

UNITED STATES BANKRUPTCY COURT

DISTRICT OF DELAWARE

Case No. 08-11643

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In the Matter of:

WCI COMMUNITIES, INC., ET AL.,

Debtors.

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United States Bankruptcy Court
824 Market Street
Wilmington, Delaware

October 22, 2008
10:11 AM

B E F O R E:

HON. KEVIN J. CAREY

U.S. BANKRUPTCY JUDGE

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HEARING re Debtors' Motion for Entry of an Order

(I) Authorizing Debtors to (a) Maintain Insurance and Surety Bond Programs, (b) Maintain Insurance Premium Financing Program, (c) Pay Insurance and Surety Bond Premiums in the Ordinary Course and (d) Pay all Obligations Associated Therewith; and (II) Preventing Insurance and Surety Companies from Giving any Notice of Termination or Otherwise Modifying any Insurance Policy or Surety Bonds without Obtaining Relief from the Automatic Stay.

HEARING re Motion of Richard and Patricia Beach for Relief from the Automatic Stay under 11 U.S.C. 362(d).

HEARING re Debtors' Motion for an Order Pursuant to Sections 105, 363 and 554 of the Bankruptcy code for Authority to Establish and Implement Expedited Procedures for the Sale, Abandonment or Donation of Certain Miscellaneous Assets.

HEARING re Motion to Modify Stay Alternatively, for Adequate Protection Filed by Safeco Insurance Company of America.

Transcribed by: Penina Wolicki

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THE CLERK: All rise. Be seated, please.

THE COURT: Good morning, all.

MR. SCHLERF: Good morning, Your Honor. Jeffrey Schlerf for the debtors. Your Honor, we submitted an amended agenda yesterday afternoon. I hope chambers received that.

THE COURT: I have.

MR. SCHLERF: Great. Going through the agenda, Your Honor, numbers 1, which is a motion by Legend Yacht and also a retention application by the committee, number 6, are adjourned by agreement of the parties. Two, three and four, we submitted CNOs and the Court has entered orders, Your Honor, so that leaves us with matters, 5, 7, 8, 9. The only unresolved matter is number 7. Your Honor, we'd like to take things out of order so 7 is last, unless, for some reason, we get bogged down with talking about the surety bond issue, and I don't think we will get bogged down.

THE COURT: All right.

MR. SCHLERF: We have an agreed form of order.

THE COURT: Very well.

MR. SCHLERF: So with that, Your Honor, I turn the podium over to Mr. Averch of White & Case.

MR. AVERCH: Good morning, Your Honor. Craig Averch with White & Case on behalf of WCI and its affiliated debtors. Your Honor, on matter number 5, the debtors' motion for entry

1 of an order authorizing the debtors to maintain insurance and
2 surety bond programs, which also prevented insurance and surety
3 companies from giving any notice of termination or otherwise
4 modifying any insurance policy or surety bonds without
5 obtaining relief from the automatic stay, that's Docket 11.
6 That was one of the first day motions that we filed with Your
7 Honor.

8 As the Court will recall, we had a provision in
9 there. Safeco had objected to the provision. We had continued
10 the stay provision to a subsequent hearing. At that point both
11 Safeco and Westchester ACE objected to that provision. The
12 Court instructed the parties to negotiate a procedure whereby
13 the debtors would receive some kind of notice and the parties
14 in interest in this case would receive some kind of notice
15 before there would be a cancellation of any surety bond.

16 Your Honor, I'm pleased to report that the debtors,
17 Safeco and ACE as well as the committee, have reached an
18 agreement on a set of procedures. Simply put, the procedures
19 require the surety companies to provide five days' written
20 notice to the committee and the debtors of any issues with
21 respect to the surety bonds. If the debtors are unable to
22 resolve those issues within the five days the surety companies
23 can then file a motion before this Court requesting whatever
24 relief the surety companies believe is appropriate, and the
25 debtors and the committee will have an opportunity to address

1 the Court to determine whether it's appropriate at that time.

