

**UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF VIRGINIA  
Alexandria Division**

In re:	*	
	*	
<b>GORDON PROPERTIES, LLC,</b>	*	<b>Case No. 09-18086</b>
	*	Chapter 11
Debtor.	*	
<hr/>		
<b>GORDON PROPERTIES, LLC,</b>	*	
	*	
Plaintiff,	*	
v.	*	<b>Adv. Pro. No. 09-01304</b>
	*	
<b>FIRST OWNERS' ASSOCIATION OF FORTY SIX HUNDRED CONDOMINIUM, INC.,</b>	*	
	*	
Defendant.	*	

**DEFENDANT’S OPPOSITION TO DEBTOR’S  
MOTION FOR A PRELIMINARY INJUNCTION**

Defendant, First Owners’ Association of Forty Six Hundred Condominium, Inc. (the “Association”), by counsel, in opposition to Debtor, Gordon Properties LLC’s (“Gordon Properties”) Motion for a Preliminary Injunction states as follows:

**INTRODUCTION**

After suing the Association on four separate occasions in the state courts of Virginia, and losing every case, Gordon Properties improperly filed a Petition for bankruptcy in an effort to avoid the rulings of the state courts of Virginia and to convince this Court to, in effect, set aside those decisions. In doing so, Gordon Properties asks this Court to set aside the Bylaws of the Association that apply to all 400 members of the Association, and that are required by the

---

**LINDA S. BROYHILL, ESQUIRE, VSB. NO. 22989**  
**MICHAEL S. DINGMAN, ESQUIRE, VSB NO. 30031**  
Counsel for First Owners’ Association of Forty Six Hundred Condominium, Inc.  
**REED SMITH LLP**  
3110 Fairview Park Drive, Suite 1400  
Falls Church, Virginia 22042  
Direct: 703-641-4328  
Fax: 703-641-4340  
E-Mail: lbroyhill@reedsmith.com

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF ALEXANDRIA

GORDON PROPERTIES, LLC,	)	
	)	
Plaintiff/Counter-Defendant,	)	
	)	
v.	)	Civil No. <u>CL08001432</u>
	)	
FIRST OWNERS' ASSOCIATION OF	)	
FORTY SIX HUNDRED	)	
CONDOMINIUM, INC.,	)	
	)	
Defendants/Counter-Plaintiff.	)	

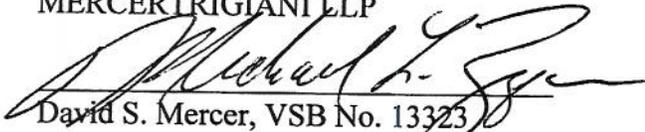
**NOTICE OF APPEAL**

COMES NOW Plaintiff/Counter Defendant Gordon Properties, LLC ("Gordon Properties"), by counsel, and gives notice of appeal to the Supreme Court of Virginia with regard to the Final Order entered by the Court on July 27, 2009, along with certain rulings made and orders entered by the Court prior to, during, and after the trial in this case, including, but not limited to, an Order entered on January 30, 2009, regarding motions for summary judgment and an Order entered July 24, 2009, regarding legal fees. Transcripts of the trial and other relevant proceedings will be filed. Counsel hereby certifies that, to the extent such transcripts have not already been filed, the transcripts have been ordered from the court reporters who reported the case.

GORDON PROPERTIES, LLC  
By Counsel



MERCERTRIGIANI LLP



David S. Mercer, VSB No. 13323

Michael L. Zupan, VSB No. 24962

112 South Alfred Street

Alexandria, Virginia 22314

Tel: 703-837-5000

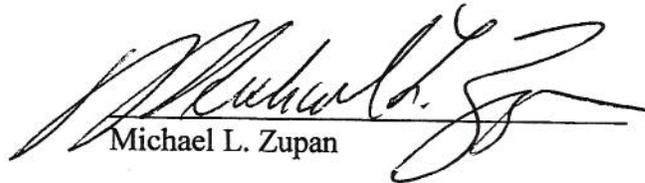
Fax: 703-837-5001

*Counsel for Gordon Properties, LLC*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 24th day of August 2009, a true and accurate copy of the foregoing was served by attachment to electronic mail and by first-class mail, postage prepaid, upon:

Michael Dingman, Esquire  
Robert Diamond, Esquire  
Reed Smith LLP  
3110 Fairview Park Drive  
Suite 1400  
Falls Church, Virginia 22042  
Fax: 703-641-4340  
*Counsel for Defendants*



Michael L. Zupan

#27475

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF ALEXANDRIA

_____		)
<b>GORDON PROPERTIES, LLC,</b>		)
		)
<b>Plaintiff/ Counter-Defendant,</b>		)
		)
v.		)
		)
<b>FIRST OWNERS' ASSOCIATION OF</b>		)
<b>FORTY SIX HUNDRED CONDOMINIUM,</b>		)
<b>INC., et al.,</b>		)
		)
<b>Defendants/ Counter-Plaintiff.</b>		)
_____		)

