

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Alexandria Division**

**In re:**

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

**Debtors**

**Case No. 09-18086-RGM  
(Jointly Administered)**

**Chapter 11**

**MOTION OF UNITED STATES TRUSTEE TO APPOINT  
AN EXAMINER OR, IN THE ALTERNATIVE, A CHAPTER 11 TRUSTEE**

Comes now, Judy A. Robbins, United States Trustee for Region 4 (the “United States Trustee”), by counsel, and moves this Court to order the appointment of a Chapter 11 Trustee. In support of this motion the following representations are made:

1. This Court has jurisdiction in this matter pursuant to 28 U.S.C. § 1334.
2. The United States Trustee files this motion in furtherance of his duties and responsibilities pursuant to 28 U.S.C. § 586, 11 U.S.C. § 307, and 11 U.S.C. § 1112.

**STATEMENT OF FACTS**

3. On October 2, 2009, Gordon Properties, LLC. filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. On January 26, 2010, Condominium Services, Inc. filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. The cases of Gordon Properties, LLC. and Condominium Services, Inc. (the “debtors”) were jointly administered by this Court’s order, entered September 29, 2010.

4. Prior to the filing of the bankruptcy petitions, the debtors were engaged in longstanding disputes with First Owners’ Association Of Forty Six Hundred Condominium, Inc.

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(“FOA”), which represents approximately 400 condominium unit owners in a high-rise building. The building also includes two separate structures that are used as a restaurant owned by Gordon Properties (the “Gordon Properties’ Restaurant Unit”) and a gas station. These disputes began in 2006 when, FOA’s board of directors (the “Board”) terminated a management contract with CSI. CSI maintained that its termination was improper, and directed the Unit Owners to continue paying their assessments to CSI. FOA commenced a law suit against CSI for conversion and damages, and obtained a judgment against CSI in the approximate amount of \$450,000 (the “CSI Judgment”). Following entry of the CSI Judgment, FOA commenced post-judgment collection action and CSI filed its chapter 11 case.

5. In 2009, FOA levied an assessment against Gordon Properties’ Restaurant Unit in the amount of nearly \$300,000. Gordon Properties disputed the validity of the 2009 Assessment. 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 based upon a by-law provision in the Condominium’s governing documents that prohibits a Unit Owner from voting if the Unit Owner is delinquent in any obligation to the Condominium.

6. Following commencement of Gordon Properties’ chapter 11 case, further litigation between the Parties ensued. In total, the litigation between FOA, Gordon Properties, and CSI has continued for a period of approximately six years and consumed a substantial amount of financial resources for both the FOA as well as the debtors.

7. FOA is currently managed by a seven member board. Three of the board members have an affiliation with Gordon Properties. In negotiating a proposed settlement between FOA and Gordon Properties, the FOA board of directors delegated negotiation of the settlement to a

special litigation committee, which retained John T. Donelan to represent it.

8. On September 13, 2012, this Court referred FOA, Gordon Properties, and CSI to mediation with the Hon. Kevin R. Huennekens. A settlement agreement was proposed and a motion to approve the compromise under Fed.R.Bankr.P. 9019 was filed on January 28, 2013. The settlement agreement provides that the parties will resolve all litigation between them; that the parties will make offsetting payments in satisfaction of the judgment FOA has against CSI for conversion and that Gordon properties has against FOA for over-assessing one of its units; that FOA will pay Gordon properties ten payments of \$37,700 in satisfaction of damages for violation of the automatic stay; that FOA will prepare its assessments according to its 2013 budget; that the annual assessment against Gordon Properties street-front unit shall not exceed \$30,000; and that FOA will not impose upon Gordon Properties or Bryan Sells any user fee or charge exceeding \$200 without the prior written consent of Gordon Properties, whose consent shall not be unreasonably withheld.

9. However, the settlement agreement did not release Dewanda Cuadros, Corey Brooks, Elizabeth More, F.J. Pepper, Jerry Terry, Lucia Hadley, and Kevin Broncato from any claim that Gordon Properties may have against them for conduct engaged in by them during the time they served as officers or directors of FOA.

10. The settlement agreement was approved by the FOA board by a 2-0 vote. All board members affiliated with Gordon Properties abstained, one disinterested board member abstained, and one board member was absent.

11. On March 26, 2013, this Court held a hearing on approval of a proposed management contract between FOA and CSI. In a memorandum opinion, dated April 15, 2013, the Court expressed concerns about the overlapping directorships, involving FOA. In an April

16, 2013 order appointing Stephen Leach as *amicus curiae*, the Court noted that the proposed settlement agreement between FOA, Gordon Properties, and CSI, “must be closely scrutinized because of the overlapping directorships and ownerships,” and the Court found that “the appointment of a disinterested *amicus curiae* is the best way to assure a full, fair, and transparent review of the proposed settlement.”

