UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

In re:	)	
	)	
GORDON PROPERTIES, LLC, and **CONDOMINIUM SERVICES, INC.**,	)	**Case No. 09-18086-RGM** (Jointly Administered) (Chapter 11)
Debtors.	)	
GORDON PROPERTIES, LLC, and **CONDOMINIUM SERVICES, INC.**,	)	
Debtors,	)	
v.	)	**Contested Matter** (Motion to Approve Settlement, Docket Entry 498)
FIRST OWNERS' ASSOCIATION OF FORTY SIX HUNDRED CONDOMINIUM, INC.,	)	
Creditor.	)	

Reply Memorandum in Support of Motion to Reconsider Order Appointing *Amicus Curiae*, and Reply to Response of *Amicus Curiae* to Debtors' Motion to Reconsider Order Appointing *Amicus Curiae*

Gordon Properties, LLC ("Gordon Properties"), and Condominium Services, Inc. ("CSI") (Gordon Properties and CSI are referred to herein jointly as the "Debtors"), file this Reply Memorandum in Support of Motion to Reconsider Order Appointing *Amicus Curiae* ("Order") and Reply to Response of *Amicus Curiae* to Debtors' Motion to Reconsider Order [Docket No. 581].

Introduction

In undertaking its obligations to approve a settlement between Debtors and FOA that resulted from two days of Court ordered mediation with the Honorable Kevin R. Huennekens following years of costly litigation by the parties that have been represented by competent

counsel, this Court, *sua sponte*, appointed an *amicus curiae*, gave that *amicus* the broad powers of a party (without any limitation or guidance) and ordered that Debtors should pay for that expense. As a result, the Joint Motion and Memorandum for Order Approving Settlement between Debtors and FOA ("Settlement Motion") [Docket No. 498] remains in limbo indefinitely, presumably pending action by the *amicus*. Debtors requested that the Court reconsider its Order as set forth in its Motion and Memorandum ("Reconsideration Motion") [Docket No. 575].

The *Amicus* filed a Response to the Reconsideration Motion which did not contest the legal or factual authority set forth in the Reconsideration Motion, but recommended that the intent of the Court's Order could be achieved by the appointment of an examiner under section 1104(c) of the Bankruptcy Code. The *Amicus* further asserts that such an appointment is proper and urges the Court to vacate its prior Order and appoint an examiner pursuant to Sections 105(a) and 1104(c) of the Bankruptcy Code to "conduct the investigation discussed in the Court's *Amicus* Order." As set forth below, Debtors respectfully oppose this suggestion of the *Amicus* and urge the Court to reconsider its Order as previously asserted.

THE APPOINTMENT OF AN EXAMINER IS UNWARRANTED IN THIS CASE AND IS INCONSISTENT WITH THE COURT'S OBLIGATIONS IN CONSIDERING THE SETTLEMENT MOTION BEFORE IT.

The power to appoint an examiner is set forth in section 1104(c) of the Code:

> (c) If the court does not order the appointment of a trustee under this section, then at any time before the 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 an examiner to conduct such an investigation of the debtor** as is appropriate, including an investigation of any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor of or by current or former management of the debtor, if—
>
> (1) such appointment is in the interest of creditors, any equity security holders, and other interests of the estate; or

(2) the debtor's fixed liquidated, unsecured debts, other than debts for goods, services, or taxes, or owning to an insider, exceed $5,000,000."

Because the Debtors do not fall under Section 1104(c)(2), the power to order the appointment of an examiner falls under 1104(c)(1).[1] However, the statute is clear that the order for appointment of an examiner is predicated upon a need for an investigation of the debtor and the management of the debtor's affairs. That is inconsistent with the Court's stated purpose of the need for an amicus/examiner which is the corporate governance concerns not of the Debtors, but of the other party to the Settlement Motion.

Moreover, section 1106(b) of the Code provides that upon an appointment of an examiner, that examiner "**shall** perform the duties specified in paragraphs (3) and (4) of subsection (a) of this section, **and** except to the extent that the court orders otherwise, any **other duties of the trustee that the court orders the debtor in possession not to perform**. Paragraphs 3 and 4 *require* the examiner to investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business along with any other matter relevant to the case or the formulation of a plan and to file a statement of investigation.

Thus, according to the plain meaning of the Code, the appointment of the examiner is to investigate the financial affairs of the Debtors, including issues of mismanagement and fraud, and to submit a report to on those matters to the Court. While additional duties can be added, they are additional duties that would be the duties of a trustee if one were appointed. These are not the duties that can reach into an investigation of the other party to the Settlement Motion. Here, while the Order appointing the Amicus was silent on the scope of the appointment, the proposal offered by the *amicus* is an investigation into the corporate governance not of the

[1] While the Fourth Circuit has not opined on whether a court may appoint an examiner *sua sponte*, Debtors acknowledge that several courts have found such authority for the appointment of an examiner in Bankruptcy Code Section 105(a).

debtor, but of FOA the non debtor settling party. That is not the purview of the mandatory language of 1104(c) which *requires* an investigation of the debtor and the management (or mismanagement of its affairs).