Case No. CL08-1432

ORDER

THIS MATTER came before the Court on January 14, 2009, upon Defendant/ Counterclaimant, First Owners' Association of 4600 Condominium, Inc.'s (the "Association") and Defendant, Board of Directors of the First Owners' Association of 4600 Condominium, Inc.'s Motion for Partial Summary Judgment and upon Plaintiff/Counter-Defendant Gordon Properties, LLC's Motion for Partial Summary Judgment; and

IT APPEARING to the Court based upon the pleadings filed herein and argument of counsel that, for the reasons stated on the record, that the Street-Front Commercial Unit owned by Gordon Properties, LLC is subject to assessment for the common expenses of the Association for the operation and management of the Association pursuant to Virginia Code § 55-79.83(D); that the common expenses are described in Article VIII of the Association's Bylaws; and that the Street-Front Commercial Unit owned by Gordon Properties, LLC is liable for 11.32% of such expenses; and



IT FURTHER APPEARING to the Court that the Association's claim in its Counterclaim for a money judgment against Gordon Properties, LLC with respect to the under-assessment of the Street-Front Commercial Unit owned by Gordon Properties, LLC is premature because no corrective assessment has been made by the Board; it is therefore

ORDERED that the Association's Motion for Partial Summary Judgment is Granted and the court hereby construes the Declaration and Bylaws, together with Virginia Code § 55-79.83(D) as granting the Association the authority to assess the Street-Front Commercial Unit owned by Gordon Properties, LLC for common expenses relating to the operation and management of the Association as described in Article VIII of the Bylaws of the Association; and that the street-front commercial unit owned by Gordon Properties, LLC is responsible for 11.32% of those expenses; and that Gordon Properties, LLC's claim in the First Amended Complaint for monetary damages for over assessment of the Street-Front Commercial Unit is dismissed with prejudice; and Gordon Properties' claim in section (a) (iv) of the Prayer for Relief in Count I of the First Amended Complaint, for an injunction against collecting maintenance Assessments from Gordon Properties as owner of a Street Front Commercial Unit, is hereby dismissed with prejudice. That is the only claim for injunctive relief that is dismissed; and it is

FURTHER ORDERED that Gordon Properties, LLC's Motion for Partial Summary Judgment on the Association's claim for a money judgment against Gordon Properties, LLC with respect to the Street-Front Commercial Unit is granted without prejudice because the Association's claim for a money judgment at law is premature; and it is

FURTHER ORDERED that the Association's request to amend its Counterclaim to allege a cause of action for an accounting with respect to the Street-Front Commercial Unit

owned by Gordon Properties, LLC is granted and the Association's Amended Counterclaim shall be filed by the close of business on Thursday, January 15, 2009;

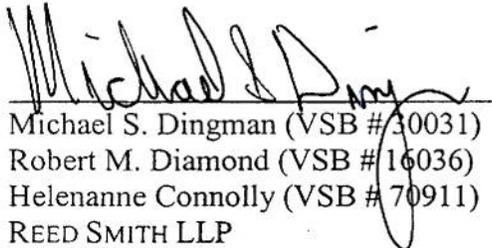
AND THIS MATTER IS CONTINUED.

ENTERED this \_\_\_\_\_ day of January, 2009.

---

The Honorable Lisa B. Kemler

SEEN AND OBJECTED TO WITH  
RESPECT TO THE COURT'S RULING  
ON GORDON PROPERTIES, LLC'S  
MOTION FOR PARTIAL SUMMARY  
JUDGMENT:



Michael S. Dingman (VSB # 30031)

Robert M. Diamond (VSB # 16036)

Helenanne Connolly (VSB # 70911)

REED SMITH LLP

3110 Fairview Park Drive

Suite 1400

Falls Church, VA 22042

(703) 641-4200 (telephone)

(703) 641-4340 (facsimile)

*Counsel for Defendants/ Counter-Plaintiff*

SEEN AND OBJECTED TO FOR THE REASONS  
STATED IN THE BRIEFS AND ORAL ARGUMENT:



Robert E. Scully, Jr. (VSB # 19218)

Emily Harwood Smith, (VSB # 65527)

Stites & Harbison, PLLC

1199 North Fairfax Street

Suite 900  
Alexandria, VA 22314  
(703) 739-4600 (telephone)  
(703) 739-9577 (facsimile)  
*Counsel for Plaintiff/ Counter-Defendant*

