United States Bankruptcy Court
Northern District of Illinois
Western Division

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Judge: Thomas M. Lynch

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

In re Chardon, LLC, et al.[1]	**)**	**Bankruptcy No. 13-B-81372**
	)	**(Jointly Administered)**
Debtors.	**)**	**Chapter 11**
	)	**Judge Lynch**
	)	
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MEMORANDUM OPINION

Creditor FirstMerit Bank, N.A. seeks to appoint Chapter 11 trustees in each of the jointly administered cases of Chardon, LLC (13bk81372), Chardon II, LLC (13bk81373), The Rink of Crystal Lake, Inc. (13bk81375), Wolf Business Center, Inc. (13bk81376), Wolf Family Partnership, LLC (13bk81377), Wolf Investments, Inc. (13bk81378) and Wolf Professional Center Corporation (13bk81379) (collectively, the "Chardon Corporate Debtors").[2] (EFC Nos. 138 – 144.) For the reasons set forth herein, the motions are denied.

JURISDICTION

Each motion seeks to appoint a Chapter 11 trustee under 11 U.S.C. § 1104(a) and, therefore, the matter arises under title 11. The court has jurisdiction to decide this matter pursuant to 28 U.S.C. § 1334 and Internal Operating Procedure 15(a) of the United States District Court for the

[1] Pursuant to the administrative order entered on July 2, 2014, the bankruptcy cases of Donald Wolf, Jr. (No. 13-B-83571), David Wolf (No. 13-B-83572) and Donald Wolf, Sr. (No. 14-B-81919) were procedurally consolidated for joint administration with the eight corporate bankruptcy cases previously procedurally consolidated for joint administration into the lead case of Chardon, LLC (13-B-81372).

[2] FirstMerit does not seek to appoint a Chapter 11 trustee in the eighth affiliated and jointly administered corporate case, Intervest, LLC (13bk81374). Another creditor, Colfin BAMO II Funding A, LLC, initially joined in FirstMerit's motions and sought also to appoint a Chapter 11 Trustee in the Intervest case. (Response Joinder, 7/2/13, ECF No. 148.) However, Colfin later withdrew its requests to appoint trustees as part of a global settlement with the Chardon Corporate Debtors, Intervest and their principals. (Order Granting Motion to Approve Settlement Agreement, 8/1/14, ECF No. 816.)

Northern District of Illinois. These motions are core proceedings pursuant to 28 U.S.C. § 157(b)(2)(A) and (O) in which this court has constitutional authority to enter final orders.

FINDINGS OF FACTS AND PROCEDURAL BACKGROUND

After opportunity for discovery, the court held a trial on the motions on September 5, 9, October 23, 24, and November 3, 2014. Additionally, the court takes judicial notice of its own docket. *See, e.g., In re Primes*, 518 B.R. 466, 468 n. 1 (Bankr. N.D. Ill. 2014). The following sets forth the court's findings of fact as required by Fed. R. Civ. P. 52(a) and Fed. R. Bankr. P. 7052.[3]

A. Brief Description of the Chardon Enterprise and Its Assets and Liabilities

Through a number of closely held corporate entities, Donald Wolf, Sr., Donald Wolf, Jr., and David Wolf (collectively, the "Wolf Individuals"), and Roseann Wolf, Rebecca Evans, and DeAnn Dinelli (together with the Wolf Individuals collectively, the "Wolf Family") own, lease, and manage various real estate holdings. (Joint Stipulation, Ex. 2, ECF No. 530.) The Wolf Family owns 10 affiliated companies that hold or manage these real estate properties. (Id.) The companies include the seven Chardon Corporate Debtors to whom these motions are addressed, another debtor not at issue in the motions, Intervest, LLC ("Intervest"), and two non-debtors: Wolf Builders Corp. and Wolf Realty II, LLC, successor to Wolf Realty, Inc. (Id.) Each of the Chardon Corporate Debtors and Intervest filed voluntary Chapter 11 petitions on April 17, 2013. The non-debtor Wolf Builders Corp. provides management services for the commercial real estate properties owned by the Chardon Corporate Debtors and Intervest, none of whom have employees of their own. Wolf Realty II is the property manager and sales and leasing agent for the Chardon Corporate Debtors and Intervest. (Id.) As discussed further below, the Chardon Corporate Debtors

[3] To the extent that any findings of fact constitute conclusions of law, they are adopted as such, and to the extent that any conclusions of law constitute findings of fact, they are adopted as such.

and Intervest moved to substantively consolidate their bankruptcy estates and non-debtor Wolf Builders Corp.

Each of the Chardon Corporate Debtors, Intervest, Wolf Builders and Wolf Realty II are primarily owned by one or more of the Wolf Family members or family trusts in which one or more of the Wolf Family members are beneficiaries.[4] Wolf Realty was owned 100% by Donald Wolf, Sr., but merged in September 2012 into Wolf Realty II, a newly formed entity that is 90% owned by Donald Wolf, Sr. and 10% owned by his two daughters, Rebecca Evans and DeAnn Dinelli, each of whom hold a 5% interest in the entity. (Donald Wolf, Sr. SOFA, FirstMerit Ex. 130.) While the Wolf Individuals are jointly liable on the Chardon Corporate Debtors' debts to FirstMerit through guarantees or as a primary borrower, Ms. Dinelli and Ms. Evans are not. As of the date of their petitions, the Chardon Corporate Debtors and Intervest collectively owned 18 parcels of real property, directly or through land trusts, which they rented to various office, retail and industrial tenants. Chardon, LLC owned seven of the parcels and the other Chardon Corporate Debtors and Intervest each owned one to three of the remaining ten.[5] Various loans from FirstMerit were secured by eight of the properties, loans from Colfin BAMO II Funding A, LLC ("Colfin") were secured by five of the properties, and loans from Old Second Bank were secured by four properties.[6] David Wolf testified that all of the properties securing FirstMerit's debts have high occupancy rates, which have increased during the pendency of this case.

A nineteenth property, 10611 – 10875 Wolf Dr., Huntley, IL ("10611 Wolf Dr."), also secured the various debts to FirstMerit, which were guaranteed by the Wolf Individuals and cross-collateralized. This property, the guarantees and the cross-collateralization agreement are

[4] Intervest is the only afiiliate owned in part by an unrelated third-party investor. It is owned 50% by Bruce Bossow.
[5] Other than Chardon II, LLC, which owned no real property.
[6] According to its bankruptcy schedules, the 18th property, 9213 N. Route 31, Crystal Lake, IL, was apparently owned by Wolf Family Partnership free and clear.

described in more detail in this court's earlier memorandum opinion denying FirstMerit's motion for relief from the automatic stay with respect to that property in Donald Wolf, Jr. and David Wolf's cases. (Memorandum Opinion, 9/30/14, ECF No. 954.) 10611 Wolf Dr. is held in a land trust formed in December 1999 in which Donald Wolf, Sr., Donald Wolf, Jr. and David Wolf are the beneficiaries of record.[7] FirstMerit was given both a mortgage in 10611 Wolf Dr. and a collateral assignment of the beneficial interests in the land trust pre-petition.

