

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

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IN RE: GORDON PROPERTIES, LLC, : Case Number 09-18086
Debtor. : (Chapter 11)

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GORDON PROPERTIES, LLC, :
Plaintiff, :

v. : APN 11-01020-RGM

FIRST OWNERS ASSOCIATION OF FORTY-SIX :

HUNDRED, ET AL., :

Defendant. :

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Monday, July 25, 2011

U.S. Bankruptcy Court

Alexandria, Virginia

The above-entitled matter came on to be heard before THE HONORABLE ROBERT G. MAYER, Judge in and for the United States Bankruptcy Court, for the Eastern District of Virginia, Alexandria Division, beginning at approximately 9:38 a.m.

Diversified Reporting Services, Inc.

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APPEARANCES:

On Behalf of the Defendant:

JENNIFER SARVADI, ATTORNEY AT LAW

ELIZABETH EBANKS, ATTORNEY AT LAW

On Behalf of Plaintiff:

DONALD F. KING, ESQUIRE

C O N T E N T S

					FURTHER	FURTHER
WITNESS	DIRECT	CROSS	REDIRECT	RECROSS	REDIRECT	RECROSS
James Claggett	14	27	32			
Dewanda Cuadros	34	51	64	69	70	73
					74	78
						82
Robert Diamond	84	98				
Bryan Sells	100	110	119	127		
James Claggett	130	132				
(Recalled)						

E X H I B I T S

	MARKED FOR IDENTIFICATION	IN EVIDENCE
Plaintiff Exhibit 1		128
Plaintiff Exhibit 2		128
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Plaintiff Exhibit 10	21	21, 128
Plaintiff Exhibit 11	35	69, 128

1 P R O C E E D I N G S

2 THE CLERK: The matter on this morning's docket is
3 Gordon Properties, LLC v. First Owners Association of Forty-
4 Six Hundred, Case Number 11-1020.

5 MR. KING: Good morning, Your Honor. Donald King
6 for the plaintiff, Gordon Properties.

7 MS. SARVADI: Good morning, Your Honor. Jennifer
8 Sarvadi and my colleague, Elizabeth Ebanks, on behalf of the
9 defendant.

10 THE COURT: Good morning.

11 MR. KING: I think we need a rule on witnesses,
12 Your Honor. I think the plaintiff is entitled to one
13 representative. I gather, since Mr. Claggett is sitting at
14 the table, he's their representative. Miss Cuadros has been
15 subpoenaed and she's a witness.

16 MS. SARVADI: Yes, Your Honor, she is.

17 MR. KING: We have one other witness subpoenaed,
18 Mr. Diamond. Miss Sarvadi advised me that he was flying in
19 today. We haven't heard anything but he is under subpoena.
20 I'm hoping he's going to be here.

21 MS. SARVADI: When I communicated with him last
22 week, he indicated he would be here. He was on the redeye
23 from California landing at BWI this morning and he said he
24 would come as soon as he arrived.

25 THE COURT: We may be here at 5:00. I don't know

1 about much after.

2 MS. SARVADI: That's all I can represent.

3 THE COURT: All right. Now, we just have Miss
4 Cuadros who's the only one present?

5 MS. SARVADI: Yes, Your Honor.

6 MR. KING: She's the only witness in the room.
7 Yes, Your Honor.

8 THE COURT: Miss Cuadros, you've been subpoenaed as
9 a witness. I'm going to ask that you sit across the hall and
10 wait to be called. The purpose of that is to get your
11 testimony independently of what might be said or heard.
12 You're not to talk to anyone about your testimony or what
13 they testified to until you're released. All right. Thank
14 you. And we will need to watch for Mr. Diamond.

15 One thing other before we get started, a couple of
16 procedural issues. First of all, as far as the scope of the
17 hearing, this is on count one only. It's a violation of the
18 automatic stay. If the decision is there is no violation of
19 the automatic stay, that's the end of the hearing. We don't
20 need to do anything beyond that. If there is, the hearing
21 will also include any sanctions that may be applicable except
22 not including today any damages that the debtor assert and
23 that would include attorney fees for the purpose of bringing
24 the motion, if that would be appropriate. Those we will
25 schedule for another date. I think we may do that this

1 afternoon when we're done or on August 8th when there's a
2 pretrial on the objection to proof of claim.

3 Now, I would also like to take judicial notice of
4 the pleadings and rulings in the prior adversary proceeding
5 which is 09-1304. I recognize I'm not bound by the opinion
6 that was granted in that case.

7 The District Court and this Court of Appeals
8 properly opined, in my view, that they would be judgments,
9 not statements or rulings of the court, and the opinion that
10 you're looking at today is collateral to that. So, I don't
11 feel that I'm bound by that but there may be pleadings in
12 that that may be relevant and to the extent that is, I would
13 take notice of them. I noticed that you I think put in the
14 opinion from that which I could take judicial notice of that
15 for whatever value that may have.

16 Second, I take judicial notice of the proof of
17 claim that has been filed primarily because the declaration
18 and bylaws are attached to it and I think those are at issue.
19 I didn't see them here. I may have overlooked them.

20 MR. KING: Actually, Your Honor, they are part of
21 the exhibits in the preliminary injunction hearing and we
22 have both included as exhibits today the transcripts and I
23 was going to ask the court to take judicial notice, that it
24 would incorporate not only the testimony but the exhibits
25 submitted at that hearing.

1 THE COURT: If those declaration and bylaws are
2 elsewhere, I just wanted to make sure they were a part of the
3 record somewhere and they were attached to the proof of
4 claim. If there are two sets, one from the exhibits, I'll
5 use the one in the exhibits because that one you both have
6 looked at, damage action. And also, the summary judgment
7 motion on the objection to proof of claim, because the state
8 court record primarily is there. I don't know that it's
9 relevant to what you're doing but to the extent there's been
10 a lot of references to it, I think that sets out what the
11 court did to the extent you need to refer to it.

12 The transcripts which you just referred to, Mr.
13 King, I think are April 21st and the 25th on the preliminary
14 hearing. I understand that they are to be accepted into
15 evidence as though those parties or those witnesses were
16 present and testifying in person today, and that also
17 includes, as you were suggesting, all the exhibits that were
18 admitted at that particular time.

19 So, with that, if I have not omitted anything that
20 you need to address, you're welcome to present such further
21 evidence and argument as you wish.

22 MS. SARVADI: Nothing further except the
23 declaration and bylaws and other documents are found at
24 Plaintiff's Exhibit 12 in the original binder here.

25 THE COURT: Twelve. All right.

1 MR. KING: I was just going to say that. And Your
2 Honor, you saved me a couple of minutes because I was going
3 to ask you to take judicial notice of all that. So, you
4 saved me some time there, Your Honor. Thank you. And I'm
5 hopeful that I can suggest to the court that it's not going
6 to have to be this afternoon when you address the second
7 issue. I hope it will be this morning.

8 Donald King for the plaintiff, Gordon Properties.
9 This is the second phase of this injunction action. We had a
10 preliminary injunction hearing in April which for shorthand I
11 will refer to as the PI hearing, Your Honor. And of course,
12 today is the final hearing; and as Your Honor has already
13 indicated, we've bifurcated the monetary damage portion of
14 that.

15 So, with that, I think we should have a rather
16 short action today because really it's just the additional
17 evidence that has come to light since the PI hearing.

18 To refresh the court's recollection, Your Honor, we
19 are asking for an injunction that orders FOA to conduct its
20 annual meeting and to allow Gordon Properties all its rights
21 to vote as a unit owner.

22 Specifically, Your Honor, we're asking the court to
23 rule that enforcement of FOA's bylaw provision prohibiting
24 Gordon Properties from exercising its voting rights due to
25 its failure to pay the 2009 assessment is a violation of the

1 automatic stay.

2 We ask the court to find that FOA's conduct at the
3 2009 annual meeting was intended to deny Gordon Properties'
4 voting rights in violation of the automatic stay. We ask the
5 court to find that FOA's conduct in canceling the 2010 annual
6 meeting was intended to deny Gordon Properties' voting rights
7 in violation of the automatic stay. And we ask the court to
8 find that FOA's conduct since the PI hearing in April has
9 been intended to deny Gordon Properties' voting rights in
10 violation of the automatic stay.

11 As a remedy for these violations, Your Honor, we're
12 asking the court to outline a structure for the 2011 meeting
13 that ensures the integrity of the meeting and towards Gordon
14 Properties being provided all of its voting rights at that
15 meeting.

16 Your Honor, again we had a two-day trial on the
17 preliminary injunction. We have the transcripts and Your
18 Honor has already said all of that will be admitted.

19 With that evidence in the record, Your Honor, we
20 intend, again as I said, solely to deal with the new
21 evidence; and in short, Your Honor, we intend to introduce
22 evidence regarding the conduct that has occurred since the PI
23 hearing which we believe corroborates the evidence that we
24 previously submitted as to FOA's intentions.

25 In particular, Your Honor, Your Honor will recall

1 the notice that went out regarding postponing or canceling
2 the 2010 annual meeting, the testimony of Mr. Diamond and Mr.
3 Claggett that the reason why that meeting was postponed,
4 apart from this subterfuge about the door prize which I'll
5 get to in a moment, that the real reason was that they were
6 awaiting a decision from the 4th Circuit regarding the stay
7 issue.

8 The 4th Circuit opinion was issued and
9 notwithstanding the issuance of that opinion, which
10 essentially was the stated reason that they testified to Your
11 Honor it was postponed, they have refused to reschedule the
12 2010 annual meeting. So, we think that that's further
13 evidence of their intention.

14 Secondly, when they refused to reschedule the
15 meeting, Gordon Properties petitioned for a special meeting,
16 got the requisite number of unit owners in the building to
17 sign the petition to demand a special meeting so that an
18 election could be held to elect the board members and we just
19 got notice that FOA denied that request for a special
20 meeting. We don't think they have any authority at all to
21 deny the request that they did.

22 Then finally, Your Honor, we intend to introduce
23 evidence that FOA intends to enforce at the 2011 annual
24 meeting a policy resolution that it adopted shortly prior to
25 the 2009 annual meeting which was the meeting that Your Honor

1 addressed at the first adversary proceeding; and Your Honor,
2 I think, concluded that policy resolution had one intention
3 and that is to deny Gordon Properties the right to vote for
4 candidates, to put candidates on the board of directors.
5 Your Honor will see what we mean when we get to the policy
6 resolution.

7 THE COURT: What is the policy resolution?

8 MR. KING: The policy resolution, 2009-03, which
9 was adopted just before the 2009 annual meeting says that if
10 you own more than one unit, you don't get the one unit, one
11 vote. You still only get one vote. You can own every unit in
12 the building but you still only get one vote. That's the
13 resolution.

14 THE COURT: All right. I will have to read it.

15 MR. KING: Thank you, Your Honor.

16 We believe, Your Honor, that the combination of the
17 evidence that was introduced at the PI hearing and the
18 additional evidence today will lead the court to conclude
19 that FOA has in fact violated the automatic stay and,
20 moreover, it continues to continue to violate the automatic
21 stay at the 2011 annual meeting.

22 THE COURT: All right. Thank you.

23 MS. SARVADI: Good morning, Your Honor. Jennifer
24 Sarvadi again for the defendant.

25 I understand that Mr. King has just articulated

1 what his client hopes to be the case that's going to be
2 presented today.

3 In response, I would like to just point out, first
4 of all, that the complaint only alleges that the violation of
5 the automatic stay occurred with regard to the postponement
6 of the 2010 annual meeting. That is the sole count that was
7 alleged within the conduct giving rise to the violation; and
8 therefore, we would argue that anything regarding the 2009
9 disputed at the PI hearing is irrelevant, Your Honor, because
10 it doesn't go to proving the 2010 act.

11 Second of all, Your Honor, with regard to this new
12 policy resolution which I don't believe was produced by any
13 party in discovery has not been pled in the complaint, has
14 not been raised in discovery or made an issue in the
15 discovery responses. It's not subject of this litigation and
16 we are not prepared to address it today.

17 But going to the heart of what this case is about,
18 that's whether or not this board willfully violated the
19 automatic stay in October of last year or technically
20 September 28 of last year when it elected to initially
21 postpone the 2010 annual meeting.

22 We submit, Your Honor, that the only evidence that
23 you will hear either between April's testimony and today --
24 that there is no evidence, actually, with regard to an
25 intention by FOA to attempt to collect a debt and that is the

1 basis of Gordon Properties' motion here.

2 The only person in this courtroom who is saying it
3 was intended to collect a debt or coerce something from
4 Gordon Properties is Mr. King.

5 The board has testified and will testify today that
6 its intention was simply to conduct an annual meeting at the
7 appropriate time with the appropriate guidance either from
8 its counsel or the court.

9 We will also address through testimony and argument
10 at the conclusion of this hearing the issues regarding the
11 flyer.

12 We also maintain the special meeting which Mr.
13 Sells did petition for for Gordon Properties on July 6th is
14 irrelevant for the reasons we'll state at the time those
15 objections are duly made.

16 THE COURT: Thank you.

17 MR. KING: Your Honor, Gordon Properties calls
18 Gordon Claggett.

19 THE COURT: Mr. Claggett, will you come forward and
20 be sworn?

21 Whereupon,

22 JAMES L. CLAGGETT, JR.

23 was called as a witness and, having been first duly
24 sworn, was examined and testified as follows:

25 //

1 DIRECT EXAMINATION

2 BY MR. KING:

3 Q Good morning, Mr. Claggett. Will you please state
4 your name and business address?

5 A James L. Claggett, Junior. Business address is
6 4600 Duke Street, Suite 400.

7 Q And you're the general manager of the condominiums;
8 is that right?

9 A Yes.

10 Q Mr. Claggett, I'm going to be short and I'm going
11 to refer you back to your testimony at the preliminary
12 injunction hearing. You'll recall a series of questions that
13 I asked you regarding the postpone of the 2010 annual
14 meeting?

