

**UNITED STATES DISTRICT COURT
NORTHRN DISTRICT OF OHIO
EASTERN DIVISION**

In re:) CASE NO. 07-51261
))
EVERGREEN HOMES, LLC) Chapter 11
))
 Debtor.) Judge Marilyn Shea-Stonum

**MOTION OF THE COMMITTEE OF UNSECURED CREDITORS FOR AN
ORDER APPOINTING A CHAPTER 11 TRUSTEE.**

1. The Official Committee of Unsecured Creditors of Evergreen Homes, LLC (the “Committee”) herein and hereby moves this Court to order the appointment of a Chapter 11 trustee in this case over Evergreen Homes, LLC, and its affiliates, Evergreen Investment Corporation and Evergreen Builders, pursuant to section 1104(a) of the Bankruptcy Code and Bankruptcy Rules 2007.1 and 9014. In support of its motion, the Committee says as follows:

I. The Debtor’s Case and Parties

2. On April 29, 2007 (the “Petition Date”), Evergreen Homes, LLC (the “Debtor” or “Evergreen Homes”) filed a Voluntary Petition under Chapter 11 of the Bankruptcy Code. Evergreen Homes has been operating its business as a debtor-in-possession pursuant to 11 U.S.C. §§ 1107 and 1108 (the “Bankruptcy Code”). Also on April 29, 2007, Evergreen Homes’ two affiliates, Evergreen Investment Corporation (“Evergreen Investment”) and Evergreen Builders, LLC (“Evergreen Builders”), filed Voluntary Petitions under Chapter 11 of the Bankruptcy Code. Both are operating as debtor-in-possession. Evergreen Investment’s Chapter 11 filing was assigned Case No.

07-51262. Evergreen Builders' was assigned Case No. 07-51263. "Debtor Affiliates" is a term used herein to refer to Evergreen Homes, Evergreen Investment and Evergreen Builders, collectively.

3. On April 30, 2007, Evergreen Homes filed a Motion for Joint Administration of the respective bankruptcies of the Debtor Affiliates. That motion has been orally granted. The order granting approval of the motion has not yet been entered on the Court's docket.

4. Evergreen Homes buys, rehabilitates and sells existing as well as new single family homes. Prior to the Petition Date, Evergreen Homes' subsidiary, Evergreen Builders, was in the business of building new homes sold buy Evergreen Homes. All homes rehabilitated or built by Evergreen Homes and its subsidiary Evergreen Builders are located in Summit, Stark and Cuyahoga counties. Evergreen Builders is not currently engaged in business activity.

5. Prior to the Petition Date, Evergreen Investment was in the business of raising funds through the sale of securities, then loaning that money to its affiliate Evergreen Homes. Evergreen Investment also used investor funds to buy notes and mortgages from Evergreen Homes. Upon information and belief, the Committee believes that Evergreen Homes presently acts as a holding company focused exclusively on the collection of notes receivable.

6. David Willan ("Willan") is the principal of each of the Debtor Affiliates. Willan is managing member of Evergreen Homes, Inc. (and by extension Evergreen Homes' wholly-owned subsidiary Evergreen Builders) and president and sole shareholder of Evergreen Investment.

7. A Committee of Unsecured Creditors, i.e., the Committee, was appointed under Title 11 of the United States Code, though the appointing order is not reflected on the Court's docket. The Committee represents the interests of the unsecured creditors of the Debtor Affiliates (the "Creditors").

II. Jurisdiction and Venue

8. This Court has jurisdiction over these Chapter 11 proceedings pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409.

9. The statutory basis for the relief requested in this motion is section 1104 of the Bankruptcy Code.

III. Background Facts

A. Pre-Petition Conduct

10. *Misappropriation of Corporate Resources* - Upon information and belief, prior to the Petition Date the Debtor Affiliates paid Willan an annual salary of \$350,000.00 (net).¹ It appears that Evergreen Investment and Evergreen Builders, respectively, paid a management fee to Evergreen Homes, which in turn paid Willan's salary.

11. Upon information and belief, since Willan's estrangement from his current spouse and until the Petition Date, Evergreen Homes made all monthly rent payments owed by Willan for use of a residential apartment in Tower 80, 80 North Portage Path, Akron, Ohio 44305.

¹ Pursuant to Evergreen Homes' Amended Operating Agreement, Willan received an additional amount of compensation equal to the amount necessary to cover his personal income tax obligations.

12. Upon information and belief, Evergreen Homes purchased a personal membership on Willan's behalf to Portage Country Club and/or paid Willan's related monthly membership dues.

13. Willan testified at the First Meeting of Creditors' hearing of the Debtor Affiliates' cases (the "341 Hearing") that in December, 2006, he gave Evergreen Homes a personal promissory note in the amount of Twenty Thousand Dollars (\$20,000.00) as consideration for Evergreen Homes transferring to him title to two sport utility vehicles: a "2005 or 2006" Dodge Durango and a "2005 or 2006" Jeep Grand Cherokee in lieu of a cash payment to the Debtor. The Kelley's Blue Book value of each, in fair condition and with standard features, as of the date of transfer in December, 2006, greatly exceeded Fifteen Thousand Dollars (\$15,000.00).

