Michael R. Johnson (7070)
David H. Leigh (9433)
Elaine A. Monson (5523)
Brent D. Wride (5163)
RAY QUINNEY & NEBEKER P.C.
36 South State Street, 14th Floor
Salt Lake City, UT 84111
(801) 532-1500
mjohnson@rqn.com
dleigh@rqn.com
emonson@rqn.com
bwride@rqn.com

Proposed Counsel for the Debtor in Possession

IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

In re: **THE FALLS EVENT CENTER LLC**, a Utah limited liability company, Address: 9067 S 1300 W, #301 West Jordan, UT 84088, Tax I.D. No. 90-1023989, Debtor in Possession.	Bankruptcy Case No. 18-25116 Chapter 11 Honorable R. Kimball Mosier [Filed Electronically]

DEBTOR'S (1) OBJECTION TO MOTION FOR APPOINTMENT OF A CHAPTER 11 TRUSTEE, (2) NOTICE THAT THIS IS A CONTESTED MATTER, (3) RESERVATION OF RIGHTS, AND (4) REQUEST THAT PRELIMINARY HEARING BE TREATED AS SCHEDULING HEARING

NOTICE AND RESERVATION OF RIGHTS

The Falls Event Center LLC (the "**Debtor**") hereby objects to the *United States Trustee's Motion for the Appointment of a Chapter 11 Trustee* [Docket No. 29] (the "**Motion**"). This is a contested matter governed by Rule 9014 of the Federal Rules of Bankruptcy Procedure. Pursuant to Local Rule 9014-1, the Debtor requests that the Court order that Fed. R. Bankr. P. 7026 applies in this matter.[1]

A hearing is scheduled on the Motion on August 28, 2018, at 11:00 a.m. The Debtor requests that this hearing be treated as a preliminary hearing and that the Court establish a schedule for the completion of discovery and the filing of briefs, after which an evidentiary hearing should be held.

Discovery regarding the issues raised by the U.S. Trustee in the Motion is still ongoing. In light of this fact, the U.S. Trustee has requested that the Debtor file an initial preliminary objection to the Motion at this time so the U.S. Trustee can be informed of the Debtor's position generally. However, the U.S. Trustee's office has indicated that it has not objection to the Debtor's filing a legal memorandum in opposition to the Motion and in support of its objection containing detailed statements of fact, legal argument, and evidence, including supporting declarations, by a date mutually agreeable to the Debtor and the U.S. Trustee prior to any evidentiary hearing on the Motion. Accordingly, the Debtor submits the following preliminary objection and reserves the right to file a more detailed memorandum after discovery has been completed, to which the U.S. Trustee has agreed.

[1] The U.S. Trustee has already conducted four depositions and has scheduled others.

OBJECTION

The U.S. Trustee asks that a Chapter 11 Trustee be appointed for three main reasons. First, the U.S. Trustee argues that the current manager of the Debtor, Brooks Pickering ("**Pickering**"), was appointed by Steve Down ("**Down**"), who founded and controlled the Debtor until June 2018 and who the U.S. Trustee alleges may have participated in fraud, dishonesty, or criminal conduct in the management of the Debtor as set forth in 11 U.S.C. 1104(e).

Second, the U.S. Trustee alleges that Pickering has a conflict of interest because he also manages another company that was founded and controlled by Down until June 2018.[2]

Finally, the U.S. Trustee argues that the Debtor is guilty of "gross mismanagement" because it did not prevent certain limited and intentional violations of the automatic stay by three entities in the first few days of this case.

As explained below, none of the reasons set forth by the U.S. Trustee justify appointment of a Chapter 11 Trustee. It will be quicker, easier, and cheaper to allow the Debtor to remain as debtor in possession, with the assistance of Gil Miller as Chief Restructuring Advisor, so that the Debtor can continue with its plan for reorganization.

