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.	)	

OBJECTION OF DEBTORS TO MOTION OF UNITED STATES TRUSTEE TO APPOINT EXAMINER

Gordon Properties, LLC ("Gordon Properties"), and Condominium Services, Inc. ("CSI") (Gordon Properties and CSI are referred to herein jointly as the "Debtors"), hereby object to the motion (the "Motion") [Docket No. 592] of the United States Trustee ("UST") to appoint an examiner, or, in the alternative, a chapter 11 trustee, for the following reasons.

I. Preliminary Statement

The issues that appear to concern both the Court and the UST are issues that the Debtors are confident can be answered and resolved at the evidentiary hearing to approve the Settlement Agreement. Only after that hearing has been conducted and the Court has heard the evidence will the Court know whether there is a need or basis for appointment of an examiner. At this time, however, there simply is no demonstrable evidence to support appointment of an examiner.

II. Argument

A. It is premature to appoint an examiner, and the Court should first conduct the hearing on approval of the Settlement Agreement.

The issues identified by the Court in its Memorandum Opinion and Order Appointing *Amicus Curiae* [Docket No. 563] as requiring the appointment of an *amicus* and the issues identified by the UST in its Motion as requiring the appointment of examiner are similar, if not identical. The questions raised all go to facts about which the Court should be informed in order to make its decision on whether to approve the Settlement Agreement. In short, all of those facts come down to a single question, that is, whether the Settlement Agreement is the proper corporate act of and creates a binding contractual commitment by First Owners' Association of Forty Six Hundred Condominium, Inc. ("FOA").[1] These are facts that are part of the evidentiary burden of the parties in order to obtain approval of the Settlement Agreement. The parties are prepared to present that evidence. Neither an *amicus*, a special master, nor an examiner is necessary to determine those facts. In fact, asking such a third party to inquire and report as to such facts supplants the evidentiary burden of the parties and usurps the judicial function of this Court.

There also is a practical reason why the Court should allow the parties an opportunity to satisfy their evidentiary burden in obtaining approval of the Settlement Agreement. Economics were a driving motivation of the Settlement Agreement. Notwithstanding the efforts of both the Debtors and FOA to obtain prompt approval of the Settlement Agreement, nearly six months have passed since the Settlement Agreement was negotiated. Now, both the dynamics and the

[1] There have been no facts alleged by anyone to suggest that the Settlement Agreement is not a binding contractual commitment of the Debtors. Similarly, there have been no facts alleged by anyone to suggest that the Settlement Agreement is not fair and reasonable as to, and in the best interest of, the Debtors and their estates. The fundamental issue underlying the Court's *amicus* order and the UST's Motion is solely that of the non-debtor, FOA, and arises solely from the fact that a minority of FOA's Board members are related to the Debtors.

economics of the settlement have changed. It is not news to anyone that FOA is on the brink of financial ruin and can no longer sustain these costs. What may be news, however, is that the appointment of an examiner, particularly one with unlimited scope of inquiry, poses a potential threat to the Debtors' financial condition and reorganization prospects. At a minimum, the appointment of an examiner seems likely to upset the judgment made by both parties at the negotiating table. It is not in the interest of the Debtors, their estates, or their creditors to impose an added layer of expense for an examiner and delay approval of the Settlement Agreement.

B. The UST has not alleged, and it cannot establish, facts necessary to support appointment of an examiner.

The Debtors have previously set forth in their filings in this case their explanation of why they believe appointment of either an *amicus* or an examiner is not warranted.[2] The Debtors incorporate those arguments in this response and will not repeat them again. Rather, the Debtors respond herein to the UST's Motion.

Specifically, the UST's Motion suggests that appointment of an examiner is appropriate because (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.

[2] See Debtors' Motion to Reconsider Order Appointing *Amicus Curiae* [Docket No. 575], Memorandum in Support of Motion to Reconsider Order Appointing *Amicus Curiae* [Docket No. 576], and 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* [Docket No. 583].

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.

If the test for appointment of an examiner is whether a court might be assisted in performing its judicial functions, an examiner would be appointed in every case. That, however, is not the test. The parties to the Settlement Agreement bear the evidentiary burden necessary for approval, and the Court is the fact finder in that process. Appointing an examiner to undertake that role does not alter the reality that such an appointment substitutes the examiner for the evidentiary burden of the parties and usurps this Court's independent judicial role as the fact finder. The parties are capable of sustaining their evidentiary burden, and this Court is capable of determining whether that evidence satisfies the evidentiary burden, without assistance from an examiner.

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.

Mere allegations of improper conduct by a debtor are not sufficient to support the appointment of an examiner (or a trustee) – such allegations must be supported by evidence. 10 Collier on Bankruptcy ¶ 1104.03[3] (16th ed. 2013).[3] There is no demonstrable evidence of any such improper conduct in this case, and the UST cannot sustain its burden for appointment of an examiner.

There is no evidence that the Debtors have engaged in any wrongful conduct in the negotiation and approval of the Settlement Agreement. As a threshold, the settlement was negotiated at length with an independent mediator appointed by this Court. There is no evidence that the mediation was not conducted at arms-length and in good faith by the parties. The

[3] The UST's Motion is supported by citation to case law for the proposition that appointment of an examiner is appropriate when the Court requires "outside expertise." These citations are inapposite. The Debtors respectfully submit that approval of the Settlement Agreement requires evidence from the parties, not outside expertise.

settlement was negotiated by an independent special litigation committee (the "SLC") appointed by FOA's board of directors (the "Board"), and was approved by both the SLC and the disinterested members of the Board. The SLC was appointed by the Board for the specific purpose of ensuring the integrity of FOA's approval process in light of the overlapping directors noted in both the Court's order and the UST's Motion.

