

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

IN RE:)	
)	
TELLICO LANDING, LLC,)	No. 3:11-bk-33018
)	Chapter 11
Debtor.)	

MEMORANDUM IN SUPPORT OF WINDRIVER INVESTMENT LLC’S
MOTION FOR THE APPOINTMENT OF A TRUSTEE

WindRiver Investments, LLC (“WindRiver”) has filed a motion for the entry of an order for the appointment of a trustee pursuant to the provisions of 11 U.S.C. § 1104(a)(1) and (2), and files this memorandum in support thereof.

Tellico Landing, LLC (“the Debtor”) filed its petition for relief under Chapter 11 of the Bankruptcy Code on June 27, 2011, and since that time has continued in the possession of its assets and in the management of its business as a debtor in possession pursuant to the provisions of 11 U.S.C. §§ 1107(a) and 1108.

The Debtor is a limited liability company formed on April 1, 1998 for the purpose of developing and marketing certain lakefront real property located in Loudon County, Tennessee, which ultimately became known as “Rarity Pointe” (“the Project”). In 2002, LTR Properties, Inc. (“LTR”) – an entity owned solely by Michael L. Ross (“Ross”) – acquired a 50% ownership interest in the Debtor. At that time, Ward S. Whelchel and Robert T. Stooksbury, Jr. each owned a 25% ownership interest in the Debtor.

On April 29, 2002, LTR, Whelchel and Stooksbury executed the Second Amended and Restated Operating Agreement of Tellico Landing, LLC (“the Operating Agreement”). In the Operating Agreement, LTR was appointed the managing member of the Debtor, and was given

certain management authority over the business of the Debtor. This authority was exercised by LTR through Ross, LTR's sole shareholder. Ross was designated as the Debtor's chief manager.

On the same day that LTR, Whelchel and Stooksbury signed the Operating Agreement, they also signed a Contract for Transfer of Real Property, a copy of which is attached hereto as EXHIBIT 1 ("the Golf Course Agreement"). Pursuant to the terms of the Golf Course Agreement, LTR agreed, at its sole cost and expense, to design and construct a golf course on a portion of the Project, and the Debtor agreed to transfer the golf course to LTR upon its completion of the construction thereof.

On June 26, 2002, as the declarant, LTR executed the Declaration of Covenants, Conditions and Restrictions for Rarity Pointe ("the Declarations"). The Declarations were recorded in the Office of the Loudon County Register of Deeds on June 27, 2002.

Section 14.10(a) of the Declarations, a copy of which is attached hereto as EXHIBIT 2, provides in part as follows:

Every Owner, other than the Declarant, Declarant-Related Entity, or a Builder, shall be a "Social Member" of the Rarity Pointe Club (the "Club") At the closing of a Unit, each Owner shall be required to remit an initiation deposit applicable to a Social Membership to the Club. Upon closing and payment of such deposit, the Owner's membership shall become effective and the Social Membership shall entitle the Owner and his or her family and guests to Membership privileges at the Club in accordance with the Club's membership program. *The Social Membership does not include golfing privileges at the Club.* Emphasis added.

At the closings of the sales of residential lots, LTR collected from the lot purchasers the initiation deposits referenced in Section 14.10(a) of the Declarations ("the Deposits") for a social membership at the Rarity Pointe Club (the "Club"), entitling the lot purchasers to the use of the amenities that were to be built at the Club, including a clubhouse, swimming pool and tennis facility (the "Club Amenities"). (Rarity Pointe Club was never incorporated or otherwise

created.) At the initial stages, Ross set the amount of the Deposit at \$10,000.00. Subsequently, Ross increased the Deposit to \$20,000.00. In all, LTR/Ross collected in excess of \$4,000,000.00 in Deposits.

