

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

In re: *
*
GORDON PROPERTIES, LLC, * **Case No. 09-18086-RGM**
CONDOMINIUM SERVICES, INC., * Chapter 11
* (Jointly Administered)
Debtors. *

JOINT MOTION AND MEMORANDUM FOR ORDER APPROVING SETTLEMENT AGREEMENT BETWEEN DEBTORS AND FIRST OWNERS' ASSOCIATION OF FORTY-SIX HUNDRED CONDOMINIUM, INC., AND FOR RELATED RELIEF

The Debtors herein (the “**Debtors**”), Gordon Properties, LLC (“**Gordon Properties**”), and Condominium Services, Inc. (“**CSI**”), together with First Owners’ Association of Forty Six Hundred Condominium, Inc. (“**FOA**”), by and through their respective counsel, jointly move this Court for entry of an order approving a Settlement Agreement pursuant to 11 U.S.C. § 105 and Federal Rule of Bankruptcy Procedure 9019, and in support of this motion (the “**Motion**”), state as follows:

Jurisdiction

1. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334. Venue in this Court is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This Motion is a core proceeding within the meaning of 28 U.S.C. § 157(b).

2. The relief sought in this motion is predicated upon section 105 of title 11 of the United States Code (the “**Bankruptcy Code**”), and Rule 9019(a) of the Federal Rules of Bankruptcy Procedure (“**FRBP**”).

The Parties and the Condominium

3. The Forty Six Hundred Condominium (the “**Condominium**”) is a mixed-use condominium located at 4600 Duke Street, Alexandria, VA. The Condominium consists of a

high-rise building containing both residential and commercial units (the “**Condominium Building**”), and two separate commercial street front units (the “**Street Front Units**”), one of which is operated as a gas station (the “**Gas Station Unit**”), and the other of which is operated as a restaurant (the “**Restaurant Unit**”).

4. FOA is the association of unit owners of the Condominium (the “**Unit Owners**”) required by the Virginia Condominium Act, Virginia Code § 55-79.35, *et seq* (the “**Condominium Act**”).

5. Gordon Properties is a Virginia limited liability company owned by four family members.¹ Bryan Sells (“**Mr. Sells**”)² is the managing member. Gordon Properties owns approximately 40 units in the Condominium, including both residential and commercial units in the Condominium Building, plus the street-front Restaurant Unit.³ Gordon Properties also owns CSI.

6. CSI is a Virginia corporation that is in the business of managing condominiums. It is a wholly-owned subsidiary of Gordon Properties.

7. Gordon Residential Holdings, LLC (“**Gordon Residential**”), is a Virginia limited liability company owned by the same members who own Gordon Properties. Mr. Sells is the managing member. Gordon Residential’s only asset is a single residential rental unit in the Condominium.

8. Gordon Properties, CSI, Gordon Residential, and the individual members of Gordon Properties and Gordon Residential, are sometimes referred to herein collectively as the

¹ The four members are Bryan Sells, Lindsay Wilson, Elizabeth Greenwell, and Julia Langdon (Julia Landon is under a legal disability, and Alexandria attorney Richard Mendelson, together with Lindsay Wilson, serve as court-appointed conservators on her behalf).

² Mr. Sells, individually, also owns a residential rental unit in the Condominium.

³ The Restaurant Unit is leased by Gordon Properties to an unrelated entity that owns and operates the Mango Mikes Restaurant on the site.

“**Gordon Properties Parties.**” The Gordon Properties Parties and FOA are sometimes referred to herein collectively as the “**Parties.**”

The CSI Judgment

9. CSI at one time was the manager of the Condominium. In 2006, FOA’s board of directors (the “**Board**”) terminated CSI. CSI maintained that its termination was improper, and it directed the Unit Owners to continue paying their assessments to CSI. Although CSI remitted all of the assessments to FOA, CSI retained and paid itself its management fees under the contract (\$91,125.00). FOA commenced a law suit against CSI for conversion and damages, and was successful in obtaining a judgment against CSI for conversion and punitive damages in the approximate amount of \$450,000.00 (the “**CSI Judgment**”). The CSI Judgment was affirmed on appeal to the Virginia Supreme Court. Following entry of the CSI Judgment, FOA commenced post-judgment collection action. CSI was unable to post a bond to stay enforcement of the CSI Judgment pending the appeal and filed its chapter 11 case. Gordon Properties is not liable to pay the CSI Judgment. However, FOA filed a motion in these cases seeking substantive consolidation of the CSI and Gordon Properties bankruptcy estates in order to obtain payment of the CSI Judgment from the Gordon Properties estate.