15 A Yes.

16 Q And you'll recall that apart from the issue of the
17 flyer that was sent out that the reason stated for the
18 postponement of the meeting was that the board was awaiting
19 the decision of the 4th Circuit on the stay issue?

20 A Yes.

21 Q And you'll agree that the 4th Circuit has in fact
22 issued its opinion; is that right?

23 A An opinion, yes.

24 Q And you'll agree that the 2010 annual meeting has
25 not been rescheduled?

1 A Yes.

2 Q Can you tell us the reason why the 2010 annual
3 meeting hasn't been rescheduled?

4 A Because the board is actively trying to put
5 together the 2011 meeting and because of the time of the year
6 the board doesn't want to incur the extras or the expense of
7 having two meetings back to back.

8 Q Let me try to put it in different words and see if
9 you will agree because this is the way that it was
10 represented to me. Judge Mayer ruled in response to our
11 motion for a preliminary injunction that there was no reason
12 at this point for purposes of a preliminary injunction to
13 order the 2010 meeting to be rescheduled because the 2011
14 meeting was already scheduled in a few months and that would
15 suffice for addressing any remedies that might be necessary.
16 Is that essentially the reason why FOA has decided not to
17 reschedule the 2010 annual meeting?

18 A No. The reason why FOA hadn't scheduled the 2010
19 meeting was because of the time of year it is now. They've
20 already started or instructing. They've already started
21 planning the 2011. They just didn't want to have two
22 meetings back to back.

23 Q So, the conclusion is, essentially, that the 2011
24 annual meeting is an adequate substitute for the 2010 annual
25 meeting?

1 A I wouldn't say that. I would say that what I have
2 been instructed to do is to prepare for this 2011 meeting
3 because of the time of year, that all of these -- it's still
4 an opinion, not a decision. The 4th Circuit didn't hear the
5 case. They just said they didn't want to rule because
6 nothing had been decided here. So, the association's
7 position directed to me is just to plan for the 2011 meeting
8 which I'm doing.

9 **Q So, tell me this then, Mr. Claggett: Is it the**
10 **board's intention to allow Gordon Properties to vote at the**
11 **2011 annual meeting?**

12 A I wouldn't know. I'm not a board member.

13 **Q You've been present at the discussions regarding**
14 **the postponing of the 2010 annual meeting, the decision not**
15 **to reschedule the 2010 meeting and the decision to schedule**
16 **the 2011 meeting. You were present at all those meetings;**
17 **were you not?**

18 A Yes.

19 **Q And you recall the discussion at those meeting**
20 **regarding those issues; do you not?**

21 A Gordon Properties was never singled out or targeted
22 at any of those meetings. In fact, the only -- the only
23 discussion about Gordon Properties is, we will wait for the
24 court to decide, give a -- not an opinion but a, you know,
25 decision to be rendered. But there's no deliberate attempt

1 to target Gordon Properties in any way.

2 Q Mr. Claggett, you testified when you were here in
3 April that you solicited advice from your attorney as to what
4 to do about Gordon Properties because the board was uncertain
5 as to what to do with respect to its voting rights. Do you
6 recall that?

7 A Yes.

8 Q Is the board still uncertain?

9 A I think what the board -- excuse me. It's not what
10 I think. What the board is looking for is direction. You
11 have written documents that require a certain course of
12 action and then you have opinions. And so, you have to go
13 with what's written. So, what the board is seeking is
14 clarification as to this action. That's what the board
15 wants. That's all.

16 Q So, what you're saying is, if as a result of this
17 hearing and as a result of that solicitation, if you will,
18 Judge Mayer orders the association to allow Gordon Properties
19 to exercise its right at that meeting that the board will
20 abide by it?

21 MS. SARVADI: Objection. That calls for
22 speculation. He said he's not a board member.

23 THE COURT: Can you ask that again?

24 BY MR. KING:

25 Q Based on your understanding of the board's position

1 and the fact that it's simply awaiting guidance from the
2 court, is it your understanding that if Judge Mayer orders
3 the association to allow Gordon Properties to exercise its
4 voting rights at the 2011 annual meeting that that order will
5 be complied with?

6 MS. SARVADI: Same objection. I still think its
7 speculation. He's not a board meeting. He doesn't know what
8 he might do in the future if this court rules in any
9 particular way or it doesn't.

10 MR. KING: I'm not asking Mr. Claggett to
11 speculate. I'm asking what his understanding as the manager
12 is based on participation at the board's deliberations.

13 THE COURT: I think that's a fair question. He has
14 already given his impression of why they've done what they've
15 done based on what he heard and saw at the meeting; and now,
16 this is just another way to inquire as to what he understands
17 the tenor of their approach could be. I think that is
18 appropriate. If you have an understanding, you can give that.

19 THE WITNESS: It has never been the intention of
20 the board to correct the law or to go against a court ruling.

21 BY MR. KING:

22 Q That's not my question, Mr. Claggett. I asked, is
23 it your understanding that the board will comply with Judge
24 Mayer's order?

25 A I would only say that I'm not a board member. So,

1 I don't know what the board would do. But it's not their
2 intention to go against -- if the Honorable Judge Mayer were
3 to order a meeting or order Gordon Properties, you know, say
4 that they can vote, I've never heard any discussion from any
5 board member or from any legal counsel to say that we would
6 have to go against that.

7 **Q You're aware that Gordon Properties filed a**
8 **petition for a special meeting?**

9 A Yes.

10 **Q If you would look at in the white binder, Exhibit**
11 **No. 6. Can you identify that as the petition for a special**
12 **meeting that was submitted by Gordon Properties?**

13 A Yes.

14 **Q That request was denied by the board; is that**
15 **right?**

16 MS. SARVADI: Objection, Your Honor. Now that he
17 has identified what the document is, it's our position that
18 the petition for a special meeting is not relevant to the
19 claims in this case for the reason that this is a petition
20 submitted in this past month demanding a meeting to be held
21 this coming Wednesday, July 27th. It doesn't form the basis
22 of the complaint, and of course it has not been put at issue
23 by the pleadings.

24 It is also a separate set of requirements under the
25 bylaws as to when a special meeting may be held and under

1 what terms, with what notices and other issues that are just
2 not part of this case, Your Honor.

3 MR. KING: Evidence that simply arose in the last
4 week or two possibly could not have been part of the
5 complaint, Your Honor.

6 Our position, Your Honor, is that this is further
7 corroboration of the intention of FOA to violate the
8 automatic stay and it's clearly relevant in that context.

9 THE COURT: I think the question that is raised by
10 the unit owners association why these actions are taken place
11 -- they assert that they are not efforts to collect a debt.
12 This goes to intention. This is one of the questions in the
13 snow as to the circumstantial evidence as to what that
14 intention might be.

15 Mr. King is saying this intention predates this
16 meeting, goes back before the 2009 meeting, and it continues
17 through today, and this is a piece of evidence that goes to
18 this. I will allow the question and overrule the objection.

19 Mr. Claggett, you can answer the question.

20 BY MR. KING:

21 **Q The question, Mr. Claggett, was: The request for a**
22 **special meeting was denied by the board; is that correct?**

23 A I was on vacation from July 15th and I arrived back
24 in town yesterday at 5:00 o'clock.

25 It was my understanding, you have to understand,

1 that the president was out of town on a medical emergency the
2 week before I left and then I left before she got back. So,
3 I don't know. I came in to work this morning and drove
4 straight here to the courthouse.

5 **Q So, you have no knowledge as to what action the**
6 **board took in response to the petition?**

7 A No emails, no phones, no nothing.

8 **Q Thank you. I'd ask you to look at Plaintiff's**
9 **Exhibit 10 -- I'm sorry.**

10 MR. KING: Your Honor, I'm handing a new exhibit to
11 the court which we have already identified. We have already
12 marked it as Plaintiff's Exhibit 10 to follow the sequence in
13 our book.

14 THE COURT: All right. Do you have one for the
15 witness?

16 MR. KING: I have one for the witness, Your Honor.

17 THE COURT: Do you have a copy?

18 MS. SARVADI: Yes.

19 (Plaintiff Exhibit No. 10 was
20 marked for identification.)

21 BY MR. KING:

22 **Q I am showing you, Mr. Claggett, what has been**
23 **marked as Plaintiff's Exhibit 10. You'll acknowledge that**
24 **that is the notice that was sent out by the association for**
25 **its 2011 annual meeting?**

1 A Yes.

2 Q I want to refer you specifically to the attachment
3 to that notice of meeting. It's titled, "Policy Resolution
4 Number 2009-03." Do you see that?

5 A Yes.

6 Q This was a resolution that was adopted by the board
7 in March of 2009; is that right?

8 MS. SARVADI: Objection, Your Honor. Again, to the
9 extent that we're getting into whether or not this resolution
10 was duly entered into or passed by the board or that -- other
11 than identifying the document, he's going to get into the
12 merits and the validity of this document. It's not part of
13 the case that has been pled in the complaint or put at issue
14 in discovery.

15 And notably, while the first page of Exhibit 10
16 which is the call for candidates and the proxy form for 2011
17 may have been newly created subsequent to the initiation of
18 the case, assuming this policy resolution was in fact passed
19 in '09, it was something about which the plaintiff had
20 knowledge and could have made part of its case.

21 THE COURT: So, what's the objection?

22 MS. SARVADI: The objection is, it's not relevant.
23 It's not a basis for the relief requested in the complaint
24 and it hasn't been put at issue in any pleading or discovery
25 response.

1 As I told Mr. King in our conversation on Friday
2 which I won't disclose, the settlement conversation -- we
3 were attempting a conversation. I was not prepared and had
4 not reviewed this material because it has not been put at
5 issue in this case and I wasn't prepared to address it.

6 MR. KING: Again, the notice, Your Honor, just came
7 out. Your Honor can see it's dated July 12th. It just came
8 out from the association. It was received by Gordon
9 Properties well after the date for filing exhibits, well
10 after the date for discovery. It's something new.

11 Again, it's nothing more, Your Honor, than the
12 evidence as Your Honor alluded to with respect to the intent.
13 We are continuing the intention as stated all the way back to
14 the 2009 meeting that was subject of the first adversary
15 proceeding until now.

16 The fact is, Your Honor, that it's clear from the
17 notice that is sent out that the association intends to
18 enforce this policy resolution, and I think the court can
19 reasonably conclude based on the evidence that this policy
20 resolution is intended to deny Gordon Properties its right to
21 vote. It's introduced for that purpose.

22 THE COURT: Let me read it first and see it.

23 (Pause.)

24 THE COURT: I've read that. I think it's part of
25 the call for candidates. It goes to the manner in which this

1 upcoming election is to be conducted. It purports to set out
2 rules and regulations that can made.

3 It explicitly addresses delinquent unit owners and
4 in this case we have a situation where we have multiple unit
5 owners or multiple units owned by Gordon Properties.

6 I think that it is Mr. King's supposition that it
7 was something to get around 360. I think it goes to intent.
8 I think it could be a subterfuge. It just came out July
9 12th. I think it is timely and will admit it, subject to the
10 --

11 MR. KING: I know I have to connect the dots, Your
12 Honor. I understand.

13 THE COURT: But it's relevant.

14 MR. KING: Thank you, Your Honor.

15 BY MR. KING:

16 **Q Mr. Claggett, were you aware of the existence of**
17 **this policy resolution before this call for candidates came**
18 **out July 12th?**

19 A Yes.

20 THE COURT: You said yes?

21 THE WITNESS: Yes.

22 BY MR. KING:

23 **Q You sent out the notice for the 2010 annual**
24 **meeting; did you not?**

25 A Yes.

1 Q This policy resolution was not attached to that
2 notice; was it?

3 A Correct.

4 Q You'll agree, Mr. Claggett, that there's no
5 provision in the bylaws that you're aware of? There's no
6 provision in the bylaws or any of the condominium instruments
7 or in any of the statutes related to the homeowner
8 associations, condo associations, that prohibits a person who
9 owns more than one unit from voting each of those units? Are
10 you?

11 A I'm not aware of anything in the bylaws.

12 Q In fact, the bylaws specifically call for one unit,
13 one vote; is that correct?

14 A Yes.

15 Q And you'll agree that the purpose of this policy
16 resolution was to limit Gordon Properties as an owner of more
17 than one unit from voting for more than one candidate to the
18 board; is that right?

19 MS. SARVADI: Objection, Your Honor. Mr. Claggett
20 testified he wasn't employed by the association until 2010
21 and by the face of the document it was passed in '09. So, I
22 believe it's something outside of his knowledge.

23 MR. KING: Well, Mr. Claggett certainly was aware
24 of it. He testified he was aware of it.

25 THE COURT: I think that she's correct. I think he

1 stated the last time he was employed in June 2010.

2 THE WITNESS: Yes.

3 THE COURT: And this is March of 2009. Unless you
4 can establish that he was around at that time or got
5 information later relating to it. I think you're faced with
6 a foundational issue.

7 MR. KING: Understood.

8 BY MR. KING:

9 Q Have you acquired any notice since you became the
10 manager as to the effect of this policy resolution as to
11 Gordon Properties?

12 A No.

13 Q So, you don't know how this policy resolution would
14 apply to Gordon Properties at the 2011 annual meeting?

15 A This policy resolution would not just affect Gordon
16 Properties. There are two other persons that signed a
17 special petition that that -- you see, there are several
18 persons that own more than one property, and I believe the
19 goal of this resolution is diversity.