However, LTR did not use the Deposits for the construction of the Club Amenities, which is clearly contemplated by Section 14.10(a) of the Declarations. In fact, the Club Amenities have not yet been constructed. Rather, in breach of its agreement in the Golf Course Agreement that LTR would construct the golf course at its sole expense, LTR deposited the Deposits in a LTR account and used the Deposits, totaling over \$4,000,000.00, for the payment of the construction of the golf course that, under the Golf Course Agreement, was to be conveyed to LTR following the completion of construction. In addition to constituting a breach of the Golf Course Agreement, these actions constitute a fraud upon the lot purchasers, who paid the Deposits for the privilege of the use of the Club Amenities, but the Deposits were not used for the construction of the Club Amenities, which in fact have not yet built. LTR shifted its contractual obligation to construct the golf course at its sole expense to the lot purchasers, who paid \$4,000,000.00 in Deposits that were used by LTR to construct the golf course. Moreover, Section 14.10(a) of the Declarations expressly provides that the social membership does not include golf privileges, even though the Deposits were used by LTR to construct the golf course.

The actions of LTR/Ross also constitute a fraud upon the Debtor and its other members as well since the Project was advertised as having certain amenities, and the failure of LTR/Ross to escrow the Deposits and use them for their intended purpose leaves the Debtor unable to construct the Club and the Club Amenities, and subjects the Debtor to potential fraud claims by lot purchasers.

Ross testified at the first meeting of creditors that LTR is entitled to collect the Deposits from future lot purchasers, and to use the Deposits to reimburse LTR for golf course expenses paid by LTR over and above the amount of the Deposits collected to date.

Ross further testified at the first meeting of creditors that LTR is entitled to the revenue from the operation of the golf course, and in fact, all of the golf course operating revenue is deposited into a LTR account.

11 U.S.C. § 1104(a) provides in part as follows:

(a) At any time after the commencement of the case but before confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of a trustee--

(1) for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, *either before or after the commencement of the case*, or similar cause, but not including the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor; or

(2) if such appointment is in the interests of creditors, any equity security holders, and other interests of the estate, without regard to the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor.
Emphasis added.

In the case of *In re Oklahoma Refining Company*, 838 F.2d 1133, 1136 (10th Cir. 1988), the court stated that “[o]nce the court has found that cause exists under § 1104, it has no discretion but must appoint a trustee.”

WindRiver respectfully submits that cause exists for the appointment of a trustee, and that the appointment of a trustee is in the best interests of creditors. LTR was obligated under the Golf Course Agreement to pay for the construction of the golf course, at its sole cost and expense. Rather, to the extent of \$4,000,000.00, the lot purchasers paid for the construction of the golf course, even though under Section 14.10(a) of the Declarations their social memberships, purchased with their Deposits, do not include golf privileges. The Club Amenities

which lot purchasers are entitled to use by virtue of their payment of the Deposits have not yet been built, and no funds exist to construct the Club Amenities, all to the detriment of the lot purchasers, the Debtor and its other members. LTR intends to continue to apply Deposits collected on future lot sales to the payment of LTR's un-reimbursed golf course expenses. Of course, because the golf course was to be conveyed to LTR upon its completion, LTR's use of the Deposits to construct the golf course inures to LTR's financial gain, at the expense of the lot purchasers, the Debtor and its other members. All of this constitutes fraud, dishonesty, incompetence and gross mismanagement of the affairs of the Debtor. Unquestionably, there is cause for the appointment of a trustee, and the appointment of a trustee is clearly in the best interests of creditors.

Respectfully submitted, this 14th day of September, 2011.

/s/ W. Morris Kizer
W. Morris Kizer
(BPR No. 1571)
Gentry, Tipton & McLemore, P.C.
P.O. Box 1990
Knoxville, Tennessee 37901
(865) 525-5300
wmk@tennlaw.com
Attorney for WindRiver
Investments, LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 14, 2011, the foregoing document was filed electronically and will be served electronically by operation of the Court's electronic case filing system on the United States Trustee, Thomas Lynn Tarp, Thomas M. Leveille, Jesse D. Overbay, William F. McCormick and James R. Moore. Additionally, the foregoing document has been served upon the following by mailing a copy thereof by first class mail, in envelopes addressed as follows, this 14th day of September, 2011:

APAC Atlantic, INC
Harrison Construction
4817 Rutledge Pike
P.O. Box 6357
Knoxville, TN 37914