The 2009 Assessment

10. In May 2009, FOA levied an assessment against Gordon Properties’ Restaurant Unit in the amount of nearly \$300,000.00 (the “**2009 Assessment**”). FOA claimed that the Restaurant Unit had been under-assessed during the period from 2003 through 2008, and further claimed that the 2009 Assessment had been authorized by the Alexandria Circuit Court in certain litigation between Gordon Properties and FOA (the “**2008 State Court Action**”). Gordon Properties disputed the validity of the 2009 Assessment, and further disputed FOA’s assertion

that the 2009 Assessment had been authorized by the court in the 2008 State Court Action. When Gordon Properties failed to pay the 2009 Assessment, FOA filed a lien against the Restaurant Unit. In addition, FOA maintained that Gordon Properties was prohibited from exercising its voting rights at the 2009 annual meeting of the Unit Owners (the “**2009 Annual Meeting**”), based upon a by-law provision in the Condominium’s governing documents (the “**Condominium Instruments**”) that prohibits a Unit Owner from voting if the Unit Owner is delinquent in any obligation to the Condominium. The validity of the 2009 Assessment and the right of Gordon Properties to vote at Condominium elections have been at the core of virtually every dispute between the Parties in this chapter 11 case.

The Bankruptcy Proceedings

11. Gordon Properties commenced its chapter 11 case on October 2, 2009, and CSI commenced its chapter 11 case on January 26, 2010. Upon joint motion of Gordon Properties and CSI, this Court entered an agreed order on September 29, 2010, authorizing joint administration of their respective estates.

12. Following commencement of Gordon Properties’ chapter 11 case, further litigation between the Parties ensued, including the following:⁴

A. In adversary proceedings commenced by Gordon Properties against FOA in 2009 (09-1034) and 2011 (11-1020), Gordon Properties asserted that FOA violated the automatic stay with respect to the 2009 Annual Meeting and the 2010 annual meeting (the “**2010 Annual Meeting**”) by denying Gordon Properties its voting rights in order to collect the 2009 Assessment. FOA asserted that the automatic stay did not apply to its enforcement of the Condominium’s by-law provision that prevents delinquent unit owners from voting, and further

⁴ All pending litigation between the Parties has been stayed by the courts in which the proceedings are pending in order to allow the Parties to pursue court-ordered mediation (as discussed below).

asserted that, even if the automatic stay was applicable, it did not violate the stay or act intentionally. Following numerous hearings, lengthy pre-trial proceedings, and a trial, this Court entered a series of related orders and memorandum opinions, *inter alia*, holding that FOA intentionally violated the automatic stay, entering judgment in favor of Gordon Properties against FOA for damages incurred by Gordon Properties, ordering that FOA's 2011 annual meeting (the "**2011 Annual Meeting**") and election be conducted under the supervision of the Court, and certifying the results of the 2011 election. All of the orders were appealed to the District Court, and those appeals are pending.

B. FOA filed a proof of claim in Gordon Properties' case for the amount of the 2009 Assessment (the "**Claim**"). Gordon Properties objected to the Claim (the "**Claim Objection**"). Following trial, this Court entered an order and memorandum opinion sustaining Gordon Properties' Claim Objection and disallowing FOA's Claim in its entirety. The order was appealed to the District Court, and that appeal is pending.

C. FOA filed a motion seeking to dismiss Gordon Properties' chapter 11 case as having been filed in bad faith. Following trial, this Court entered an order and memorandum opinion denying the motion. FOA appealed the order to the District Court. The appeal was dismissed as interlocutory.

D. FOA filed a motion seeking to substantively consolidate the bankruptcy estates of Gordon Properties and CSI (see discussion, above, regarding the CSI Judgment). Following trial, this Court entered an order and memorandum opinion denying the motion. FOA appealed the order to the District Court. The District Court reversed this Court's order and remanded for further proceedings. Those further proceedings are pending.