Wolf Builders is the only affiliated entity with employees; the Wolf Individuals, three other relatives and two nonrelatives work for that entity. The debtors' witnesses testified that Wolf Builders traditionally provided the services of its eight employees to the Chardon Corporate Debtors and other affiliated entities in exchange for payment from rents which it used to pay its employee's salaries. However, this occurred without any written agreement. Additionally the various entities had a history of using Wolf Builders as a centralized entity to pay certain shared operating expenses of the various entities and rental properties that they owned. Again, this was done with no formal or written agreement.

B. The Pre-Petition Litigation by FirstMerit and Retention of Counsel

FirstMerit filed a lawsuit against Wolf Family Partnership, LLC and the Wolf Individuals in the Northern District of Illinois on December 12, 2012 to enforce one or more of its notes. The initial FirstMerit litigation involved a debt for which one or more of the Chardon Corporate Debtors was jointly liable and secured by one or more properties owned by Chardon Corporate Debtors. The Wolf Individuals and Wolf Family Partnership initially retained Neal Wolf[8] and his law firm, Neal Wolf & Associates ("NW&A") on or about December 19, 2012 to represent them

[7] Donald Wolf, Jr. and David Wolf each own 24.5% beneficial interests. Donald Wolf, Sr. owns a 51% beneficial interest through a family trust.
[8] Neal Wolf is not related to the Wolf Family.

and their affiliates in the FirstMerit litigation and for the possible negotiation of a global settlement or restructuring of debt. In mid-January 2013, the Wolf Individuals retained attorney Robert Hanlon to take over and represent them in the FirstMerit litigation. Mr. Hanlon filed his appearance in the FirstMerit litigation and a motion to dismiss that action on January 18, 2013. The record is not entirely clear on whether Mr. Hanlon represented only the Wolf Individuals in that litigation or also Wolf Family Partnership. Donald Wolf, Sr. testified that Mr. Hanlon only represented the Wolf Individuals, while Neal Wolf testified that Mr. Hanlon replaced him completely in the litigation and represented all of the defendants. In any event, the initial FirstMerit litigation was dismissed on April 2, 2013.

On or about April 11, 2013, FirstMerit initiated four new suits in the Northern District of Illinois against The Rink of Crystal Lake, Wolf Investments, Inc., Wolf Professional Center Corp., Wolf Business Center, Inc., Wolf Realty, Inc., the Wolf Individuals and a certain land trust. Around this time, beginning in January 2013, creditor Colfin also commenced five separate law suits in the state courts in McHenry County, Illinois, to enforce its indebtedness against certain of the Chardon Corporate Debtors and Wolf Family Members. Neal Wolf did not appear in those federal and state lawsuits, which were instead handled by Mr. Hanlon. In early 2013, NW&A began representing the Chardon Corporate Debtors and Intervest in connection with a potential future bankruptcy filing, which was memorialized in an engagement letter dated the date the corporate debtors actually filed their bankruptcy petitions, April 17, 2013.

C. Pre-Petition Payments and Transfers

On December 19, 2012, The Rink of Crystal Lake paid NW&A an initial retainer of $25,000 for NW&A's representation in the initial FirstMerit litigation against the Wolf Individuals and Wolf Family Partnership. Neal Wolf testified that in addition to filing an appearance in the

FirstMerit litigation, during December 2012 and January 2013 he also attempted to negotiate a global settlement with FirstMerit of all of the debts of the Chardon Corporate Debtors, including The Rink of Crystal Lake. The Rink of Crystal Lake paid a $13,475 retainer to Mr. Hanlon on February 15, 2013. (The Rink SOFA, Debtors' Ex. 96.) Donald Wolf, Sr. testified that the Wolf Individuals used funds of The Rink of Crystal Lake for this because it had excess funds in its possession from rental income. Mr. Wolf explained further that the Wolf Individuals indirectly owned the building generating this income through their ownership of The Rink of Crystal Lake.

On December 29, 2012, shortly after FirstMerit filed its initial lawsuit, Wolf Builders opened a new bank account at The Apple River State Bank / First Community Bank of Galena (the "Apple River Account"). From this date until their petition date, the Chardon Corporate Debtors and Intervest did not make monthly payments to FirstMerit and Colfin and instead transferred amounts similar to the missed debt payments into the Apple River Account of Wolf Builders.[9] Between December 29, 2012 and April 17, 2013, the Chardon Corporate Debtors and Intervest deposited a total of $421,013.17 into the Apple River Account.

D. Pre- and Post-Petition Payments by Wolf Builders of Pre-Petition Funds Transferred to the Apple River Account

In connection with NW&A's representation of the Chardon Corporate Debtors and Intervest in their anticipated bankruptcy filings, Wolf Builders paid NW&A a retainer of $50,000 on March 22, 2013 and an additional $200,000 on April 11, 2013. In both cases, the payment was by a wire transfer out of the Apple River Account. (FirstMerit Ex. 22, 23.) After application of $119.45 in banking fees, a balance of $170,893.72 remained in the account as of the petition date. Of the NW&A retainers, $80,441.49 had been applied against pre-petition work as of the petition

[9] The Chardon affiliated entities which were indebted to Old Second Bank continued to make regular monthly payments to Old Second until the petition date. Unlike creditors FirstMerit or Colfin, Old Second did not bring pre-petition litigation against either the Wolf Individuals or any of the Chardon affiliated entities.

date, leaving a remaining $194,558.51 in the law firm's IOLTA client trust account. Neal Wolf testified that, as of the trial date, the remaining retainer was still untouched in his client trust account but the post-petition services provided by NW&A to date exceeded the amount remaining in the account.[10] As of July 10, 2014, Neal Wolf's firm had accrued over $1.1 million in unpaid attorney's fees working on this bankruptcy case.

Post-petition, Wolf Builders paid $50,000 on behalf of the Chardon Corporate Debtors from the Apple River Account to the Plante Moran accounting firm as a retainer to provide accounting services to the corporate debtors in this case. Between May 9, 2013 and September 13, 2013, Wolf Builders transferred over $149,000 from the Apple River Account to Wolf Builder's operating account for payroll. The transferred funds were in turn used to pay the payroll, employment taxes and health care benefits of the Wolf Builders employees for the services they continued to provide to the Chardon Corporate Debtors and Intervest post-petition. (FirstMerit Ex. 68.) Although these retainer and payroll transfers alone exceeded the petition date balance of $170,893.72 in the Apple River Account, the Wolf Individuals deposited $57,000 into the account on July 3, 2013, derived from rents from the 10611 Wolf Dr. property. (Id.)

