

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

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BEFORE:

THE HONORABLE KEVIN J. CAREY  
UNITED STATES BANKRUPTCY COURT JUDGE

- - -

IN RE: : NO. 08-11643  
: :  
WCI COMMUNITIES, INC., et al. :

- - -

Wilmington, Delaware  
September 10, 2008  
2:07 o'clock p.m.

- - -

APPEARANCES:

JEFFREY M. SCHLERF, ESQUIRE  
Bayard, PA  
222 Delaware Avenue, Suite 900  
Wilmington, DE 19801  
-- for the Debtors

THOMAS E. LAURIA, ESQUIRE  
MATTHEW C. BROWN, ESQUIRE  
White & Case, LLP  
Wachovia Financial Center  
200 South Biscayne Blvd., 49th Floor  
Miami, FL 33131  
-- for the Debtors

DANIEL H. GOLDEN, ESQUIRE  
PHILIP ABELSON, ESQUIRE  
Akin Gump Strauss Hauer & Feld, LLP  
590 Madison Avenue  
New York, NY 10022-2524  
-- for the Creditors Committee

LAURA DAVIS JONES, ESQUIRE  
Pachulski Stang Ziehl Jones  
919 North Market, Street, 17th Floor  
Wilmington, DE 19899-8705  
-- for the Creditors Committee

## APPEARANCES: (Continued)

THOMAS T. PENNINGTON, ESQUIRE  
150 4th Avenue North  
Nashville, TN 37219  
-- for Safeco

BRADFORD J. SANDLER, ESQUIRE  
Benesch Friedlander Coplan & Aronoff,  
LLP  
222 Delaware Avenue, Suite 801  
Wilmington, DE 19801-1611  
-- for Safeco

TOBEY M. DALUZ, ESQUIRE  
Ballard Spahr Andrews & Ingersoll,  
LLP  
919 North Market Street  
Wilmington, DE 19801-3034  
-- for ACE-Westchester Fire

DANA MONZO, ESQUIRE  
White and Williams, LLP  
824 North Market Street, Suite 902  
Wilmington, DE 19899-0709  
-- for Bank of America

ADAM G. LANDIS, ESQUIRE  
Landis Rath & Cobb, LLP  
919 Market Street, Suite 600  
P.O. Box 2087  
Wilmington, DE 19899  
-- for Golden Hills Golf and  
Castro Realty

L. JASON CORNELL, ESQUIRE  
Rox Rothschild, LLP  
Citizens Bank Center, Suite 1300  
919 N. Market Street  
Wilmington, DE 19801  
-- Key Bank Agent for Lendor

JANE LEAMY, ESQUIRE  
Office of The United States Trustee  
J. Caleb Boggs Federal Building  
844 King Street, Suite 2313  
Lock Box 35  
Wilmington, DE 19801

## TELEPHONE APPEARANCES:

MICHAEL RIELA, ESQUIRE  
Latham & Watkins, LLP  
885 Third Avenue  
New York, NY 10022-4834  
-- for Interested Party,  
Ernst & Young

ROBERT D. ALBERGOTTI, ESQUIRE  
Haynes Boone  
901 Main Street, Suite 3100  
Dallas, TX 75202  
-- for Bank of America

CLIFFORD A. WOLFF, ESQUIRE  
Clifford A. Wolff, PA  
P.O. Box 11421  
Fort Lauderdale, FL 33339  
-- for Interested Party,  
Lindstromair

- - -

Audio Operator: Al Lugano

Transcribed by: Jo-Anne L. Hutt,  
Laws Transcription Service

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1           (The following occurred in open court at 2:07  
2 o'clock p.m.):

3           THE COURT: Good afternoon, everyone.

4           MR. SCHLERF: Good afternoon, your Honor. Jeffrey  
5 Schlerf for the Debtors.

6           Your Honor, we have seven matters on the agenda. I  
7 was remarking to somebody earlier, I don't remember ever  
8 having an agenda that's representing the Debtor, and not  
9 having any matters continued. So we have one order that's  
10 already been entered, your Honor, and six matters going  
11 forward. All but one are resolved. And we have orders that  
12 have (indiscernible), so what we thought we would do, your  
13 Honor, is to start with No. 3. No. 2 is the contested one.

14           THE COURT: All right.

15           MR. SCHLERF: And I'll turn the podium over to Mr.  
16 Lauria.

17           THE COURT: Okay. Thank you.

18           MR. LAURIA: Good afternoon, your Honor. Tom Lauria  
19 with White & Case. We represent WCI Communities and its  
20 affiliated Debtors.

21           Your Honor, if I may approach, I have clean and  
22 black-lined copies of each of the orders that we would like  
23 the Court to consider for entry at today's hearings.

24           THE COURT: You may.

25           (Pause.)

1 MR. LAURIA: Thanks.

2 THE COURT: Thank you.

3 MR. LAURIA: Your Honor, if I may start with Item  
4 No. 3 on the agenda, as foretold by Mr. Schlerf, this is our  
5 application to retain FTI Consulting, Inc., as a bankruptcy  
6 and restructuring advisors nunc pro tunc to the petition  
7 date. We received input from both the United States Trustee  
8 and the Creditors Committee with respect to this application.  
9 In particular, the U.S. Trustee asked that Section 4 of the  
10 engagement letter be modified such that FTI will bill the  
11 Debtors only for direct expenses and not for allocated  
12 expenses, and that limitations on liability contained in the  
13 engagement letter be eliminated.

14 In addition, the Creditors Committee sought to have  
15 Section 4 of the engagement letter modified such that any  
16 performance fee sought by FTI must first be capped, at \$1.5  
17 million, two, be approved by WCI's Board, and three,  
18 be subject to court approval under a reasonableness standard.

19 The Debtors in FTI have agreed to make the requested  
20 changes, and it is my understanding that both the Creditors  
21 Committee and the U.S. Trustee have reviewed and approved the  
22 form of order that we have submitted to the Court this  
23 afternoon for entry.

24 It is my understanding there are no other objections  
25 filed or received, and so we'd ask that the revised order be

1 entered by the Court.

2 THE COURT: All right. Let me ask if anyone else  
3 cares to be heard?

4 MR. GOLDEN: Thank you. Daniel Golden, Akin Gump,  
5 counsel for the Official Creditors Committee.

6 I just want to confirm -- excuse me -- Mr. Laurie's  
7 statements. We did review the original form of order. We  
8 worked with FTI and the Debtors. They have satisfied our  
9 requirements and we have no objections to the entry of the  
10 order.

11 THE COURT: All right. Thank you.

12 (Pause.)

13 That order has been signed.

14 MR. LAURIA: Thank you, your Honor.

15 The next item is actually the emergency motion to  
16 compel rejection of executory contracts with Golden Hills  
17 Golf, LLC, and Castro Realty Holding, LLC, pursuant to  
18 Bankruptcy Code Section 365, and although this is not our  
19 motion, in that we have reached agreement on the form of an  
20 order, I guess I can go ahead and at least start presentation  
21 of the matter.

22 The Court will recall that, as a consequence of  
23 concerns, that the Debtor was going to discontinue  
24 performance of its obligations under a management agreement  
25 relating to a country club and golf course. The

1 counter-parties sought emergency relief from the Court. We  
2 had a pretrial conference where we agreed that we would  
3 continue performing under the agreement pending a  
4 determination to assume or reject, and hope that we could  
5 reach an agreement regarding how we would resolve our issues.

6 We have done so, and the agreement is embodied in  
7 the revised form of order that has been submitted. Pursuant  
8 to the parties' negotiations, the Debtors, and they exercised  
9 their business judgment and determined that the agreements  
10 are burdensome and should be rejected effective today. We  
11 have agreed that we would cooperate with the Golden  
12 Hills-Castro Group in connection with the transition of the  
13 club's facilities to new management, and we have agreed that  
14 any claims for damages resulting from the rejection of the  
15 agreements will be governed by Bankruptcy Code Sections  
16 365(g) and 502(g).

