

1 WRITTEN DECISION - NOT FOR PUBLICATION

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6 CLERK, U.S. BANKRUPTCY COURT

7 SOUTHERN DISTRICT OF CALIFORNIA

8 BY *[Signature]* DEPUTY

9 UNITED STATES BANKRUPTCY COURT

10 SOUTHERN DISTRICT OF CALIFORNIA

11 In re) Case No. 10-02677-PB11

12 BRIARWOOD CAPITAL, LLC,)

13 Debtor.)

14)

15 NICHOLAS MARSCH, III,) Case No. 10-02939-PB11

16 Debtor.) ORDER FOR APPOINTMENT

17) OF CHAPTER 11 TRUSTEE

18 Several months back, KBR Group filed motions to appoint

19 Chapter 11 Trustees in this case, the companion Briarwood

20 Capital, LLC case, and the Colony Properties cases. At the

21 hearing, the Court ordered appointment of a Trustee for the

22 Colony cases, and an Examiner in Briarwood, and continued the

23 hearing to a date in the future for review of the Examiner's

24 report. That date was subsequently set for July 12, 2010.

25 Immediately prior to the July 12 hearing, the Court and

26 parties were notified by Lennar that Mr. Marsch had appeared as

1 the person most knowledgeable at the § 341(a) hearing of an
2 entity called Mountains Resort Properties, LLC, (MRP) which filed
3 under Chapter 11 in Colorado. Certain interested parties,
4 including Lennar and KBR argued for immediate appointment of a
5 Trustee. Because Mr. Marsch and Briarwood had just been given
6 notice of the additional arguments, the Court afforded Mr. Marsch
7 and Briarwood an opportunity to respond to those arguments. They
8 have done so.

9 Mr. Marsch contends in his opposition that the movants have
10 their facts wrong about the merits of the transaction between
11 Mr. Marsch and Mr. Minkow and Mr. Sachs in the transfer to them
12 of the property in Colorado by transferring ownership of MRP.
13 In so arguing, Mr. Marsch misses the point of great concern to
14 the Court, his honesty with the Court as a debtor-in-possession
15 in his own case, and as managing member of Briarwood Capital,
16 LLC.

17 The Court's concerns arise in two major respects. The first
18 arises from the Statement of Financial Affairs signed under
19 penalty of perjury by Mr. Marsch on March 16, 2010. Item 10
20 required him to list all non-ordinary course transfers within two
21 years before filing. He disclosed his transfer of a security
22 interest in his interest in Colony Properties in exchange for a
23 loan, which he has stated elsewhere was for monies to fund the
24 litigation he is pursuing. He mentions no other transfer,
25 although we are now told that he sold MRP to Minkow and Sachs for
26 \$950,000 plus \$500,000 in services for the same reason, to raise

1 cash to fund litigation. His failure to disclose the transfer of
2 MRP is puzzling because it is not as if he forgot about it
3 altogether. To the contrary, in the same statement, at item 18,
4 asking him to identify the nature, location and name of all
5 businesses in which he was "an officer, director, partner, or
6 managing executive . . ." in the preceding 6 years, he listed
7 MRP, gave its address as his own, and the nature of the business
8 was "investment/management", and the dates were "12/11/06 -
9 present". Despite identifying the nature of MRP as an
10 investment, there is no mention of an interest in MRP on
11 Schedule B.

12 At the July 12 hearing, and since, Mr. Marsch's position has
13 been that he intended to disclose his relationship to MRP and had
14 actually submitted to his lawyers amendments to his Schedules and
15 Statement of Financial Affairs in late April (after MRP filed
16 bankruptcy). Those languished on an attorney's desk while the
17 attorney was out of the office for surgery, and were finally
18 filed July 16, 2010. In the amendment to the Statement of
19 Financial Affairs item 10, Mr. Marsch now says on May 9, 2009 he
20 sold his membership interest in MRP to an entity and to Mr. Sachs
21 for \$950,000 cash and \$500,000 for forgiveness of debt. Item 18
22 was amended to add the sale of the interest in May 2009 while
23 indicating he is still involved with MRP at present, in some
24 undisclosed capacity.

