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
	)	

EXAMINER'S LIMITED RESPONSE TO JOINT OBJECTIONS TO EXAMINER'S REPORT

On August 19, 2013, the Debtors and FOA (together, the "Objectors") filed Joint Objections to the Examiner's Report (the "Joint Objection") [Dkt. No. 662]. The Court has not directed the Examiner to offer a substantive response to objections to his Report [Dkt. No. 648] (or to the Supplement thereto [Dkt. No. 656]). Accordingly, this limited response is not intended to address the Objectors' challenge to substantive conclusions of the Report (such as the Report's position as to whether any particular director was disinterested as to a particular issue.) Nonetheless, the Joint Objection contains at least three mistaken assumptions or misunderstandings about the Report that can be rectified without addressing the substance of the Examiner's views.

First, the Objectors twice state that the Examiner erroneously asserted in the Supplement to the Report that the minutes of the January 15, 2013 Board meeting are inconsistent because those minutes report that the vote of the disinterested directors was 3 to 0 in favor of ratification of the Settlement Agreement, whereas the actual vote was 2 in favor and 1 abstension.[1] The Objectors suggest that the Examiner's reliance on a "Draft" of the minutes of the January 15 meeting may have led him into error. The Objectors' assertion of error is itself in erroneous.

[1] See Footnote 3 (page 3) and Footnote 12 (page 8) of the Joint Objection.

The minutes of the January 15 Board meeting incontrovertibly state on page 8, that "[t]he motion passed with three votes in favor and no votes in opposition." Immediately thereafter, the minutes state that directors Bill Reichenbach and Martina Hernandez voted "yes" while directors Jonathan Halls (the only other disinterested director present at the meeting), Elizabeth Greenwell, Bryan Sells, and Lindsay Wilson all abstained. Thus the minutes first state that the vote of the disinterested directors present was 3 to 0, but then state that the vote was 2 in favor, 0 opposed, and 1 abstaining. The Objectors are free to insist that these two statements are not inconsistent, but the Examiner is at a loss as to how they are not.

Second, the Objectors take the Examiner to task for stating that the published agenda for the January 15 Board meeting did not identify a vote on ratification of the Settlement Agreement as a topic to be considered by the Board. See Joint Objection, p. 8. The Objectors support their point by attaching as Exhibit 4 to the Joint Objection a 2-page agenda for the January 15 meeting, the second page of which does, indeed, contain a reference to Board consideration of the Settlement Agreement. The Objectors suggest that the Examiner missed this reference to the Settlement Agreement on the second page of the agenda due to "his rush to file his Supplemental Report…." To the contrary, the Examiner "missed" the second page of the agenda (and its reference to the Settlement Agreement) because FOA failed to produce to the Examiner the second page of the agenda when the Examiner requested copies of all agendas of all relevant Board meetings. In this regard, on July 8, 2013, the Examiner made the following document request to FOA (through John Donelan, Esq.)[2]:

> Finally, I have asked this question before, but I would like copies of the written meeting agendas – there clearly were written agendas because they were often debated at the start of meetings. So far, none has been produced.

[2] A copy of the entire e-mail request is attached hereto as Exhibit A. The request for the agendas of Board meetings appears at the end of the e-mail.

In response to this (second) request, on July 10, 2013, FOA (through a memorandum from its interim general manager, Joe Riviere) advised Mr. Donelan (with a "cc" to the Examiner):

> Finally, you requested copies of agendas. All available agendas found in the Management Office are attached, as requested. Please be further reminded that I began my contract with FOA in October 2012. Records from prior management were sparse, at best, to include both paper and electronic files. The attached are everything I have in my files that you have requested and everything that I could find in what was left behind when I came under contract in October 2012.[3]

Attached to Mr. Riviere's memorandum, numbered page 77, was what the Examiner now understands was the first page of the January 15 Board meeting agenda, a copy of which is attached hereto as Exhibit C. *The now-produced second page of the agenda was not attached to Mr. Riviere's memorandum*. Page 78 of the materials produced by FOA is the agenda for the February 19, 2013 Board meeting,[4] which led the Examiner to the conclusion that page 77 comprised the entire agenda for the January 15 meeting. Suffice it to say, the Examiner was and is at the mercy of the Objectors with respect to obtaining documents. It is unhelpful for the Objectors to fail to produce a requested document and then criticize the Examiner for his inability to know that a responsive document had not been produced.

Third, the Objectors question why in his Supplement, the Examiner took the unequivocal position that, under Va. Code § 13.1-871(B), a favorable vote to ratify the Settlement Agreement would require a majority of the disinterested directors on the Board, while in Footnote 51 of the Report, the Examiner had expressed uncertainty as to whether such a vote would require a majority of the disinterested

[3] A copy of Mr. Riviere's Memorandum to Mr. Donelan is attached hereto as Exhibit B.
[4] A copy of page 78 of the materials produced by FOA through Mr. Riviere is attached hereto as Exhibit D.

directors present at the meeting at which the vote was taken.[5] The Objectors misconstrue the scope Footnote 51, which is limited to the question of when a quorum is present for purposes of a board of directors' vote on a conflict of interests transaction. To begin with, Va. Code §13.1-871(B) contains multiple provisions relating to board votes on conflict of interests transactions. The first, and key, provision is that, "[f]or purposes of subdivision A 1, 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." This provision is clear as a bell. In the context of this case, a majority of the disinterested directors on the FOA Board must approve a conflicts of interests transaction, not just a majority of disinterested directors who are in attendance at any particular Board meeting. Va. Code § 13.1-871(B) goes on, however, to provide 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." Footnote 51 is merely a statement by the Examiner that he found this second provision to lack the crystalline clarity of the initial provision of Va. Code § 13.1-871(B). The Examiner has not changed his position between the Report and the Supplement – he concluded initially, and hews to the position today, that proper ratification of the Settlement Agreement requires a vote of the majority of the disinterested directors on the Board. Whether director Lucia Hadley is a disinterested director and whether a majority of the disinterested directors properly ratified the Settlement Agreement on January 15, 2013, are substantive matters for determination by the Court upon the creation of an evidentiary record.

[5] Footnote 51 stated in full: "Va. Code § 13.1-871(B) is not entirely clear (at least to the Examiner) as to whether the quorum requirement refers to a majority of all disinterested directors or only a quorum of disinterested directors in attendance at a particular meeting. Regardless of the correct interpretation, neither a majority of the disinterested directors overall nor those in attendance at the October 3 meeting, approved the Second SLC Resolution, and thus no quorum was achieved for consideration of the Second SLC Resolution."

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

Dated: August 20, 2013

Respectfully submitted,

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

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Counsel to Examiner

Certificate of Service

I certify that this Limited Response was served electronically on August 20, 2013, upon all parties in interest pursuant to the Court's CM/ECF procedures and by e-mail upon the following:

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/s/ Stephen E. Leach
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