17 We have also agreed that all of the parties'  
18 respective claims or cause of actions, any defenses thereto,  
19 shall be preserved, and that any claims for damages arising  
20 from the rejection of the agreement shall be filed on or  
21 before the general claim. The bar date is established by the  
22 Court, or shall be forever barred, and that the Court will  
23 retain jurisdiction over any remaining issues in dispute.

24 One thing I wanted to clarify on the record, there  
25 are a number of items that have been incurred during the

1 post-petition pre-rejection period, that at this point have  
2 not been agreed to or resolved by the parties and paid.  
3 It is our intention to recognize those obligations as  
4 administrative expenses, as we believe they are, subject to  
5 whatever defenses or rights the Debtors may have, and to pay  
6 those subject to, if there are any disputes, of course, the  
7 Golden Hills-Castro folks retain their right to seek  
8 allowance of an administrative expense, and to seek -- to  
9 compel payment, and the estate retains its rights to dispute  
10 any such claims.

11 THE COURT: All right. Does anyone else care to be  
12 heard?

13 MR. LANDIS: Thank you, your Honor. For the record,  
14 Adam Landis from Landis Rath & Cobb on behalf of Golden Hills  
15 Golf, LLC and Castro Realty Holdings, LLC.

16 Mr. Lauria has put on the record our agreement with  
17 respect to the entry of an order rejecting these executory  
18 contracts. This agreement is essentially a partial agreement  
19 dealing with the issues that were raised by us in our  
20 emergency motion to compel rejection.

21 We had been hoping, since I got involved on August  
22 11th, based on discussions that we were having, that we would  
23 wrap up everything in a global resolution. There obviously,  
24 as you can tell from the papers, your Honor, claims back and  
25 forth among the parties.

1           I think this partial resolution makes a lot of sense  
2 for today. There's no need for us to go forward to seek that  
3 the Debtors reject the contract, because they've agreed to  
4 it. They've agreed that the contracts are executory.

5           We will have damage claims to present to the Court  
6 in connection with the rejection. We agree that those claims  
7 are subject to 365(g) and 502(g).

8           We believe also, your Honor, that the Debtors may  
9 raise claims against Golden Hills, may raise claims against  
10 Castro, and we believe that we'll have some discussions about  
11 that. They may get resolved. They may get litigated. We're  
12 not sure, but I can tell you that the process by which we got  
13 to court today to reach agreement on the rejection of these  
14 contracts has been one that should not have required the  
15 filing of a motion.

16           From the outset of this case, and our involvement in  
17 it, we believe that we could agree to the relief that your  
18 Honor is going to sign the order recognizing, and go our  
19 separate ways. It's unfortunate that it's come to this  
20 point, and I do hope that we'll have productive conversations  
21 going forward.

22           Mr. Lauria mentioned, and I appreciate it, the  
23 Debtors' obligation to pay certain pre-rejection,  
24 post-petition expenses that were incurred while WCI still  
25 maintained the property, the golf course property.

1           We have been working on a protocol, so we can figure  
2 out what those are. Hopefully, there won' be too many  
3 disputes and hopefully they'll get paid.

4           However, your Honor, I would request that to the  
5 extent that there are disputes, we could at least set down  
6 for a status conference at the next omnibus hearing, without  
7 having to go to the expense of filing a motion for a -- to  
8 pay administrative claims. We can come back to the Court and  
9 at least, if there's nothing to report, we'll easily take it  
10 off, but if there is something to report, I think we can at  
11 least set down at that time for a further hearing what  
12 disputes there may be with respect to these post-petition  
13 pre-rejection amounts.

14           And I ask that, your Honor, knowing full well that  
15 while we could file a motion in advance, I think that the  
16 parties need, really, all of us on both side to keep our feet  
17 to the fire to get these matters resolved in a consensual  
18 basis, and it will be efficient to do so that way.

19           I also make that request noting that, you know, I  
20 sat here at the last omnibus hearing and I heard and listened  
21 quite intently when the Debtors explained that their  
22 potential need for debtor in possession financing, and their  
23 husbanding of cash. And as I recall the Debtors'  
24 presentation in that regard, what we heard was that they have  
25 maybe \$67 million that they're -- that they're way ahead of

1 schedule, and the reasons for that are twofold.

2 One reason is they've done a very good job of  
3 closing sales, creating cash. The other reason is they've  
4 done a very -- they've done a different job of being -- and I  
5 think the quote was -- of being stingy with the payment of  
6 cash going out the door.

7 Part of that, call it stinginess, part of that  
8 careful watching of expenses that go out the door impacts  
9 directly to my clients, and how that impacts directly to my  
10 clients is by the nonpayment potentially of several  
11 administrative claims that were incurred post-petition and  
12 pre-rejection.

13 So I'm very hopeful that we'll be able to work out  
14 these issues, but I would request that the Court set down for  
15 status conference, just as a trailing matter, matters in  
16 connection with this motion, notwithstanding the fact that,  
17 you know, I expect that the request for immediate rejection  
18 is resolved by the entry of the order today.

19 THE COURT: Well, the emergency motion called for an  
20 immediate rejection of the agreements, and directing the  
21 Debtors to assist in the orderly transition. Both of those  
22 things are accomplished, it strikes me, in the agreed order.  
23 There was no further relief requested in the emergency  
24 motion.

25 So if you want to have a status hearing on this

1 matter at an omnibus, that's fine, but if you want additional  
2 or further relief, you'll need to file a motion.

3 MR. LANDIS: Your Honor, I understand that there  
4 would be no basis for relief absent the filing of a motion,  
5 but when we filed -- and I don't know if your Honor had the  
6 opportunity to go through the papers -- but the Debtors filed  
7 a response to our motion detailing several claims they may  
8 have against us, and we filed a reply to that response. And  
9 in the reply to that response, one of the issues we raised  
10 was the Debtors' commitment at the August 20th  
11 teleconference, status conference on the emergency motion,  
12 the Debtors' commitment, to operate, you know, pursuant to  
13 the terms of the management agreement, pending its rejection  
14 or potentially something, I suppose.

15 Mr. Lauria today has offered, at my request, and,  
16 you know, and I appreciate it, to make sure that expenses  
17 would be recognized I think is the word he used. And while  
18 we're happy to do that, I don't want to file a motion in  
19 blank to get it on to the next hearing, to say there may be  
20 expenses that need to be paid. I think that if we work  
21 together, if the order works as it's supposed to, this should  
22 be a non-issue.

23 So if it's not, however, I guess we could file  
24 another emergency motion to try to get it on for the next  
25 hearing.

1 THE COURT: Well, it better be an emergency.

2 MR. LANDIS: Well, exactly, your Honor, and it's  
3 difficult to suggest that, you know, the non-payment of  
4 agreed amounts is an emergency. However --

5 THE COURT: I have that same thought, actually.

6 MR. LANDIS: Yes, I agree, your Honor, but we are  
7 here because of initially the Debtors -- there is no  
8 equivocation about it -- the Debtors having walked away from  
9 its obligations under the management agreement.

10 THE COURT: You know, Mr. Landis, I have to confess,  
11 I've never heard a party argue so long after they actually  
12 got the relief that they asked for.

13 (Laughter.)

14 MR. LANDIS: Your Honor --

15 THE COURT: Only a lawyer would do something like  
16 that I think.

17 MR. LANDIS: Your Honor, perhaps I have gone on too  
18 long. We will work with the Debtors, hopefully to resolve  
19 these issues without the need for a further hearing.

20 THE COURT: Okay.

21 MR. LANDIS: Thank you, your Honor.

22 THE COURT: Anyone else care to be heard in  
23 connection with this resolution?

24 (No response.)

25 THE COURT: All right. The agreed has been signed.

1 MR. LAURIA: Thank you, your Honor. I was wondering  
2 if it was an agreed order there for a minute.

3 The next item is Item 5 on the Court's agenda, which  
4 is the Debtors' application to retain Ernst & Young as  
5 auditors and tax advisors for the Debtors nunc pro tunc to  
6 the petition date.

