EXHIBIT A

TRANSCRIPT OF DECEMBER 18, 2009, HEARING

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In Re:	**Case No. 09-37010-sgj-11**
	Chapter 11
ERICKSON RETIREMENT COMMUNITIES, LLC,	Dallas, Texas
	Friday, December 18, 2009
Debtor.	9:30 a.m. Calendar
	- MOTIONS
	- APPLICATIONS TO EMPLOY

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE STACEY G.C. JERNIGAN,
UNITED STATES BANKRUPTCY JUDGE.

APPEARANCES:

For the Debtor:	Thomas R. Califano DLA PIPER, LLP 1251 Avenue of the Americas New York, NY 10020-1104 (212) 835-6000
For the Debtor:	Vincent P. Slusher DLA PIPER, LLP 1717 Main Street, Suite 4600 Dallas, TX 75201 (214) 743-4572
For the Official Committee of Unsecured Creditors:	Sam Stricklin Andrew Schoulder BRACEWELL & GIULIANI, LLP 1445 Ross Avenue, Suite 3800 Dallas, TX 75202-2711 (214) 758-1095
For the Official Committee of Unsecured Creditors:	Andrew Schoulder BRACEWELL & GIULIANI, LLP 1177 Avenue of the Americas, 19th Floor New York, NY 10036-2714 (212) 508-6132

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For the NSC NFPs:	Thomas J. Francella, Jr. WHITEFORD, TAYLOR & PRESTON, LLP 1220 N. Market Street, Suite 608 Wilmington, DE 19801 (302) 357-3252
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APPEARANCES, cont'd.:

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For MSRESS III Dallas Campus, LP, Denver Campus, LLC and Kansas Campus, LP, Strategic Ashby Ponds Lender and Strategic Concord:	Artoush Varshosaz BAKER BOTTS, LLP 2001 Ross Avenue Dallas, TX 75201-2980 (214) 953-6479
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APPEARANCES, cont'd.:

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DALLAS, TEXAS - DECEMBER 18, 2009 - 9:36 A.M.

THE COURT: All right. We're ready to begin the Erickson Retirement Communities settings this morning, Case No. 09-37010. Let's start by getting appearances from counsel, please. First, in the courtroom?

MR. CALIFANO: Good morning, Your Honor. Tom Califano, DLA Piper, on behalf of the Debtors.

THE COURT: Good morning.

MR. SLUSHER: And Vincent Slusher with DLA Piper on behalf of the Debtors.

THE COURT: Okay. Good morning.

MR. STRICKLIN: Good morning, Your Honor. Sam Stricklin and Andrew Schoulder on behalf of the Official Committee of Unsecured Creditors.

THE COURT: Good morning.

MS. RUCKMAN: Good morning, Your Honor. Dee Ruckman, Gardere, on behalf of M&T Bank as collateral agent.

THE COURT: Good morning.

MR. SWETT: Good morning, Your Honor. Brian Swett on behalf of Bank of America, National Association, as agent for the Dallas project.

THE COURT: Okay. Good morning.

MR. CHEVALLIER: Your Honor, Mark Chevallier and Tom Francella on behalf of the NSC NFPs.

THE COURT: Okay.

MS. TANCREDI: Good morning, Your Honor. Lisa Tancredi on behalf of PNC Bank, National Association.

THE COURT: Okay. Good morning.

MR. MORAN: Good morning, Your Honor. Matt Moran and Molly Sorg with Vinson & Elkins on behalf of HCP, Inc.

THE COURT: Okay. Good morning.

MR. CONNOP: Good morning, Your Honor. Tom Connop from Locke Lord on behalf of MSRESS III Dallas Campus, LP, Denver Campus, LLC, and Kansas Campus, LP. I believe Matthew Summers of the Ballard Spahr firm is on the line as well.

THE COURT: Okay. Mr. Summers, are you there?

MR. SUMMERS: I am, Your Honor. Good morning.

THE COURT: Okay. Good morning.

MR. CONNOP: Thank you, Your Honor.

MR. BOONE: Good morning, Your Honor. Bill Boone on behalf of Wilmington Trust as agent for the corporate revolver lenders.

THE COURT: Okay. Good morning.

MR. VARSHOSAZ: Good morning, Your Honor. Artoush Varshosaz of Baker Botts on behalf of the Michigan Retirement System entities.

THE COURT: Okay.

MR. VARSHOSAZ: And Strategic Ashby Ponds Lender LLC and Strategic Concord Landholder, LP.

THE COURT: Okay. Good morning. All right. Now,

quickly, if we could have appearances from the people on the phone.

MR. MARKS: Jeffrey Marks, Squire Sanders & Dempsey, for Sovereign Bank.

THE COURT: Okay. Good morning.

MR. KANNEL: William Kannel for Wells Fargo Bank and U.S. Bank as indenture trustee.

THE COURT: Okay. Next?

MS. WALKER: Good morning, Your Honor. Adrienne Walker on behalf of Capmark Finance, Inc.

THE COURT: Okay. Next?

MR. ROSE: Good morning, Your Honor. Jorian Rose for Redwood.

THE COURT: Okay. Next? Anyone else?

A VOICE: John Cusack for DLA Piper.

THE COURT: Okay. Anyone else?

(No response.)

THE COURT: All right. Mr. Califano, we have six matters that are set. How did you want to proceed with them this morning?

MR. CALIFANO: Well, Your Honor, I think we have -- most of these matters have been resolved.

THE COURT: Okay.

MR. CALIFANO: We can get to them in order. We are qualifying our objection to Protiviti, so there's -- I don't

think there's any necessity for an evidentiary hearing.

We have the carryover issues related to the DIP that related to the NSC.

THE COURT: Uh-huh.

MR. CALIFANO: And my suggestion would be -- oh, we also have, I believe, resolved the HCP 2004 examination. They're in the courtroom represented today, and what we have agreed to, and we need to document it, but it is a voluntary information-sharing. And what we've done with HCP -- and basically, you know, I'm making the offer open to everyone in this process -- to get into the data room. If they sign a confidentiality agreement, we'll get them into the data room. And then if there's further information they may require, questions that aren't answered in the data room, then to ask us informally, and if there's an issue then we'd come back to the Court.

So that's, I believe, the resolution of the HCP matter. I'm making that as an open invitation. What I would suggest, with the Court's approval and consent, is to go through the non-objected matters, and my partner Mr. Slusher can go through them, and we'd hold the DIP issue and a status to the end of the calendar. Because I'd like to bring Your Honor up to date on the auction process, --

THE COURT: Okay.

MR. CALIFANO: -- where we are, some issues that we

see may come up next Tuesday, and how they relate to the DIP issues that remain. So we'd just hold that to the end of the calendar, and then just I would handle the Protiviti, but my partner Mr. Slusher will handle the rest.

THE COURT: Okay. That sounds appropriate. We have counsel for HCP getting up. Maybe we can --

MR. MORAN: Matt Moran.

THE COURT: -- get his comments about your proposal on that.

MR. MORAN: Your Honor, and I spoke with Latham & Watkins, which is lead counsel in this matter. I'm pinch-hitting for Bill Wallander today.

THE COURT: Okay.

MR. MORAN: But my understanding is that we do have access to the data room, but that's not exactly all that we need, and we need a little bit more than that. If we could get an agreement that they would respond to our document requests -- we've significantly narrowed it; I think there's just four or five document requests -- as part of our 2004 exam, and then if we had those and had, you know, say, seven days to look at them, and then we could revisit the issue as to whether or not we need the actual 2004 exam of an individual. We could do it that way.

But access to the data room does not give us exactly what we need to investigate here.

MR. CALIFANO: And Your Honor, I anticipated that. That's why I thought people -- my suggestion to people is go to the data room first. If there is something that you don't see in there, let us know.

So we have no problem with the proposal that was laid out by HCP. We'll respond to the rest of the document requests and, you know, we'll see in a week or so whether we're in agreement or not.

THE COURT: Okay.

MR. MORAN: Your Honor, that's fine. What's proposed, in terms of time frame, --

MR. CALIFANO: Why don't we talk about this, you know, afterwards?

MR. MORAN: Okay. That's fine. Obviously, we're on a tight time frame, as Your Honor knows. And to the extent that we need to examine someone about the documents -- obviously, I know there's a lot going on in the next week. We're not expecting them to have the documents to us before the auction. But we would like to have a -- sort of a designated time frame where we'd know when we'll have those documents, so that we can look at them and review them and see whether we need further information.

THE COURT: Okay. Well, --

MR. CALIFANO: We'll do it as fast as we can with the holidays and everything. Two weeks? Is two weeks --

THE COURT: Two weeks?

MR. MORAN: That'll be fine, Your Honor.

THE COURT: Okay. So why don't you all upload an order partially resolving motion, just memorializing that you're going to produce the documents in two weeks, and you'll request a further setting on this if you want more relief.

MR. MORAN: That'd be fine, Your Honor.

THE COURT: Okay.

MR. CALIFANO: Thank you, Your Honor.

THE COURT: Very good.

MR. SUMMERS: Your Honor, this is Matthew Summers. I wonder if I can just inject myself for a moment on the issue.

THE COURT: Okay.

MR. SUMMERS: HCP, like the MSRESS III entities that I represent, engaged in a series of sale-leaseback transactions. We're the mezzanine lender to various retirement communities. And while we haven't filed our own 2004 exam motion, I think that the documents that HCP is seeking are -- you know, we, being similarly positioned as to our own communities, would be interested in obtaining, you know, similar discovery along the lines of what HCP is given. And I had spoken briefly with Mr. Califano about this a day or two ago, and I understand this morning he's making an open invitation to the process, and I just wanted to confirm that that would -- that invitation included the MSRESS III entities.

THE COURT: Okay. As to going in the data room if you sign a confidentiality agreement?

MR. SUMMERS: Right. And as to, you know, receiving documents relating to the issues that HCP has raised in their 2004 exam motion.

MR. CALIFANO: Well, Your Honor, I don't think it's the appropriate forum.

THE COURT: Yes.

MR. CALIFANO: But, yeah, the invitation is open. People should just contact me and I'll deal with them.

THE COURT: Okay. So, you know, if you feel the need to file your own motion, you may. But right now, he's made the offer of the data room being available. And if you don't feel that gets you where you need to be, such as HCP expressed, you'll have to file a motion. But I'm not going to put on a burden of making copies for everyone if the data room is there.

MR. SUMMERS: Understood. Thank you, Your Honor.

THE COURT: All right. Thank you. All right. Mr. Slusher?

MR. SLUSHER: Good morning, Your Honor. Your Honor, we have two separate motions on this morning that no opposition has been filed to. The motion for entry of an order authorizing the Debtors to reject certain unexpired leases and related listing agreements. In this motion, Your Honor, the Debtors seek authority to reject six leases.

THE COURT: Okay.

MR. SLUSHER: A lease for property located at 705 Digital Drive in Linthicum, Maryland. 991 Corporate Boulevard, also in Linthicum, Maryland. A property located at 817 Maiden Choice Lane in Catonsville, Maryland. 4652 Wilkins Avenue in Catonsville, Maryland. And 57 -- I mean, 57 Bedford Street, Lexington, Massachusetts. And a hangar/office/shop use permit at Baltimore Washington International Airport.