US\_ACTIVE-101037241.1

Virginia Condominium Act, and to allow Gordon Properties to exercise certain voting rights even though Gordon Properties is delinquent in its payments to the Association. Under the Association's Bylaws, no delinquent unit owner may vote at a meeting of the Association or be elected to the Association's Board of Directors. Gordon Properties asks this Court to ignore these requirements, and allow it to not only vote, but to seek seats on the Board of Directors. Most egregiously, Gordon Properties asks this Court to ignore and/or override the various decisions of the State Courts of Virginia on the very issues presented by Gordon Properties in its motion. The Court should deny Gordon Properties' Motion For Preliminary Injunction.<sup>1</sup>

### **FACTUAL BACKGROUND**

The Association is a non-stock corporation that is the unit owners' association mandated by the Virginia Condominium Act to oversee and administer the affairs of the Forty Six Hundred Condominium (the "Condominium") located in Alexandria, Virginia. The Condominium was created on or about 1975 with the recordation of a Declaration required by the Virginia Condominium Act for the creation of a condominium. The Declaration, including the Bylaws of the Association, was recorded among the land records of Alexandria, Virginia and constitutes covenants running with the land that are binding upon and that create rights in favor of all of the unit owners and members of the Association.

The Condominium was established by an entity known as West End Properties whose primary owner was a gentleman known as Bryan Gordon. As the Condominium was developed

---

<sup>1</sup> The Association also objects to this motion being heard on an emergency basis. The only emergency was manufactured by Gordon Properties who purposefully waited to file its motion only 2 business days before the hearing. The date of the annual meeting is set forth in the Bylaws and was well know by Gordon Properties. Further, the assessment Gordon Properties complains of was levied in June. There is no excuse for Gordon Properties waiting until the last minute to file. The Court should not reward such gamesmanship.

and marketed, West End Properties retained several units for itself. Mr. Gordon died suddenly in a plane crash in 1978 and the units owned by his company, West End Properties, were placed in a trust for the grandchildren of Mr. Gordon. On or about November, 2002, the trust was terminated and the units at the Condominium owned by Mr. Gordon's company were transferred to an entity known as Gordon Properties, LLC, the Debtor in this case. The units conveyed from the trust to Gordon Properties are the same units identified in the bankruptcy filing of Gordon Properties in this case.<sup>2</sup>

In addition to receiving ownership of the units at the Condominium identified in its filings, Gordon Properties also obtained ownership over a company known as Condominium Services, Inc. ("CSI"), a management company also formed by Bryan Gordon to manage the Association. CSI managed the Association from approximately 1978 until August 1, 2006 when it was terminated by the Association for cause. The exercise of the Association's right to terminate CSI triggered what has now extended into a three-year multi-lawsuit legal battle between the Association and Gordon Properties; a battle Gordon Properties now attempts to extend to this Court.

In October of 2006 Gordon Properties filed suit against the Association in a case known as *Gordon Properties, LLC vs. Board of Directors of the First Owners' Association of Forty Six Hundred Condominium, Inc.*, Case No. CL06-3060, in the Circuit Court for the City of Alexandria, Virginia (the "First Lawsuit"). In the First Lawsuit Gordon Properties contested the termination of CSI contending that the Association's termination of CSI was in violation of the Association's Bylaws. Gordon Properties also alleged a myriad of other claims against the Association in that case, including an extraordinary claim of attorneys' fees in excess of

---

<sup>2</sup> The four members of Gordon Properties are the four grandchildren of Bryan Gordon.

\$200,000. The parties in that case presented cross motions for summary judgment and the court granted the Association's motion for summary judgment and denied Gordon Properties' motion for summary judgment holding that the Association had the right to and had properly terminated CSI. Gordon Properties filed a Petition for Appeal with the Virginia Supreme Court regarding this decision, which petition was denied for being untimely filed.

On February 20, 2008, Gordon Properties filed its second lawsuit against the Association known as *Gordon Properties, LLC vs. First Owners' Association of Forty Six Hundred Condominium, Inc., et. al.*, Case No. CL08-1432 (the "Second Lawsuit"). In this lawsuit, in which Gordon Properties also sued every individual member of the Association's Board of Directors, Gordon Properties asserted at least seven different causes of action which included, among other things, a broad ranging attack on the Association's assessment methodology and a request that the Association be dissolved. One of the primary issues asserted by Gordon Properties in that case was whether the Association had the authority to assess a unit owned by Gordon Properties known as a "street front unit" which Gordon Properties then, and now, leases to a restaurant known as Mango Mike's. This is the "Restaurant Site" referred to by Gordon Properties in its pleadings. The Association filed a counterclaim in the Second Lawsuit asking the court to declare that it had the right to assess the Restaurant Site for certain expenses of the Association. This issue was presented by the parties on cross motions for summary judgment that were heard by the Circuit Court for the City of Alexandria on January 14, 2009. The Court, through the Honorable Lisa B. Kemler, denied Gordon Properties' motion for summary judgment and granted the Association's motion for partial summary judgment. In doing so, the Court held as follows:

The Court hereby construes the declaration and bylaws, together with Virginia Code § 55-79.83(D) as granting the Association the

authority to assess the street-front commercial unit owned by Gordon Properties, LLC for common expenses relating to the operation and management of the Association as described in Article VIII of the bylaws of the Association; and that the street-front commercial unit owned by Gordon Properties, LLC is responsible for 11.32% of those expenses; and that Gordon Properties, LLC's claim in the first amended complaint for monetary damages for over-assessment of this street-front commercial unit is dismissed with prejudice."