20 Q And other than Gordon Properties, how many people
21 own more than one unit, condominium?

22 A Several.

23 Q Several?

24 A Several. Dozens.

25 Q Other than Gordon Properties, what is the most

1 **number of units owned by any single unit owner?**

2 A I don't keep statistics but there are several
3 owners that I can tell you that own two, three, four homes.

4 **Q Would you agree that no unit owner other than**
5 **Gordon Properties owns five or more units in a condominium?**

6 A I don't keep statistics.

7 **Q Thank you.**

8 MR. KING: Your Honor, I would ask that Plaintiff's
9 Exhibit No. 6 and No. 10 be admitted.

10 MS. SARVADI: The same objections as I previously
11 articulated, Your Honor.

12 THE COURT: The objections are overruled. They
13 will be admitted.

14 (Plaintiff Exhibit Nos. 6 and
15 10 were received in evidence.)

16 MR. KING: That's all the questioning I have for
17 Mr. Claggett, Your Honor.

18 CROSS EXAMINATION

19 BY MS. SARVADI:

20 **Q Mr. Claggett, isn't it correct that the board**
21 **instructed you as early as June of this year to begin the**
22 **process for a 2011 annual meeting?**

23 A Yes.

24 **Q And are you aware as to whether the board has**
25 **already appointed an election committee to serve for the**

1 purpose of the 2011 annual meeting?

2 A They have.

3 Q And isn't it true that there are four individuals
4 on the committee?

5 A Yes.

6 Q And none of them are current board members?

7 A Yes.

8 Q And were those also people recommended to the
9 president of the board, Dee Cuadros, by Miss Betty Gillam?

10 A Yes.

11 Q And to your knowledge, has the election committee
12 undertaken any steps for preparation for the 2011 annual
13 meeting?

14 A No. I believe that they have not yet.

15 Q Do you know if they have any meetings scheduled?

16 A I believe that there's a meeting scheduled for this
17 Wednesday.

18 Q You were testifying a few moments ago about the
19 petition for a special meeting. Do you recall that?

20 A Yes.

21 Q You received that in the month of July?

22 A Yes.

23 Q Do you remember the date?

24 A It was the first week of July. It was either July
25 6th or July 8th, one of the two.

1 Q And pursuant to receipt that notice of that special
2 meeting did you circulate a notice to the board members to
3 have to hold a board meeting to address the special petition?

4 A Yes.

5 Q And to your knowledge was that meeting scheduled?

6 A Yes.

7 Q And for what date?

8 A July the -- it would have been July 11th, to my
9 knowledge.

10 Q And do you recall if that meeting was held?

11 A Yes.

12 Q Was a vote taken at that meeting?

13 A No, there were no vote.

14 Q Miss Cuadros was out of town at the time of that
15 meeting?

16 A Yes.

17 Q Due to her daughter's heart attack?

18 A Yes.

19 Q In addition to issuing the call for candidates
20 which is dated July 12th of this year, have you personally
21 taken any additional steps in an effort to begin the
22 preparation process for the 2011 meeting?

23 A No.

24 Q Was there a board meeting held in June of this year
25 -- excuse me -- a board of directors meeting held June 28th

1 of this year?

2 A Yes.

3 Q Were you present for that meeting?

4 A Yes.

5 Q Was there a request put to the board by Mr. Sells
6 as to whether the 2010 annual meeting was going to be
7 scheduled this summer?

8 A Yes.

9 Q And was a response given?

10 A Yes.

11 Q And was it what you articulated earlier?

12 A Yes.

13 Q So, that was June 28th?

14 A Yes.

15 Q And the petition came July 6th?

16 A Yes.

17 Q Do you recall, Mr. Claggett, the date that the 4th
18 Circuit's ruling came out?

19 A I don't.

20 MS. SARVADI: Your Honor, I could go through this
21 with Mr. Sells since you're taking judicial notice of other
22 dockets, perhaps the court could take judicial notice of the
23 docket of which I've printed a copy in matter, First Owners
24 Association v. Gordon Properties. It's the appeal of the
25 ruling on the first adversary proceeding.

1 THE COURT: What is the date?

2 MS. SARVADI: The date of the ruling by the 4th
3 Circuit was June 2nd of this year.

4 THE COURT: June 2nd?

5 MS. SARVADI: Yes, Your Honor.

6 THE COURT: Any objection?

7 MR. KING: I don't have any reason to disbelieve
8 Miss Sarvadi's representation, Your Honor.

9 MS. SARVADI: I brought a copy if the court would
10 like a copy.

11 THE COURT: The date was June 2nd?

12 MR. KING: That sounds correct.

13 THE COURT: All right. We'll accept the opinion
14 that the Court of Appeal issued June 2nd.

15 BY MS. SARVADI:

16 **Q Mr. Claggett, are you aware if other than the**
17 **petition for a special meeting, Mr. Sells has also made a**
18 **request -- and in addition to the one we discussed with**
19 **respect to the board meeting, has he made any request through**
20 **counsel with regard to holding an annual meeting?**

21 A Not that I'm aware of.

22 MS. SARVADI: I don't have any more questions for
23 this witness on cross examination, Your Honor; but we will be
24 calling him at a later time.

25 //

1 REDIRECT EXAMINATION

2 BY MR. KING:

3 Q You're not aware, Mr. Claggett, that following the
4 issuance of the 4th Circuit opinion, I requested from Mr.
5 Dingman in writing that the association reschedule the 2010
6 annual meeting?

7 A I must not have understood the first question. Yes,
8 I'm aware of that.

9 Q And you're aware that it was declined for the
10 reason that the 2011 annual meeting was being prepared for?

11 A Yes.

12 Q And you'll agree that the request for a special
13 meeting was submitted by Gordon Properties after its request
14 to reschedule the 2010 annual meeting was denied?

15 MS. SARVADI: Objection. I think he's testified he
16 doesn't know if it has been denied.

17 MR. KING: No. He just --

18 MS. SARVADI: Oh. I'm sorry.

19 THE COURT: He's not saying the special meeting was
20 denied. The request for the special meeting was submitted
21 after the June 28 meeting at which Mr. Sells requested a 2010
22 meeting be held and the board said no?

23 THE WITNESS: Yes.

24 MR. KING: Thank you.

25 THE COURT: You started to answer a question. I

1 wasn't sure what it was related to but you were talking about
2 multiple owners and then you were referred to a petition for
3 a special election. What were you referring to?

4 THE WITNESS: Just that there are several persons
5 or families that own more than one unit in FOA.

6 THE COURT: And is that related to the petition for
7 a special meeting?

8 THE WITNESS: It was just a reference. I just
9 noted that there were some persons who signed the request for
10 a special meeting that were on that petition. That's all.

11 THE COURT: All right. So, what you're saying is
12 that on page one of Exhibit 6, second and third lines from
13 the bottom, the signature of -- I can't read it. It looks
14 like an "AT." And on one of them it says units 1616; another
15 1614, signed as one?

16 THE WITNESS: Well, that's one person that owns
17 more than one unit.

18 THE COURT: All right. And that is what you were
19 referring to? And then of course Mr. Sells signed for
20 multiple units, as well? And Betty Gillam signed for two
21 units, 409 and 619?

22 THE WITNESS: Yes.

23 THE COURT: That's what you were referring to?

24 THE WITNESS: Yes.

25 THE COURT: As examples of multiple ownership. All

1 right.

2 Any other questions?

3 MR. KING: Nothing further, Your Honor.

4 MS. SARVADI: No.

5 THE COURT: All right. Thank you. If you will
6 have a seat with your attorney.

7 MR. KING: I call Dee Cuadros, Your Honor.

8 THE COURT: Miss Cuadros. Across the hall.

9 (Pause.)

10 THE COURT: Come on up and be sworn.

11 Whereupon,

12 DEWANDA CUADROS

13 was called as a witness and, having been first duly
14 sworn, was examined and testified as follows:

15 DIRECT EXAMINATION

16 BY MR. KING:

17 Q Good morning, Miss Cuadros. State your name,
18 please.

19 A Dewanda Cuadros.

20 Q And you're the president of the unit owners
21 association at 4600 condominium?

22 A Yes, I am.

23 Q And you're the director of the board of directors
24 of 46 condominium; correct?

25 A Yes.

1 THE COURT: You mean chairperson? You said
2 director of directors.

3 MR. KING: I'm sorry. Chairperson. Yes.
4 Chairperson of the board of directors. Sorry.

5 BY MR. KING:

6 Q You are a director and chairperson of the board?

7 A I am.

8 Q Thank you.

9 MR. KING: Thank you, Your Honor.

10 BY MR. KING:

11 Q You're aware, Miss Cuadros, that Gordon Properties
12 submitted a petition for a special meeting along with a
13 number of other people who signed the petition?

14 A Yes.

15 Q I'm going to ask you if you would look at what I've
16 marked as Plaintiff's Exhibit No. 11.

17 (Plaintiff Exhibit No. 11 was
18 marked for identification.)

19 BY MR. KING:

20 Q That purports to be your letter of July 20th,
21 denying the request for a special meeting; is that correct?

22 A Yes, it is.

23 Q Who drafted this letter?

24 MS. SARVADI: Objection, Your Honor. Just for the
25 purpose of establishing A record, we object to the

1 introduction on the same relevancy grounds as we've argued
2 with respect to the prior exhibit; and also, just as a
3 cautionary instruction, we haven't waived the attorney-client
4 privilege with respect to any communications that might have
5 occurred and I don't know if they have.

6 THE COURT: Go ahead and lay the foundation for the
7 exhibit and then we can consider the objection.

8 BY MR. KING:

9 Q Who drafted this letter, Miss Cuadros?

10 A I beg your pardon.

11 Q Who drafted this letter?

12 A I did.

13 Q Is this solely your language in this letter?

14 MS. SARVADI: Objection, Your Honor. I think this
15 may get into the attorney-client communication issue I was
16 trying to address earlier.

17 THE COURT: And we don't know that there is one
18 because --

19 MS. SARVADI: And I'm not sure if there is, Your
20 Honor, because I hadn't seen this until today.

21 THE COURT: If she says it's her sole product then
22 it's not.

23 MR. KING: Correct.

24 BY MR. KING:

25 Q Is this solely your language in the letter?

1 A There were some other people who looked at the
2 letter, Elizabeth Moore, my secretary, and also Lucia Hadley,
3 the vice president, and also Michael Dingman.

4 **Q The interpretations with respect to the sections of**
5 **the bylaws that are stated in the letter, are those your**
6 **interpretations or counsel's interpretations?**

7 MS. SARVADI: Again, Your Honor, this may -- if the
8 answer is that it's not hers and only counsel would be the
9 only answer, I think that may be getting into attorney-client
10 communications if advice was sought.

11 This is a document I told Mr. King I had not seen
12 before this morning. I wasn't aware the notice had actually
13 gone out. And so, I wasn't prepared to anticipate objections
14 along these lines since I hadn't seen it.

15 MR. KING: I can represent to the court, Your
16 Honor, I have no intention of getting into the communications
17 between the board and its counsel. But I think if the advice
18 is then put into a letter that's published, I think I'm
19 entitled to know whether it's the board's language or the
20 attorney's language.

21 THE COURT: Why don't I read the letter first and
22 then we can take on further issues.

23 (Pause.)

24 THE COURT: And your question?

25 MR. KING: Just simply whether the language in the

1 letter interpreting the sections of the bylaws that are
2 referenced is your interpretation or the interpretation of
3 your counsel.

4 MS. SARVADI: And it's our position that unlike the
5 notice which was circulated last year in which they
6 affirmatively waived privilege that our attorneys gave us the
7 following advice, if this document captures advice rendered
8 by an attorney to the association which it is entitled to
9 obtain, it's not something that should be disclosed here to
10 the court.

11 Certainly it is the position of the board. How it
12 was obtained is not relevant. It is the position the board
13 is taking with respect to the petition and that in and of
14 itself can be -- certainly it's the board but not whose
15 opinion it is, or how it was formed or whether they conferred
16 with anyone to come to this conclusion.

17 THE COURT: There's no issue of advice of counsel
18 being a defense on this?

19 MS. SARVADI: There isn't, Your Honor. I'm not
20 prepared since I hadn't seen it before today.

21 MR. KING: Not for purposes of the violation of the
22 automatic stay, Your Honor. But again, I don't intend to get
23 into the communications. I simply want to know --

24 THE COURT: You're not raising advice of counsel as
25 a defense, to suggest that it's incorrect. You're putting

1 this in to show relevancy of their state of mind and they're
2 not asserting that it's anyone's state of mind except their
3 own. By not raising the advice of counsel defense, I don't
4 think you need to get into it. You can just take it as their
5 statements advancing their understanding and state of mind.
6 Well, before I say "their," Miss Cuadros, was this approved
7 by the board of directors?

8 THE WITNESS: The letter itself was not approved by
9 the board of directors but I believe at a meeting it was
10 voted on that this letter would be sent.

11 THE COURT: Well, the board of directors reviewed
12 these reasons for declining to hold the special meeting?

13 THE WITNESS: I believe so.

14 THE COURT: And this evidence is the thinking and
15 the reasons adopted by the board of directors?

16 THE WITNESS: Yes.

17 THE COURT: As opposed to yours individually?

18 THE WITNESS: Yes.

19 THE COURT: All right. Then the plural is correct.

20 MR. KING: I'm sorry, Your Honor.

21 THE COURT: The plural is correct. It's not her
22 statement; it's their statement.

23 MR. KING: The board's statement; yes.

24 BY MR. KING:

25 Q Will you look at what you have enumerated as

1 paragraph one in your letter?

2 A Yes. Mm-hum.

3 Q You refer to Article 5, Section 4 of the bylaws?

4 A Yes.

5 Q Is it your testimony that the statements that you
6 make in here refer to Article 5, Section 4 of the bylaws?

7 A Yes. I did read the bylaws when I wrote the
8 letter.

9 Q I'll show you the bylaws, Miss Cuadros. I'll
10 represent to you that Article 5, Section 4 says nothing about
11 election of directors. It talks about contracting with a
12 management agent.

13 MS. SARVADI: Objection, Your Honor. She should
14 have an opportunity to review it in order to respond to the
15 representations.