The attack against the SLC and its authority are two-fold[4] – first, that the SLC was improperly appointed at the Board's organizational meeting following the 2012 election, and, second, that members of the committee are "friendly" towards Gordon Properties.

As to the question of validity of appointment of the SLC, while Gordon Properties is satisfied that all necessary corporate formalities were honored by FOA's Board when it appointed the SLC, all doubt was removed and the argument was mooted when the Board at a later meeting voted unanimously, with all members present, to ratify appointment of the SLC.

As to the allegation that members of the SLC are "friendly" to Gordon Properties, the reality is that no one who might have been sitting in the room with the court-appointed mediator while the Debtors and the SLC were negotiating the Settlement Agreement could reasonably make such an allegation. Nonetheless, "friendliness" has absolutely no legal significance. In fact, virtually every member of FOA is friendly to someone or supports one position versus another. Moreover, the fact that members of Gordon Properties who sit on FOA's Board might support a position that is beneficial to them is not impermissible. That is the essence of the democratic process.

The sole relevant question in determining the validity of FOA's approval of the Settlement Agreement is whether there was an impermissible conflict under applicable law that

[4] This "attack" stems primarily from the allegations of the plaintiffs in *Sobel, et al v. Sells, et al,* A/P No. 12-1562-RGM.

would taint the decision of the SLC or Board to approve the Settlement Agreement. There is not a scintilla of evidence that the actions of the SLC or the Board were tainted by failure to comply with any applicable "interested transaction" or "conflict" rules. To the contrary, the undisputed facts are that (i) appointment of the SLC was ratified by unanimous vote of the disinterested Board members, (ii) no member of the SLC is related to the Debtors, (iii) the SLC approved the Settlement Agreement unanimously, and (iv) the Settlement Agreement was approved by a majority of the disinterested members of the Board.[5]

Apart from the question of whether corporate formalities were honored, all of which would be demonstrated by the evidence the parties would introduce at the approval hearing, the UST's Motion also is premised upon its suggestion that Gordon Properties might have improperly influenced FOA's decision to enter into or approve the settlement. The suggestion that the Debtors might have exerted undue influence on FOA borders on scandalous. Moreover, it simply is not supported by any demonstrable evidence. The UST's suggestion could only have arisen from an *ex parte* communication from a disgruntled unit owner. Gordon Properties submits that the very serious and expensive act of appointing an examiner should not be based upon scurrilous and unsupportable *ex parte* accusations from disgruntled unit owners representing a tiny fraction of FOA's membership, but should be based upon demonstrable evidence. No such demonstrable evidence exists.

Finally, there is no allegation that FOA has not been fully and adequately represented by competent counsel throughout this entire process. Moreover, the Debtors had no role in the selection of FOA's counsel. While the UST's Motion might be well-intentioned, the reality is

[5] Three disinterested Board members were present at the meeting to approve the Settlement Agreement. Two voted in favor, and one abstained. One Board member was absent. Although the Debtors believe this absent Board member is not disinterested (because she is adverse to Gordon Properties), even if that other Board member is deemed to be disinterested, had been present at the meeting, and had voted against approval, the vote nonetheless would have been 2-1 in favor.

that a request to appoint an examiner to inquire as to the validity of FOA's actions places into question the adequacy of such representation.

C. If the Court decides to appoint an examiner, the scope of the examiner's inquiry should be limited to the issues related to the Settlement Agreement, and the proposed examiner should be required to submit a budget that is subject to notice an opportunity to object.

The task at hand is approval of the Settlement Agreement.[6] Without waiving the Debtors' prior arguments regarding appointment of an examiner, the Debtors submit that, should the Court decide to appoint an examiner, the scope of the examiner's inquiry should be limited to the issues directly relevant to approval of the Settlement Agreement. Specifically, the scope of inquiry should be:

(i) Was appointment of the SLC by FOA's Board a proper act of FOA?

(ii) Did the SLC have the authority to enter into the Settlement Agreement?

(iii) Was the Settlement Agreement approved by the SLC?

(iv) Was the Settlement Agreement approved by FOA's Board?

(v) Was the Settlement Agreement approved by the Debtors?

(vi) Is the Settlement Agreement the valid and binding act of FOA and the Debtors?

In addition, the Court should require the examiner that is proposed to be appointed by the UST to submit, in advance, a budget to render the defined services, with notice and opportunity to object.

[6] Also pending on the Court's docket is the motion of FOA to approve its management agreement with CSI [Docket No. 326]. As to that agreement, the vote of the Board for approval was 5-2. As evidenced by the Court's Memorandum Opinion of April 15, 2013[Docket No. 352], it is apparent that the Court is concerned about whether the vote of the interested Board members to approve the CSI contract taints the approval. Again, the Debtors are confident they can satisfy the Court's concerns once they are given the opportunity to present evidence and argue the law. For that reason, there also is no need at this time for appointment of an examiner.

III. Conclusion

The Debtors respectfully submit that appointment of an examiner is not warranted in this case at this time. The Debtors and FOA should be given an opportunity to present evidence to meet their evidentiary burden in seeking approval of the Settlement Agreement. Only then should the Court decide whether further inquiry is warranted and whether such inquiry requires the appointment of an examiner.

Respectfully submitted,

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

By: **/s/*Donald F. King***
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Certificate of Service

The undersigned certifies that this response was served electronically on May 28, 2013, upon Joseph Guzinski and Bradley Jones, Office of the U. S. Trustee, and John Donelan, Esquire, counsel for FOA, pursuant to this Court's CM/ECF procedures.

/s/ *Donald F. King*
Donald F. King