14. *Investment Certificates* - On June 19, 2006 the Ohio Department of Commerce, Division of Securities issued an order suspending Evergreen Investment's temporary permit to sell investment certificates ("Certificates") in Ohio due to alleged violations of state securities law. Specifically, the Department of Commerce alleged that: (1) Evergreen Investment was insolvent as of December 30, 2005, but that it continued – without disclosing its insolvency – to market and sell its Certificates to prospective investors; (2) Evergreen Investment's employee, Daniel Mohler, sold securities without a license; and (3) that Mohler's compensation for Certificate sales was commission-based rather than salary-based (contrary to statements regarding Mohler's compensation in Evergreen Investment's offerings circular).

15. Despite professing Evergreen Investment's innocence, and rather than defending its actions, on June 22, 2006, Willan, on behalf of Evergreen Homes and

Evergreen Investment, entered into a Consent Agreement whereby he voluntarily waived the right to an adjudicative hearing and consented to the issuance of Division Order No. 06-161. This order codified the Commerce Department's suspension of Evergreen Investment's permit to purchase, sell or otherwise deal in securities of any kind.

16. ***Second Mortgages*** - On September 27, 2006, the Ohio Department of Commerce, Division of Financial Institutions filed a Complaint for Injunctive Relief against Evergreen in the Summit County Court of Common Pleas. The case was captioned *Scott O'Donnell v. Evergreen Homes, et. al.*, case number CV 2006-09-6098. The Complaint alleged that Evergreen Homes and Evergreen Investment, respectively, while not registered in Ohio as a second mortgage lender, made, transferred, or acquired second mortgage-secured loans on Ohio properties which, on information and belief, the Committee believes totaled Six Million Two Hundred Eighty Nine Thousand Eight Hundred Ninety Seven Dollars and Eighty Three Cents (\$6,289,897.83) as of the Petition Date (the "Loaned Funds").

17. Rather than defending the Debtor Affiliate's actions, Willan, through counsel, signed an Agreed Entry for Preliminary Injunction ("Agreed Entry") which barred Evergreen Homes and "Evergreen Investments, Inc." from extending further credit in the form of second mortgages, from transferring or assigning its second mortgages, and from collecting or receiving interest on their respective portions of the Loaned Funds.²

18. By signing the Agreed Entry, Evergreen Homes and Evergreen Investment – at Willan's direction – surrendered all interest due or owed them on the Loaned Funds –

² The Agreed Entry appears to misidentify Evergreen Investment as "Evergreen Investments, Inc."

interest that the Committee believes, upon information and belief, would otherwise be accruing, under the terms of the respective loans, at rates in excess of 8% APR.

19. On October 13, 2006, Roetzel & Andress, L.P.A. (“Roetzel”), then the Debtor Affiliates’ general legal counsel, filed a Motion for Leave to Withdraw as Counsel in the Summit County Court of Common Pleas case *Scott O’Donnell v. Evergreen Homes, et. al.* Upon the Committee’s information and belief, Roetzel served as general counsel to the Debtor Affiliates – as well as to Willan personally – since at least 2005.

20. Upon the Committee’s information and belief, the accounting firm Brockman Coats Gedelian & Co served as accountant to the Debtor Affiliates and Willan, respectively, since roughly 2004.

21. ***Brittain Holdings, LLC and Brittain Entertainment LLC*** - On April 4, 2006, Willan caused Articles of Organization to be filed for the formation of Brittain Holdings, LLC, an Ohio limited liability company (hereinafter referred to as “Brittain”). Upon information and belief, Willan is the sole member of Brittain. From a review of documents of public record, Brittain is in the business of commercial and residential real estate investment.

22. On or about April, 2006, Willan caused Evergreen Investment to issue a \$500,000.00 line of credit to Brittain (the “Line of Credit”). As alleged by the Ohio Department of Commerce, Evergreen Investment was of questionable solvency. The Committee is not aware of a single capital contribution to Brittain by any other person or entity other than David Willan.

23. On May 22, 2006, Brittain acquired the business formerly known as Dreamerz Nite Club, an exotic dance/gentleman's club establishment, and its underlying real property at 1110 Brittain Road for Three Hundred and Fifty Thousand Dollars (\$350,000.00). The purchase was entirely funded by cash drawn by Brittain from its Line of Credit with Evergreen Investment.

24. Upon information and belief, Dreamerz Nite Club is no longer in operation and the underlying real estate and building at 1110 Brittain Road currently sits dormant.

25. On November 29, 2006, Articles of Organization were filed for the entity Brittain Entertainment LLC (hereinafter referred to as "Brittain Entertainment"). According to the Ohio Secretary of State and the Division of Liquor Control, the managing member and statutory agent of Brittain Entertainment is Brianna Fullerton ("Fullerton"), 80 North Portage Path, Akron, Ohio 44305. Upon information and belief, Fullerton is the girlfriend of Willan.

26. A subsequent filing by Fullerton indicates that Brittain Entertainment registered for the trade name "Stripped" with an address of 1110 Brittain Road, Akron, Ohio 44305.

27. According to the Ohio Division of Liquor Control, Brittain Entertainment dba Stripped owns a D1, D3, D3A liquor permit at 1110 Brittain Road.