7 We did receive some comments from the Office of the  
8 United States Trustee. In particular, the United States  
9 Trustee requested that Section 6B of the standard terms and  
10 conditions for tax services regarding certain limitations on  
11 liability be deleted in its entirety. This is in the DNY  
12 retention agreement. And the Debtors and Ernst & Young have  
13 agreed to resolve the issue through the deletion of that  
14 provision, and the order has been revised to reflect that  
15 deletion.

16 No other objections or responses were received, so  
17 we would ask that the order, as modified, be entered by the  
18 Court.

19 THE COURT: Okay. I have my usual issue, and that  
20 is, I was unable to find in the affidavit, in support of the  
21 application, a statement by the applicant that it was  
22 disinterested. In the order proposed, suggested I should  
23 find that, but I'd like the applicants to actually say it.

24 So unless I missed it, and somebody's free to tell  
25 me that I did, I'd like a supplemental affidavit just stating

1 that plainly, and once I receive that, I'll be pleased to act  
2 on the order.

3 MR. RIELA: Your Honor, this is Michael Riela from  
4 Latham & Watkins on behalf of Ernst & Young. I would be  
5 happy to have Ian Wyatt file a supplemental affidavit. I'm  
6 looking through it right now. I believe you're right.  
7 There's not a clear statement that's just that, but certainly  
8 we can do so.

9 THE COURT: All right. Thank you.

10 (Pause.)

11 MR. LAURIA: Thank you, your Honor.

12 The next matter is Item 6 on the agenda. This is  
13 the Debtors' first omnibus motion to reject certain unexpired  
14 leases and executory contracts nunc pro tunc to August 22,  
15 which is the date that we filed the motion.

16 By this motion, the Debtors have sought to reject 20  
17 leases for office space that were either under-utilized or  
18 vacant, and as reflected in the schedule attached to the  
19 motion, involve an ongoing expense of approximately \$200,000  
20 per month, not counting certain additional charges and  
21 expenses that arise under some of the leases.

22 We received one written objection that was filed by  
23 BIT Investment Forty-Four, LLC. BIT is the successor to  
24 Teachers Insurance and Annuity Association of America, which  
25 is listed as Lease No. 13 on Exhibit 1 to Exhibit A of the

1 motion.

2           And Teachers or BIT's concern was, I believe,  
3 three-fold, your Honor. Number one, it was not clear from  
4 the motion whether the Debtors sublet the subject premises,  
5 and if they did, BIT wanted to be on the record that we had  
6 done so wrongfully, and if they did, they wanted the Debtors  
7 to be obligated to reject the sublease. We confirmed that  
8 there had been no subletting of the premises, and on the  
9 basis of that, the objection has been withdrawn by  
10 stipulation filed by the Court on September 5th.

11           In addition, we received two informal responses.  
12 One from an entity named GVB Properties, which is the  
13 successor to Colony Corporate Centre, which is listed at Item  
14 4 on Exhibit 1 to Exhibit A of the motion, and we received a  
15 similar response from an entity named Case, LLC, which is  
16 listed at No. 3 on Exhibit 1 to Exhibit A.

17           Both requested that the lease be terminated, their  
18 respective lease be terminated as of the petition date,  
19 rather than August 22, and that the parties exchange mutual  
20 releases. We thought that this was advantageous to the  
21 estate in that we avoided the incurrence of any  
22 administrative expense with respect to these leases, and made  
23 a clean cut with respect to these properties, avoiding  
24 rejection damage claims.

25           So with changes incorporated into the order to

1 reflect those two parties' request, the motion is otherwise  
2 unopposed. I understand, again, that it has been vetted with  
3 the Creditors Committee, and the Creditors Committee has no  
4 objection to the entry of the order as submitted.

5 THE COURT: All right. Let me ask, for the record,  
6 if anyone else cares to be heard in connection with this  
7 motion?

8 (No response.)

9 THE COURT: I hear no response.

10 (Pause.)

11 The order has been signed.

12 MR. LAURIA: Thank you, your Honor.

13 The final matter on the agenda is at Item No. 7, and  
14 this is the Debtors' second omnibus motion to reject certain  
15 unexpired leases and executory contracts, which was filed on  
16 August 22.

17 And the second motion is really a companion motion  
18 to the first. In it we seek authority to reject six  
19 subleases that the Debtors have properly entered into,  
20 associated with the leases that are being rejected under the  
21 first omnibus motion.

22 In each case, the rent that the Debtors have been  
23 receiving is less, under the sublease is less than the  
24 Debtors' rental obligation under its own lease. So what we  
25 have sought, by way of this motion, is a mechanic pursuant to

1 which the lessors can have a 30-day period under which they  
2 can notify us that they would like us to assume and assign to  
3 them the underlying sublease, so that the tenant can stay in  
4 place, and the landlord can continue directly receiving the  
5 rental stream.

6 If we do not get notice within that 30-day period,  
7 then the subleases will be deemed rejected, subject to  
8 whatever possessory rights the tenants have, and otherwise we  
9 would be authorized by this order to go forward with the  
10 assumption and assignment to our now former landlord.

11 We received no objections to this motion. We did,  
12 however, receive two informal comments. One from an entity  
13 named Casper Medical Leasing, LLC. This is identified at No.  
14 1 on Exhibit 1 to Exhibit A to the second motion, and an  
15 entity named Crescent Resources, LLC, which is identified at  
16 No. 3 on the same exhibit.

17 Both have requested that they would like their  
18 subleases to be treated as terminated as of the petition  
19 date, and have offered to exchange mutual releases with the  
20 Debtors, which we have agreed to, and have modified the order  
21 to reflect those changes.

22 As with the first omnibus, it is my understanding  
23 that the Creditors Committee has reviewed and has no  
24 objection to the entry of the order as modified.

25 THE COURT: All right. Let me ask, for the record,

1 if anyone else would like to be heard in connection with this  
2 motion?

3 (No response.)

4 THE COURT: I hear no response.

5 (Pause.)

6 That order has been signed.

7 MR. LAURIA: Thank you, your Honor.

8 Your Honor, that leaves Item No. 2 on the agenda,  
9 which is a contested matter. This is with respect to the  
10 Debtors' motion for entry of two broad forms of relief with  
11 respect to its insurance and surety bond programs. There has  
12 been no objection to the first part, which authorizes us to  
13 maintain our existing programs, to maintain our premium  
14 financing arrangements, and to pay insurance and surety bond  
15 premiums in the ordinary course on a going forward basis.

16 As to the second component, which asks the Court to  
17 issue an order that the automatic stay prevents termination  
18 or unilateral modification of our insurance policies or bonds  
19 post-petition, we, as the Court will recall, had one  
20 objecting party at the first day hearing, and as a  
21 consequence, the Court issued an interim order which we, by  
22 agreement extended, to be effective through today, giving  
23 affected parties an opportunity to object and for the Debtors  
24 to respond.

25 As a consequence, we have received two objections.

1 One was filed by Safeco, and a second objection was filed by  
2 Westchester Fire Insurance Company and ACE, all of whom have  
3 provided bonding to the company, so that it may satisfy  
4 various of its obligations associated with its projects, and  
5 also with respect to its ability to utilize deposits that are  
6 provided under real estate sale contracts, so that the bond,  
7 in essence, serves as a sub surrogate for returning the cash  
8 that was posted by a purchaser.

9 Both of these sureties have made arguments that the  
10 automatic stay ought not to prevent the termination  
11 post-petition of the bonds that they have issued. And, your  
12 Honor, we believe that both sureties have built their  
13 arguments on fundamental misperceptions of both the relief  
14 sought and the applicable law.

15 To be clear, and I do think our papers are clear on  
16 this, we are not seeking, by way of this order, any sort of  
17 relief that would compel the issuance of new bonds, or  
18 provide the Debtor with the unilateral right to modify bonds,  
19 or to prevent bonds from expiring on their terms.

20 Rather, your Honor, we're seeking to insure the  
21 maintenance or the status quo exactly as contemplated by the  
22 Bankruptcy Code, broadly speaking, and under Section 362 in  
23 particular.