E. Prior to FOA's 2011 annual meeting, FOA commenced an action in state court seeking a declaratory judgment that Gordon Residential may not seat more than one candidate on FOA's Board, and sought a preliminary injunction on an expedited basis against Gordon Residential seating more than one candidate on FOA's Board as a result of the election to be conducted at FOA's 2011 Annual Meeting. The state court issued a preliminary injunction preventing Gordon Residential from seating more than one candidate on FOA's Board in the 2011 election. Following issuance of the preliminary injunction, the dispute was removed to arbitration pursuant to the arbitration clause in the Condominium Instruments. Gordon Properties was later added as a party defendant to the arbitration.⁵ Although the court's preliminary injunction applied to the 2011 election, Gordon Residential agreed to honor that preliminary injunction with respect to the 2012 election.

FOA's 2011 Election

13. As previously mentioned, FOA's 2011 election was conducted under the supervision of this Court. Gordon Properties and FOA jointly selected, and the Court approved, an election administrator and a parliamentarian to conduct the election. At this election, all seven (7) seats on FOA's Board were up for election. Following the election and the interim report by the election administrator, the Court conducted a hearing to rule on various election objections filed by FOA and Gordon Properties. Following the Court's rulings on the election objections, and in accordance with those rulings, the election administrator certified the final vote tally. That final vote tally reflected that six (6) of the candidates elected by the Unit Owners to the 7-member Board were Gordon Properties-related candidates. However, in response to

⁵ Although the Bankruptcy Court granted FOA leave from the automatic stay to add Gordon Properties as a party defendant in the arbitration, the Bankruptcy Court ultimately ruled itself on the issue pending before the arbitrator (i.e., whether a non-natural Unit Owner can seat more than one candidate on FOA's Board).

objection by FOA, the Court limited Gordon Properties to one seat on the Board.⁶ Consequently, following the 2011 election and this Court's subsequent orders, FOA's 7-member Board consisted of three individuals related to Gordon Properties and four individuals not related to Gordon Properties.⁷

FOA's 2012 Election

14. Although FOA's 2012 election was not conducted under the supervision of this Court, FOA attempted to follow as closely as possible the meeting procedures outlined by the Court for the 2011 election. Most importantly, FOA engaged for the 2012 election the same election administrator and parliamentarian appointed by the Court to supervise the 2011 election. In addition, Gordon Properties agreed that it would be subject to the Court's prior ruling limiting it to one seat on the Board regardless of whether its candidates received sufficient votes to win the election. At the 2012 election, only three (3) seats were up for election.⁸ Since one of the 3 candidates receiving the highest number of votes was a Gordon Properties-related candidate, the third candidate seated to the Board was the person receiving the next highest number of votes.⁹

⁶ The Court's ruling in this regard is the subject of one of the appeals pending in the District Court.

⁷ Lucia Hadley was the only non-Gordon Properties related candidate to receive sufficient votes to fall in the top 7 of the vote tally. Although the Unit Owners elected six (6) Board members related to Gordon Properties, as indicated above, the Court limited Gordon Properties to one Board seat on the basis that a non-natural Unit Owner is limited to one (1) seat on the Board, and Gordon Residential was limited to one Board seat on the basis of the preliminary injunction entered by the state court. Therefore, following the Court's ruling, the seven (7) members seated on the Board, in order of vote tally, were Lindsay Wilson, Bryan Sells, Elizabeth Greenwell, Lucia Hadley, F. J. Pepper, Alex Zoghaib, and Elizabeth Moore.

⁸ Pursuant to the Condominium Instruments, the candidates falling in the top 4 of the vote tally are seated for 2 years, and the candidates falling in the next top 3 of the vote tally (i.e., 5th through 7th) are seated for 1 year. Consequently, when the 2012 election was held, only 3 seats were up for election. Since the 3 Gordon Properties candidates elected to the 2011 Board fell within the top 4 of the vote tally, those seats were not up for election in 2012.