16 THE COURT: All right. He's going to give it to
17 her. You're talking about the bylaws?

18 MR. KING: Yes, Your Honor.

19 THE WITNESS: I think that what you're talking
20 about is simply a typo.

21 MR. KING: Okay.

22 THE WITNESS: I'm not the world's greatest typist.

23 BY MR. KING:

24 Q Would you agree that the section you're intending
25 to refer to there is Article 5, Section 5 which deals with

1 election and term of office?

2 A Yes.

3 Q Now, you say in that letter that the term of each
4 director expires when they're replaced at an election held at
5 an annual meeting of the association with a quorum present
6 either in person or in proxy?

7 A Yes.

8 Q And that's the language you took from Section 5; is
9 that right?

10 MS. SARVADI: Objection. She didn't say she took
11 the language from Section 5. She said she read it before she
12 drafted the letter.

13 THE COURT: Well, why don't I take a look. What
14 page is that?

15 MR. KING: Well, if you're referring to my Exhibit
16 12, Your Honor, it's page 118.

17 THE COURT: "See Book 811 at page 428?"

18 MR. KING: Yes, Your Honor.

19 THE COURT: Let me take a look.

20 Do you have that in front of you, Miss Cuadros?

21 MR. KING: She does not, Your Honor.

22 THE WITNESS: I'm sorry.

23 (Pause.)

24 MR. KING: I don't think the exhibits from the last
25 hearing are there, Your Honor.

1 THE COURT: All right. Go ahead and take a look at
2 that. Do you see the place he's talking about?

3 THE WITNESS: I'm sorry.

4 THE COURT: Do you see the provision?

5 THE WITNESS: I am reading it now.

6 THE COURT: All right. Take your time and read it.

7 (Pause.)

8 THE WITNESS: Yes.

9 MR. KING: Okay.

10 BY MR. KING:

11 Q Read the first sentence of that section, Miss
12 Cuadros. You don't have to read it out loud. I just want to
13 make sure that you've read it.

14 A Okay. "The term of the directors named herein and
15 in any articles of incorporation shall expire when their
16 successors have been elected at the first annual meeting of
17 members and are duly qualified."

18 Q That's the language that you were referring to in
19 your letter?

20 A Yes.

21 Q Thank you.

22 What is the authority for your statements in
23 paragraph number two?

24 THE COURT: Before you go on, Mr. King, does that
25 refer to the directors that are initially appointed by the --

1 MR. KING: I'm going to argue, Your Honor, that the
2 reason for the denial was entirely without --

3 (Pause.)

4 THE COURT: What about the last line?

5 MR. KING: Again, that's a different provision,
6 Your Honor. That's not the provision that the letter
7 referred to.

8 THE COURT: Your next question was referring to?

9 BY MR. KING:

10 Q The next question is, what is your authority for
11 the statements that are made in numbered paragraph two?

12 A From the bylaws.

13 Q Do you know specifically which section?

14 A I believe it is the section on removal of
15 directors.

16 Q Anything else?

17 A Not that I recall.

18 Q Thank you. May I have the exhibit book back?

19 THE CSO: I just gave it to you.

20 MR. KING: Thank you.

21 BY MR. KING:

22 Q Miss Cuadros, I'm going to ask you to look at --
23 it's not in the exhibit binder. It should be a separate
24 document in front of you, labeled "Plaintiff Exhibit No. 10."

25 A It's not in the book?

1 Q No. It should be there by itself.

2 A This?

3 Q Does that say "Plaintiff Exhibit 10" at the bottom?

4 THE CSO: Yes.

5 BY MR. KING:

6 Q Miss Cuadros, do you recognize this as the call for
7 candidates that was sent out by the association on July 12th?

8 A Yes.

9 Q And I'm going to ask you to look at the attachment
10 to that call for candidates that is titled, "Policy
11 Resolution Number 2009-03."

12 MS. SARVADI: Your Honor, just for the record, same
13 objection previously noted with discussion of this, for the
14 purpose of not waiving it.

15 THE COURT: Okay.

16 BY MR. KING:

17 Q Do you see that?

18 A Policy Resolution Number 2009-03, yes. I have it
19 in front of me here.

20 Q And you were the president at the time that this
21 policy resolution was adopted; is that correct?

22 A In 2009, I was, yes.

23 Q And you recall the discussions of the board
24 regarding the adoption of this policy resolution?

25 A Actually, no.

1 Q Okay. Let me try to refresh your recollection,
2 Miss Cuadros, and see if this helps. Do recall that prior to
3 the 2008 annual meeting the association assessed Gordon
4 Properties for the money that it alleged that CSI had taken
5 after its contract was terminated?

6 MS. SARVADI: Objection. It assumes facts not in
7 evidence, of which I have no knowledge of --

8 THE COURT: Overruled.

9 BY MR. KING:

10 Q Do you recall that?

11 A Are you saying -- tell me again.

12 Q I'm asking you to recall. If you don't recall, I
13 understand. Prior to the 2008 annual meeting, FOA assessed
14 Gordon Properties for the amount of money that it alleged
15 that CSI had taken after CSI's -- which was the basis for
16 terminating CSI's contract. Do you remember that assessment?

17 A I don't remember it but I mean it may have been
18 done. I have no idea.

19 Q Do you remember the litigation that was commenced
20 by Gordon Properties against FOA to contest that assessment,
21 to contest its liability on the money that was taken by CSI?

22 A No.

23 Q You don't remember the litigation regarding the CSI
24 funds?

25 A I remember that FOA filed a suit against CSI.

1 Q And Gordon Properties?

2 A Exactly.

3 Q And there was a jury trial on that; was there not?

4 A Yes, there was.

5 Q The jury ruled and the court confirmed that Gordon
6 Properties was not liable for those funds that CSI had taken;
7 is that right?

8 A Yes. That's true.

9 Q And it was that claim that FOA made against Gordon
10 Properties with respect to the CSI funds that was used as the
11 basis to create Gordon Properties' delinquency so that it was
12 not allowed to vote at the 2008 annual meeting; is that
13 right?

14 MS. SARVADI: Objection. Again, this is getting
15 into facts not in evidence. No issue has been raised with
16 regard to 2008 or the CSI litigation. It is not part of this
17 case and it has not been brought up before today.

18 MR. KING: It will all connect, Your Honor.

19 THE COURT: I'll overrule the objection.

20 THE WITNESS: I really don't know whether that is
21 true or not.

22 BY MR. KING:

23 Q Do you recall that immediately or shortly after the
24 jury verdict declaring that Gordon Properties was not liable
25 for those monies that Gordon Properties petitioned for a

1 **special meeting?**

2 A I do know that they -- that they did petition for a
3 special meeting.

4 Q **And it was in response to Gordon Properties'**
5 **request for a special meeting, 2009, following the jury**
6 **verdict, that this policy resolution was adopted by the**
7 **board; is that correct?**

8 A I'm not sure of exactly what the time frames were.
9 It may have been.

10 Q **Thank you. Would you agree, Miss Cuadros, that the**
11 **intent of this resolution was to restrict Gordon Properties**
12 **as an owner of more than one unit from placing more than one**
13 **candidate on the board?**

14 A It was to restrict any owner from that.

15 Q **Are you aware of any unit owner in the association**
16 **who owns five or more units other than Gordon Properties?**

17 A I do know some; yes.

18 Q **Can you tell me who?**

19 A Mr. John Seay. I believe he owns eight units. Did
20 you say five?

21 Q **Five or more.**

22 A No, I can't think of any other people who do.

23 THE COURT: What was the name of that individual?

24 THE WITNESS: John Seay, S-e-a-y.

25 THE COURT: S-e-a-y?

1 THE WITNESS: That's the way we pronounce it. I
2 understand there are other ways.

3 (Pause.)

4 BY MR. KING:

5 Q Miss Cuadros, you were aware that the 4th Circuit
6 had issued its opinion on the appeal that FOA filed to Judge
7 Mayer's decision?

8 A Yes.

9 Q And are you aware that I had specifically requested
10 from Mr. Dingman in writing, following the 4th Circuit's
11 opinion, that the 2010 annual meeting be rescheduled?

12 A I don't know if you made that request of Mr.
13 Dingman or not.

14 Q You were not advised by Mr. Dingman that I made
15 that request?

16 A I don't recall being advised by Mr. Dingman.

17 Q You'll recall, Miss Cuadros, the testimony that was
18 introduced at the preliminary injunction hearing that we had
19 in April?

20 A Yes.

21 Q And you'll recall the topic of discussion regarding
22 the notice that was sent out by the board postponing the 2010
23 annual meeting?

24 A Yes.

25 Q And you'll also recall the memorandum that your

1 attorneys prepared and sent to you that was used as the basis
2 for that postponement? Do you recall that?

3 A I do remember that.

4 Q Ignoring the issue regarding the flyer for the HDTV
5 you'll agree, won't you, that the reason for postponing the
6 2010 annual meeting was that you had not yet received the
7 opinion from the 4th Circuit on the appeal?

8 A That was one of them.

9 Q The other reason being the flyer?

10 A Yes.

11 Q There was no other reason stated in the notice
12 other than the potential tainting of the proxy by the flyer
13 or the fact that you had not gotten the decision from the 4th
14 Circuit on the appeal?

15 A Well, I think there was more discussion than that.

16 Q You'll agree there's nothing more stated in the
17 notice though; won't you?

18 A Yes.

19 Q Now that the 4th Circuit has issued its opinion,
20 why has the 2010 annual meeting not been rescheduled?

21 A Well, it is my feeling that it's too late in the
22 year to have the 2010 annual meeting. We've already started
23 working on the 2011 annual meeting.

24 Q So, your feeling and the feeling of the board, I
25 assume. When you say your feeling, you mean the feeling of

1 the board?

2 A That's correct.

3 Q So, the feeling of the board is that as Judge Mayer
4 suggested in his memorandum opinion on the preliminary
5 injunction, since we have a meeting already scheduled a few
6 months from now, there's no reason to schedule two meetings?

7 A Yes. That's correct.

8 Q So, then can you represent to Judge Mayer as you
9 sit here that Gordon Properties will be provided all of its
10 rights to vote at the 2011 annual meeting?

11 A Well, we have not decided that that will be the
12 case. No, we haven't.

13 Q What is it that you're waiting for?

14 A We're still waiting for a definitive answer as to
15 whether we should obey the stay or the bylaws. All the board
16 members feel that we are required to follow the bylaws as
17 closely as we can. The bylaws say that no one can vote who
18 is delinquent 30 days or more.

19 Q Didn't Judge Mayer tell you in his memorandum
20 opinion that enforcement of the bylaws for the delinquency
21 would be a violation of the automatic stay?

22 A Yes, he did. It's an opinion, not an order.

23 Q Are you aware that Judge Mayer entered an order for
24 the reasons stated in his memorandum opinion?

25 A No.

1 Q So, your position is that Judge Mayer's opinion
2 when he issued his memorandum opinion in the first litigation
3 is not the definitive ruling that you're waiting for?

4 A It isn't.

5 Q If Judge Mayer were to rule as a result of this
6 hearing that enforcement of the bylaws to prevent Gordon
7 Properties from voting because of its delinquency on the 2009
8 assessments violates the automatic stay, would that be the
9 definitive ruling that you're waiting for?

10 A Yes.

11 MR. KING: Nothing further, Your Honor.

12 CROSS EXAMINATION

13 BY MS. SARVADI:

14 Q Good morning, Miss Cuadros.

15 A Good morning.

16 Q I apologize. I may have to jump around a little
17 bit to follow up on some of the questions that Mr. King asked
18 of you. But first, I would like to address the letter that
19 has been marked as Plaintiff's Exhibit No. 11 which is dated
20 July 20th. Do you have that letter in front of you?

21 A No. I don't have it. He took it back.

22 (Document handed to witness.)

23 BY MS. SARVADI:

24 Q I believe you testified earlier in response to one
25 of Mr. King's questions about whether there any other

1 references in the bylaws that supported your position with
2 regard to paragraph number two. Your answer was you didn't
3 recall. Am I correct? You're not saying there's nothing
4 else in this document that supports your conclusion? It's
5 that as you sit here you don't recall all the provisions?

6 A I don't recall all of the provisions. There
7 certainly may be some in there.

8 Q Did you review all of the bylaws before you
9 prepared the letter?

10 A All the bylaws? No.

11 Q Did you review -- earlier you cited to Article 4,
12 Section 4 regarding special meetings. You read that section?

13 A Yes. I did. I think that's Section 5 or Article
14 5.

15 Q Would you please --

16 MS. SARVADI: I guess she doesn't have the bylaws.
17 If I may show her my copy of the bylaws. I will disclose to
18 counsel it has my highlights in it.

19 MR. KING: Mine doesn't have any highlights.

20 THE COURT: Why don't you let Mr. King use his.

21 MS. SARVADI: Thank you, Your Honor.

22 (Pause.)

23 BY MS. SARVADI:

24 Q I apologize. It should be 115, if you could turn
25 your attention, which is Plaintiff's Exhibit No. 12 to the

1 original PI hearing. Page 115.

2 A Page 115 of the bylaws?

3 Q Yes, ma'am.

4 MR. KING: Actually, no. Page 115 of the exhibit.

5 MS. SARVADI: It's 115 of the exhibit, at the
6 bottom.

7 May I help the witness, Your Honor?

8 THE COURT: It's the number at the bottom.

9 THE WITNESS: Okay. You said of the exhibit?

10 MS. SARVADI: It's Exhibit No. 12 for the Judge's
11 reference to the prior PI hearing.

12 BY MS. SARVADI:

13 Q Do you see that?

14 (Mr. Diamond enters the courtroom.)

15 THE COURT: Mr. Diamond, there's a rule on
16 witnesses which you're familiar with. If you will wait
17 across the hall. We'll come get you.

