

ROBB EVANS & ASSOCIATES LLC
Temporary Receiver of
Longboat Global Funds Management, LLC, et al.
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Sun Valley, California 91352-1121
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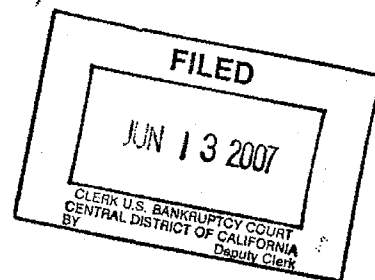
Commodity Futures Trading Commission v. Longboat Global Funds Management, LLC
CASE No. 05-CV-2142 PJH
United States Bankruptcy Court – Central District of California
In Re: Branford Partners, LLC
CASE No. SV 06-12551 KT

**U. S. Trustee's Notice of Motion and Motion for the Appointment of a
Chapter 11 Trustee; Declaration of Maria D. Marquez in Support Thereof**

Filed June 13, 2007

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ORIGINAL

PETER C. ANDERSON
UNITED STATES TRUSTEE
Jennifer L. Braun, No. 130932
Assistant United States Trustee
OFFICE OF THE UNITED STATES TRUSTEE
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UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
SAN FERNANDO VALLEY DIVISION

11	In re	)	Case No. SV 06-12551 KT
12		)	Chapter 11
13	BRANFORD PARTNERS, LLC.	)	U.S. TRUSTEE'S NOTICE OF MOTION
14		)	AND MOTION FOR THE
15	Debtor.	)	APPOINTMENT OF A CHAPTER 11
16		)	TRUSTEE; DECLARATION OF MARIA
17		)	D. MARQUEZ IN SUPPORT THEREOF
		)	Date: July 24, 2007
		)	Time: 10:00 a.m.
		)	Ctrm: 301

18
19 TO THE HONORABLE KATHLEEN THOMPSON, UNITED STATES BANKRUPTCY JUDGE
20 FOR THE CENTRAL DISTRICT OF CALIFORNIA, AND ALL PARTIES IN INTEREST:

21 PLEASE TAKE NOTICE THAT, on July 24, 2007 at 10:00 a.m., or as soon thereafter as the
22 matter may be heard, the United States Trustee (the "U.S. Trustee"), will and hereby does move
23 this Court to order the appointment of a chapter 11 trustee, pursuant to 11 U.S.C. §1104.

24 If you wish to oppose or respond to this motion, you must file a written response with the
25 Clerk of the United States Bankruptcy Court at 21041 Burbank Boulevard, Woodland Hills, CA
26 91367, serve a copy of it on the United States Trustee at the address set forth above no less than 14
27 days prior to the above hearing date. If you fail to file a response to this motion within such time
28 period, the Court may treat such failure as a waiver of your right to oppose the motion and may

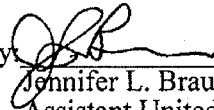
1 grant the requested relief.

2 This Motion is based upon this Notice of Motion, the Memorandum of Points and
3 Authorities and Declaration attached hereto, and all other papers and pleadings on file with this
4 Court.

5 Dated: June 12, 2007

Respectfully submitted,

6 UNITED STATES TRUSTEE

7
8 By:  _____
Jennifer L. Braun
Assistant United States Trustee

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 The U.S. Trustee moves this Court for the appointment of a chapter 11 trustee in this case.
4 Section 1104 of the Bankruptcy code, as amended by the Bankruptcy Abuse Prevention and
5 Consumer Protection Act of 2005 (“BAPCPA”), provides, in relevant part, that the United States
6 Trustee “shall move for the appointment of a trustee under subsection (a) if there are reasonable
7 grounds to suspect that current members of the governing body of the debtor... participated in
8 actual fraud, dishonesty, or criminal conduct in the management of the debtor....” 11 U.S.C. §
9 1104(e). The U.S. Trustee now moves for the appointment of a chapter 11 trustee pursuant to his
10 duties under that section.

11 **II. STATEMENT OF FACTS**

12 The manager of the debtor in this case, Branford Partners, LLC (the “debtor” or
13 “Brandofrd,”) is Pinnacle West, LLC. Jonathan Brake is the sole member and manager of
14 Pinnacle, and accordingly is the person who acts on behalf of the debtor in possession. See Motion
15 for Order Appointing Responsible Person for the Debtor, ¶ 9; see also Chapter 11 Voluntary
16 Petition, at 3.¹

17 In a case pending in the United State District Court for the Northern District of California,
18 titled Commodity Futures Trading Commission v. Longboat Global Funds Management, LLC,
19 Case No. 05-CV-2142 PJH, the Receiver of Longboat Global Funds Management, LLC (the
20 “Receiver”) recently filed a Report of Assets, reporting on his efforts to identify assets pledged as
21 collateral for loans made by Piranha Capital, L.P. After examining the records relating to loans to
22 Pinnacle West LLC and to Branford’s predecessor, Sunquest Development, the Receiver
23 concluded,

24 ≡

25
26 _____
27 ¹ The U.S. Trustee requests that the Court take judicial notice of the debtor’s Petition,
28 other documents filed therewith, and other pleadings and exhibits thereto in the Court’s file,
pursuant to Rule 201 of the Federal Rules of Evidence, made applicable to bankruptcy
proceedings by Rule 9017 of the Federal Rules of Bankruptcy Procedure.