24 With respect to the applicable law, I think we could  
25 have a very engaging discussion regarding the application,

1 perhaps, of Section 365(c) and (e), and the applicability of  
2 363, which to the extent the Court has questions on those --  
3 the potential application of those provisions, I'm happy to  
4 address, but I think that we can really kind of skip forward  
5 to the meat, which is the fact that we have found no case,  
6 and the objectors have cited the Court to no case standing  
7 for the proposition that a surety bond paid for by a Debtor,  
8 and issued at the Debtor's request, may be terminated  
9 post-petition without first obtaining relief from the stay.

10           And conversely, your Honor, we have cited the Court  
11 to every published case that we have been able to find.  
12 There were four of them that has held exactly the opposite  
13 way on this issue. And at least two of those decisions,  
14 specifically addressed the situation where 365(c) and (e)  
15 apply, and find, nevertheless, that the automatic stay would  
16 apply, and that a motion for relief should be filed before a  
17 unilateral termination can be affected.

18           Now, I recognize that there is case law in the Third  
19 Circuit on the issue of the application to stay to a contract  
20 that cannot be assumed or signed. I don't think we have to  
21 get to that issue today. I think that what we are asking the  
22 Court to do is to retain control over a matter that is quite  
23 important to the estate, and quite frankly, if unilaterally  
24 acted on by the sureties, could cause great harm to the  
25 estate, and quite frankly, result in an after-the-fact

1 litigation mess.

2 Westchester-ACE, in particular, attempted to make a  
3 stand on the procedural argument that there is no case or  
4 controversy for the Court to decide. I think this is  
5 obviously incorrect, just based on a quick perusal of the  
6 rest of their objection. We've taken the position that the  
7 automatic stay prevents termination and they've taken the  
8 position that it doesn't. It's hard to imagine a more direct  
9 controversy than that.

10 But even looking through the substance or the --  
11 what -- looking their words, I think what -- it's fair to say  
12 is that they would have the Court entreat us into a pennywise  
13 pound foolish approach that would require us to seek redress  
14 after the fact, for actions that they have clearly argued  
15 they are otherwise entitled to take. This would be wasteful  
16 and unnecessary, and we're not even clear, your Honor, that  
17 the Debtors' estates would be able to be made whole if we  
18 were to go down that path.

19 As the Court is well aware, prior to the bankruptcy,  
20 Safeco terminated seven bonds. We have commenced adversary  
21 proceedings with respect to those matters. We are not  
22 anywhere near achieving a resolution there, and in fact, you  
23 know, we confront the scenario where we have bonding  
24 obligations that are required under applicable local law that  
25 we now have to come up with a way to satisfy that most

1 likely, if we can satisfy, is going to require cash  
2 collateralization of post-petition bonds, obviously at great  
3 burden and expense to the estate. And if we cannot obtain  
4 the required bonding, the value of these properties  
5 diminishes substantially, and certainly to the detriment of  
6 the estate.

7           So we're asking that the Court basically issue an  
8 order that allows it to clearly retain control of this issue  
9 on the front end. There is no real prejudice of any kind to  
10 the sureties. They simply have to file their motion for  
11 relief from stay, and if they're correct that they're  
12 entitled to relief from stay, they will then be permitted to  
13 terminate the sureties.

14           Subject to one point, I think that's important,  
15 we've attached a form of the Safeco bond as Exhibit A to our  
16 response. And the thing that's noteworthy, is there is no  
17 termination right to be found in the bond, and so we still  
18 remain puzzled at the basis upon which a surety can terminate  
19 a bond that has no termination right, regardless of the  
20 application of the automatic stay.

21           I think, in fact, it's noteworthy that when you look  
22 at the indemnity agreement, which is attached as Exhibit B,  
23 the consequence of the Debtors' default or breach, it's  
24 insanity or insolvency. Some would argue there's no  
25 difference, I guess, between the two. Is that they have to

1 perform under the bond, and they can take any action they  
2 need to to honor the bond obligations.

3           So rather than a situation where you would have a  
4 breach by the Debtor relieving the surety of its bond  
5 obligation, in fact, the breach by the Debtor triggers the  
6 surety's bond obligation.

7           And I guess I will add, more or less by way of  
8 footnote, I think it raises a matter that can be litigated  
9 another day, if necessary, the whole question of whether or  
10 not a bond issued, as was done here, is even an executory  
11 contract for purposes of Section 365. I think there is a  
12 credible argument, in fact, I think it's a better view, that  
13 the estate's performance is complete.

14           We've paid our premium. We've delivered our  
15 indemnity. There is no further performance required by the  
16 Debtor to retain the bond.

17           So, in effect, it is no longer an executory  
18 contract. Under existing Third Circuit law, I think Sharon  
19 Steel is probably the best example. An executory contract  
20 has to be executory both ways. And here there is no  
21 remaining performance required by the Debtor to retain the  
22 bond.

23           So treating these bonds as executory contracts would  
24 have a bad result whichever way you slice it. If we were  
25 forced to assume, all we would do is convert our pre-petition

1 indemnity obligation into an administrative expense.

2 Conversely, if we were forced to reject, we would be forced  
3 to forfeit, in effect, a right that we have already fully  
4 paid for pre-petition.

5           So it seems to make no sense to go down the path of  
6 treating these bonds as executory contracts, and then going  
7 into the labor of determining, Do 365(c) and (e) apply, when  
8 the far more sensible result would seem to be simply to put  
9 the sureties to the task of coming back to Court, if they  
10 believe that they have a cause for lifting the stay to  
11 exercise a termination right, that as far as I can tell,  
12 doesn't even exist.

13           So, your Honor, we believe that the interim order  
14 should be converted into a final order, and I'm happy to  
15 address any particular questions or concerns that the Court  
16 may have.

17           THE COURT: I have no questions at this point.  
18 Thank you.

19           MR. PENNINGTON: Good afternoon, your Honor. Tom  
20 Pennington of the Tennessee Bar on behalf of Safeco.

21           It's kind of hard to understand how we could be this  
22 far apart conceptually, but I'm going to try to bring it back  
23 together, and I'm going to try to take a few things off the  
24 table, so that we won't have any misunderstanding here.

25           Number one, with respect to the pre-petition

1 cancellation bond, we acknowledge that those actions, if  
2 taken post-petition without permission of the Court, would  
3 have been a stay violation. And so if we were ever to seek  
4 to do something like that, we would come before you and ask.

5 Now, that said, there are a number of other things  
6 going on here, because we can see that to that set of facts,  
7 362 applies, and if that's all they're asking for, they don't  
8 need an order. They've got their remedy. It's codified in  
9 362.

10 The question is, I suppose, What else do they want?  
11 Why do they have to have a special order? And what they want  
12 to do is they want to say, Well, a surety bond is an  
13 insurance contract. It's not an insurance policy.

14 And, by the way, this is the first time I've heard  
15 unilateral. It's not in the motion. It's not in the order.  
16 And it's not in the reply. Now, if you want to talk about  
17 modifying it, I might have something to talk to you about.

18 But the elemental difference here is that while you  
19 buy an insurance policy for a term, and it contains in its  
20 language a means by which for the insurance carrier to  
21 terminate, but a surety bond is not an insurance policy, it  
22 is a credit enhancement that may be withdrawn at will.  
23 Occasionally you will see language in bonds that say, This  
24 bond may not be cancelled except on 30, 60, 90 days notice,  
25 and an opportunity to replace whatever.

1           These are limitations on the right to cancel. This  
2 is not the baseline right to cancel. The law of surety goes  
3 all the way back to Ancient Rome. Modern insurance policies  
4 weren't invented until the 1700's when Ben Franklin came up  
5 with that great idea, and they're entirely different  
6 creatures.