Your Honor, each of these properties has either been abandoned by the Debtors or, in one instance, the property was never moved into by the Debtors. So each of the leases represent properties which are not occupied by the Debtors and not used by the Debtors in the course of their day-to-day operations postpetition.

The listing agreements that are identified in the motion are listing agreements involving seeking sublease tenants to 991 Corporate Boulevard, 4652 Wilkins Avenue, and then 5525 Research Park Drive in Catonsville, Maryland. I want to make clear that in the -- with the Research Park Drive location, we're simply seeking authority to reject the listing agreement. We're not seeking any authority to reject any leases --

THE COURT: Okay.

MR. SLUSHER: -- relative to that property.

No opposition to the motions have been filed, Your Honor. Mr. Rundell is present in the courtroom, and if the Court will

accept a proffer of his testimony, --

THE COURT: That's fine.

PROFFER OF TESTIMONY OF PAUL RUNDELL

MR. SLUSHER: Present in the courtroom is Mr. Paul Rundell, who is the Executive Vice President-Restructuring for the Debtors, Erickson Retirement Communities. If Mr. Rundell were called to testify, he would testify under oath that the six unexpired lease agreements that the Debtor seeks to reject all represent properties that the Debtors do not occupy now or have never occupied; that the properties are not used by the Debtors in the ordinary course of their business to fulfill any of their obligations as debtors in the cases; that the properties simply sit vacant; and that is in the best interests of the Debtors, the estates, and in the Debtors' business judgment, it is proper to reject these leases effective as of the later of November 23, 2009, which is the date the motion was filed, or the date the Debtors vacated the premises. And that would be the substance of Mr. Rundell's proffer on this point, Your Honor.

THE COURT: All right. Mr. Rundell, could you stand and raise your right hand? Do you swear the proffer just made was the truth, the whole truth and nothing but the truth, so help you God?

THE WITNESS: I do.

THE COURT: Okay. Does anyone wish to cross-examine

Mr. Rundell? (Pause.) I thought Ms. Tancredi was getting up to cross-examine him for a minute.

(Laughter.)

THE COURT: All right. Well, notice appearing proper and there being no objections and this otherwise appearing to be an exercise of reasonable business judgment by the Debtor and in the best interests of the estate, the Court will approve this motion to reject these six unexpired leases, as well as the listing agreements listed. The rejection will be effective on the later of November 23, 2009 or when the properties are abandoned, and it sounds like that will be November 23rd for likely all of them.

MR. SLUSHER: I believe that's correct, Your Honor.

THE COURT: All right. We'll look for your order on that.

MR. SLUSHER: Thank you, Your Honor.

THE COURT: Okay.

MR. SLUSHER: Your Honor, the second motion is the Debtors' motion for order authorizing retention of professionals utilized by the Debtors in the ordinary course of business.

THE COURT: Okay.

MR. SLUSHER: And we have received an informal response from Mr. McElreath, the United States Attorney, in connection with this motion, Your Honor.

THE COURT: Okay.

MR. SLUSHER: And his concerns were twofold, the first of which was he would like the cap of ordinary course professionals, he would like the monthly fee to be capped at $50,000 without the necessity for filing a 327 application.

THE COURT: Okay. $50,000 rather than the $90,000 proposed?

MR. SLUSHER: Rather than the $90,000 --

THE COURT: Okay.

MR. SLUSHER: -- that we requested. And he also was of the opinion that PricewaterhouseCoopers should file a retention application under Section 327, in any event.

I would like to point out to the Court that the Pricewaterhouse inclusion on our list of ordinary course professionals was in error. We should withdraw that. They will not be retained in this case by the Debtors.

THE COURT: Okay.

MR. SLUSHER: So that resolves that issue, Your Honor.

We have attempted to reach out to Mr. McElreath in connection with inserting language in the order that satisfies his other objections, and we will continue to do that before we upload an order, Your Honor.

Other than that, Your Honor, this motion was filed on November 25th and was noticed for hearing for today. We've received no opposition or objections to this motion. And the

Debtors would request that the Court approve the retention of ordinary course professionals subject to the $50,000 a month limitation on an average monthly basis and a withdrawal of PricewaterhouseCoopers from the list of ordinary course professionals.

THE COURT: All right. Was Mr. McElreath in the courtroom today? I don't see him.

(No response.)

THE COURT: All right. As far as the aggregate of $540,000, is that what you still propose?

MR. SLUSHER: It is, Your Honor.

THE COURT: Okay.

MR. SLUSHER: But I think that if you remove -- I think the number will be less than that, but it is what we're proposing on the aggregate.

THE COURT: Okay. And again, to understand, no application is needed so long as people stay under the cap, --

MR. SLUSHER: That's --

THE COURT: -- and then if they bust the cap, you would file a 327 application?

MR. SLUSHER: That's correct, Your Honor.

THE COURT: All right. And then you had the annex attached showing who these people are. If more are added --

MR. SLUSHER: We will add --

THE COURT: -- during the case, you will supplement?

MR. SLUSHER: We'll supplement the ordinary course.

THE COURT: You'll file a notice?

MR. SLUSHER: Yes.

THE COURT: Okay.

MR. SLUSHER: We will, Your Honor.

THE COURT: All right. Does anyone wish to be heard with regard to this motion? Mr. Boone?

MR. BOONE: Your Honor, the only question I have is more of a clarification question, and that is whether or not these amounts are already included in the prior-approved DIP budget.

MR. SLUSHER: And they are, Your Honor.

THE COURT: They are?

MR. SLUSHER: They are.

THE COURT: Okay. Anyone else?

(No response.)

THE COURT: All right. Well, the Court is prepared to approve and will approve this motion regarding Debtors' retention of ordinary course professionals. The Court will accept the modification that has been proposed by the U.S. Trustee reducing the cap to $50,000 a month as what it takes to be defined as an ordinary course professional. The Court will also accept the announcement that PricewaterhouseCoopers has been withdrawn as an ordinary course professional. But other than that, the Court will approve this procedure pursuant to

its authority under 363 and 105.

All right.

MR. SLUSHER: Thank you, Your Honor. That's all the uncontested matters for the Debtor today, Your Honor.

THE COURT: Okay. So we're down to just the Committee, two professionals, as well as DIP?

MR. SLUSHER: Yes, Your Honor.

THE COURT: All right. Mr. Stricklin or Mr. Schoulder?

MR. SCHOULDER: Good morning, Your Honor.

THE COURT: Good morning.

MR. SCHOULDER: Andrew Schoulder of Bracewell & Giuliani for the Official Committee of Unsecured Creditors.

Before the Court is the retention [*sic*] to retain Bracewell & Giuliani as proposed counsel to advise the Committee. On November 2, 2009, Bracewell was selected by the Committee to be its proposed counsel. We are a full-service firm with over 400 attorneys. We have extensive restructuring experience representing Creditors' Committees, both on an official and *ad hoc* basis.

In light of the complexity of these cases, for the Committee to effectively do its job and exercise its duties, the need for counsel is vital. Given that the cases were filed in Dallas and the company's headquarters are in Baltimore, we believe that Bracewell's presence in Dallas and New York and

D.C. create a very cost-efficient representation for the benefit of the estate.

We believe that our hourly fees are reasonable and in line with firms of the same size and sophistication.

We have conducted an extensive search of our client databases and determined that there are no conflicts of interest that would disqualify us from representing the Committee and being disinterested.

As disclosed in the declaration of Mr. Stricklin, Bracewell represents certain clients in matters that are adverse to certain general unsecured creditors of the Debtors. We've identified those parties as Microsoft Licensing, IBM and GE Appliances. These engagements have no relation to the Debtors' estates.

As also disclosed in Mr. Stricklin's declaration, between 2007 and 2009, Bracewell has represented certain of the Debtors' prepetition secured lenders. None of those representations involved the Debtors or any of their affiliates, and each of those representations for each of those lenders represented less than one percent of Bracewell & Giuliani's overall revenues for those years.

THE COURT: Okay.

MR. SCHOULDER: We will obviously continue to periodically check our client databases to ensure that there are no issues that pop up after today, and to the extent that

something does pop up, we will report to the Court.

As of present, we do not believe that there are any objections that have been filed with respect to Bracewell's retention. We note that Capmark, Bank of America and PNC have filed limited objections and reservations of rights. We understand that the objections to Bracewell's retention are more a reservation of rights, and we don't believe there's really any need to actually address the substance of those reservations at this time.

Just one clarification. In terms of PNC's actual objection, they indicate that Bracewell is seeking *nunc pro tunc* treatment to the petition date. We checked our application, we checked the proposed order filed with the Court, and it's clear that we state that we're only seeking *nunc pro tunc* treatment to November 2nd. And obviously, if there was an inadvertent typo in any of the documents, that was not intended and it would be November 2, 2009.

Given that there are no other objections, we would ask the Court to approve Bracewell and Giuliani's application to serve the Committee as counsel.

THE COURT: Okay. Thank you. Who wishes to be heard with regard to this application?

MR. SWETT: Good morning, Your Honor. Brian Swett on behalf of Bank of America.

Mr. Schoulder is correct. Bank of America filed a limited

1 objection to the Committee's request to retain Bracewell as
2 counsel. I think he's also correct that the substantive
3 matters raised with respect to that reservation are not
4 necessarily before the Court today. We wanted to preserve them
5 for the record in the event that, in our evaluation and
6 subsequently the Court's evaluation of requests by
7 professionals for reimbursement of fees and expenses, it
8 becomes relevant what interests the Committee was protecting
9 and the magnitude of claims and the identity of creditors for
10 whom they were acting.
11 So, with those rights reserved on the record through our
12 objection, he is correct, and we have no further objection to
13 the Committee's retention of Bracewell.
14 THE COURT: Okay.
15 MR. SWETT: Thank you, Your Honor.
16 THE COURT: Thank you. Anyone else wish to be heard?
17 MS. TANCREDI: Good morning, Your Honor. Just to echo
18 a few points that Mr. Swett made, again, it's not a question
19 for today, but PNC has concerns and questions about the
20 appropriateness of appointment of Committees at the project
21 level. And Your Honor can expect to hear that, you know, in
22 the coming days, that when one looks at the debt that's in
23 Schedule F, the vast majority of the unsecured debt actually
24 has been assigned or subordinated to PNC, or I guess whoever
25 the project lender is for that particular project, and the

remaining trade debt is *de minimis*.

So, there are questions of standing of the Committee and cost-benefit and reasonableness of the fees. So we just wanted to preserve all of those rights in connection with the application for the Committee to employ Bracewell and Protiviti.

We don't have -- just to clarify for future times, PNC does not have an objection to appointment of a Committee at the corporate level, but just at the project level, where the debts are different. And PNC reserves its rights on all these points.

And in addition, just so that PNC is clear for the future, PNC would object to any surcharge of its collateral to pay the Committee's fees, whether they be incurred by the lawyers or the accountants.

So, with those reservations, I cede the podium.

THE COURT: Okay. Anyone else?