I. Section 11 U.S.C. 1104(e)

Section 1104(e) states that the U.S. Trustee shall file a motion for appointment of a Chapter 11 Trustee if there are reasonable grounds to suspect that the person who appointed Pickering (Down) "participated in actual fraud, dishonesty, or criminal conduct." The Debtor disagrees that the requirements of section 1104(e) are met here. Indeed, the U.S. Trustee points

[2] As set forth below, Down no longer has control over either company.

to no evidence establishing that Down engaged in actual fraud, dishonesty, or criminal conduct. In fact, even though Down was the subject of an investigation by the SEC, the adjudication of that matter resulted only in a judgment against Down stating that he engaged in *negligent* activity related to the Debtor, which falls well short of fraud, dishonesty, or criminal conduct. Moreover, even if it were determined that Down was guilty of fraud or dishonesty, it does not follow that Pickering is necessarily tainted or that a Chapter 11 Trustee should automatically be appointed. Indeed, although subsection (e) requires that a motion be filed with the court if certain facts are found to be present, Congress did not include those same facts in the list of items in subsection (a) that can constitute cause for the appointment of a trustee.

In this case, Pickering acts completely independently of Steve Down, who has resigned and who has no control over Pickering, the Debtor, or the administration of the estate. Furthermore, Pickering had no relationship with Down or with the Debtor until he was asked to provide consulting services to the Debtor shortly before Pickering put the company into bankruptcy as the newly appointed Manager of the Debtor. As set forth in the accompanying Declaration of Brooks Pickering, Pickering does not take any direction from Down, and he persuaded Down to step down as Manager and to relinquish all control of the Debtor. Thus, the mere fact that Down is the person who asked Pickering to take over management of the Debtor is not a sufficient reason to appoint a Chapter 11 trustee.

While there were problems with the management of the Debtor pre-petition, the relevant issue *now* is how to manage the Debtor in such a way as to maximize the benefit to creditors of the estate *going forward*. Pickering and his team have invested substantial time and resources in

understanding the Debtor and its operations, protecting its assets, improving its processes, creating a plan for its reorganization, and maximizing the eventual recovery for creditors. The majority of the unsecured creditors support Pickering and do not wish to have the estate incur the additional and very significant expense of starting over with new management in the form of a Chapter 11 trustee.

II. Alleged Conflict of Interest

The U.S. Trustee also argues in the Motion that Pickering has a conflict of interest because he also manages another company, Even Stevens, that was founded by Steve Down and that is not in bankruptcy. However, Down has no control over that company either, so he cannot exercise back-door control over the Debtor. The U.S. Trustee points out that Even Stevens may owe the Debtor money. To avoid a conflict of interest in this limited area, the Debtor will agree that the Unsecured Creditors Committee can be given authority to investigate and collect the debt if it is appropriate and in the best interests of creditors.

More importantly, any possibility of a conflict of interest in this case is allayed by the Debtor's imminent appointment of Gil Miller as its Chief Restructuring Advisor. Not only is Miller independent, he brings a wealth of experience to the case, and his involvement will maximize the return to creditors. To avoid any possible concerns about Miller's ability to act independently, the Debtor will agree that it cannot remove Miller without Court approval.

III. Alleged Gross Mismanagement

Finally, the U.S. Trustee argues that, due to some problems the Debtor had with Bank of the West when the petition was filed, current management of the Debtor is somehow guilty of

"gross mismanagement." However, as shown below, there was no mismanagement by the Debtor, much less "gross" mismanagement.

As will be explained in greater detail in the Debtor's forthcoming legal memorandum and declarations, the Debtor had a pre-petition account at Bank of the West, which is one of six banks listed on The United States Trustee's List of Authorized Depositories for Bankruptcy Cases Filed in the District of Utah as of January 1, 2018.

On the morning of July 11, 2018, prior to the filing of the petition, the Debtor called Bank of the West to inform it of the imminent bankruptcy filing and to request that the bank freeze the Debtor's account. The Debtor followed up with an e-mail after the petition had been filed, which included a date- and time-stamped copy of the Debtor's voluntary bankruptcy petition, which had been filed. Then, later in the day, to be sure that the account was protected, the Debtor sent a second e-mail to Bank of the West.