2 In addition, we've struck some additional agreements
3 with Safeco that we've included in the procedural order.

4 Safeco's concern is that the debtors not commence construction
5 on projects that were bonded, where the debtors had not
6 previously commenced construction. So we've agreed with Safeco
7 that we will -- and ACE for that matter, to the extent they
8 have any projects that are in the same position -- that we will
9 provide ten days' business notice before the debtors commence
10 construction on projects that are bonded where no construction
11 had previously been commenced. And then Safeco and/or ACE
12 could file a motion seeking adequate protection or whatever
13 they want, and a hearing would be scheduled on an omnibus
14 hearing day.

15 In addition, Your Honor, I'm pleased to report,
16 although this is not in the procedures order, nor does it need
17 to be, the debtors' and Safeco have reached an agreement in
18 principle where Safeco will reinstate the outstanding bonds
19 that were cancelled prepetition that the debtors have five
20 existing lawsuits over. Some of the bonds I don't believe need
21 to be reinstated. Some of the bonds do need to be reinstated.
22 But upon reinstatement, the debtors have agreed to dismiss the
23 five pending lawsuits without prejudice. And that's not
24 reflected in the proposed order, but that is part of the
25 agreement that the debtors have reached with Safeco.

1 And with that, Your Honor, I have an order to present
2 to the Court. I would note that the committee has
3 interlineated four words in here that we did not have an
4 opportunity to put in our typewritten order, but all parties
5 have signed off on the language that's in this order. And if
6 it pleases the Court, I'd like to present it for Your Honor's
7 consideration.

8 THE COURT: Certainly. Thank you. And before I read
9 the order, let me ask one question and then I'll allow others
10 to speak if they wish to be heard. One of the requests for
11 relief in the Safeco motion was to permit, I guess, the payment
12 of claims or the addressing of claims that had been made.
13 Where does that part of this stand?

14 MR. AVERCH: Your Honor, that's not addressed by the
15 procedures order. Safeco has whatever rights it has under the
16 outstanding bonds to settle and resolve claims. I should note
17 to the Court that as far as the debtors are aware, there's only
18 one outstanding claim, and the debtors believe that that
19 outstanding claim will be resolved and are working to resolve
20 that claim. But this procedures order doesn't address it
21 either way.

22 So to the extent Safeco has the rights under its
23 documents to compromise and settle claims against itself as a
24 surety and then reassert those claims under the indemnity, it
25 will continue to have those rights. Obviously the debtors

1 believe that the claims adjudication process should come
2 through this Court first, but recognizes that Safeco is not a
3 debtor that's entitled to protection under the automatic stay,
4 and they have to settle claims where it has its liability.
5 That said, Your Honor, with the one outstanding claim that we
6 think will be resolved, we don't see that as being a
7 significant issue and it was not addressed in the order.

8 THE COURT: All right. Thank you. Does anyone else
9 care to be heard? I hear no response. All right. Let me take
10 a look at the order.

11 (Pause)

12 THE COURT: All right. I've reviewed the proposed
13 order. I don't have any questions. From our prior discussions
14 on the record in connection with this issue, I suspect that
15 this was not an easy resolution to come to, and I applaud all
16 concerned for having made this arrangement and I think it's
17 entirely appropriate.

18 MR. AVERCH: Thank you, Your Honor. Also, if I
19 didn't say it before, this will resolve item 9 on the Court's
20 agenda. I don't know whether the Court needs a particular
21 order on that motion. It is --

22 UNIDENTIFIED ATTORNEY: Yes. Safeco withdraws that
23 motion, Your Honor. Do you need a piece of paper?

24 THE COURT: Nancy, for docket purposes, do we need a
25 piece of paper? Yes.

1 UNIDENTIFIED ATTORNEY: I'll get you one.

2 THE COURT: All right. Thank you.

3 MR. AVERCH: Your Honor, that leaves the Court with
4 two more matters on the WCI agenda. If I could, I'd like to
5 take them out of order. Item number 8 is a miscellaneous asset
6 sales procedure. There's been no objections. And then we can
7 move on to the contested motion for relief from the stay filed
8 by the Beaches.

