

10 THE COURT: Okay.

11 MR. SCHLERF: Going through the agenda, Your Honor,  
12 items 1, 5, and 6, orders have been entered. And 2, 3, 4, by  
13 agreement of the parties, they're continued until the next  
14 hearing on February 4<sup>th</sup>. So that brings us to item no. 7,  
15 which is resolved, Your Honor. We submitted a form of order  
16 under certification of counsel. So unless Your Honor has any  
17 questions.

18 THE COURT: No. I received it just this morning.  
19 The certification didn't indicate that the Committee had  
20 signed off on it. So I thought I'd just hold it.

21 MS. BECKERMAN: Your Honor, we have signed off on  
22 it.

23 THE COURT: With that, the order has been signed.

24 MR. SCHLERF: Thank you, Your Honor. That brings us  
25 to the Kraft motion for relief, Your Honor, and I'll cede the

1 podium to Mr. Averch and Kraft's counsel. Thank you.

2 MR. AVERCH: Good morning, You Honor. Craig Averch  
3 with White & Case on behalf of the WCI Debtors. We have  
4 reached an agreement with Kraft. We filed our response with  
5 the Court I believe last Friday indicating that we had  
6 produced 13 thousand pages of documents to Kraft  
7 Construction. In addition we would agree to submit to a half  
8 day deposition. We've agreed with Kraft's counsel to have a  
9 full day deposition instead of the half day deposition, and  
10 embody that in an agreed order that we would submit under  
11 certificate of counsel. If Kraft believes that additional  
12 discovery is necessary, although we're reluctant to make Your  
13 Honor the discovery master in a case, in litigation that's  
14 not in front of the Court, we still want to make sure that  
15 it's not unduly burdensome where it would impair, impede, or  
16 retard the reorganization in this case.

17 THE COURT: I'm reluctant to be discovery master  
18 even in cases that are in front of me. Is it - - well let me  
19 ask. The Debtor had said, Look. We've basically given you  
20 everything that's not privileged. Is there still a dispute  
21 over whether that's occurred?

22 MR. AVERCH: There may be, You Honor. I think after  
23 the deposition we would know, and then it would be Kraft's  
24 burden to come before the Court with an additional motion.  
25 This, the order wouldn't decide it with prejudice, and Kraft

1 would come forward with the specific categories of documents  
2 they believe the Debtors possess that could be easily  
3 produced or produced.

4 THE COURT: Okay.

5 MS. WOLFE: Good morning, Your Honor. Etta Wolfe  
6 with Smith, Katzenstein & Furlow on behalf of Kraft  
7 Construction. That is the agreement that we reached just  
8 this morning. We appreciate the Debtors' willingness to work  
9 with us on this. And I rise simply to ask Your Honor if I  
10 may be excused from the remainder of the hearing.

11 THE COURT: Yes. The exciting conclusion of this  
12 hearing? You may.

13 MS. WOLFE: Thank you.

14 MR. AVERCH: Your Honor, again for the record, Craig  
15 Averch. This moves us to agenda item 9. There is no  
16 objection to the actual relief requested, which is to  
17 transfer club assets to Old Palm Club. By way of background,  
18 Your Honor, there are approximately 20 country clubs for  
19 which WCI continues to manage and hold the majority of the  
20 club memberships. In this particular case, there's been 100,  
21 approximately 108 equity memberships sold at \$275 thousand a  
22 piece. There's another 200 or so memberships that WCI owns.  
23 Club members are nervous, because WCI is in bankruptcy. It's  
24 subsidiary Community, Communities Finance Company holds the  
25 memberships. The club members are nervous about the

1 bankruptcy. The transfer of the club assets have not been  
2 made to the club. The agreement that's in front of Your  
3 Honor that's attached as an exhibit does not require  
4 Communities Finance Company to transfer the club assets until  
5 prior to the turnover date. Turnover date occurs when either  
6 the parties agree otherwise or a certain amount of equity, I  
7 believe 90% of the equity memberships are sold. But because  
8 of the tension, the nervousness, the possible litigation, and  
9 beyond everything else, the Debtors want to encourage - - we  
10 think this is a beautiful facility - - we want to encourage  
11 people to buy equity memberships. And the equity memberships  
12 held by Community Finance Company, a Debtor in this case,  
13 are, could be worth up to \$61 million. So although there's  
14 no compulsion to transfer the property and the club assets at  
15 this time, the Debtors believe that it's in their best  
16 business judgment to do so to reduce the tension. We  
17 received one objection from the US Trustee. The objection is  
18 based on the recent Supreme Court decision in Piccadilly  
19 Cafeterias. We believe that that case is distinguishable  
20 because no assets are being sold here. This is not a 363  
21 sale, this is a transfer with a right of rescission that is  
22 maintained by the Debtors. So it's possible that the Debtors  
23 could exercise their right of rescission if 90% of the club  
24 memberships are not sold, or up to 200 memberships are not  
25 sold. And then the club assets would be re-transferred back

1 to Communities Finance Company, the Debtor. And we'd be  
2 paying two transfer taxes.

3 THE COURT: Well let me see if I can get my arms  
4 around the principle that the Debtor is asserting here. The  
5 Supreme Court in Piccadilly held the following. And I read  
6 verbatim. "§1146(a) affords a stamp tax exemption only to  
7 transfers made pursuant to a Chapter 11 plan that has been  
8 confirmed. Because Piccadilly transferred its assets before  
9 its Chapter 11 plan was confirmed by the Bankruptcy Court, it  
10 may not rely on §1146(a) to avoid Florida stamp taxes." So  
11 that I understand what the Debtor is asserting here. It's  
12 saying that in a transfer of rights which involves a transfer  
13 of less than all of the rights, or in a conditional transfer,  
14 the Piccadilly holding does not apply?

15 MR. AVERCH: Your Honor, that's one of the, that was  
16 an argument that the Debtors espoused in their papers. In  
17 trying to reach an agreement with the US Trustee on a  
18 compromise that falls within Piccadilly and does not try to  
19 skew the law, we propose that the Florida Department of  
20 Revenue could object, as they did in Piccadilly, at any time  
21 prior to confirmation without prejudice, and without shifting  
22 the burden of the stamp tax, and have an administrative  
23 claim, if they believe that the 1146 exemption was valid and  
24 if the Debtors couldn't otherwise convince them, at the time  
25 of confirmation, that no stamp tax should be payable.

1 THE COURT: Well you raise another question. And  
2 that is, were the appropriate taxing authorities notified?

3 MR. AVERCH: Absolutely, Your Honor. If you look at  
4 the service list, we served Florida at two different  
5 addresses. Under the order that we tried to resolve the  
6 objection, we would serve them again, and give them until  
7 confirmation to raise this objection. We do believe that if  
8 we could have a dialog, it's a governmental unit. Having a  
9 dialog with the Florida Department of Revenue is not easy.  
10 But we do - -

11 THE COURT: Well, I suppose it will start when the  
12 document is presented for recording.

13 MR. AVERCH: Well, that's the problem, Your Honor.  
14 Is once we present the document for recording, we have to pay  
15 the tax. There's no getting around that. And what we wanted  
16 to do, and provide in the order, to resolve the US Trustee's  
17 concern, and to make sure that the State of Florida didn't  
18 believe that we were playing fast and loose with their rights  
19 on a 20 day notice period, which it could be sitting on some  
20 administrator's desk, that we would give the State of Florida  
21 until confirmation to bring the objection. And I would note  
22 in Piccadilly Cafeterias that's what happened. The sale  
23 occurred, there was no objection by the, by the State of  
24 Florida Department of Revenue. That occurred at  
25 confirmation. And the proposed order and black line language

1 would allow the Florida, the State of Florida those same  
2 rights to come in. If we don't have that in the order, we  
3 will never be able to have a dialog with the state of  
4 Florida, because when we go to record this deed, that we're  
5 not required to record, that we're not getting any proceeds  
6 for, that we're doing it to appease club members, we will pay  
7 the tax, the 98 thousand of tax, and that will be the end of  
8 it. You know, recovering the tax once you've paid it is a  
9 herculean, herculean task, and it's just not something that  
10 would be cost effective to litigate with the State of Florida  
11 afterwards. We hope that we could have a dialog with this  
12 motion, but we realize on a 20 day motion, perhaps you don't  
13 get the attention. If it pleases the Court, I could approach  
14 the Court with a black lined order that shows how we would  
15 preserve the State of Florida's rights, and give them  
16 additional notice, and again, all the way until confirmation  
17 they could object, without changing the burdens. And if they  
18 prevailed, we would pay their stamp tax as an administrative  
19 expense claim. This - -

20 THE COURT: So you're anticipating that if you get  
21 such an order, that when you present the document for  
22 recording it will be taken without a fee?