28. On February 5, 2007, Willan signed a land contract on behalf of Brittain to sell 1110 Brittain Road to Daniel Ringer ("Ringer"), a past Evergreen employee, for the sum of \$350,000.00. This land contract required Ringer to make monthly payments to

Brittain of \$2,098.43 for a term of forty-eight (48) months. The remaining balance due, at 6% interest, was to be paid in the form of a balloon payment due February 1, 2011.

29. Upon information and belief, Daniel Ringer made no payments to Brittain under the terms of this land contract.

30. Despite receiving zero purchase money from Ringer under the land contract referenced in Paragraph 28, supra, six days prior to the Petition Date, Willan signed a quitclaim deed conveying 1110 Brittain Road to Ringer free and clear. Upon information and belief, Ringer signed a promissory note payable to Brittain and gave Brittain a mortgage in the amount of \$350,000.00 (the "First Note"). Despite an informal request, Willan has not produced a copy of the First Note for the Committee's inspection.

31. Upon information and belief, Ringer has made no payments to Brittain under the terms of the First Note.

32. Following Brittain's purchase of 1110 Brittain Road, Willan began purchasing, renovating and selling single family homes through Brittain. Relevant transactions include those at 1174 Madrid Drive, 741 Roselawn Avenue, 429 McGowan Street, and 848 Wall Street.

33. Given that Brittain's business involves the purchase, renovation and resale of single family homes, it is in the same line of business as, and is a direct competitor of Evergreen Homes.

34. Upon information and belief, all of Brittain's assets have been purchased with funds provided through the Line of Credit made available to Brittain by Evergreen Investment at the direction of Willan. Further troubling is the apparent additional extension of credit from Evergreen Investment as Brittain of an additional \$250,000.00,

making the total potential debt closer to \$750,000.00 – an amount reasonably expected to exceed the value of Brittain’s assets.

35. ***Divorce Proceedings*** - In a hotly contested divorce pending before the Summit County Court of Common Pleas, Domestic Relations Division – *David Willan v. Mary Willan*, No. DR-2006-10-3254 (the “Domestic Relations Case”) – Mary Willan, Willan’s estranged spouse, has filed cross claims against Fullerton, Brittain, Daniel Ringer and Brittain Entertainment.

36. Specifically, Mary Willan has alleged that David Willan committed financial misconduct by channeling material assets to Brittain Holdings, Ringer, Fullerton and/or Brittain Entertainment. Mrs. Willan also alleges that Brittain has been “systematically divesting itself” of assets since its formation.

B. Post-Petition Conduct

37. On June 27, 2007, Ringer gave a second promissory note (secured by a second mortgage) to Brittain in the additional amount of \$175,000.00 (the “Second Note”). Upon information and belief, Ringer provided this Second Note to Brittain in consideration of construction financing for the renovation of the gentlemen’s club located 1110 Brittain Road and further operation of the “Stripped” business. Despite informal request, Willan has not produced a copy of the Second Note for the Committee’s inspection.

38. Brittain apparently has not yet maxed out its Line of Credit with Evergreen Investment, and upon information and belief, Evergreen Investment continues post-Petition Date to extend credit to Brittain on demand and transfer funds to Brittain as indicated in the monthly operating report for Evergreen Investment for May, 2007.

39. Evergreen Investment has not received a single payment from Brittain as to any debt owed by Brittain on funds extended on the Line of Credit.

40. Upon the Committee's information and belief, Evergreen Investment has loaned Brittain far in excess of Four Hundred Seventy Five Thousand Dollars (\$475,000.00), said amount likely is under-secured, as would be any additional extensions of credit, given that the property was quit-claimed to Ringer just months ago for Three Hundred Fifty Thousand Dollars (\$350,000.00).

41. Upon information and belief, Ringer has made no payments to Brittain in satisfaction of Ringer's obligations under either the First or Second Notes.

42. Upon information and belief, under the terms of the Notes, Ringer has no obligation to make payments on the First or Second Notes until or unless he obtains refinancing of the 1110 Brittain Road property from a qualified financial institution.

43. Additionally, despite demand, Evergreen has not attempted to modify or vacate the Agreed Entry enjoining its collection of interest otherwise owed it on the Loaned Funds to allow it to collect interest on second mortgages. Such action is merited by Willan's stated "good faith" belief that both Evergreen Homes and Evergreen investment are innocent relative to the state's underlying wrongful second mortgage lending activities. Such action would benefit the Debtor Affiliates and the Creditors.

44. Despite demand, Willan has not signed a release submitted by the Committee for Willan's review and execution that would allow the Committee to inquire into the scope of representation provided by Roetzel in its capacity as general counsel for the Debtor Affiliates citing Roetzel's past representation of Willan personally.

45. The Committee has identified a potential legal malpractice claim by the Debtor Affiliates against Roetzel. Willan on behalf of the Debtor Affiliates does not appear to be investigating or potentially prosecuting such a claim despite the time-sensitive nature of such a claim.

46. Upon information and belief, in June, 2006, a Joint Task Force, including the Summit County Sheriff and representatives of the Ohio Attorney General's Office, seized the corporate financial records of Evergreen Homes, Evergreen Builders, and Evergreen Investments for the purpose of conducting a criminal investigation. During the pendency of this bankruptcy case, the Committee's efforts to obtain information from the Debtor Affiliates has been frustrated because the Debtor Affiliates claim that certain records are unavailable due the past seizure. Such circumstances create an additional level of concern by the Committee as to the Debtor Affiliates' ability to maintain and adequately disclose necessary financial information to the Committee and creditors.

