Docket #0581 Date Filed: 10/07/2020

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

In re	§	**Chapter 11**
	§	
CFO MANAGEMENT HOLDINGS, LLC,[1]	§	**Case No. 19-40426**
	§	
Debtor.	§	
	§	

CHAPTER 11 TRUSTEE'S MOTION FOR
SUBSTANTIVE CONSOLIDATION OF CERTAIN NON-DEBTOR ENTITIES

21-DAY NEGATIVE NOTICE – LBR 9007(a):

Your rights may be affected by the relief sought in this pleading. You should read this pleading carefully and discuss it with your attorney, if you have one in this bankruptcy case. If you oppose the relief sought by this pleading, you must file a written objection, explaining the factual and/or legal basis for opposing the relief.

No hearing will be conducted on this Application unless a written objection is filed with the Clerk of the United States Bankruptcy Court and served upon the party filing this pleading WITHIN TWENTYONE (21) DAYS FROM THE DATE OF SERVICE shown in the certificate of service unless the Court shortens or extends the time for filing such objection. If no objection is timely served and filed, this pleading shall be deemed to be unopposed, and the Court may enter an order granting the relief sought. If an objection is filed and served in a timely manner, the Court will thereafter set a hearing with appropriate notice. If you fail to appear at the hearing, your objection may be stricken. The Court reserves the right to set a hearing on any matter.

NOTWITHSTANDING THE ABOVE, please take notice that the Trustee is separately filing a request to have a hearing set on this motion on an EXPEDITED basis, including a request for an expedited objection deadline. Please check the docket in this case for the current status of this motion.

[1] The following entities' bankruptcy cases and estates have been substantively consolidated with that of Debtor CFO Management Holdings, LLC (EIN# XX-XXX6987) for all purposes (see Docket No. 248): Carter Family Office, LLC (Case No. 19-40432); Christian Custom Homes, LLC (Case No. 19-40431); Double Droptine Ranch, LLC (Case No 19-40429); Frisco Wade Crossing Development Partners, LLC (Case No. 19-40427); Kingswood Development Partners, LLC (Case No. 19-40434); McKinney Executive Suites at Crescent Parc Development Partners, LLC (Case No. 19-40428); North-Forty Development LLC (Case No. 19-40430); and West Main Station Development, LLC (Case No. 19-40433). The following mailing address can be used for the consolidated Debtor with respect to these cases: c/o David Wallace, Chapter 11 Trustee, 4131 North Central Expressway, Suite 775, Dallas, Texas 75204.

David Wallace, Chapter 11 Trustee (the "Trustee") for the above-captioned bankruptcy case of CRO Management Holdings, LLC (the "Debtor"), files this *Motion for Substantive Consolidation of Certain Non-Debtor Entities* (this "Motion") and, in support thereof, respectfully represent as follows:

PRELIMINARY STATEMENT

1. During this bankruptcy case, it has been repeatedly shown that the pre-petition activities of the Debtor's now substantively consolidated affiliates (as listed in Footnote No. 1 to this Motion, the "Subsidiary Debtors") were "extreme and unusual" in nature. As was the case when the Trustee filed his initial substantive consolidation motion regarding the Debtor and the Subsidiary Debtors last year, the Trustee has become aware of such extreme and unusual circumstances warranting the Court's application of its equitable powers to substantively consolidate two non-debtor entities that were actively engaged in the same Phillip Carter enterprise that led to the filing of the Debtor and Subsidiary Debtors' bankruptcy cases. These non-debtor entities are named Prosper Flex Development Partners, LLC ("Prosper Flex") and Texas Cash Cow Investments, Inc. ("Texas Cash Cow," together with Prosper Flex, the "Non-Debtor Entities"). The Trustee is not seeking this relief lightly but in response to the realities of this case and in furtherance of the execution of his duties to the Debtor's estate and creditors. Like the previously substantively consolidated Subsidiary Debtors, the Non-Debtor Entities engaged in the same Phillip Carter enterprise, used and intermingled the same funds (including funds from certain "Investors," as defined below), and were operated without regard for the corporate formalities that would justify their separate existence. Here where significant harm will be done to the Debtor's estate and creditors should the superficial separation between the Non-Debtor Entities and the Debtor be maintained, substantive consolidation is the only means to facilitate a fair and efficient result for the administration of Debtor's estate. Commingling of funds, failure to maintain separate