9 THE COURT: All right. Let me ask first, does anyone
10 else care to be heard in connection with the debtors' motion
11 for establishment of expedited sale procedures? I hear no
12 response. I had only one request. I've reviewed the papers.
13 I don't have any questions. I'm satisfied with the process
14 that's been proposed and to which there is no objection. But I
15 would like, upon the completion of any sale, a report to be
16 filed so that the docket will reflect exactly what's happened
17 after the notices have been given and in the absence of
18 objection. So if you would send me a form of order that makes
19 that additional provision, unless there's one in there and I
20 missed it.

21 MR. AVERCH: No, there is none, Your Honor.

22 THE COURT: I would appreciate that.

23 MR. AVERCH: Okay. Thank you, Your Honor. We will
24 make that change. In addition, Your Honor, we've made two
25 other changes in the order. One was requested by the DIP

1 lenders to have the amount of all the sales, de minimis sales,
2 capped at one million dollars. The debtors have agreed to that
3 change and the committee's agreed to that change. The U.S.
4 Trustee also requested that the miscellaneous asset procedures
5 not be used to sell certain items like personal information.
6 We've agreed to make the changes the U.S. Trustee has requested
7 as well.

8 So when we send Your Honor, the Court, with the
9 black-line depicting the changes Your Honor has requested,
10 we'll also show the black lines requested by other parties,
11 namely the DIP lenders and the U.S. Trustee.

12 THE COURT: Thank you.

13 MR. AVERCH: And, Your Honor, with that, I think we
14 can move to the motion for relief from stay filed by the
15 Beaches.

16 THE COURT: Okay. And I'll just say, anyone who's on
17 the phone or present who has no interest in remaining is free
18 to go at this point, but welcome to stay, as always.

19 MR. MURLEY: Good morning, Your Honor. Luke Murley
20 of Saul Ewing for the movants. And with me today is Dan Saxe
21 who is a member of the Florida Bar. He is admitted pro hac
22 vice in this case, and he'll be handling the argument.

23 THE COURT: All right.

24 MR. SAXE: Good morning, Your Honor.

25 THE COURT: Good morning.

1 MR. SAXE: My name is Dan Saxe. I represent the
2 Beaches in this case. First of all, I'd like to thank White &
3 Case for the courtesy they've extended in allowing this case to
4 go forward first in this argument. I'm trying to catch an
5 airplane back to Tampa, so I do appreciate it. And I also want
6 to --

7 THE COURT: Going to catch the game tonight?

8 MR. SAXE: I'm hesitating in this community to say
9 that I'm from Tampa. But I probably will watch it on TV like
10 the rest of us. The facts of this case, I'd like to just set
11 forth briefly, Your Honor. The Beaches are husband and wife.
12 They obtained a judgment against WCI in May of 2007 for
13 116,692.01 and subsequently obtained an attorneys' fees
14 judgment in October of 2007.

15 The motion before the Court is for relief from the
16 automatic stay to permit the continuation of a presently stayed
17 appeal that was filed by the debtor in the Second District
18 Court of Appeals in Tampa, Florida. All that was remaining on
19 that appeal was oral argument when the matter was stayed. The
20 final judgment was appealed from in October of 2007. The
21 attorneys' fees judgment was appealed in November. The appeals
22 were consolidated in December, and the supersedeas bond in the
23 amount of \$370,114.96 was posted in December of 2007 on both
24 appeals.

25 The oral argument was set for August the 19th.

1 Chapter 11 filing happened on the 4th. And the appellate court
2 canceled oral argument when it received the suggestion of
3 bankruptcy on the 12th. Your Honor, our motion papers are
4 fairly detailed. I know you read them.

5 THE COURT: I have.

6 MR. SAXE: I'm not going to repeat them here other
7 than to say that I want to identify at least three or four
8 points. The first is, on the Borman matter, the Third Circuit
9 noted in that case that it is in the best interest of the
10 estate to allow appeals to go forward generally and that cause
11 for lifting of the stay is generally handled on a case by case
12 basis. And I think that's particularly appropriate here in
13 view of the fact that White & Case is arguing that the Akin
14 case is law of the case and is therefore dispositive of my
15 issue.

