

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

In re: : Chapter 11  
: :  
WCI COMMUNITIES, INC., et al., : Case No. 08-11643 (KJC)  
: :  
: :  
Debtors. : :  
: : **Objections Due: October 17, 2008 at 4:00 p.m.<sup>1</sup>**  
: : **Hearing Date: October 22, 2008 at 10:00 a.m.**

**UNITED STATES TRUSTEE’S OBJECTION TO APPLICATION OF OFFICIAL  
COMMITTEE OF UNSECURED CREDITORS FOR AUTHORITY TO RETAIN  
HOULIHAN LOKEY HOWARD & ZUKIN CAPITAL, INC. AS FINANCIAL ADVISOR  
AND INVESTMENT BANKER, *NUNC PRO TUNC* TO AUGUST 15, 2008**

In support of her objection (the “Objection”) to the Application of Official Committee of Unsecured Creditors for Authority to Retain Houlihan Lokey Howard & Zukin Capital, Inc. as Financial Advisor and Investment Banker, *Nunc Pro Tunc*, to August 15, 2008 (the “Application”), Roberta A. DeAngelis, the Acting United States Trustee for Region 3 (“UST”), by and through her undersigned counsel, states as follows:

1. This Court has jurisdiction to hear the above-referenced Objection.
2. Pursuant to 28 U.S.C. § 586, the UST is charged with the administrative oversight of cases commenced pursuant to chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”). This duty is part of the UST’s overarching responsibility to enforce the bankruptcy laws as written by Congress and interpreted by the courts. *See United States Trustee v. Columbia Gas Sys., Inc. (In re Columbia Gas Sys., Inc.)*, 33 F.3d 294, 295-96 (3d Cir. 1994) (noting that UST has “public interest standing” under 11 U.S.C. § 307, which goes beyond mere pecuniary interest); *Morgenstern v. Revco D.S., Inc. (In re Revco D.S., Inc.)*, 898 F.2d 498, 500 (6<sup>th</sup> Cir. 1990)

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<sup>1/</sup> The objection deadline was extended by agreement of the parties.

(describing the UST as a “watchdog”).

3. Pursuant to 11 U.S.C. § 307, the UST has standing to be heard with regard to the above-referenced Objection.

### **BACKGROUND**

4. On August 4, 2008 (the “Petition Date”), each of the Debtors<sup>2</sup> filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware (the “Court”).

5. On August 13, 2008, the UST appointed a statutory committee of unsecured creditors (the “Committee”) in this case.

6. On September 25, 2008, the Committee filed the Application, seeking to retain Houlihan Lokey Howard & Zukin Capital, Inc. (“Houlihan”) as their financial advisor and investment banker, *nunc pro tunc* to August 15, 2008.

7. As set forth in the Application, it is proposed that Houlihan will be paid (i) a monthly fee of \$175,000 and (ii) a Restructuring Transaction Fee of \$3,000,000 based upon the confirmation of any chapter 11 plan and paid on the consummation of such plan.

8. The UST does not contest the Committee’s determination that the services of an financial advisor may be necessary to assist them in performing their duties. However, the UST objects to certain terms of Houlihan’s proposed retention by the Committee.

### **GROUND/BASIS FOR RELIEF**

9. *Nunc Pro Tunc Retention*. The UST objects to the retention of Houlihan *nunc pro tunc* to August 15, 2008 because the Committee has failed to allege extraordinary circumstances

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<sup>2</sup> All capitalized terms not defined herein shall have the meaning ascribed to them in the Application.

warranting *nunc pro tunc* approval. The Application was not filed until September 25, 2008, approximately 41 days after Houlihan commenced work for the Committee.

10. *Nunc pro tunc* approval may be granted by the bankruptcy court in its discretion, but such approval is limited to those cases where extraordinary circumstances are present. *In re Arkansas Co., Inc.*, 798 F.2d 645, 650 (3d Cir. 1986); *F/S Airlease II, Inc. v. Simon (In re F/S Airlease II, Inc.)*, 844 F.2d 99, 105 (3d Cir. 1988); *In re Fleming Cos., Inc.*, 305 B.R. 389, 393 (Bankr. D. Del. 2004). In *In re Arkansas Co., Inc.*, 798 F.2d at 650, the Third Circuit set forth several factors that a bankruptcy court must consider in determining whether the failure to have sought prior approval is adequately excused:

This will require consideration of factors such as whether the applicant or some other person bore responsibility for applying for approval; whether the applicant was under time pressure to begin service without approval; the amount of delay after the applicant learned that initial approval had not been granted; the extent to which compensation to the applicant will prejudice innocent third parties; and other relevant factors.

