

**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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**EXAMINER’S REPLY TO DEBTORS’ RESPONSE TO MOTION FOR  
CLARIFICATION REGARDING DUE PROCESS RIGHTS**

A fatal flaw in the Debtors’ Constitutional due process argument is that they face no prejudice from the Examiner’s proposed private interviews of members of the first and second Special Litigation Committees (or of anyone else for that matter). The Debtors are entirely free to conduct their own interviews of the same individuals, or if necessary, to subpoena and conduct sworn depositions of those individuals pursuant to Federal Rules of Bankruptcy Procedure 7030 and 9014. That the Examiner needs to conduct investigatory interviews with key participants in the process that gave rise to the proposed Settlement Agreement between the Debtors and FOA does not in any way whatsoever disable or interfere with the Debtors’ own preparation for an evidentiary hearing on approval of the Settlement Agreement. Likewise, the Debtors repeatedly express concern that the interviews will result in “evidence,” as though the Examiner was the final trier of fact and that the Debtors will have no opportunity to challenge the Examiner’s report. But of course, that is not so. The report will be just that – a report, not a judgment – and the Examiner harbors no illusions that the Debtors will be reticent about criticizing any element of the report that they find objectionable.

{LTB-00043806- }  
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*Examiner*

The Debtors are conflating an examiner's investigation with formal discovery, perhaps because the Debtors view the Examiner as a party to litigation or even an adversary. The Examiner may be a party in interest, but he is not a litigant. Bankruptcy Code sections 1106(a)(3) and (a)(4) make abundantly clear that the role of an examiner is simply to conduct an "investigation" and report on "any fact ascertained" pertaining to the subject of his or her assignment. A fact-finding investigation by an examiner does not impair due process rights because an examiner's findings and conclusions are only advisory and any party objecting to such findings or conclusions is free to dispute them with its own evidence.

That the Debtors are confusing an investigation with litigation is apparent from their insistence that they not only be permitted to attend all Examiner interviews, but that they be permitted to cross-examine interviewees. Response at p. 2. Cross-examination is part of adversarial litigation. It has no place in a fact-finding investigation, which is all the Examiner is seeking to conduct. If the Debtors decide it is in their interest to cross-examine an interviewee, they are free to schedule a pre-hearing deposition or subpoena the interviewee to appear as a witness at the hearing on approval of the Settlement Agreement.

The Debtors again argue that an examiner appointed under Bankruptcy Code section 1104(c) and a master appointed by a U.S. district court under Federal Rule of Civil Procedure 53 are functionally the same. But even the most cursory reading of section 1104(c) and rule 53 makes abundantly clear that the two positions are of different species. An examiner may investigate and prepare a report. On the other hand, a master may hold trial proceedings, conduct evidentiary hearings, and otherwise fill a quasi-judicial role. The Debtors needlessly taunt the Examiner by suggesting that his "exalted status" has gone to his head (Response, p. 3, fn. 5), but precisely the reverse is true – it is the Debtors who are attributing to the Examiner

powers and a role he knows does not hold (and has no desire to hold). It is noteworthy that the Debtors fail to cite any authority whatever equating an examiner under section 1104(c) and a master under rule 53. Indeed, it is noteworthy that the Debtors fail to cite any authority whatever on any point – surely if an examiner violated the due process rights of a debtor by not allowing debtor’s counsel to cross-examine interviewees there would be abundant case law on the point. The utter absence of authority supporting the Debtors’ arguments is telling.

Wherefore, the Examiner prays that the Court determine whether that Examiner’s investigative interviews do not violate the Debtor’s due process rights and do not constitute improper *ex parte* contacts.

Date: July 1, 2013

Respectfully submitted,

/s/ Stephen E. Leach

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**Certificate of Service**

I hereby certify that on the 1<sup>st</sup> day of July, 2013, I caused a copy of this Reply to be served by via e-mail, upon the following:

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