16 THE COURT: I disagree with that proposition, so you
17 need not dwell on that.

18 MR. SAXE: Thank you, Your Honor. Borman also
19 instructs that, "whereas here the claim is covered by insurance
20 or indemnity, the hardship to the debtor is likely to be
21 outweighed by the hardship to the plaintiff." The Third
22 Circuit has not yet reached the question of whether a
23 supersedeas bond is actually property of the bankruptcy estate,
24 and that's the Advanced Electronics case. But Florida courts,
25 construing the supersedeas bonds, have described such bonds as

1 a separate, direct, contractual undertaking from the surety and
2 not part of the bankruptcy estate.

3 THE COURT: An argument that's been made in other
4 contexts here.

5 MR. SAXE: I'd like to address some of the arguments
6 made by WCI. First, and that is the result in Akin as law of
7 the case, Your Honor has already said that you disagree with
8 that. I will not belabor that point. They also make the
9 comment, however, that our claim is unliquidated and
10 contingent. Clearly it is not. We have a liquidated claim
11 that is secured by a supersedeas bond. I know that that was a
12 major issue in Akin. That is not an issue here.

13 The supersedeas bond that is claimed is secured by a
14 letter of credit issued by Bank of America prepetition, and
15 that executing on the bond would entitle Bank of America to
16 draw on the letter of credit, and that somehow impacts the
17 debtors' estate. And that lifting the stay for the Beaches
18 would encourage other parties to file similar motions. I've
19 looked very carefully at the docket and at what WCI has filed,
20 and I fail to see any other cases like ours, that is, a case
21 where the creditor won underneath, there was an appeal and the
22 supersedeas bond was posted. Akin --

23 THE COURT: Well, as you say, there's always some
24 difference among the different situations. I've granted relief
25 in only one such case, again different --

1 MR. SAXE: I read the case, Your Honor. I can
2 appreciate the distinction in that case.

3 THE COURT: Okay.

4 MR. SAXE: However, in this case, the second argument
5 that was made for lifting the stay is that it would divert the
6 attention of WCI from reorganization, and it cites the GAF
7 Johns-Manville case at 26 B.R. 405. That result, however, Your
8 Honor, was based on a situation where the Court was concerned
9 about and extended a stay to employees and directors of the
10 company because they were being sued individually and drawn
11 into the litigation. And the Court was concerned that those
12 actions would divert those people from their reorganization
13 efforts. We don't have that situation here, Your Honor.

14 Here, WCI is trying to continue a stay against a
15 surety company, a third party, not the debtor. And there is a
16 case out there called In re Pestritto v. Trust Company that
17 highlights the distinctions between that case and another
18 contending case in the Southern District. The cite is 108 B.R.
19 850, and it's a Southern District of Georgia case in 1989.

20 Third, and I think most importantly, I would
21 respectfully draw the Court's attention to a 1994 case of In re
22 Keene Corporation, 171 B.R. 180. And that's a Southern
23 District of New York bankruptcy matter from 1994. It has the
24 same facts as we have in the instant case. In that case there
25 was a plaintiff named Richter who had obtained a prepetition

1 judgment against Keene, which is an asbestos manufacturer. The
2 judgment was stayed when Keene obtained a supersedeas bond like
3 this case and then filed an appeal which was pending when the
4 petition in that case was filed.

5 Richter sought release from the stay to continue the
6 appeal, much like what we are trying to do here. And the Court
7 granted it and made some particular statements in that case
8 which I'd like to convey to the Court. First of all, like
9 Bowman, the Keene Court emphasized that each case is different,
10 and the particular circumstances of each case must be analyzed
11 to determine what is just for claimants, what is just for the
12 debtor, and what is just for the estate, not just the debtors'
13 reorganization effort.

14 The Keene Court also noted that while cause is not
15 always satisfied simply by alleging the supersedeas bond, it
16 frequently is the case. Thirdly that where, as here, the
17 continuation of the stay deprives the judgment creditor of the
18 ability to collect a judgment from a third party, and there is
19 no other source to collect from, a court will generally lift
20 the stay to allow the litigation to continue, in this case, the
21 oral argument on the appeal, which is the last step.