*See* Order attached as Exhibit 1.

As is clear from the court's order in the Second Lawsuit, the validity of the assessment against the street front unit was fully litigated by the parties and the Circuit Court for the City of Alexandria found as a matter of law that the Association had the right to assess what Gordon Properties now refers to as the "Restaurant Site." Thus, Gordon Properties' statement that the assessment of the Restaurant Site is "disputed" or has been made in bad faith by the Association is a false statement. The Association has acted in compliance with the order of the Circuit Court for the City of Alexandria and Gordon Properties well knows it.

The Second Lawsuit proceeded to a five-day trial on February 9, 2009 which resulted in a dismissal of all of Gordon Properties' claims against the Association with the exception of Gordon Properties' claim to a certain storage area in the basement of the Condominium. On August 24, 2009, Gordon Properties filed a Notice of Appeal to the Virginia Supreme Court in the Second Lawsuit, specifically noting as one of the issues for appeal the summary judgment order entered by the Court on January 30, 2009 regarding the assessment of the "Restaurant Site." A copy of the Notice of Appeal is attached as Exhibit 2. In summary, the "disputed" assessment referred to by Gordon Properties in its various pleadings is in fact the subject of a final order which Gordon Properties is presently appealing to the Virginia Supreme Court. In the

midst of these actions Gordon Properties now asks this Court to intervene on these very same issues.

Gordon Properties has also filed two lawsuits regarding elections issues, including those raised in its motion. On August 19, 2008, Gordon Properties filed its third lawsuit against the Association in the Circuit Court for the City of Alexandria, Virginia known as Case No. CL2008-3228. In this lawsuit Gordon Properties sought declaratory and injunctive relief regarding the conduct of the Association's 2008 annual meeting. Part of the relief sought by Gordon Properties was a waiver of the quorum requirement of the Association's Bylaws. In the third lawsuit, the Court held an expedited trial on Gordon Properties' complaint which occurred on September 12, 2008. At the conclusion of the trial the Court dismissed Gordon Properties' complaint with prejudice and refused to set aside or suspend application of the Bylaws. Gordon Properties appealed this decision to the Virginia Supreme Court which, after considering Gordon Properties' Petition for Appeal, declined to accept the appeal.

On the heels of the dismissal of the third lawsuit, Gordon Properties, on or about September 25, 2008 filed another complaint requesting injunctive relief with respect to the Association's 2008 annual meeting. Gordon Properties also requested an "ex parte" preliminary injunction with respect to the meeting. In that complaint Gordon Properties raised the issue, as it does here in this case, of whether Gordon Properties should be allowed to vote at the annual meeting even if it is delinquent in its payments to the Association. The Court denied Gordon Properties' ex parte Motion for a Preliminary Injunction and Gordon Properties subsequently dismissed the case without prejudice.

Having lost numerous lawsuits in the state courts of Virginia, Gordon Properties contrived the filing of a Petition in bankruptcy to ask this Court to intervene in these state court

matters and to essentially overrule the state court decisions and allow Gordon Properties to vote at the upcoming annual meeting. In essence, Gordon Properties is asking this Court to rule that the Circuit Court for the City of Alexandria was wrong in deciding that the Association had the right to assess the "Restaurant Site," and that the Court was also wrong in its various rulings concerning the voting cases filed by Gordon Properties against the Association. In doing so, Gordon Properties ultimately asks this Court to excuse Gordon Properties from compliance with the Association's Bylaws and to allow Gordon Properties to participate in the 2009 annual meeting under circumstances under which no other member of the Association would be allowed to participate. Article IV, § 7 of the Association's Bylaws, attached as Exhibit 3, states: "No member shall be eligible to vote, either in person or by proxy, or to be elected to the Board of Directors who is shown on the books or management account of the owners association to be more than 30 days delinquent in any payment due the owners association." Gordon Properties not only seeks to vote at the election, it seeks to elect to the Board nine members or agents of Gordon Properties, LLC. In short, Gordon Properties, even though it is not eligible to vote or to have any member run for the Board of Directors of the Association, is asking the Court to waive the Bylaws and to allow Gordon Properties to stack the Board in its favor in an attempt to undo the various decisions of the Circuit of the City of Alexandria. This is the sole purpose of the bankruptcy petition, to circumvent the Bylaws of the Association. Indeed, it is the Association's belief that if the preliminary injunction is granted, this case will be dismissed soon after the annual meeting as this case was not filed for any legitimate reorganization of Gordon Properties.