23 MR. AVERCH: Well, we put in the order that the  
24 clerk will accept it and take it without a fee. If we don't  
25 have that in the order, we will not record it, we will have

1 to pay the fee. So Your Honor we realize that this is  
2 threading a needle, and maybe the hole is not there on the  
3 needle. But we believe there are also arguments that under  
4 the, that the State of Florida would recognize that perhaps  
5 we shouldn't be paying stamp tax twice. And there is a  
6 reasonable prospect of rescission. And if the rescission occurs,  
7 and we re-record it, and it's transferred back, we would have  
8 paid another transfer tax. If it wasn't for the business - -

9 THE COURT: Well, not if it's after confirmation.

10 MR. AVERCH: Under a plan. If we could do it under  
11 a plan on the, the reconveyance, Your Honor is correct. But  
12 if it wasn't for the business concern, and the concerns  
13 expressed by the club members, we would not be transferring  
14 this now in light of the Supreme Court's decision in  
15 Piccadilly Cafeterias. We would wait until a plan.

16 THE COURT: I understand. You know, handicaps are  
17 probably up too. Because of anxiety. All right. Let me  
18 hear from the US Trustee.

19 MR. HARRINGTON: Good morning, Your Honor. William  
20 Harrington from the Office of the United States Trustee.

21 THE COURT: Mr. Harrington, let me start by asking,  
22 why don't we leave this to the Florida Taxing Authority? And  
23 I know the US Trustee gets tired of hearing, which Mr. Averch  
24 actually didn't say, that you don't have any economic stake  
25 in the outcome of this dispute. But so let's say I'm asking

1 the question. Why not leave this to the Florida Taxing  
2 Authority?

3 MR. HARRINGTON: Well, I think as counsel aptly  
4 pointed out, a lot of times when you're dealing with State  
5 Taxing Authorities, and as Your Honor knows from your  
6 practice, sometimes it does sit on an administrator's desk,  
7 and it doesn't get through to the right channels. Despite  
8 the fact that you send it to the right P.O. Box somewhere.  
9 It takes longer than 20 days to, you know, get to the right  
10 person who could raise the objection.

11 THE COURT: Well then, is the answer to put this off  
12 to the next omnibus hearing?

13 MR. HARRINGTON: What I think the answer is, Your  
14 Honor, exactly as you stated. This will come to a head when  
15 they walk into the recorder's office, and try to record this  
16 without an exemption. And then they'll directly have to deal  
17 with the State of Florida. And we're not shifting the burden  
18 to forcing the State of Florida to come back in here and seek  
19 an admin claim for recovery of monies that were not paid at  
20 the time of the transfer. I think the Supreme Court has said  
21 that you cannot allow it pre-confirmation, and what they're  
22 asking you to do is allow it pre-confirmation, and then have  
23 the State of Florida, with this full reservation of rights,  
24 come back and seek to reclaim that money if they think its  
25 appropriate. As opposed to the Debtor walking into the

1 recorder's office, and then trying to convince the State of  
2 Florida, at the front end, that all of these arguments that  
3 have been made to you. That it's recision, and it might be  
4 transferred back and forth, do not justify the payment of the  
5 fee. What they're asking Your Honor to do is say, No, you  
6 don't have to pay the fee now, and the State of Florida has  
7 got to come back into the Court, the Bankruptcy Court and  
8 then seek a, you know, seek that fee at a later time.

9 THE COURT: Well, let me ask this. I mean, it  
10 really, it is incumbent upon parties who are properly served  
11 with notice, and whose interests are affected to respond,  
12 isn't it?

13 MR. HARRINGTON: It is, it - -

14 THE COURT: I mean, this isn't a sovereign immunity  
15 issue type thing here where the state can't be hailed into  
16 court for this purpose. It seems to me that, especially in  
17 these times, it ought to be attentive to someone that  
18 presumes to seek an exemption from the recording tax.

19 MR. HARRINGTON: And Your Honor, I don't stand here  
20 for the State of Florida. I don't know what circumstances  
21 arose that they did not respond here. But I just, past  
22 history indicates to me that sometimes when taxing  
23 authorities are served it takes additional time for, you  
24 know, the motion to find it's way to the right person. And  
25 maybe, you know, the motion doesn't find its way over to the

1 right person. I, you, I never know, Your Honor. But I think  
2 in this circumstance, we have a Supreme Court case that says  
3 pre-confirmation Your Honor can't approve the exemption to  
4 the transfer tax under 1146. And what the Debtors are asking  
5 you here is to approve the exemption under 1146, advise the  
6 Recorder of Deeds that they should not collect the tax, and  
7 then the order will, you know, provide some provision and  
8 reservation of rights for the State of Florida to come back  
9 in prior to confirmation and argue that they should have paid  
10 the tax in the first instance. And I think here we have the  
11 Supreme Court case that says, you know, you have to pay the  
12 tax. And I don't disagree that the circumstances were such  
13 in the Piccadilly Cafeterias case that the tax wasn't paid at  
14 the time of transfer, but the Supreme Court said that was  
15 wrong. It should have been paid. And you should not have  
16 received the exemption under 1146. So despite the fact that  
17 we have similar facts here, I think we had a ruling from the  
18 Supreme Court that said you have to pay unless it's post-  
19 confirmation. 1146 doesn't provide you any protection here.

20 THE COURT: Thank you. Does anyone else care to be  
21 heard? Mr. Averch, would you like the last word?

22 MR. AVERCH: Given I'd never argue, especially  
23 today, that Mr. Harrington doesn't have standing to appear,  
24 since he's polite enough to spend his holiday weekend  
25 negotiating with us over the KEIP, I do believe I would like

1 to present the proposed form of order where we, where we  
2 preserved rights. We do believe, Your Honor, we have  
3 arguments. Mr. Harrington, I think, overstates the fact that  
4 you can have a discussion with the State of Florida when you  
5 walk into the County Recorder's Office to record a deed.  
6 There is no discussion with the State of Florida. You, you  
7 give them your check, and you pay the tax. You have no  
8 discussion with the State of Florida. We would be happy to  
9 have that discussion. And perhaps 20 days, even though it's  
10 provided by the Rules, is not sufficient due process for the  
11 states, and we've tried to address that concern without  
12 changing the playing field. And we do think we have some  
13 unique circumstances here, because we're not receiving any  
14 money. And we do have a rescission right. It is almost like a  
15 fee simple subject to a, a condition subsequent.

16 THE COURT: But let's go through, let's describe the  
17 characteristics of what the Debtor proposes to do. There is  
18 a transfer. Lien claimants are being paid, so there is a  
19 similarity to a sale free and clear. You're assuming and  
20 assigning a contract. All that's correct?

21 MR. AVERCH: All that's correct, Your Honor.

22 THE COURT: I mean, it has, you know, it's the walk  
23 like a duck test.

24 MR. AVERCH: Well, yeah. Most ducks don't get to  
25 rescind and walk backwards. Here we have the absolute right,

1 if the memberships are not sold, to ask for a rescission and  
2 have every single asset transferred back. And so in the duck  
3 test, if you were just looking at the duck test, that would  
4 be one thing. But with the rescission rights, it is somewhat  
5 distinguishable, not perfectly distinguishable. But the  
6 other thing is, Your Honor, you were going to preclude our  
7 arguments under State of Florida law to have a dialog with  
8 the state of Florida to ask whether a transfer tax should  
9 even be appropriate.