books and records, redirection of Investor payments, and failure to account for intercompany transactions all reinforce the common identity of the Debtor and Non-Debtor Entities, regardless of the different names used during the course of business operations. Such activity makes an accurate separation of the assets and liabilities of the entities likely impossible. And seeking to maintain such separation would be costly and detrimental to creditors as estate funds would be depleted by fighting over false distinctions between Texas Cash Cow and Debtor liabilities or by less clarity on the ownership of assets, such as any causes of action related to the 2017 transfer of Prosper Flex's main asset, the Prosper Business Park. As described in more detail below, substantive consolidation of the Debtor and Non-Debtor Entities is necessary to avoid those harms, provide benefits to the estate, and ultimately improve creditor recoveries in these cases. Therefore, the Trustee believes that substantive consolidation is in the best interest of the Debtor's estate and creditors and respectfully requests that the Court use its equitable powers to this end.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this Motion under 28 U.S.C. § 1334(b). This Court can hear and determine this matter in accordance with 28 U.S.C. § 157 and the standing order of reference of bankruptcy cases and proceedings in this District. This matter is a core proceeding, and venue for this Motion is proper in this district under 28 U.S.C. §§ 1408 and 1409.

BACKGROUND

A. Bankruptcy Case Background

3. On February 17, 2019 (the "Petition Date"), the Debtor and its subsidiaries (as listed in Footnote 1 in this Application, the "Subsidiary Debtors," including Frisco Wade Crossing Development Partners, LLC, "FWC," and McKinney Executive Suites at Crescent Parc Development Partners, LLC, "MES") each commenced a case under chapter 11 of the Bankruptcy Code (collectively, the "Bankruptcy Cases" and, as consolidated, the "Bankruptcy Case").

4. On February 28, 2019, the Office of the United States Trustee formed an Official Unsecured Creditors' Committee (the "Committee"), appointing five members to serve. See Docket No. 58.

5. On April 4, 2019, the Court entered an order requiring that a chapter 11 trustee be appointed in the Bankruptcy Cases. See Docket No. 140. On April 10, 2019, the United States Trustee for the Bankruptcy Cases filed a notice of the appointment of David Wallace as Chapter 11 Trustee for the Debtor and Subsidiary Debtors' estates. See Docket No. 143. On April 24, 2019, the Court entered its order granting the United States Trustee's application to approve the appointment of David Wallace as Chapter 11 Trustee. See Docket No. 153.

6. On August 15, 2019, the Court entered an order substantively consolidating the Debtor and Subsidiary Debtors and their estates for all purposes under the name and case of the Debtor, CFO Management Holdings, LLC. See Docket No. 248.

7. On May 27, 2020, the Trustee filed his proposed *Second Amended Plan of Liquidation for Debtor CFO Management Holdings, LLC* (as may be further amended, modified, and supplemented, the "**Plan**") and *Disclosure Statement Under 11 U.S.C. § 1125 in Support of the Chapter 11 Trustee's Second Amended Plan of Liquidation.* See Docket Nos. 444 and 445. On July 22, 2020, the Court entered an order, among other things, approving the Disclosure Statement and scheduling an October 20, 2020 hearing for confirmation of the Plan. See Docket No. 508.

B. Pre-Petition Transactions, Books and Records, and Creditor Interactions

8. The Subsidiary Debtors and the Non-Debtor Entities were each at one time wholly-owned and controlled by Phillip Carter and/or by entities that Mr. Carter controlled, managed, and/or owned. Mr. Carter's business focused on real estate development, with each of the

Subsidiary Debtors (other than North-Forty Development, LLC and Carter Family Office, LLC) and Prosper Flex each owning particular real estate assets in either Texas or Oklahoma. Specifically, Prosper Flex, a Texas limited liability company formed in 2015 by Mr. Carter, with the PC Legacy Two Trust (another Phillip Carter-related entity) as its initial member, was the entity set up to own the deed to Prosper Business Park, a real estate development of flex office and warehouse space located southeast of North Dallas Parkway and Prosper Trail on Cook Lane in Prosper, Texas ("Prosper Business Park"). It has been alleged that Mr. Carter represented to investors that the Prosper Business Park project had an estimated land value of more than $16 million and an estimated completed value of $75 million at the time of the investor-related activities described below.

9. Debtor records and information provided by the Securities and Exchange Commission (the "SEC") and the Texas State Securities Board support the allegation that, starting in or before July 2015 and continuing through at least February 2017, Mr. Carter, through and with other individuals, raised over $40 million from more than 270 noteholders across the United States (the "Investors"). In addition to such funds being used in Mr. Carter's real estate enterprise, it has been alleged (in, among other places, a January 25, 2019 complaint filed against Mr. Carter by the SEC), that Mr. Carter misappropriated Investor funds, using the funds to finance his own expenses, operate a luxury hunting ranch in Oklahoma (an asset held in the name of Subsidiary Debtor Double Droptine Ranch, LLC), and to pay certain Investors to perpetuate the alleged fraudulent scheme. More background information about this scheme is contained in paragraphs 15 through 26 of the amended complaint [Docket No. 28] filed in Adversary No. 20-04054, with such paragraphs incorporated herein by reference.