Loudon County Trustee
P.O. Box 351
Loudon, TN 37774

LTR Properties, Inc.
100 Rarity Bay Parkway
Vonore, TN 37885

Rarity Point Comm. Assoc., Inc.
100 Rarity Bay Parkway
Vonore, TN 37885

Tellico Lake Properties
P.O. Box 4187
Maryville, TN 37802

Ward Whelchel
3003 River Haven Point
Knoxville, TN 37922

Long, Ragsdale & Waters, PC
1111 Northshore Drive, NW
Suite S-700
Knoxville, TN 37919

LTR Properties
P.O. Box 4187
Maryville, TN 37802

Michael L. Ross
P.O. Box 4187
Maryville, TN 37802

Michael Ross
2624 Carpenters Grade Road
Maryville, TN 37803

Sun Sigh Graphics
1503 N. 6th Avenue
Knoxville, TN 37917

/s/ W. Morris Kizer
W. Morris Kizer

CONTRACT FOR TRANSFER OF REAL PROPERTY

This CONTRACT FOR TRANSFER OF REAL PROPERTY (the "Agreement") is made and entered into on the date last recorded below, by and between Tellico Landing, LLC, a Tennessee limited liability company, hereinafter referred to as "LLC," and LTR Properties, Inc., a Tennessee corporation, referred to as "LTR."

WITNESSETH:

WHEREAS, LLC was organized to acquire, hold, own and develop approximately 540 acres of undeveloped land in Loudon County, Tennessee; and

WHEREAS, LLC intends to develop said real property as a mixed resort/residential community doing business as Rarity Pointe; and

WHEREAS, LLC intends to include among the amenities at Rarity Pointe a guest lodge, marina, spa and golf course and further intends to engage in a national marketing program to advertise the availability of said amenities to guests of the resort and to residents of the residential portion of the development; and

WHEREAS, each of the current Members of LLC have previously entered into a certain Memorandum of Understanding, pursuant to the terms of which LTR, one of the Members, agreed to build a golf course at Rarity Pointe and LLC agreed to transfer said golf course to Purchaser when completed and upon the terms and conditions set forth in the Memorandum; and

WHEREAS, It is in the best business interests of LLC that LTR construct a golf course at Rarity Pointe, from which LLC will receive direct financial benefit; and

WHEREAS, LLC is willing to transfer the same to LTR, and LTR is willing to accept such transfer, upon the terms and conditions herein contained.

NOW, THEREFORE, in consideration of the premises, and of the mutual covenants and provisions herein contained, and other good and valuable consideration, the receipt and adequacy of which is hereby acknowledged, the parties hereto agree as follows:

1. **Transfer of Real Property.** For and in consideration of LTR's agreement to construct, at LTR's sole cost and expense, a golf course on a portion of certain undeveloped real property which is currently owned, or which may be hereafter acquired by LLC in Loudon County, Tennessee, and on which LLC intends to develop a mixed resort/residential community, and which golf course, when

constructed by LTR, will provide immediate and direct economic benefits to LLC, and subject to all the terms and conditions set forth below, LLC hereby agrees to transfer to LTR the golf course property and all improvements constructed thereon by LTR, said transfer to take place when the golf course is completed as defined below in Section 9(c). The property to be transferred is further described in Section 2, below, and shall be referred to herein as the "golf course," or the "Property", and includes all improvements thereon, and all easements, covenants, licenses and other rights appurtenant to said Property.

2. The Property to be Transferred. The property to be transferred to LTR hereunder shall be a portion of the approximately 540 acres of real property owned by LLC and located in Loudon County, Tennessee, which 540 acres is more particularly described in Exhibit "A", which is attached and incorporated herein by reference. The property to be transferred may also include a portion of a tract of undeveloped real property consisting of approximately 119 acres which LLC is currently negotiating to purchase from the Tennessee Valley Authority, and which is adjacent to the 540 acre tract, and which is more particularly described on Exhibit "A-1", which is attached and incorporated herein by reference. The two tracts (the 540 acre tract and the 119 acre tract) are sometimes referred to collectively as the "Total Development Acreage." As of the date of this Agreement, LTR and LLC have not made a final determination of the exact number of acres upon which the golf course shall be constructed, nor the exact location of the golf course within the Total Development Acreage. The parties agree that within a reasonable time after the execution of this Agreement they shall mutually agree on the exact number of acres required for the golf course and the location of the golf course within the Total Development Acreage, and shall attach a copy of such golf course description to this Agreement as Exhibit "B", which shall become a part of this Agreement. The parties agree that the number of acres and the location of the golf course shall be of a size and location reasonably adequate for the construction and operation of a golf course and related amenities as described in Section 9, below. The parties currently estimate that the total acreage required shall be approximately 175 acres.