1 Although the promissory notes indicated that loans to Pinnacle West were for real estate
2 investments, most of the funds appear to have been used to repay other investors. In
3 addition there were millions of dollars in expenditures by cashier's check and debit card
4 transactions from accounts controlled by Jonathan Brake. There were multiple cashier's
5 checks and cash withdrawals on almost a daily basis. In March and April 2001, there
6 were cash withdrawals and cashier's checks totaling more than \$230,000 in amounts
7 ranging from \$5000 to \$154,000. In July 2002, there were 26 cash withdrawals and
8 cashier's checks amounting to more than \$467,799 from Jonathan Brake's Pinnacle
9 West Account. There were debit card transactions for luxury hotels, department stores,
10 and private jet travel.

11 Temporary Receiver's Report of Assets of Robb Evans & Associates, LLC for the period from
12 February 1, 2006 through October 31, 2006, approved by the United States District Court for the
13 Northern District of California on January 4, 2007 ("Report"), attached as Exhibit A to the
14 accompanying Declaration of Maria D. Marquez ("Marquez Dec."), at 4.

15 The Receiver further found that in December, 2003, Jonathan Brake executed a promissory
16 note in favor of Piranha Capital on behalf of Pinnacle West for over 8.2 million dollars. The
17 Receiver further determined that although that note stated that it was secured by properties in Park
18 City, Utah and Nicaragua, in fact Pinnacle West never owned those properties. Report, at 8-9.

19 The Receiver reports that in addition to examining books and records, he also took the
20 deposition of Mark Boucher, an associate of Mr. Brake's who, along with Mr. Brake, had signing
21 authority over the Pinnacle West bank accounts. Report at 10. The Receiver explains, "Boucher
22 confirmed that probably 40 or so individuals or funds were investing in Pinnacle West, LLC,
23 including the Piranha Offshore Fund, and the Midas A & B funds, which are Cayman Island-based
24 mutual funds. Boucher verified that many of the individuals or entities receiving funds from the
25 Pinnacle West accounts were other investors, not Piranha Capital investors." Report at 5. The
26 Report further explains that Piranha Capital also loaned funds to allow Plutus Alternative
27 Strategies, LLC, which the debtor's List of Equity Security Holders states has a 99% interest in the
28 debtor, to buy the lien on the property that is the asset of this estate. The Receiver has filed suit

1 against Branford Partners in the District Court alleging an obligation of over \$4.7 million on that
2 note. Report at 11.

3 Accordingly, it appears from the Receiver's Report that Mr. Brake siphoned funds out of
4 Pinnacle West for his own gain to the detriment of investors; signed a promissory note for over 8.2
5 million dollars listing as security property that Pinnacle in fact did not own, before defaulting on
6 the note; and participated in a scheme in which funds were obtained from investors to pay investors
7 in other funds.

8 In addition, the debtor has not provided creditors with records of its financial transactions
9 since the year before it filed for bankruptcy protection. The U.S. Trustee's requirements for debtors
10 in chapter 11 state that debtors must provide copies of the debtor's most recently prepared audited
11 and unaudited financial statements, including a balance sheet, profit and loss statement, and a cash
12 flow statement containing a detailed statement of all receipts and disbursements. Notice of
13 Requirements for Chapter 11 Debtors in Possession, Exhibit B. to the Marquez Dec. In this case,
14 the debtor provided only financial statements for the year concluding December 31, 2005. The
15 Balance Sheet as of December 31, 2005 showed assets of over \$1.2 million and fixed assets of over
16 \$15 million. Exhibit C to the Marquez Dec. The debtor provided no financial records for the year
17 2006. It then filed this case in December, 2006, and since has submitted a Operating Reports
18 reflecting balances of under \$130.00. Counsel for WRC Development, LLC, an unsecured creditor
19 of the estate and a 1% member of the debtor, has described her efforts to obtain information
20 showing where the funds went and to whom, to no avail. See Declaration of Cynthia Futter in
21 Support of Objection of WRC Development, LLC and All-Teck, Inc. to Claim of California
22 Environmental Remediation Fund, filed with the Court on June 4, 2007, at ¶¶ 6-18, Exhibit B.

23 **III. ARGUMENT**

24 Section 1104(a) of the Bankruptcy Code expressly provides three grounds on which the court
25 shall order the appointment of a trustee. It first provides, in relevant part: "At any time after the
26 commencement of a case but before confirmation of a plan, on request of a party in interest or the
27 United States trustee, and after notice and a hearing, the court shall order the appointment of a
28 trustee--(1) for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the

1 affairs of the debtor by current management, either before or after the commencement of the case,
2 or similar cause . . ." 11 U.S.C. § 1104(a)(1).

