

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

In re:)) GORDON PROPERTIES, LLC, and) CONDOMINIUM SERVICES, INC.,)) _____) Debtors.) GORDON PROPERTIES, LLC, and) CONDOMINIUM SERVICES, INC.,)) Debtors,)) v.)) FIRST OWNERS’ ASSOCIATION OF) FORTY SIX HUNDRED CONDOMINIUM,) INC.,)) _____) Creditor.)	Case No. 09-18086-RGM (Jointly Administered) (Chapter 11) Contested Matter (Motion to Approve Settlement, Docket Entry 498)
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**DEBTORS’ RESPONSE TO
MOTION OF EXAMINER FOR CLARIFICATION REGARDING DUE PROCESS**

Gordon Properties, LLC (“Gordon Properties”), and Condominium Services, Inc. (“CSI”) (Gordon Properties and CSI are referred to herein jointly as the “Debtors”), hereby respond to the motion (the “Motion”) [Docket No. 620] of Stephen Leach, Examiner (the “Examiner”), for clarification of the parties’¹ due process rights:

I. Preliminary Statement

Secret discovery is abhorred in American jurisprudence. Rather, it is axiomatic that parties engaged in litigation be given the opportunity to confront and cross examine those whose testimony might be used as evidence. This is a fundamental constitutional protection afforded every litigant. Nonetheless, the Examiner has refused to provide notice of any intended

¹ Although the Examiner’s Motion suggests that he is seeking clarification as to the Debtors’ rights, the fact is that the question of due process applies to both the Debtors and the other party to this litigation, First Owners’ Association of Forty Six Hundred Condominium, Inc. (“FOA”).

examination, has refused to allow FOA's counsel to attend the examination of its adversaries in this litigation (the Debtors), and has refused to allow Debtors' counsel to attend the examination of its adversary in this litigation (FOA). Moreover, the Examiner has stated unequivocally that he intends to use as evidence testimony elicited during these clandestine examinations (which he calls "*interviews*").² After learning of the Examiner's plans, the Debtors requested that the Examiner respect the constitutional rights of the parties to the litigation. The Examiner simply ignored the request, essentially maintaining that he is exempt from compliance with the constitutional rights of the litigants and inviting the parties to seek protection from the Court. Subordinating their desire for a prompt decision on the 9019 Motion to their desire for due process, the Debtors advised the Examiner that they would not seek the intervention of the Court at that time (with a reservation of rights).³ Having been alerted to the question and the seriousness of the answer, the Examiner was compelled to seek guidance from the Court and filed his Motion.

The Debtors respectfully challenge the Examiner's assertion of an exemption to the Constitution, and request that the Court direct the Examiner to extend due process to the parties by notice of and opportunity to attend any examination.

II. Facts

Debtors' counsel was surprised to learn, via an email from FOA's counsel, that the Examiner was preparing to examine FOA's special litigation committee ("*SLC*") without notice to the Debtors and without an opportunity for counsel to appear and cross examine. Debtors' counsel also learned that the Examiner intended to examine the Debtors without notice to or

² The Examiner maintains that evidence elicited secretly is more credible. This suggestion is preposterous and flies in the face of every tenant of constitutional law. Testimony given openly and subject to cross examination is what produces truth!

³ The Debtors sought assistance from the Office of the U. S. Trustee and explained their views as to the role of the Examiner and the right of the litigants to due process. The U. S. Trustee does not believe due process is implicated.

opportunity of FOA's counsel to attend. Upon learning of this plan, Debtors' counsel communicated with the Examiner and requested that the constitutional rights of the litigants be respected by the Examiner in the course of the performance of his duties.⁴

III. Discussion

The Debtors believe simply that the Examiner is not exempt from honoring constitutional rights routinely extended to all parties engaged in litigation. This is all the Debtors have ever requested of the Examiner. The Examiner cannot deny that, until learning of the Examiner's intention to conduct clandestine examinations, the Debtors had been fully supportive of the Examiner's work and cooperative in responding promptly to all of his document and information requests. Neither can the Examiner deny that the emails attached to his Motion reflect an inquiry by Debtors' counsel made professionally and with civility.⁵ Notwithstanding the Debtors' request, the Examiner could provide no legal support for his claimed constitutional exemption. Rather, he responded by stating that he does not need to convince the Debtors of what is "*self-evident*." (See Examiner's Exhibit A-2, p. 4.)