IV. Argument

47. The Committee seeks the appointment of a Chapter 11 trustee in this proceeding pursuant to the provisions of Section 1104 of the Bankruptcy Code. Pursuant to 11 U.S.C. § 1104, a court shall order the appointment of a Chapter 11 trustee for cause. Cause includes "fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management either before or after" the filing of the bankruptcy petition, "or [for] similar cause." 11 U.S.C. § 1104(a)(1). A trustee shall also be

appointed where “such appointment is in the best interest of the creditors.” 11 U.S.C. § 1104(a)(2).

48. In determining the propriety of appointing a Chapter 11 trustee, both the pre-petition and post-petition activity of the debtor are relevant factors to be considered. *In re Main Line Motors, Inc.*, 9 B.R. 782, 784 (Bankr. E.D. Pa. 1981).

49. Given the absence in §1104(a) of express congressional intent to apply a higher standard of proof, whether a movant has met his burden of proof is judged against the preponderance of the evidence standard. *See, Grogan v. Garner*, 498 U.S. 279, 286-291 (1991).

A. Appointment of a trustee under 11 U.S.C. § 1104(a)(1)

50. Relative to §1104(a)(1) appointment “for cause,” the list of examples of justifying “cause” set forth in the rule is not exhaustive. *In re Madison Group, Inc.*, 137 B.R. 275, 281 (Bankr.N.D.Ill.1992). Further, it is solely within the Court’s discretion to determine whether §1104(a)(1) cause exists. *Id.* Once a court has found that such cause exists, however, it has no discretion, but must appoint a trustee. *See, In re Ford*, 36 B.R. at 504; *see also, In re Bonded Mailings*, 20 B.R. 781, 786 (Bankr.E.D.N.Y.1982).

51. In the instant case, there are three categories of circumstances that give rise to §1104(a)(1) “cause.” All circumstances and each “cause” are rooted in Willan’s conduct to date as manager, principal, and insider of the Debtor Affiliates, and each provides a basis upon which the Court may rely in granting the instant motion. Specifically, Willan, while managing Evergreen Homes and Evergreen Investment: (1) engaged in blatant **self-dealing** at the expense of these respective debtors and their creditors; (2) used his positions to **misuse funds** of both Evergreen Homes and Evergreen

Investment for his personal benefit; and (3) grossly mismanaged the defense (or, more accurately, the non-defense) of Evergreen Homes and Evergreen Investment relative to the Ohio Department of Commerce's various claims against them when he signed the enormously punitive Consent Decree and Agreed Entry on their behalf – all while claiming to believe these debtors to have been innocent of the alleged wrongdoing. Additionally, Willan's present refusal to investigate and pursue the Debtor Affiliates' potential malpractice claims against their former general counsel, Roetzel, out of fear that to do so could jeopardize his own personal attorney/client privilege, constitutes waste of potentially extremely valuable assets of the Debtor Affiliates' bankruptcy estates to the detriment of both the Debtor Affiliates and the Creditors. Such waste of assets constitutes continuing **gross mismanagement** of the Debtor Affiliates by Willan.

1. Willan's self-dealing justifies the appointment of a trustee.

52. The U.S. Supreme Court held in *Commodity Futures Trading Commission*, infra: "If a debtor remains in possession, the debtor's directors have essentially the same fiduciary obligations to creditors and shareholders as would the trustee for a debtor out of possession. The willingness to leave debtors in possession 'is premised upon an assurance that the officers and managing employees can be depended upon to carry out the fiduciary responsibility of a trustee.'" *Commodity Futures Trading Commission v. Weintraub*, 471 U.S. 343, 355 (1985), quoting *Waff v. Weinstein*, 372 U.S. 633 (1963). A breach of the debtor-in-possession's fiduciary duties may constitute cause for appointment of a trustee to manage the estate in accordance with Code provisions and Court order. *In re Ford*, 36 B.R. 501, *504 (Bkrtcy.Ky.,1983), citing *In Re James C. Bailey*, No. 5-82-00388 (Bkrtcy.W.D.Ky.1983).

53. “The notion of fiduciary obligations proscribes self-dealing and negligent behavior. These obligations are summarized by the duty of loyalty and care. The duty of loyalty and good faith forbids directors and other business operators from using their positions of trust and control over the rights of other parties to further their own private interest, either by usurping opportunities, holding undisclosed conflicts, or otherwise exploiting their position. 6 Bankr.Dev.J., supra, p. 10 at 35.” *In re Microwave Products of America, Inc.*, 102 B.R. 666, 672 (Bankr.W.D.Tenn.1989). A trustee may be appointed for misconduct or self-dealing, such as questionable business dealings between a debtor corporation, and related entities. *Id.*; see also, *In re Oklahoma Refining Co.*, 828 F.2d 1133, 1136 (10th Cir. 1988); *In re McCorholl Publishing, Inc.*, 73 B.R. 1013, 1017 (Bankr.S.D.N.Y.1982).³ “Self-dealing” is defined as “[p]articipation in a transaction that benefits oneself instead of another who is owed a fiduciary duty.” *See, Black’s Law Dictionary* 1364 (Bryan A. Garner ed., 7th ed., West 1999).