18 THE WITNESS: Okay. Page 115. Yes.

19 BY MS. SARVADI:

20 Q Will you take a moment and please review section
21 two. It's titled, "Annual Meeting."

22 (Pause.)

23 THE WITNESS: Yes.

24 BY MS. SARVADI:

25 Q The second full sentence of that paragraph that

1 begins with the word, "Thereafter," would you read that
2 sentence, please?

3 A "Thereafter the annual meetings of the members of
4 the owners association shall be held on the first Wednesday
5 of October each succeeding year."

6 Q And the following sentence.

7 A "At such meeting there shall be elected by a ballot
8 of the members or board of directors in accordance of these
9 bylaws." "The" -- I'm sorry.

10 Q Thank you. I don't need you to read the last
11 sentence.

12 Is that a provision of the bylaws in which you
13 relied in forming this letter, specifically paragraph two?

14 A Yes. I did read this.

15 Q And if you would turn to page 118 of the --

16 MR. KING: Your Honor, if the purpose of this is to
17 testify for Miss Cuadros, I think that's objectionable.

18 THE COURT: Go ahead.

19 MS. SARVADI: Thank you.

20 BY MS. SARVADI:

21 Q That's on page 118.

22 A Yes.

23 Q Section five. You previously referred to that your
24 in conversation with Mr. King a few moments ago?

25 A Yes.

1 **Q Would you direct your attention to the final**
2 **sentence of that paragraph and take a look at that?**

3 A "At the expiration of the initial term of offices
4 of any prospective elected director his successor shall be
5 elected to serve a term of two years. The directors shall
6 hold office until their successors have been elected and hold
7 their first meeting."

8 **Q And my question is actually at the very last**
9 **sentence of that paragraph, Miss Cuadros. Could you read**
10 **that last sentence?**

11 A I did.

12 **Q Of the full paragraph?**

13 A Yes.

14 **Q Does your copy not say that directors shall hold**
15 **office until their successors have been elected and hold**
16 **their first meeting?**

17 A Yes.

18 **Q Is that what you were just reading?**

19 A I believe so.

20 MS. SARVADI: It sounded like she read something
21 different. I apologize, Your Honor.

22 BY MS. SARVADI:

23 **Q And is that part of what formed the basis for the**
24 **board's decision with regard to the response to the petition**
25 **for a special meeting?**

1 A Yes.

2 Q As well, if you would turn back to page 115,
3 Section 3 under Article 4 of the bylaws that is entitled,
4 "Special Meetings." Did you rely on that provision in
5 forming this response to the petition?

6 A I did read this. Yes.

7 Q And that was part of what went into your response?

8 A Yes.

9 Q Has the board -- and I'm switching gears. So, we
10 can hand Mr. King his binder back.

11 THE COURT: It can stay up there. Ask your next
12 question.

13 MS. SARVADI: Yes, sir.

14 BY MS. SARVADI:

15 Q Has the board reached a conclusion that it will not
16 allow Gordon Properties to vote in an upcoming election?

17 A No.

18 Q At any time since the filing of this bankruptcy
19 action in the fall of 2009 has the board made an affirmative
20 decision not to allow Gordon Properties to vote?

21 A No.

22 Q Do you recall the 2009 annual meeting?

23 A Yes.

24 Q Had the board at the time of that 2009 annual
25 meeting on October 2nd made an affirmative decision that it

1 was going to allow or deny Gordon Properties the right to
2 vote?

3 A No.

4 Q Since that time has there been any vote of the
5 board to determine the answer to that question?

6 A No.

7 Q Did you receive the flyer that was the subject of
8 one of the reasons for the postponement of the 2010 annual
9 meeting?

10 A I did.

11 Q And did you form any opinion with regard to the
12 flyer itself?

13 MR. KING: I'm going to object, Your Honor. None
14 of this was part of my direct and it's not an issue for
15 today. The issue with respect to the flyer was tried back at
16 the preliminary injunction hearing.

17 THE COURT: We're just taking the same evidence on
18 it. You can go into it. Are you going to call her again in
19 your case?

20 MS. SARVADI: No, Your Honor. He simply referred
21 to it as a false premise.

22 THE COURT: Go ahead.

23 BY MS. SARVADI:

24 Q Did you form an opinion, Miss Cuadros, as to the
25 flyer?

1 A Well, I whenever -- I read the flyer. It was put
2 under my door. My first concern was it had no one's name on
3 it and I felt like anyone who took advantage of the promises
4 of this flyer might have a problem determining where to go to
5 get their prize.

6 **Q Was that the first time you were made aware of the**
7 **flyer being circulated in the building when you first**
8 **received it?**

9 A That's the first time I saw the flyer, was it was
10 put under my door; and then I had a telephone call from Mr.
11 Claggett telling me that someone was circulating this flyer.

12 **Q And did you then attend a regularly scheduled**
13 **meeting of the board on September 21, 2010 at which the flyer**
14 **was discussed?**

15 A Yes.

16 **Q And that's the meeting where Reed Smith came and**
17 **gave initial comments to the board?**

18 A Yes, they did.

19 **Q At that time did the subject of postponing the 2010**
20 **annual meeting come up?**

21 A Yes.

22 **Q And who suggested that to the board?**

23 A Mr. Robert Diamond.

24 **Q Prior to that time had there ever been a discussion**
25 **of the board about postponing or canceling the 2010 annual**

1 meeting?

2 A No.

3 Q Had the board undertaken efforts as a group to have
4 the association hold the annual meeting?

5 A Yes.

6 Q Had you yourself been campaigning as a member for
7 election to the board if an upcoming election were to have
8 been held?

9 A Yes.

10 Q Why did the board elect to postpone the 2010 annual
11 meeting?

12 A It was the recommendation --

13 MR. KING: I'm going to object, Your Honor. The
14 reason is stated in the notice.

15 THE COURT: She can answer the question.

16 Answer the question, please.

17 THE WITNESS: It was the recommendation of our
18 attorney.

19 BY MS. SARVADI:

20 Q As set forth in the memo and the notice you
21 circulated?

22 A Yes.

23 Q What was the objective of the board in making the
24 decision to postpone?

25 A We wanted to have a definitive answer about whether

1 or not Gordon Properties could vote and we wanted to -- we
2 wanted to prevent any kind of problem with this flyer.

3 Q Was there any discussion by the board that by
4 postponing the 2010 annual meeting that Gordon Properties
5 would do anything with respect to the past-due assessment
6 that formed the basis of the delinquency?

7 A No. There was no discussion.

8 Q Was there any discussion about whether this would
9 extract from Gordon Properties anything of any kind, anything
10 of any value of any kind?

11 A No.

12 Q You testified earlier that Mr. Sells on behalf of
13 Gordon Properties had previously requested a special meeting
14 of the board. Do you recall that?

15 A I do recall it; yes.

16 Q Do you recall the expressed terminology of the
17 petition from the prior request for a special meeting? Do
18 you recall what it says?

19 A No, I don't.

20 Q So, do you have any opinion as to whether it is
21 different or the same as the language set forth in the
22 petition that has been admitted as Plaintiff's Exhibit?

23 A I believe it is different; yes.

24 Q And what forms the basis of that belief?

25 A Well, it's difficult for me to answer that since I

1 don't know what was in the petition at this point.

2 Q Is the basis of your belief that in the first
3 instance you in fact did try to hold that special meeting?

4 A Yes, we did.

5 Q And did the board incur costs in trying to hold
6 that special meeting?

7 A Yes.

8 Q Was it in excess of \$20,000?

9 A Yes, it was.

10 Q And was a quorum achieved at the special meeting
11 that was conducted at that time?

12 A No.

13 Q Do you have any reason to disagree with the date of
14 June of 2009 as the time of that special meeting?

15 A I don't have. I couldn't argue with it. I don't
16 remember the date.

17 MS. SARVADI: I'll represent only to the court
18 since we're taking judicial notice of the papers filed in the
19 first adversary proceeding, there was a passing reference, I
20 believe, in those papers that one was held in June of '09.
21 That was the sole reference to it. That is the source of
22 that information. I believe it was in opposition to their
23 motion for a preliminary injunction.

24 THE COURT: Do you know where in the record?

25 MS. SARVADI: Excuse me.

1 THE COURT: Do you know where in the record?

2 MS. SARVADI: It was a footnote. I can only
3 picture it visually, Your Honor.

4 THE COURT: Was it in a brief?

5 MS. SARVADI: It was in FOA's opposition to the
6 motion for a preliminary injunction in the first adversary.

7 THE COURT: I would not have adjudicated that.

8 MS. SARVADI: No but simply if the court were going
9 to ask if we had a copy, I don't.

10 THE COURT: No. What I take notice of -- I'm going
11 to take notice of the fact that the pleading was filed. I'm
12 not going to necessarily take notice of the truth of the
13 allegation.

14 MS. SARVADI: Yes, sir. Just simply the source of
15 the basis for my request. I just wanted you to know where --

16 (Pause.)

17 THE COURT: Where it is found? Do you know? He
18 doesn't know.

19 MR. KING: I'm not even sure what's being asked,
20 Your Honor.

21 THE COURT: She's trying to tie down about the 2009
22 special meeting and Miss Cuadros doesn't know. The best you
23 can say, as I understand it, it was in the summer of 2009?

24 THE WITNESS: I believe that's true. Yes.

25 MR. KING: I think we will get some specificity

1 soon. BY MS. SARVADI:

2 Q Miss Cuadros, at this time does the board intend to
3 hold a 2011 annual meeting?

4 A Yes.

5 Q And to your knowledge are any of the members of the
6 election committee that the board appointed intending to run
7 for the board?

8 A I would have no knowledge of that. I assume not.
9 They could not be on the election committee if they're a
10 candidate.

11 Q Are there any board members who currently hold that
12 position who own more than one unit in the FOA condominium
13 project?

14 A There are.

15 Q Who are they?

16 A Lucia Hadley owns three units.

17 Q And anyone else? Does Dr. Pepper own more than one
18 unit?

19 A Dr. Pepper owns two units; yes.

20 Q Is he a commercial owner as well as a residential
21 owner?

22 A Yes, he is.

23 Q Does he get any additional voting strength by
24 virtue of his ownership of more than one unit?

25 A He has the voting rights of both.

1 Q Fair distinction. My question was different. As a
2 board member does he have any additional weight given? In
3 other words, does he hold more than one seat because he has
4 more than one unit?

5 A No. No. No, he doesn't.

6 Q And the provision that's the resolution of 2009-03
7 which you were discussing with Mr. King applies equally to
8 those board members?

9 A Yes. It applies to anyone that owns property.

10 MS. SARVADI: I don't have any further questions,
11 Your Honor.

12 REDIRECT EXAMINATION

13 BY MR. KING:

14 Q Miss Cuadros, you'll agree that no successors have
15 been elected since 2006? Is that right?

16 A That is correct.

17 Q So, what you're telling the court is that your
18 understanding of the bylaws is that those successors serve in
19 perpetuity as long as there's no annual meeting?

20 A As long as there's no election replacing them.

21 Q Which your position is, that can only occur at an
22 annual meeting; is that right?

23 A It can occur at a special meeting if the petition
24 were to say that they were being removed and an election were
25 to occur at that time.

1 Q Oh, so you have to remove the successor before you
2 can elect his replacement at a special meeting?

3 A Yes.

4 Q Okay. So, if the successor is not removed in
5 accordance with the bylaws then that successor serves in
6 perpetuity until an annual meeting is conducted?

7 A Or a special meeting is.

8 Q At which the successor is removed in accordance
9 with the bylaws?

10 A Yes.

11 Q But in the absence of a removal under the bylaws
12 the unit owners aren't allowed to vote for new board members
13 except at an annual meeting?

14 A Yes.

15 Q Did I understand you to say, Miss Cuadros, that
16 your concern about the flyer that had been sent out was that
17 the recipient of the flyer didn't know where to get their
18 prize?

19 A Right.

20 Q Was there any other concern?

21 A Well, I really hadn't read it that closely at the
22 time Mr. Claggett called. I was in the process of reading it
23 when the telephone call came. It was my initial concern.

24 Q So, if your concern was that someone didn't know
25 where to get their prize how would that taint the proxy?

1 A Well, at that point I hadn't considered the proxies
2 being tainted. That was my initial -- uh, with the petition
3 when I read it.

4 Q You'll agree that one of the objectives of the
5 board and the association is to encourage attendance at the
6 annual meeting; is that right?

7 A I'm sorry. What did you say?

8 Q You'll agree that one of your objectives as a board
9 member is to encourage participation at the annual meeting?

10 A Yes. Yes.

11 Q Have you ever attended any type of an event where
12 they gave away a door prize to encourage participation?

13 A I may have.

14 Q Are you aware that that's illegal?

15 A No, I'm not aware it's illegal.

16 Q In fact, your understanding is it's not illegal; is
17 that right?

18 A It's my understanding it's not illegal.

19 Q And wasn't that the basis of your attorney's
20 opinion to you as to why you should cancel the meeting,
21 because this flyer was somehow a violation of the law?

22 A That is correct.

23 Q You didn't question that?

24 A I didn't question that when he told us that, no. I
25 hadn't previously considered it. So, I did not question it

1 when he said it was.

2 Q Doesn't the flyer say that the TV would be awarded
3 following the meeting?

4 A I -- I don't remember exactly. It may say that.

5 Q When was Mr. Hadley elected to the board?

6 A Miss?

7 Q Miss Hadley. I'm sorry. When was Miss Hadley
8 elected to the board?

9 A She was appointed to the board.

10 Q She's never been elected?

11 A No, she has not been elected.

12 Q What members of the board that have been elected
13 own more than one unit?

14 A Dr. Pepper is one.

15 Q Dr. Pepper?

16 A Mm-hum.

17 Q And when was he elected?

18 A He has been on the board probably since 2000, I
19 would imagine, 2000 on.

20 Q So, if the elections that were held by the board at
21 which Mr. Hadley [sic] was elected -- those elections were
22 not covered by policy resolution that was adopted in 2009;
23 were they?