It is undisputed that the Wolf Builders employees continued to perform their regular duties on behalf of the Chardon Corporate Debtors and Intervest both pre- and post-petition. Two changes in payroll occurred shortly before the Chardon Corporate Debtors and Intervest filed their bankruptcy petitions. First, for its payroll for the week of April 12, 2013, Wolf Builders paid its employees three times their ordinary weekly salary. This payment came from its general payroll account. (FirstMerit Ex. 67.) Donald Wolf, Sr. testified that he decided to pay the employees an

[10] During the pendency of these cases, Neal Wolf and most of his associates moved to Much Shelist, PC on or about February 17, 2014, but have continued to represent the Chardon Corporate Debtors and Intervest since changing firm affiliation. For simplicity, references in this memorandum to NW&A include Much Shelist following the merger of the firms.

extra two weeks in advance to carry them through the beginning of the bankruptcy case. This explanation is supported by the check register for the general payroll account, which shows that the Wolf Builders employees were not paid on April 19 or April 26, 2013, with their regular paychecks resuming on May 3, 2013. (FirstMerit Ex. 67.)

Second, Donald Wolf, Sr.'s paychecks from Wolf Builders, which had previously been $1,000 per week, increased to $1,817.69 per week commencing April 5, 2013. Donald Wolf, Sr. admitted at trial that he caused the increase. At trial, Donald Wolf, Sr. testified that he increased his salary to make it in line with his two sons' salaries. This is inconsistent with the sons' salaries individually; this amount instead is the same as the combined weekly salary of each son ($1,000) and his respective spouse ($817.69). (FirstMerit Ex. 67.) The sons' wives were also employees. FirstMerit's expert witness, in response to an explanation apparently offered in a deposition of David Wolf that was not received into evidence, opined that the salary increase could not be explained as a mere offset for a claimed decrease in indirect compensation.

Any amount that the Wolf Individuals received from pre-petition transfers appears to be offset by funds they contributed to the Chardon Corporate Debtors post-petition. It is not controverted that after the Wolf Builders Apple River Account was exhausted in mid-September 2013, Donald Wolf, Sr. began transferring his own funds to Wolf Builders to enable it to continue to make its weekly payroll disbursements. (FirstMerit Ex. 68.) After Donald Wolf, Sr. filed his individual bankruptcy petition, his non-debtor spouse began making deposits for this purpose. According to the check register for the general payroll account, Donald Wolf, Sr. deposited at least $15,500 between October 8 and October 31, 2013. His wife deposited at least $27,500 between December 6, 2013 and January 3, 2014. Donald Wolf, Sr. testified that his spouse made her deposits out of her retirement account.

E. The 'Failed Assignment'

As discussed above, 10611 Wolf Dr. is titled in the name of a land trust in which the Wolf Individuals are the sole beneficiaries. However, Donald Wolf, Sr. testified that the Wolf Individuals had mistakenly believed the owner of the beneficial interests to be Wolf Business Center, Inc. In the 1990s the Wolf Individuals had transferred interests in various real estate holdings to the Chardon Corporate Debtors. Mr. Wolf testified that he and his family members believed that the beneficial interests in the land trust holding 10611 Wolf Dr. also had been transferred to Wolf Business Center, Inc. at that time. The 1999 trust agreement refers to the underlying real estate as the "Wolf Business Center" and Donald Wolf, Sr. testified that the leases for the building listed Wolf Business Center as the landlord and on tax returns they had treated Wolf Business Center, Inc. as the owner.

Shortly after the Chardon Corporate Debtors filed their bankruptcy petitions, the Wolf Individuals learned that they were listed as the beneficiaries of record for the land trust holding 10611 Wolf Dr. David Wolf testified that FirstMerit brought the matter to their attention after the petition date. The case docket reflects that FirstMerit raised the issue of the ownership of the land trust in several pleadings filed in May 2013. On May 3, 2013, FirstMerit moved for leave to request documents and conduct Rule 2004 examinations. (Mot. for Leave, ECF No. 32.) FirstMerit described in the motion the land trust holding 10611 Wolf Dr. and noted that the last known beneficiaries were the Wolf Individuals and a certain family trust. (Id.) FirstMerit further asserted that the beneficiaries of the 10611 Wolf Dr. land trust were the Wolf Individuals in a supplemental memorandum in support of FirstMerit's objection to the Chardon Corporate Debtors' use of cash collateral. (Supplemental Mem., 1, May 7, 2013, ECF No. 34.)

Donald Wolf, Sr. testified that under the belief that Wolf Business Center, Inc. was and

was always intended to be the true owner of 10611 Wolf Dr., the Wolf Individuals prepared and signed an outright assignment of their beneficial interest in the land trust to Wolf Business Center, Inc., dated May 7, 2013. (FirstMerit Ex. 27.) The outright assignment contained a blank for signature by First Midwest Bank, the trustee of the land trust, and stated that the assignment "shall not be binding on the Trustee unless and until the original or a duplicate thereof is lodged with the Trustee and its acceptance indicated thereon." (Id.) At some point in May or June 2013, Donald Wolf, Sr. took the outright assignment and other documents to First Midwest Bank. He testified that he understood that, as a secured lender with a collateral assignment of the beneficial interests, FirstMerit would need to consent to the assignment before the trustee of the land trust could accept and sign it, and instructed the trustee to contact FirstMerit to obtain its signature. FirstMerit, however, refused to consent to the assignment and it was never signed or accepted by the trustee of the land trust.

F. The Adversary Proceeding to Enjoin FirstMerit and the Wolf Individuals' Bankruptcies

On July 31, 2013, the Chardon Corporate Debtors and Intervest filed an adversary complaint against FirstMerit and Colfin, seeking to enjoin the district court and state court litigation by those creditors against the Wolf Individuals on debts for which the Chardon Corporate Debtors and Intervest were jointly liable. (Compl., ECF No. 206 (commencing case no. 13-A-96077)). The corporate debtors alleged in their complaint that the time, efforts and financial resources of the Wolf Individuals were necessary for the effective reorganization of the corporate debtors, which would be hampered if the creditors' litigation against them continued.

FirstMerit and Colfin contested the adversary proceeding. (See, e.g., case no. 13-A-96077, ECF Nos. 31, 36.) Shortly afterward, Donald Wolf, Jr. and David Wolf filed voluntary petitions under Chapter 11 in this court. Their father, Donald Wolf, Sr., initially filed for protection under

Chapter 11 in Florida on October 28, 2013. The automatic stays imposed by the filing of the Wolf Individuals' cases rendering moot their request for injunctive relief, the Wolf Individuals and the Chardon Corporate Debtors and Intervest agreed to the voluntarily dismissal of their adversary proceeding without prejudice on November 8, 2013.

Donald Wolf, Sr.'s bankruptcy case was transferred to this court on June 18, 2014. The Wolf Individuals' cases were procedurally consolidated for joint administration with the Chardon Corporate Debtors' and Intervest's cases on July 2, 2014.