10 THE COURT: That I can fix. By giving you more  
11 time.

12 MR. AVERCH: Well, I mean, I, if Your Honor is  
13 unwilling to accept our proposal to not shift the burden, but  
14 giving the state of Florida more time, of course we would  
15 like it without prejudice to our right to come in and contest  
16 the tax. But Your Honor, as a practical matter, we'd end up  
17 having to do that by an adversary proceeding, and we don't  
18 think it's as practical a resolution as what we proposed.  
19 But we would certainly accept the resolution that we, that  
20 the Debtors reserve their right to contest the tax after  
21 we've paid it.

22 THE COURT: Well, let me see counsel at sidebar. Go  
23 off the record, Al.

24 (Whereupon at 11:31 a.m. a recess was taken in the  
25 hearing in this matter.)

1           (Whereupon at 11:33 a.m. the hearing in this matter  
2 reconvened and the following proceedings were had:)

3           MR. AVERCH: Your Honor, at this time the Debtors  
4 would propose to withdraw the relief requested for the 1146  
5 exemption, and in an order that we will prepare and submit to  
6 the Court, reserve the Debtors' right to contest the payment  
7 of the taxes in the future. And we will prepare and submit  
8 that order to the Court under certificate of counsel.

9           THE COURT: All right. Does anyone else care to be  
10 heard on that matter? I hear no response. I'll await the  
11 submission of the order.

12           MR. AVERCH: Your Honor, now - - again, Craig Averch  
13 for the record. This is agenda item 10. I'm pleased to  
14 inform the Court that we've reached a consensual resolution  
15 to the issues, concerns, and objections that have been raised  
16 by the Unsecured Creditors Committee, the pre-petition  
17 lenders, both groups, term lenders, and revolver lenders, and  
18 the US Trustee with respect to a portion of the relief. The  
19 relief that's been agreed to is with respect to the  
20 management incentive compensation plan for approximately 44  
21 employees. The agreement is premised on the Debtors  
22 providing a sufficient record to the Court, and my partner,  
23 Mr. Hille, will make that evidentiary presentation by an  
24 agreed proffer. Two witnesses are in the courtroom. They  
25 are available for cross examination by the Court or any party

1 in interest. And again, this is just on one part of the key  
2 employment incentive plan, used by the acronym KEIP. The  
3 emergence incentive compensation plan, the so-called EIC, is  
4 not, is going to be passed to February 4<sup>th</sup>. It's not up for  
5 consideration today. That affects 19 more senior employees.  
6 We're still involved in discussions with the major  
7 constituencies on how to resolve that, and we pass that to  
8 the 4<sup>th</sup>. Again, I would like to publicly thank Mr. McMahon  
9 and Mr. Harrington for devoting their holiday weekend to  
10 assisting the Debtors' resolution to their one objection. I  
11 do have to make it clear on the record, this is with respect  
12 to all the parties, that should the Court decide to approve  
13 the small portion of the KEIP that we're requesting today,  
14 the 44 employees under the management incentive compensation  
15 portion, that would be without prejudice to any party. And  
16 the facts educed, and the order entered would not have any  
17 *res judicata*, collateral estoppel, or any other preclusive  
18 effect. Or prevent the parties from asserting any and all of  
19 the same objections that they may have to the portion that's  
20 going to be approved today. Of course, the portion that's  
21 going to be approved today is final, but any arguments that  
22 any party may have are reserved, and could be asserted on the  
23 4<sup>th</sup>. And with that, I would like to turn it over to my  
24 partner, Mr. David Hille to do the evidence.

25 THE COURT: Thank you.

1           MR. HILLE: Good morning, Your Honor. For the  
2 record, David Hille from White & Case on behalf of the  
3 Debtors. Your Honor, if it's acceptable to the Court as Mr.  
4 Averch mentioned, we would propose to go forward with two  
5 witness proffers. We have discussed this with the US Trustee  
6 and they do not object to proceeding in that way.

7           THE COURT: All right. You may proceed.

8           MR. HILLE: Your Honor, before doing so, I have, Mr.  
9 Averch mentioned that the application today is on the  
10 management incentive compensation plan. And that there are  
11 44 people that are subject to today's application. I'd like  
12 to hand up to the Court just a list showing those people and  
13 the amounts of the bonuses. Is that okay?

14          THE COURT: Very well.

15          MR. HILLE: I don't intend to seek to have this  
16 admitted into evidence, but I think the Court should have it  
17 during the proffers.

18          THE COURT: Okay. Is this information public?

19          MR. HILLE: No it isn't.

20          THE COURT: All right. Thank you.

21          MR. HILLE: I also note that the other creditor  
22 constituencies have received copies of this previously. Your  
23 Honor, the first proffer is of Paul Appolonia. Were Paul  
24 Appolonia called to testify, he would testify as follows.  
25 Mr. Appolonia would testify that he is employed by and holds

1 the title of Senior Vice President of Human Resources of WCI  
2 Communities, Inc. Mr. Appolonia has worked for WCI since  
3 2002 in that capacity. Mr. Appolonia would testify that he  
4 has been involved in the development of various incentive  
5 plans for WCI in prior years. WCI has had a number of  
6 management incentive compensation plans in place since the  
7 late 1990's and such plans are a regular component of  
8 compensation at WCI. Each year the plans have varied in  
9 terms of performance objectives based on what was critical to  
10 the overall success of the company that year as determined by  
11 management and WCI's board. Performance objectives have  
12 always been financially related and measured by actual  
13 performance versus the annual business plan. Through the  
14 years, the objectives have included metrics such as net  
15 income, cash flow, shareholder equity, gross revenue, gross  
16 margin, and sales. Prior plans have contained minimum  
17 threshold levels, par performance, and maximum caps on both  
18 performance measurements and the resulting bonus payments.  
19 Mr. Appolonia would testify that in the last year, WCI has  
20 lost valuable employees that are difficult to replace,  
21 including, among others, the Chief Financial Officer, Chief  
22 Operating Officer, Vice Presidents of Business Development,  
23 Vice Presidents of Sales and Marketing, division presidents,  
24 Senior Project Managers, and Vice President of Operations.  
25 WCI's current employees have been under considerable strain,

1 and have been required to take on extraordinary workloads to  
2 compensate for downsizing and attrition. Mr. Appolonia would  
3 testify that WCI established a key employee incentive plan  
4 for 2009, and the management incentive compensation plan,  
5 which is a component of the KEIP, at issue today, to motivate  
6 certain of it's key employees to meet or exceed the Debtors'  
7 financial and operational goals. Thereby aligning the  
8 interests of such employees with those of the Debtors'  
9 stakeholders. Mr. Appolonia would testify that prior to  
10 filing their motion to approve the key employee incentive  
11 plan, the Debtors consulted with the Creditors Committee,  
12 and, after responding to various requests for additional  
13 information, the Creditors Committee advised the Debtors that  
14 they did not have any objection to the proposed incentive  
15 plan, including the management incentive compensation plan at  
16 issue today. Further, the compensation committee of WCI's  
17 Board of Directors provided input to and approved the key  
18 employee incentive plan and the management incentive  
19 compensation plan. The plan has also been reviewed and  
20 approved by the pre-petition secured lenders. With respect  
21 to the management incentive compensation component of the  
22 KEIP, Mr. Appolonia would testify that the payment of bonuses  
23 is based on clearly defined performance metrics, and will  
24 incentivize WCI's key employees to continue their  
25 extraordinary services and efforts during Debtors'