24 A Well, I believe they were.

25 Q How would that have been?

1 A The board has the right to replace someone when --
2 replace a director when they leave the board.

3 Q No, that's not my question, Miss Cuadros.

4 Policy resolution 2009 prevents unit owners who own
5 more than one unit from electing more than one candidate to
6 the board; is that right?

7 A Yes.

8 Q My question to you was: That policy resolution
9 since it wasn't adopted until March of 2009 didn't apply to
10 Mr. Hadley when he was elected to the board; did it?

11 A Miss Hadley.

12 Q I'm sorry. I'm sorry. Dr. Pepper.

13 A No, it didn't apply to him. There was no
14 resolution.

15 Q In fact, prior to the adoption of the policy
16 resolution the association followed the terms of the bylaws
17 which essentially are one unit, one vote; is that correct?

18 A One unit, one vote.

19 Q Right.

20 A For what?

21 Q For candidates for the board of directors.

22 A Well, they -- yeah. More or less. They vote their
23 voting right.

24 Q There's nothing in the bylaws is there, Miss
25 Cuadros, that limits a unit owner who owns more than one unit

1 **from electing more than one candidate to the board?**

2 A Not to my knowledge.

3 MR. KING: Thank you, Your Honor.

4 Your Honor, I would ask that Exhibit No. -- I think
5 it was "11," Exhibit No. 11 be admitted.

6 MS. SARVADI: I stated my objection previously,
7 Your Honor.

8 THE COURT: "Eleven" will be admitted.

9 (Plaintiff's Exhibit No. 11 was
10 received in evidence.)

11 MS. SARVADI: Very brief followup, Your Honor.

12 RE CROSS EXAMINATION

13 BY MS. SARVADI:

14 Q **Miss Cuadros, I don't know that you have exhibits**
15 **from the PI hearing. So, I'm going to show you --**

16 MR. KING: It's in there.

17 BY MS. SARVADI:

18 Q **Could you see if Plaintiff's Exhibit 8 is in that**
19 **binder? It should be a numbered tab.**

20 A Okay.

21 Q **Is this the flyer to which you were referring with**
22 **Mr. King?**

23 A Yes.

24 Q **Was FOA's board of directors involved in any way**
25 **with the offer that is contained in this flyer?**

1 A I believe that one of the board members could have
2 been; yes.

3 Q That would be Miss Brungart?

4 A Yes.

5 Q My question was slightly different. My question
6 was: Was there an affirmative decision of the board to
7 support the offer of any sort of prize to be given away at
8 the end of the annual meeting in 2010?

9 A No.

10 Q And FOA would have been the host of that board
11 meeting in 2010; would it not?

12 A Yes.

13 Q So, this wouldn't have been a door prize because
14 it's not a prize offered by the host; correct?

15 A That is my interpretation.

16 MS. SARVADI: No further questions, Your Honor.

17 FURTHER REDIRECT EXAMINATION

18 BY MR. KING:

19 Q Would you agree to offer such encouragement for the
20 2011 meeting?

21 A Sure.

22 MR. KING: Thank you.

23 THE COURT: There have been some questions, Miss
24 Cuadros, about this policy resolution 2009-03.

25 THE WITNESS: Yes.

1 THE COURT: How is it supposed to work?

2 THE WITNESS: Well, it just means that -- that more
3 than one person from any one entity being a commercial unit
4 or a residential unit. Only one person may run for the
5 -- may be elected to the board. And we have had -- we have
6 had more than one in the past. So, Gordon Properties is not
7 the first one to do this.

8 THE COURT: Well, with respect to Gordon
9 Properties, how does this work?

10 THE WITNESS: How does it work? Well, the same way
11 it would work for anyone else. Only one -- I'm afraid I
12 don't understand exactly what you meant.

13 THE COURT: Well, I don't understand how the policy
14 is supposed to work. You're saying that only one
15 representative from Gordon Properties can be on the board of
16 directors?

17 THE WITNESS: Yes; can be elected to the board.

18 THE COURT: Can they vote for seven directors at
19 this next meeting?

20 THE WITNESS: We have allowed that in the past,
21 yes, and if they were -- we would take the one with the
22 highest number of votes if that one person --

23 THE COURT: Well, my question is different.
24 Everyone who votes can vote in this meeting coming up for
25 seven people; is that right?

1 THE WITNESS: Yes.

2 THE COURT: And then you take the totality of the
3 votes and the top seven in this case will be the new board;
4 is that right?

5 THE WITNESS: Yes.

6 THE COURT: And you're not saying that Gordon
7 Properties can't vote for seven people; are you?

8 THE WITNESS: No, no. They can vote for seven
9 people.

10 THE COURT: But you're saying if Gordon Properties
11 is made up of -- it's limited liability company; is that
12 correct?

13 MR. CLAGGETT: Correct, Your Honor.

14 THE COURT: If it has four members in the limited
15 liability company and each one runs as a director, you're
16 saying that only one of those four could be elected?

17 THE WITNESS: Yes.

18 THE COURT: Can they support anyone they want, up
19 to a non-member of the LLC?

20 THE WITNESS: Support any member?

21 THE COURT: Could they vote for anyone other than
22 who's a member of the LLC?

23 THE WITNESS: You mean like an employee of a
24 commercial --

25 THE COURT: No. It would have to be another unit

1 owner, I assume. Is a unit owner a requirement of being on
2 the board of directors?

3 THE WITNESS: We have in the past had Mr. -- Frank
4 Ward was a member of the board, representing Gordon
5 Properties. He was not an owner in the building but he
6 represented Gordon Properties.

7 THE COURT: If a unit is owned individually,
8 perhaps by Dr. Pepper, can someone run in his place who is
9 not an owner of the unit and say, "I'm running because Dr.
10 Pepper says I can run."?

11 THE WITNESS: An employee of Dr. Pepper could run;
12 yes.

13 THE COURT: All right. Any other questions?

14 MS. SARVADI: Just a quick followup.

15 FURTHER RECROSS EXAMINATION

16 BY MS. SARVADI:

17 **Q If a husband and wife jointly owned a unit and both**
18 **of them ran and let's assume they were one of the top seven**
19 **candidates who received the greatest number of votes at an**
20 **election, would they both be allowed to obtain a seat on the**
21 **board?**

22 A No.

23 **Q And how would you decide who would get that?**

24 A The one who had the highest number of votes.

25 //

1 FURTHER REDIRECT EXAMINATION

2 BY MR. KING:

3 Q You will agree, Miss Cuadros, that situation is a
4 little different than owners of multiple units; won't you?

5 A It is different.

6 Q The husband and wife still own just one unit?

7 A Yes.

8 Q And it's one unit, one vote?

9 A Right.

10 Q With respect to Gordon Properties, they own 40
11 units?

12 A Yes.

13 Q But you're saying they don't get to vote one unit,
14 one vote like every other unit owner? They can only vote one
15 candidate on the board?

16 A Anyone who has multiple units --

17 Q Understood. Understood.

18 THE COURT: So that I understand your question:
19 Your client, Gordon Properties, can still vote for seven
20 people? What they're trying to say is, only one of those can
21 be a member, one in four members to the LLC or a designee?

22 MR. KING: Right. That wasn't the distinction I
23 was making to individual owners. With respect to Gordon
24 Properties, yes.

25 BY MR. KING:

1 Q The question that Judge Mayer asked you was: Let's
2 assume. Notwithstanding policy resolution number 2009,
3 Gordon Properties today in response to the call for
4 candidates could nominate all four members of its LLC as
5 candidates for the board; could it not?

6 A They can; yes.

7 Q And what you're saying is, if those four people
8 received one of the top seven votes, three of them would be
9 rejected and then you'd move down to the next one to find out
10 who is eligible to serve on the board?

11 A Yes.

12 Q In response to the question that Judge Mayer asked
13 you about whether someone other than a unit owner, in other
14 words, Dr. Pepper, could serve and you said an employee of
15 Dr. Pepper's could serve, is Dr. Pepper's unit a commercial
16 unit?

17 A Yes. He --

18 Q Who is the unit owner? Is it Dr. Pepper
19 individually or is it some P.C. that he owns?

20 A No. It is Dr. Pepper.

21 Q It's Dr. Pepper individually?

22 A Mm-hum.

23 Q Well, then I would refer you to paragraph two of
24 your policy resolution that says, a unit owner of a single
25 unit may serve on the board of directors but may not be

1 represented by any other person on the board of directors.

2 So, how is it that an employee of Dr. Pepper would be
3 eligible to serve in light of this policy resolution?

4 A Okay. Would you read that again?

5 Q I'll let you look at it. It's Exhibit No. 10, Miss
6 Cuadros, and it's paragraph two.

7 THE COURT: That's a loose exhibit. It's not in
8 the binder.

9 MR. KING: It's the loose --

10 THE WITNESS: So, it's in the binder? It's in the
11 other --

12 MR. KING: No. It's a loose exhibit. It may be
13 hanging out there.

14 May I approach the witness stand, Your Honor?

15 THE WITNESS: Okay. I'm sorry. Now which one?

16 MR. KING: Paragraph two of the policy resolution.

17 (Pause.)

18 THE WITNESS: Okay. I may be wrong about -- my
19 answer may have been wrong. I assumed this meant a
20 residential unit. It doesn't say that specifically.

21 BY MR. KING:

22 Q So, in other words, Gordon Properties could not
23 nominate Jane Brungart as its representative to serve on the
24 board?

25 A No.

1 Q So, the only people essentially that Gordon
2 Properties under this policy resolution could nominate to
3 serve on the board is either an owner, an officer or director
4 of Gordon Properties?

5 A Yes.

6 Q You'll agree, won't you, Miss Cuadros, that either
7 individuals or entities that are affiliated with Gordon
8 Properties also own units at the condominium; is that right?

9 A Yes.

10 Q Gordon Residential Holdings owns a unit?

11 A Yes.

12 Q I think Mr. Sells individually owns a unit.

13 A Yes.

14 Q But this policy resolution will consider them all
15 one and the same unit so that even amongst all of those
16 units, the unit owned by Mr. Sells individually, the unit
17 owned by Gordon Residential Holdings, units owned by Gordon
18 Properties, maybe units owned by other individuals that own
19 Gordon Properties, all of them are still limited to just one
20 candidate; is that right?

21 A That's not my interpretation of it.

22 Q Okay. I ask you to look at --

23 THE COURT: Paragraph five.

24 BY MR. KING:

25 Q -- paragraph five.

1 (Pause.)

2 THE WITNESS: Okay. That is what it says. I had
3 not read this in a while; so, I didn't remember that.

4 MR. KING: Nothing further, Your Honor. Thank you.

5 FURTHER RECROSS EXAMINATION

6 BY MS. SARVADI:

7 Q Miss Cuadros, other than Gordon Properties and
8 Gordon Residential Holdings and Dr. Pepper, are there other
9 commercial entities that own units that are part of FOA?

10 A Under commercial units, yes.

11 Q Including the gas station that's part of the
12 project?

13 A Right.

14 Q And there are other units within the building on
15 the commercial floor that are not owned, controlled or
16 operated by Mr. Sells, to your knowledge?

17 A I believe that it was determined that all of the
18 units on the third and fourth floors are deemed to be
19 commercial units.

20 Q And do you have any idea how many units there are
21 that are commercial units?

22 A I don't know.

23 MS. SARVADI: Nothing further, Your Honor.

24 THE COURT: You were answering a question earlier
25 about Dr. Pepper and a designee from his practice, I believe,

1 sitting on the board of directors. Did problems arise with
2 that arrangement or with other arrangements like that?

3 THE WITNESS: No; not to my knowledge. I think we
4 were just anticipating problems.

5 THE COURT: What were you anticipating?

6 THE WITNESS: What this prevents is that -- we
7 didn't want people to serve on the board of directors who had
8 -- might be enticed to vote a particular way because of their
9 relationship with someone else on the board.

10 THE COURT: That had not been a problem before?

11 THE WITNESS: I don't think we've had it before.

12 THE COURT: Well, what was the threat? What was
13 the concern that caused you to move in this direction?

14 THE WITNESS: I don't know that there was a
15 specific threat.

16 THE COURT: Well, what caused it to be raised as an
17 issue?

18 THE WITNESS: I think it was first considered as an
19 issue at one point when we did have a husband and wife that
20 were running for the board or considering to run for the
21 board.

22 THE COURT: When was that?

23 THE WITNESS: It was within the last ten years. I
24 can't tell you specifically what year it was.

25 THE COURT: Was it shortly before you passed this

1 resolution?

2 THE WITNESS: It was before this resolution.

3 THE COURT: I know it was before. I said, shortly
4 before?

5 THE WITNESS: Yes. It could.

6 THE COURT: Shortly before?

7 THE WITNESS: Right. Mm-hum.

8 THE COURT: Did you say it could have been or it
9 was?

10 THE WITNESS: No. It was.

11 THE COURT: This resolution goes far beyond a
12 situation of a unit owned by a husband and wife. How did the
13 rest of it get in? What was the issue?

14 THE WITNESS: I think we just looked to the -- to
15 considering things that might happen. It wasn't -- we didn't
16 look at anything specifically.

17 THE COURT: And it's your view that if Gordon
18 Properties had four members on the board of directors that
19 would not be healthy for the condominium?

20 THE WITNESS: I don't believe it would be healthy
21 for the condominium, no; not only Gordon Properties but for
22 anyone that that might apply to.

23 THE COURT: Do you know who drafted the policy
24 resolution?

25 THE WITNESS: It was drafted by our attorneys.

1 THE COURT: At the time it was drafted was there
2 litigation pending between the association and Gordon
3 Properties?

4 THE WITNESS: I -- I imagine so.

5 THE COURT: It's dated March 26, 2009. Does that
6 help you?

7 THE WITNESS: In the last five years we have had
8 litigation pending almost constantly. So, I would say that
9 your answer is, yes.