⁹ The candidates falling in the top 4 of the vote tally, as certified by the election administrator, were Martina Hernandez, Dennis Howland, William Reichenbach, and Jonathan Halls. Pursuant to Gordon Properties' agreement to follow the Court's prior order regarding the number of Gordon Properties-related candidates that could be seated to the Board, Jonathan Halls was seated to the Board in place of Dennis Howland, the Gordon Properties-related candidate.

Consequently, following the 2012 election, the 7-member FOA Board again consisted of three individuals related to Gordon Properties and four individuals not related to Gordon Properties.¹⁰

The Special Litigation Committee

15. In order to avoid any appearance of influence or control by the Gordon Properties-related Board members, the Board adopted a resolution appointing an independent, disinterested Special Litigation Committee (“SLC”).¹¹ None of the members of the SLC who negotiated and approved this Settlement Agreement on behalf of FOA are related to any of the Gordon Properties Parties. The SLC was given the exclusive authority to, *inter alia*, negotiate and approve a settlement of the pending disputes with the Gordon Properties Parties, and engage counsel to represent it in the litigation with Gordon Properties.¹² The SLC engaged attorney John T. Donelan to represent and advise it in these matters.

FOA’s Financial Condition

16. FOA has utilized more than \$1 million of Unit Owner reserves to pay its legal fees related to the disputes with Gordon Properties, resulting in negative Unit Owner equity of approximately \$1.8 million. In addition to restoring those reserves, absent a settlement with Gordon Properties, FOA’s budget would have to be adjusted to ensure that FOA had sufficient resources to fund its continuing litigation with Gordon Properties. In short, if the Unit Owners’

¹⁰ The 2012 Board, presently serving, is Lindsay Wilson, Bryan Sells, Elizabeth Greenwell, Lucia Hadley, Martina Hernandez, William Reichenbach, and Jonathan Halls (Wilson, Sells, and Greenwell are the Gordon Properties-related Board members).

¹¹ For a short time following the 2011 election until the Court entered its ruling limiting Gordon Properties to 1 Board seat, Gordon Properties-related individuals occupied 4 of the 7 Board seats, giving them a majority. That Board appointed the first SLC. However, following the 2012 election, when non-Gordon Properties-related candidates held a majority on the Board, a new SLC was appointed. The present SLC consists of Bill Reichenbach and Martina Hernandez, two of the disinterested Board members, and Jane Brungart, a disinterested Unit Owner.

¹² Although the resolution gave the SLC discretion with respect to choosing counsel, the SLC was prohibited from engaging any attorney who had previously represented any of the Gordon Properties Parties or FOA. The Board, in the exercise of its business judgment, concluded that the most likely path to a negotiated resolution of the disputes was to engage counsel who had no prior connection with any of the Parties and who could bring a fresh approach to the negotiations.

assessments are not increased significantly, FOA could not continue to pay for the litigation and likely would be forced to seek bankruptcy relief.

CSI's Financial Condition

17. CSI has no assets from which a judgment could be paid. Its only ability to pay the judgment is through its revenue stream generated by its management contracts. While CSI continues to be optimistic that its business will grow over the next several years, its financial performance over the past several years indicates that it has no net revenue from which the judgment might be paid.

The Mediation

18. On September 13, 2012, this Court ordered the Parties to mediation (the “**Mediation**”), and appointed The Honorable Kevin Huennekens, Bankruptcy Judge for the Eastern District of Virginia, Richmond Division, as the mediator (the “**Mediator**”).¹³ Over the course of nearly three months, the Parties engaged in Mediation and settlement negotiations. The Parties prepared and submitted to the Mediator a Joint Mediation Statement, and each Party prepared and submitted a separate Confidential Mediation Statement. Mr. Sells, on behalf of the Gordon Properties Parties, and the SLC, on behalf of FOA, and their respective counsel, Donald F. King and John T. Donelan, engaged in two Mediation sessions with the Mediator (one full day on November 26, 2012, and one nearly full day on December 11, 2012). In addition, the Parties, through their counsel, engaged in numerous settlement negotiations over the course of this 3-month period which supplemented the formal Mediation. At the conclusion of the Mediation session with the Mediator on December 11, 2012, the Parties agreed to the terms of a global settlement. Over the course of the next several weeks, counsel for the Parties worked on drafting

¹³ This was the Parties’ second attempt to settle the case with formal mediation. In 2011, the Parties engaged in mediation with Magistrate Davis from the District Court. That mediation was unsuccessful.

a settlement agreement that memorialized the terms of the agreement. Although the Parties agreed to the terms of a settlement at the December 11th Mediation, counsel could not always agree on the language of the written agreement. Nonetheless, the Parties finally were able to agree on the written terms, and a formal Settlement Agreement was finalized and executed.