54. In the present case, Willan testified under oath at the 341 Hearing that in or around April, 2006, Willan – on behalf of the presumably then-insolvent Evergreen Investment – extended the wholly Willan-owned real estate redevelopment company, Brittain Holdings, a Five Hundred Thousand Dollar (\$500,000.00) unsecured line of credit (“Line of Credit”).⁴ The Line of Credit was intended to facilitate Brittain’s purchase and renovation of Dreamerz Nite Club, an exotic dance/gentleman’s club establishment, and its underlying property located at 110 Brittain Road in Akron, Ohio.

³ *See also, In re Philadelphia Athletic Club, Inc.*, 15 B.R. 60 (Bankr.E.D.Penn.1981) (principal self-dealing and commingling of funds with principal's other corporation).

⁴ It is note-worthy for the self-dealing analysis that Brittain buys, rehabilitates and sells existing single family homes, and thus is a direct competitor of Evergreen Homes. The Willan-directed provision of Evergreen Investment cash credit to Brittain (for repayment at an indefinite future date) thus adversely affects Evergreen Homes as well as Evergreen Investment, which is thereby indefinitely deprived of cash assets. Brittain’s ongoing draws therefore violate Willan’s fiduciary duties to its Creditors.

In exchange, Evergreen Investment appears to have taken an under-secured promissory note. This note, referenced above as the First Note, while informally requested, has not been made available to the Committee for inspection. It is interesting to note that Willan protected Brittain's interest in collateral by obtaining a mortgage on the property but he leaves Evergreen Investment with an unsecured line of credit.

55. Upon the Committee's information and belief, the Line of Credit available to Brittain now stands at Seven Hundred Fifty Thousand Dollars (\$750,000.00).

56. Since first drawing funds against the Line of Credit in early 2006, the Committee believes that Brittain has drawn far in excess of Four Hundred Seventy Five Thousand Dollars (\$475,000.00) without making a single payment of either principal or interest on the First or Second Notes, which represent the debt created by such borrowing.

57. Since the Petition Date, Willan has directed Evergreen Investment to continue honoring Brittain's Line of Credit-based requests for funds, despite the fact that repayment of such funds is apparently not required at any date-certain, and despite Evergreen's Investment's apparent insolvency. *See, Debtor's Monthly Operating Statements. See also, In re Ford*, 36 B.R. 501 (Bankr.W.D.Ky.1983) (debtor made inter-corporate loans and transfers without court permission and without disclosure in its monthly financial reports).

58. Given Willan's relationship to both Brittain and the Debtor Affiliates, and given his fiduciary duty to the Creditors, the transfer of Evergreen Investment funds to Brittain in exchange for notes payable at an indefinite future date constitutes flagrant "self-dealing" – i.e., transactions in which Willan benefits at the expense of the Creditors

to whom he owes fiduciary duties. Pursuant to the authority cited above, such self-dealing constitutes a breach of Willan's fiduciary duty to the Creditors, and as such constitutes "cause" for the appointment of a Chapter 11 trustee under §1104(a)(1).⁵

59. A second example of self-dealing by Willan was revealed during Willan's testimony at the 341 Hearing. At that hearing, Willan disclosed that in December, 2006, he took title from Evergreen Homes to two vehicles, one a "2005 or 2006 Dodge Durango" and the other a "2005 or 2006 Jeep [Grand] Cherokee." As consideration, Willan testified that he gave Evergreen Homes a personal promissory note in the amount of Twenty Thousand Dollars (\$20,000.00). To date, nearly eight (8) months after the transaction, Willan admittedly has failed to make a single payment toward satisfaction of that note. This note, while informally requested, has not been made available to the Committee for inspection.

60. The December, 2006, Kelley Blue Book resale value of a standard 2005-06 Dodge Durango and/or Jeep Cherokee, both in fair condition and boasting standard features, far exceeds \$15,000.00, respectively. Given that fact, the Committee avers that Willan's December, 2006, \$20,000.00 note did not constitute reasonably equivalent value for the two subject vehicles. Thus, the Committee alleges that the transaction constitutes a second example of self-dealing by Willan that was detrimental to both Evergreen

⁵ Diversion of funds and misuse of corporate assets constitute fraud or dishonesty sufficient to warrant appointment of a trustee under section 1104(a)(1). *See, e.g., Sharon Steel*, 871 F.2d at 1228 (systematic siphoning of debtor's assets to other companies under shareholder's common control constituted cause for appointment of trustee). *See also, In re Professional Accountants Referral Svcs., Inc.*, 142 B.R. 424, 428-29 (Bankr.D.Colo.1992)(diversion of corporate assets for professional use constitutes dishonesty or gross mismanagement which required the appointment of a trustee); *In re Colby Constr. Corp.*, 51 B.R. 113, 116 (Bankr.S.D.N.Y.1985)(majority shareholder's "deliberate and unabashed conversion of corporate assets to acquire another company in his own name indicates the scienter implicit in fraud as that term is used in § 1104(a)(1) or at least the dishonesty contemplated by that section"); *In re Bibo, Inc.*, 76 F.3d 256, 257-58 (9th Cir.1996)(appointment of a trustee was mandated where management had siphoned funds from the debtor through kickbacks).