3 It then provides, in subsection (2), that the court shall order the appointment of a trustee "if
4 such appointment is in the interests of creditors, any equity security holders, and other interests of
5 the estate...." 11 U.S.C. § 1104(a)(2). The grounds for appointment under subsection (a)(2) are
6 independent of the grounds in subsection (a)(1) for cause. See *In re Ionosphere Clubs Inc.*, 113
7 B.R. 164 (Bankr. S.D.N.Y. 1990). The criteria under § 1104(a)(2) are flexible, and allow for
8 appointment of a trustee even when no "cause" exists. Id. at 168; *In re Colorado-Ute Elec. Ass'n,*
9 *Inc.*, 120 B.R. 164, 176 (Bankr. D.Colo. 1990). "Among the factors considered are: (i) the
10 trustworthiness of the debtor, (ii) the debtor in possession's past and present performance and
11 prospects for reorganization, (iv) the confidence--or lack thereof--of the business community and
12 of creditors in the present management, and (iv) the benefits derived by the appointment of a
13 trustee, balanced against the cost of appointment[.]" Id. (citations omitted). Further, "[i]n
14 considering what is in the interests of creditors in connection with [a section 1104(a)(2) motion], 'a
15 bankruptcy judge has broad discretion to take judicial notice of the entire file ... and the outcome of
16 previous proceedings brought before the court.'" *In re U.S. Mineral Products Co.*, 105 Fed.App'x.
17 428, 431 (2004 WL 1758499, p.2) (3d Cir. 2004), quoting from Barry Russell, *Bankruptcy*
18 *Evidence Manual* § 201.6 (2004).

19 The BAPCPA added subsection (3) to 1104(a), providing that the court shall appoint a trustee
20 "if grounds exist to convert or dismiss the case under section 1112, but the court determines that
21 the appointment of a trustee or an examiner is in the best interests of creditors and the estate." It
22 further amended Section 1104 to provide, in relevant part, that the United States Trustee "shall
23 move for the appointment of a trustee under subsection (a) if there are reasonable grounds to
24 suspect that current members of the governing body of the debtor... participated in actual fraud,
25 dishonesty, or criminal conduct in the management of the debtor...." 11 U.S.C. § 1104(e).

26 Here, the Receiver's Report provides ample support for the appointment of a chapter 11
27 trustee under Section 1104(a)(1), as it shows dishonesty or gross mismanagement of the affairs of
28 the debtor by current management before the commencement of the case. The debtor's failure to

1 provide records of its financial affairs since 2005 provides additional "cause" for the appointment
2 of a trustee. "Failure to keep adequate records and make prompt and complete reports justifies the
3 appointment of a trustee." *In re Oklahoma Refining Co.*, 838 F.2d 1133, 1136 (10th Cir. 1988); *In*
4 *re Ford*, 36 B.R. 501, 504 (Bankr. W.D. Ky. 1983) (inaccurate or inadequate accounting
5 constitutes "cause" under § 1104(a)(1)). "[O]nce the Court has found that cause exists under 1104,
6 it has no discretion but must appoint a trustee." *Oklahoma Refining Co.*, 838 F.2d at 1136.

7 In addition, even if there is not "cause" under 1104(a)(1), there are independent grounds for
8 the appointment of a trustee under Section 1104(a)(2), as the only decision-maker for the debtor is
9 not a trustworthy fiduciary to manage the debtor's affairs. Mistrust, lack of cooperation and
10 acrimony between a chapter 11 debtor and its creditor constituency may support the appointment of
11 a chapter 11 trustee when such circumstances create an obstacle to progress in the case. *See Petit*
12 *v. New England Mortg. Services, Inc.*, 182 B.R. 64, 70 (Bankr. D.Me. 1995) ("deep-seeded conflict
13 and animosity between a debtor and its creditors provides a basis for the appointment of a
14 trustee"); *In re The Bible Speaks*, 74 B.R. 511, 512 (Bankr. D.Mass. 1987) (friction between the
15 debtor and the creditors threatened "to engulf this estate in costly and legalistic bickering" through
16 the reorganization process).

17 Here, the debtor concedes that the creditors are concerned about Mr. Brake's continuing
18 involvement with the debtor, and has itself moved for the appointment of a "responsible person."
19 Motion for Order Appointing Responsible Person for the Debtor, filed with the Court on May 24,
20 2007, ¶¶ 11, 15. The docket reflects ongoing disputes between and amongst the debtor and the
21 creditors as to most of the major claims in this case, and the adversary actions and objections filed
22 in the case demonstrate the creditors' lack of trust in Mr. Brake and Pinnacle West. *See* Marquez
23 Dec., ¶¶ 5-6.

24 Accordingly, and pursuant to its duties under 11 U.S.C. 1104(e), the U.S. Trustee requests
25 that the Court appoint a chapter 11 trustee.

26 Dated: June 12, 2007

OFFICE OF THE UNITED STATES TRUSTEE

27 By: 
28 Jennifer L. Braun
Assistant United States Trustee