The Settlement Agreement

19. Following Mediation, the Parties memorialized the terms of the settlement that had been achieved in the Mediation in a writing executed on behalf of all of the Parties. A copy of that Settlement Agreement is attached hereto and incorporated herein as Exhibit "A."

20. Several days prior to the filing of this Motion, FOA's counsel conducted a town hall meeting (the "**Town Hall**"). All Unit Owners received notice of the Town Hall. The Town Hall was conducted by FOA's counsel who described in detail the terms of the Settlement Agreement and the reasons why the SLC concluded that entering into the Settlement Agreement was in the best interest of FOA. All Unit Owners were given an opportunity to review the executed Settlement Agreement.

21. In addition to the Town Hall already conducted, upon filing of this Motion, each Unit Owner will receive a copy of this Motion and the Settlement Agreement, be given notice of the hearing at which the Court will be asked to approve this Settlement Agreement, and be given an opportunity to be heard at the hearing on approval of the Settlement Agreement.¹⁴

22. Following is a summary of the essential terms of the Settlement Agreement:¹⁵

(i) The parties to the Settlement Agreement are all of the Gordon Properties Parties and FOA;

¹⁴ The Gordon Properties Parties do not believe that the Unit Owners have standing individually in these cases or with respect to approval of the Settlement Agreement, and they do not waive any argument in that regard. Nonetheless, the Gordon Properties Parties recognize the wisdom of, and fully support, including the Unit Owners in the approval process and giving all of them an opportunity to be heard by the Court.

¹⁵ What follows is simply an explanation of the essential terms of the Settlement Agreement. If there is any conflict between this summary and the Settlement Agreement, the Settlement Agreement controls. All interested persons are encouraged to review the Settlement Agreement to determine the exact terms.

- (ii) CSI agrees to pay FOA \$225,000.00 in full and final satisfaction of FOA's judgment against CSI;
- (iii) Gordon Properties agrees to cease collection action on its judgment against FOA and agrees to release to FOA the \$276,367.00 presently held in the Bankruptcy Court's registry;
- (iv) The Parties agree to dismissal of all pending litigation and the release of all claims among the Parties;
- (v) FOA agrees to pay Gordon Properties the sum of \$377,000.00 for its judgment against FOA in the amount of \$277,000.00, the additional damages for the stay violation to which Gordon Properties would be entitled through conclusion of the litigation, the attorney's fees for successfully defending FOA's proof of claim, and Gordon Properties' claim for over-assessment of the Restaurant Unit. FOA shall make payments to Gordon Properties in ten (10) semi-annual payments of \$37,700.00 for a period of five (5) years without interest beginning January 1, 2014;
- (vi) FOA agrees that all future assessments shall be made in accordance with the Condominium Act, the Condominium Instruments, and the existing orders of both the state and bankruptcy courts, and all Parties agree that the 2013 budget attached to the Settlement Agreement sets forth the proper budget categories and was prepared in accordance with the methodology set forth in the foregoing Act, Instruments, and court orders, and that the 2013 budget will be used as the template for future budgets and assessment calculations for the Condominium;
- (vii) FOA agrees to pay Gordon Properties \$225,000.00 in full and final satisfaction of its claim for overpayment of assessments with respect to the Restaurant Unit during the period 2009 through 2012 (the Parties agree that the payment required in this section will be setoff against the payment required in section (ii));
- (viii) FOA agrees that the assessment against Gordon Properties' Restaurant Unit will not exceed \$30,000.00 per year, but can exceed \$30,000.00 if Gordon

Properties consents, which consent Gordon Properties cannot withhold unreasonably;