1 reorganization and to maximize the value of the Debtors'  
2 estates. Specifically, payment of incentive bonuses under  
3 the MIC - - which I'll use as shorthand for management  
4 incentive compensation plan - - under the MIC, is conditioned  
5 upon the achievement of threshold, which is 90%, target,  
6 which is 100%, or maximum, which is 110% levels of certain  
7 2009 consolidated financial objectives. These financial  
8 objectives which are premised upon the Debtors' financial  
9 forecasts prepared in connection with obtaining post-petition  
10 DIP financing, include at target levels attaining cash flow  
11 from operations of 31 million, 887 thousand, and gross  
12 margins on home and tower sales of 17 million, 492 thousand.  
13 Mr. Appolonia would testify that the aggregate maximum MIC  
14 payments for the 44 employees at issue on the application  
15 before the Court today are \$937,313 at the 90% threshold  
16 level, \$1,249,750 at the 100% target level, and \$1,562,188 at  
17 the 110% maximum level. Mr. Appolonia would testify that  
18 WCI's top priority in 2009 is to successfully emerge from  
19 Chapter 11 as a financially healthy company. Two key factors  
20 to that excess include, to that success include generating  
21 cash flow and selling inventory homes in an appropriate gross  
22 margin level. It is critical that key management personnel  
23 be incentivized in this endeavor, and their interests be  
24 aligned with those of the Debtors' stakeholders.  
25 Accordingly, WCI's management believed, and the compensation

1 committee of the board agreed and directed that cash from  
2 operations and gross margins on home and tower sales would be  
3 the optimum measurements of success for 2009. Other  
4 financial objectives were considered, but determined not to  
5 have the same motivational focus for the relevant WCI  
6 personnel. Mr. Appolonia would testify that employees were  
7 selected for MIC eligibility based on their ability on a day-  
8 to-day basis to positively achieve the financial objectives  
9 and affected influence the success of the Debtors' business  
10 plan. Although many managers remain employed with WCI at  
11 various levels within its management hierarchy, and serve in  
12 important roles, not all have the ability to truly impact  
13 achievement of WCI's cash flow and gross margin financial  
14 objectives. Additionally, WCI believes that the managers not  
15 eligible for the MIC are compensated appropriately through  
16 competitive based salaries or, in the case of sales and  
17 marketing personnel, through sales commissions. Mr.  
18 Appolonia would testify that none of the 44 MIC participants  
19 hold positions at WCI of Executive Vice President, Senior  
20 Vice President, or higher. Mr. Appolonia would testify that  
21 under the key employee incentive plan, no MIC bonuses will be  
22 paid unless the Debtors achieve at least threshold  
23 performance of both financial objectives. Further, bonuses  
24 under the MIC are subject to confirmation of financial  
25 performance by the compensation committee of WCI's Board of

1 Directors, and would not vest until the date that is the  
2 earlier of the effective date of a confirmed Chapter 11 plan,  
3 the successful consummation of a sale of substantially all of  
4 the Debtors assets to one or more acquirers, or January 1<sup>st</sup>,  
5 2010. The identity of the 44 employees at issue on this  
6 application, and their respective compensation and bonus  
7 levels, is treated as confidential and sensitive commercial  
8 information at WCI. In addition to employees wishing to  
9 maintain privacy over the amount of their compensation, the  
10 disclosure of this information could cause disruption among  
11 personnel at WCI. Also, making public the compensation of  
12 WCI employees would provide competitors with information that  
13 might provide them a competitive advantage over WCI. None of  
14 the 44 employees at issue in the current application is an  
15 officer for which WCI reports income or other information  
16 with the SEC. The Creditors Committee, the United States  
17 Trustee, and other creditor constituencies have been provided  
18 the list of employees and possible bonus payments under the  
19 MIC. And this would conclude Mr. Appolonia's direct  
20 testimony, and he is available in the courtroom.

21 THE COURT: Does anyone wish to examine Mr.  
22 Appolonia? I hear no response. Next witness.

23 MR. HILLE: Your Honor, the second proffer is  
24 shorter. It is from Jonathan Pertchik. Were Jonathan  
25 Pertchik called to testify, he would testify as follows. Mr.

1 Pertchik would testify that he is employed by and holds the  
2 title of Chief Restructuring Officer of WCI Communities, Inc.  
3 With respect to the MIC component of WCI's proposed key  
4 employee incentive plan, Mr. Pertchik would testify that the  
5 payment of bonuses is conditioned upon achievement of clearly  
6 defined financial objectives. These financial objectives  
7 include, at target levels, attaining cash flow from  
8 operations of \$31,887,000 and gross margins on home and tower  
9 sales of \$17,492,000. Additionally land and bulk inventory  
10 sales are excluded from the calculation of cash flow from  
11 operations, unless such sales, whether on an individual or  
12 multiple unit basis, were specifically included in the  
13 Debtors' financial forecasts prepared in connection with  
14 obtaining post-petition DIP financing. Moreover, asset  
15 impairment charges that are recorded in 2009, are excluded  
16 from the calculation of gross margins on home and tower  
17 sales. Mr. Pertchik would testify that the two financial  
18 objectives were premised upon the DIP financing forecasts  
19 which forecasts were reviewed and approved by the pre-  
20 petition secured lenders' representatives, and the Creditors  
21 Committee in late 2008, and which were finally executed  
22 effective October 13<sup>th</sup>, 2008. Mr. Pertchik would testify that  
23 the financial objectives are both meaningful and challenging,  
24 and absent a concerted effort from the company's management  
25 team, such objectives will be difficult, if not impossible,

1 to reach. Mr. Pertchik would testify that to meet the  
2 financial objectives, WCI will need to improve its  
3 operational performance from its actual performance achieved  
4 during November and December, 2008. This will require  
5 increases and improvement in operational performance in both  
6 sales and closings and the prudent management of expenses.  
7 In addition, WCI has averaged 39 closings per month from  
8 August 2008 through December 2008. In comparison, the DIP  
9 financing forecasts project an average of 48 closings per  
10 month for 2009. Moreover, since the time that the DIP  
11 financing forecast went into effect, WCI has, on average,  
12 reduced prices for home and tower units due to a continuing  
13 challenging economic environment. Accordingly, the financial  
14 objectives will require a sustained and consistent effort  
15 from WCI personnel. Mr. Pertchik would testify that he  
16 believes the key employee incentive plan, and the MIC  
17 component of the plan in particular, will incentivize key  
18 employees to meet or exceed the Debtors' financial and  
19 operational goals and accordingly align their interests with  
20 those of the Debtors' stakeholders. Mr. Pertchik would  
21 testify that the proposed bonuses to be paid under the key  
22 employee incentive plan and the MIC component are relatively  
23 modest. Indeed with respect to the 44 employees for which  
24 the Debtors are seeking authority today to approve their  
25 participation in the MIC plan, the aggregate target bonus is

1 less an \$1.25 million. This would conclude Mr. Pertchik's  
2 direct testimony. He is available in the courtroom.

3 THE COURT: Does anyone wish to examine Mr.  
4 Pertchik? I hear no response. Does the Debtor have any  
5 other evidence in support of its motion?

6 MR. HILLE: No, Your Honor.

7 MR. AVERCH: Your Honor, Craig Averch. We have a  
8 black lined order which has been circulated to the Creditors  
9 Committee and approved by the Creditors Committee and both  
10 pre-petition lending groups, as well as the US Trustee, and  
11 I'd like to present that order at this time.

12 THE COURT: All right. That's fine.

13 MR. AVERCH: May I approach?

14 THE COURT: Yes. And while you're doing that I'll  
15 ask if anyone else wishes to be heard in connection with this  
16 motion.

17 MS. HIGHSMITH: Your Honor, Autumn Highsmith with  
18 Haynes & Boone for the senior revolving lenders. I simply  
19 want to reiterate what Mr. Averch had stated, that none of  
20 the testimony today will serve as a basis for *res judicata* or  
21 collateral estoppel against the senior secured lenders'  
22 rights to argue against the other portions of the motion  
23 which remain pending. And I say that specifically in regard  
24 to the testimony about the sufficiency of the DIP budget and  
25 the efforts that it would take to reach those thresholds.

1           THE COURT: Thank you. Does anyone else care to be  
2 heard?

3           MR. HARRINGTON: Again for the record, Your Honor,  
4 William Harrington for the Office of the United States  
5 Trustee. And similar to the Debtors thanking our office, I'd  
6 like to thank the Debtors for the time they spent providing  
7 us the additional information we had requested in connection  
8 with this motion. But I had two minor points with respect to  
9 the form of order, which I am hoping are not controversial.  
10 I'm wondering if in the first ordered paragraph where it says  
11 the motion is granted as set forth herein, so we can preserve  
12 the reservation of rights that was set forth on the record,  
13 and alluded to by counsel for the DIP lender, I'm wondering  
14 if we could add there, and subject to the reservation of  
15 rights set forth on the record. Just so it's clear in this  
16 order.