7           A surety bond is based upon the assurance of  
8 performance by the surety of the voluntary undertaking of an  
9 obligation by a bond principal. Any time that bond principal  
10 advances a desire not to perform, that is, as opposed to  
11 inability to perform, a desire not to perform, it puts the  
12 surety at risk. And the surety, among other things, under  
13 the bond, is entitled to the exoneration of its obligation by  
14 its principal.

15           One of the way in which exoneration may occur is for  
16 the principal to perform. Now, as far as I know, they  
17 continue to perform under all of the bonds that were not  
18 cancelled. One of the bonds that was cancelled, I understand  
19 is to be reinstated, because it was, in fact, not cancelable,  
20 because the principal had already entered into substantial  
21 performance, and was, in fact, performing. We were just  
22 misinformed on that before.

23           But when you start looking at rights like  
24 exoneration, that is the right to require the principal to  
25 perform or, in the alternative, get out of the way, or, B,

1 rights of equitable subrogation which give a surety that  
2 suffers a loss, an interest in any property that's associated  
3 with that bond, so that the surety is made whole before the  
4 faulting principal gets anything.

5           We don't know how these words affect or may be  
6 argued to affect these rights which may be argued  
7 perspectively, and I'm all too happy to hold those issues for  
8 another day. If what he's asking for is an acknowledgement  
9 from the surety that 362 applies to the actions -- would  
10 apply to the actions that we took pre-petition, if they had  
11 had in post-petition, he has that. That's the law. He  
12 doesn't need another order.

13           And that's our real objection here, is that we don't  
14 want to go creating language problems. You know, the word  
15 "unilateral" in this context is just another word that can  
16 spark an argument. Unilaterally by whom?

17           THE COURT: Well, I'm looking at the form of order  
18 that's been presented.

19           MR. PENNINGTON: Mm-hmm.

20           THE COURT: Do you have that nearby?

21           MR. LAURIA: Yes, I do, your Honor.

22           THE COURT: And I'm looking at the decretal  
23 paragraph at the bottom of Page 2 --

24           MR. PENNINGTON: 2.

25           THE COURT: -- which is three-and-a-half lines.

1 That, I take it, is what is being requested here. That's the  
2 relief.

3 MR. PENNINGTON: That is. I have it on Page 3.

4 "Order that insurance carriers and sureties are  
5 hereby prevented from giving any notice of termination  
6 otherwise modifying or cancelling"?

7 THE COURT: That's the language.

8 MR. PENNINGTON: Okay. I have that on Page 3, your  
9 Honor.

10 THE COURT: And, you know, maybe I'm just overtaken  
11 by a wave of optimism, but it sounds to me as if you don't  
12 disagree with the need to seek relief under those  
13 circumstances?

14 MR. PENNINGTON: I don't think he needs any relief.  
15 I think he's got his relief.

16 THE COURT: Ah, respond to my question, please.

17 MR. PENNINGTON: Oh.

18 THE COURT: Am I --

19 MR. PENNINGTON: Do I disagree in the conclusion  
20 that 362 applies? No --

21 THE COURT: Okay.

22 MR. PENNINGTON: -- I do not disagree.

23 THE COURT: All right.

24 MR. PENNINGTON: What I'm troubled by is when you  
25 get into involuntary substitution of principal, which

1 discharges the bond, a cardinal change which discharges the  
2 bond, if any of these occur, do I have to seek stay relief to  
3 advise the parties that we believe they've just created a  
4 surety defense that discharges the bond?

5 See, that's the kind of -- I mean --

6 THE COURT: Look --

7 MR. PENNINGTON: He --

8 THE COURT: -- in your response, you made clear the  
9 things that you thought ought not to be covered, and as I  
10 read them, frankly, I don't know that the Debtor would  
11 disagree with that part of your response.

12 Now, here we are in a situation in which apparently  
13 nobody disagrees, and, yes, one appropriate result might be  
14 for the Court, as I indicated at the first day hearings, to  
15 do nothing, because the automatic stay applies.

16 But it also seems to me that it would be useful,  
17 especially under circumstances in which the parties agree  
18 about what ought to happen, that it be memorialized, so that,  
19 frankly, you get the comfort you want, that you're not  
20 running afoul of the automatic stay, at least as far as the  
21 Debtor's concerned, and the Debtor gets the comfort that it  
22 can really pass along to others that it's in business, and  
23 it's got the protections that are otherwise required by their  
24 various contracts and whatever state or local ordinances or  
25 laws there are.

1           It just seems to me that it would be good for  
2 everybody.

3           MR. PENNINGTON: I agree, your Honor. I do. And if  
4 we can come up with the language that's right, because we  
5 have no desire to cause unnecessary pain to the Debtor. I  
6 have no personal death wish. I'm not going to go off and do  
7 something crazy. Safeco doesn't want to be penalized for  
8 doing something outside the bounds of the law. And if we're  
9 prepared to sit down and craft appropriately limiting  
10 language, I'm happy to go with it, because he's right, I  
11 certainly have no problem with the rest of his motion.

12           THE COURT: Mr. Lauria?

13           MS. DALUZ: Your Honor, I do disagree, so I would  
14 ask if you'd --

15           THE COURT: Okay.

16           MS. DALUZ: -- allow me to make my presentation  
17 before we get there?

18           THE COURT: Well, I want to try to grab what I can,  
19 and then we'll move on to you, Ms. Daluz.

20           Mr. Lauria?

21           MR. LAURIA: Your Honor, I guess we're content with  
22 the language we've offered. I think I've heard counsel say  
23 that he doesn't disagree with the language that we've  
24 offered, but we still don't seem to be there. So I guess I  
25 need some guidance to know what issue, if any, remains.

1 THE COURT: Well, I'll give you a starting point.

2 And I'm looking at the second page of Safeco's  
3 objection. The first full paragraph, which seems to me  
4 contains the essence of Safeco's concerns.

5 And, Mr. Pennington, you can correct me if I'm wrong  
6 about that.

7 MR. PENNINGTON: No, you're at the nub of it.

8 THE COURT: The only thing you might take issue with  
9 is the statement that you're not doing the things that you're  
10 supposed to be doing, in connection with those projects that  
11 are covered by the bonds, but putting that aside for the  
12 moment.

13 MR. LAURIA: I don't think that Safeco needs to get  
14 relief from the stay to be able to assert a defense to a  
15 claim made on the bond. In fact, there are at least three  
16 cases that have been cited by both the sureties here in their  
17 briefs that involve exactly that scenario, where -- actually  
18 it's the flip side -- where the surety has had a claim made  
19 on the bond, and the surety has tried to say that the  
20 automatic stay prevents the beneficiary of the bond from  
21 asserting a claim. And in each of those cases, the Court  
22 said, No, it doesn't.

23 So we don't think the stay has anything to do with  
24 the assertion and resolution of claims as between the  
25 beneficiaries of the bonds and the surety, and, you know, we

1 can stipulate on the record, or we could add language to the  
2 order so stating.

3 THE COURT: Okay.

4 MR. LAURIA: I think I'm trying to capture the  
5 concern that I understand they express not only in the second  
6 paragraph on Page 2, but also later in their response towards  
7 the end.

8 THE COURT: Yes. Look, I recognize that the parties  
9 are adverse in other matters, but it seems to me that it's in  
10 both of your interests in going forward, that to the extent  
11 you agree, and I hear a lot about which you do agree, to  
12 memorialize it, and avoid other things.

13 Now, there may be things upon which you can't agree.  
14 And I'm here. You both know how to find me.

15 MR. PENNINGTON: You're right, your Honor. I'm  
16 happy to sit down. We went down to talk to them. We didn't  
17 get very far, but maybe we'll get further this time with a  
18 little guidance from you.

19 THE COURT: Okay. I'd like to see you do that.

20 MR. PENNINGTON: Okay. Thank you.

21 THE COURT: All right.

22 MR. PENNINGTON: I yield the floor.

23 THE COURT: Now, let me hear from Westchester Fire  
24 Insurance Company.

25 MR. DALUZ: Let me start where you just -- excuse

1 me, your Honor. For the record, Tobey Daluz, Ballard, Spahr,  
2 Andrews & Ingersoll on behalf of ACE USA and Westchester  
3 Fire.