MS. WALKER: Your Honor, this is Adrienne Walker.

THE COURT: Just a minute. We'll get to the phone after we hear all the people in the courtroom. Thank you.

MS. WALKER: Thank you.

MR. BOONE: Thank you, Your Honor. Bill Boone on behalf of Wilmington Trust as agent at the corporate level.

A variation on the same theme. I would note that, you know, we have nine project level debtors. We have one

corporate debtor. Presumably, the Committee, it would be representing all ten separate entities. And of course, we share some of the same concerns. All of the lenders, both at the corporate and the project levels, are already fully booked up with professionals. Counsel have been living this case for the better part of a year, and they're the ones, if anybody has, in a way, the largest unsecured portion, to the extent they're undersecured at any particular level. And so we share the same concern that, to a large degree, we want to be mindful that the Creditors' Committee, although we're not objecting *per se* to it, they have less range of action that it needs to take in this case than in a normal case, given the nature of this particular case. And we certainly think that to the extent they do any work in the case that's of benefit, that a majority of that is probably going to be at the project level, since there are nine more debtors than there is one corporate debtor.

THE COURT: Okay.

MR. BOONE: We'll have that fight later, Your Honor.

THE COURT: Sounds like it's going to be a fight, too. All right. Mr. Stricklin?

MR. STRICKLIN: Well, somebody on the phone wanted --

THE COURT: Oh, was there someone on the phone who wanted to be heard on this issue?

MS. WALKER: Yes, Your Honor. This is Adrienne Walker on behalf of Capmark Finance, Inc.

THE COURT: Yes.

MS. WALKER: Your Honor, I will not repeat the arguments from -- PNC and Bank of America made, but we too have filed a similar reservation of rights pleading, and we'll hold for another day those issues, --

THE COURT: Okay.

MS. WALKER: -- but reserve our rights on the record.

THE COURT: Okay. Thank you, Ms. Walker.

MR. STRICKLIN: Your Honor, Sam Stricklin for the Committee.

They've made their reservation of rights. I'm not sure how it affects the employment. There's a Committee today where it needs counsel. We've been selected as its counsel. We'd like the Court to sign the order. I don't think anything needs to change about the order.

THE COURT: Okay.

MR. STRICKLIN: If they file a motion, we'll deal with it. I'm not going to belabor it. I mean, I've got points to make about the things they said, but we'll deal with it if they file a motion.

THE COURT: Okay. Thank you.

All right. The Court is going to approve the application of the Committee to employ Bracewell & Giuliani. It will be *nunc pro tunc* back to November 2, 2009. That request seems to be reasonable and well taken. The Court specifically finds

that the connections that have been identified in the application and affidavits do not appear to create an adverse interest or a lack of disinterestedness, and this otherwise appears to be in the best interests of the estate.

The Court duly notes all of the reservations of rights that have been articulated, and certainly it will be for another day to discuss reimbursement of fees and allocation among estates of the reimbursement.

All right. So that leaves the financial advisor --

MR. STRICKLIN: Your Honor, we'll take one more look at our order and upload it today.

THE COURT: Okay. Thank you.

Protiviti's application?

MR. SCHOULDER: Your Honor, as Mr. Califano indicated before, I believe that he is going to withdraw his objection with certain reservations on the record. That would leave the objections of PNC Bank, Bank of America and Capmark as the only parties having objected to Protiviti's retention. And their objections, they deal with the flat fee that is being sought by Protiviti in its application, and I think it's important for the Court to understand how that flat fee came about, which takes us back to the interview process that the Committee undertook to select a financial advisor.

Prior to selecting a financial advisor, the Debtors had indicated to the Committee that they did not think that a

1 financial advisor for the Committee was necessary. The
2 Committee did undertake a review of whether that was the case,
3 and they determined that, based upon the complexity of the
4 case, as testified by many of the Debtors' professionals and
5 every party that has appeared before this Court, that a
6 financial advisor was absolutely necessary for them to
7 effectively do their job and understand what's happening with
8 this case and the direction it's taking.
9 But mindful of the Debtors' concerns for the costs, as part
10 of the interview process, the Committee made each of the
11 financial advisers interviewing for the position to provide it
12 with a flat fee proposal as opposed to an hourly fee proposal.
13 It was the Committee's determination that a flat-fee proposal
14 would actually assist the estate in minimizing costs, whereas,
15 you know, there is no cap on an hourly fee, obviously, subject
16 to 330 reasonableness review.
17 But with that in mind, the Committee undertook to negotiate
18 and interview several candidates over a course of several
19 hours. And after interviewing these candidates, the Committee
20 ultimately selected Protiviti, Inc. because of its experience
21 in restructuring generally, representing Committees, and its
22 experience in the industry, as well as because it had the most
23 competitive and attractive financial arrangement. And that
24 arrangement is a $150,000 flat fee for the first four months of
25 the case, and $100,000 thereafter, recognizing the timeline set

by the Debtors for the process, you know, their sale process and their plan process.

In response to the objections of PNC and Bank of America and Capmark with respect to the flat fee, we did approach Bank of America and PNC this morning with a compromise that Protiviti agreed to last night, which was that they would agree to go on an hourly basis up to a cap of $150,000. To the extent that in any given month they do not use the full amount of that cap, they have the ability to roll that unused portion over to another month. And that was a proposal that we had made to try to resolve the issues with respect to Protiviti's retention. And I don't believe that that is acceptable to PNC and Bank of America.

However, we believe that the compensation is reasonable, given the nature of the role that they're going to have to undertake, the amount of work they're going to have to undertake, and especially in light of the fees and success fees being charged by other professionals in these cases.

Protiviti has undertaken a review of their client database. They have determined that they are disinterested. There are no conflicts. And we believe that their retention is absolutely necessary and that the Court should approve the retention of Protiviti as financial advisor for the Committee.

THE COURT: Let me ask about one other thing. There has been an objection at least by the Debtor to the liability

limitation. There's an indemnification provision, and then a maximum liability of two times charges. Is there any change with regard to that proposal?

MR. SCHOULDER: Protiviti would be willing to take that limitation of liability provision out, as long as it has the same level of indemnification provisions that are benefiting the Debtors' financial advisor and investment bankers.

THE COURT: Okay. All right. Who wishes to be heard with regard to this application?

MR. CALIFANO: Good morning, Your Honor. Tom Califano, DLA Piper.

And I just want to -- that's acceptable to us on the indemnification.

THE COURT: Okay.

MR. CALIFANO: But I would just remind everyone that what Houlihan and A&M have agreed to is that any indemnification claim would be made on application to the Court.

THE COURT: Right.

MR. CALIFANO: So they, in connection with indemnification claims, have agreed to submit themselves to this Court's jurisdiction.

THE COURT: Okay.

MR. CALIFANO: Your Honor, our objection is not to

Protiviti. We have no problem with the firm or its professionals. Our issue is, and was before they were retained -- and it's correct: we asked the Committee not to retain a financial advisor, because what we would hope -- we had hoped to do was allow them access under some protocol with -- to Houlihan and A&M, and try and get past that. Because I do think there is a role for Committee counsel to play. I don't think there's a role for a financial advisor to play. And I think, when we talk about the bids, I think that'll be made clear.

That being said, we're not objecting to the retention. We are, however, asking that the Court not preapprove this $150,000 a month which decreases to $100,000 a month, because we don't think there is a reasonable justification. And we'd like to reserve all our rights to object to the fees, in part or in total, because we don't believe that it's necessary or reasonable for the Committee to have a financial advisor. But we'll withdraw our objection now, subject to our right to bring all these issues up again when Protiviti files a fee application.

THE COURT: Okay. Thank you. Who else wishes to be heard?

MR. SWETT: Thank you, Your Honor. Bank of America is prepared to proceed on the same basis as the Debtors. We have no objection to the retention by the Committee of Protiviti.

We share the Debtors' sense that it's not necessary, as a practical matter, in this case. However, we will withdraw the objection, subject to a reservation of rights to object to the reasonableness and other characteristics of any fee application, and we think it would be improvident for the Court to approve those fees in advance at this point.

THE COURT: Okay.

MR. SWETT: Thank you, Your Honor.

THE COURT: Thank you. Ms. Tancredi?

MS. TANCREDI: Thank you, Your Honor. I echo the comments of Mr. Swett and Mr. Califano, and join their arguments. In addition, PNC raises the same reservations as were raised in connection with the Bracewell retention.

With regard to the fee cap, there is no evidence that a flat -- there's no evidence that a flat fee is reasonable, and it's an inquiry best made retrospectively, not prospectively. So, we believe that the fees should be hourly, not subject to a cap.

Thank you, Your Honor.

THE COURT: Okay.

MR. BOONE: Just a --

MS. WALKER: Your Honor, this is Adrienne Walker for Capmark Finance. May I proceed?

THE COURT: Just a minute. We have another courtroom comment.

MS. WALKER: Thank you.

THE COURT: Okay.

MR. BOONE: Thank you, Your Honor. Bill Boone once again for Wilmington Trust, as agent.

We'd just adopt the same arguments and reservations as the others.

THE COURT: Okay.

MR. BOONE: Thank you.

THE COURT: Thank you. Anyone else in the courtroom?

(No response.)

THE COURT: All right. Ms. Walker?

MS. WALKER: Your Honor, again, Adrienne Walker on behalf of Capmark Finance, Inc.

Your Honor, we too filed a limited objection and echo the comments of DLA and -- Debtors' counsel and the Bank of America and PNC's arguments, and would ask that the preapproval of $150,000 up front not be approved, but rather dealt with retrospectively when a determination of the reasonableness can be determined.

THE COURT: All right. Anyone else in the courtroom? (No response.) Mr. Stricklin?

MR. STRICKLIN: Your Honor, just to take these things up in order, or maybe out of order: on the indemnity, the same as with Houlihan and Alvarez is what they'll live with. And part of that -- Mr. Califano mentioned you had to file a motion

to get the indemnity. But I thought part of that was also, before somebody brings a claim against them, they have to file a motion and ask your permission to bring a claim against --

THE COURT: That's right. It's essentially an injunction --

MR. STRICKLIN: Right.

THE COURT: -- against suing any of these people until you've asked permission from the Bankruptcy Court. And I --

MR. STRICKLIN: And I would point out, in the 'for what it's worth' category, there's a case that came out a couple of months ago. You've probably heard of it: *Pacific Lumber*.

THE COURT: Uh-huh.

MR. STRICKLIN: The buzz around town, I would say, one of the things the Fifth Circuit says in that case is that Committees ought to have -- they take away the debtor releases, they take away the bank releases, but they say a Committee ought to have immunity. And if anybody ever filed a motion, I think we would be talking about that case.

As far as whether or not we need an FA, I think that issue is no longer before you, so I will say people must be a lot smarter than me, because I don't think I could get through this case without the help of an FA. There's a lot of stuff.

The fees, Mr. Schoulder told you what -- they're willing to do that. Protiviti is willing to go on an hourly basis. We

offered that before; we're offering it to the Court as well.

THE COURT: No $150,000 up front? Just --

MR. STRICKLIN: Hourly basis.