> The Bankruptcy Code expressly requires examiners to perform two duties normally required of trustees and authorizes the court to assign other duties as well. *Id.* § 1106(b). First, the Code requires examiners to perform an investigation, which means they must "investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan." *Id.* § 1106(a)(3). Second, the Code requires examiners to file a report, which means they must identify and memorialize "any fact ascertained pertaining to fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor, or to a cause of action available to the estate." *Id.* § 1106(a)(4)(A). In addition to these mandatory duties, a bankruptcy court may order an examiner to perform "any other duties of the trustee that the court orders the debtor in possession not to perform." *Id.* § 1106(b).

In re Big Rivers Electric Corporation, 355 F.3d 415, 429 (6th Cir. 2004). Debtors submit there is no need for the type of investigation that is required of an examiner under the Code, even to meet the concern of FOA's corporate governance as expressed by the *amicus*.

The function of an examiner appointed under Section 1104 has been compared to a "civil grand jury" investigating to ascertain legitimate areas of recovery and appropriate targets for recovery. *In the Matter of Baldwin United Corp.*, 46 B.R. 314, 316 (Bankr. S.D. Ohio 1985). The investigation of an examiner in bankruptcy, is supposed to be a "fishing expedition" as exploratory and groping as appears proper to the examiner. *In re Vantage Petroleum Corp.*, 34 B.R. 650, 651 (Bankr. E.D.N.Y. 1983) citing *Sachs v. Hadden*, 173 F.2d 929, 931 (2d Cir. 1949). Indeed, most courts have held that the main function of an examiner in bankruptcy "is to uncover defalcations involving the debtor and his management of the estate" and the examination of third parties is "at best" ancillary to that purpose. *In the Matter of Wilcher*, 56 B.R. 428, 433-34 (Bankr. N.D. Ill 1985); *In re Am Bulk Transp. Co.*, 8 B.R. 337, 340 (Bankr. D. Kan. 1980); *In re*

Ionosphere Clubs, 156 B.R. 414, 432 (S.D.N.Y 1993); *In the Matter of Baldwin United Corp.*, 46 B.R. 314, 316 (Bankr. S.D. Ohio 1985). *See*: 7 COLLIER ON BANKRUPTCY §1104.03[1] ("the primary use of an examiner is investigation related to the debtor or its conduct or asset transfers"). That is not what the Court indicated was needed or required in this case.

Moreover, there has been no showing that the Debtors have acted in a way that would warrant the appointment of an examiner and the resulting investigation into their financial affairs including "an investigation of any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor." The language of the Code is the same for the appointment of examiners and trustees and the standard for appointment "is very high." *In re Smart World Technologies, LLC*, 423 F.3d 166, 176 (2d Cir. 2005); *In re Am. Bulk Transp. Co.*, 8 B.R. 337 (Bankr. D. Kan. 1980). The necessity for the appointment of an examiner "must be substantiated with factual support." *In re Gliatech, Inc.* 305 B.R. 832, 836 (Bankr. N.D. Ohio 2004); *accord*: *In re Mechem Fin. of Ohio, Inc*, 92 B.R. 760, 761 (Bankr. N. D. Ohio 1988). In addition, the benefits to the entire estate must outweigh the expenses associated with the examiner's activities. *Id.* There has been no such showing in this case to trigger the appointment of an examiner, and to justify that sanction, cost and delay in the approval of the Settlement Motion.

Here, despite the concerns expressed by the *amicus* about the value of a "disinterested lens" to view the Settlement Motion and the corporate governance of FOA, those are not matters that are within the traditional purview of an examiner, or are set forth in the Code as giving rise to the need to appoint an examiner. It is the not the Debtors' conduct that gives rise to the need for further investigation. Nor it is the Debtors that need further investigation.

Finally, appointing an examiner and then somehow bypassing the very duties of that examiner as set forth in the statute in order to substitute other duties would violate the plain meaning of Code Sections 1104 and 1106 which both employ the mandatory word "shall". *See* e.g. *Walton v. Cornerstone Ministries Invs, Inc.*, 398 B.R. 77 (N.D. Ga. 2008) (holding that "shall" in Section 1104 is mandatory and not permissive); *accord*: *In re Revco D.S. Inc.*, 898 F.2d 498 (6th Cir. 1990); *In re Residential Capital, LLC*, 474 B.R. 112 (Bank. S.D.N.Y. 2012). If the examiner is appointed, it "shall" undertake the investigation in the Debtors financial affairs as required by the statute. This investigation will not assist the Court in the resolution of the Settlement Motion. To the contrary, given that settlements are by their nature a compromise in exchange for a cessation of litigation, the very appointment of an examiner with the attendant cost, delay and further litigation may well undo the hard fought settlement achieved by the Honorable Kevin R. Huennekens.

Conclusion

Debtors respectfully submit that the *Amicus* is incorrect when it submits that the Court can appoint an examiner to accomplish the goals of the *Amicus* in the prior Order. The appointment of an examiner is, like the appointment of a trustee, an extraordinary remedy and one that is not warranted by the conduct of the Debtors in this case. Debtors respectfully request that the Court Reconsider its prior Order and then proceed to review and approve the Settlement Motion.

Respectfully submitted,

GORDON PROPERTIES, LLC,
CONDOMINIUM SERVICES, INC.
By counsel

By: ***/s/Donald F. King***

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