10 THE COURT: It's attached to the call for
11 candidates, the letter dated July 12, 2011. Do you know why
12 it got attached to that?

13 THE WITNESS: I'm sorry.

14 THE COURT: This is attached to the call for
15 candidates, the letter that went out from your secretary,
16 Elizabeth Moore, to unit owners, dated July 12th of this
17 year. Do you know why it was attached to this call for
18 candidates?

19 THE WITNESS: Well, we just wanted to make sure
20 that everyone understood what -- what the rules were
21 concerning the election.

22 THE COURT: Since this is March 2009, would it have
23 been attached to the call for candidates for the annual
24 election, 2009?

25 THE WITNESS: I don't know.

1 THE COURT: How about in 2010?

2 THE WITNESS: I don't know -- I do know. It was
3 not.

4 THE COURT: Any other questions?

5 MR. KING: Not of this witness, Your Honor.

6 MS. SARVADI: Just a point of clarification.

7 FURTHER RECROSS EXAMINATION

8 BY MS. SARVADI:

9 Q Dr. Pepper owns a commercial unit in the building?

10 A Yes.

11 Q Does he also own a residential unit?

12 A Yes, he does.

13 Q How does he own that? Is it singularly or jointly
14 owned?

15 A I believe it's probably jointly with his wife.

16 MS. SARVADI: Just since there were questions about
17 his ownership. That's the only questioning I have.

18 THE COURT: Anything else?

19 (No response.)

20 THE COURT: Can she be excused or you're going to
21 need her later?

22 MR. KING: I think she can be excused, Your Honor.

23 MS. SARVADI: Yes, Your Honor.

24 THE COURT: All right. Miss Cuadros, thank you for
25 coming. You're excused. You can stay if you like or you can

1 go.

2 MS. CUADROS: Thank you, Your Honor.

3 MR. KING: I call Robert Diamond, Your Honor.

4 THE COURT: All right. How much time do you need
5 for this witness?

6 MR. KING: Certainly not more than an hour. I
7 think it's probably about a half an hour.

8 THE COURT: And do you have much to develop on
9 this?

10 MS. SARVADI: I really don't know how much we're
11 going to address. I don't think I have much for Mr. Diamond
12 but at some point I would like a short break if possible.

13 THE COURT: I was going to take a break. I think
14 this is a good time. If he was only five minutes, I think --

15 MR. KING: It's going to be more than five minutes.

16 THE COURT: If it might be an hour, this would be a
17 good time.

18 MR. KING: Thank you.

19 THE COURT: Ten or 15 minutes.

20 (Whereupon, a recess was taken.)

21 THE COURT: Your next witness is here?

22 MR. KING: Our next witness is here.

23 THE COURT: Come on up and be sworn.

24 //

25 //

1 Whereupon,

2 ROBERT DIAMOND

3 was called as a witness and, having been first duly
4 sworn, was examined and testified as follows:

5 DIRECT EXAMINATION

6 BY MR. KING:

7 **Q It's still morning. Good morning, Mr. Diamond.**

8 A Good morning.

9 **Q Would you state your name for the record, please?**

10 A Robert Diamond.

11 **Q And you're an attorney at Reed Smith; is that**
12 **right?**

13 A Yes, sir.

14 **Q And you're counsel for First Owners Association of**
15 **Forty-Six Hundred Condominium?**

16 A We're special counsel; yes.

17 **Q Mr. Diamond, you'll recall your testimony from a**
18 **hearing that we had in April on the preliminary injunction;**
19 **correct?**

20 A Yes.

21 **Q And specifically the advice that you gave to the**
22 **board with respect to postponing the 2010 annual meeting?**

23 A Yes.

24 **Q And you'll agree that the notice that was sent out**
25 **essentially had two reasons for postponement? One had to do**

1 with the flyer for the HDTV that was sent out and the other
2 had to do with the fact that you were awaiting a decision
3 from the 4th Circuit on the appeal?

4 A That's correct.

5 Q And you I assume know that the 4th Circuit issued
6 its opinion?

7 A Yes.

8 Q Notwithstanding the fact that the 4th Circuit
9 issued its opinion, FOA has not rescheduled the 2010 annual
10 meeting; is that right?

11 A That's correct.

12 Q Do you know that I had sent an email to Mr. Dingman
13 after the issuance of the 4th Circuit opinion saying now that
14 the opinion has been issued, would you now please reschedule
15 the 2010 annual meeting? Were you aware of that?

16 A Probably. I can't recall it at the moment.

17 Q Do you recall whether Mr. Dingman responded to that
18 request?

19 A Since we haven't held the meeting, I assume he said
20 no.

21 Q In fact, he did, and I don't know how much your
22 recollection is. I will represent to you that Mr. Dingman's
23 response was -- and he essentially referred to Judge Mayer's
24 opinion on the preliminary injunction which said: I'm not
25 going to order as a remedy a meeting now when there's a 2011

1 meeting scheduled in October. There's enough time. We can
2 get it scheduled. Mr. Dingman's response was the same thing,
3 that because Judge Mayer felt that, that that's the
4 association's position; they'll just have an annual meeting
5 in 2011. Does that ring a bell to you?

6 A Yes. That sounds reasonable.

7 Q So, if the idea is to use the 2011 meeting then,
8 can you represent to Judge Mayer that the association will
9 provide Gordon Properties all of its voting rights at that
10 meeting?

11 A I can't because I'm, first of all, not the person
12 making that decision. I do know that between Mr. Dingman and
13 myself, we'll obviously advise the board as to whether or not
14 it's our legal opinion that they're obligated to allow Gordon
15 Properties to vote or not, and that's going to take looking
16 at Judge Mayer's opinion, 4th Circuit opinion and what we
17 think the law is.

18 Q Which opinion of Judge Mayer?

19 A The one that you referenced. The one that was
20 appealed to the 4th Circuit.

21 Q I assume you would also look at whatever opinion
22 Judge Mayer might issue as a result of this hearing?

23 A Of course.

24 Q Would you agree as you sit here now, Mr. Diamond,
25 that if the association were to offer a door prize to any of

1 the unit owners who registered their proxies in order to
2 encourage attendance that that would be okay?

3 A I don't know. I really don't know. I'd have to go
4 look at both the City of Alexandria Code and state law.

5 Q You're aware that Gordon Properties filed a
6 petition for a special meeting; is that correct?

7 A Gordon Properties along with some other owners did
8 file a request for a special meeting; yes.

9 Q And that request was denied; is that right?

10 A That's correct.

11 Q Did you review the letter that went out by Miss
12 Cuadros rejecting that petition for a special meeting?

13 MS. SARVADI: I believe that may call for the
14 disclosure of attorney-client work product.

15 THE COURT: I think that's correct.

16 MR. KING: I think that's right. Strike the
17 question.

18 BY MR. KING:

19 Q Mr. Diamond, how long have you been counsel for
20 FOA?

21 A In the most recent iteration, probably about four
22 and a half years.

23 Q So, you were counsel for FOA at the time that FOA
24 commenced its litigation against CSI and Gordon Properties
25 back in 2008; is that right?

1 A Yes.

2 Q And you'll agree, will you not, Mr. Diamond, that
3 the claim that was made at that litigation against Gordon
4 Properties with respect to its liability on the money that
5 CSI allegedly took was used as the basis for an assessment
6 that Gordon Properties didn't pay and then was denied the
7 right to vote at the 2008 annual meeting forward? Do you
8 have a recollection of that?

9 A I certainly wouldn't put it that way.

10 Q How would you put it?

11 A That Gordon Properties did not pay its assessments
12 to the association.

13 Q And the only assessment in 2008 that wasn't paid
14 was the assessment that was evidenced by that claim in the
15 litigation, that Gordon Properties was responsible for the
16 money that CSI allegedly had taken?

17 A I can't answer that question sitting here. I don't
18 know.

19 Q Okay. Do you recall that there was a jury verdict
20 in that case wherein the jury held that Gordon Properties and
21 the court confirmed that Gordon Properties was not
22 responsible for that money that CSI allegedly had taken?

23 A I believe that the jury held that CSI was
24 responsible. I don't remember what they said about Gordon
25 Properties. I assume it was nothing -- I assume they did not

1 find them liable because otherwise there would be judgment on
2 them, as well.

3 Q And do you remember when that jury verdict came
4 down?

5 A No.

6 Q Do you recall whether Gordon Properties petitioned
7 for a special meeting after that jury verdict?

8 A No, sir.

9 Q Do you recall that FOA adopted a policy resolution
10 in 2009 with respect to what candidates would be elected to
11 the board?

12 A Yes, sir.

13 Q Do you recall the timing of that policy resolution
14 in context of the jury verdict and Gordon Properties' request
15 for a special meeting?

16 A No, sir.

17 Q And you'll agree that the intent of that policy
18 resolution is to limit an owner of more than one unit from
19 electing to the board more than one candidate?

20 A Yes, sir.

21 Q You'll agree that there is no such limitation in
22 the bylaws; is that right?

23 A That's correct.

24 Q And in fact, there's no such limitation in any of
25 the condominium statutes or in any of the other condominium

1 instruments related to 4600 Condominium?

2 A That's correct.

3 Q And in fact, those instruments as adopted and
4 recorded in the land records provide for one unit, one vote?

5 A No, sir.

6 Q Then tell me how the candidates are elected.

7 A You vote by percentage interest.

8 Q Based on the unit?

9 A Yeah. Each unit has its own percentage interest
10 and the owner of that unit casts a vote equal to the -- it's
11 actually -- I think it's a hundred times -- ten times
12 percentage interest of that unit.

13 Q The number of votes that a person obtains is based
14 on the percentage interest voting?

15 A Yes.

16 Q But it's still one unit, one vote?

17 A I don't understand how you can say that.

18 Q Well, let's talk about a unit that is owned by a
19 husband and a wife. The husband and wife both can't vote; is
20 that right?

21 A No. They only get the vote pertinent to that one
22 unit.

23 Q Just the unit?

24 A That's correct.

25 Q The position of FOA is that under the policy

1 **resolution, even if Gordon Properties owned every unit in the**
2 **condominium it still could only elect one candidate?**

3 A No. If they owned every unit in the condominium no
4 one could complaint about anything that they did.

5 **Q But if they owned every one but one, they could**
6 **only vote for one candidate?**

7 A Unless they repeal that resolution, I believe
8 that's the correct result.

9 **Q That policy resolution can be repealed by a vote of**
10 **the members at the annual meeting; can't it?**

11 A Not to my knowledge.

12 **Q How can it be repealed?**

13 A By the board.

14 **Q Oh, so the unit owners have no say over whether**
15 **that policy resolution applies to them?**

16 A The way governance of condominiums works in
17 Virginia and in fact almost in every state: The board of
18 directors has the operating authority for all decisions
19 except for those specifically called out in the documents and
20 reserved in membership. If the members don't like what the
21 board is doing, whether it's management, resolutions,
22 spending or anything else, their remedy is to replace the
23 board.

24 THE COURT: At the circumstances at which you're
25 faced at this condominium, you would agree would you not that

1 policy resolution 2009-03 makes it more difficult for the
2 unit owners to replace?

3 THE WITNESS: No. It just means you'd have to have
4 more than one group of owners represented on the board.

5 THE COURT: When was the last time there was a
6 quorum?

7 THE WITNESS: I'm not certain. I think 2006.

8 THE COURT: When did the last term expire for
9 someone who was elected at an annual meeting? I understand
10 there are holdover provisions. But the regular term would
11 have expired when?

12 THE WITNESS: I don't know.

13 THE COURT: There are two-year terms. They were
14 elected in 2006. They would have expired when?

15 THE WITNESS: If they were elected in '06, it would
16 be '08.

17 THE COURT: So, the directors who enacted this
18 policy resolution were all holdovers or appointed by
19 holdovers?

20 THE WITNESS: I believe so; yes. Your Honor, the
21 one thing I would add to that: You asked me the question, is
22 there anything in the documents for 4600 Duke Street or FOA
23 dealing with limitations on the number of directors unit
24 owners could elect. The answer is, no, there isn't. But
25 those documents were done in the early '70s. There are very

1 frequently similar provisions today, in modern condominium
2 documents.

3 THE COURT: What's the point, Mr. Diamond?

4 THE WITNESS: I didn't want to be misleading when I
5 said that, you know, it's like nobody ever does this; it's
6 not done.

7 THE COURT: You didn't say that. You didn't give
8 the impression that no one else has ever done this before.

9 THE WITNESS: Okay. I'm sorry.

10 THE COURT: But your testimony is that these
11 documents don't contain these provisions?

12 THE WITNESS: They do not. That's correct.

13 THE COURT: And by what authority does the board of
14 directors have the right to establish qualifications in
15 excess of those within the documents?

16 THE WITNESS: Actually, the bylaws specify that the
17 board of directors has the power to govern the operations of
18 the association, the administration of the association and
19 the election procedures and all of the things surrounding the
20 election.

21 THE COURT: You've got the book in front of you
22 with the bylaws. It's Exhibit 12. Would you point to the
23 provision that permits them to establish qualifications for
24 directors?

25 MR. KING: It's in the black book, Mr. Diamond.

1 THE COURT: Exhibit 12 in the black book.

2 (Pause.)

3 THE WITNESS: The section primarily that use their
4 general powers basically says, the board of directors --

5 THE COURT: Excuse me. Where are you?

6 THE WITNESS: Article 5, Section 3. It's page 117
7 of the notebook. "The board of directors shall have all the
8 powers and duties necessary for the administration of the
9 affairs of the owners association at the condominium project
10 and may do all such acts and things as are not by law or
11 these bylaws directed to be exercised and done by the
12 members." And it is generally accepted that they can
13 establish rules and regulations for the operation of the
14 association and governance of the association.