THE COURT: -- hourly, --

MR. STRICKLIN: Now, PNC --

THE COURT: -- subject to that cap?

MR. STRICKLIN: Well, PNC said they shouldn't be subject to a cap, which kind of amazed me. I don't -- I'm not sure if she -- I don't know. That doesn't seem to be in the best interests of the estate. Hourly, $150,000 a month cap. Unused portion: if they only bill $125,000, say, it's not 'use it or lose it;' it rolls over. Okay?

THE COURT: Uh-huh.

MR. STRICKLIN: And the application, as far as review at the end, the application that was filed stated that it would be subject to 330 review, just like my fees, Mr. Califano's fees, and everybody else's fees. So I'm not sure there's anything really to say about that. We're all subject to 330 review.

THE COURT: Yes. You were pushing for that at the last hearing, as I recall.

MR. STRICKLIN: Yes, we had a long time to talk about that.

THE COURT: Yes. Yes. All right. Ms. Tancredi, I don't know if you misspoke or what.

MS. TANCREDI: I did misspeak, and I just want to clarify. What I meant to say --

THE COURT: You want the cap?

MS. TANCREDI: Thank you, Your Honor.

THE COURT: You want hourly and you want the cap?

MS. TANCREDI: The problem I see with the carryover of the cap concept is that presupposes that $150,000 or $100,000, whatever month it may be, is reasonable.

THE COURT: Okay.

MS. TANCREDI: And, you know, reasonable is reasonable.

THE COURT: You don't want that implication or inference?

MS. TANCREDI: Exactly, Your Honor.

THE COURT: But it --

MS. TANCREDI: I do -- I mean, it shouldn't be any more than $100,000 or $150,000.

THE COURT: Well, that's -- yes. I think that's what he meant by the cap.

MS. TANCREDI: Thank you.

THE COURT: All right. The Court will approve the Committee's application to employ the financial advisor under the modified terms as discussed here.

First, the Court does believe that it's reasonable and there's a necessity for this and it's in the best interests of

1 the Committee and its constituency and the estate. The Court
2 finds that none of the connections that may have been
3 identified create an adverse interest or lack of
4 disinterestedness.
5 And just to be clear about the modified terms the Court is
6 approving, first, there will be no $150,000 upfront lump sum
7 payment at the beginning of the engagement. Rather, the firm
8 is going to bill on an hourly basis, keep time records so that
9 the reasonableness of their labor and services can be assessed.
10 Their hourly fees will be subject to a $150,000 per month cap
11 the first four months, then going to $100,000 a month
12 thereafter.
13 So this is not preapproval under 328(a). There will be a
14 330 review available at the end to assess the reasonableness of
15 the fees and expenses.
16 The Court also will clarify that the indemnification with
17 regard to Protiviti will work the same as the Debtors'
18 professionals'. In other words, indemnification is there, but
19 any party in interest who desires to sue Protiviti with regard
20 to their actions in this case must first seek permission from
21 this Court.
22 And the two-times maximum liability cap is not being
23 approved. So there will be no limitation on liability as
24 described in the application.
25 All right. And again, everyone's rights are reserved to

talk about how fees are allocated at the end of the day among estates.

MR. STRICKLIN: Your Honor, the only thing I didn't hear you mention is whether they can roll over unused amounts.

THE COURT: The Court will approve that, yes.

MR. STRICKLIN: Thank you, Your Honor.

THE COURT: The Court approves that as reasonable. All right. Mr. Califano?

MR. CALIFANO: Yes, Your Honor.

THE COURT: Now for the DIP.

MR. CALIFANO: Thank you.

THE COURT: By the way, I did sign the DIP order last night, --

MR. CALIFANO: I saw that.

THE COURT: -- and it showed up this morning, I think.

MR. CALIFANO: I saw that, Your Honor. Thank you very much.

THE COURT: Okay.

MR. CALIFANO: Your Honor, there were two -- Your Honor may recall in the context of the DIP there were two issues that were put off to this week, --

THE COURT: Right.

MR. CALIFANO: -- one of which was the issue of payment of fees to National Senior Campuses. And the related issue to that was the subordination issue raised by PNC. And I

1 don't want to mischaracterize their argument, but their
2 argument was, based on the underlying documents, the rights of
3 the NSC under the -- I mean, the Not-for-Profits under the
4 community loan were subordinate to the rights of the
5 construction lenders. Project agents, as we refer to them.
6 And that any money, including money for fees, that goes on
7 behalf of the Not-for-Profits is subject to the claims of the
8 project agents.
9 Neither of those issues are ours. We do have a view on
10 both those issues. But I do think, with the Court's
11 indulgence, it may be helpful for me to explain where we are,
12 and sort of the good news/bad news today --
13 THE COURT: Okay.
14 MR. CALIFANO: -- with the auction coming on Tuesday.
15 THE COURT: Okay.
16 MR. CALIFANO: Your Honor may recall from the very
17 first day I was here, I talked about the process and how this
18 process required the cooperation of a number of parties who had
19 conflicting, not always consistent, interests, but that who had
20 to work together so that we could have a proposal which could
21 be the -- form the basis for a plan.
22 We had this process started prepetition. We located a
23 bidder who would be a plan funder: Redwood. We entered into a
24 letter of intent. We consulted with the project agents, we
25 consulted with the corporate revolver lenders, and we consented

-- we, I'm sorry, we consulted with the NSC. Everybody signed off on an LOI.

Thereafter, we entered into a master purchase and sale agreement, right before the filing. And the filing was precipitated, as we know, by an attempt to seize our cash.

That was the fulfillment of the LOI, and the parties were brought in on that. We filed. We brought forth the bid procedures. Everybody was consulted on the bid procedures. We had a hearing, Your Honor, at which Your Honor approved the bid procedures, and the players supported the bid process, including the Redwood bid, and the NSC was here supporting our bid process and Redwood as the initial bidder.

Flash forward, you know, we had the auction -- the bids were due on Monday. We received an additional bid from a Kohlberg Kravis entity known as Coastwood, and they have bid on the assets. There were some questions with the bid, and I know that Houlihan is consulting to get them qualified. And we fully anticipate that they will be qualified by the Debtors. Because, as you recall, or you may recall, under the bid procedures, the Debtor has the right to qualify bidders, in consultation with the other parties.

We have received -- and, you know, consents prior to the auction were an important part of this bid process, because we weren't going to have an auction which was DOA, which was dead on arrival. And since this had to be done through a plan, we

1 thought that we needed consents from our various
2 constituencies. We did receive, by close of business
3 yesterday, which was two business days before the auction,
4 received consents from the three project agents and from the
5 agent for the corporate revolver. So we know that we can go
6 forward and have an auction.
7 THE COURT: Okay.
8 MR. CALIFANO: One other thing that we needed, Your
9 Honor, were the consents of National Senior Campuses. And as
10 we've tried to clarify to them, what we were looking for them
11 to do was to qualify two bidders as counterparties to
12 management agreements, because that's their interest in the
13 case. They're the counterparties to the management agreements.
14 If you don't have management agreements, you don't have
15 anything to sell. So we needed to know, going through the
16 auction, that we had that.
17 We didn't receive those consents from the NSC last night by
18 close of business. We did receive something today, and with
19 Your Honor's permission I'd like to hand it up.
20 THE COURT: You may.
21 MR. CALIFANO: We've made it available to everyone in
22 the courtroom. But there are some problems with it.
23 THE COURT: Okay.
24 MR. CALIFANO: And I'd like to walk through the
25 problems, but first, I think, to put the problems in context, I

want to talk about what the NSC's process has been.

THE COURT: Okay.

MR. CALIFANO: Because we have gone -- in my opinion, we have gone above and beyond to help the NSC, and the NSC has had its expenses paid, which is -- I won't get into the DIP issue. It might seem like I'm going off on a tangent. They've had their expenses paid because their cooperation was necessary and we wanted them to have professionals so they could weigh in on the issue.

Despite the fact that we didn't think it was a good idea, the NSC scheduled what I can only characterize as a beauty contest this week, where the two bidders came in and made presentations and the NSC had interviews. We had asked them to do this earlier, because for weeks we'd said, "We expect your consents two business days before the auction." Everybody else read it two business days; it appears the NSC reads it as Sunday, two days. So they're on their own in that.

And we have had Houlihan give them complete analysis of the bids. They've had their professionals who have had access to the bids. They've had access to Redwood prior to the filing, and they've had access to KKR's entity, Coastwood, as soon as they popped up. And there have been, you know, there have been proposals going back and forth between the NSC and Coastwood and discussion.

Initially, the NSC didn't want us to monitor them. We

insisted on monitoring it, because we, as the Debtors' professionals, have an obligation to all the constituencies -- to this Court, to the regulators, to the residents -- to come in when we seek approval and say, "This was a full and fair process." So that's why we needed to have a monitor. Thankfully, at the last minute, they agreed to that.

THE COURT: Okay.

MR. CALIFANO: At the last minute, we received what they call the "Consent with Respect to Qualified Bidders." Your Honor, there's a number of problems, and if this consent is not clarified, we can't have an auction. And we can't have an auction despite the fact that a number of professionals -- for the Debtor and for all the creditors -- have spent an inordinate amount of time to prepare for this auction on Tuesday. Despite the fact that we have invited, in addition to the lenders and the NSC, the sub debt, the Committee, regulators to our office on Tuesday. People are traveling from all over the country to come to this auction, but we can't have an auction which is an empty exercise.

And Your Honor, if this consent is not clarified, we have to call off the auction. Because what this consent means, and I can walk Your Honor through these provisions, is it means that the exercise, the auction, is an empty exercise and that the Not-for-Profits retain the veto right to pick the winner, which was never intended.

1 If you look, Your Honor, in the second paragraph, what they
2 do here -- completely unilaterally, without any consultation
3 with the Debtor or any of the other parties in interest -- they
4 rescind the consent that they granted on September 14th to
5 Redwood as the stalking horse bidder. Your Honor, that was the
6 basis of this case. We would not have spent three months
7 getting ready if they were going to withdraw consent that the
8 Debtor relied on in seeking approval of the bid process. Never
9 discussed. They never reserved that right. In fact, Your
10 Honor, they were here back in October, getting the bid -- well,
11 supporting the bid procedures. Supporting the bid procedures
12 that had a letter of intent, a plan, a master sale and purchase
13 agreement that they had been a party to. They had been through
14 that process. They had had unparalleled access to Redwood.
15 So now, three months later, without any discussion with us
16 or anybody else, they are taking back that consent. If we
17 didn't have that consent, Your Honor, we would not have been
18 here. We would not have wasted the Court's time and the
19 parties' time on something that we didn't think we could get
20 done.
21 We thought our concern was going to be the lenders. It
22 turns out the lenders are on board. That's why this case is so
23 strange, Your Honor.
24 What they purport to do in this second paragraph is qualify
25 bidders and state that they consent to Redwood and Coastwood --

they merely consent to the right of Redwood and Coastwood to participate in the auction. They don't have that right, Your Honor. The bid procedures provides for the Debtor, in consultation with the other parties, to determine who is a qualified bidder. The bid procedures lays out what qualifies a bidder. The NSC was never given the right to qualify bidders, nor, as I said, were they given the right to rescind their previously granted consent.