Homes and its unsecured creditors. This self-dealing violated Willan's fiduciary duties to Evergreen Homes the Creditors and thus constitutes "cause" for the Court to appoint a Chapter 11 trustee under §1104(a)(1).⁶

2. Misuse/Misappropriation of Debtor Funds

61. While Willan apparently has not drawn a salary since prior to the Petition Date, the Committee feels it appropriate to direct the Court's attention to Willan's prior allocation of personal and business expenses as between himself and the Debtor Affiliates. The facts of such allocations, combined with Willan's self-dealing and gross mismanagement, bear on Willan's integrity, as well as on the fact that the Committee and Creditors have lost confidence in Willan's continued leadership of the Debtor Affiliates and his fiduciary obligation to act in the best interest of creditors.

62. As noted in the statement of background facts, *supra*, Willan testified at the 341 Hearing that the Debtor Affiliates paid him a post-tax annual salary of \$350,000.00. Essentially, the Debtor Affiliates paid the personal income tax charged to Willan on \$350,000.00. The mechanics of Evergreen's payment of Willan's taxes are presently unclear.

63. In addition, on information and belief, up to the Petition Date Evergreen Homes paid Willan's \$1,400.00 monthly rent on Willan's residential apartment at Tower 80, an apartment high-rise located at 80 N. Portage Path in Akron, Ohio. Such payments

⁶ *In re Nartron Corp.*, 330 B.R. 573, 593 (Bkrtcy.W.D.Mich.2005) ("As debtor-in-possession and principal of the corporation, [the manager] owed [the debtor company] and its creditors the highest duties of care and loyalty. [The manager's] actions must be made on an informed basis, in good faith, and in the honest belief that the action taken was in the best interest of the Company. Business judgments will be respected. However, principals that derive personal financial benefit from a transaction or fail to inform themselves of all material information reasonably available to them, will not receive that protection. See, *Sinclair Oil Corp. v. Levien*, 280 A.2d 717 (Del.1971).").

continued monthly throughout 2006 and 2007, even when Evergreen Homes was insolvent.

64. Evergreen Homes also purchased and made all payments for Willan's personal membership to Portage Country Club until the Petition Date. Such payments continued monthly throughout 2006 and 2007, even when Evergreen Homes was insolvent.

65. A review of the Debtor Affiliates' petition and schedules reveals a significant number of payments toward Willan's personal credit card charges.

3. Gross Mismanagement

66. In his testimony at the 341 Hearing, as confirmed in subsequent investigations, Willan disclosed several facts, occurring both pre- and post-Petition, that constitute "gross mismanagement" that resulted in the breach of Willan's fiduciary obligations to the Debtor Affiliates, respectively, and the Creditors. Specifically, Willan (1) admitted that his accounting employees negligently failed to enter information relative to various check-based transactions, and (2) admitted that, despite his steadfast belief that Evergreen Homes and Evergreen Investment were innocent of the state's claims against them, he declined to defend their respective interests. Instead, he opted to sign a consent decree on Evergreen Investment's behalf (with the Ohio Department of Commerce) admitting improper dealings in securities, and to sign an "Agreed Entry" with the same state entity admitting that both Evergreen Homes and Evergreen Investment improperly engaged in second mortgage lending activities. The punitive effect of the Agreed Entry in restricting Evergreen Investment from, among other things,

collecting interest on Loaned Funds severely harmed the financial interests of both Evergreen Homes and Evergreen Investment.

67. Relative to the errors and omissions of Willan's accounting staff, the "pre-petition failure to adequately supervise [his] bookkeeper[s] in view of misapplication of proceeds and confusion of debtor's accounting system is sufficient cause to justify appointment of a Chapter 11 trustee. *Midlantic National Bank v. Anchorage Boat Sales, Inc. (In re Anchorage Boat Sales, Inc.)*, 4 B.R. 635, 645 (Bankr.E.D.N.Y.1980). As such, the endemic failure of Evergreen bookkeepers to properly log descriptions for checks paid out, and Willan's failure to identify and/or correct the practice, warrants appointment of a trustee.

68. Relative to Willan's pre-petition failure to adequately defend the interests of Debtor Affiliates against claims which he admittedly believed were meritless, and to effectively admit fault and accept severe financial penalties (i.e., the loss of ability to collect hundreds of thousands of dollars in interest payments owing on the Loaned Funds), such pre-Petition Date conduct constituted gross mismanagement, and is a justifying cause for the appointment of a Chapter 11 trustee.

69. As for Willan's refusal to investigate or prosecute the Debtor Affiliates' potential legal malpractice claims against their pre-petition legal counsel, Roetzel, the Committee simply reminds the debtor-in-possession that:

"A debtor-in-possession's fiduciary duties require him to act to protect and conserve the property of the estate for the benefit of all creditors. *Ionosphere Clubs*, 113 B.R. at 169; *Parker Grande Dev.*, 64 B.R. at 561. Additionally, the debtor-in-possession has a fiduciary obligation to the creditors of the estate to refrain "from acting in a manner which could damage the estate, or hinder a successful reorganization". *Parker Grande Dev.*, 64 B.R. at 561 (citing *In re Thurmond*, 41 B.R. 464, 465 (Bankr.D.Or.1983)). See *Ionosphere Clubs*, 113 B.R. at 169;

In re Microwave Prods. of America, 102 B.R. 666, 671 (Bankr.W.D.Tenn.1989); *In re Sharon Steel Corp.*, 86 B.R. 455, 457 (Bankr.W.D.Pa.1988), *aff'd*, 871 F.2d 1217 (3d Cir.1989).