22 And lastly, the Keene Court noted that the state
23 court judgment was fixed and liquidated, which is exactly what
24 we have here for bankruptcy purposes, and that was a fact of
25 life that Keene could not ignore. The Court noted that the

1 prosecution of the appeal would actually expedite resolution of
2 Richter's claim and was, in fact, the only means by which Keene
3 could recover its collateral for the benefit of all creditors,
4 if it prevailed on the appeal; because, as here, Keene retained
5 a reversionary interest in the supersedeas bond which was
6 subject to divestiture if Keene prevailed. Similarly here, if
7 WCI prevails on its appeal, all rights in the collateral, we
8 believe, will revert to WCI and that will read down to the
9 benefit of WCI's other creditors. In short, allowing the
10 appeal to go forward, Your Honor, would work to the benefit not
11 only of my clients, but also WCI and other creditors and would
12 provide for a final resolution of the issues that we have with
13 WCI.

14 Lastly, Your Honor, I would like to draw to the
15 Court's attention the really heavy adverse economic impact this
16 is having on my clients. They moved into this house that was
17 built for them by WCI in 1999. They have spent a great deal of
18 time, effort and money, first negotiating and then litigating
19 this case. There's been a trial. There's been an appeal.
20 They had to borrow heavily to get to where we are now. They're
21 being debt serviced every single month, Your Honor, and it is
22 an extreme difficulty for them to continue to do this.

23 So for all of these reasons, we would respectfully
24 request that the Beaches' motion for relief from stay be
25 granted to permit the continuation of the appeal to oral

1 argument, and then if successful, the Beaches be allowed to
2 collect that judgment against the posted supersedeas bond that
3 was there for that purpose. Thank you.

4 THE COURT: Thank you.

5 MR. AVERCH: Thank you, Your Honor. Craig Averch on
6 behalf of WCI and the affiliated debtors. Your Honor, with
7 respect to the last statement made by Mr. Saxe, there is no
8 evidence to support hardship and I take that statement as
9 argument not as any evidence that's been presented before the
10 Court. Mr. Saxe makes some good points but he misses the most
11 significant point. The fact is, his clients do have a
12 supersedeas bond. The fact is, the supersedeas bond far
13 exceeds the amount of the judgments. The fact is, the
14 judgments continue to accrue interest at eleven percent per
15 annum, fully protected by the supersedeas bond.

16 So the fact is, his clients are protected. They're
17 protected by the supersedeas bond. The debtor recognizes that
18 the automatic stay is a temporary injunction, it's not
19 permanent. Reading the Court's ruling from Akin, we understand
20 that this Court takes each case on a case by case basis. This
21 case is easier than the Akin case. In this case, the Beaches
22 have the supersedeas bond. In this case, the Beaches are
23 accruing their judgments at eleven percent interest protected
24 by the supersedeas bond.

25 THE COURT: Well, not an investment they made

1 voluntarily.

2 MR. AVERCH: Your Honor, in this environment,
3 frankly, I think a lot of us would be happy with an investment
4 guaranteed by Westchester Fire Insurance that's accruing
5 interest at eleven percent per annum. The debtors, on the
6 other hand, are looking for the automatic stay. One of the
7 reasons that the debtors have had, to the extent the debtors
8 have had success in this case, is because of the automatic
9 stay. The automatic stay allows the general counsel, Ms.
10 Hastings, Mr. Purchik (ph.), the CRO, opportunities to develop
11 due financial introspection, to respond to seventeen page
12 information requests from the creditors' committee --

13 THE COURT: Well, let's say I agree with you. Let's
14 look at this particular situation, and each one comes up a
15 little differently. But in the Akin case I pushed it over to
16 December 17th hoping that by that time the debtor will have
17 developed some kind of protocol to suggest about how to address
18 all these prepetition lawsuits. And the typical protocol,
19 although I'm not intending to limit the debtor here in any way
20 and the committee, in terms of what they may propose, would
21 suggest an ADR type of procedure.