25 Section 1104, title 11, United States Code, provides in
26 relevant part:

1 (a) At any time after the commencement of the
2 case but before confirmation of a plan, on request
3 of a party in interest or the United States
trustee, and after notice and a hearing, the court
shall order the appointment of a trustee -

4 (1) for cause, including, fraud,
5 dishonesty, incompetence, or gross
6 mismanagement of the affairs of the
debtor by current management, either
7 before or after the commencement of the
case, or similar cause . . . ;

8 (2) if such appointment is in the
9 interests of creditors, any equity
security holders, and other interests of
the estate . . . ; or

10 (3) if grounds exist to convert
11 or dismiss the case under section 1112,
but the court determines that the
12 appointment of a trustee or examiner is
in the best interests of creditors and
13 the estate.

14 While some courts have fixed on the word "shall" to indicate that
15 appointment of a trustee is mandatory if "cause" under (a)(1) is
16 found, (see In re Sundale, 400 B.R. 890 (Bankr. S.D. Fla. 2009)),
17 the court in In re G-I Holdings, Inc. explained:

18 While appointment of a trustee is mandatory
19 upon a finding of cause under subsection (1)
or upon a finding that a trustee would serve
20 the interests outlined in subsection (2),
the decision to appoint a trustee still
21 falls within the court's discretion. A
determination of "cause" under subsection (1)
22 is within the court's discretion.

23 295 B.R. at 507, aff'd 385 F.3d 313, 317 (3d Cir. 2004).

24 Factors to consider for cause under (a)(1) include:

25 1) Materiality of the misconduct; 2)
26 Evenhandedness or lack of same in dealings
with insiders or affiliated entities

1 vis-a-vis other creditors or customers; 3)
2 The existence of pre-petition voidable
3 preferences or fraudulent transfers; 4)
4 Unwillingness or inability of management to
5 pursue estate causes of action; 5) Conflicts
6 of interest on the part of management
7 interfering with its ability to fulfill
8 fiduciary duties to the debtor; 6) Self-
9 dealing by management or waste or squandering
10 of corporate assets.

11 In re Intercat, Inc., 247 B.R. 911, 921 (Bankr. S.D. Ga. 2000).

12 Subsection (a)(2) also has a list of factors for a court to
13 consider. They include:

14 (1) the trustworthiness of the debtor;
15 (2) the debtor in possession's past and
16 present performance and prospects for the
17 debtor's rehabilitation; (3) the confidence -
18 or lack thereof - of the business community
19 and of creditors in present management; and
20 (4) the benefits derived by the appointment
21 of a trustee, balanced against the cost of
22 the appointment.

23 In re Sundale, 400 B.R. at 901.

24 As this Court expressed at the May hearing, there is a
25 general presumption that a debtor-in-possession should be able to
26 remain in possession absent a showing to the contrary. In In re
Marvel Entertainment Group, Inc., 140 F.3d 463, 471 (3d Cir.
1998), the court explained:

27 "It is settled that appointment of a trustee
28 should be the exception, rather than the
29 rule." [citation omitted.] In the usual
30 chapter 11 proceeding, the debtor remains in
31 possession throughout reorganization because
32 "current management is generally best suited
33 to orchestrate the process of rehabilitation
34 for the benefit of creditors and other
35 interests of the estate." Thus, the basis
36 for the strong presumption against appointing
an outside trustee is that there is often no

1 need for one: "The debtor-in-possession is a
2 fiduciary of the creditors and as a result,
3 has an obligation to refrain from acting in a
4 manner which could damage the estate, or
5 hinder a successful reorganization."

6 [Citation omitted.] The strong presumption
7 also finds its basis in the debtor-in-
8 possession's usual familiarity with the
9 business it had already been managing at the
10 time of the bankruptcy filing, often making
11 it the best party to conduct operations
12 during the reorganization.

13 These cases are very different from the usual operating
14 business chapter 11 cases. Here, the principal assets, and
15 liabilities of the debtors are litigation claims by and against
16 the debtors. While pursuit and defense of those claims require
17 factual knowledge, they do not, in themselves, require the
18 typical business management skills that underlie the presumption.

19 In these cases, the Court is now persuaded that any
20 presumption has been fully rebutted and that movants have shown
21 by clear and convincing evidence that a trustee should be
22 appointed in both the Marsch and Briarwood cases. In so
23 concluding, the Court has looked specifically at Mr. Marsch's
24 testimony, under oath at the § 341(a) meetings of both Briarwood
25 and MRP.