*In re Arkansas Co., Inc.*, 798 F.2d at 650.

11. The Committee and Houlihan have provided no explanation for the delay in filing the Application. There is no indication in the Application that Houlihan was working under time pressures that prevented them from filing the Application sooner. The Application indicates that Houlihan “has served as financial advisor in some of the largest and complex restructuring matters in the United States, including serving as the financial advisor to the debtors in [multiple] chapter 11 proceedings.” (Application, ¶ 8). Houlihan is a sophisticated bankruptcy professional who should be aware of the requirement to file timely retention applications. At the very least, counsel to the Committee should have been aware of the need to file the retention application sooner.

Standard of Review

12. 11 U.S.C. § 328(a) provides that:

[t]he trustee, or a committee appointed under section 1102 of this title, with the court's approval, may employ or authorize the employment of a professional person under section 327 or 1103 of this title, as the case may be, on any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, on a fixed or percentage fee basis, or on a contingent fee basis. Notwithstanding such terms and conditions, the court may allow compensation different from the compensation provided under such terms and conditions after the conclusion of such employment, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions.

(emphasis added).

13. The Application, Engagement Letter and proposed order seek to subject Houlihan's compensation to review only under the improvidence standards set forth in 11 U.S.C. § 328(a), with a specific exclusion from the "reasonableness" standards of 11 U.S.C. § 330. The UST objects to this determination being made at the time of Houlihan's retention, in that such a determination is premature and inconsistent with 11 U.S.C. §§ 330 and 331. Review, consideration and approval of Houlihan's fees should be deferred until the conclusion of this case when the benefit of Houlihan's services can be evaluated upon application to the Court, with an opportunity for all parties in interest to comment upon or object to such an application.

14. The UST also objects to paragraph 4 of the Engagement Letter, which provides that notwithstanding expiration or termination of the Engagement Letter, Houlihan shall be entitled to full payment of the Restructuring Fee so long as the conditions causing such Restructuring Fee to be payable are satisfied within 12 months after expiration or termination of the Engagement

Letter. Such payment should not be permitted except upon application to the Court and review for reasonableness under 11 U.S.C. § 330.

#### Content of Fee Applications

15. The UST objects to the Application to the extent Houlihan seeks a waiver of Local Rule 2016-2(d), which requires, among other things, that applications for compensation contain “complete and detailed activity descriptions” that are billed in tenths of an hour. Houlihan seeks to provide only “reasonable” descriptions of its work in one hour increments. Houlihan should be required to maintain complete time records in increments of at least ½ hour in order to allow meaningful review with respect to the reasonableness of Houlihan’s fees.

#### Fee Structure

16. Section 6 of the Engagement Letter provides that in addition to its monthly compensation, Houlihan will be reimbursed for certain allocated expenses “that are not capable of being identified with, or charged to, a particular client or engagement in a reasonably practical manner, based upon a uniformly applied monthly assessment or percentage of fees due to Houlihan.” This provision suggest that Houlihan will charge the estates, in addition to actual expenses, a portion of expenses that Houlihan is unable to allocate to particular client engagements. Such expenses, however, are in the nature of overhead and should be subsumed in Houlihan’s monthly rates. Overhead, regardless of how denominated, should not be a recoverable expense item.

17. The UST reserves any and all rights, remedies and obligations to, *inter alia*, complement, supplement, augment, alter and/or modify this Objection and to conduct any and all discovery as may be deemed necessary or as may be required and to assert such other grounds as

may become apparent upon further factual discovery.

WHEREFORE the UST requests that this Court issue an order denying the Application as written and/or granting such other relief as this Court deems appropriate, fair and just.

Respectfully submitted,

**ROBERTA A. DeANGELIS**  
**ACTING UNITED STATES TRUSTEE**

By: /s/ Jane M. Leamy

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Dated: October 17, 2008

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

In re: : Chapter 11  
: :  
WCI COMMUNITIES, INC., et al. : Case No. 08-11643 (KJC)  
: :  
Debtors. : Jointly Administered  
: :

**CERTIFICATE OF SERVICE**

IT IS HEREBY CERTIFIED that on October 17, 2008, the Acting United States Trustee's Objection to the Application of Official Committee of Unsecured Creditors for Authority to Retain Houlihan Lokey Howard & Zukin Capital, Inc. as Financial Advisor and Investment Banker, *Nunc Pro Tunc*, to August 15, 2008, was caused to be served via facsimile to the following persons:

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