

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF VIRGINIA  
Alexandria Division

<b>IN RE:</b>	)	
	)	
<b>GORDON PROPERTIES, LLC and</b>	)	<b>Case No. 09-18086-RGM</b>
<b>CONDOMINIUM SERVICES, INC.,</b>	)	<b>(Jointly Administered)</b>
	)	<b>Chapter 11</b>
<b>Debtors in Possession.</b>	)	
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**RESPONSE OF AMICUS CURIAE TO DEBTORS' MOTION TO RECONSIDER ORDER APPOINTING AMICUS CURIAE**

Stephen E. Leach, as *amicus curiae* (“*Amicus*”), respectfully responds to the Motion to Reconsider Order Appointing *Amicus Curiae* (the “Motion”) [Dkt. No. 575], filed jointly by Gordon Properties, LLC and Condominium Services, Inc. (collectively, the “Debtors”), as follows:

In their memorandum [Dkt. No. 576] in support of the Motion, Debtors challenge the Court’s authority to have entered its Memorandum Opinion and Order Appointing *Amicus Curiae* (the “*Amicus* Order”) [Dkt. 563]. In particular, Debtors argue that (a) this Court lacks power to appoint an *amicus*; (b) even if the Court has some limited authority to appoint an *amicus*, it exceeded that power here by not more narrowly constraining the role of an *amicus*; (c) alternatively, the Court should more precisely define the role of *Amicus*; and (d) the Court has no authority to impose the costs and fees of *Amicus* on Gordon Properties, LLC. Debtors further submit that the First Owners’ Association of Forty Six Hundred Condominium, Inc. (the “FOA”) was represented by capable counsel throughout its negotiations with Gordon Properties that led to the proposed settlement; and that FOA is fully capable of convincing the Court, without the

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*Amicus Curiae*

aid of an *amicus*, that FOA's decision to enter into the settlement agreement satisfied all applicable corporate formalities, was approved by a majority of genuinely disinterested directors, and was not the product of any inappropriate influence by Gordon Properties on the disinterested directors voting to approve the settlement.

It is fair to assume that everyone involved in this case, its affiliated adversary proceedings, or both is painfully aware of the contentious and complex disputes that have been, and are being, litigated between Debtors and their affiliates and owners on the one hand, and FOA and certain of its members and directors on the other hand. By its terms, the purpose of the proposed settlement agreement is to resolve most (although evidently not all) of the disputes between the warring factions. The self-evident purpose of the Court's order appointing an *amicus* was to provide the Court with an additional, indisputably disinterested lens, on the question of whether the settlement agreement represents a genuine arm's length deal between genuinely independent parties, or is to some improper degree a simulacrum controlled behind the scenes by Debtors.

The potential problem with Debtors' assertion that FOA can independently establish that its decision to enter into the settlement agreement was free of inappropriate pressure or influence is that, were such inappropriate pressure or influence to have existed (and *Amicus* has no opinion on that question), that very same pressure or influence might be brought to bear to create a distorted evidentiary record. The integrity of the bankruptcy court system requires that a bankruptcy court be satisfied that any deal between a debtor and a third-party represents a genuine agreement and not a manipulated Potemkin village version of a deal.

Notwithstanding the reasonable need, under the unusual factual circumstances of this case, for a fully independent eye to analyze the process and proceedings that led to the settlement

agreement, Debtors have the right to challenge the status and role of an *amicus* in this case. This challenge, however, creates two issues. First, an independent, disinterested analysis of the settlement process is desirable and appropriate, whether performed by an *amicus* or some other party. Second, Debtors' challenge to the Court's authority threatens to add yet another layer of litigation, costs, and delay to a case long awash in legal wrangling. Further, and from the particular perspective of *Amicus*, it is by no means clear that an appropriate (or even permitted) role of an *amicus* is to litigate questions of the Court's authority to have appointed *Amicus* in the first place.

In challenging the Court's authority, Debtors assert that "[t]he Order, under the guise of the appointment of an *amicus*, in reality, appoints a special master with the power of fact finding, discovery, motions, and the ability to report to the court." (Motion, p. 4). *Amicus* respectfully suggests that this contention misses the mark, because what Debtors are in fact describing is not a prohibited special master, but instead, an examiner under section 1104(c) of the Bankruptcy Code. The only material distinction between the proposed role of a section 105(a) *amicus* in this case, and that of a section 105(a)/1104(c) examiner, is that the United States Trustee, rather than the Court, selects the examiner.

It is widely recognized that a bankruptcy court may, under section 105(a) of the Bankruptcy Code, *sua sponte*, order the appointment of an examiner. See *In re First American Health Care of Georgia, Inc.*, 208 B.R. 992, 994 (Bankr. S.D. Ga. 1996) ("No party has yet requested the appointment of a trustee or examiner in this case. Nevertheless, the court clearly has the authority *sua sponte* to order the appointment of a trustee or examiner."); *In re Michigan BioDiesel, LLC*, 466 B.R. 413, 414-15 (Bankr. W.D. Mich. 2011) (court may order the appointment of a trustee or examiner *sua sponte* under sections 105(a) and 1104 of the

Bankruptcy Code); *In re Public Service Co. of New Hampshire*, 99 B.R. 177, 182 (Bankr. D.N.H. 1989) (court has the power *sua sponte* to order appointment of examiner); see also *Byrd v. Johnson*, 467 B.R. 832, 842-43 (D. Md. 2012) (bankruptcy court may order the appointment of a trustee *sua sponte* for cause under sections 105(a) and 1104); *Allen v. King*, 461 B.R. 709 (D. Mass. 2011) (bankruptcy court may order appointment of a trustee *sua sponte* under section 105(a)).

Likewise, under section 1106(a) and (b) of the Bankruptcy Code, an examiner may be directed to investigate and report on any matter relevant to the case, including, in this instance, whether the conduct of Gordon Properties or its owners improperly influenced the decision of FOA to enter into the proposed settlement agreement. See *In re Mirant Corp.*, 2004 WL 2983945 \*2 (Bankr. N.D. Tex. 2004) (“The plain meaning of the applicable provisions of the Code demonstrates Congress intended to give ample discretion to the court to empower the Examiner as it has done in the case at bar.” (citations omitted)).

Appointment of an examiner would resolve Debtors’ challenge to the legitimacy of *Amicus* and the scope of his role. Further, section 330(a)(1) of the Bankruptcy Code expressly empowers the Court to award compensation to an examiner, thus resolving the Debtors’ challenge to the Court’s power to order that the reasonable fees and costs of *Amicus* be paid by Gordon Properties as an administrative expense of the bankruptcy estate.

In light of the foregoing, in the interests of judicial economy, and to avoid yet another round of contentious litigation with its attendant delays and costs, *Amicus* respectfully suggests that (a) the Court order the appointment of an examiner under sections 105(a) and 1104 of the

Bankruptcy Code to conduct the investigation discussed in the Court's *Amicus* Order and (b) the Court vacate the *Amicus* Order on such terms as the Court deems appropriate.<sup>1</sup>

Date: May 9, 2013

Respectfully submitted,

/s/ Stephen E. Leach

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*Amicus Curiae*

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<sup>1</sup> *Amicus* was presented with a proposal for resolving the issues raised in the Motion. Notwithstanding that the proposal had the indicia of good faith, it included limitations on *Amicus* that were unacceptable.

**Certificate of Service**

I hereby certify that on the 9th day of May, 2013, I caused a copy of this Response of *Amicus Curiae* to be served by via e-mail and first class mail upon the following:

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