⁴ Notwithstanding that FOA and the Debtors have been litigation adversaries for more than 6 years, their respective counsel have been working in unison to ensure that the process of obtaining approval of their settlement is neither delayed nor compromised. In that cooperative spirit, counsel agreed to permit the Examiner to conduct "*informal*" discovery. At no time, however, did counsel waive the constitutional protections afforded to all litigants, and never did counsel authorize its adversary to be examined in private (particularly when considering that the testimony elicited in private is intended by the Examiner to be used as evidence). It is a fundamental axiom of American jurisprudence that litigants have the right to confront and cross examine any witness whose testimony might be used in the litigation.

⁵ Debtors' counsel does not take lightly a potential violation of constitutional rights. It is regrettable that the opening sentence of the Examiner's Motion alleges that the Debtors have accused him of some ungodly conduct. Asking the Examiner to consider the constitutional rights of the parties to the litigation does not rise to accusations of wrongful conduct. There is not a scintilla of evidence in the emails attached to the Examiner's Motion that he was the subject of any attack or accusation. To the contrary, those emails evidence a civil inquiry by Debtors' counsel – an inquiry that any party engaged in years of litigation should be entitled to make. Yet the Examiner mocks Debtors' counsel by sending an email insisting that his exalted status makes the propriety of his litigation strategy "*self-evident*" (see Examiner's Exhibit A-2, page 3). The Debtors certainly recognize the possibility that the Court might uphold the secret examinations being conducted by the Examiner. Similarly, the Examiner should respect the possibility that the Court would agree that the parties to the litigation are entitled to due process. In any event, the answer to the question is less than *self-evident*, and the parties should not be expected to subordinate their desire for due process to the Examiner's conclusion that his actions are "*non-controversial*." (See Examiner's Motion, p. 2.) Such an attitude is beneath the dignity of an examiner.

The Debtors ask only that the Examiner respect their constitutional rights. While the parties have supported the Court's desire to create a structure that assists the Court in rendering its decision on the 9019 Motion, it would be inappropriate to sanction secret fact finding.⁶ The Debtors recognize that the Court is aware of their prior disagreement over whether §1104 contemplates appointment of an examiner to engage in fact finding in pending litigation. Nonetheless, the Debtors respected the Court's attempt to solidify the quality of the evidence it expected the parties to introduce at the hearing on the 9019 Motion, and the Debtors have been fully supportive of and cooperative with the Examiner in that regard. However, the "elephant-in-the-room" is that the difficulty with responding to the Examiner's *self-evident* position stems largely from the fact that the "square" of the Examiner's role in this proceeding does not fit the "circle" of the nature of litigation. The reality is that assisting the Court in a fact finding role in pending litigation is the role of a special master. In that regard, FRCP 53, which authorizes appointment of a special master in litigation, and the case law interpreting that rule, make clear that *ex parte* communications by the master are impermissible (except in very unusual circumstances approved by the court in advance). The Debtors have been unable to locate a single case in which an examiner was appointed to conduct fact finding in litigation. While the Debtors acknowledge that lack of reported authority does not mean that §1104 does not contemplate such a role, it certainly should mean that the role should be similar to that of a special master when appointment is related to ongoing litigation. Similar to a special master engaged in fact-finding to assist the Court, the Examiner in this case should be prohibited from

⁶ The Examiner has told Debtors' counsel that he has been contacted by unit owners of FOA and that he does not believe he is prevented from speaking with them *ex parte* and without notice. To be intellectually honest with the position advanced by the Debtors in this response, the answer should be that examination of witnesses, as well as examination of parties, is subject to the same constitutional protection. Nonetheless, Debtors' counsel has advised the Examiner that he does not object to the Examiner speaking with a unit owner who has contacted him without advance notice to the Debtors. On the other hand, if the Examiner wishes affirmatively to examine a unit owner (or other witness), the examination should be subject to the same level of constitutional protection.

ex parte communications, and all parties should be afforded due process by notice and opportunity to participate.

IV. Conclusion

For the foregoing reasons, the Debtors respectfully request that the Examiner be required to provide notice of any examination of a party or witness and that the parties' counsel be permitted to attend and examine.

Respectfully submitted,

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

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Certificate of Service

The undersigned certifies that this response was served electronically on June 30, 2013, upon Joseph Guzinski and Bradley Jones, Office of the U. S. Trustee, John Donelan, Esquire, counsel for FOA, and Stephen Leach, Examiner, and his counsel, pursuant to this Court's CM/ECF procedures.

 /s/ Donald F. King
Donald F. King