17           MR. AVERCH: Your Honor, we have no objection to  
18 that.

19           THE COURT: All right.

20           MR. HARRINGTON: And my only other request is in the  
21 second ordered paragraph. That we indicate, where it says,  
22 105(a) and 363(b) that also because we believe there's a  
23 503(c)(3) motion that we add 503(c)(3) to that as well. To  
24 the approval.

25           MR. AVERCH: Again, Your Honor, no objection to that

1 request either.

2 MR. HARRINGTON: Thank you.

3 THE COURT: To completely confuse the legal standard  
4 involved. Okay. Does anyone else care to be heard?

5 MS. BECKERMAN: Your Honor, just the record reflect  
6 that the Committee is supportive of what's on today. I just  
7 wanted to again put on the record that the company is  
8 obviously reconsidering what it was proposing with respect to  
9 the other parties not covered by the relief sought today, so  
10 obviously we reserve all our rights, and have to before,  
11 until we see what the company is going to come back to us  
12 with respect to that. And while we were supportive of what  
13 was in the motion with respect to those employees, we  
14 obviously don't know what will be proposed in terms of  
15 changes, so we're reserving our rights with respect to that.

16 THE COURT: Thank you. Does anyone else care to be  
17 heard in connection with this motion? All right. Mr.  
18 Averch, do you want to walk me through the black line?

19 MR. AVERCH: Yes, Your Honor. Your Honor, again,  
20 the, the first black line, the second decretal paragraph is  
21 to make sure that the 19 participants that are all EIC  
22 participants, there's nothing, no relief is being approved  
23 with respect to this order on those 19 participants. The - -

24 THE COURT: How about with respect to the third  
25 line. Which approval may be sought by the Debtors. Not that

1 if you failed to do that someone would seek to enforce it.

2 Do you see where I am?

3 MR. AVERCH: Which approval shall be sought by the  
4 Debtors?

5 THE COURT: Yeah. May be sought.

6 MR. AVERCH: Yeah, may, may would probably be  
7 better.

8 THE COURT: Okay.

9 MR. AVERCH: The second, the first full decretal  
10 paragraph on page 2 of the black line simply states what was  
11 in our presentation materials, and was in there for  
12 clarification. The same thing with the next two decretal  
13 paragraphs. The last decretal paragraph on page 2 was  
14 negotiated. Originally the CEO had authority to adjust the  
15 MIC bonuses not to exceed \$25 thousand. And if it exceeded  
16 \$25 thousand, the compensation committee, which is a subgroup  
17 of the board, had to approve that judgment. The order  
18 modifies that to provide the pre-petition secured lenders and  
19 the Creditors Committee two business days notice to object to  
20 any modification. And if we're unable to resolve,  
21 consensually, that modification, the Debtors shall be  
22 required to come to court and get approval. Moving on, this,  
23 as part of this, our motion had provided that employees would  
24 waive their long-term incentive plans as a condition to  
25 participating in the KEIP. We have negotiated a resolution

1 since there may be some employees that never receive any KEIP  
2 payments, even though they want to be part of the KEIP  
3 program. So this provision modifies the waiver. If an  
4 employee receives a KEIP payment, actually receives a KEIP  
5 payment, it will waive it's claim under the long-term  
6 incentive plan that was approved pre-petition by the Debtors.  
7 The last black line, the second to last decretal paragraph  
8 which is black lined is simply to make clear that to the  
9 extent there are any inconsistencies between the plan, the  
10 motion, and the order, that this order supercedes and  
11 governs.

12 THE COURT: All right. Any other comments on the  
13 form of order? As it's to be amended and submitted? All  
14 right. I hear nothing further.

15 MR. AVERCH: Thank you, Your Honor.

16 THE COURT: Thank you. All right. Now the fun  
17 part. Okay. Let me start the fee application portion of  
18 this hearing by saying that I intended to, and I think I  
19 solicited suggestions from the parties in connection with  
20 appointment of a fee auditor, which I have failed to do.  
21 Much to my law clerk's pain and to my chagrin. But I do  
22 intend to appoint one. And I think I did receive suggestions  
23 from the this group, but refresh me if I'm wrong about that.

24 MR. SCHLERF: Your Honor, Jeffrey Schlerf for the  
25 Debtors. I don't believe it's come up at all, Your Honor.

1           THE COURT: Okay. Then boy, I really dropped the  
2 ball. Okay. I would ask, then, within, oh by the next  
3 omnibus hearing in February that the parties either jointly  
4 or individually submit suggestions, recommendations for fee  
5 auditors. As many of you may know, I've probably used Warren  
6 Smith more than anybody else. And I've been very happy with  
7 his services. But, I am always constantly on the lookout for  
8 others, just believing that variety and competition for Mr.  
9 Smith is a good thing. And I say that, again, with the  
10 deepest respect for the quality of the service Mr. Smith has  
11 provided to this Court. I have used Stuart Maue in the past,  
12 and been happy with them in the one matter I appointed them  
13 in. So your recommendations will be welcome. I don't limit  
14 myself, however, to say that I will choose from among those.  
15 But I, I think I always have. But I reserve my rights. All  
16 right. Let's start with Akin Gump. Okay. Let me first note  
17 - - well, let me ask you first, do you have your application  
18 with you?

19           MS. BECKERMAN: I do, Your Honor.

20           THE COURT: Okay. Let me first ask you to turn to  
21 the second monthly fee application behind what is my Tab,  
22 Exhibit B. And it's page 10.

23           MS. BECKERMAN: Okay.

24           THE COURT: And the date, November 18<sup>th</sup>, '08 appears  
25 under the page number. Let me know when you're there.

1 MS. BECKERMAN: Okay.

2 THE COURT: I notice that there is some September  
3 time mixed in with the October time.

4 MS. BECKERMAN: Yes, Your Honor. That is correct.

5 THE COURT: And I have no issue with somebody having  
6 missed something and submitting it later, but what it does is  
7 it makes it harder for me to, in connection with the  
8 September time, determine whether something unreasonable  
9 happened in terms of numbers of hours. I, but I've  
10 identified the place in September which it, where it  
11 otherwise would have gone, and have concluded it's okay. I  
12 just ask if you submit time subsequently, tell me where it  
13 should go where September was.

14 MS. BECKERMAN: Yes, Your Honor. My committee chair  
15 actually had noted that as well. He reviews our bill every  
16 month before we submit it, and asks questions or raises  
17 issues with us, just so you know, before it's submitted to  
18 this Court. And I don't really have a good explanation, I'm  
19 sorry, for why my senior associate, Mr. Davis, who's been  
20 practicing for 10 years, all of his September time did not  
21 manage to get into the bill, but it has not happened  
22 subsequently, and it obviously was raised by him as well. So  
23 it is something that I, I am obviously keeping an eye on - -

24 THE COURT: Okay.

25 MS. BECKERMAN: - - as well.

1           THE COURT: All right. Turn to page 12. Just a  
2 couple pages farther along.

3           MS. BECKERMAN: Yes.

4           THE COURT: There are several entries, starting with  
5 the first full one dated October 3<sup>rd</sup>, referencing due  
6 diligence.

7           MS. BECKERMAN: Yes, Your Honor. We, when we are  
8 Committee counsel in a case, we generally, fairly early on in  
9 a case, put together a list of information that we have from  
10 the Debtor that we review. And it, it is, it covers a  
11 variety of topics. This is another topic I've had a lot of  
12 discussions with my committee chair about. Especially  
13 actually recently, Your Honor. So I'll bring the Court up to  
14 date on that recent discussion in a moment.