4 I'm going to start where you just concluded with Mr.  
5 Pennington, which is what language changes would be necessary  
6 in order for this to remain in the order?

7 And from the perspective of ACE and Westchester,  
8 who, by the way, and I'll just refer to them collectively as  
9 ACE going forward, who are not engaged in a current dispute  
10 with the Debtor, and who has no current intention to attempt  
11 to try to cancel any bonds. That the only way we would  
12 agree, if this language remains in the order, would be to  
13 remove the reference to sureties and surety bonds, because it  
14 doesn't belong there.

15 Additionally, if they want to put the word "Safeco"  
16 in, because there's a pre-petition dispute between Safeco,  
17 then they can direct whatever they want to Safeco, but we  
18 believe it would be inappropriate for this Court to grant  
19 this kind of advisory opinion, this kind of order, without  
20 any underlying case or controversy.

21 So if you'll give me an opportunity to address the  
22 issues briefly that we set forth in our objection, I would  
23 appreciate that, your Honor.

24 THE COURT: I'm anxious to hear it.

25 MR. DALUZ: There are a number of issues going on

1 here. Surety bonds, and whether they are property of the  
2 estate, whether they are executory contracts, whether they  
3 are financial accommodations, whether they may be terminated  
4 post-petition with our without relief from the automatic  
5 stay. But there is one simple conclusion setting aside all  
6 of those legal issues that can be drawn based on the record  
7 before this Court, and the facts set forth in the pleadings,  
8 and that is that there's been absolutely no factual showing  
9 that the relief requested is appropriate or necessary, which  
10 is the standard set forth under Section 105.

11 Now, I'll get back to that in a minute, but because  
12 that statement actually goes to, you know, the Debtors'  
13 failure to carry its burden on the motion, it also supports  
14 the proposition that the requested relief is not right for  
15 adjudication and that there's no underlying case in  
16 controversy.

17 So ACE would ask that this Court not reach the  
18 merits, and not decide that stay relief is necessary in  
19 connection with surety bonds. I'm not talking about  
20 insurance policies, only surety bonds, for purposes of this  
21 motion.

22 Now, the U.S. Supreme Court has stated in connection  
23 with the case in controversy doctrine, that in order to  
24 invoke the jurisdiction of a federal court, that the litigant  
25 must have suffered or be threatened with actual injury

1 traceable to the defendant. The Supreme Court went on to say  
2 that there's no really no exact test, that it's a matter of  
3 degrees, but the Third Circuit in Caudera (ph), uses the term  
4 "injury in fact," as a part of its three-part test in  
5 determining whether or not there's a case of controversy.

6 It also goes on to say that there must be a causal  
7 relationship between the injury and the challenged conduct,  
8 and the likelihood that the injury will be redressed by the  
9 order that they're seeking.

10 Now, the Debtor has not shown any injury or any  
11 threat of injury because there is no threat, your Honor. The  
12 pre-petition actions of Safeco do not equate to the kind of  
13 expansive relief that the Debtor is requesting here. What  
14 they want is for this Court to issue an edict that is, in  
15 essence, an advisory opinion based on hypothetical facts. If  
16 an insurance company wants to cancel a bond, they may first  
17 get relief from stay.

18 Frankly, if, you know, there's no case or  
19 controversy unless one of the surety companies attempts to  
20 cancel its bond post-petition.

21 Now, there are several cases that Mr. Lauria alluded  
22 to which they have cited. I'm going to take a chance to  
23 distinguish them here, in the context of the case in  
24 controversy argument, in order to make one very important  
25 point. And that is that all four cases that were cited that

1 stand for the purported proposition that sureties do need  
2 relief from stay before they can terminate a surety bond is  
3 that in each of those cases, there was a surety who actually  
4 tried to cancel the surety bond post-petition. None of those  
5 cases were decided in the context of a surety's motion for  
6 relief from stay, whether they filed that relief from stay in  
7 an abundance of caution, because they thought it was  
8 necessary, or because they thought it was the right to do.  
9 Certainly none of those cases were decided in the context of  
10 a first day motion, which sought relief, preemptory relief.

11           So, you know, if we look at the case in the  
12 controversy doctrine, and we see that there's not one surety  
13 right now that has threatened to cancel the bond  
14 post-petition, or at least there's been no evidence offered  
15 of that.

16           I think that also supports the ripeness issue, which  
17 is kind of the sister doctrine of case in controversy. And  
18 to quote the United States Supreme Court in connection with  
19 ripeness, "A claim is not ripe for adjudication if it rests  
20 upon contingent future events that may not occur as  
21 anticipated or indeed may not occur at all."

22           WCI anticipates a situation that hasn't even been  
23 threatened, your Honor. In their brief today, WCI has argued  
24 that they'll be armed if sureties cancelled their surety  
25 bonds without relief from stay, thereby depriving them of the

1 breathing spell that is afforded by Section 362.

2 Now, in order to evaluate the ripeness issue, the  
3 Court has to look at two points.

4 First, the fitness of the issues for judicial  
5 determination. And, secondly, the hardship of the parties if  
6 the Court withholds opinion on the issue.

7 Now, with regard to the fitness of the issues,  
8 they're not easy. There's many issues that have to be  
9 decided, and although Mr. Lauria skirted over many of them, I  
10 believe this Court has to make a fundamental finding in order  
11 to determine that the stay applies. You have to make  
12 findings with respect to what a surety bond is, if it's a  
13 financial accommodation, if that financial accommodation may  
14 be assumed or rejected, and whether or not because it's a  
15 financial accommodation, whether relief from stay is even  
16 necessary prior to termination, and there's a case in the  
17 Third Circuit that I think is instructive on that point

18 The parties, or at least on behalf of ACE, I'll  
19 continue to strenuously argue these positions, but to what  
20 end? Because if we decide we want to cancel a surety bond,  
21 your Honor, the first thing we're going to do is reach out to  
22 the Debtor. We're not one of those amorphous insurance  
23 companies that the Debtor would have you believe is somehow  
24 operating in a world where we have no context with regard to  
25 the code, or bankruptcy cases, or bankruptcy law.

1           We know what the code says. We know what the case  
2 law says. And we do things in accordance with our  
3 understanding of the code. We call the Debtor first, we  
4 reach out to the debtor, and if we can't agree with the  
5 Debtor, then maybe we would go ahead and file a motion for  
6 relief from stay. But we would not, and that motion would  
7 not say it is because we think it is necessary, just because  
8 we would want to put the Court and other parties on notice,  
9 that this relief is being sought.

10           Because there's no threatened injury here, the  
11 Debtor can't argue that they'll suffer any hardship, because  
12 their post-petition business operations are not going to be  
13 effective. It's not currently being threatened by the  
14 sureties, and any purported threat is too abstract, and this  
15 Court should refrain from holding otherwise.

16           Now, as further evidence that there's no hardship,  
17 is the fact that there's a remedy in the code. In 362(k) of  
18 the code, a Debtor could seek damages if a surety does ahead  
19 and attempt to cancel a bond if this Court determines that  
20 it's in violation of the automatic stay.

21           There's all types of relief that this Court could  
22 consider. That bond could be reinstated, damages equal to  
23 the penal sum of the bond could be found, other consequential  
24 damages related to breach of the contract between the  
25 principal, WCI, and the obligee, other punitive damages.

1 That's what the code provides.

2           If what the Debtor is asking for you to do here is  
3 to issue an order which could lead to a slippery slope;  
4 whereas -- and every first day hearing will need a special  
5 comfort order with respect to the issue that they believe is  
6 at play in that particular case.

7           I believe on the eve of this bankruptcy filing, it  
8 was probably the situation with Safeco. And in the next case  
9 it will be another entity. But if the harm has not been  
10 threatened post-petition, then we think there's no need for  
11 the Court to decide the issue.