3. Exceptions to Title. The Property is to be transferred free and clear of all liens, mortgages and encumbrances, excepting only such liens or encumbrances, if any, acceptable to LTR. The parties acknowledge that the Property is currently subject to a first mortgage in favor of LLC's lender, SunTrust Bank. If at the time of Closing hereunder said first mortgage has not been paid in full, and if SunTrust Bank, or any successor holder of a first mortgage, will not release the golf course from said first mortgage, then LTR agrees to accept transfer, provided, however, that LLC hereby agrees that it shall remain responsible for satisfying all obligations under said first mortgage until paid in full.

4. Title Documents. The Property shall be transferred to LTR at the Closing by warranty deed in proper statutory form for recording and shall be duly executed and acknowledged by LLC and shall transfer to LTR good, marketable and insurable fee simple title to the Property, free of all encumbrances, liens, encroachments, interests and adverse matters of any nature or description whatsoever

except those as may be acceptable to Purchaser, and except as provided in Section 3, above

5. Damage, Destruction or Condemnation Prior to Closing. In the event of fire or other casualty, or the taking of the Property or any part thereof by condemnation, and in the event the damage, if any, shall not have been repaired by the time of the Closing hereunder, the parties agree that LTR shall have the option to either: (a) terminate this Agreement, or (b) accept the Property in the condition in which it is left following such destruction or taking, with an assignment by LLC to LTR of all rights to the collection of any insurance proceeds or condemnation award.

6. Closing Adjustments. At the time of Closing hereunder, LLC and LTR shall mutually agree to allocate all real estate taxes due and owing on the Property for the year in which Closing takes place, and to allocate all closing costs, filing and recording fees and transfer taxes in a manner that they deem to be equitable.

7. Closing. Unless the parties mutually agree to a later date, Closing for the transfer of the Property hereunder shall be held within thirty (30) days from the date on which the construction of the golf course by LTR is complete (as that term is defined in Section 9, below), upon written notice by LTR to LLC setting forth the date, time and location of said Closing. At said Closing, LLC shall execute and deliver the warranty deed and the parties shall further execute such other documents as may be reasonably required to consummate the transaction contemplated by this Agreement.

8. Representations. The representations, warranties, covenants and agreements of LLC and LTR contained in this Agreement shall survive the Closing hereunder. In addition to any representations and warranties otherwise contained herein, LLC represents, to the best of its knowledge, that at the time of execution of this Agreement and at the time of Closing:

a. LLC is the owner of the Property, and has the power and authority to transfer the same free of encumbrances and claims of every nature, kind and description, except such as may be acceptable to LTR.

b. The Property, or any part thereof, is not now subject to any litigation, and LLC has no knowledge of any pending or threatened litigation.

c. The Property, or any part thereof, is not now subject to any liens or claims of lien from any work, labor or services performed at the direction of LLC to, at, or for the Property, except such liens or encumbrances that shall be satisfied at or before Closing.

d. The Property, or any part thereof, is not now subject to any

condemnation or similar proceeding, and LLC has no knowledge of any pending or threatened condemnation or similar proceedings.

e. LLC has complied with all applicable laws, ordinances, regulations, statutes, rules and restrictions relating to the Property or any part thereof.

f. There are no tenancies or leaseholds affecting the Property and possession of the Property shall be delivered to LTR upon the Closing hereunder.