10. In exchange for their payment towards Mr. Carter's real estate enterprise (allegedly often described as an investment in one or more of the particular real estate properties), Investors received promissory notes. Texas Cash Cow, a Texas corporation formed by Mr. Carter in 2007 and owned and managed by Mr. Carter as President, was the main entity used by Mr. Carter for soliciting and/or receiving investments prior to him switching to the use of Subsidiary Debtor entity North-Forty Development, LLC ("North-Forty") for such purpose. Many of the promissory notes given in exchange for amounts paid by the Investors were not technically in the name of Texas Cash Cow or any Subsidiary Debtor entity, even though funds received went to such entities. The notes were instead generally made in the names of entities created by Bob Guess, an individual who has since been convicted for his role in defrauding Investors and who used entity names similar to Texas Cash Cow and North-Forty in the investment activities that gave rise to the claims in this Bankruptcy Case. The funds received from Investors, however, either went directly to Texas Cash Cow or North-Forty or through Bob Guess's company Texas First Financial (not a Debtor affiliate) to one of those entities for the benefit of Carter and his business enterprise. For example, Texas Cash Cow had a Legend Bank (account ending in 6738) into which Subsidiary Debtor Christian Custom Homes, LLC ("CCH") initially deposited funds in July 2015. Over the following months, several million dollars in Investor funds were deposited into the account, with Prosper Flex and Subsidiary Debtors FWC and CCH receiving a few large payments from the account (over $3 million to Prosper Flex, $700,000 to FWC, and over $1 million to CCH). In December 2015 and January 2016, the remaining funds (over $1 million) were transferred to North-Forty and, within days of that transfer, then transferred to an account held by MES. Such account activity continued between North-Forty and the other entities in the years that followed. No matter how the funds came in, there is no evidence that corporate formalities were adhered to

or that intercompany claims were separately documented for all of the movement of such funds between the Subsidiary Debtors and the Non-Debtor Entities, collectively.

11. On August 5, 2016, Mr. Carter filed a "Certificate of Termination" for Texas Cash Cow with the Texas Secretary of State's office citing a voluntary decision to wind up the entity.

12. On or before early 2017, following the Investor-related activities discussed above, Crossland Construction Company, Inc. ("Crossland"), the contractor on the real estate projects held in the names of Prosper Flex (i.e. the Prosper Business Park) and Subsidiary Debtors FWC (i.e. the project previously referred to in this case as the "FWC Development" or "Frisco Wade Crossing") and MES (i.e. the project previously described in this case as "Crescent Parc"), engaged in certain disputes with Mr. Carter over the construction projects, culminating in Crossland filing suit against those two Subsidiary Debtors[2] and entering into arbitration with Prosper Flex. By agreements dated July 28, 2017, Crossland, Prosper Flex, FWC, and MES entered into a settlement through which Prosper Flex sold the Prosper Business Park to Crossland for $18.8 million, consisting of approximately $10 million in cash and certain credits related to the release or assignment (to North-Forty for subsequent release) of certain liens Crossland allegedly held against the FWC and MES projects and Crossland's agreed dismissal of the pending suits described above. The check for the cash portion of the settlement amount was made out to Prosper Flex and North-Forty. Based on bank records, it appears that these funds were deposited into a Prosper Flex account, which was then depleted over the course of the following year by transfers to the accounts of Subsidiary Debtors, North-Forty, Christian Custom Homes, LLC, Carter Family

[2] On March 2, 2017, Crossland filed suit in the 429th Judicial District Court of Collin County, Texas, Cause No. 429-01033-2017, for breach of contract, among other things, claiming that FWC owed Crossland over $1.9 million for labor and materials furnished in connection with the FWC Development. On March 2, 2017, Crossland filed a similar suit against MES, Cause No. 429-01040-2017 in the same Collin County court.

Office, LLC, and Double Droptine Ranch, LLC, as well as by transfers to personal accounts held by Phillip Carter.

13. On or about January 18, 2019, CFO Management Holdings, LLC was created to hold and manage the underlying assets of the Subsidiary Debtors. At the same time as the creation of the holding company, Mr. Carter surrendered his control and management over the Subsidiary Debtors, and SierraConstellation Partners, LLC, an interim management and advisory firm, and its founder and CEO Lawrence Perkins took over management of the Debtor's businesses and prepared them for chapter 11 bankruptcy. As noted above, soon after the Petition Date, the Court appointed the Trustee to take over administration of the Bankruptcy Case.