15           THE COURT: Okay.

16           MS. BECKERMAN: But what that list does is it asks  
17 for certain information about, for example, you know,  
18 organizational documents of the Debtors, indentures, things  
19 that we would normally need to review in connection with  
20 that. We asked for information about tax related stuff, so  
21 that we are prepared when we get to plan time. We've done  
22 our basic work that we need to. We asked for information  
23 about environmental related areas, because in a case like  
24 this that involves a lot of land that's obviously a potential  
25 issue, and we've had a few minor things to date, for example,

1    come up in our motions.  And so we have a fairly standard  
2    form that we obviously tailor towards the type of company it  
3    is.  Here we have more real estate and land related issues  
4    than we might have in a normal case.  And so that's what we  
5    do, is we send out that list and then we receive information  
6    back from the company and review that.  And so that's, in  
7    part, what goes into this category that you see.  The other  
8    thing that obviously goes into this category that I think  
9    Your Honor is familiar with is the, what I would describe as  
10   more typical, pre-petition, transactional type of review,  
11   which we've obviously been quite involved with looking at for  
12   avoidance action issues and other types of things.

13           THE COURT:  And I did see that, and I don't have any  
14   questions about that.

15           MS. BECKERMAN:  And my committee chair, just so you  
16   know, Your Honor, has asked us, I think he's now asked me to  
17   put together a list for him for everything that we're doing  
18   that would fall under the more general due diligence.  Not  
19   the avoidance action review, which we've obviously had a lot  
20   of discussions with the Committee on.  In particular  
21   recently.  And has submitted a couple of memos relating to  
22   lien review and avoidance action to them.  So they're very  
23   aware of what we're doing.  But with respect to the due  
24   diligence, he's actually asked me to put together a task list  
25   and to have an approval going forward before we do any such

1 work, from him as well. So I think you'll see less of this,  
2 I guess, is really what I'm saying to you, after January,  
3 unless it's something that's actually been specifically  
4 reviewed and approved by our chair.

5 THE COURT: Okay. Thank you. Let's turn now to  
6 expenses.

7 MS. BECKERMAN: Um-hum.

8 THE COURT: There is a summary, a one page summary  
9 for expenses incurred in August and September, but there is  
10 no detail.

11 MS. BECKERMAN: Your Honor, I think we put our  
12 detail, at least in my document, at the back. There is  
13 detail. And we have also submitted a detail to the US  
14 Trustee. But if, at least in my tab, sorry, after our  
15 summary, for example, on the bill you were just looking at  
16 for October, then there's a run of our disbursement  
17 information right at the back of that. And I think there's  
18 one similarly for September, but let me just look at that.  
19 Sorry. Bear with me a second. I don't see it for September.  
20 But we have submitted that to the Trustee.

21 THE COURT: Some of the detail - - okay. All right.  
22 Let me see. All right. Behind my Tab D there's the expense  
23 summary for October that does have October detail.

24 MS. BECKERMAN: Yeah, I - -

25 THE COURT: You know what? It goes in reverse

1     chronological order.

2             MS. BECKERMAN: Yeah.

3             THE COURT: And it does contain some September  
4     expense detail. But then it goes back and forth, actually,  
5     between September and October. Maybe it's because it's by  
6     category. But I still don't see anything for August.

7             MS. BECKERMAN: Okay. Well if you have a question  
8     specifically I guess I could try to see if I can answer it.  
9     And if not, I'm obviously going to have to provide you with  
10    that information if it's not in --

11            THE COURT: Yeah. No, I want the detail.

12            MS. BECKERMAN: Okay. That's fine.

13            THE COURT: Because then I know what questions to  
14    ask.

15            MS. BECKERMAN: Okay. That's fine.

16            THE COURT: Okay. But I do have some questions on  
17    what detail was submitted.

18            MS. BECKERMAN: Uh-huh. Sure.

19            THE COURT: And I'll direct you to behind my Tab D,  
20    expense detail, page 53.

21            MS. BECKERMAN: Okay.

22            THE COURT: And I'm looking at what are largely your  
23    entries for meals. Now they are on, looks like a number of  
24    successive days. I take it that your firm has a policy, like  
25    many others, that if you work after hours you're entitled to

1 a meal expense and a ride home.

2 MS. BECKERMAN: That's right.

3 THE COURT: Okay.

4 MS. BECKERMAN: That is correct, Your Honor.

5 THE COURT: I'm also looking at the last entry on  
6 page 53.

7 MS. BECKERMAN: Okay.

8 THE COURT: For \$158.34. Catering, Fresco On the Go  
9 Catering.

10 MS. BECKERMAN: Okay.

11 THE COURT: I need to know what meal that was and  
12 how many people were at it to determine whether the charge  
13 was reasonable.

14 MS. BECKERMAN: Right. I understand, Your Honor.  
15 Just bear with me one second.

16 THE COURT: Okay.

17 MS. BECKERMAN: I actually was hoping maybe from the  
18 time descriptions I can see if that was a day we actually had  
19 some kind of meeting taking place. So just bear with me one  
20 second. One second. Okay. Well, we did obviously have a,  
21 our weekly Committee call, but I'm not sure that I'm seeing  
22 anything else. So I'll obviously have to get information on  
23 that, Your Honor.

24 THE COURT: Okay. And on page 57, there are the  
25 transportation charges for you. Again, I guess that's after

1 hours transportation?

2 MS. BECKERMAN: I'm sorry. 57. Yes that's right,  
3 Your Honor.

4 THE COURT: Okay. And page 62. Let me know when  
5 you're there.

6 MS. BECKERMAN: Okay.

7 THE COURT: Travel train there, B. Golden, \$145 from  
8 where to where?

9 MS. BECKERMAN: Oh, from, I'm sure it's from New  
10 York to Delaware or vice versa.

11 THE COURT: Okay.

12 MS. BECKERMAN: I can check which it is, because  
13 that's the only travel we've had at all in this case, Your  
14 Honor.

15 THE COURT: All right.

16 MS. BECKERMAN: Actually, interestingly enough, all  
17 meetings that we've had in this case have been in New York.  
18 So we literally haven't even gone, at least, Akin Gump - - I  
19 mean, Houlihan's gone to Florida a number of times to do  
20 their, do their diligence at the company. But the lawyers  
21 have all just met in New York. So - -

22 THE COURT: Okay.

23 MS. BECKERMAN: - - it's got to be to and from  
24 court.

25 THE COURT: All right. Thank you. So there's only

1 one expense item.

2 MS. BECKERMAN: Yes. That meal.

3 THE COURT: So, you know, as far as I'm concerned  
4 you can just do the math on whatever form of order you have,  
5 and I'll act on it. Or if you'd rather wait and give an  
6 explanation, you know. It can be - -

7 MS. BECKERMAN: No. No, that's fine.

8 THE COURT: What you can do is submit it later.

9 MS. BECKERMAN: Yes, Your Honor.

10 THE COURT: That's okay too.

11 MS. BECKERMAN: That's fine. We're fine to do the  
12 math on our order. We'll just, I'll take that out. And I  
13 will make sure in the future that this type of backup that we  
14 have here, you know, that it, that we have that for the  
15 entire time period thoroughly when we submit applications.

16 THE COURT: Okay. Thank you.

17 MS. BECKERMAN: We do provide it to the US Trustee  
18 every month, and in the format they require. But I  
19 understand it doesn't appear to be necessarily perfectly in  
20 the format that would be easiest for somebody to review here.

21 THE COURT: Yeah. And I will tell you, if it's Mr.  
22 Smith who ends up being the examiner, he has a whole series  
23 of - -

24 MS. BECKERMAN: I've had him as my fee - -

25 THE COURT: Yeah.

1 MS. BECKERMAN: - - examiner before, Your Honor.

2 THE COURT: Okay.

3 MS. BECKERMAN: Same with Mr. Maue. So I'm familiar  
4 with both of them, and - -

5 THE COURT: All right.

6 MS. BECKERMAN: - - probably several others in  
7 Delaware as well.

8 THE COURT: Okay.

9 MS. BECKERMAN: Thank you.

10 THE COURT: Let me turn to Bayard. Okay. All  
11 right. Let's look at the expense detail. I'm looking at  
12 what's behind Tab B on the first monthly fee statement. No  
13 page number. But it's dated September 24, 2008. The entry  
14 is for August 5<sup>th</sup> of '08. Let me know when you're there.