The second Romanette ii, when we go down to the next paragraph, Your Honor, once again, they talk about consenting to their participation in the auction and determining that Redwood and Coastwood are qualified bidders. That's not their right, Your Honor. We have made it clear to them that what we expect from them, having had access to these bidders, to consent -- they've already consented to Redwood. Consented to Redwood as of September 14th. We have asked them, so that we can have a full and fair auction, to consent to Coastwood as a counterparty to management agreements. That's their right. That's all they're entitled to.

Once again, they reaffirm on the paragraph that begins, "By delivery," that they are unilaterally rescinding their prior granted consent.

And then, Your Honor, on the next page, in Item (e) on Page 2, I think that's the most troubling provision. And I'll give Your Honor a second to read that.

1 (Pause.)
2 What they are doing by that provision, which states, Your
3 Honor -- well, I'll just read it so it's on the record.
4 "Without limiting the foregoing, the NSC entities expressly
5 reserve the right to (e) select the party, whether or not the
6 successful bidder, Redwood or Coastwood, with which to enter
7 into (a) one or more agreements relating to restructuring of
8 the bonded debt of certain of the undersigned NFPs' management
9 agreements and other agreements."
10 Your Honor, they can't substitute their business judgment
11 for the Court's and for the Debtors'. That's not what was
12 intended. What was intended, Your Honor, and what they
13 participated in and what we have reimbursed them for and what
14 we have made sure that the bidders are continuing to reimburse
15 them -- because there's a $5 million payment to the NSC for
16 prepetition claims. They've participated. They have benefited
17 from this process. They have supported this process. Other
18 parties -- the Debtor and the lenders -- have incurred costs in
19 reliance on the Not-for-Profits' support for this process.
20 What they cannot do, Your Honor, what they cannot do the Friday
21 before the Tuesday auction is say, "Go forward with your
22 auction, but we reserve the right at the end of the day,
23 whether or not the Debtor believes that someone is a successful
24 bidder, whether or not it's Redwood or Coastwood or anyone
25 else, we reserve the right to do whatever we want at the end of

1 the day."
2 Your Honor, if this stands, in good conscience, I can't ask
3 all these people to come to New York and have an auction that
4 is an empty exercise. What we need to do is have the NSC
5 clarify it and say, "No, we didn't mean that. What we would do
6 is we are approving these both as counterparties to the
7 management agreement, and we reserve our right to weigh in on
8 the ultimate deal and how it may reasonably affect us."
9 Now, if there's an issue with leverage on the properties,
10 that's a reasonable issue. If there's an issue with, you know,
11 some change in the management or change in the management
12 agreement, that's a reasonable issue. But absent that, Your
13 Honor, we can't have an auction.
14 And I think it's -- I mean, it's shocking to me, and having
15 been through this case and worked on it prepetition, I've been
16 going down this road since March of this year, that we would
17 get to the point where I have these lender groups with very
18 disparate interests saying, "We want the auction. We like the
19 bidders. May not be happy with the deal right now, but let's
20 get the process going." I think the Committee supports this.
21 The sub debt, I'm not sure where they are, but they've been
22 invited to the process. The regulators want to see this
23 resolved. I find it surprising that we go down this path and
24 then the National Senior Campuses, which is an umbrella
25 organization representing these Not-for-Profits, says, "Okay,

1 folks. It's nice what you've done, but we reserve the right to
2 trump your decision."
3 So, the National Senior Campuses is here today, Your Honor.
4 I'd ask their counsel to clarify just what this document means.
5 THE COURT: Let me ask you about the mechanics. With
6 regard to the informal consent that you are seeking from these
7 parties before going forward with the auction, I mean, were you
8 expecting any document at all, or, you know, just a one-
9 sentence letter, "We consent to any -- you know, this bidder,
10 this bidder, this bidder"?
11 MR. CALIFANO: What we were expecting, Your Honor, is
12 what we received in writing from all the lenders and which we
13 shared with the NSC, which was basically, "We consent to their
14 participation. We reserve our rights to weigh in on the offer.
15 And we support the auction process," reserving all their
16 rights. Project lenders reserving rights to credit bid; the
17 corporate lenders reserving rights to credit bid. But just
18 saying, "We support the auction process."
19 But the problem is, Your Honor, we can't have -- no one was
20 saying, "We deserve the right to designate who wins despite
21 what happens at the auction" and no one was saying, "We're
22 rescinding the prior support."
23 So that's what we want. We don't want anybody to -- we
24 didn't want it to rise to the level of a plan acceptance. We
25 just needed to know that we could go forward and have an

1 auction.
2 THE COURT: Okay. And show me the language on Page 1
3 where they're rescinding --
4 MR. CALIFANO: You'll see, Your Honor, it's in two
5 places. It's in C of the second paragraph, where it states,
6 "The effectiveness of the suppression of the conditional
7 consent dated September 14, 2009 previously provided by the NSC
8 entities to Redwood as the stalking horse bidder." That's --
9 I'm not sure I know what the suppression of the consent --
10 THE COURT: Supersession. "The effectiveness of the
11 supersession."
12 MR. CALIFANO: And then, if you look down, Your Honor,
13 after Romanette iii, there's a paragraph that begins, "By
14 delivery of this consent."
15 THE COURT: Yes?
16 MR. CALIFANO: And that states, "By delivery of this
17 consent, the NSC entities shall be deemed to have superseded
18 the conditional consent previously provided by the NSC entities
19 to Redwood as the stalking horse bidder."
20 So, in those two places, Your Honor, they're purporting to
21 rescind the previously granted consent that everybody in this
22 courtroom acted in reliance upon.
23 THE COURT: Well, okay. We'll hear from their
24 counsel. I know that you all were talking and the Court wanted
25 to start because I have a 12:00 o'clock engagement, but is it

1 possible you were just bringing into the tent the concept of
2 "We also consent to Coastwood"? Is that what you meant by this
3 supersession language?
4 MR. FRANCELLA: Your Honor, Thomas Francella on behalf
5 of the NSC NFPs.
6 And first of all, I'd like to apologize for Mr. Fletcher
7 not being here. I'd just like to give the Court a little
8 background.
9 The board members of the various NSC NFPs have been in
10 Baltimore since yesterday, meeting for very long hours, going
11 over the two potential bids. They met with the bidders
12 yesterday. The reason Mr. Fletcher couldn't be here today is
13 the boards are still meeting, trying to vet this out.
14 We want this to be a meaningful process, Your Honor.
15 They're going over everything. And as you're aware, back when
16 you entered the bidding procedures order, our conditional
17 consent was not due until the 20th. The Debtors, *sua sponte*
18 and on their own, let us know last week that we had to have
19 this in by this morning. And I think it's important to note as
20 well, in the original order you entered, Your Honor, the
21 consents that we had to give was consent to -- and if you'll
22 give me one second, Your Honor -- it was not -- it was consent
23 to a transaction, not to a bidder. They've changed that as
24 well.
25 Because of these issues, while the boards are meeting, we

are trying to get them to focus on the auction next week, Your Honor. Since this time frame was moved up, we did everything we could -- trying not to, I guess, put off track the meetings with the different bidders -- to get this done, and we did a conditional consent. And this has been provided today, but the boards are still meeting to go over what's going on next week, Your Honor. And again, this is a consent that's been provided to the Debtors per their request. And I can't tell you what had to go down to get this out this morning.

I mean, we have a right to actively participate. And since Day One, the NSC NFPs have been actively involved, have supported the Debtor, and have supported this process. I mean, I think it's in everybody's best interests, you know, that eventually this auction happen next week and hopefully a bidder is found to be the successful bidder and we're able to sell the assets.

THE COURT: Well, I'm still confused.

MR. FRANCELLA: Yes, Your Honor.

THE COURT: I mean, it's unfortunate Mr. Fletcher is not here, --

MR. FRANCELLA: That's the problem, Your Honor.

THE COURT: -- because he was pressing a fast process in this as much as anyone else.

MR. FRANCELLA: Oh, and we have -- I will tell you, the board has been working tirelessly, and hours and hours. I

mean, our firm has been working nonstop to get this done. But the original plan, we've always been: get the board to meet, meet with the bidders, which we've been doing. The Debtors asked that Houlihan be allowed to be there when the bidders came in. We worked very hard to get the boards to allow Houlihan to be there yesterday during the presentations. We've been working very closely with the Debtors to get this done. But the consents weren't supposed to be due until Sunday. Yesterday and today were supposed to be going over the bids with the bidders to focus on what's going on, and then once we've had time to digest what the bids are, provide our consents to the Debtor.

THE COURT: Okay. Well, why don't you attempt to explain what some of this language means?

MR. FRANCELLA: Yes, Your Honor.

THE COURT: For example, the language in Paragraph 2(c) as well as the language after Romanette iii. Are you rescinding a prior consent or what?

MR. FRANCELLA: What it is, Your Honor, is originally we had only consented to Redwood, because Redwood was the original stalking horse bidder. In this letter, we are now consenting under these terms and with these caveats and conditions to both bidders as informal consents so the auction can go forward next week.

THE COURT: Subject to these caveats and conditions?

Okay.

MR. FRANCELLA: The terms of this consent, Your Honor.

THE COURT: Elaborate on that.

MR. FRANCELLA: I think, again, we were forced to provide this this morning, rather than Friday -- on Sunday.

THE COURT: Why are you saying you were forced to provide this this morning? I mean, again, I'm remembering Mr. Fletcher pushing for a fast process, --

MR. FRANCELLA: Okay. I mean, just --

THE COURT: -- and the process being described that NSC would be among the parties who had to informally consent --

MR. FRANCELLA: Yes, Your Honor.

THE COURT: -- for -- I mean, it was a concession to your client and others on the part of the Debtor.

MR. FRANCELLA: Other -- and, Your Honor, --

THE COURT: We're not going to waste everyone's time with an auction unless we're holding hands going into this. So I --

MR. FRANCELLA: And that's what we've been working day and --

THE COURT: So your comment that you're being forced to provide this this morning is a little troubling to me.

MR. FRANCELLA: Well, Your Honor, it's not to be troubling. It's -- I just want to clarify it. What we're trying to do is let our boards meet with the bidders, find out

exactly what they're offering, and make a determination, which is what they've been doing. I can tell you they met last night until 9:00 o'clock. They started at 9:00 in the morning. They started again this morning at 9:00 in the morning. They're meeting with the bidders. They're vetting the separate bids that have been offered. And the intent was to give a consent on Sunday, as was required by the order. But we -- it came -- when we were told this, it came this morning. We did get it in.

THE COURT: Okay. So you thought this was --

MR. FRANCELLA: Not required --

THE COURT: -- required this Sunday?

MR. FRANCELLA: What --

THE COURT: Sunday, two days --

MR. FRANCELLA: The order said, if you look at the order, Your Honor, --

THE COURT: Okay. Well, I don't --

MR. FRANCELLA: -- it says December 20th.