12           The Debtor has another option right now, too. If  
13 they think that sureties are so unaware of the case and the  
14 code, they could send a notice. Those types of notices go  
15 out all the time from Debtors post-filing. A bankruptcy case  
16 has been filed, a bankruptcy case gives rise to the -- to the  
17 imposition of the automatic stay under 362 of the code. We  
18 take the position that any act to attempt to cancel a surety  
19 bond is in violation of that. You know, there's ways they  
20 could get to the same place without asking for an order of  
21 this Court, and for you to decide an issue that we disagree  
22 with on the Debtor, with the Debtor.

23           And to turn to that issue, the disagreement is  
24 fundamental. The Debtors' reply would have you believe that  
25 an insurance policy is a bond.

1           They're nothing alike. An insurance policy shifts  
2 the risk of loss from the insured to a third party upon  
3 payment of a premium. That insured is the principal, in the  
4 context of a surety bond, which does not shift the risk of  
5 loss. Instead, the third party surety guarantees payment or  
6 performance up to the penal sum or a sum certain of an  
7 obligation that runs from the principal to an obligee. And,  
8 in this case, a contract party of WCI.

9           What the requirement -- and this is what is so  
10 important -- that the principal indemnify or reimburse that  
11 surety. In the insurance scenario, the risk of loss is what  
12 determines the amount of the premium. In a surety bond  
13 scenario, the principal credit-worthiness is what determines  
14 the amount of the bond and if collateral security is  
15 required. Often that collateral security can be in the form  
16 of letters of credit and cash deposits.

17           I haven't heard the Debtor mention that once. ACE  
18 has collateral. I think Safeco does, too. In fact, the  
19 Debtor hasn't mentioned, but the obligation to indemnify,  
20 which arises only in the context of a surety bond, and not in  
21 connection with an insurance policy. It is the very essence  
22 of this guaranteed relationship that makes a surety bond a  
23 financial accommodation, as opposed to an insurance policy.

24           It's because -- and I think the language that all of  
25 the cases use, and what we've all agreed on is that it's an

1 obligation to pay money on the obligation of another. It is  
2 much more like a guarantee.

3           And another thing I want to say, too, is that all  
4 surety bonds are not alike. Some surety bonds have  
5 cancellation clauses, some don't. Some expire by their own  
6 terms, some do not. You have before you one copy of one bond  
7 from one surety. The Debtor would have you believe that  
8 those are the terms of every bond for all \$166 million worth  
9 of bonds that have been issued on behalf of WCI.

10           I don't think that you can take into account the  
11 Safeco situation or the Safeco documents at all. Not only in  
12 the context of ACE, or any other surety, but in the context  
13 of even Safeco's other bonds. I don't know whether they look  
14 the same, but the kinds of bonds that you post on behalf of  
15 your principals, can differ based on the obligation, the  
16 underlying obligation.

17           Now, I think the issue that we've all been kind of  
18 skirting around here, and the reason why I can't agree to  
19 keep the language in the order, is the existence of the Watts  
20 decision in the Third Circuit.

21           Now, I do admit, your Honor, the Watts decision was  
22 a case that centered on a loan. In fact, a state -- the  
23 state's -- a state loan program as opposed to a bond, but I  
24 think what everybody's papers do agree on is that a bond  
25 constitutes a financial accommodation. And Watts go on to

1 say that if it's a financial accommodation, because 365(e)(2)  
2 does not differentiate between loans and financial  
3 accommodations, then if it's a financial accommodation, then  
4 it may be terminated post-petition. And what Watts says is  
5 that you do not need to go through the pro forma active  
6 relief from stay if you have the right to terminate.

7 I think Watts also addresses some of the very  
8 concerns that have been raised by the Debtor in this case.  
9 Watts acknowledged, when it decided that you did not need to  
10 go through the pro forma test of receiving relief from stay,  
11 that other courts have held differently. Those are all of  
12 the cases that have been cited by the Debtors.

13 Watts also acknowledges that a post-hoc challenge is  
14 sufficient, that that's what 362(k) is for. Watts also says  
15 that the breathing spell is not intended to insure the  
16 continued existence of a credit enhancement.

17 So I think Watts has spoken on this issue. Yes, the  
18 case does not say, This is a surety bond situation, but it's  
19 a 365(e)(2) case.

20 I think, you know, we are in the Third Circuit, that  
21 the Court should look to Watts favorably. I think what it  
22 does give rise to here is a question, a question, a real  
23 thorny legal question that I'm not ready or willing to  
24 concede to.

25 And, instead, it brings me back to my original

1 argument. The parties, I think all parties, would be far  
2 bettered served if your Honor would show judicial restraint  
3 and not decide this issue today.

4 Do you have any questions for me, your Honor?

5 THE COURT: I do not.

6 All right. I'll give the Debtor a brief chance for  
7 rebuttal if it wishes?

8 (No response.)

9 I assume no one else wishes to be heard?

10 (No response.)

11 Okay.

12 MR. LAURIA: Your Honor, I think that this can be  
13 boiled down to a rather simple assessment for the Court, and  
14 one that is not at all unusual in a bankruptcy circumstance  
15 here.

16 The relief requested, at the end of the day, is not  
17 an adjudication of whether or not a surety can terminate or  
18 not, whether a surety has defenses or not, whether a bond can  
19 terminate or expire or not. What we have sought is, in  
20 effect, a procedural order that simply requires a hearing  
21 before this Court before the action is taken, as opposed to  
22 after the action is taken.

23 It provides a thin prophylactic for this estate,  
24 which if as counsel has argued, if all of their arguments are  
25 right, or any of them are right, the lift stay hearing that

1 we will have will be a brief one, but at least there will be  
2 an opportunity, we're assured of having an opportunity, to  
3 know there's going to be a motion, and have an opportunity to  
4 prepare for it, and have a hearing, and also prepare for the  
5 possibility that the estate may lose.

6 Now, in making these comments, I don't mean to  
7 concede that the argument of ACE is correct. In fact, I  
8 think we completely disagree on the substantive points. It  
9 strikes me as incredible, as it did strike the Court in the  
10 Wagner Farms (ph) decision, one of the cases that I think  
11 shows up in all three briefs, where I think it -- maybe it's  
12 easier just to quote the Court there.

13 The Court was talking about cases standing for the  
14 proposition that the estate has no protectable interest in a  
15 surety that would make the automatic stay applicable.

16 THE COURT: In fact, it said it defied the logic  
17 test.

18 MR. LAURIA: Yes. The Debtor has paid a premium,  
19 and given indemnity, and whatever you want to call it, we did  
20 that to get something. And whatever that something is, I  
21 think Section 541 is broad enough to say it's an asset of the  
22 estate and, therefore, no act may be taken against it under  
23 362(a)(3).

24 Now, counsel wants to turn it around and say there's  
25 no case in controversy, there's no real threat. Well, their

1 papers set forth the threat.

2 Counsel said right here at the podium, and explained  
3 it. Who said, Our view is, under Watts, we are not subject  
4 to the automatic stay and may terminate without relief the  
5 bonds that we have issued, that the Debtor has paid for, that  
6 logic says must be property of the estate in some fashion,  
7 and all we're asking for -- and it's amazing the resistance  
8 that we're getting from Westchester-ACE on this -- is to have  
9 notice, and a hearing, and an opportunity to let the Court  
10 decide this before Humpty-Dumpty falls apart, rather than  
11 after Humpty-Dumpty falls apart.

12 And I think that ACE and Westchester have a hard  
13 time, in fact, I haven't heard it, explaining the harm to  
14 them from getting that relief. In fact, they've kind of  
15 said, Well, of course we would do something before we, you  
16 know, broke the egg. We'd do something. Well, maybe they  
17 would or maybe they wouldn't. And what do they do? Do they  
18 give me 24 hours notice? Can I protect the estate in 24  
19 hours?

20 THE COURT: I don't know. What did the documents  
21 require?

22 MR. LAURIA: The documents have no termination  
23 right, your Honor. The documents have no termination right.

24 And we could have an evidentiary hearing, and have  
25 witnesses, and go through each and every document, and put

1     them all into the record.  Why do that today?