14. In the months following his appointment, the Trustee and his professionals reviewed available documents and records regarding the Subsidiary Debtors' assets, liabilities, contracts, transactions, and other activities engaged in prior to the Bankruptcy Cases and the Trustee's appointment. During that time, it has become evident that the entities were operated not as separate and distinct entities but as part of the bigger real estate development enterprise of Mr. Carter. This lead to the Trustee's initial substantive consolidation motion and, ultimately, the substantive consolidation of the Subsidiary Debtor entities into the Debtor.

15. Since that time, the Trustee and his professionals have had the opportunity to delve deeper into the financial and related history of the Subsidiary Debtors and, in doing so, have seen the similar financial integration and lack of corporate formalities between the Subsidiary Debtors and the Non-Debtor Entities. For example, the documents and records that the Trustee has for the Carter enterprise include documents for both Texas Cash Cow and Prosper Flex, with emails relating to those entities sent from the Carter enterprise's email servers and/or Mr. Carter's msn.com email address. Funds were transitioned to and from the Non-Debtor Entities in the same

fashion as between the Subsidiary Debtors. As described above, the Crossland settlement involved FWC and MES receiving releases but Prosper Flex and North-Forty paid funds in exchange for the Prosper Flex asset. Further, a review of the claims filed in this Bankruptcy Case shows that the dozens of Investors who made payments to the Carter entities in 2015 generally did so through Texas Cash Cow and were given a corresponding promissory note (though, as noted above, such notes were often in the name of a closely named entity held by Bob Guess). Carter and his employees made no apparent distinction between those Investors who gave funds through Texas Cash Cow or those who gave funds through North-Forty both in how those funds were treated and in how they represented to such creditors that they would be paid from the sale of now-Debtor assets. All of these events and pre-Petition Date habits of the Non-Debtor Entities and Subsidiary Debtors have led to the Trustee to believe that substantive consolidation is the most appropriate path forward to both acknowledge the reality in how business was conducted through these entities and to avoid the costs and inefficiencies related to perpetuating this "on-paper" difference and separation between the Non-Debtor Entities and Subsidiary Debtors.

16. The Trustee is not aware of any currently separate assets or liabilities held by the Non-Debtor Entities other than potential causes of action associated with the Crossland transaction that would become an asset of the estate to the extent that they could not be considered pursuable by the Trustee at this time. As to the Non-Debtor Entities' liabilities, the Trustee does not deny that Investors whose funds went into the Carter enterprise through Texas Cash Cow (versus North-Forty following transition to use of that entity for solicitation and transfer of funds) are creditors of the estate to the extent that they are unpaid. And to the extent such Investors were paid pre-Petition Date, the Trustee believes the Debtor's estate should have the right to pursue actions appropriate to avoid "net winners" in the Ponzi-scheme context of these cases. Notably, almost

all of the Investor creditors in this case are in the same boat, as they have promissory notes in the name of non-Debtor entities but put funds into the Carter businesses and were promised repayment. The Trustee believes that any attempt to deny the status of such Investors as creditors of the estate would be costly and futile, provided that such funds were actually paid and remain unpaid. Because of this reality and because the substantive consolidation should not expose the estate to additional liabilities, the Trustee believes that this is the best path forward for the estate and all creditors.

RELIEF REQUESTED

17. By this Motion, the Trustee respectfully requests that the Court exercise its equitable powers to substantively consolidate Prosper Flex and Texas Cash Cow with the Debtor for all purposes. While the substantive consolidation of Texas Cash Cow is also proposed to be completed through the Plan,[3] the Trustee believes that this Motion further clarifies the benefit and factual background pertinent to that request and seeks a separate order for substantive consolidation of both of the Non-Debtor Entities (as such an order of additional entities is also contemplated in the Plan).