## ARGUMENT

### **I. The Extraordinary Remedy of a Preliminary Injunction Requires Gordon Properties to Clearly Demonstrate a Likelihood of Success on the Merits of Its Claims, Irreparable Harm, That the Balance of the Equities Favors Gordon Properties and That the Public Interests are Served by Issuing the Injunction.**

---

In recent decisions, both the United States Supreme Court, in *Winter v. Natural Resources Defense Council, Inc.*, 129 S. Ct. 365 (2008), and the Fourth Circuit Court of Appeals, in *The Real Truth About Obama, Inc. v. Federal Election Commission*, 575 F.3d 352 (2009), have clarified the requirements for the issuance of a preliminary injunction. In doing so, both courts made clear that the grant of a preliminary injunction is an extraordinary remedy that should rarely be granted and only upon a clear showing of four factors by the party seeking the injunction. The decisions in both *Winter* and *The Real Truth About Obama, Inc.* demonstrate that the courts now apply a stringent test to issue a preliminary injunction, which test Gordon Properties cannot begin to meet in this case.

In *Winter*, the Supreme Court held: “A preliminary injunction is an extraordinary remedy never awarded as a matter of right.” 129 S. Ct. at 376. The Court further held in *Winter* that “a plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.”<sup>3</sup> In *The Real Truth About Obama, Inc.*, the Fourth Circuit adopted the criteria set forth in *Winter* and held that “all four requirements must be satisfied.” *The Real Truth About Obama, Inc.*, 575 F.3d at 346.<sup>4</sup>

---

<sup>3</sup> In *Winter* the Supreme Court specifically rejected the issuance of a preliminary injunction on the grounds that irreparable harm is “a possibility.”

<sup>4</sup> The Fourth Circuit further concluded in *The Real Truth About Obama, Inc.* that the Fourth Circuit’s prior decision in *Blackwelder Furniture Co. of Statesville v. Seilig Manufacturing Co.*,

Continued on following page

Therefore, based upon the decisions in *Winter* and *The Real Truth About Obama, Inc.*, in order to obtain the preliminary injunction it seeks, Gordon Properties must clearly establish: that it is likely to succeed on the merits of its complaint; that it will likely suffer irreparable harm if a preliminary injunction is not granted; that the balance of the equities tips in its favor; and that an injunction is in the public interest. As argued below, Gordon Properties cannot satisfy any of these four requirements and its Motion for a Preliminary Injunction must be denied.

**II. Gordon Properties Cannot Demonstrate, Let Alone Clearly Show, a Likelihood of Success on the Merits of Its Claims.**

Gordon Properties cannot satisfy the first requirement for the issuance of a preliminary injunction because Gordon Properties is not likely to succeed on the merits of its Bankruptcy Petition or its Complaint for Injunctive Relief. First, the Bankruptcy Petition itself was filed in bad faith because Gordon Properties has no need to reorganize and improperly filed this lawsuit to circumvent decisions by the state courts of Virginia and, as its counsel candidly admitted, to allow Gordon Properties, contrary to the Association's Bylaws, to vote at the 2009 annual meeting being held this Wednesday. Second, application of the Bylaws to Gordon Properties, just as to every other member of the Association, does not violate the automatic stay. Indeed, Gordon Properties improperly attempts to use the automatic stay as a sword with respect to its request for a preliminary injunction. Finally, Gordon Properties has no support for its contention that this Court can set aside the Bylaws of the Association, which are a contract and covenants running with the land mandated by the Virginia Condominium Act to bind all of the members of

---

Continued from previous page  
550 F.2d 189 (4<sup>th</sup> Cir. 1977), setting forth the test for the issuance of preliminary injunction in the Fourth Circuit, could not stand in light of the decision in *Winter*.

the Association. Accordingly, Gordon Properties' request for a preliminary injunction should be denied.

**A. The Bankruptcy Petition is a Bad Faith Filing.**

In *In re: Premier Automotive Services, Inc.*, 492 F.3d 274, 279, the Fourth Circuit Court of Appeals held that “the right to file a Chapter 11 bankruptcy petition is conditioned upon the debtor’s good faith – the absence of which is cause for summary dismissal.” The Fourth Circuit further held in that case: “Indeed, the ability of a bankruptcy court to conduct a threshold inquiry into the good faith of a petitioner is indispensable to proper accomplishment of the basic purposes of Chapter 11 protection.” *See also Carolin Corp. v. Miller*, 886 F.2d 693 (4<sup>th</sup> Cir. 1989). In *Carolin*, the Fourth Circuit held that the court should apply a subjective test in determining whether a petition is filed in good faith which test “asks whether a Chapter 11 petition is motivated by an honest intent to effectuate reorganization or is instead motivated by some improper purpose.” *Carolin*, 886 F.2d at 702. Here, Gordon Properties’ filing of a Bankruptcy Petition was not motivated by a need or an intent to reorganize, but instead was filed for the improper purpose of circumventing state law decisions as well as the application of the Association’s Bylaws. In fact, it is the Association’s belief that if Gordon Properties obtains the right to vote at the 2009 annual meeting, it will soon thereafter dismiss this case having improperly obtained the relief it really seeks, the right to vote in violation of the Association’s Bylaws.