G. The Status of the Jointly Administered Bankruptcy Cases

Although the Chardon Corporate Debtors' bankruptcy cases have now been pending for over two years without confirmation of a plan, the delay has been caused largely by the extensive discovery and litigation of the highly contested motion to employ NW&A and these motions to appoint a Chapter 11 trustee. Both of these matters are now resolved, with NW&A permitted to be the Chardon Corporate Debtors' counsel and the Chardon Corporate Debtors permitted to remain as debtors-in-possession.

An initial Chapter 11 Plan was timely filed by the Chardon Corporate Debtors and Intervest on August 15, 2013. Their initial plan proposed to pay their debts in full over time and to substantively consolidate the Chardon Corporate Debtors, Intervest and Wolf Builders. (Plan, Aug. 15, 2013, ECF No. 220.) Shortly after the court gave an indicative ruling that the motion to employ NW&A would be granted, the Chardon Corporate Debtors and Intervest filed a modified Chapter 11 Plan and disclosure statement. (ECF Nos. 1293, 1294.) The modified plan also provides for payment of all creditors and substantive consolidation, but also made modifications to the initial plan to reflect the Wolf Individuals' subsequent bankruptcy filings and to make the plan consistent with plans filed by the Wolf Individuals. The corporate debtors' modified plan also incorporates

the terms of two global settlements approved by this court. The first settled the claims of secured creditor Colfin against the Chardon Corporate Debtors, Intervest and the Wolf Individuals. (Order, Aug. 1, 2014, ECF No. 816.) The second resolved the claims of another secured creditor, Old Second Bank, against the Wolf Individuals and certain of the Chardon Corporate Debtors and affiliates. (Order, Dec. 29, 2014, ECF No. 1132.) These global settlements provided in part for the surrender of certain properties in exchange for the satisfaction, forgiveness or reduction of debt and agreed upon treatment of the remaining debt in a proposed modified Chapter 11 plan.

Although the Chardon Corporate Debtors failed to obtain confirmation of their proposed plan of reorganization prior to the exclusivity period terminating on December 17, 2014, neither FirstMerit nor any other creditor has filed a competing plan. There is no evidence that any of the real estate properties securing the Chardon Corporate Debtors' debt to FirstMerit have depreciated in value during the pendency of the bankruptcy cases or that the occupancy rates or rental income have decreased. The court has entered twenty-seven agreed interim orders for the use of FirstMerit's cash collateral. Each has provided for an agreed budget, which includes payment or escrow of insurance and real estate taxes for FirstMerit's collateral, as well as periodic adequate protection payments to FirstMerit. There has been no allegation that during the pendency of these cases the Chardon Corporate Debtors have failed to stay within such agreed budgets or failed to make adequate protection payments to FirstMerit. The monthly operating reports ending February 28, 2014 filed by the Debtor on March 17, 2014 (ECF Nos. 506-513), to which FirstMerit stipulated as to its authenticity and admissibility (Debtors' Ex. 81-88), show that the net cash of the Chardon Corporate Debtors and Intervest, excluding amounts escrowed for property taxes, increased from $180,705 as of the petition date to $854,069 as of February 28, 2014. (Debtors'

Ex. 81-88). [11]

CONCLUSIONS OF LAW

FirstMerit seeks appointment of Chapter 11 trustees in the Chardon Corporate Debtors' jointly administered cases. On request of a party in interest,

> the court shall order the appointment of a trustee--
> (1) for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar cause, but not including the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor; or
> (2) if such appointment is in the interests of creditors, any equity security holders, and other interests of the estate, without regard to the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor.

11 U.S.C. §1104(a). The majority of courts, including the only courts within this circuit and the only courts of appeal to have published rulings on the issue, have held that the movant must demonstrate cause by clear and convincing evidence.[12] Generally, these cases have based the heightened burden on case law holding that the appointment of a trustee is an "extraordinary remedy" and that there is a strong presumption that a debtor should be permitted to remain in control and possession of its business. *In re LHC, LLC*, 497 B.R. at 291; *In re G-I Holdings*, 385 F.3d at 319-20. In contrast, a handful of lower courts in other jurisdictions have held or suggested that the appropriate standard is the preponderance of the evidence. *Tradex Corp. v. Morse*, 339 B.R. 823, 832 (D. Mass. 2006); *In re Keeley & Grabanski Land P'ship*, 455 B.R. 153, 163 (8th

[11] The Chardon Corporate Debtors' and Intervest's most recently filed monthly operating reports show that the corporate debtors' net cash further increased to $1,190,722 as of May 31, 2015. (ECF Nos. 1328 – 1335.)

[12] *See, e.g., In re LHC, LLC*, 497 B.R. 281, 291 (Bankr. N.D. Ill. 2013); *Kwitchurbeliakin, LLC v. LaPorte Sav. Bank*, No. 3:10-CV-170 JVB, 2011 WL 93714 (N.D. Ind. Jan. 10, 2011); *Raymond Prof'l Grp. v. William A. Pope Co. (In re Raymond Prof'l Grp.)*, 421 B.R. 891, 909 (Bankr. N.D. Ill. 2009); *In re Berwick Black Cattle Co.*, 405 B.R. 907, 912 (Bankr. C.D. Ill. 2009); *In re Bellevue Place Assocs.*, 171 B.R. 615, 623 (Bankr. N.D. Ill. 1994); *In re Madison Mgmt. Grp., Inc.*, 137 B.R. 275, 281 (Bankr. N.D. Ill. 1992); *Official Comm. of Asbestos Claimants v. G-I Holdings, Inc. (In re G-I Holdings, Inc.)*, 385 F.3d 313 (3rd Cir. 2004) (Alito, J.); *In re Adams v. Marwil (In re Bayou Grp., LLC)*, 564 F.3d 541, 546 (2d Cir. 2009).

Cir. B.A.P. 2011); *In re Celeritas Techs., LLC,* 446 B.R. 514, 519 (Bankr. D. Kan. 2011); *In re Veblen West Dairy LLP*, 434 B.R. 550, 555 (Bankr. D.S.D. 2010). These cases have generally cited the Supreme Court's holding in *Grogan v. Garner* that the appropriate standard for determining non-dischargeability under Section 523(a)(2) is the preponderance of the evidence. 498 U.S. 279 (1991). The Court in *Grogan* stated that because "the preponderance-of-the-evidence standard results in a roughly equal allocation of the risk of error between litigants, we presume that this standard is applicable in civil actions between private litigants unless 'particularly important individual interests or rights are at stake'" and found that neither the right to a discharge of a specific debt nor the "fresh start" policy of the Bankruptcy Code was a sufficiently fundamental or constitutional right to justify a heightened burden of proof. *Id.*[13] Although Congress did not expressly state the appropriate burden for a motion under Section 1104(a), this court agrees with the majority view that, unlike the discharge, the Chapter 11 debtor's presumptive right to maintain possession and control over the reorganizing business is a particularly important individual interest or right justifying a heightened burden.

