

1 WRITTEN DECISION - NOT FOR PUBLICATION

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6 CLERK, U.S. BANKRUPTCY COURT  
7 SOUTHERN DISTRICT OF CALIFORNIA  
8 BY 3 DEPUTY

9 UNITED STATES BANKRUPTCY COURT  
10 SOUTHERN DISTRICT OF CALIFORNIA

11 In re ) Case No. 10-02677-PB11  
12 )  
13 BRIARWOOD CAPITAL, LLC, )  
14 )  
15 Debtor. )

16 )  
17 ) Case No. 10-02937-PB11  
18 )  
19 In re )  
20 )  
21 COLONY PROPERTIES )  
22 )  
23 INTERNATIONAL, LLC, )  
24 )  
25 Debtor. )

26 )  
27 ) Case No. 10-02939-PB11  
28 )  
29 In re )  
30 )  
31 NICHOLAS MARSCH, )  
32 )  
33 Debtor. )

34 )  
35 ) ORDER ON MOTION TO EMPLOY  
36 ) MINTZ LEVIN COHN FERRIS  
37 ) GLOVSKY AND POPEO, P.C.  
38 )

39 )  
40 )  
41 ) Debtor Briarwood Capital, LLC has applied to employ Mintz  
42 ) Levin Cohn Ferris Glovsky and Popeo, P.C. (sometimes hereafter

1 Mintz Levin or the Firm) as counsel for Briarwood as debtor-in-  
2 possession. Contemporaneously, Nicolas Marsch III, who is the  
3 managing member and sole interest holder of Briarwood, filed his  
4 own Chapter 11 proceeding, and has filed his own application to  
5 employ Mintz Levin as his counsel. And, Colony Properties,  
6 International LLC also seeks to employ the Firm. The United  
7 States Trustee has objected, arguing that because there are  
8 multiple debts, guarantees, and potentially preferential payments  
9 between Marsch, Briarwood and Colony, the Firm cannot represent  
10 one without having at least a potential conflict with the others.  
11 Creditor Lennar objects on the ground that attorney Davis of  
12 Mintz Levin, lead counsel for Briarwood, Marsch and Colony, is  
13 ineligible to be employed because he previously represented  
14 creditor HCC Investors, LLC and Lennar in earlier proceedings  
15 involving the same property and project.

16 The Court has subject matter jurisdiction pursuant to  
17 28 U.S.C. § 1334 and General Order No. 312-D of the United States  
18 District Court for the Southern District of California. This is  
19 a core proceeding under 28 U.S.C. § 157(b)(2)(A).

20 The controlling statute is 11 U.S.C. § 327(a). It provides:

21 (a) Except as otherwise provided in this  
22 section, the trustee, with the court's  
23 approval, may employ one or more attorneys  
24 . . . that do not hold or represent an  
25 interest adverse to the estate, and that are  
26 disinterested persons, to represent or assist  
the trustee in carrying out the trustee's  
duties under this title.

26 ///

1 Mintz Levin has responded, arguing that the interrelated debts  
2 and litigation claims of Briarwood, Marsch and Colony make  
3 co-representation sensible, economic, and more affordable. The  
4 assets of both are mostly litigation claims, and success of  
5 either estate is dependent on success in pursuing the litigation  
6 while warding off the litigation claims against the estate.

7       The United States Trustee points out that according to the  
8 Schedules and Statements of Financial Affairs of the debtors,  
9 including also Colony Properties International, show that Marsch  
10 has a 100% membership interest in Briarwood, which he valued at  
11 over \$274 million. Marsch also has a 100% membership interest in  
12 Colony Properties, Int'l. Marsch asserts he is also a creditor  
13 of Briarwood and is owed over \$2 million. Marsch is a guarantor  
14 of debt owed by Briarwood to KBR Opportunity Fund II, and also of  
15 debt owed by Colony to the same entity. At the same time, Colony  
16 is a creditor of Marsch and is owed over \$668,000. Within 90  
17 days of filing, Marsch made payments to Colony of over \$13,000,  
18 and within one year before made payments over \$197,000 to Colony.  
19 Colony is a creditor of Briarwood, owed over \$50,000, while  
20 Briarwood made payments of over \$6,800 within the year before  
21 filing. Finally, Briarwood made payments to Marsch in the year  
22 preceding of over \$21,000.

23       In the interim, the Court has ordered a trustee be appointed  
24 for Colony Properties, and the trustee has employed his own  
25 counsel after Court approval. Accordingly, the ruling on this  
26 employment application as to Colony is relevant historically, up

1 to appointment of the trustee, insofar as the Firm seeks to be  
2 employed by the estate.

3 Mintz Levin's position, as advanced by itself and by the  
4 respective debtors is that any conflicts at the present are only  
5 potential conflicts, and only become actual if there is not  
6 enough assets to repay all creditors of all the estates in full.  
7 The Court disagrees, and points out that many decisions the  
8 respective debtors-in-possession have to make include whether  
9 to settle, whether to pursue specific litigation, how to ensure  
10 the primary obligor satisfies the debt and spares a guarantor, or  
11 vice versa. The Court is persuaded that many of those issues are  
12 current actual conflicts, with Mr. Marsch directing all the  
13 estates.