One of the considerations in determining whether a petition has been filed in good faith is whether there is a legitimate need to reorganize when the petition is filed. In *In re: Premier*, the Fourth Circuit affirmed the dismissal of the petition in that case holding: “Premier had no demonstrable need to reorganize when it filed the petition: it was not, the bankruptcy court

found, even experiencing financial difficulties.” 492 F.2d at 280. The Fourth Circuit further held in *Premier*: “As one of our sister circuits has noted, courts have consistently dismissed Chapter 11 petitions filed by financially healthy companies with no need to reorganize under the protection of Chapter 11.” *Id.* See also *Furness v. Lilienfield*, 35 B.R. 1006 (D. Md. 1983) (“Chapter 11 was designed to give those teetering on the verge of a fatal financial plummet an opportunity to reorganize on solid ground and try again, not to give profitable enterprises an opportunity to evade contractual or other liability.” *Id.* at 1009). A review of the schedules attached to Gordon Properties’ Petition demonstrates that Gordon Properties has no need for reorganization.

The schedules identify assets of Gordon Properties that exceed its liabilities by almost \$10 million. The schedules demonstrate a monthly rental income of nearly \$56,000 and a current balance in a checking account of \$337,436.67. The only unsecured creditors listed are the two law firms that represented Gordon Properties in its prior litigation with the Association in state court. One secured creditor is listed which is fully secured and Gordon Properties is likely current in that underlying obligation. Gordon Properties is solvent, has no demonstrable need to reorganize and is not experiencing financial difficulties.

The Petition was not filed because of any need of Gordon Properties to reorganize, but was clearly filed in order to bring into the Bankruptcy Court disputes between Gordon Properties and the Association that have been litigated over the last three years and that remain pending in the state courts of Virginia. In short, this Chapter 11 case is nothing more than a dispute between two parties that can be resolved in the pending state court action. As the Fourth Circuit made clear in *In re: Premier Automotive Services*, a Chapter 11 petition filed for an improper purpose, such as seeking to circumvent state court decisions with no need to reorganize, requires the

dismissal of a Chapter 11 petition for lack of good faith. The facts set forth above show that Gordon Properties cannot demonstrate a substantial likelihood of success in this matter and, therefore, its request for a preliminary injunction must be denied.

**B. Application of the Association's Bylaws Recorded Among the Land Records 35 Years Ago Does Not Violate the Automatic Stay.**

In its Complaint, Gordon Properties requests that this Court issue a preliminary injunction to allow Gordon Properties to vote at the Association's upcoming meeting even though the Bylaws of the Association plainly state that any member of the Association who is delinquent in its accounts is not eligible to vote. Gordon Properties seeks to evade this provision of the Bylaws by contending that its application violates the automatic stay. Gordon Properties is incorrect in this position and it is not likely to succeed in this argument. Therefore, its request for a preliminary injunction must be denied.

First, the Association's Bylaws are not an attempt by the Association to collect a debt from Gordon Properties and application of the Bylaws' provision with respect to voter eligibility has no effect on the estate of Gordon Properties or on its ability to reorganize, though the Association contends there is no need to reorganize.

Second, the Bylaws have been in existence, and recorded, for more than 35 years and Gordon Properties was subject to the provisions of these Bylaws well before the filing of the Bankruptcy Petition in this case. Therefore, Gordon Properties' ownership interest in the units of the Condominium is subject to the provisions of the Bylaws under Virginia law and the estate's interest is equally subject to the Bylaws. In *Universal Cooperatives, Inc. v. FCX, Inc.*, 853 F.2d 1149 (4<sup>th</sup> Cir. 1988), the Fourth Circuit held: "The estate succeeds only to those interests that the debtor had in property prior to commencement of the bankruptcy case . . . no more, no less."