22 This is not the type of case, it seems to me, that
23 should be required to go into ADR. Here you have a plaintiff
24 who's won. Bond is posted to cover the judgment. I wonder
25 whether it would be fair to include this type of matter in

1 those type of procedures. Typically, the procedures cover
2 prejudgment situations at whatever stage litigation is or
3 litigation that's not yet been commenced. So I wonder whether
4 even if I were to -- not under the law of the case doctrine,
5 but say this is close to the Akin situation than another one,
6 and put it over, what would happen on December 17th with
7 respect to the Beaches --

8 MR. AVERCH: Your Honor --

9 THE COURT: -- that would put us in any different
10 posture than where we are today?

11 MR. AVERCH: The short answer is, Your Honor, I don't
12 know. The debtors are formulating an ADR procedure. If this
13 was put over to December 17th the Beaches would not be harmed
14 by that. The Court may be correct in its observation that
15 nothing changes. But we're looking at a period of six weeks.
16 We're not looking at a period of six months. And that extra
17 breathing space and looking at all 170 lawsuits as a whole in
18 developing an ADR procedure, it may very well be that the
19 Beaches case, the only resolution is to go forward with the
20 appeal.

21 But an ADR procedure also will provide -- most ADR
22 protocols provide an offer and settlement period where you have
23 an exchange of letters. That certainly doesn't cost any money.
24 And I can't see a reason why the Beaches' claim couldn't be
25 part of that initial ADR process. That offer and acceptance

1 procedure eliminates the appeal, eliminates a court of appeals
2 from having to deal with it, does not eliminate the Beaches'
3 ability to collect on the supersedeas bond. And I can't
4 imagine, at this moment, why they wouldn't be eligible for that
5 and why that wouldn't be helpful for them.

6 THE COURT: Well, are you telling me now that if the
7 Beaches were to prevail that the debtor would not oppose their
8 being able to move against the supersedeas bond to satisfy any
9 judgment?

10 MR. AVERCH: I don't -- the debtors do not contend
11 that the supersedeas bond is property of the estate. What we
12 do point out to Your Honor is that the supersedeas bond,
13 Westchester, holds a letter of credit that secures their
14 obligation. Certainly the letter of credit, if Westchester
15 pays on the supersedeas bond, draws on the letter of credit,
16 the letter of credit will be funded by the DIP lenders and will
17 be part of a secured claim against this estate. So in that
18 sense, the supersedeas bond does impact the estate.

19 The supersedeas bond itself, we're not arguing is
20 property of the estate that they cannot draw on. The debtors
21 are also cognizant of the sort of indirect preference analysis
22 that has been used by circuit courts in undoing obligations
23 that were not property of the estate based on a transfer that
24 was property of the estate, like a security interest transfer.
25 In this instance we've looked at it, and with the amendments to

1 the Bankruptcy Code since the security interest transfer, was
2 outside the ninety-day period, we don't even see a basis to
3 avoid the supersedeas bond. So we're not going there, Your
4 Honor.

5 What we're asking for is a limited breathing space.
6 We are formulating ADR procedures. The Court has set Akin for
7 the 17th. We would suggest that the Beaches be set for the
8 17th. They are protected by the supersedeas bond. We're not
9 trying to avoid it. And they may benefit from the offer and
10 acceptance process. And if the second stage of the ADR
11 procedure is a mediation, they may benefit from that as well.
12 They may not. They may elect to say that it's better for us to
13 go forward with the appeal, and on December 17th, we may agree
14 with them.

15 At this point, we have not had an opportunity to
16 fully formulate an ADR procedure, vet it with the committee,
17 get it filed with the Court. And again, Your Honor, there are
18 170 suits, and on December 17th we may well agree to go
19 forward. But at this stage of the case, Your Honor, we're
20 still early in the case. And as I hope the Court recognizes,
21 we've been able to accomplish a lot in a very short amount of
22 time under various difficult economic circumstances. And the
23 Beaches' case is not going to make or break the debtors, but on
24 the other hand, if you're weighing the balance of harms, which
25 is one of the things that the Court looks at, there is no harm

1 to the Beaches because they do have a supersedeas bond that's
2 60 or 70,000 dollars in excess of their combined judgments.

3 And on that basis alone, we think that a short
4 extension of the automatic stay to get us to the point where we
5 can propose an ADR procedure where the Beaches may decide that
6 it's in their interest rather than arguing a legal issue on
7 statute of limitations that they could lose on, they may be
8 interesting in pursuing that process as well as a potential
9 mediation process or not. But we would like to get to that
10 point where the parties, the debtors and the Beaches, could
11 look at the Court and say whether it's appropriate for them to
12 be within the ADR or outside of an ADR.