THE COURT: -- have the order in front of me, but --

MR. FRANCELLA: I'm sorry, Your Honor. And that was the time frame, because we wanted our boards to be able to focus on the bids, which is what they're doing, and -- right now.

THE COURT: Okay.

MR. FRANCELLA: That's why Mr. Fletcher is not here,

Your Honor.

THE COURT: So, I don't have the order in front of me, but you're saying you all had the belief you had till Sunday to give the consent that you committed to give many weeks ago.

MR. FRANCELLA: Your Honor, if --

THE COURT: And when you learned the Debtor had a different interpretation of that time frame, you quickly scrambled and put this together, and you felt like this was the best you could say since you're in the middle of having these board meetings?

MR. FRANCELLA: Yes. That is correct, Your Honor.

THE COURT: Okay. I don't have the order in front of me. Is there a reasonable dispute here about the time frame?

MR. CALIFANO: Well, if there is a reasonable dispute, Your Honor, the NSC is the only one who has that reading. It doesn't say the 20th. It says "two days." Everybody else read it as two business days. That's why everybody else got it to us last night. So, if it's reasonable, they're standing out alone.

But I do have some questions. I'm sorry. I didn't get your last name, sir.

MR. FRANCELLA: It's Francella. But Your Honor, --

MR. CALIFANO: Francella. I just have some questions for Mr. Francella so he can explain, you know, some of the things he just said.

MR. FRANCELLA: Your Honor, --

MR. CALIFANO: Because, Your Honor, if he's saying that all this rescission or suppression or supersede -- supersede --

THE COURT: We're having trouble with that word.

MR. CALIFANO: If all that is, if all that is is now saying, "Well, originally, we said Redwood. Now we're saying Redwood and Coastwood," that's okay. But I have a question. If Redwood wins and the terms at the end of the day, the management agreement terms that were laid out in the agreement, if they're the same terms, is the NSC going to sign the management agreements? Because that's what the original consent said, so --

MR. FRANCELLA: Your Honor, I --

MR. CALIFANO: So I'm just --

MR. FRANCELLA: And I have to clarify. This is just based off what came through today. I don't have the authority today, we're going to say -- we're going to agree to these management agreements. I will need to speak with my client for them to --

MR. CALIFANO: Again, but Your Honor, I'm not asking them to --

THE COURT: That --

MR. CALIFANO: I'm saying, how do you impact -- how does this document impact your September 14th consent? I

thought it withdrew it. He said he didn't. It just means what he said --

THE COURT: Okay.

MR. FRANCELLA: Your Honor, for clarification, I think what's going to be easier, if we could have like a ten-minute break. I can get a hold of Mr. Fletcher, I can talk with Debtors' counsel, and we can talk about this. I don't want to proffer anything that's not 100 percent clear from the Court. I will be honest with Your Honor. I just think it's easier, and that's why I was talking to Mr. Doherty outside while Your Honor was dealing with the other matters.

THE COURT: Okay. We'll take a break. But again, I do have this 12:00 o'clock engagement that I really need to leave at 11:45 for. How long did you think your DIP --

MR. CALIFANO: Well, the DIP isn't my issue. They were objecting because of their fees, and PNC was objecting for subordination. You know, on this issue, Your Honor, if we need to clarify it, because -- and I apologize to Mr. Francella.

MR. FRANCELLA: Yes.

MR. CALIFANO: He hasn't been involved, so he doesn't know some of the things.

MR. FRANCELLA: Your Honor, I'm --

MR. CALIFANO: Please. Some of the things he just said, and I know it's not intentionally, were just factually wrong. You know, if we had to, I could throw Mr. Doherty on

the stand, because we've had conversations --

THE COURT: Right.

MR. CALIFANO: The change from transaction to participants was something that Mr. Fletcher asked for and we accommodated him. But the real issues I have, Your Honor, are simple, so we can know whether we have an auction.

THE COURT: Okay.

MR. CALIFANO: Do they still -- you know, if Redwood just says the same management agreement but a dollar more, are they still consenting to sign the management agreements like they did on September 14th?

And the other thing is he's saying that his clients are having meetings and doing a determination. What are they trying to determine? Because if they're trying to determine management agreement counterparties, hopefully, they know that by now. But if they're going into the terms of deals and conducting a mini-auction, that's completely inappropriate.

MR. FRANCELLA: Your Honor, they're not going and conducting a mini-auction. They're vetting the bidders that are coming in. What's their, you know, financial solidity? What are their plans in regards to what's going to happen here? What is the basis of their bid?

MR. CALIFANO: But Your Honor, this is the thing --

THE COURT: Was there any consultation with the Debtor and its professionals before these separate meetings were set

1 up?
2 MR. FRANCELLA: Houlihan is there, Your Honor, at the
3 meetings.
4 MR. CALIFANO: But if I may, Your Honor, --
5 THE COURT: I understand they're there, but that
6 didn't answer my question.
7 MR. CALIFANO: Let me tell you how it happened.
8 THE COURT: Yes.
9 MR. CALIFANO: Okay? Because about -- I don't know,
10 about three weeks ago or so, three weeks ago or so I talked to
11 Mr. Fletcher. And I said, "I understand that you've sent out a
12 letter to our potential bidders," because at that time we had
13 potential bidders, "and you said, 'Come to Baltimore the 16th,
14 17th and 18th and make presentations.'" And I said, "First of
15 all, I don't think that you should do that, but I'm not going
16 to cause a war over it. But what I ask you to do is change the
17 dates so that it's up earlier, so we don't have a -- we're not
18 banging up against the consents." Couldn't do it. He said he
19 couldn't do it. He had people flying over, all over the
20 country.
21 I assumed at that point, since Houlihan has been part of
22 everything, that Houlihan was going to be at those meetings to
23 monitor them, you know, and to see what's going on at these
24 meetings, just because Mr. Niemann is going to have to testify
25 at some time to the appropriateness of this procedure,

proceeding.

I found out that they didn't want Houlihan. So we had a spirited exchange of e-mails over the last few days, where I suggested to Mr. Fletcher that I would be duty-bound to seek this Court's intervention if I couldn't have a representative of the Debtor just standing in the corner being quiet, just to observe. So they conceded.

So when he says that Houlihan is part of the process, they got in the door after I kicked and screamed.

THE COURT: Uh-huh.

MR. CALIFANO: The other thing is, Your Honor, you know, Mr. Rundell is here and Mr. Shapiro is here. If this was appropriate, they could testify to the great deal of interchange that they have had with H -- with HMP or -- the financial consultants that --

MR. FRANCELLA: HCMP.

MR. CALIFANO: HCMP, that the NSC has hired. And going back to prior to the filing.

So, to me, if they're not conducting a mini-auction, they're just trying to find out the bona fides of these bidders and their financial wherewithal, etcetera, I don't know why it has to -- why it's -- it can't be -- it hasn't been done. One is Redwood, who has been around since July. One is a KKR- -- Kohlberg Kravis -- funded entity. Okay? I think -- I don't think it would have taken all this time to get it done.

So, if they're just -- if their board -- unless the board operates at a glacial pace, Your Honor, they should be able to tell us today what we want to hear, which is either "We support both of them as counterparties to management agreements and will sign management agreements with them," or "We'll still sign a management agreement with Redwood, which we pledged we'd do on September 14th, so we have an issue with Coastwood," and then we'll have to make them comfortable on the issues we have. But we need to know if we're wasting our time.

And this is worse. I mean, I was in better shape before I got this. I was in better shape on September 14th. Because this takes away September 14th --

THE COURT: Well, maybe it does, and that's what we're going to take a break to find out.

MR. FRANCELLA: And Your Honor, again, I need to speak with Mr. Fletcher, but I would like to add for the record, today what was on was the DIP. It was not an issue of our consent.

THE COURT: Well, I know, but --

MR. FRANCELLA: And I'm responding.

THE COURT: But right now, the future of the case may hang in the balance.

MR. FRANCELLA: Oh, and Your Honor, I understand. That's why I'd like to take a break to speak with Mr. Fletcher.

THE COURT: And again, you know, I'm hoping that this

doesn't mean what it might be interpreted to mean. Because, again, I keep remembering that your client was part of the driver of this process.

MR. FRANCELLA: Yes, Your Honor.

THE COURT: "We've got to go fast. We've got to go fast." You know, I wondered if pushing the deadlines out past the holidays might be a good idea, and I was persuaded we needed to have the solution by year-end, as far as the results of the auction.

And I have to say I'm a little bit troubled by these separate meetings. I mean, it's a free country and all, but the whole reason we have bid procedures and a financial advisor, investment banker, Houlihan, in charge of the process as the point person is to avoid this kind of thing, where people are brokering deals with different constituents in the case, and it just creates chaos and hampers the process.

MR. FRANCELLA: Your Honor, just so I can clarify a little bit, this is not to broker a deal. This is just so our boards can understand what's being offered. And then they will be at the auction so it can be meaningful. I just want to clarify that. This is not trying to broker some special deal for the NSC NFPs.

THE COURT: Well, I hope not.

MR. STRICKLIN: Can I just jump in here?

THE COURT: Mr. Stricklin?

MR. STRICKLIN: Your Honor, I was going to make the same point you just made. It's very troubling to hear that they're potentially, I mean, as Mr. Califano characterized it, conducting a mini-auction for their own consent. Like, "What will you give us?" and "If you give us this," -- I mean, this could be, "If you give us this, we'll consent to you and not consent to the other one." And this is the first I've heard of these meetings, and we're -- I'm very troubled by that.

I would point out, first of all, I looked up "supersession." I would have thought it was a New York word, but Mr. Califano didn't know it.

(Laughter.)

MR. CALIFANO: It must be a Baltimore word, Your Honor.

THE COURT: It must be a Baltimore word, yes.

MR. STRICKLIN: And it's, "to take the place of, replace" is what Wikipedia or whatever says.

THE COURT: Uh-huh.

MR. STRICKLIN: And besides supersession and superseding in two points, I mean, (e) on the second page is really disturbing.

THE COURT: Uh-huh.

MR. STRICKLIN: (e) is -- basically says, "No matter which bidder wins, we may not go with that bidder; we may pick a completely third party." I agree with Mr. Califano. I don't

-- who would -- what kind of an auction is that?

THE COURT: Uh-huh.

MR. STRICKLIN: I mean, you're not going to get the highest and best bid at an auction like that.

The last thing I wanted to point out, you said we -- Mr. Califano said we consented to this. I just want to point out, since this seems to be a reservation day, this was all done before we were appointed. I read the transcript, thought it didn't make any sense for us to seek any kind of relief. I understood where the Court was going. But we certainly reserve all of our rights.

THE COURT: Okay.

MR. STRICKLIN: Especially now.

THE COURT: Okay. Well, again, we are going to take this break.

MR. FRANCELLA: Thank you, Your Honor.

THE COURT: But we've got to get this resolved --

MR. FRANCELLA: Can I have --

THE COURT: -- during the break.

MR. FRANCELLA: Can I have 30 minutes, and then we should be able to get it resolved, hopefully?

