

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

IN RE:)	
)	
TELLICO LANDING, LLC,)	No. 3:11-bk-33018
)	Chapter 11
Debtor.)	

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF
WINDRIVER INVESTMENT LLC'S
MOTION FOR THE APPOINTMENT OF A TRUSTEE

WindRiver Investments, LLC (“WindRiver”) has filed a motion for the entry of an order for the appointment of a trustee pursuant to the provisions of 11 U.S.C. §1104(a)(1) and (2), and files this supplemental memorandum in further support thereof.

Tellico Landing LLC (the “Debtor”) filed its petition for relief under Chapter 11 of the Bankruptcy Code on June 27, 2011, and since that time has continued in the possession of its assets and in the management of its business as a debtor in possession pursuant to the provisions of 11 U.S.C. §§ 1107(a) and 1108.

The Debtor is a limited liability company formed on April 1, 1998 for the purpose of developing and marketing certain lakefront real property located in Loudon County, Tennessee, which ultimately became known as “Rarity Pointe” (the “Project”). In 2002, LTR Properties, Inc. (“LTR”), an entity owned solely by Michael L. Ross (“Ross”), acquired a 50% ownership interest in the Debtor. At that time, Ward S. Whelchel (“Whelchel”) and Robert T. Stooksbury, Jr. (“Stooksbury”) each owned a 25% ownership interest in the Debtor.

On April 29, 2002, LTR, Whelchel and Stooksbury executed the Second Amended and Restated Operating Agreement of Tellico Landing, LLC (the “Operating Agreement”), in which LTR was appointed the managing member of the Debtor, and was given certain management

authority over the business of the Debtor. This authority was exercised by LTR through Ross, LTR's sole shareholder. Ross was designated as the Debtor's chief manager.

The Operating Agreement provides that LTR, as the managing member of the Debtor, is entitled to payment by the Debtor of a development fee in an amount equal to 12% of the net sales price received from the sale of all residential and commercial lots, or other real property, in Rarity Pointe. Such development fee is to be paid at the closing for any lot sale.

The Operating Agreement also provides that the Debtor shall pay certain marketing expenses, as defined in the Operating Agreement, incurred by LTR or Ross in connection with the performance of their duties thereunder. The Operating Agreement provides that the Debtor shall share marketing costs and expenses with Tellico Lake Properties, L.P., doing business as Rarity Bay on Lake Tellico ("Rarity Bay"), and pay Rarity Bay the lesser of 4% of gross sales from the sale of lots in Rarity Pointe or "a percentage of the total costs and expenses incurred by Rarity Bay in the conduct of its marketing efforts for both Rarity Bay and Rarity Pointe that represents the percentage of the aggregate sales price for all lots sold at Rarity Pointe in proportion to the total sales price of all lots sold at Rarity Bay."

Also, on April 29, 2002, LTR, Whelchel and Stooksbury signed a Contract for Transfer of Real Property (the "Golf Course Agreement"), pursuant to which LTR agreed, at its sole cost and expense, to design and construct a golf course on a portion of the land in Rarity Pointe, and the Debtor agreed to transfer the golf course to LTR upon its completion, including construction of a clubhouse which LTR has failed to construct.

On June 26, 2002, LTR, as the declarant, executed the Declaration of Covenants, Conditions and Restrictions for Rarity Pointe (the "Declaration"), which provides that, at the closings of the sales of residential lots within Rarity Pointe, each owner is required to pay an

initiation deposit (the “Deposit”) for a social membership at the Rarity Pointe Club, purportedly entitling the owner to the use of the amenities that were to be built at the Club. Rarity Pointe Club was never incorporated or otherwise created¹.

The Operating Agreement (Section 8.5(b)) clearly provides: “...all costs and expenses that may be incurred by LTR in connection with the performance of its management and administrative responsibilities under this Agreement (the “Management expenses”) shall be the responsibility of LTR and that the LLC [Debtor] shall have no financial obligation to LTR for such expenses other than payment of the 12% development fee. Such Management expenses for which LTR shall be responsible shall include wages for LTR employees, rent, equipment, supplies and all other goods and services purchased directly by LTR for its own use in performing its duties hereunder.”

Contrary to the Operating Agreement, LTR improperly calculated management fees and was overpaid thousands of dollars by the Debtor and improperly billed the Debtor for payroll expenses of LTR as well as another Ross related entity, Tellico Lake Properties.

Similarly, although the Operating Agreement provided that the Debtor would share marketing costs and expenses with Rarity Bay and pay Rarity Bay a marketing fee as provided in the above described agreed-upon formula, such fees were calculated incorrectly in relation to the Debtor and many thousands of dollars were overpaid by Debtor in contravention of the agreed-upon formula.

Although the Golf Course Agreement required that LTR design and construct a golf course within Rarity Pointe at its sole cost and expense, LTR breached the Golf Course Agreement by improperly using thousands of dollars of the Debtor’s funds to pay for numerous

¹ Mike Ross testified at the 341 hearing that the Rarity Pointe Club was a d/b/a of LTR rather than the Debtor which actually sold the lots and owned the land upon which the amenities were to be built.

expenses related to the golf course. (This breach is in addition to the breach of the Golf Course Agreement described in WindRiver's initial memorandum.)

At the closings of the sales of residential lots within Rarity Pointe, LTR collected the Deposits from the lot purchasers. During the initial stages, Ross set the amount of the Deposit at \$10,000 but subsequently increased the Deposit amount to \$20,000. In total, millions of dollars of excessive membership fees over and above the original membership dues were charged by LTR/Ross in sales related to the Debtor's property.

LTR/Ross' use of the Debtor's funds in relation to the golf course constitutes fraud, dishonesty and gross mismanagement of the affairs of the Debtor. Moreover, the excessive Deposits and development fees charged by LTR/Ross and the improper charges paid by the Debtor for the benefit of Ross related entities constitute a fraud upon the Debtor and its other members, as well as the lot purchasers. Additionally, the excessive marketing fees paid out of the Debtor's funds constitute a gross mismanagement by LTR/Ross of the Debtors' affairs.

LTR/Ross has exhibited a pattern of fraudulent, dishonest and incompetent behavior resulting in gross mismanagement of the affairs of the Debtor. As such, there is undoubtedly cause for the appointment of a trustee, as such appointment is clearly in the best interest of the Debtor's creditors.

Respectfully submitted, this 13th day of October, 2011.

/s/ Lewis S. Howard, Jr.
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 13, 2011, the foregoing document was filed electronically and will be served electronically by operation of the Court's electronic case filing system on the United States Trustee, Thomas Lynn Tarp, Thomas M. Leveille, Jesse D. Overbay, William F. McCormick and James R. Moore. Additionally, the foregoing document has been served upon the following by mailing a copy thereof by first class mail, in envelopes addressed as follows, this 13th day of October, 2011:

APAC Atlantic, INC
Harrison Construction
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Loudon County Trustee
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Vonore, TN 37885

Rarity Point Comm. Assoc., Inc.
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Tellico Lake Properties
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/s/ Lewis S. Howard, Jr.
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