13 THE COURT: All right. Mr. Saxe, let me ask you
14 this. From the moment you're given the go-ahead to reschedule
15 the argument, how long will that take between the time you have
16 the go-ahead and the date an argument would actually take
17 place?

18 MR. SAXE: That, Your Honor, would be a function of
19 us getting an order from this Court and filing it with the
20 Second District Court of Appeals, and as I understand the
21 process, would put us in line with the next set of dates that
22 are available for them for hearing. I just don't know the
23 answer specifically to that. But hopefully it would be before
24 December of 2008. I don't know if that answers Your Honor's
25 question.

1 THE COURT: Actually, it does. All right. Any brief
2 rebuttal?

3 MR. SAXE: Just this, Your Honor. I did hear Mr.
4 Averch say that the Beach case won't make or break the debtor.
5 I think that's right. The Beaches will not benefit from ADR.
6 The Beaches have already went through a mediation pretrial,
7 Your Honor. We sat for a day and a half, or a full day rather,
8 with trial counsel for WCI, and we could not settle the case.
9 We went through a seven-day jury trial. We got a judgment that
10 was not all that we asked for, but it was a judgment, and we
11 got all the attorneys' fees and costs that we asked for.

12 The cases, I think, that I've cited to Your Honor are
13 fairly consistent in allowing these types of matters to go
14 forward, particularly where there's a supersedeas bond. We
15 would respectfully submit that in view of the fact that it does
16 not harm the debtor, it does harm the Beaches. I know I'm
17 making a little bit of argument, but if Your Honor would
18 indulge me, this really has had a very dramatic impact on them
19 financially, mentally and every other way. They need to get
20 this resolved.

21 We need to get it up on appeal and get it heard and
22 done. There's one issue on appeal. The statute of
23 limitations. We think the trial judge got it right when she
24 denied both their ore tenus motion at the conclusion of our
25 case as well as their motions at the end of the trial. We

1 think we're going to prevail. We just want to have an
2 opportunity to make that happen. Thank you, Judge.

3 THE COURT: All right. Thank you. I'm prepared to
4 make my ruling. As both parties have acknowledged, every
5 situation is different. And I frankly tend to agree with the
6 debtor that by resisting the first handful of motions that have
7 come on it's probably discouraged others from filing. But I
8 also have not changed my mind that as things are developing and
9 because additional motions, although not in any great number,
10 for relief have been filed, that December 17th ought to be the
11 date by which the debtor has some concrete suggestion.

12 I am inclined, just because of the overall
13 considerations of giving the debtor that brief breathing room,
14 to deny relief on an interim basis, but to have this motion
15 come back for a final hearing on the 17th. Now, that having
16 been said, I say to the debtors, I repeat what I said earlier,
17 and that is, this does not necessarily strike me as a case that
18 benefits from additional ADR procedures. And while I'm not
19 predeciding the issue, my suggestion to the debtors with
20 respect to this matter, to the extent you wish to informally
21 begin something, I would do so now with respect to the Beaches.
22 And Mr. Saxe, I will tell you, unless you intend to make an
23 evidentiary presentation on the 17th, you're welcome to --
24 you're always welcome to be here of course, -- but you're
25 welcome to join us by phone on that date to save yourself a

1 trip, if you wish.

2 MR. SAXE: I would do that. Thank you, Your Honor.

3 THE COURT: Okay. Are there any questions? Then
4 I'll ask counsel to confer and submit a form of order that
5 embodies that ruling.

6 MR. SCHLERF: Thank you, Your Honor. We have nothing
7 further this morning to present.

8 THE COURT: All right. Thank you all. That
9 concludes this hearing. Court will stand in recess.

10 (Proceedings concluded at 10:46 a.m.)

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I N D E X

RULINGS

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Motion of Beaches for 29 14
Relief from the
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an Interim Basis

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C E R T I F I C A T I O N

I Penina Wolicki, court approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

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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

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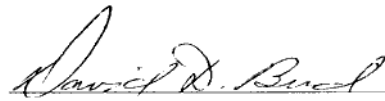
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