MR. CALIFANO: Your Honor, that -- 30 minutes is a little long. If you have to be out of here at 11:45, 30 minutes is a long time. That puts us --

THE COURT: I mean, we can --

MR. FRANCELLA: How about --

THE COURT: We can come back in the afternoon if we need to come back. But I have to go to this lunch.

MR. FRANCELLA: Okay, Your Honor.

THE COURT: So I don't think people want to be spending Friday night in our lovely city.

MR. CALIFANO: Especially since we're having a storm on the Northeast tonight.

THE COURT: Oh, that's right.

MR. CALIFANO: So I'll be here all week.

THE COURT: That's right. Okay. We'll take a 15-minute break. We'll come back at five after 11:00.

MR. FRANCELLA: Thank you, Your Honor.

THE COURT: Okay.

THE CLERK: All rise.

(A recess ensued from 10:51 a.m. until 11:18 a.m.)

THE COURT: We're going back on the record in Erickson. Mr. Fletcher, I understand you're on the phone now?

MR. FLETCHER: Yes, Your Honor. That's correct.

THE COURT: All right. Well, we've been having a pretty heated discussion about this consent that came in this morning from NSC and what it might be purporting to do. Have you all reached any resolution of these issues during this 25-minute break we had or 30-minute break we had?

MR. CALIFANO: Your Honor, we haven't heard anything

from them. All we heard was that Mr. Fletcher was going to join the CourtCall.

THE COURT: All right. Mr. Fletcher, let me give you the recap. The Debtor is very, very concerned about this document that it received this morning, the "Consent with Respect to Qualified Bidders." The Debtor handed it to the Court. There is language in there that is hard for all of us to understand, but we are all concerned, the Court included, that the wording seems to suggest in places that NSC is rescinding its prior consent to Redwood as the stalking horse and that NSC is sort of attempting to have some sort of veto power over the auction process.

And the language in particular that was pointed out to the Court, if you have the document in front of you, is Paragraph 2, Paragraph (c). We've all been debating what the word "supersession" means. Then we have Romanette iii, the paragraph following Romanette iii on Page 1, "By delivery of this consent," da, da, da. And then we have, on Page 2, Paragraph (b) that is troubling.

So we want to know what the position is right now of your client with regard to this auction that is supposed to go forward Tuesday.

I guess, additionally, the Debtor was concerned that it just got this letter today, when it got everyone else's consent yesterday, and the Debtor thought everyone understood the

consents were due yesterday. And Debtor just learned that your client believes it wasn't even due until Sunday, and you're there meeting with people.

Last but not least, I'm very concerned about what I'm hearing about these side meetings going on with your board or boards and the bidders. You know, I expressed that the whole reason we have bid procedures orders and investment bankers in Chapter 11 cases is to streamline and organize the process so we can maximize value and not have chaos and, for God's sakes, not have something like bid collusion going on under 363(n).

So, anyway, you know, with that, I will ask you to respond.

MR. FLETCHER: Thank you, Your Honor. I appreciate the opportunity to respond. I wish I could have been there in person, but we were trying to accommodate the Debtors' change in schedule.

I understand there's been a fair amount of --

THE COURT: What change in schedule do you mean?

MR. FLETCHER: Your Honor, the bid procedures, what we have been operating under and what we have communicated to the Debtor since the inception, the bid procedures say that responses to the bids are due two days before the auction on the 22nd. I believe there was a specific colloquy on the record when those were approved, pointing out that the 20th is a Sunday. And while I don't have, you know, the transcript in front of me, I believe it may have even been Mr. Califano who

1 responded, "We work on Sundays," so that it being on a Sunday
2 was not a problem.
3 We have communicated repeatedly that that is the schedule
4 we are working under.
5 When we were advised that, no, that -- two things. One,
6 you know, the parties were no longer going to actually consent
7 to transactions because the transactions have been -- proposals
8 have been changing almost daily, that the consent now was going
9 to be limited just to saying that the two prospective bidders
10 are simply okay to go forward to the auction. We understood
11 the banks were going to get that in early, and we had a request
12 that came in from the Debtors to get that in early. We had
13 already scheduled our 40 board members to travel in from around
14 the country for actually three days of presentations.
15 The steering committee met Wednesday to get an update on
16 the bids. The full boards had invited the bidders to introduce
17 themselves and make a presentation to the boards for Tuesday.
18 Or, excuse me, for Thursday. Keeping in mind, Your Honor,
19 these boards are being asked to enter into brand new, outside-
20 of-this-court proceedings, brand new five- or in some cases
21 ten-year agreements to turn over the management of their
22 nonprofits to a new entity. And as we've explained repeatedly
23 to the Debtors, our boards feel in their fiduciary duties they
24 need to meet the prospective parties with whom they are being
25 asked to turn over management.

The Debtors requested that Houlihan attend that meeting. As that was a board meeting where the boards were going to meet the bidders, we had extensive debate about whether a representative of Erickson, the counterparty to our contract, should attend, and whether it would potentially chill discussion. For example, if board members had dissatisfaction with management or particular management members, that they might be uncomfortable raising that if an Erickson representative like Houlihan was present.

Ultimately, a decision was made that we would invite the Houlihan representative to attend the meetings.

THE COURT: Okay. Mr. Fletcher, --

MR. FLETCHER: And they --

MR. FLETCHER: Mr. Fletcher, I'm going to cut you off because we are really pressed for time. And I'm going to give you a chance to say your piece, but I just want to be clear. The Debtor is in charge of this process. Houlihan is in charge of this process. And I have in front of me a pleading that your client filed on October 29th called, "The NSC NFPs' Statement in Response to Debtors' Bidding Procedure Motion," where you described in there how this process had been going on since June 2009. You described your involvement. "The NSC NFPs began to vet the Redwood bid immediately. As it became clear that Redwood was sufficiently qualified to be a bidder, the NSC NFPs were asked to articulate the conditions under

which they would consider entering into new management agreements with Redwood. In that regard, on September 14, 2009, the NSC NFPs provided a letter to ERC and Redwood outlining conditions under which it would do a deal with them." And the overall theme is supporting the expedited process. "The NSC NFPs do not want to unnecessarily chill a robust and competitive bidding process."

So, anyway, I understand -- I've gone back and looked at the bid procedures motion and order. I understand there may be, from the wording of that motion and order, some confusion on whether two days before the auction meant two business days or two calendar days. But the fact is, we've got to know what your letter means. And I am troubled that all of these meetings are going on, these side meetings, if you will, when the Debtor is in charge.

So, I just need you to quickly respond to that. What does this consent mean? Where are your clients right now with regard to this auction?

MR. FLETCHER: Your Honor, our position is absolutely consistent with what it has been from the first day. We're -- you know, we're concerned about the process, the fairness, as well, and are concerned, frankly, that there is an effort by the Debtor to predetermine an outcome by jamming us. You know, we entered into the stalking horse consent on September 14th. This --

THE COURT: Are you rescinding that or not?

MR. FLETCHER: We have not rescinded that. We have not revoked that. It may not say what the Debtor is telling you it says.

THE COURT: Okay. Mr. --

MR. FLETCHER: We have not rescinded the --

THE COURT: Mr. Califano asked your colleague -- and that's why we took a 30-minute break, because we wanted the answer to this question that your colleague couldn't answer -- if there was an auction and Redwood was the winning bidder, with the same bid that has always been on the table, the stalking horse bid, would you support it or not? (Pause.) Are you consenting to that stalking horse bid right now, if that's the best bid at the end of the day?

MR. FLETCHER: Well, may I have a moment, Your Honor?

THE COURT: You may.

MR. FLETCHER: That's a compound question, and I'm trying to reflect on how to answer it.

(Pause.)

MR. FLETCHER: Your Honor, when we -- what the -- what the September 14th letter says is we will support Redwood and the stalking horse bid subject to all the other agreements being worked out if -- unless we determine that another proposal has arisen that is superior. And we absolutely intend to stand by that.

Our concern is that the attempt being made by the Debtor now is to engineer a situation where, next week, what happens is they disqualify Coastwood or they unilaterally announce that, notwithstanding that -- that in terms of entering into new forward-looking contracts, we have determined that another contracting party is superior. That they can override that and force us to enter into new agreements. That's our concern of what they're angling at.

THE COURT: Okay.

MR. FLETCHER: It's not us trying to usurp their discretion; it's they're trying to strip the nonprofits of their ability in their fiduciary due diligence to select who they are managed by.

THE COURT: Okay. Mr. Califano, please respond.

MR. CALIFANO: All I can respond is that's absolute nonsense, Your Honor. What we're asking is simple. We have said -- I told you about the bids and I told you we were going to qualify Coastwood. An auction needs a stalking horse. We need to know there is a floor. What we need to know, and what Mr. Fletcher said on September 14th, and the pleading that Your Honor was kind enough to give us makes very clear: they're consenting to the Redwood transaction. We need to go in there saying that that consent is still good. I never would have asked the question if we didn't have the letter that we had, which -- what was the word that they used?

A VOICE: Supersede.

MR. CALIFANO: Supersede.

A VOICE: Superseded.

A VOICE: Supersession.

THE COURT: Supersession. It's ingrained in my mind now.

MR. CALIFANO: Super... I'm sorry, Your Honor. It wasn't ingrained in mine. "Supersession" sounds like "rescind." So now I think Mr. Fletcher has said they're not rescinding it, so now we go back to having a stalking horse.

We're not trying to disqualify Coastwood. We've got a bunch of banks here who would be beating us up if we did.

THE COURT: Uh-huh. Right.

MR. CALIFANO: Because what the banks are hoping is that they have the NSC saying, "We'll sign a contract with Redwood. We'll sign the contract with Coastwood." We've got our management agreements. Then it's all dollars.

If I was trying to engineer a solution, these banks would be beating me up. What we need --

THE COURT: And don't forget Mr. Stricklin.

MR. CALIFANO: Mr. Stricklin, who beats me up --

(Laughter.)

THE COURT: It's his only chance of getting paid.

MR. CALIFANO: He beats me up constantly.

But Your Honor, it's the exact opposite.

THE COURT: Right.

MR. CALIFANO: So, what Mr. Fletcher is saying, there's no rational basis for it. What we need is his client to say it's full and fair. We've gone through. We've met these bidders.

And by the way, we told them their schedule didn't work. We've been telling them for weeks. And by the way, the change, that was -- Mr. Doherty is here. That's a change that Mr. Fletcher asked for.

But what we need from him is two things. A, supersession was a mistake. We're not rescinding the stalking horse support. This way, we know we have a stalking horse bidder. Then we need him to say, Redwood and Coastwood, they're acceptable counterparties to management agreements. Okay? And that -- we will consult with them on the ultimate bidder. Then the rest is about dollars. Okay? And that's what we want. We don't want to limit any bidder, because then they're satisfied they're getting a financially -- and he was concerned that the bidders be sufficiently qualified. He said in his letter that Redwood is sufficiently -- I mean, in his pleading that Redwood was sufficiently qualified. Let them say that Coastwood is sufficiently qualified. Then it's all about numbers. And then the banks and Mr. Stricklin will be looking over my shoulder to make sure it's full and fair.