9. Conditions. The obligation of either LTR or LLC to Close hereunder is subject to the following conditions:

a. LTR's Discretion. Subject to any restrictions set forth in this subsection 9.a, LTR shall have sole discretion in the planning, design, construction and operation of the golf course and related amenities, provided that LTR shall provide LLC with periodic reports on the design and construction progress. LTR further agrees that the golf course and amenities shall include the following: (i) an eighteen hole golf course, which shall be designed by a recognized and experienced golf course designer (for purposes of this Agreement, LLC acknowledges that Cupp Design, Inc. is such a designer); (ii) a driving range; (iii) a club house, the design of which shall be compatible with the overall design concept for Rarity Pointe; and (iv) reasonable maintenance facilities. Provided further, that prior to commencing construction of the golf course, LTR shall provide LLC with copies of all plans and specifications for the golf course which LLC shall accept unless such plans are clearly inadequate in light of the required amenities listed above.

b. Start Date. LTR agrees to commence construction of the golf course within six months of the date on which LTR has approved final design plans, provided that all necessary zoning and regulatory approvals have been obtained for the golf course and for the mixed resort/residential community being planned by LLC. Zoning and regulatory approval shall include, without limitation, zoning and regulatory approvals from TRDA, TVA, Loudon County, and any other governmental body or agency whose approval is required.

c. Completion Date. the Completion date shall be the date on which LTR receives a written certification from either the golf course designer, or from an independent engineer, that the course has been substantially completed in accordance with the plans and specifications described in subsection 9(a), above.

d. Golf Course Membership. LTR agrees that, on or before the

completion date, it will complete a written membership plan for the golf course, which plan shall specifically provide that all owners of lots at Rarity Pointe shall be eligible for golf course membership pursuant to the golf course membership plan.

10. Other Covenants.

a. **Financing the Construction.** LTR agrees that it will be solely responsible to pay for all costs and expenses for the planning, design and construction of the golf course, and that LLC shall have no obligation to pay, advance or reimburse any such costs and expenses incurred by LTR, or to guarantee any loans made to LTR in connection with the construction of the golf course.

b. **No Pledge of Golf Course.** LTR agrees that, prior to Closing hereunder, it will not permit or cause any lien, mortgage or other encumbrance to be placed on the golf course, or any of its improvements. Provided, that nothing in this subsection 10(b) is intended to preclude LTR from pledging this Agreement as security to finance construction of the golf course.

c. **Title to Improvements.** LTR agrees that, prior to Closing, title to all improvements constructed on the golf course property shall be in the LLC. If LTR shall fail to complete the golf course for any reason, or shall abandon work on the golf course, or discontinue work on the golf course, then LTR's sole interest in the improvements shall be his indirect interest as a fifty percent owner of LLC.

d. **Withdrawal as Member.** If LTR elects to withdraw as a Member of Tellico Landing, LLC, pursuant to Section 4.3(b) of LLC's Second Amended and Restated Operating Agreement, then the rights and obligations of LLC and LTR relating to such withdrawal shall be governed by the provisions of said Section 4.3(b).

11. General Provisions.

a. All notices or demands hereunder shall be in writing and shall be deemed to have been sufficiently given or served for all purposes when presented personally or sent by registered or certified United States mail, return receipt requested, or forwarded by a nationally recognized overnight courier service, to any party hereto at the address set forth below or at such other address as any party shall subsequently designate in writing:

If to LTR:
LTR Properties, Inc.
Attn. Michael L. Ross

P.O. Box 5958
Maryville, TN 37802

If to LLC:

Tellico Landing, LLC
Attn. Ward S. Welchel
4700 Papermill Road
Knoxville, TN 37909

- b. This Contract shall be construed and enforced in accordance with the laws of the State of Tennessee.
- d. The captions of this Contract are inserted only for the purpose of convenient reference and in no way define, limit, or prescribe the scope of intent of this Contract or any part thereof.
- e. LLC covenants that it will execute and deliver, from time to time, whether on or after the Closing date, on the request of LTR, all consummatory deeds, bills of sale, assignments and other documents which may reasonably be required to assure LTR of LTR's title in and to the Property transferred hereunder.
- f. This Contract constitutes the entire contract between the parties relating to the subject matter hereof, and may not be changed or terminated orally but may only be modified by an instrument in writing signed by the parties hereto.
- g. The provisions hereof shall apply to and inure to the benefit of the successors, assigns and representatives of the respective parties hereto.
- h. This Agreement and the provisions hereof shall survive the Closing of the transfer of the Property by LLC to LTR.