Gordon Properties does not allege in the Complaint that it is not bound by the Bylaws or that they are invalid or unenforceable under Virginia law. Instead, Gordon Properties contends that the automatic stay imposed by Section 362 of the Bankruptcy Code precludes the application of this qualification to vote because the delinquency is based upon a monetary default which accrued prior to the Petition date. Gordon Properties is essentially asserting that Section 362 preempts the provisions of the Association's Bylaws. The Fourth Circuit considered a similar contention in the *FCX* case in the context of a Section 1123(a)(5)(D) case acknowledging that "Congress may . . . abrogate state law entitlements in bankruptcy pursuant to its Bankruptcy Clause power, U.S. Const., art. 1, § 8, Clause 4." *Id.* at 1154. However, here, unlike the statutory provision at issue in the *FCX* case, which specifically overrode non-bankruptcy law, Section 362 is not "an empowering statute in the sense that new rights or powers for dealing with the property of the estate are created." *Id.* at 1155. The purpose of the automatic stay in corporate reorganization proceedings is to shield creditors from each other and to aid in the equitable distribution of the debtor's assets in a way that maximizes the interests of all parties. In essence, to maintain the status quo among the competing interests. *See, e.g., In re: Briggs Trans. Co.*, 780 F.2d 1139, 1343 (8<sup>th</sup> Cir. 1985). The purpose of the stay is not to create new rights in the debtor that did not exist on the petition date. In this case, Gordon Properties is impermissibly attempting to use the stay as a sword rather than shield to create a right that it did not have on the Petition date. *See Oberg v. Aetna Cas. and Surety Co.*, 828 F.2d 1023, 1026 (4<sup>th</sup> Cir. 1987) (stating that "[o]ur system of law universally frowns on a party who would use the stay as a sword and a shield"; *Central Fid. Bank v. Cooper*, 116 B.R. 469, 472 (Bankr. E.D. Va. 1990) (asserting that a co-debtor stay of Code Section 1301 "is to be used as a shield and not as a sword.")).

In short, the automatic stay is not implicated by the voter eligibility provisions of the Association's Bylaws and Gordon Properties' attempt to invoke the automatic stay is an improper attempt to use Section 362 of the Bankruptcy Code as a sword and not a shield. Thus, Gordon Properties cannot demonstrate a likelihood of success on the merits of the allegations set forth in its Complaint and its request for a preliminary injunction should be denied.

**C. Gordon Properties Cannot Invoke Section 362 of the Bankruptcy Code to Set Aside the Association's Bylaws Which Constitute a Contract Between Gordon Properties and the Other Nearly 400 Members of the Association.**

The Bylaws of the Association are required by the Virginia Condominium Act to be recorded in order to create the condominium and constitute covenants running with the land that are binding on all of the unit owners, including Gordon Properties. Further, the condominium instruments recorded to create a condominium, including Bylaws, are deemed a contract by and between all of the unit owners of the condominium. Gordon Properties can cite to the Court no authority to set aside the contractual obligations of Gordon Properties set forth in the Bylaws, to the detriment of the other nearly 400 members of the Association. Therefore, Gordon Properties cannot demonstrate a likelihood of success.

The filing of a petition under the Bankruptcy Code creates an estate comprised of the property listed in Section 541(a), including "all legal or equitable interests of the debtor and property as of the commencement of the case." 11 U.S.C. § 541(a)(1). Despite this broad definition, there is no provision in the Bankruptcy Code that determines the nature and extent of a debtor's interest in a particular piece of property. Instead, property interests are created and defined by state law. *Butner v. United States*, 440 U.S. 48, 55 (1979).

Virginia Code § 55-79.45 states: "No condominium shall come into existence except by the recordation of condominium instruments pursuant to the provisions of this chapter." Virginia

Code § 55-79.73 states: “There shall be recorded simultaneously with the declaration a set of bylaws providing for the self government of the condominium by an association of all the unit owners.” Finally, Virginia Code § 55-79.53 states: “The declarant, every unit owner, and all of those entitled to occupy a unit shall comply with all lawful provisions of this chapter and all provisions of the condominium instruments.”<sup>5</sup> The Virginia Condominium Act clearly provides that the bylaws are an integral part of the formation of a condominium and are binding on all of the members of the condominium’s unit owners association.

Further, the Virginia Supreme Court has held that the bylaws of an association such as a unit owners association “constitutes a contract between the members, which, if not immoral or contrary to public policy, or the law, will be enforced by the courts.” *Gottlieb v. Economy Stores, Inc.*, 199 Va. 848, 856 (1958). Further, in *Unit Owners Association of Build America – I, a Condominium v. Gillman*, 223 Va. 752 (1982), the Virginia Supreme Court held that the bylaws of a condominium association are “contractual in nature,” based upon “the condominium documents to which all unit owners subjected themselves in purchasing their units.” *Id.* at 766.

In its Motion for a Preliminary Injunction, Gordon Properties requests that this Court suspend the application of the Bylaws of the Association as they apply to Gordon Properties and allow Gordon Properties to vote under circumstances under which no other member of the Association could vote. Gordon Properties is asking the Court to modify the contract between Gordon Properties and all of the other unit owners comprised by the Bylaws. The statutory purpose of the Bylaws is to set forth a document for the governance of a condominium and to ensure that all unit owners are fully aware of the requirements of the bylaws when they purchase

---

<sup>5</sup> This Code section goes on to state that the association may be sued if it fails to enforce the provisions of the bylaws, and further provides that a unit owner may bring suit against another unit owner for violation of the condominium instruments.

their unit. The Court cannot abrogate the contractual relationships that existed between Gordon Properties, the Association, and the other members of the Association created by the Bylaws and that were in existence years before the filing of the Petition in this case.