* * * * *

The legislative history and case law indicate an appointment of a trustee is appropriate when the debtor in possession fails to adequately perform the duties of a trustee. Specifically, appointment of a trustee is proper when the debtor in possession fails to protect and conserve property of the estate for the benefit of its creditors. The intent of § 1104(a) is to protect the *entire creditor body* from debtor activities which diminish the value of the estate as a whole.”

See, Matter of Holly's, Inc., 140 B.R. 643, *685 (Bkrtcy.W.D.Mich.1992). In light of Willan’s duties and given the effect of Willan’s present refusal to investigate a claim that statutorily must be filed by October, 2007, these circumstances justify immediate appointment of a Chapter 11 trustee.

B. Appointment of a trustee under 11 U.S.C. § 1104(a)(2)

70. “Unlike §1104(a)(1), which provides for the mandatory appointment of a trustee upon a specific finding of ‘cause,’ §1104(a)(2) envisions a flexible standard.” *See, In re National Staffing Services, LLC*, 338 B.R. 31, 33 (Bkrtcy.N.D.Ohio 2005), citing *In re Marvel Entertainment Group, Inc.*, 140 F.3d 463, 474 (3rd Cir.1998). Even if cause is not established within the meaning of § 1104(a)(1), “[I]t affords the bankruptcy court the discretion to appoint a trustee ‘when to do so would serve the parties’ and estate’s interests.’ This is necessarily an equitable approach.” *See, In re National Staffing Services, LLC*, *supra*, citing *In re SunCruz Casinos, LLC*, 298 B.R. 821, 829 (Bankr.S.D.Fla. 2003); see also, *In re Cardinal Industries, Inc.*, 109 B.R. 755, 766 (Bkrtcy.S.D.Ohio 1990).

71. “What the Court undertakes in a §1104(a)(2) determination is a cost-benefit analysis to determine which, under general principles of equity, would be in the best interests of the creditors, equity security holders, and other interests of the estate: (1) leaving the debtor in possession; or (2) appointing a trustee.” See, *In re National Staffing Services, LLC*, supra, citing *In re SunCruz Casinos, LLC*, 298 B.R. at 829.

72. If appointment is ordered pursuant to the Court's general equitable powers under § 1104(a)(2), the cost of a trustee to the estate, when compared with the benefit sought to be derived, will be a significant aspect of that determination. See, *In re Cardinal Industries, Inc.*, 109 B.R. 755, 766 (Bkrtcy.S.D.Ohio 1990), citing: *In re Stein and Day, Inc.*, 87 B.R. 290, 295 (Bankr.S.D.N.Y. 1988); *In the Matter of Parker Grande Development, Inc.*, 64 B.R. 557, 561 (Bankr.S.D.Ind. 1986).

73. The Creditors’ and Committee’s “[c]onsiderable and continuing erosion of confidence in the debtor and its board of directors to operate the company” is another factor to be considered in determining whether it is in the best interest of the creditors, the estate, and other parties in interest that a trustee be appointed. *In re Microwave Products of America, Inc.*, 102 B.R. 666, 676 (Bkrtcy.W.D.Tenn. 1989).⁷

74. Additionally, a debtor-in-possession’s lack of incentive to pursue possible claims that may have resulted from conflicts of interest and fraudulent transfers provides additional support for the claim that a trustee would likely be better situated to investigate

⁷ It is the duty of the debtor-in-possession to preserve the property of the estate for the benefit of creditors and to minimize damage to the estate. *In re Ionosphere Clubs, Inc.*, 113 B.R. 164, 169 (Bankr.S.D.N.Y.1990). When a debtor-in-possession is incapable of performing this vital duty, or when creditors’ confidence evaporates, a Chapter 11 trustee must be appointed. See e.g., *In re V. Savinoa Oil & Heating Co., Inc.*, 99 B.R. 518, 526 (Bankr.E.D.N.Y.1989).

claims that could result in additional sums of money coming into the estate. *In re Microwave Products of America, Inc.*, 102 B.R. 666, *676 (Bkrcty.W.D.Tenn.1989).⁸

75. In the instant case, the Committee proposes the appointment of a trustee to act as, among other things: (1) the approver of proposed acquisitions or divestitures of Debtor Affiliates' assets (i.e., the check signer), (2) the investigator of past fraudulent or otherwise avoidable transfers of Debtor Affiliates' assets, and (3) the decider of whether or not the Debtor Affiliates should pursue potential causes of action (e.g., legal malpractice claims against pre-petition general counsel). The Committee believes that given the apparent breadth of Willan's self-dealing, and in light of the value of the Debtor Affiliates' potential claims, such a trustee, acting aggressively, will recover his costs to the estate many times over.⁹ What is clear is that Willan, the *de facto* debtor-in-possession, has little incentive to investigate and/or avoid the many fraudulent transfers of assets from which he apparently benefited, directly or indirectly, at the expense of the Debtor Affiliates and the Creditors. Upon information and belief, the Committee avers that these transactions include, but are by no means limited to, the incidents of self-dealing listed above.