BASIS FOR RELIEF

A. This Court has the authority to substantively consolidate the Non-Debtor Entities with the Debtor.

18. Substantive consolidation is a judicially created doctrine derived from the general equitable powers of bankruptcy courts provided in § 105(a) of the Bankruptcy Code. *Chem. Bank N.Y. Trust Co. v. Kheel*, 369 F.2d 845, 847 (2d Cir. 1966); *In re ADPT DFW Holdings, LLC*, 574 B.R. 87, 91-92 (Bankr. N.D. Tex. 2017). The doctrine allows a bankruptcy court to consolidate

[3] Substantive consolidation is an act that can appropriately take place in connection with plan confirmation. *See, e.g.*, *In re Introgen Therapeutics*, 429 B.R. 570, 587 (Bankr. W.D. Tex. 2010).

the assets and liabilities of separate legal entities and to treat those assets and liabilities as held and incurred by a single entity. *Id*. A basis for this ability stems from the Supreme Court decision of Sampsell v. Imperial Paper & Color Corp., 313 U.S. 215, 219 (1941), in which the Supreme Court "recognized that the consolidation of different but related estates was a vital tool in fulfilling a fundamental purpose of bankruptcy proceedings." *ADPT DFW Holdings*, 574 B.R. at 91. When consolidation takes place outside of the plan process, section 105 provides the statutory basis for the doctrine. *Id*. at 93.[4]

19. While the Fifth Circuit has stated that substantive consolidation is "an extreme and unusual remedy," the Fifth Circuit has also acknowledged that bankruptcy courts have the authority to order substantive consolidation. *S.I. Acquisition, Inc. v. Eastway Delivery Serv. Inc. (In re S.I. Acquisition Inc.)*, 817 F.2d 1142, 1145 n.2 (5th Cir. 1987); *see also Bank of New York Trust Co., NA v. Official Unsecured Creditors' Comm. (In re Pacific Lumber Co.)*, 584 F.3d 229, 249 (5th Cir. 2009) (citing In re Gandy, 299 F.3d 489, 499 (5th Cir. 2002)) (while holding that plan of reorganization did not substantively consolidate debtor entities, the Fifth Circuit acknowledged the existence of substantive consolidation and did not question the authority of the bankruptcy court to order such remedy); *Wells Fargo Bank v. Sommers (In re Amco Ins.)*, 444 F.3d 690, 696 n.5 (5th Cir. 2006) (noting in a non-plan context that substantive consolidation "is an extreme and unusual remedy"); *In re Introgen Therapeutics*, 429 B.R. 570, 581-82 (Bankr. W.D. Tex. 2010) (discussing Fifth Circuit's acknowledgment of the bankruptcy court's authority to order substantive consolidation).

[4] Within the context of a bankruptcy plan, § 1123(a)(5)(C) also provides a statutory basis for substantive consolidation, as it allows the "merger or consolidation of the debtor with one or more persons" through a chapter 11 plan. *Id*.

20. A substantive consolidation analysis is a "highly fact specific analysis that must be made on case-by-case basis." *In re Permian Producers Drilling, Inc*., 263 B.R. 510, 517-18 (W.D. Tex. 2000). There is no universally accepted standard for substantive consolidation, *Introgen Therapeutics*, 429 B.R. at 581-82, but over the years, two main standards have developed in case law: "(1) a more traditional, multi-factor test (which ultimately gets distilled down to two critical factors); and (2) a balancing of harm test." *ADPT DFW Holdings*, 574 B.R. at 94. The Fifth Circuit Court of Appeals has not adopted a particular test for substantive consolidation, and courts in the Fifth Circuit have looked to both tests for guidance in determining whether substantive consolidation was appropriate. *See, e.g., id*. at 91, 104 (considering both tests); *Permian Producers*, 263 B.R. at 517-18 (same).

21. Most courts that have addressed substantive consolidation as applied to non-debtor entities have determined that the same equitable powers used for and the same tests and standards applied to the substantive consolidation of debtor entities in a bankruptcy case also permit the substantive consolidation of non-debtor entities in a bankruptcy case. *See, e.g., Roberts v. J. Howard Bass & Assocs., Inc. (In re Bass)*, Nos. 09-11451-CAG, 10-01101- CAG, 2011 Bankr. LEXIS 555, at *33-35 (Bankr. W.D. Tex. 2011) (acknowledging that a debtor and non-debtor may be substantively consolidated if the facts warrant). As might be expected, more caution is warranted in the decision to substantively consolidate a non-debtor entity. *See, e.g,, In re E'Lite Eyewear Holding, Inc*., No. 08-41374, 2009 Bankr. LEXIS 297, at *7-8 (Bankr. E.D. Tex. 2009) (discussing how the courts are divided on whether to allow consolidation of a debtor with a non-debtor, but determining that it is allowed, just with more caution than with a substantive consolidation between two debtors) ("[A]s careful as the courts must be in allowing substantive consolidation of debtors to occur …, the caution must be multiplied exponentially in a situation

where a consolidation of a debtor's case with a non-debtor is attempted.") (quoting *Morse Operations, Inc. v. Robins Le-Cocq, Inc. (In re Lease-A-Fleet, Inc.)*, 141 B.R. 869, 872 (Bankr. E.D. Pa. 1992) (emphasis in original)). But the allowance of such a remedy recognizes the reality that, in such an instance, the entities are not a non-debtor and a debtor but rather the same entity. *Rodriguez v. Boyd (In re Boyd)*, No. 11-51797, 2012 Bankr. LEXIS 4969, at *11 (Bankr. W.D. Tex. 2012) ("In essence, by piercing (or reverse-piercing) the corporate veil, the party establishes that the two entities are legally the same, not two different entities. Therefore, they are not really debtor and non-debtor, but simply one debtor.") (citing *In re Pearlman*, 462 B.R. 849, 855 (Bankr. M.D. Fla. 2012)).