- (ix) FOA agrees not to impose user fees or charges in excess of \$200.00 per year without the consent of Gordon Properties (subject to the same reasonableness standard stated above);**
- (x) The Parties consent to the Bankruptcy Court vacating its order regarding how many candidates a non-natural Unit Owner may seat on the Board, without prejudice however to any Unit Owners' right to contest the issue with respect to any future election and without changing the composition of the current Board; and**
- (xi) The Parties agree that the Settlement Agreement will be binding notwithstanding dismissal of the case or confirmation of a plan, and FOA agrees not to oppose dismissal and to support confirmation of any plan proposed by Gordon Properties and CSI.**

Relief Requested

23. By this Motion, FOA and the Gordon Properties Parties jointly seek entry of an Order approving the Settlement Agreement and authorizing and directing the Parties to take all necessary action to consummate the Settlement Agreement promptly.

Applicable Standard

24. Section 105(a) of the Bankruptcy Code provides, in pertinent part, that “[t]he court may issue any order...necessary or appropriate to carry out the provisions of [the Bankruptcy Code].” In turn, FRBP 9019(a) provides that “On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement.” FRBP 9019(a). Compromises and settlements are “a normal part of the process of reorganization.” Protective Comm. For Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424 (1968) (quoting Case v. Los Angeles Lumber Prods. Co., 308 U.S. 106, 130 (1939)).

25. The decision whether to approve a compromise under FRBP 9019 is committed to the discretion of the Court, which must determine if the compromise or settlement is fair and equitable. See *In re Frye*, 216 B.R. 166, 174 (Bankr. E.D. Va. 1997); *In re Marvel Entertainment Group, Inc.*, 222 B.R. 243 (D. Del. 1998). The Court is not required to conduct a “mini-trial” of the underlying case, but instead must only decide whether the Settlement proposed falls “below the lowest point in the range of reasonableness.” *In re Austin*, 186 B.R. 397, 400 (Bankr. E.D. Va. 1995) (citations omitted); see also *In re Jasmine, Ltd.*, 258 B.R. 119, 123 (D.N.J. 2000).

26. Factors the Court should consider when evaluating a settlement under FRBP 9019 include: (i) the probability of success in the litigation; (ii) the complexity, expense and likely duration of the litigation; (iii) all other factors relevant to making a full and fair assessment of the wisdom of the proposed compromise, including potential difficulties in collection, if any; and (iv) whether the proposed compromise is fair and equitable to the debtors, their creditors, and other parties in interest. See *TMT Trailer Ferry, id.*, at 424; *In re Frye, id.*, at 174; *In re Austin, id.*, at 400; *In re Martin*, 91 F.3d 389, 393 (3d Cir. 1996) (stating that “[t]o minimize litigation and expedite the administration of a bankruptcy estate, compromises are favored in bankruptcy” and citing criteria set forth above in determination of reasonableness of particular settlements) (internal quotation marks and citation omitted); *Official Committee of Unsecured Creditors v. White Plains Joint Venture*, 1994 U.S. App. LEXIS 1282, at *10 (4th Cir. Jan. 26, 1994) (compromises are favored in bankruptcy).

27. Basic to the process of evaluating proposed settlements, then, is “the need to compare the terms of the compromise with the likely rewards of litigation.” *TMT Trailer Ferry, id.*, at 425. But, “the settlement may be approved even if the court finds it likely that the trustee would ultimately succeed in the litigation.” *In re Austin, id.*, at 399.

Basis for Relief

28. The Settlement represents a fair, reasonable, and responsible compromise and settlement of disputed issues and claims among the Parties, and is the product of the exercise of reasonable business judgment by the Parties.