Appointment of a trustee "is a fact-sensitive determination that must be made on a case-by-case basis." *In re LHC, LLC*, 497 B.R. at 291. Although Section 1104(a) states that the court "shall" appoint a trustee if cause is shown or in the interests of the estate, the determination of "whether the moving party has satisfied its burden under either subsection is committed to the court's discretion." *In re G-I Holdings*, 385 F.3d at 318. The list of examples of "cause" in Section 1104(a)(1) is non-exhaustive and courts also consider "whether: (1) the alleged misconduct was

[13] FirstMerit also cites *In re Woodbrook Assocs.*, where the court of appeals held with no discussion other than a citation to a treatise and a Florida case that where "a motion to dismiss for cause [under Section 1112(b)] is opposed, the movant bears the burden of proving by a preponderance of the evidence that cause exists for dismissal of the debtor's bankruptcy case." 19 F.3d 312, 317 (7th Cir. 1994) (citing 5 Collier on Bankruptcy ¶ 1112.03[2][a], at 1112-16; *Colonial Daytona Ltd. P'ship v. Am. Sav. of Fla., F.S.B.*, 152 B.R. 996, 1002 (M.D.Fla.1993)). At issue in *Woodbrook*, however, was who bore the burden, not what the burden was as is the case here.

material; (2) the debtor treated insiders and affiliated entities better or worse than other creditors or customers; (3) the debtor made pre-petition voidable preferences or fraudulent transfers; (4) the debtor was unwilling or unable to pursue causes of action belonging to the estate; (5) conflicts of interest on the part of management interfered with its ability to fulfill its fiduciary duties to the debtor; and (6) management engaged in self-dealing or squandering of corporate assets." *In re LHC, LLC*, 497 B.R. at 292 (citing *In re Intercat, Inc.*, 247 B.R. 911, 921 (Bankr. S.D. Ga. 2000)).

A. The Purported Attempt of the Wolf Individuals to Use the Corporate Bankruptcies to Obtain the Benefits of Bankruptcy Without the Costs.

A number of FirstMerit's allegations of "cause" to appoint a trustee essentially became moot when the Wolf Individuals filed their individual bankruptcy cases which have been procedurally consolidated with the cases of the Chardon Corporate Debtors and Intervest. These relate to FirstMerit's general argument that the Wolf Individuals were attempting to obtain the benefit of bankruptcy personally and with respect to personally owned property without themselves incurring the duties and responsibilities of filing their own bankruptcy cases. Even were the court to conclude that the Wolf Individuals had initially hoped to utilize the Chardon Corporate Debtors' bankruptcy stay to protect their own assets, that is no longer a concern now that the Wolf Individuals are protected by their own bankruptcy stays.

For example, FirstMerit points to the adversary proceeding filed by the Chardon Corporate Debtors and Intervest to enjoin certain lawsuits by FirstMerit and Colfin against the Wolf Individuals on loans to various Chardon Corporate Debtors and Intervest for which the Wolf Individuals were jointly liable. FirstMerit argues that the filing of the adversary proceeding shows that the Wolf Individuals were attempting to use the corporate bankruptcies to benefit themselves rather than benefit creditors of the corporate debtors' estates. In contrast, the Chardon Corporate Debtors argue that the adversary proceeding would have benefited the Chardon Corporate Debtors

because, as principals and providers of service, the Wolf Individuals' attention and financial contributions were necessary to the Chardon Corporate Debtors' successful reorganization. In any event, Donald Wolf, Jr. and David Wolf filed their own bankruptcy cases under Chapter 11 on October 21, 2013, and their father, Donald Wolf, Sr., filed his own Chapter 11 case on October 28, 2013. Upon those filings, the litigation against them was automatically stayed by their own bankruptcy cases, and on November 6, 2013, the debtors agreed to dismiss the adversary complaint, and the adversary proceeding was dismissed on November 8, 2013.

Similarly, FirstMerit argues that the Wolf Individuals attempted to transfer property to one of the Chardon Corporate Debtors in order to gain the protection of the corporate debtor's bankruptcy case without having to file their own bankruptcy case. Specifically, FirstMerit refers to the "outright assignment" dated May 7, 2013, signed by each of the Wolf Individuals purporting to transfer their beneficial interests in the land trust holding 10611 Wolf Dr. to Wolf Business Center Inc. However, the weight of the evidence shows that the Wolf Individuals merely sought to correct a technical error in documentation which they hoped to do with FirstMerit's consent and cooperation.

Usually parties in interest seek to appoint a Chapter 11 trustee when a debtor-in-possession is surreptitiously transferring property *out of* the bankruptcy estate, not transferring property *into* the estate. The former would usually harm creditors of the estate while the latter would usually benefit creditors. The former would also generally require bankruptcy court approval, at least if outside the ordinary course, 11 U.S.C. §363(b)(1), while the latter would not. FirstMerit nevertheless argues that the attempted transfer was a form of attempted fraudulent conveyance by the Wolf Individuals to transfer property which they owned to one of the Chardon Corporate Debtors to keep the property away from FirstMerit if the bank was successful in its non-bankruptcy

litigation against the Wolf Individuals on their notes and guarantees. The facts of this case do not support this, however. First, the attempted transfer was not successful, because under the trust documents the land trust trustee needed to accept the assignment. The trustee did not accept the assignment and would not do so without obtaining the consent of FirstMerit. Therefore, FirstMerit suffered no actual harm or prejudice. Second, as FirstMerit concedes, an assignment would have had little effect on the bank's interests because FirstMerit had both a mortgage in the underlying real estate and a collateral assignment of the beneficial interests – neither of which would have been affected by the transfer.[14] More importantly, the court finds credible the testimony of the Wolf Individuals that the attempted assignment was not intended as a transfer at all. Rather, it was intended as a correction of the documentation to reflect what they believed to be, and had always intended to be, the true ownership of the 10611 Wolf Dr. property. The court also finds credible Donald Wolf, Sr.'s testimony that he knew that he would need FirstMerit's consent to effectuate the summer 2013 assignment and had intended to and attempted to get FirstMerit's consent. The court finds that the preparation and execution of the "outright assignment" was just a first step and not an attempt to evade the necessity of obtaining FirstMerit's consent.