12. On April 30, 2012, the debtors filed a motion to reconsider the Court’s April 16<sup>th</sup> order, contending that the Court did not have the power to appoint an *amicus curiae* in this case, and that such an appointment is akin to the appointment of a special master, which the debtors contend is not permitted by the bankruptcy code.

13. On May 9, 2013, Mr. Leach filed a response stating that the Court’s objectives could be accomplished by appointing him as an examiner under § 1104 of the bankruptcy code and noting that the debtors’ Debtors’ opposition to the appointment of an *amicus curiae* threatens to increase the costs and delays associated with this case.

14. On May 14, 2013, this Court held a status hearing on the approval of the settlement. Counsel for the U.S. Trustee appeared and argued that the appointment of an examiner was appropriate in this matter and that conducting an investigation into the arm’s length nature of the proposed settlement was an appropriate duty for the examiner under § 1106(a)(3) and (a)(4) of the bankruptcy code. Because of the concerns raised by the Debtors regarding the propriety of appointing an *amicus curiae*, the U.S. Trustee moves for the appointment of an examiner under § 1104(c) of the bankruptcy code, or in the alternative the appointment of a chapter 11 trustee.

## LEGAL ARGUMENT

15. Section 1104(c)(1) of the Bankruptcy Code states:

(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 interests 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 owing to an insider, exceed \$5,000,000.

16. The Court has the discretion to appoint an examiner in cases where, as here, the total unsecured debts of the debtor are less than \$5 million. The function of the examiner is investigative, and “the court may order the examiner to investigate any aspect of the case, the business, or events leading up to the bankruptcy case.” 10 Collier on Bankruptcy ¶ 1104.03[1] (16th ed. 2013).

17. Here appointment of an examiner is appropriate for two reasons: (1) an investigation of the proposed settlement by an independent, disinterested examiner would assist the Court in determining the validity of a settlement that represents a major issue in the case; and (2) a determination of whether the owners of the debtor entity Gordon Properties are exerting improper influence on FOA is relevant for determining mismanagement or irregular management of the debtors.

**Investigation of the Proposed Settlement is an Appropriate Task for an Examiner**

18. Pursuant to § 1106(a)(3) an examiner<sup>1</sup> shall:

(3) except to the extent that the court orders otherwise, 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. (emphasis added).

19. Section 1106(a)(3) contemplates broad investigative power for the examiner in order to aid the Court in determining facts relevant to the bankruptcy case. Courts have discretion to direct the appointment of an examiner to investigate a wide variety of matters affecting the bankruptcy estate, including where outside expertise would be helpful to the Court. *See In re UAL Corp.*, 307 B.R. 80, 87 (Bankr. N.D. Ill. 2004)(appointing neutral examiner to investigate alleged unfair treatment of debtor's employees where the issue was key to a successful reorganization of debtor's business); *In re Public Service Company of New Hampshire*, 99 B.R. 177, 182-83 (Bankr. D. N.H. 1989)(appointing examiner where the Court needed aid in understanding arcane concepts employed in the utility rate-setting regulatory world); *First American Health Care of Georgia, Inc. v. U.S. Department of Health and Human Services*, 208 B.R. 992, 994 (Bankr. S.D. Ga. 1996)(finding that the need for independent expertise was sufficient to establish cause to appoint an examiner where the parties themselves were "insufficient in the absence of outside expertise, to evaluate many matters likely to arise during the pendency of this case.").

20. Here, a determination of whether the settlement agreement between FOA, Gordon Properties, and CSI is valid, enforceable, and free from undue influence is a matter relevant to this case, and the appointment of an independent examiner would aid the Court's determination

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<sup>1</sup> Section 1106(a)(3) sets forth duties of a chapter 11 trustee. These duties are made applicable to examiners by § 1106(b) ("An examiner appointed under section 1104(d) of this title shall perform the duties specified in paragraphs (3) and (4) of subsection (a) of this section . . .")

of the issue. The proposed settlement will bring to an end six years of litigation that have cost the parties millions of dollars in attorney's fees and that have been a primary issue in this case. The settlement involves complex issues regarding corporate governance in the context of interlocking directorships. And, as in *UAL Corp.*, the appointment of an examiner would aid in determining the appropriateness of the debtors' dealings with non-bankruptcy third parties.