76. In addition, the Committee cites to considerable and continuing erosion of Creditor confidence in Willan's ability and/or willingness to aggressively protect their interests or with respect to his fiduciary obligations to said Creditors. This uneasiness

⁸ In *In re Sharon Steel*, 871 F.2d at 1228, citing *In re L.S. Good & Co.*, 8 B.R. 312, 315 (Bankr.N.D.W.Va.1980), the judge held: "that although no clear proof of fraud, dishonesty, or gross mismanagement had been presented, inter-company transactions exceeding \$1 Million Dollars justified appointment of a trustee under section 1104(a)(2) because the size and number of transactions 'places current ... management ... in a position of having grave conflict of interest, and the presumption arises that the current management ... will be unable to make the important investigation and decisions demanded.'"

⁹ "As a disinterested party, the trustee can monitor the relationship between the debtor and [affiliated corporations], establish controls over the transfer of cash assets, and insure that the assets of the estate are not being depleted." *In re Humphreys Pest Control Franchises, Inc.*, 40 B.R. 174, 177 (Bankr.E.D.Pa.1984).

grows as facts emerge as to (1) additional incidents of self-dealing by Willan, (2) Willan's unwillingness to investigate – much less prosecute – potentially valuable legal malpractice claims of the respective Debtor Affiliates, and (3) as to Willan's shifting account of whether or not various corporate records of the Debtor Affiliates are in fact available.

77. Given the value of potentially recoverable debtor assets that may otherwise go unrecovered, and given the circumstantial evidence that has caused the Creditors to lose confidence in Willan to protect their interests, much less those of the Debtor Affiliates, the benefit of appointing a Chapter 11 trustee in the instant case outweighs the cost of the trustee to the estate. As such, for purposes of the Court's §1104(a)(2) analysis, the Court's appointment of a trustee in this case would best serve the interest of the creditors and other parties of interest.

V. Conclusion

78. In reviewing the circumstances set forth herein, the appointment of a trustee in this proceeding is necessary. In light of Willan's self-dealing, "it would be naïve, indeed, to accept the proposition that [this Debtor] would * * * undertake [the necessary] steps to investigate and attempt to recover all transfers [including those to himself and entities wholly owned by him] which ultimately may be found to be voidable either as preferential transfers or fraudulent transfers." *In re State Capital Corp.*, 51 B.R. 400, 404 (Bankr. M.D. Fla. 1985).

79. Given Willan's past misapplication of Debtor Affiliates' assets to pay personal expenses and to finance other Willan-owned enterprises, the Committee has

justified reservations as to whether Willan is a suitable protector of their interest in the Debtor Affiliates.

80. Finally, based on Willan's unwillingness to investigate either (1) avoidable transfers that directly or indirectly benefited Willan, or (2) the Debtor Affiliates' respective malpractice claims against its former general counsel Roetzel, a trustee would likely recover its cost to the estate many times over, and best serve the interests of the Creditors.

81. In light of the foregoing, and all of the more specific justifications for the appointment of a trustee cited throughout this Motion, the Committee respectfully requests that this Honorable Court appoint a Chapter 11 trustee to manage the reorganization of the respective Debtor Affiliates.

Notice

82. Notice of this Motion is being given to: (a) the Debtor Affiliates, (b) counsel for the Debtor Affiliates, (c) all parties that have requested notice in this proceeding, (d) the United States Trustee, and (e) the members of the Official Committee of Unsecured Creditors. In light of the nature of the relief requested herein, the movant submits that no other or further notice is required.

No Prior Request

83. No prior request for the relief sought in this motion has been made to this or to any other court in connection with this Chapter 11 case.

Memorandum of Law

84. Because there are no novel issues of law presented by this Motion and all legal arguments are sufficiently addressed herein, the Committee respectfully requests that the Court waive the requirement set forth in Local Bankruptcy Rule 9013-1 of a separate memorandum of law in support of the relief requested herein.

WHEREFORE, the Committee of Unsecured Creditors respectfully requests that this Court (a) enter an order ordering the appointment of a Chapter 11 trustee to operate the business of the Debtor Affiliates and to propose a plan of reorganization that will be to the benefit of the Debtor Affiliates' creditors as opposed to the Debtor Affiliates' equity holder; and (b) granting such other and further relief as the Court may deem proper.

Dated: August 10, 2007

Respectfully Submitted,

GOLDMAN & ROSEN, Ltd.

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*Attorney for the Official Committee
of Unsecured Creditors*

CERTIFICATE OF SERVICE

A copy of the foregoing Motion of the Committee of Unsecured Creditors for an Order Appointing a Chapter 11 Trustee was sent via U.S. Mail this 10th day of August, 2007, to:

United States Trustee
Howard M. Metzenbaum Building
201 Superior Avenue, E., Suite 441
Cleveland, Ohio 44114-1240

Howard Mentzer
Mentzer & Mygrant
I Cascade Plaza, Suite 1445
Akron, OH 44305

/s/ Michael A. Steel
MICHAEL A. STEEL (0072367)