B. Substantive consolidation of the Non-Debtor Entities is appropriate under the traditional multi-factor test.

22. Under the traditional multi-factor test, courts look to a long list of factors in determining whether substantive consolidation is appropriate, with no single factor or group of factors being determinative. *In re AHF Development*, 462 B.R. 186, 195-96 (Bankr. N.D. Tex. 2011). These factors include:

- the presence or absence of consolidated financial statements;
- the unity of interests and ownership between the various corporate entities;
- the existence of parent and intercorporate guaranties on loans;
- the degree of difficulty in segregating and ascertaining individual assets and liabilities;
- the transfer of assets without formal observance of corporate formalities;
- the commingling of assets and business functions;
- the profitability of consolidation at a single physical location;
- the parent corporation owns all or a majority of the capital stock of the subsidiary;
- the parent and subsidiary have common officers and directors;
- the parent finances the subsidiary;
- the parent is responsible for incorporation of the subsidiary;
- the subsidiary has grossly inadequate capital;

- the parent pays salaries, expenses, or losses of the subsidiary;
- the subsidiary has substantially no business except with the parent;
- the subsidiary has essentially no assets except for those conveyed by the parent;
- the parent refers to the subsidiary as a department or division of the parent;
- the directors or officers of the subsidiary do not act in interests of the subsidiary, but take directions from the parent;
- the formal legal requirements of the subsidiary as a separate and independent corporation are not observed; and
- the transfer of assets without formal observance of corporate formalities.

23. These factors have been distilled down to two critical factors: "(1) whether creditors dealt with the entities as a single economic unit and did not rely on their separate identity in extending credit . . . ; or (2) whether the affairs of the debtors are so entangled that consolidation would benefit all creditors." *ADPT DFW Holdings*, 574 B.R. at 95-96 (citing *Union Sav. Bank v. Augie/Restivo Baking Co., Ltd. (In re Augie/Restivo Baking Co., Ltd.)*, 860 F.2d 515, 519 (2d Cir. 1988)). These two critical factors have also been phrased slightly different in the Third Circuit, reading as follows: "(i) [whether] prepetition the debtors disregarded separateness so significantly their creditors relied on the breakdown of entity borders and treated them as one legal entity, or (ii) whether postpetition their assets and liabilities are so scrambled that separating them is prohibitive and hurts all creditors." *Id.* at 98 (quoting *In re Owens Corning*, 419 F.3d 195, 211 (3d Cir. 2005)). "The presence of either factor provides a sufficient basis to order consolidation." *Permian Producers*, 263 B.R. at 518.

24. Substantive consolidation is appropriate in these cases when analyzing the Non-Debtor Entities under the above "distilled" factors. It appears that many Investors and other creditors ultimately dealt with the Non-Debtor Entities as part of the larger economic unit of entities under the control of Mr. Carter. Entity boundaries between the Non-Debtor Entities and the Subsidiary Debtors were disregarded for the purposes of cash management, with funds flowing

between those entities without accompanying accounting records for such "intercompany" transactions, as evidenced by the fact that the books and records of the Subsidiary Debtors had to be constructed in early 2019 in preparation for this Bankruptcy Case. The Investor creditors were given materials noting their investments were in several real estate developments, and Investor funds were moved to different Carter projects despite where originally deposited. Each of these realities support the notion that the separate legal nature of the Non-Debtor Entities within the Carter business enterprise was not respected and that, therefore, any attempt to separate the assets and liabilities of the entities and the Debtor would be futile and harmful to creditors as a whole.

25. Individual factors in the larger list also support the substantive consolidation of the Non-Debtor Entities and the Debtor. For example, there has historically been a unity of interests and ownership between the Subsidiary Debtors and the Non-Debtor Entities as they were all owned, controlled, and managed by Mr. Carter. There was regular comingling of funds and obligations, with funds being transferred between real estate projects or with payment of one entity's obligation being paid out of the funds of a "separate" Carter entity without formal observance of corporate formalities. These facts and those discussed in more detail above, among others, support the Trustee's belief that substantive consolidation of the Non-Debtor Entities is warranted in this case—even when more caution is applied in the non-debtor context.