29. The foregoing factors weigh heavily in favor of approving the Settlement Agreement. The Parties engaged in intense, good faith settlement discussions in Mediation conducted by a respected Bankruptcy Judge and amongst themselves over the course of three months. The SLC, which negotiated and approved the settlement on behalf of FOA, was created by proper action of FOA's Board, and its members are unrelated to and wholly independent of the Gordon Properties Parties. Upon approval of the Settlement Agreement by the SLC, the SLC presented the Settlement Agreement to FOA's Board for approval. The Board approved the Settlement Agreement based solely upon the votes of its disinterested members (i.e., all Gordon Properties-related Board members abstained from the vote).¹⁶

30. Although all Parties believe they would prevail in any pending litigation, they also recognize the uncertainties associated with and the potentially protracted nature and cost of litigating the complex issues. These issues include, without limitation, whether FOA's by-law provision preventing Unit Owners from voting is preempted by the Bankruptcy Code when a Unit Owner is protected by the automatic stay, whether the Bankruptcy Court exceeded its authority in fashioning its remedy for FOA's violation of the automatic stay, what are the applicable standards for substantively consolidating related debtor estates, whether a non-natural Unit Owner may seat more than one candidate on the Board, and how condominium assessments are determined under applicable law and in accordance with the highly-complex series of

¹⁶ The vote to approve the Settlement Agreement was 2-0 in favor of approval, with all Gordon Properties-related parties abstaining, one disinterested Board member abstaining, and one Board member absent.

Condominium Instruments governing this Condominium. Moreover, given the procedural posture of the disputes, in the absence of a settlement, the parties will be required to brief and argue multiple appeals in the District Court, and then likely will be required to do the same on appeal to the Circuit Court of Appeals, and possibly could be required to do the same on appeal to the Supreme Court.

31. Because CSI has no assets, and because it is not presently generating net income on a regular basis, it is reasonable for FOA to conclude that CSI could not make a meaningful payment on the judgment and that it would opt to convert its case to chapter 7 in the absence of a settlement. Furthermore, because both Parties have reasonable arguments on the merits of FOA's substantive consolidation motion, it is reasonable for FOA to conclude that it cannot rely upon its substantive consolidation arguments as a vehicle to force Gordon Properties to pay CSI's debt. Consequently, it is a reasonable exercise of the SLC's (and Board's) business judgment to conclude that the amount CSI proposes to pay under the Settlement Agreement is more than FOA is likely to recover in formal post-judgment collection action.

32. Until the 2013 budget was adopted by FOA's Board and this Settlement Agreement was executed and approved by the SLC, FOA stood on the verge of its own bankruptcy filing due to its precarious financial position. That precarious position resulted largely from the decision of a prior Board not to assess Unit Owners in order to raise the funds necessary to pay FOA's legal fees related to its dispute with Gordon Properties, but instead, to use the Unit Owners' reserve funds to pay those legal fees. This left the Unit Owners with negative equity of approximately \$1.8 million, as reflected in FOA's financials. If this Settlement Agreement had not been entered into, and if FOA instituted a plan to restore its reserves over a reasonable period of time and budgeted appropriately for future legal fees, FOA's

budget would necessarily reflect an increase in assessments for each Unit Owner of a minimum of twenty percent (20%).

33. When the complexity, uncertainty, and cost of litigation, not to mention the practical limits on FOA's ability to continue to pay legal fees, are balanced against the probability of success, it becomes apparent to both Parties, in the exercise of their sound business judgment, that settling all disputes at this time clearly is in their respective best interests, and in the best interest of creditors and other parties in interest. Consequently, the Settlement Agreement should be approved.

WHEREFORE, the Parties respectfully request that this Court enter an order, substantially in the form of the order attached hereto as Exhibit "B," approving the Settlement Agreement, and authorizing the Parties to take any and all action necessary to consummate the Settlement Agreement.

Jointly and respectfully submitted,

**GORDON PROPERTIES, LLC, and
CONDOMINIUM SERVICES, INC.,**

and

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

By and through their respective counsel

By: /s/Donald F. King
Donald F. King, Esquire (VSB No. 23125)
Counsel for the Gordon Properties Parties
ODIN FELDMAN & PITTLEMAN PC
1775 Wiehle Avenue, Suite 400
Reston, Virginia 20190
Direct: 703-218-2116
Fax: 703-218-2160
Email: donking@ofplaw.com

By: /s/John T. Donelan
John T. Donelan, Esquire (VSB No. 18049)
Counsel for the SLC and FOA
LAW OFFICE OF JOHN T. DONELAN
125 South Royal Street
Alexandria, Virginia 22314
Direct: 703-684-7555
Fax: 703-684-0981
Email: donelanlaw@gmail.com