14 Even if the conflicts were only potential conflicts, the  
15 Court notes, as did the United States Trustee, that California  
16 Rule of Professional Conduct 3-310(C)(1) and (2) provides:

17 (C) A member shall not, without the informed  
18 written consent of each client:

19 (1) Accept representation of more than  
20 one client in a matter in which the  
interests of the clients potentially  
conflict; or

21 (2) Accept or continue representation of  
22 more than one client in a matter in  
23 which the interests of the clients  
actually conflict; . . .

24 Even if the Firm obtained written conflict waivers from  
25 Mr. Marsch for his own estate, and from Mr. Marsch as 100%  
26 member of Briarwood and Colony Properties, the Court is

1 persuaded such waivers would be ineffective where not granted by  
2 creditors or creditors' committees, to whom the debtors-in-  
3 possession owe duties. As noted recently in In re Straughn,  
4 428 B.R. 618, 627 (Bankr. W.D. Pa. 2010): "Consent by a Chapter  
5 11 debtor to waive conflicts is insufficient to cure any actual  
6 or potential conflicts because the ultimate parties in interest  
7 are the bankruptcy estate's creditors." The Straughn court also  
8 observed:

9           As a practical matter, given the nature  
10          of the relationship between a sole  
11          shareholder and the related corporation, it  
12          is difficult to imagine a situation where  
13          both parties in separate Chapter 11 cases  
14          could be represented by a single attorney.

13 428 B.R. at 627-28. Other courts agree. In re Hoffman, 53 B.R.  
14 564, 566 (Bankr. W.D. Ark. 1985); In re Interwest Business  
15 Equipment, 23 F.3d 311, 316-17 (10<sup>th</sup> Cir. 1994). In Interwest,  
16 the Tenth Circuit borrowed from an earlier Bankruptcy Court  
17 decision in stating:

18           The reasons why counsel to a debtor in  
19          possession must meet the high standards of  
20          undivided loyalty established in § 327(a)  
21          are explained in In re McKinney Ranch Assoc.,  
22          62 B.R. 249 (Bankr. C.D. 1986).

21           It is the duty of counsel for the debtor  
22          in possession to survey the landscape in  
23          search of property of the estate,  
24          defenses to claims, preferential  
25          transfers, fraudulent conveyances and  
26          other causes of action that may yield a  
27          recovery to the estate. The jaundiced  
28          eye and scowling mien that counsel for  
29          the debtor is required to cast upon  
30          everyone in sight will likely not fall  
31          upon the party with whom he has a

1 potential conflict. . . .

2 The Tenth Circuit continued to borrow from McKinney and quoted:

3 The policy behind disqualification for  
4 representing potentially conflicting  
5 interests provides the key to its  
6 extent. The jaundiced eye and scowling  
7 mien of counsel for the debtor should  
8 fall upon all who have done business  
9 with the debtor recently enough to  
be potential targets for the recovery  
of assets of the estate. The  
representation of any such party  
disqualifies counsel from representing  
a debtor.

10 23 F.3d at 316. As the United States Trustee has pointed out,  
11 from the Schedules and Statements of Financial Affairs of the  
12 respective debtors we know of inter-debtor debts and receivables,  
13 as well as potentially preferential payments between them. As  
14 good a firm as Mintz Levin is, and as skilled as Mr. Davis and  
15 his colleagues are, they cannot take on representation of  
16 multiple debtors-in-possession with the competing and conflicting  
17 interests of Mr. Marsch, Briarwood and Colony Properties and  
18 still meet the requirements of 11 U.S.C. 327(a).

19 Given the Court's ruling, and the nature of the conflicts  
20 between the Marsch, Briarwood, and Colony Properties estates, it  
21 may well be that the Firm is not eligible under § 327(a) at this  
22 point to represent any of the three debtors. That issue has not  
23 been squarely addressed, however. Accordingly, having hereby  
24 denied the applications of the Firm and debtors to be employed  
25 by the Marsch, Briarwood and Colony Properties estates, it is  
26 for the debtors-in-possession in the first instance to determine

1 who it wishes to now represent each, and to submit the  
2 appropriate applications. The Court has not forgotten the  
3 separate grounds in opposition asserted by Lennar. If Mintz  
4 Levin applies again to represent one of these debtors-in-  
5 possession, Lennar's objection may need to be addressed at that  
6 time. Because employment of the Firm has been denied at the  
7 present time, the Court need not address Lennar's objection now.

8

9

Conclusion

10 For the foregoing reasons, the Court finds and concludes  
11 that Mintz Levin is ineligible to represent the estates of  
12 Mr. Marsch, Briarwood and Colony Properties, or any two of them.  
13 Accordingly, the applications to employ Mintz Levin by and on  
14 behalf of each of those estates is denied.

15

IT IS SO ORDERED.

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DATED: JUL 20 2010

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PETER W. BOWIE, Chief Judge  
United States Bankruptcy Court

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