Therefore, the court must conclude that the Wolf Individuals did not intend to abuse the bankruptcy system for their own benefit by causing the Chardon Corporate Debtors to file bankruptcy petitions or to file an adversary proceeding seeking to enjoin litigation against them or by signing the "outright assignment." In any event, now that the Wolf Individuals have filed their own bankruptcy petitions and are subject to this court's supervision, there is no evidence of an

[14] It is true that FirstMerit might have been delayed in its enforcement rights by the automatic stay in the Chardon Corporate Debtors' bankruptcy cases if the property had been transferred into those estates. But, the Wolf Individuals ultimately filed their own bankruptcy cases, initiating their own automatic stays, before FirstMerit attempted to enforce any debt against the land trust or underlying property. There is therefore no showing that FirstMerit suffered any actual harm or prejudice merely because the Wolf Individuals prepared a document that was never signed by the trustee.

ongoing danger of abuse if the Chardon Corporate Debtors are permitted to stay in control of their reorganization efforts.

B. Pre-Petition Transfers

FirstMerit next argues that several pre-petition transfers by the Chardon Corporate Debtors at the initiative of the Wolf Individuals constitute cause to appoint a trustee. This argument rests on four events, including: (1) the periodic transfers from the Chardon Corporate Debtors and Intervest to Wolf Builders' account at Apple River State Bank between December 29, 2012 and April 17, 2013, totaling $421,013.17;[15] (2) the $25,000 retainer payment from The Rink of Crystal Lake to NW&A on December 19, 2012, and (3) the $13,475 retainer payment from The Rink of Crystal Lake to Attorney Hanlon on February 15, 2013. In addition, FirstMerit points to the September 2012 merger of Wolf Realty and Wolf Realty II which resulted in Donald Wolf, Sr. effectively transferring 10% of his ownership interest in Wolf Realty's assets, including the value of Wolf Realty's management agreements, to his two daughters who are not liable on the debt to FirstMerit. FirstMerit also alleges that the Wolf Individuals are recipients of fraudulent transfers from the Chardon Corporate Debtors and have otherwise engaged in self-dealing because they caused Wolf Builders to use some of the funds it received from the Chardon Corporate Debtors to pay "payroll" to themselves and other purported employees of Wolf Builders despite not having

[15] FirstMerit's motion alleges, based on the Debtors' SOFAs that they transferred a total of at least $777,300 to Wolf Builders. The $421,013.17 figure is based on transfers to Wolf Builders of amounts the Chardon Corporate Debtors had previously been paying its secured creditors for debt service to the newly opened Apple River Account. The $777,300 figure appears to be the total amount of funds that flowed through Wolf Builders' general operating and payroll account (including ordinary expenses that had flowed through Wolf Builders even before the change in practice in December 2012). In FirstMerit's statement of theories in the parties' joint Amended Pretrial Statement, FirstMerit alleges only $421,013.17 in transfers to constitute fraudulent transfers. (ECF No. 530, Ex. 1-B-4.) Nor did FirstMerit pursue at trial an argument that the additional $356,286.80 in alleged transfers directly to Wolf Builders' general payroll account in the ordinary course constitute cause for appointment of a trustee. *See, e.g., Chatz v. BearingPoint Inc. (In re Nanovation Tech., Inc.)*, 364 B.R. 308, 345 n.6 (Bankr. N.D. Ill. 2007) (argument "hinted at" in pleadings but not pursued deemed abandoned); *Divelbiss v. Maida (In re Maida)*, 2000 WL 777875 (Bankr. N.D. Ill. June 15, 2000) (count not pursued in closing argument deemed withdrawn); *Baden Sports, Inc. v. Molten USA, Inc.*, 556 F.3d 1300, 1308 (Fed. Cir. 2009) (argument not pursued at trial deemed waived); *Van Wagenen v. Ashcroft*, 104 Fed. Appx. 12 (9th Cir. June 10, 2004) (district court did not err in not considering theory not pursued at trial).

written employment contracts with the Chardon Corporate Debtors, and to pay $250,000 in retainers to NW&A.

The court in *In re LHC, LLC* found that, under the circumstances of that case, pre-petition prepayment of legitimate and necessary expenses for goods and services provided post-petition did not constitute fraudulent conduct or gross mismanagement warranting appointment of a Chapter 11 Trustee. 497 B.R. 281, 305-08 (Bankr. N.D. Ill. 2013). Here, the evidence shows that the pre-petition payments to Wolf Builders and for retainers were in anticipation of future expenses. Although the payments were to a third party affiliate who did not file a bankruptcy petition, rather than directly to third party suppliers, it is uncontroverted that Wolf Builders in fact used such funds post-petition for the benefit of the Chardon Corporate Debtors or for costs of the reorganization. Over half the amount, $250,000, was paid by Wolf Builders to Neal Wolf and his firm to represent the Chardon Corporate Debtors in connection with this bankruptcy case and certain limited related work representing Wolf Family Partnership, LLC in the pre-petition district court litigation that triggered these bankruptcy cases. There is no dispute that NW&A has in fact provided legal services to the Chardon Corporate Debtors worth well in excess of that amount. As of the petition date, Neal Wolf had applied $80,441.49 of those payments from Wolf Builders and the The Rink of Crystal Lake to pre-petition fees and expenses. As of trial, the remaining $194,558.51 of the retainer was still in his firm's IOLTA client trust account. But as of July 10, 2014, Neal Wolf's firm had accrued over $1.1 million in unpaid attorney's fees working on the Chardon Corporate Debtors' bankruptcy cases. Moreover, Neal Wolf, as debtor's counsel, will need to obtain this court's approval before applying such retainer. Pursuant to Section 329 of the Bankruptcy Code, this court will order the disgorgement of such compensation if it is found to exceed the reasonable value of services provided.

Thus, of the $421,013.17 that Wolf Builders received pre-petition from the Chardon Corporate Debtors that otherwise could have been paid to their lenders, the retainer to Neal Wolf accounts for $250,000, leaving $171,013.17. But it has been shown that over $149,000 of such funds were used between May 9 and September 13, 2013 to pay the salaries, benefits and payroll taxes of the Wolf Builders employees, who undisputedly provided labor and services to the Chardon Corporate Debtors during the pre- and post-petition periods. FirstMerit's expert witness testified that, although there was no written agreement between the Chardon Corporate Debtors and Wolf Builders, it had been the historical pre-petition conduct for the Chardon Corporate Debtors to pay the payroll of Wolf Builders' employees in consideration for the services that they provided the Chardon Corporate Debtors, and that the payment of such wages was not out of the ordinary course. No evidence has been presented to show that this compensation was unreasonable or exceeded the value of the services provided to the Chardon Corporate Debtors. Another $50,000 was paid by Wolf Builders to pay a retainer to Plante Moran to provide accounting services in this bankruptcy case. It is undisputed that the same employees paid post-petition by Wolf Builders continued to provide services to the Chardon Corporate Debtors post-petition, including additional services and obligations caused by the bankruptcy. Thus, it appears that Wolf Builders has spent or contributed at least as much as it received in the disputed pre-petition transfers on legitimate expenses benefitting the Chardon Corporate Debtors' post-petition operations and attempts at reorganization.