**III. Gordon Properties Cannot Show a Likelihood of Irreparable Harm.**

As stated by the Fourth Circuit in *The Real Truth About Obama, Inc.*, Gordon Properties must clearly show that if the preliminary injunction is not granted, Gordon Properties will likely suffer irreparable harm. Gordon Properties cannot begin to meet this standard. Application of the provision of the Bylaws regarding voter eligibility will have no effect on any of the assets of the estate of Gordon Properties. The purpose of the annual meeting is to simply vote for the Board of Directors for the Association. At the meeting no actions will be taken that will affect the units of Gordon Properties, or any other assets of Gordon Properties in any manner. Gordon Properties cannot demonstrate any harm, let alone irreparable harm, if it is not allowed to circumvent the requirements of the Bylaws regarding voter eligibility. Therefore, the Motion for a Preliminary Injunction should be denied.

**IV. The Balance of the Equities Tips Strongly in the Favor of the Association.**

The third criterion that must be satisfied by Gordon Properties to obtain a preliminary injunction is a clear demonstration that the balance of the equities tips in Gordon Properties' favor. In fact, the balance of the equities tips strongly in the favor of the Association. The Association has a statutory obligation to enforce the Bylaws of the Association, including in this instance, the voter eligibility requirements of the Bylaws. This obligation is to ensure that all members of the Association are treated equally and are subject to the same requirements set forth in the condominium instruments that created the Condominium in the first place. Further, if a member of the Association can avoid the voter eligibility requirements of the Bylaws by merely

filing for bankruptcy, then the purpose of this provision of the Bylaws could be easily thwarted and circumvented, just as Gordon Properties is seeking to do in this case.

Moreover, Gordon Properties controls nearly 20% of the votes of the Association though it owns less than 10% of the total units of the Association. Allowing Gordon Properties to exercise its votes in contravention of the Bylaws creates the very real possibility that Gordon Properties could elect a slate of Board members who would then undo the victories of the Association in the litigations filed in the state courts of Virginia. It is obvious that this is the tactic taken by Gordon Properties since it has lost its legal arguments in the state courts. If Gordon Properties was in good standing and could effect such a change in the Board, so be it. However, it would be inequitable for Gordon Properties to effect such a change by this Court granting Gordon Properties the special right to vote in contravention of the Association's Bylaws.

**V. The Public Interests Weigh Against the Issuance of a Preliminary Injunction.**

The final factor to be considered by the Court is the public interest or public consequences in employing the extraordinary remedy of injunction. The relief requested by Gordon Properties would have long ranging and negative effects upon condominium associations throughout Virginia. Gordon Properties is in essence asking this Court to set aside the Bylaws of the Association and to allow Gordon Properties to act in conflict with these Bylaws. As argued above, the Bylaws are mandated by the Virginia Condominium Act to be recorded, to be followed by all of the members of the condominium association and to be enforced by the courts. Allowing a member of a condominium association to avoid the application of the Bylaws of the Association, particularly when the application of those bylaws has no effect on the unit owner's unit or assets, would severely undermine the condominium scheme created under the Virginia

Condominium Act. The effect could be particularly egregious in this case as the Court setting aside of the Association's Bylaws could allow Gordon Properties to seize control of the Association. There is a clear public interest in affirming the requirements of the Virginia Condominium Act and the obligation of all members of the condominium association to adhere to the Association's Bylaws.

For these reasons, Gordon Properties' Motion for a Preliminary Injunction should be denied.

Respectfully submitted,

FIRST OWNERS' ASSOCIATION OF  
FORTY SIX HUNDRED CONDOMINIUM, INC.  
By Counsel

By:           /s/ Linda S. Broyhill            
Linda S. Broyhill, Esquire, VSB No. 22989  
Michael S. Dingman, Esquire, VSB No. 30031  
REED SMITH LLP  
3110 Fairview Park Drive, Suite 1400  
Falls Church, Virginia 22042  
Direct: 703-641-4328  
Fax: 703-641-4340  
E-Mail: lbroyhill@reedsmith.com

**CERTIFICATE OF SERVICE**

The undersigned certifies that this Opposition was served on October 6, 2009, by electronically sending a copy to the Debtor's counsel at [donking@ofplaw.com](mailto:donking@ofplaw.com), and by first-class mail, postage prepaid, to

Donald F. King, Esq.  
James W. Reynolds, Esq.  
Odin Feldman & Pittleman, P.C.  
9302 Lee Highway, Suite 1100  
Fairfax, Virginia 22031

\_\_\_\_\_  
/s/ Linda S. Broyhill

US\_ACTIVE-102425897.1