May 29 02 02:37p

FHT

EXECUTED as of the day, year and month last recorded below.

LTR PROPERTIES, INC.

By: Michael L. Ross Date: 5/29/02
Michael L. Ross, President

TELLICO LANDING, LLC

By: ROX Date: 5/29/02
Its: Chief Manager

14.10. Club Membership and Other Club Matters.

(a) Mandatory Social Membership. Every Owner, other than the Declarant, Declarant-Related Entity, or a Builder, shall be a "Social Member" of the Rarity Pointe Club (the "Club"), but shall have the right to upgrade as set forth in Section 14.11 below. There shall be only one (1) Social Membership per Unit. If a Unit is owned by more than one (1) Person, all co-Owners shall be subject to the usage rules and requirements established by the Club in the Club's sole discretion from time to time. All Owners will be subject to the bylaws, rules, regulations, and charges of the Club and shall be responsible for the payment of Social Membership Dues to the Club. At the closing of a Unit, each Owner shall be required to remit an initiation deposit applicable to a Social Membership to the Club. Upon closing and payment of such deposit, the Owner's membership shall become effective and the Social Membership shall entitle the Owner and his or her family and guests to Membership privileges at the Club in accordance with the Club's membership program. The Social Membership does not include golfing privileges at the Club. The Owner shall have no right of reimbursement or refund for initiation fees or deposits related to the Social Membership except in accordance with the Club's membership plan, and the Social Membership is non-transferable except in connection with the sale of the Unit relating to such Social Membership.

(b) Mandatory Social Membership Dues. Commencing on the date of closing of the Unit the Club shall be entitled to charge and collect dues directly from each Owner on an annual basis ("Social Membership Dues"), prorated from the date of closing on the purchase of a Unit. The Social Membership Dues shall be payable by each Owner to the Club without set-off, diminution or abatement for any reason. Each Owner, by accepting a deed or entering into a contract of sale for any portion of the Properties, is deemed to have notice of liability for these Social Membership Dues and to covenant and agree to pay these assessments. All such Social Membership Dues or other charges, together with interest not to exceed the maximum rate allowable by law, late charges of ten percent (10%) per annum or the highest amount allowable by law, whichever is greater, costs of collection, and reasonable attorneys fees shall be the personal obligation of the Owner of such Unit at the time the Social Membership Dues or other charges arose. Upon a transfer of title to a Unit, the grantee shall be jointly and severally liable for any Social Membership Dues and other charges due at the time of conveyance. However, no first Mortgagee who obtains title to a Unit by exercising the remedies provided in its Mortgage shall be liable for unpaid Social Membership Dues or other charges which accrued prior to such acquisition of title. No Owner shall be exempt from liability for Social Membership Dues by non-use of the Club, abandonment of the Unit, or any other means, except as may be provided in the Club's membership program. The obligation to pay Social Membership Dues is a separate and independent covenant on the part of each Owner.

(c) Lien for Social Membership Dues. The Club shall have a lien against each Unit to secure payment of all or any portion of the initiation deposit which was not paid at closing and delinquent Social Membership Dues, as well as interest at a rate to be set by the Club (subject to the maximum interest rate limitations of Tennessee law), costs of collection and reasonable attorneys fees. Such lien shall be superior to all other liens, except (i) the liens of all taxes, bonds, assessments, and other levies which by law would be superior, (ii) the lien or charge of any first Mortgage of record (meaning any recorded Mortgage with first priority over other Mortgages) made in good faith and for value, and (iii) the lien(s) of the Association pursuant to Section 8.7 of this Declaration, regardless of the date of recording of such lien(s). The Club's lien may be enforced by suit, judgment, and judicial or non-judicial foreclosure as permitted under Tennessee law.

Notwithstanding anything contained herein to the contrary, as a condition precedent to the Club's obtaining lien rights, and/or enforcement rights pursuant to the terms of this Section, the Club must first provide the Association with twenty (20) Days prior written notice of the Club's intent to record a lien against a Unit, and/or proceed with other judicial or non-judicial foreclosure of the lien.