So there is absolutely no intention -- we wouldn't be doing

1 this if we were trying to engineer something, Your Honor. We
2 want to make sure we go into those -- the auction, the bid
3 auction, the bidders know they have management agreements, and
4 then let's get it on.
5 THE COURT: Okay. Mr. Stricklin?
6 MR. STRICKLIN: I just want to add, Your Honor, I'm
7 glad you brought this pleading out. Paragraph 3, "The NSC NFPs
8 understand that the only way a buyer is willing to acquire
9 substantially all of the assets of the Debtor is if the NSC
10 NFPs are willing to enter into new third-party contracts for
11 long-term management with the acquirer." That makes sense.
12 Nobody's going to buy this thing unless they get long-term
13 management contracts.
14 I don't see how you can square that with Paragraph (e) on
15 the second page of this consent that says that (e) -- the way I
16 read Paragraph (e) is, no matter who the bidder is, they
17 reserve the right to sign up management contracts with somebody
18 else. They've already admitted, and I think correctly so, that
19 nobody's going to buy this thing unless they get management
20 contracts. But in Paragraph (e), they're saying, "Even if
21 Redwood or Coastwood wins, we may sign up a management contract
22 with somebody else."
23 If I'm representing the buyer, why -- I don't see how you
24 can do that.
25 THE COURT: I agree. All right. Well, Mr. Fletcher,

1 what about it? I mean, can you address very squarely those two
2 items that Mr. Califano asked on the record for you to address?
3 Was the word "supersession" perhaps an inadvisable use of a
4 term to the extent it suggests you're rescinding the September
5 14, 2009 consent? Do you acknowledge that you would accept the
6 Redwood deal if it's the highest and best offer at the end of
7 the day? And are you willing to say on the record that both
8 Redwood and Coastwood are acceptable counterparties to your
9 agreements?
10 MR. FLETCHER: Well, Your Honor, I guess to start with
11 the language, we do not believe the use of the word
12 "superseded" was a mistake, as Mr. Califano suggests. We
13 carefully considered whether the word "revoked" should be used,
14 and determined that that was not what we were doing. That
15 superseded, as in "this comes after," just as the bid that is
16 now on the table is no longer what was the stalking horse bid.
17 And so we were attempting, as we had been requested on an
18 expedited basis, disrupting our board meeting, to meet the, you
19 know, the demand that we facilitate the Debtor and the banks by
20 giving them an indication that we thought both bidders were
21 fine quality individuals that should go to the auction for
22 determination going forward. So that's -- you know, that's
23 what that language suggests.
24 You know, as to our position with Redwood and, frankly,
25 Coastwood, for that matter, you know, I fully expect that we

1 will emerge next week with one of the two of those being
2 selected, hopefully unanimously, by the parties.
3 You know, if the suggestion by Erickson is that,
4 notwithstanding a determination that -- by the nonprofits that
5 the contracts proposed by one of these two bidders are
6 materially beneficial or better for the nonprofits, that they
7 somehow have stripped the nonprofit of the ability to contract
8 with third parties and can force us into long-term agreements
9 with whomever they choose, notwithstanding that we had always
10 said that that was a piece of discretion we retained, then I
11 don't know what to say to that.
12 MR. CALIFANO: Your Honor, if I may?
13 THE COURT: You may.
14 MR. FLETCHER: I mean, if the desire -- if the
15 Debtors' desire is that the board, which is together, you know,
16 about another hour, that we select a contracting party today
17 and just get this over with, we may be able to accomplish that.
18 THE COURT: That's not it.
19 MR. CALIFANO: That's not -- Your Honor, --
20 THE COURT: That is not it.
21 MR. CALIFANO: Your Honor, I'm sorry. I thought I was
22 being clear --
23 THE COURT: Go ahead.
24 MR. CALIFANO: -- to Mr. Fletcher.
25 THE COURT: I thought so, too.

MR. CALIFANO: And either I'm very unclear or he's got a future in politics.

(Laughter.)

MR. CALIFANO: Because he keeps --

THE COURT: It does sound a little bit like a Congressional debate.

MR. CALIFANO: The question is this, Your Honor. And I'm looking at Page 3, Paragraph 4 of the pleading that they filed. All right, Your Honor? And I'm going to ask some very simple questions. In that regard -- I just want to read what he said. "In that regard, on September 14, 2009, the NSC NFPs provided a letter to ERC and Redwood outlining the conditions under which they would be prepared to enter into management agreements with Redwood, should they ultimately be selected as the successful bidder."

What I would ask Mr. Fletcher is, does that remain true? If Redwood is ultimately successful and selected as the successful bidder, would the NSC NFPs agree to enter into management agreements which meet those conditions that are in that letter? That's my first question.

THE COURT: Yes or no?

MR. FLETCHER: If they meet all the conditions in that letter, yes.

MR. CALIFANO: Okay.

THE COURT: There we go.

MR. CALIFANO: And now my next question.

MR. FLETCHER: But what my concern is, they're trying to strip out those conditions now.

THE COURT: No. We're --

MR. CALIFANO: Your Honor, can we just -- I mean, keep him on -- I'm sorry.

THE COURT: Yes. Okay. You said yes.

MR. CALIFANO: And then the second question, --

THE COURT: Okay.

MR. CALIFANO: -- the second question, Your Honor: if Coastwood meets those conditions set forth in the letter and Coastwood is the ultimately successful bidder, will they enter into management agreements with Coastwood as the successful bidder? That's a yes or no question.

THE COURT: Mr. Fletcher?

MR. FLETCHER: Yes.

MR. CALIFANO: So that --

MR. FLETCHER: If Coastwood meets all the same conditions with respect to satisfying the things in that letter with respect to them, just like they are with respect to Redwood, yes.

THE COURT: Okay.

MR. CALIFANO: Good.

THE COURT: There we go.

MR. CALIFANO: Your Honor, that's all we need.

THE COURT: So we're done, right?

MR. CALIFANO: So now we have an auction.

THE COURT: We have an auction.

MR. CALIFANO: Thank you, Your Honor.

THE COURT: Okay.

MR. CALIFANO: I'm sorry we had to go through this, --

THE COURT: Okay. Well, --

MR. CALIFANO: -- but now we have an auction.

THE COURT: Yes. Okay. We've got that on the record. The Court heard it. The Court duly notes that. Mr. Stricklin?

MR. STRICKLIN: Well, I just wonder if the bidders are getting that clear a signal.

MR. FLETCHER: Your Honor, may I say one last thing?

THE COURT: You may.

MR. FLETCHER: You know, this -- the last process over the last several days with the Debtors has left the nonprofits deeply concerned about what's going to happen in New York next week. And we hope that what the Debtors are doing is actually going to carry out not just the letter of the process, but the spirit, and that we're not going to find ourselves with some kind of game --

THE COURT: Okay.

MR. FLETCHER: -- that predetermines the outcome.

THE COURT: Everybody wants to talk, but let me just say this. I hope you will educate your clients, who probably

have not participated in a bankruptcy auction process, that the way these things work is the Debtor is in charge, their investment banker is in charge. There are many parties in interest who the Debtor has to look out for: your clients, the secured lenders, the unsecured creditor constituency, regulators. The Debtor is a fiduciary. The Debtor has fiduciary duties that the Bankruptcy Code imposes on the Debtor and this Court takes very seriously. I believe all of these professionals very well understand that. And they just have to understand that it's going to be a little chaotic, but the Debtors' mission is to maximize value. And there are a lot of people looking over the Debtors' shoulders, making sure that happens. And I don't have any doubt that it's going to be very chaotic, but there are enough people involved here where that's going to happen. Okay? So, please make sure your clients understand that.

Please also make sure your clients understand that the Judge is very concerned about side meetings and that interfering with the process. And I hate to dangle out there something like a 363(n), but explain to them that 363(n) of the Bankruptcy Code is one reason we have a point person in charge, *i.e.*, an investment banker of the Debtor in charge, and a streamlined process. Because when you have all these little side conversations going on, there is a trap there that you can fall into of side deals that might chill bidding, *i.e.*, bid

collusion. Okay? So that's a very serious thing to throw out there, but that's always the concern when these side meetings are happening. Okay?

All right. Mr. Califano, what's next?

MR. CALIFANO: That's it, Your Honor.

THE COURT: Okay.

MR. CALIFANO: I think the DIP issues will be carried to our next hearing.

I would ask if we could just -- what I'd like to do is order the transcript on an expedited basis and share, because Mr. Stricklin said he wants to make sure bidders get the message. And Coastwood is represented by Jim Stempel of K&E, and Redwood is represented by the Venable firm. I'd like to order the transcript and make it available to those attorneys in advance of the auction.

THE COURT: Okay. Dawn, you will get on that as soon as possible? And we'll get Kathy Rehling, who's usually pretty quick, to get that, so we'll make sure we get it quick. I don't know --

THE CLERK: I'll need an order form for her, but we can --

THE COURT: Yes. She'll process an order form real quick. But January 13th, I think, is our next hearing date. Correct?

MR. FRANCELLA: Your Honor, if I may, there's a

hearing, I believe, on the 7th. I know Mr. Fletcher is not available on the 13th.

THE COURT: Okay. The 7th, we have a setting?

MR. CALIFANO: Do you want to put everything from the 13th? Is that what you're saying?

MR. FRANCELLA: To the 7th.

MR. CALIFANO: That's fine.

THE COURT: Okay. If we have a setting. Be sure and follow up with Ms. Davis later and confirm that, because she seemed to think that -- well, didn't I get a note from you?

THE CLERK: Yes.

THE COURT: I got a note from Anna.

THE CLERK: She just said they don't have any more hearings blocked beyond January 13th.

THE COURT: Beyond the 13th? Okay. That was it. You don't have any pre-set hearing blocks beyond the 13th. So if you want to go ahead and get some of those established and follow up with her.

MR. CALIFANO: We'll consult with your chambers.

MR. FRANCELLA: I'll follow up --

THE COURT: But we will carry the DIP till the next setting, --

MR. FRANCELLA: To the 7th.

THE COURT: -- January 7th.

MR. CALIFANO: All right. Thank you, Your Honor.

THE COURT: Okay.

MR. KANNEL: Your Honor, may I be heard for a moment?

THE COURT: Very briefly. I'm sorry. I have an appointment out of the office.

MR. KANNEL: Okay. I will be very brief. I am William Kannel. I represent the trustee on the bonded projects, three of which are not in bankruptcy. And I just want to make it clear that our position is, regardless of whether NSC agrees to assignments of management agreements on the bonded communities, to the extent those constitute defaults which give us rights against non-debtors, the NSCs, that we are not in any way waiving those defaults with respect to assignment of management agreements that are defaults under our documents with non-debtors.

THE COURT: Okay. Understood.

MR. KANNEL: Thank you.

THE COURT: So acknowledge.

(Proceedings concluded at 11:45 a.m.

--oOo--

CERTIFICATE

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

Kathy Rehling

Digitally signed by Kathy Rehling
DN: cn=Kathy Rehling, c=US, email=kathy.rehling@tx.rr.com
Date: 2009.12.21 11:11:57 -06'00'

Kathy Rehling Date
Certified Electronic Court Transcriber
CET**D-444

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