15 MR. SCHLERF: I see August 5<sup>th</sup>, Your Honor.

16 THE COURT: Okay. There's \$116.76 entry for a  
17 working lunch and only one person's name there. Do you know  
18 how many people were there?

19 MR. SCHLERF: Your Honor, I recall this coming up  
20 the first time the US Trustee's Office contacted us when we  
21 filed this application, and we mended our ways after this for  
22 the subsequent applications. But Tammy Wilson is the  
23 secretary that was ordering the lunch, and we described to  
24 Mr. Harrington's office the number of people. And it was, I  
25 can tell you it was a number of people, probably five or

1 more.

2 THE COURT: Okay.

3 MR. SCHLERF: And that was sufficient for their  
4 purposes.

5 THE COURT: Answers my question. Turn if you would  
6 to, within that same category, an entry for August 7<sup>th</sup>. It's  
7 a few pages further on. About two - -

8 MR. SCHLERF: Yes.

9 THE COURT: About two thirds of the way down the  
10 page, there's an entry for \$47.20. Breakfast. But only one  
11 person's name appears there.

12 MR. SCHLERF: Your Honor - - by the way, Your Honor,  
13 just so it's clear, this is now my former firm. I invited  
14 somebody from Bayard to appear, and they did not respond.

15 THE COURT: They decided to let you have all the fun  
16 - -

17 MR. SCHLERF: But I'm probably in the best position  
18 to respond.

19 THE COURT: - - all by yourself.

20 MR. SCHLERF: Yes. Your Honor, James Sanderson is  
21 somebody in accounting. For whatever reason that day he was  
22 the person that ordered the food for people other than  
23 himself. And this was, Your Honor, the first few days of the  
24 case, and we had, I believe maybe we had an army of people at  
25 our offices.

1 THE COURT: Okay. That's good enough. Farther on,  
2 August 13<sup>th</sup>.

3 MR. SCHLERF: Yes.

4 THE COURT: There's a \$184.25 charge for dinner on  
5 August 5<sup>th</sup> at Gallucio's. How many people?

6 MR. SCHLERF: Your Honor, I don't recall off the top  
7 of my head. That would have been the evening after the first  
8 day hearing. I think I know we were working on a lot of  
9 orders. So my guess is, I know that we answered this  
10 question for the US Trustee's Office, again, but I'm guessing  
11 that there were at least half a dozen people. Probably even  
12 more.

13 THE COURT: That satisfies my question. Turn a  
14 couple pages farther on. August 21<sup>st</sup> entry.

15 MR. SCHLERF: Your Honor, that would have been, I  
16 think there was a, trying to be on vacation during this time,  
17 but I think we had a emergency hearing involving some matter,  
18 or a status conference. So we had people in town for that.  
19 And this, again, would have been a meal for multiple  
20 individuals.

21 THE COURT: Okay. I mean, your restaurant choices  
22 are fine. I just need to make sure the charges are  
23 reasonable. All right. Let's move. Again I'm on expense,  
24 on the expense side. It's behind my Tab D. I'm on the  
25 second monthly fee statement. It's an entry for October 13,

1 '08. The top of the page is dated December 2. Let me know  
2 when you're there.

3 MR. SCHLERF: This is the October fee application,  
4 Your Honor?

5 THE COURT: It is, yes, the October fee application.  
6 It's behind my Tab Exhibit D.

7 MR. SCHLERF: Which date in October, Your Honor.

8 THE COURT: The date of the entry is October 13,  
9 '08.

10 MR. SCHLERF: Yes.

11 THE COURT: It's a hotel charge for August 15<sup>th</sup>.

12 MR. SCHLERF: Um-hum.

13 THE COURT: For \$2,236 for co-professionals. How  
14 many people? How many rooms?

15 MR. SCHLERF: Your Honor, first of all, this is a  
16 pet peeve of mine. When the bills get submitted on a delayed  
17 basis. But I remember also answering the US Trustee's Office  
18 question on this. And my guess is, based on my knowledge of  
19 the room rates at the hotel, this is probably a, several  
20 people, client and co-professionals. The exact number I  
21 don't know, but we gave the number to the US Trustee's  
22 Office, and they were comfortable with the amount per person.

23 THE COURT: Mr. Harrington, can you add anything to  
24 that? It may not be, you may not be the person in the office  
25 who had this discussion, and I understand that.

1 MR. SCHLERF: I think it was - -

2 MR. HARRINGTON: Unfortunately, Your Honor, this is  
3 not my case. And I assume that's correct. I know the person  
4 in my office would have - -

5 THE COURT: All right.

6 MR. HARRINGTON: - - checked that information.

7 THE COURT: All right. Well, in the future, you  
8 know what I want.

9 MR. SCHLERF: Yes.

10 THE COURT: Okay. Let's see. Okay. That's it on,  
11 that's it on Bayard. Let's turn to Earnst & Young. Is  
12 anyone present for them? Or on the phone?

13 MR. SCHLERF: I don't believe so, Your Honor. I  
14 know that they, they have counsel, Latham & Watkins, who's  
15 been assisting them in preparing fee applications. But I  
16 have not heard from their counsel.

17 THE COURT: Well, our requirement on the Chambers  
18 procedures, I think is on the website. And that is that  
19 anyone who's got a fee application up needs to appear either  
20 in person or by telephone to answer any questions that I  
21 might have. Even in the absence of objection. So we'll put  
22 the Earnst & Young application over to whatever the next  
23 hearing is.

24 MR. SCHLERF: I believe it's February 4<sup>th</sup>, Your  
25 Honor.

1           THE COURT: Okay. To February 4<sup>th</sup>. My mouse died.  
2 Or it's not hooked up. Okay. To February 4<sup>th</sup>. And if  
3 someone would advise them, I would appreciate it. Let's turn  
4 to FTI. Who I note had a voluntary reduction of about \$287  
5 thousand. Not insignificant. Is anyone present or on the  
6 phone on behalf of FTI?

7           MR. GUMBS: Yes, Your Honor. Sean Gumbs. And I  
8 must apologize to the Court, Your Honor. I do not have the  
9 fee application actually in front of me.

10          THE COURT: All right.

11          MR. GUMBS: Wonderful. Thank you. I do now, Your  
12 Honor.

13          THE COURT: All right. Thank you. Mr. Gumbs, I  
14 note that, and I'm looking at the September time summary.  
15 It's behind my Tab B in the binder.

16          MR. GUMBS: Okay.

17          THE COURT: It's part of the second monthly  
18 application. And I note that your time is, for September is  
19 240 hours. Now in September, if my math is correct. That's  
20 eight hours every day of the month.

21          MR. GUMBS: One moment, Your Honor. I'm catching up  
22 with you. You're in the September?

23          THE COURT: Yes. Behind what's in my binder Exhibit  
24 Tab B in the September application.

25          MR. GUMBS: Okay. Okay. I'm catching up with where

1 you are. But yes, Your Honor, time for - - this is October.  
2 Hold on.

3 THE COURT: You need September.

4 MR. GUMBS: No, I understand. I'm trying to find  
5 September. But I can answer your question generally, Your  
6 Honor. Which is that as financial advisors to the Debtor, we  
7 have a totally dedicated team, Your Honor, that is on site.  
8 The vast majority of the team is on site five days a week. I  
9 am on site a minimum of three to, three days a week. And  
10 while the math may work out at eight, eight hours a day,  
11 there certainly are lots of days where the time incurred is  
12 actually more like 14 or 15. And there are days where the  
13 time incurred is less. But we are on site, as I said, and  
14 involved in, you know, significant undertakings with respect  
15 to the restructuring process. Not the least of which, not  
16 the least of which are bankruptcy administrative matters,  
17 such as the statements and schedules, and monthly operating  
18 reports, and communication with the various constituents.  
19 Whether they be the Unsecured Creditors Committee, or the  
20 pre-petition lenders, or the DIP lenders.