In *In re Brenda's Rentals, L.L.C.*, the court found no cause to appoint a Chapter 11 trustee where funds were transferred pre-petition to a non-debtor affiliate tenant of the debtor but were used to refurbish and convert the building owned by the debtor. 2014 WL 1675881 (Bankr. N.D. Ala. 2014). Noting that "trying to survive while having all your rental income seized is not

incompetence or gross mismanagement," the bankruptcy court was persuaded that the debtors "were just trying to stay afloat and that there was no underhandedness." *Id.* Similarly, here the court finds that there was no evidence of underhandedness by the Chardon Corporate Debtors when they transferred funds to Wolf Builders pre-petition. Nor was there any ultimate harm to the creditors of the Chardon Corporate Debtors or their bankruptcy estate. Instead, the Chardon Corporate Debtors were simply transferring funds to a centralized cash management account for future expenses of the Chardon Corporate Debtors. Post-petition, those funds have been used to pay legitimate costs and expenses of the continuing operation of the Chardon Corporate Debtors and their reorganization. Indeed, rather than siphoning off corporate funds for the personal use of the equity owners, Donald Wolf, Sr. testified that his non-debtor wife contributed funds out of her retirement account post-petition to help make payroll for the Chardon Corporate Debtors. The evidence shows that before he filed his own bankruptcy petition Donald Wolf, Sr. deposited at least $15,500 into Wolf Builder's payroll account between October 8 and October 31, 2013, and his non-debtor wife deposited at least $27,500 between December 6, 2013 and January 3, 2014.

The pay raise that Donald Wolf, Sr. received shortly before the petition date from $1,000 per week to $1,817.69 per week raises some concern, but FirstMerit offered no evidence to show that the new salary was unreasonable. In contrast, Donald Wolf, Sr. provided testimony to show that the raise was justifiable and not unreasonable. First, he argued that his previous salary was artificially low, not that the new salary was artificially high. FirstMerit presented no evidence to show that the amount of salary paid to Donald Wolf, Sr. or any of the other employees of Wolf Builders is less than the reasonable value of the services that they provided to the Chardon Corporate Debtors. In any event, even if the pay raise were to present some concern, it is not enough to justify the appointment of a Chapter 11 Trustee. *See, e.g.*, *In re Daily*, 2009 WL 3415204

(Bankr. M.D. Tenn. Oct. 19, 2009) (noting that "virtually every insolvency case involves some degree of mismanagement" and finding that debtor's past acts did not justify the appointment of a Chapter 11 Trustee).

With respect to the pre-petition payment of the $13,475 retainer to attorney Hanlon by The Rink of Crystal Lake, most of the debts owed by the Chardon Corporate Debtors and the Wolf Individuals have been cross-collateralized and guaranteed, and attorney Hanlon's representation in defending against the FirstMerit litigation may reasonably be seen to indirectly benefit The Rink of Crystal Lake and the other Chardon Corporate Debtors. In addition, as discussed above, Donald Wolf, Sr. contributed at least $15,500 post-petition towards the payment of payroll post-petition benefiting the Chardon Corporate Debtors and his wife contributed at least an additional $27,500, far exceeding the amount of the retainer paid by The Rink of Crystal Lake. The Wolf Individuals have also now filed their own cases and are subject to this court's supervision. They have proposed plans of reorganization in which they will contribute assets and income to help support the Chardon Corporate Debtors' reorganization. Furthermore, there is no indication that the payment by the Chardon Corporate Debtors of fees to an attorney solely representing the Wolf Individuals presents an ongoing issue. Therefore, this, too, does not justify the appointment of Chapter 11 trustees for the Chardon Corporate Debtors.

FirstMerit also alleges that Donald Wolf, Sr. transferred a portion of his interest in Wolf Realty II to his non-debtor daughters pre-petition. Donald Wolf, Sr. alleges that this was for estate-planning purposes rather than to divert assets from FirstMerit. This transfer, too, bears little relevance to the motions to appoint a Chapter 11 Trustee in the pending Chardon Corporate Debtors' cases. [16] FirstMerit has not demonstrated that the pre-petition transfer of certain of his

[16] FirstMerit had moved to convert Donald Wolf, Sr.'s case to Chapter 7 or appoint a Chapter 11 trustee while the case was pending in Florida. Judge Delano denied that motion, which Colfin had joined, on May 28, 2014. FirstMerit

assets caused a diminution in value of the Chardon Corporate Debtors' assets.

C. Purported Inaction, Incompetence or Mismanagement by the Wolf Individuals

Finally, FirstMerit alleges that the Wolf Individuals' previously described failure to investigate or seek to recover the pre-petition transfers to Wolf Builders and other affiliates, lack of progress with the Chardon Corporate Debtors' reorganization and the Wolf Individuals' lack of knowledge about the details of their business operations furnish grounds to appoint a trustee.

The evidence presented by FirstMerit does not support these allegations. As discussed above, it appears that the proceeds of the pre-petition transfers have been used for legitimate business expenses benefitting the Chardon Corporate Debtors. Additionally, since the beginning of the case the Chardon Corporate Debtors have indicated that Wolf Builders will contribute funds and employee labor, as it has in the past, to help fund the Chardon Corporate Debtors' joint plan of reorganization. The evidence presented at trial does not demonstrate that Wolf Builders cannot do so or will alter its past practice and refuse to do so.

Indeed, the Chardon Corporate Debtors and Intervest filed a motion seeking to substantively consolidate the Chardon Corporate Debtors, Intervest and Wolf Builders. (ECF No. 222.) The debtors' proposed Chapter 11 Plan of reorganization also provides for the substantive consolidation of such entities, together with the contribution of 10611 Wolf Dr. by the Wolf Individuals into the substantively consolidated debtor entities. It makes little sense for the debtors to bring a separate action to avoid a transfer from an entity whose assets will be consolidated with the debtors'. The proposed Chapter 11 Plans filed by the Wolf Individuals similarly propose to repay FirstMerit and the other debts of the Chardon Corporate Debtors, Intervest and the Wolf Individuals, most of which are guaranteed or joint debts, through a coordinated joint plan that

filed a motion to reconsider that ruling on June 11, 2014, which was still pending when the case was transferred to the Northern District of Illinois. This court denied that motion on September 8, 2014 for reasons stated in open court.

would use the income of the Chardon Corporate Debtors, Intervest, Wolf Builders and the Wolf Individuals. While the Chardon Corporate Debtors' attorney, Neal Wolf, admitted that there are some inconsistencies between the proposed plan filed in the Chardon Corporate Debtor cases on August 15, 2013 and the proposed plans filed in the Wolf Individuals' cases on February 24, 2014, he also testified that an amended plan reconciling the differences could be quickly filed.[17]