Notwithstanding the three specific contacts with the bank on the day of the Debtor's bankruptcy filing, the Debtor noticed the next morning that certain automatic withdrawals were pending. As a result, the Debtor did two things. First, counsel for the Debtor called the three lenders whose withdrawals were pending and specifically advised them of the bankruptcy petition and of the automatic stay. Second, the Debtor then sent a third e-mail to Bank of the West asking that the account be frozen and that the transfers not be honored. Bank of the West responded that it could not freeze the account without receiving direct contact from the bankruptcy court itself.

When Bank of the West refused to freeze the account, the Debtor attempted to *close* the account and to open its DIP account at Bank of the West. However, even though the U.S. Trustee has approved Bank of the West as a DIP depository, no one at the bank knew how to open a DIP account, and the Debtor's management team, who were at the bank attempting to open a DIP account, were asked to leave the bank. Thereafter counsel for the Debtor placed no less than four calls to Bank of the West. Finally, counsel for the Debtor personally visited Bank of the West, but his efforts to stop the automatic withdrawals and deal with the DIP account issue were rebuffed. Furthermore, employees of the bank refused to give the Debtor's counsel contact information for the bank's general counsel so that the matter could be addressed at that level. Failing to obtain any cooperation from the bank, the Debtor's counsel was finally able to track down and reach the bank's regional counsel in Omaha, Nebraska, who after several phone calls was finally able to arrange to have the account frozen.

In the meantime, approximately $78,000 of the Debtor's funds were transferred in violation of the automatic stay. The Debtor has sent letters demanding return of these funds from the lenders and from Bank of the West (and the U.S. Trustee has copies of those letters). Neither the three creditors nor the bank have not responded to the Debtor's formal demands, so within the next ten days, the Debtor will be filing a motion with the Court for return of those funds and for an award of attorney fees.

The foregoing circumstances are unfortunate. However, they do not amount to mismanagement, much less "gross" mismanagement. In fact, the Debtor and its management did everything in their power to ensure that Bank of the West and the creditors at issue were aware

of the bankruptcy filing and that Bank of the West had secured the Debtor's funds. Furthermore, the Debtor promptly notified the U.S. Trustee of the problems it had had with Bank of the West and of the automatic withdrawals that had been honored. The U.S. Trustee did not discover the information on its own. The Debtor has at all times been open and candid with the U.S. Trustee about the problems, and it is working diligently to remedy them. Furthermore, this is a one-time problem that will not arise again. Because of the problems that the Debtor encountered at Bank of the West, the Debtor has now opened DIP accounts for the Debtor at Wells Fargo Bank.

The situation with Bank of the West is not related in any way to ongoing management of the Debtor, and it does not provide a basis for the appointment of a Chapter 11 Trustee.

IV. Section 11 U.S.C. § 1104(a)

The U.S. Trustee has also based his Motion on 11 U.S.C. § 1104(a). That section states as follows:

> At any time after the commencement of the case but before confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of a trustee--
>
> (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 in the amount of assets or liabilities of the Debtor.

11 U.S.C. § 1104(a). The movant bears the burden of demonstrating cause. *In re Golden Park Estates, LLC.*, 2015 WL 3643479 at *5 (Bankr. N.M. 2015). The decision of whether cause

exists to appoint a Chapter 11 Trustee is within the court's discretion, but "[t]he appointment of a Chapter 11 trustee is an *extraordinary remedy* based on a strong presumption in favor of leaving the debtor in possession. *In re Celeritas Technologies, LLC*, 446 B.R. 514, 518 (Bankr. Kan. 2011) (emphasis added).

Here, cause has not been proven by the U.S. Trustee to appoint a Chapter 11 trustee under 1104(a). Rather, as set forth above there has been no showing of "fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case." 11 U.S.C. § 1104(a). Accordingly, the U.S. Trustee's Motion should be denied.

DATED this 20th day of August, 2018.

RAY QUINNEY & NEBEKER P.C.

Brent D. Wride
Proposed General Bankruptcy and Litigation Counsel for the Debtor in Possession

1463161

CERTIFICATE OF SERVICE

I hereby certify that on August 20, 2018, a true and correct copy of the foregoing document was electronically filed and therefore served via ECF on all parties that have entered an electronic appearance in this case.

1463161