C. Substantive consolidation of the Non-Debtor Entities is also appropriate under the harm-balancing test.

26. Under the harm-balancing test, courts often look to certain elements from the traditional multi-factor test but ultimately balance the harms or prejudice that would result from substantive consolidation. *ADPT DFW Holdings*, 574 B.R. at 100 (citing examples). The party proposing substantive consolidation "must first show identity between the entities to be consolidated, and then show that consolidation is necessary in order to prevent harm or prejudice,

or to effect a benefit generally." *Introgen Therapeutics*, 429 B.R. at 584 (citing *Permian Producers*, 263 B.R. at 518); *Eastgroup Properties v. Southern Motel Assoc., Ltd*., 935 F.2d 245, 249 (11th Cir. 1991) (movant must demonstrate: "(1) there is substantial identity between the entities to be consolidated; and (2) consolidation is necessary to avoid some harm or to realize some benefit"). After that showing, a creditor may object and defeat consolidation "by showing that it relied on the separateness of the debtors in extending credit and would thereby suffer harm by consolidation." *Introgen Therapeutics*, 429 B.R. at 584. Then the court will consider whether the benefit outweighs the harm and, if it does, will order consolidation. *Id.*

27. In this instance, substantive consolidation would provide all creditors with several benefits, while avoiding certain key harms. Substantive consolidation would clearly establish the Trustee's authority to pursue avoidance actions relating to the activities that the Carter business enterprise conducted through the Non-Debtor Entities. This provides a potential monetary benefit to the estate for the benefit of creditors. That benefit is warranted given the way the Carter enterprise intermingled and applied payments received by creditors of the estate. The manner in which these entities operated as one overall operation, notwithstanding Mr. Carter's attempt to have real estate assets owned by separate entities, dictates this approach to avoid the inequitable result of allowing similarly situated creditors to be treated differently based on whether they made a payment to Mr. Carter's business in, for example, September 2015 versus February 2016. In the former month, such funds would have come through Texas Cash Cow and in the latter month through North-Forty. The funds in either case were used for various real estate projects owned by either Prosper Flex or a Subsidiary Debtor or for other personal or business purposes of Mr. Carter. Any attempt by the Trustee to deny "creditor" status to the dozens of claimants who paid funds

into the Carter enterprise through Texas Cash Cow[5] would cost the estate significant administrative fees and require the Trustee to take a very insecure legal position. Similarly, Mr. Carter's use of funds from various sources for the Prosper Business Park without respecting corporate distinctions justifies an estate interest and preserves potential benefit for the estate. Finally, the Trustee is not aware of any creditors of either Texas Cash Cow or Prosper Flex who are not already involved in and/or aware of this Bankruptcy Case. Therefore, the substantive consolidation of the Non-Debtor Entities not only better comports with reality but does not carry with it concerns about prejudice to those creditors of the estate who are currently recognized as such.

28. Ultimately, maintaining a separation between the Debtor and the Non-Debtor Entities does not align with the realities of the case and causes harm to the estate and creditors in the form of significant administrative costs (to attempt to deny creditor status to claimants whose funds went into the Carter enterprises and properties) and the form of the causes of action that may otherwise be outside of the Trustee's reach for the benefit of the estate. Just as the original substantive consolidation in this bankruptcy case, the consolidation proposed in the Plan and in this Motion attempt to rectify these issues for the benefit of the estate and creditors.

WHEREFORE, the Trustee requests an order granting the relief requested herein substantially in the form of the proposed order submitted herewith, ordering that the Non-Debtor

[5] In a recent objection to the Plan [Docket No. 577], CPIF Lending, LLC raised an issue with the fact that Texas Cash Cow is a voluntarily terminated entity. However, this should not be a hindrance to the Court's applying its equitable power to substantively consolidate the entity. First, courts have permitted the substantive consolidation of terminated entities in the past. *See Alexander v. Compton (In re Bonham)*, 229 F.3d 750, 759 (9th Cir. 2000) (affirming bankruptcy court's substantive consolidation of a dissolved non-debtor entity and a non-debtor entity not registered to do business in the state in question where such consolidation was appropriate under the normal substantive consolidation analysis). Next, equity further dictates that the filing of a termination statement by the purported wrongdoer should not affect the ability of those who made payments through such a terminated entity to recover on account of the resulting claims.

Entities be substantively consolidated with the Debtor, and granting such further relief as the Court may deem just and proper.