As for delays, a principal delay in these cases appears to be due to the adjudication of the Chardon Corporate Debtors' application to employ Neal Wolf and his firm as counsel, which FirstMerit vigorously objected to and demanded extensive discovery, and which culminated in an evidentiary hearing spanning five days. Corporate entities can only prepare and file reorganization plans and disclosure statements and conduct confirmation hearings through attorneys, and therefore it was difficult for the case to proceed towards confirmation of a plan until that issue was resolved. *See, e.g., In re IFC Credit Corp.*, 663 F.3d 315 (7th Cir. 2011) ("Corporations unlike human beings are not permitted to litigate *pro se*."). Meanwhile, the Chardon Corporate Debtors timely filed a proposed Chapter 11 Plan within 120 days after the petition date, and came to resolution with their principal creditors other than FirstMerit, including two secured creditors collectively holding nearly half the total secured claims against the Chardon Corporate Debtors and Intervest. Shortly after this court ruled that it would approve the application of Neal Wolf and his firm as counsel in April 2014, the Chardon Corporate Debtors and Intervest filed an amended plan and disclosure statement. The court has no reason not to expect that with the resolution of the employment issue and this motion to appoint a trustee have been resolved, the Chardon Corporate Debtors will move quickly to seek approval of their disclosure statement and

[17] After this court recently resolved the disputed and pending application to employ Neal Wolf and his firm as counsel for the Chardon Corporate Debtors and Intervest in April 2015, the Chardon Corporate Debtors and Intervest filed their Modified Chapter 11 Plan and Disclosure Statement on May 8, 2015. (ECF Nos. 1293, 1294.)

confirmation of their plan.

Nor has FirstMerit presented any evidence of dissipation of assets or deterioration in the value of the real estate serving as its collateral during the pendency of the Chardon Corporate Debtors' cases. Although this creditor has been forced to delay enforcement of its debt against its collateral, and has incurred legal expenses in its prosecution of its numerous objections and appeals during this case, it is also undisputed that FirstMerit has been receiving regular adequate protection payments pursuant to the interim cash collateral orders entered in this case.

Finally, FirstMerit argues that the Chardon Corporate Debtors' inability to provide clear testimony on details of the business show either a "consistent disregard for" their fiduciary duties to their creditors or "an inability to manage and operate Debtors, control their finances, and navigate the Chapter 11 system." (Joint Memo. in Support of Mot., 10, ECF No. 146.) These include general confusion or inability to respond to questions at a Rule 2004 examination about whether the Chardon Corporate Debtors had direct employees, formal positions, corporate structure, pre-petition transfers and pre-petition retainers. But the Chardon Corporate Debtors have acknowledged that they have historically been somewhat informal with corporate formalities and have treated and managed the closely-affiliated Chardon Corporate Debtors, Intervest, Wolf Builders and Wolf Realty as components of a single entity. (Mot. to Consolidate, 11, ECF No. 222.) Indeed, this is part of the reason given for the Chardon Corporate Debtors' motion to substantively consolidate their bankruptcy cases and for proposing a plan of reorganization that would substantively consolidate these entities. (ECF Nos. 222, 1293.) Moreover, the Chardon Corporate Debtors are now represented by highly experienced bankruptcy counsel that, now that the employment application has been approved, can guide them through the complexities of reorganization.

Most importantly, FirstMerit has not demonstrated that management is unable to operate the business of the Chardon Corporate Debtors. During the pendency of this case, there have been no allegations that the Chardon Corporate Debtors have been losing tenants or losing money. There is no evidence that there has been any offsetting decrease or depreciation of the real estate or other assets during such time or evidence of decrease in tenant occupancy. Additionally, it appears that the Chardon Corporate Debtors have not only been escrowing and paying property taxes on the real estate, but making regular adequate protection payments to FirstMerit, Colfin and Old Second Bank. Therefore, other than delays and increased attorney fees in these cases, occasioned at least in part by the creditor, FirstMerit has not alleged any actual harm to creditors caused by the Chardon Corporate Debtors remaining in control of the estate during these cases.

It is uncontroverted that the Wolfs have been in charge of the Chardon enterprise for over 30 years, and that the financial difficulties prompting these bankruptcy cases was not caused by mismanagement but rather by the recession peaking between 2008 and 2010, and subsequent inability to refinance or restructure the companies' long-term debt obligations in tightened credit markets. Although the Chardon Corporate Debtors may be unfamiliar with the complexities of reorganization through the Chapter 11 process, they also now have bankruptcy counsel with approximately forty years of experience, including extensive experience representing Chapter 11 debtors. FirstMerit has not met its burden of showing that, with the assistance of such counsel, the Chardon Corporate Debtors are unable to guide their cases or the business operations towards a successful reorganization.

D. Best Interests Under Section 1104(a)(2)

For essentially the same reasons, FirstMerit has not demonstrated that appointment of a trustee is in the best interests of creditors, equity security holders and other interested parties under

Section 1104(a)(2). Determination under Section 1104(a)(2) is fact-specific and within the sound discretion of the bankruptcy judge. *In re LHC, LLC.*, 497 B.R. 281, 293 (Bankr. N.D. Ill. 2013). Factors that have been considered include "(1) the trustworthiness of the debtor; (2) the debtor's past and present performance and prospects for rehabilitation; (3) whether the business community and creditors of the estate have confidence in the debtor; and (4) whether the benefits outweigh the costs." *Id.* Appointment of a Chapter 11 Trustee is an extraordinary remedy. *Kwitchurbeliakin, LLC v. Laporte Sav. Bank*, 2011 WL 93714 (N.D. Ind. Jan. 10, 2011) (citing *Adams v. Marwil*, 564 F.3d 541, 546 (2d Cir. 2009)); *In re LHC, LLC*, 497 B.R. at 291. An appointed trustee not only supervises a case, but takes over, displaces and divests the current management of all control of and possession of property of the debtors' estate. *In re Footstar, Inc.*, 323 B.R. 566, 572 (Bankr. S.D.N.Y. 2005); *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 352-53 (1985) ("Congress contemplated that when a trustee is appointed, he assumes control of the business, and the debtor's directors are 'completely ousted.'"); *Abdulla v. Klosinski*, 523 Fed. Appx. 580 (11th Cir. July 10, 2013) (appointment of Chapter 11 "trustee would have ousted [principal] from control of [debtor's] operation and could have resulted in the liquidation of its assets."). Here, under the stewardship of the Wolfs, the Chardon Corporate Debtors have reached global settlements with two of the debtors' major secured creditors – one of which had originally joined in this motion. Further, the Chardon Corporate Debtors have proposed a plan of reorganization that would pay FirstMerit's claims in full within five years with interest. Based on the evidence presented, this court must conclude that it is in the best interest of all interested parties for the debtors to attempt to confirm and complete a plan of reorganization.

CONCLUSION

For the foregoing reasons, FirstMerit's motions seeking the appointment of a Chapter 11

trustee are denied.

DATE: July 1, 2015 ENTER:

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Thomas M. Lynch
United States Bankruptcy Judge