26 The Briarwood § 341(a) meeting was held on March 23, 2010.
During the sworn testimony of Mr. Marsch, as the managing member
of Briarwood, he was asked:

BY MR. MARROSO:

Q. Page 3, there are various payments listed in the
amount of \$2,000 to an entity called Mountain Resort
Properties, LCC?

1 MR DAVIS: . . .

2 BY MR. MARROSO:

3 Q. Various payments totalling \$2,000 to Mountain
4 Resource Properties, LLC. Are you - you've listed
5 Mountain Resource Properties as an affiliate. . .
What is the affiliation between the debtor,
6 Briarwood, and Mountain Resource Properties, LLC?

6 A. I'm not sure, actually.

7 Q. Does Briarwood have an ownership interest?

8 A. No, it doesn't.

9 Q. Does Briarwood have an ownership in another entity
10 that has an ownership interest in Mountain Resort
Properties?

11 A. Not that I know of, no.

12 Q. Who are the members of Mountain Resource
Properties?

13 A. I don't have any idea at this point.

14 Q. Have you - is it a company with which Briarwood
15 has been affiliated in the past?

16 A. No.

17 Q. And what is the nature of Mountain Resort
Properties' business?

18 A. I'm not actually sure right now.

19 Q. Do you know who are the members?

20 A. I don't.

21 Q. Can you tell me anything at all about various
22 payments totalling \$2,000 to Mountain Resort
Properties?

23 A. I can't.

24

25 Shortly after giving that testimony, MRP filed bankruptcy in
26 Colorado and Mr. Marsch appeared as the representative of MRP at

1 the 341(a) meeting on May 16, 2010 in that case. He testified he
2 was appearing by agreement with the LLC shareholders, that he had
3 "knowledge of the day-to-day operations of the debtor",
4 "knowledge of the history of the debtor", and that he was a
5 member of the debtor until May 2009. He testified the principal
6 asset was a residence in Avon, Colorado, appraised in April 2009
7 at about \$10 million, while the debt is about \$6 million (\$5.9
8 million). He testified he thinks the property is still worth
9 \$10-11 million, and explained why. Interestingly, Mr. Marsch
10 testified that all the personal property in the Avon house
11 belonged to his wife, even though he had sold his interest in MRP
12 a year earlier. He testified he sold for \$950,000, but did not
13 mention any additional compensation in the form of debt
14 forgiveness or services. Moreover, he testified that if Sachs
15 and Minkow sold the property for a good return, he anticipated
16 they would give him some part of the equity because that is how
17 they do business together.

18 In Briarwood's response papers, Mr. Marsch focused on his
19 economic analysis of the sale of his MRP interest, as his
20 attorney did at the July 12 hearing. In addition, Mr. Marsch
21 explained he appeared for MRP because he was a guarantor on the
22 loan on the Avon property. Then, in what this Court considers an
23 unmitigated effort to deflect the impact of Mr. Marsch's apparent
24 dishonesty at the Briarwood 341(a), he argues his answers were
25 correct that Briarwood had no interest in MRP. It was Mr. Marsch
26 who had the interests. Yet he testified he did not know what

1 sort of business MRP did or who its members were. Contrary to
2 his assertions, Mr. Marsch did not "give brief, truthful answers
3 at the 341 meeting rather than providing additional information
4 that was beyond the scope of the questions asked."

5 Whether or not there was or is sufficient equity in the Avon
6 property to support a fraudulent transfer claim, the issue
7 squarely presented to the Court is Mr. Marsch's dishonest
8 testimony, under oath, at the Briarwood 341(a) meeting. This
9 Court has lost confidence in Mr. Marsch's capacity for candor and
10 honesty, and concludes that a trustee should be appointed in both
11 the Marsch and Briarwood Chapter 11 cases, both for cause under
12 § 1104(a)(1), and in the best interests of creditors and the
13 estate under § 1104(a)(2).

14 The United States Trustee is directed to comply with the
15 applicable statutory provisions and identify and select a trustee
16 in each of the Marsch and Briarwood cases.

17 IT IS SO ORDERED:

18 DATED: JUL 19 2010

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20 
21 PETER W. BOWIE, Chief Judge
United States Bankruptcy Court

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