Dated: October 7, 2020

By: */s/ Judith W. Ross*

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COUNSEL TO CHAPTER 11 TRUSTEE DAVID WALLACE

CERTIFICATE OF SERVICE

I certify that on October 7, 2020, I served or caused to be served a copy of the foregoing document (i) electronically on the Electronic Case Filing System for the United States Bankruptcy Court for the Eastern District of Texas and (ii) for mailing the following day, via first class mail by noticing agent Kurtzman Carson Consultants LLC ("KCC") on the parties listed on the Certificate of Service to be filed upon receipt from KCC.

/s/ Jessica Lewis
Jessica Lewis

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

In re	§	**Chapter 11**
CFO MANAGEMENT HOLDINGS, LLC,[1]	§	**Case No. 19-40426**
Debtor.	§	

ORDER GRANTING CHAPTER 11 TRUSTEE'S MOTION FOR SUBSTANTIVE CONSOLIDATION OF CERTAIN NON-DEBTOR ENTITIES

On the *Motion for Substantive Consolidation of Certain Non-Debtor Entities* (the "Motion")[2] filed by David Wallace, Chapter 11 Trustee (the "Trustee") for the above-captioned bankruptcy case of CRO Management Holdings, LLC (the "Debtor"), requesting an order substantively consolidating non-debtor entities Texas Cash Cow Investments, Inc. and Prosper Flex Development Partners, LLC (together, the "Non-Debtor Entities") for all purposes, including distributions to creditors, all as more fully set forth in the Motion; the Court finds the following:

(a) The Court has jurisdiction over this matter under 28 U.S.C. § 1334;

(b) The Court can hear and determine the Motion in accordance with 28 U.S.C. § 157 and the District Court's standing order of reference;

(c) This is a core proceeding under 28 U.S.C. § 157(b);

[1] The following entities' bankruptcy cases and estates have been substantively consolidated with that of Debtor CFO Management Holdings, LLC (EIN# XX-XXX6987) for all purposes (see Docket No. 248): Carter Family Office, LLC (Case No. 19-40432); Christian Custom Homes, LLC (Case No. 19-40431); Double Droptine Ranch, LLC (Case No 19-40429); Frisco Wade Crossing Development Partners, LLC (Case No. 19-40427); Kingswood Development Partners, LLC (Case No. 19-40434); McKinney Executive Suites at Crescent Parc Development Partners, LLC (Case No. 19-40428); North-Forty Development LLC (Case No. 19-40430); and West Main Station Development, LLC (Case No. 19-40433). The following mailing address can be used for the consolidated Debtor with respect to these cases: c/o David Wallace, Chapter 11 Trustee, 4131 North Central Expressway, Suite 775, Dallas, Texas 75204.

[2] Capitalized terms used and not otherwise defined herein shall have the meanings ascribed to them in the Motion.

(d) Venue of this proceeding and the Motion is proper pursuant to 28 U.S.C. §§ 1408 and 1409;

(e) The relief requested in the Motion is in the best interest of the Debtor's estates, its creditors, and other parties in interest;

(f) The Trustee has provided adequate notice of the Motion and the opportunity for hearing on the Motion under the circumstances and for the purpose of the relief requested, and no other or further notice is required beyond what is required by this Order;

(g) The Court reviewed the Motion and heard statements in support of the Motion at a hearing held before the Court (the "Hearing");

(h) The legal and factual bases set forth in the Motion and at the Hearing establish just cause for the relief granted herein; and

(i) Any objections to the relief requested herein have been withdrawn or overruled on the merits.

Having reviewed the Motion and heard the statements in support of the relief requested therein at a hearing, if any, before the Court, and after due deliberation and sufficient cause appearing therefor, IT IS HEREBY ORDERED THAT:

(1) The Motion is GRANTED to the extent provided herein;

(2) The Non-Debtor Entities are substantively consolidated with the Debtor for all purposes;

(3) All intercompany claims, if any, by, between, and among the Debtor and Non-Debtor Entities are hereby extinguished;

(4) All assets and liabilities, respectively, of the Non-Debtor Entities are hereby merged (or treated as if they were merged) with the assets and liabilities of the Debtor and each other;

(5) All claims based on guarantees of collection, payment, or performance made by a Non-Debtor Entity as to an obligation of the Debtor or by the Debtor as to an obligation of a Non-Debtor Entity are hereby released and of no further force and effect;

(6) The Trustee is authorized and empowered to take all actions necessary to implement the relief granted in this Order; and

(7) This Court shall retain jurisdiction to hear and determine all matters arising from or related to the implementation, interpretation and/or enforcement of this Order.