

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

IN RE:)	
)	
GORDON PROPERTIES, LLC and)	Case No. 09-18086-RGM
CONDOMINIUM SERVICES, INC.,)	(Jointly Administered)
)	
Debtors in Possession.)	Chapter 11
_____)	

SUPPLEMENT TO REPORT OF STEPHEN E. LEACH, AS EXAMINER

D. Marc Sarata, Esq. (Va. Bar. No. 68621)
Kristen E. Burgers, Esq. (Va. Bar No. 67997)
LEACH TRAVELL BRITT pc
8270 Greensboro Drive, Suite 700
Tysons Corner, Virginia 22102
Telephone: (703) 584-8900
Email: msarata@ltblaw.com
Email: kbürgers@ltblaw.com

Counsel to Examiner

On August 15, 2013, counsel for FOA and the Debtors jointly advised the Examiner that the Report did not discuss the effect of a vote taken at the regular meeting of the Board held on January 15, 2013, and inquired as to whether the omission of a discussion was an oversight or intentional. The omission was inadvertent, but given the subject matter of the vote, a discussion should have been a part of the original Report – hence this Supplement. I regret my error in not including the discussion herein as part of the initial Report.

The vote in question was on a motion (the “Ratification Motion”) of director William Reichenbach who “moved that the Board of Directors ratify and accept the Settlement Agreement between Gordon Properties LLC and FOA dated December 2012.”¹ The minutes of the January 15, 2013 meeting are internally inconsistent as to the vote on the Ratification Motion. On one hand, they contain the statement that the Ratification Motion “passed with three votes in favor and no votes in opposition.” On the other hand, the breakdown of the vote by individual director indicates that Mr. Reichenbach and Martina Hernandez voted in favor; while Jonathan Halls, Elizabeth Greenwell, Bryan Sells, and Lindsay Wilson all abstained.

The Examiner interviewed Mr. Halls at the offices of the SLCs’ counsel, John Donelan, on August 31, 2013. Mr. Donelan attended the interview. Based on Mr. Halls’ statements, the Examiner concludes that the minutes correctly reflect the vote of the individual directors, and that Mr. Halls abstained from voting to ratify the Settlement Agreement. Thus, the vote of the Board on the Ratification Motion was two in favor (Ms. Hernandez and Mr. Reichenbach), zero against, and four abstaining (Mr. Halls, Ms. Greenwell, Mr. Sells, and Ms. Wilson).

For purposes of a vote to ratify the Settlement Agreement, Ms. Hernandez and Mr. Reichenbach were disinterested directors. Two other directors were disinterested as well: Mr.

¹ A copy of the minutes of the January 15, 2013 Board meeting is attached hereto as Exhibit 1. The “ratification” motion and vote are discussed on page 8 of the minutes.

Halls and Lucia Hadley.² Thus, there were a total of four disinterested directors on the Board as of January 15, 2013.³ A majority of four is, of course, at least three.

Va. Code § 13.1-871(B) (discussed in the initial Report), states that for purposes of subdivision A 1 of § 13.1-871 (addressing board of directors approval), “a conflict of interests transaction is authorized, approved, or ratified if it receives the affirmative vote of a majority of the disinterested directors on the board of directors, or on the committee.” Va. Code § 13.1-871(B) goes on to state that “[i]f a majority of the disinterested directors vote to authorize, approve or ratify the transaction, a quorum is present for the purpose of taking action under this section.”

The Examiner concludes that the vote on the Ratification Motion did not satisfy Va. Code § 13.1-871(B) because only two disinterested directors voted in favor, while a majority vote of three of the four disinterested directors was required. Further, because a majority of the disinterested directors did not vote in favor of the Ratification Motion, no quorum was present for the purpose of taking action under Va. Code § 13.1-871(B).

There are also problematic, albeit non-dispositive, circumstances relating to the vote on the Ratification Motion. First, given the Board’s delegation of authority to the Second SLC to settle the Litigation between FOA and the Gordon Properties Entities, there was no need for Ratification Motion in the first place – the Second SLC, properly or not, had facial authority to bind the FOA to the Settlement Agreement. The Examiner recognizes that he has recommended in the initial Report that the Court not approve the Settlement Agreement unless it is hereafter approved by a majority of the disinterested members of the Board. Such a future vote would,

² The minutes reflect on page 1 that Ms. Hadley and wanted to participate in the meeting by telephone, but that attempts to contact her failed, and thus she did not “attend” the January 15 meeting.

³ There remain four disinterested directors on the Board, although Mr. Halls resigned in April 2013 and was replaced by David Fochtman.

however, be qualitatively different from a vote by the disinterested directors in January 2013, because it would be taken with a more complete understanding of the issues raised in the Report about the creation of, and restraints imposed upon, the SLCs. Second, the Agenda for the January 15 meeting did not include any reference to the Ratification Motion, while it did include such less important items of business as a front desk manual.⁴ Thus, it is not clear if Ms. Hadley (who had expressed a desire to participate in the meeting) or anyone other than Mr. Reichenbach, who proposed the Ratification Motion, was aware beforehand that the Board was going to vote on the Settlement Agreement. Given the importance of the Settlement Agreement to the FOA, advance notice of the Ratification Motion, through its inclusion on the Agenda, was material, particularly because Ms. Hadley might have made other arrangements to “attend” the meeting had there been advance notice of the Motion. Third, based on Mr. Halls comments to Mr. Donelan and the Examiner, it is not clear that the Settlement Agreement had been distributed to Ms. Hadley and Mr. Halls, as disinterested directors, before the January 15 meeting. A vote on something as important as approval of the Settlement Agreement would have been inappropriate before all disinterested directors had carefully reviewed the document itself.

The Examiner is prepared to address, at the Court’s convenience, any questions, comments, or concerns the Court may have regarding the Report or this Supplement.

Dated: August 15, 2013

Respectfully submitted,

/s/ Stephen E. Leach
Stephen E. Leach, Examiner

⁴ A copy of the Agenda for the January 15 meeting is attached hereto as Exhibit 2.