21 THE COURT: It would give me another reason not to  
22 miss practice.

23 MR. GUMBS: What's that, Your Honor?

24 THE COURT: I said, that gives me another reason not  
25 to miss being back in practice. All right. Bear with me.

1 Okay. That was it on FTI. Thank you.

2 MR. GUMBS: Thank you, Your Honor.

3 THE COURT: Okay. Thank you. Houlihan Lokey.

4 Anyone here or on the line?

5 MS. BECKERMAN: Your Honor, I unfortunately don't  
6 believe anyone is present or on the line.

7 THE COURT: Okay. Well, theirs - -

8 MS. BECKERMAN: They have a flat rate, so I assume  
9 the questions are probably mostly expense oriented.

10 THE COURT: Well, they're exclusively expense  
11 oriented, because no detail has been provided.

12 MS. BECKERMAN: Your Honor, that detail was provided  
13 to the US Trustee. I know that that was requested, and it  
14 was reviewed by them. I'm sorry that I don't see it in this  
15 application. I was actually thumbing through it myself. If  
16 Your Honor would be amenable to this, it seems like perhaps  
17 we could just eliminate the expense information out of the  
18 order and they'd have to submit that detail for Your Honor  
19 and put it on for another day so that Your Honor could review  
20 and ask the questions. And I'm sorry, I will make sure  
21 someone's available to answer them. I, I have seen myself,  
22 personally, that detail. So I know it did go to the US  
23 Trustee. It's just not in this application, I'm sorry to  
24 say.

25 THE COURT: Okay. Thank you. Yeah. And that will

1 be fine. I'm content to approve the fee today.

2 MS. BECKERMAN: Thank you. I will, I will, we'll  
3 fix that, and I will get, we'll put it on for the 4<sup>th</sup>, and  
4 I'll make sure someone is around to answer your questions.

5 THE COURT: Okay. Let's turn to Lazard. Okay.  
6 Anyone here on their behalf? Or on the line? I hear no  
7 response. Well again, the question there is just on  
8 expenses. I'm willing to approve the fee portion, but not  
9 the expense portion. Which can be submitted - -

10 MS. BECKERMAN: Right. I think it would just make  
11 sense to adjourn the expense portion of theirs, just like  
12 Houlihan's, for the 4<sup>th</sup>, and then just get the fee part  
13 approved.

14 MR. AVERCH: Your Honor, if that's acceptable, we'll  
15 adjourn the expense portion to the 4<sup>th</sup>?

16 THE COURT: Yeah. That's fine. But again, if it's,  
17 if the detail is submitted ahead of time, and I have no  
18 questions, I'm content just to sign off on an order approving  
19 the expenses.

20 MS. BECKERMAN: Okay. We will do that. We'll  
21 submit the information and, along with an order on expenses,  
22 and then if Your Honor's is content, that's fine. And if  
23 not, we'll know it's on for the 4<sup>th</sup>.

24 THE COURT: Okay. Okay. Let's turn to Citrex &  
25 Company (phonetic). Anyone here or on the line on their

1    behalf? I do have just expense issues with them. And we'll  
2    put that over for the next hearing as well. I'm willing to  
3    sign off on the fee portion. But there's no detail for hotel  
4    expenses and for some meals. There's purchases that were  
5    made at CVS and WalMart. Not margin number, but enough to  
6    raise my curiosity. And I need a confirmation that all the  
7    airfare there charged is coach. But we'll put that over, and  
8    if they want to submit explanations for those in the interim,  
9    I'll act on them, unless I have questions, without further  
10   hearing. All right. Let's turn to White & Case. Which has  
11   its very own whole binder.

12           MR. AVERCH: Your Honor, before Your Honor goes  
13   through, we have made a number of write downs that, with the  
14   request, at the request of the US Trustee, and with  
15   discussions with the, requests for the US Trustee. Meal  
16   charges have been reduced by, it appears about \$54 hundred.  
17   Going forward, we have advised the US Trustee and discussed  
18   with the US Trustee that for dinners, \$50 a person, request  
19   for reimbursement will not exceed \$50 a person for dinner.  
20   \$25 a person for lunch, and \$15 a person for breakfast.  
21   We've also written off \$3,850 for conflicts checks. We've  
22   also written off an additional \$52 hundred for attorneys that  
23   were here at the first day hearings that may not have  
24   contributed as fulsome as the US Trustee believed. And we  
25   have another \$595 write off for additional meal charges. For

1 a total of \$14,996.46. Those write offs and reductions will  
2 be made in connection with any order we submit to the Court.

3 THE COURT: Okay. That eliminates a lot of my  
4 questions. I just have two others. One is that you confirm  
5 that all of the airfare is coach airfare.

6 MR. AVERCH: Confirmed, Your Honor.

7 THE COURT: Okay. And appearing in the expense  
8 category in a couple places is Concord. What is that?

9 MR. AVERCH: Concord is a car service, and it costs  
10 the same as a taxi cab.

11 THE COURT: Okay. Just hadn't run across that  
12 before, or if I had, I hadn't noticed it. That answers my  
13 questions with respect to White & Case. But I do want, with  
14 respect to the expenses, as you've now heard, I want details  
15 on meals and hotels. What was the name of the hotel, how  
16 many nights, how many people. That kind of thing. That was  
17 not included in the expense. But given the write down.

18 MR. AVERCH: Your Honor, just for the sake of  
19 clarity. All of our code, all of our airfares are coach.  
20 Because we tend to fly a lot, and we all seem to have  
21 executive platinum status, we pay a, what's called a Y Up  
22 coach fair. So on the ticket, it may say you ride in a first  
23 class seat, but you're paying a refundable coach fare. Just  
24 so the record is clear when we provide that detail to the  
25 Court. That the actual fares are not first class fares.

1           THE COURT: Understood. Thank you. Okay. That  
2 satisfies my questions on the applications that are before me  
3 today. Is there an omnibus order, or are there a couple of  
4 orders? What have you got, and have you marked them up  
5 accordingly?

6           MR. AVERCH: Your Honor, to save time, we will agree  
7 to - -

8           MR. SCHLERF: Your Honor, even if we attempted to  
9 submit an omnibus order, we'd have to go back and, I think,  
10 make some changes. I think the troops need to figure out  
11 whether we need an omnibus order, or maybe it would be more  
12 efficient to have individual orders.

13          THE COURT: Okay. Well, I'll be out of the office  
14 on Friday, but will otherwise be around. If you get me  
15 something before Friday, I'll act on it promptly.

16          (The remainder of the page is intentionally left blank.)

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1 MR. SCHLERF: We appreciate that, Your Honor.

2 THE COURT: Okay.

3 MR. SCHLERF: Thank you.

4 THE COURT: Anything further for today? Nothing  
5 further? All right. That concludes this hearing. Court is  
6 adjourned.

7 UNIDENTIFIED SPEAKER: Thank you, Your Honor.

8 (Whereupon at 12:31 p.m. the hearing in this matter was  
9 concluded for this date.)

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18 I, Jennifer Ryan Enslin, approved transcriber for  
19 the United States Courts, certify that the foregoing is a  
20 correct transcript from the electronic sound recording of the  
21 proceedings in the above entitled matter.

22

23 /s/Jennifer Ryan Enslin  
24 Jennifer Ryan Enslin  
25 43 Bay Boulevard  
Newark, DE 19702  
(302) 836-1905

January 27, 2009

**UNITED STATES BANKRUPTCY COURT**  
**District of Delaware**

**In Re:**

WCI Communities, Inc.  
24301 Walden Center Drive  
Bonita Springs, FL 34134

**EIN:** 59-2857021

Florida Design Communities, Inc.  
Watermark Communities, Inc.

**Chapter:** 11

*Case No.:* 08-11643-KJC

***NOTICE OF FILING OF TRANSCRIPT AND OF DEADLINES RELATED TO RESTRICTION AND REDACTION***

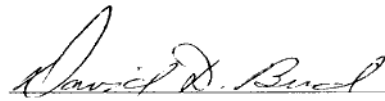
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The parties have 7 days to file with the court a *Notice of Intent to Request Redaction* of this transcript. The deadline for filing a *request for redaction* is 2/18/09 .

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To review the transcript for redaction purposes, you may purchase a copy from the transcriber (name, address/contact information) or you may view the document at the clerk's office public terminal.



Clerk of Court

Date: 1/28/09

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