2             To me it seems like balancing the harms here.  The  
3     far easier thing to do is to have the Court retain a look-see  
4     opportunity.

5             THE COURT:  All right.  Thank you.

6             MR. PENNINGTON:  Let's not give up hope on your  
7     burst of optimism, Judge.

8             THE COURT:  I haven't.

9             All right.  Let me, after having reviewed the  
10    submissions in preparation for today's hearing, and  
11    consideration of the cases that have been cited, and after  
12    having heard counsel's argument, I'm still partially of the  
13    view that I expressed at the first day hearings on August  
14    5th.  But the view has evolved, as we've discussed in  
15    connection with the Safeco objection, to a place where it  
16    seems eminently practical to try to see whether the parties  
17    can't make some arrangement.

18            Now, ACE, Ms. Daluz will say, You make sound,  
19    principled arguments about the exercise of Federal Court  
20    jurisdiction, but here's how it applies in my experience in  
21    Bankruptcy Court.  And I first, I will say, was attracted to  
22    the case or no case or controversy argument, and in part to  
23    the ripeness argument, which is not the same, but a related  
24    doctrine.

25            And I look at specific illustrations.  For example,

1 after the '05 amendments, when -- it used to happen when the  
2 committee was appointed, now the Debtors often make them  
3 first day motions -- relief is sought which insulates a  
4 committee even before it's appointed, from having to disclose  
5 confidential or privileged information, which it might  
6 receive from the Debtor.

7           Where is the case or controversy there, in the  
8 absence of a request by some creditor for information which  
9 the committee -- which is not yet formed --refuses to give?  
10 There isn't any.

11           But in bankruptcy we administer, among other things,  
12 we administer estates, and there are certain orders that are  
13 appropriate to enter to facilitate the efficient  
14 administration of the estate. And you can say 105 confers  
15 that authority, you can say there's inherent power in the  
16 Bankruptcy Court to -- upon which a Court can act on such  
17 matters, and I suppose there are some who would argue that  
18 the Court would have no authority in either event, but I  
19 enter them, and that's why I do that.

20           There are, on the other hand, so-called procedural  
21 orders on utility motions in which utilities file objections  
22 that say, Your Honor, the Debtor has it utterly and  
23 completely backwards. It's not a procedural order or relief  
24 that's being sought. In fact, what you're doing is depriving  
25 the utility, under amended 366, of its substantive right to a

1 timely deposit in the nature of the adequate assurance.

2           Fortunately, at least in the cases I've had, those  
3 matters get resolved before I have to decide whether, in  
4 fact, the utilities who make that argument are right. And in  
5 looking at the relief that's been requested here, I have a  
6 difficult time, at least in my own mind, under the  
7 circumstances as they've been described, in the absence of an  
8 evidentiary record, saying that it falls within that category  
9 of orders that are strictly to enhance the smooth and  
10 efficient administration of the estate.

11           There is some part of this request for relief by the  
12 Debtor in this motion, I think which arguably may affect at  
13 least procedurally, the rights of those to whom the order is  
14 directed. But then I come back to what Mr. Lauria said on  
15 rebuttal, and that is, Look, we're just trying to form a  
16 process to get through these disputes. It may be there is no  
17 defense to the motion for relief based upon the very  
18 arguments that you've made.

19           But I can't decide that, and I prefer not to decide  
20 it, in the absence of agreement without an evidentiary  
21 record. My inclination, however, is not now to set up  
22 another hearing for evidentiary record.

23           I disagree with ACE's position. I think the  
24 pleadings, themselves, describe the reason why there is a  
25 need for this. Nobody really disputes here what happens in

1 the building industry and how these things work. At least I  
2 haven't seen any dispute about that in the papers. The  
3 dispute centers around the legal issue of what rights, if  
4 any, may be exercised without violating the automatic stay.

5 That's where the dispute lies here. And, frankly,  
6 it is a dispute. The question is, What's the Court supposed  
7 to do when one really isn't directly before it in a situation  
8 in which some termination has occurred or been attempted  
9 without the party having come to the Court first seeking  
10 relief from stay because it believes it needs it or does so,  
11 as Ms. Daluz suggested out of an abundance of caution.

12 So let me get back specifically to the objections  
13 that are before me.

14 What I would like to do is to give the Debtor and  
15 Safeco another opportunity to try to build a protocol to  
16 address these issues. I'd like to ask ACE, without foregoing  
17 any of its principles, to do the same, to maintain the stay  
18 that was ordered on an interim basis, just for a very short  
19 period of time.

20 And I'll give the parties a choice. There are two  
21 hearings coming up. The next one is -- what I have to do is  
22 find out where I wrote it --

23 SPEAKER: The 23rd.

24 THE COURT: September 23rd at 1:30, and the one  
25 which follows that is October 8th at 2:30. If the parties

1 think they can get to the end by the 23rd, I'll bring you  
2 back on then. If you think you need a little more time, I'll  
3 bring you back on the 8th.

4 MR. PENNINGTON: My thinking is, your Honor, and you  
5 have two large companies, and one very large Debtor, and the  
6 hurricane season in process, perhaps the October date would  
7 be better.

8 THE COURT: All right. Ms. Daluz, are you okay with  
9 that?

10 MS. DALUZ: I'm fine with the 8th. The 23rd may be  
11 close to the (indiscernible) and --

12 THE COURT: It's the day before actually.

13 MS. DALUZ: Yes, I'll be at the conferences then.

14 THE COURT: Okay. So you're going down a day early.

15 Okay. I'll continue this matter then until October  
16 8th at 2:30. I'll order from the bench that the stay remain  
17 in place that was extended -- well, it was initially entered  
18 on August 6th, and then extended by written order on August  
19 27th.

20 MR. GOLDEN: Your Honor --

21 THE COURT: If the parties feel that it needs to be  
22 memorialized again in writing, I'll consider an order, but  
23 otherwise I'll so order it now from the bench.

24 Yes?

25 MR. GOLDEN: I'm sorry, your Honor. I just noticed

1 that October 8th is Yom Copper, which is probably going to be  
2 a serious problem for many of the lawyers involved. So if  
3 there's another day, even the day before or the day after,  
4 because I do agree, I think September 23 is probably too  
5 quick, and there's also the Dipp Hearing (ph), which I assume  
6 will take up much of that day.

7 (Pause.)

8 THE COURT: The day before is not so good.

9 MR. GOLDEN: When's the next one after that, Judge?

10 THE COURT: But I'll do --

11 MR. LAURIA: Judge, for this matter alone, I would  
12 do the 6th. I was going to mention that the next omnibus is  
13 October 22nd, and if the -- if the two sureties have no  
14 objection to just setting it on the 22nd, it's certainly  
15 better for us as well. We --

16 THE COURT: That's okay with me.

17 MR. PENNINGTON: If we come to an agreement, not  
18 only the -- the institutions have to come together with the  
19 debtor, we've got the committee, we've got all kinds of  
20 hurdles we've got to get over. The 22nd may be better.

21 THE COURT: All right. Ms. Daluz, are you available  
22 on that date?

23 MS. DALUZ: Yes, I am.

24 THE COURT: All right. We'll make it the 22nd at  
25 10:00 o'clock.

1 (Pause.)

2 Are there any questions?

3 MR. LAURIA: Your Honor, just to be clear, so the  
4 Court is so ordering on the record that the stay in effect  
5 would continue until October 22 at, I guess, at 5:00 o'clock  
6 p.m.?

7 THE COURT: Yes, as embodied by the earlier written  
8 orders.

9 MR. PENNINGTON: That's what we understand.

10 THE COURT: Okay.

11 MR. LAURIA: Okay.

12 THE COURT: Anything further for today?

13 MR. LAURIA: No, your Honor.

14 All right. Thank you all very much.

15 That concludes this hearing. Court is adjourned.

16 (Court adjourned at 3:27 o'clock p.m.)

17 \* \* \*

CERTIFICATION

I hereby certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

Geraldine C. Laws, CET  
Laws Transcription Service

Dated 9/15/08