21. The debtors argue that because Fed.R.Civ.P. 53, which authorizes the federal the appointment of a special master, was not incorporated in the bankruptcy code, this Court lacks the authority to appoint an individual to carry on the responsibilities of investigating the proposed settlement. But § 1104(c) provides for the appointment of an examiner and the duties of an examiner and special master are distinct. Unlike a special master, an examiner is not a member of the judiciary and is appointed by the U.S. Trustee, rather than the courts. Also, the role of an examiner is more limited than that of a special master. *See In re Baldwin United Corp.*, 46 B.R. 314, 316-17 (Bankr. S.D. Ohio 1985)(noting that examiner's "findings do not have the binding effect on the Court or parties of those of a special master, arbitrator or magistrate; nor do they have the evidentiary character of an opinion by a Court expert"). Further, the debtors have pointed to no provision in the bankruptcy code that provides that the appointment of a neutral, independent expert to aid the Court is improper. *See e.g. In re Kensington Intern. Ltd.*, 368 F.3d 289, 307 (3d Cir. 2004)("There is, of course, nothing inherently wrong with appointing a panel of experts.").

**Appointment of an Examiner Aids in Investigating the Management of the Debtors**

22. Pursuant to § 1106(a)(4) an examiner shall:

as soon as practicable—

(A) file a statement of any investigation conducted under paragraph (3) of this subsection, including 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.

23. The conduct of management in dealing with non-debtor third parties is relevant to whether management is acting in good faith as well as whether a debtor will have the ability to reorganize. *In re UAL Corp.*, 307 B.R. at 87. In this case, owners of Gordon Properties are sitting on the board of FOA. The existence of interlocking board of directors between the debtor and one of its major creditors constitutes an “irregularity in the management of the affairs of the debtor,” which warrants an independent investigation.

**In the Alternative, This Court Should Appoint a Chapter 11 Trustee, Because the Appointment would be in the Best Interest of the Creditors**

24. Section 1104(a)(2) of the Bankruptcy Code states, in pertinent part, that the court shall order the appointment of a trustee:

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

25. Under Section 1104(a)(2), courts look to the practical realities and necessities. *In re Euro-American Lodging Corp.*, 365 B.R. 421, 427 (Bankr. S.D.N.Y. 2007). Accordingly, the standard for appointment of a Chapter 11 trustee under section 1104(a)(2) is flexible. Notably, Section 1104(a)(2) of the Code allows appointment of a trustee even when “cause” does not exist. *See In re Sharon Steel Corp.*, 871 F.2d 1217, 1226 (3d Cir. 1989)

26. The appointment of a trustee pursuant to § 1104(a)(2) is appropriate where the debtors’ conduct raises questions about current management’s ability to fulfill its fiduciary duty to an entities creditors. *See Sharon Steel Corp*, 871 F.2d at 1228; *In re Concord Coal Corp.*, 11 B.R. 552 (Bankr. S.D.W.Va. 1981)(appointing trustee appointed pursuant to § 1104(a)(2) where debtor's many competing business interests rendered questionable his commitment to rehabilitation and debtor could not secure and maintain lenders' and creditors' trust).

27. Even in the absence of clear proof of fraud, dishonesty or gross mismanagement, the presence of a significant conflict of interest necessitates the appointment of a trustee. *In re Euro-American Lodging Corp.* 365 B.R. 421, 428 (Bankr. S.D.N.Y. 2007)( “Where the debtor or its management suffer from material conflicts of interest an independent trustee should be appointed.”).

28. Here, the appointment of a trustee is in the best interest of all creditors. The litigation between FOA, Gordon Properties, and CSI is one of the most significant matters in this case. The interlocking ownership between the debtor and FOA makes it very difficult, if not impossible for the parties to resolve their disputes in a way that will give confidence that the settlement agreement is valid or fair to the affected homeowners.

29. A disinterested trustee will be in the best position to negotiate the settlement on behalf of the debtor entities and remove the significant cloud of undue influence that hangs over the proposed agreement. Debtor Gordon Properties’ current management cannot avoid having a material conflict of interest in this case, where its owners make up 3 of the 7 members of the board of its major creditor. Without the appointment of a trustee, the proposed settlement agreement will be subject to attack, regardless of its substance, while the appointment of a disinterested trustee would provide immediate assurance to all creditors that the agreement is fair and free from conflicts of interest.

**RELIEF REQUESTED**

WHEREFORE, the United States Trustee respectfully requests that the Court enter an order requiring the appointment of an examiner in this case pursuant to 11 U.S.C. § 1104(c). In the alternative, the U.S. Trustee respectfully requests that the Court enter an order requiring the appointment of a chapter 11 trustee pursuant to 11 U.S.C. § 1104(a)(2).

May 21, 2013

Judy A. Robbins  
United States Trustee for Region 4

/s/ Bradley D. Jones  
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**CERTIFICATE OF SERVICE**

I hereby certify that on May 21, 2013, a true copy of this motion, notice of motion, and proposed order were served on the following persons by first class U.S. mail, or by notice of electronic filing:

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