15 THE COURT: But that is the sole source of the
16 authority to establish --

17 THE WITNESS: I can't -- I'm sorry.

18 THE COURT: That's the sole source, as far as you
19 know, of authority of the board of directors to establish the
20 qualifications to serve as a director?

21 THE WITNESS: That's correct. They could not
22 modify what's in these bylaws as far as qualifications but
23 they can add gloss and add additional requirements.

24 Again, you haven't asked me the question but one of
25 the things people are doing these days is saying, you can't

1 serve on the board if you're a registered sex offender.

2 Those things didn't exist in the '70s when these documents
3 were drafted.

4 THE COURT: The question is one of authority, Mr.
5 Diamond.

6 THE WITNESS: Okay.

7 THE COURT: If you have the authority, you can do
8 it; if you don't have the authority, you can't. That's a
9 principal ruling, is it not, in Gilman v. Build America?

10 THE WITNESS: The Gilman v. Build America case was
11 decided primarily on the fact there was a punitive effort to
12 prevent a husband and wife's legitimate use of the property,
13 and the court said you can't do that.

14 THE COURT: That's correct.

15 THE WITNESS: And I think they're right.

16 THE COURT: And they could not do it because they
17 did not have the authority to do it. The General Assembly
18 came back and later said yes, you can impose fines and
19 penalties, if you wish.

20 The principle of Gilman is: If you have the
21 authority, you may exercise it; if you do not have the
22 authority, you may not exercise it.

23 THE WITNESS: I agree.

24 THE COURT: And my question to you is for you to
25 point to where that authority is in these documents. You

1 pointed me to Article 5, Section 3.

2 THE WITNESS: That's correct.

3 BY MR. KING:

4 Q Mr. Diamond, you'll agree, won't you, that prior to
5 the adoption of that policy resolution a person that owned
6 more than one unit could elect more than one candidate to the
7 board?

8 A No one had challenged that right. Yes, I would
9 agree with you.

10 Q And in fact, in 2008, Joe Smith who owns one unit
11 decides to buy another unit and he looks at what is recorded
12 among the land records to determine what his rights are and
13 as of that date when he bought his unit he had the right to
14 vote for a candidate for each one of those units if he bought
15 the second unit?

16 A He always has the right to vote for as many
17 candidates as he wants.

18 Q Not since the policy resolution.

19 A After the policy resolution.

20 Q Excuse me.

21 A He could not nominate and elect two candidates, say
22 him and his wife. That he couldn't do.

23 Q But he owns two units.

24 A Right.

25 Q He can't nominate and elect more than one candidate

1 for the board as an owner of more than one unit under that
2 policy resolution?

3 MS. SARVADI: Objection.

4 THE WITNESS: No. That's not correct.

5 BY MR. KING:

6 Q So, if Mr. Sells owns -- it doesn't work in the
7 case of an individual because it's the same person. Let's
8 talk about a corporation. Mr. Smith's corporation owned one
9 unit in 2006 and he could vote for a candidate for the board
10 of directors as an unit owner?

11 A He could vote for seven candidates.

12 Q No. He could nominate and vote his own candidate
13 for --

14 A If you say "his own candidate," that makes all the
15 difference.

16 Q Yes.

17 A Yes.

18 Q In 2006, he could?

19 A Yes.

20 Q And he could have bought his second unit and
21 nominated his president of his company for one unit and the
22 vice president of his company for the second unit?

23 A Prior to this resolution, yes, that could have been
24 done.

25 Q And that was a right that he had when he looked at

1 the land records for what was in the condominium --

2 A Absolutely.

3 Q And this policy resolution took that right away
4 from him?

5 A That's correct.

6 MR. KING: Nothing further, Your Honor.

7 THE COURT: Did you have anything further?

8 (Pause.)

9 CROSS EXAMINATION

10 BY MS. SARVADI:

11 Q Without disclosing any attorney-client confidence
12 that might have been shared with you, do you have any under-
13 standing as to whether this resolution was passed with
14 respect to collecting an assessment from Gordon Properties?

15 MR. KING: Your Honor, if Miss Sarvadi is going to
16 ask questions about his understanding, I think she opens up
17 entire -- I won't accept that qualification without
18 disclosure of attorney-client privilege. I think if you're
19 going to get into the basis for which it was adopted and
20 things of that nature, I think it opens it up.

21 MS. SARVADI: If he learned the information from
22 something other than attorney-client confidence -- I don't
23 know the answer because, as I said, I wasn't aware this was
24 even going to be addressed here today.

25 THE COURT: Well, lay the foundation, first of all,

1 outside, as to whether or not he has any knowledge outside
2 the attorney-client relationship.

3 BY MS. SARVADI:

4 Q Other than any communication shared with you by
5 your client, FOA, do you have any information from a third
6 source, third-party source about the purpose behind this
7 resolution?

8 A I can speak to this as to why a condominium would
9 adopt this kind of thing.

10 MS. SARVADI: I appreciate that. We don't want
11 your generalities. So, at this point, I have no further
12 questions.

13 THE COURT: Thank you. May he be excused?

14 MS. SARVADI: Yes.

15 MR. KING: Your Honor, I think he needs to stay as
16 to rebuttal. Maybe I will release him very shortly but I
17 think he needs to stay at least until the examination of Mr.
18 Sells is completed, Your Honor.

19 THE COURT: Thank you. We may need you still, Mr.
20 Diamond. So, if you would wait across the hall.

21 MR. KING: I call Bryan Sells, Your Honor.

22 THE COURT: Mr. Sells, come forward and be sworn,
23 please.

24 //

25 //

1 Whereupon,

2 BRYAN SELLS

3 was called as a witness and, having been first duly
4 sworn, was examined and testified as follows:

5 DIRECT EXAMINATION

6 BY MR. KING:

7 **Q State your name for the record, please.**

8 A Bryan Sells.

9 **Q And you're a member of Gordon Properties, LLC?**

10 A Managing member; yes.

11 **Q Managing member. You also are an owner of another
12 entity that owns a unit at 4600 Condominium; is that right?**

13 A I am the managing member of Gordon Residential
14 Holdings, LLC which owns one residential unit, and I also in
15 my individual capacity own one other residential unit.

16 **Q And your understanding is that this policy
17 resolution that we've been talking about applies not only to
18 the units owned by Gordon Properties but units owned by
19 Gordon Residential Holdings and your individual unit, that
20 you could not nominate and elect more than one candidate?**

21 A My understanding of the purpose and effect of the
22 resolution would be to prevent me as an owner of unit 703 as
23 an individual from holding office if, say, Gordon Residential
24 were to elect somebody or Gordon Properties were to elect
25 somebody. But those three entities, me, Gordon Residential

1 and Gordon Properties, could only get one candidate elected.

2 **Q And all of your units were purchased prior to the**
3 **adoption of this policy resolution; is that right?**

4 A I think that's right. I don't remember exactly
5 whether I bought unit 703, before or after this. But I can
6 tell you, my recollection is that this resolution was not in
7 my -- call it resale package.

8 **Q Mr. Sells, I would like you to take us through,**
9 **briefly, the chronology here so that Judge Mayer can put**
10 **things into context, and I'd like you to go back to 2008 and**
11 **the litigation that was commenced by FOA against Gordon**
12 **Properties. You heard the testimony earlier with respect to**
13 **FOA suing both CSI and Gordon Properties with respect to**
14 **funds. And there was a jury verdict in that litigation; is**
15 **that right?**

16 A It was.

17 **Q Prior to the jury verdict was there an annual**
18 **meeting of FOA scheduled?**

19 A You're talking about the 2008 meeting?

20 **Q 2008 annual meeting.**

21 A Yes, there was a meeting scheduled in 2008 as per
22 the bylaws in October.

23 **Q Was Gordon Properties permitted to vote at the 2008**
24 **annual meeting?**

25 A No.

1 Q And why was that?

2 A Because we were allegedly delinquent; and the story
3 of how they came to that conclusion is an interesting one.

4 MS. SARVADI: Objection. Again, we're getting into
5 relevance. Anything that happened in '08 certainly can't be
6 the basis of a violation for a stay when the bankruptcy was
7 filed in '09.

8 MR. KING: Again, I'm not asking for a finding of a
9 stay based on conduct in '08. Again, all of this is part of,
10 as Your Honor had mentioned, a footnote.

11 I think when you connect all of these dots, the
12 whole argument that we are making, Your Honor, is that FOA
13 has evidenced an intention for years, not just since the
14 bankruptcy was filed but for years of trying to deny Gordon
15 Properties the right to vote and that its actions post-
16 bankruptcy are simply a continuation of this pattern of
17 conduct by the board and, candidly, by its attorneys in order
18 to deny Gordon Properties the right to vote. And Your Honor
19 can accept --

20 THE COURT: Well, that's one thing. Then the other
21 is, is it an effort to collect a debt?

22 MR. KING: Correct. That's why we're not asking to
23 say that the conduct in 2008 was a violation of the stay
24 because there was no stay in effect. But it goes to the
25 intent, Your Honor, and I think it provides Your Honor the

1 circumstantial evidence that you need to conclude that the
2 conduct post filing of the bankruptcy which in the abstract
3 by itself may be equivocal to Your Honor -- I think the
4 equivocalness of all the evidence goes away when Your Honor
5 understands this footprint and the circumstantial evidence
6 with respect to what it is that FOA had done for years, Your
7 Honor, with respect to Gordon Properties and its right to
8 vote.

9 MS. SARVADI: It's collateral. It is a character
10 attack that has no relationship to the acts that have
11 allegedly formed the basis of damages to Gordon Properties.
12 There's no doubt. You can take judicial notice of the
13 court's opinion from the CSI action that these parties have
14 been litigating for years and this lawsuit was in fact as a
15 result of CSI's theft and conversion of money from FOA as
16 found by a jury. But all of these are circumstances
17 regarding prior damage that are not subject of the claim
18 objection or other things that may have happened to its
19 members should not be admitted for the reasons I've stated.

20 THE COURT: I don't see how it's related to
21 character damage at all. That doesn't strike a bell with me.
22 I don't see that. I think what Mr. King is saying that
23 there's a pattern of conduct and in trying to determine what
24 the association is doing one can look at the totality of the
25 circumstances and pattern of conduct over a number of years.

1 It's not just one instance, he's saying, and to try to
2 discern from all of that circumstantial evidence their intent
3 in postponing the 2010 meeting, not rescheduling when there
4 was a decision from the Court of Appeals and what they intend
5 to do at the 2011 meeting. I think that that's all fair
6 evidence.

7 It's all circumstantial because they're trying to
8 discern intent, because they're trying to find out something
9 that's in the minds of individuals, and the only thing we can
10 do is look at the actual events that occurred.

11 So, it is all relevant to establishing the intent
12 and it's a broader picture of what has occurred.

13 The association is saying no, we're not violating
14 the automatic stay and Mr. King is saying yes, you are and
15 look at the totality of the total picture, everything that
16 has gone on before and actually happening now and that which
17 is going to happen in October based on what we can discern
18 from the package that has already gone out. We can draw a
19 conclusion as to intent.

20 So, with that, I think it's relevant and you may go
21 ahead.

22 BY MR. KING:

23 **Q What was the basis for denying Gordon Properties**
24 **the right to vote at the 2008 annual meeting?**

25 A In September of 2008, FOA instructed its management

1 company to retroactively add an assessment to Gordon
2 Properties' account as of early August so that we would be 30
3 days delinquent by the time the October meeting came.

4 **Q And that assessment was for what?**

5 A That assessment was FOA's contention that Gordon
6 Properties owed this money that CSI had allegedly stolen
7 because Gordon Properties owns CSI.

8 **Q So, Gordon Properties did not get to vote at the**
9 **2008 annual meeting?**

10 A No, we did not.

11 **Q And there was a jury verdict on FOA's claim against**
12 **Gordon Properties?**

13 A There was. That came February of 2009.

14 **Q And that jury verdict was in Gordon Properties'**
15 **favor?**

16 A It was. It was that Gordon Properties doesn't owe
17 FOA a dime as of the middle of February 2009.

18 **Q So, at that time, what did Gordon Properties do**
19 **with respect to elections after the jury verdict had been**
20 **rendered?**

21 A Well, as soon as we were in the clear, we
22 immediately petitioned for a special meeting to have an
23 election of the board of directors.

24 **Q And you'll notice from Exhibit No. 10 that the date**
25 **that the policy resolution was adopted was in March of 2009.**

1 **Was your petition for a special meeting before or after that?**

2 A You know, I don't know if it was precisely before
3 or just afterwards but I think our intention to call a
4 special meeting for that purpose was going on before. We had
5 in fact called a special meeting in '06.

6 **Q And then leading up to the 2009 annual meeting --**
7 **up until the issuance of the 2009 assessment that is the**
8 **subject of the claim objection was Gordon Properties current**
9 **in all of its assessments?**

10 A Well, no. What happened is, after we filed this
11 petition for a special meeting that is when Miss Cuadros sent
12 me the letter saying, oh, by the way, we are going to
13 retroactively assess you for three years, and that's the
14 quote, unquote 2009 assessment that forms the basis of the
15 claim.

16 So, the chronology was very specifically: We asked
17 for a special meeting. Miss Cuadros' letter I believe is
18 dated May 20th. It says, if you look at it, that this
19 retroactive assessment will become delinquent after June 1st.
20 That's what it says. So, in other words, we're going to give
21 you a ten-day grace period to pay this money even though I
22 think the bylaws state 15 days but her letter said June 1st.

23 Well, the special meeting that we asked for in the
24 spring of 2009 was held on June 25th which is not, if I've
25 done my math right, 30 days after June 1st, and the bylaws

1 section that we're talking about here is -- it says 30 days.

2 So, we were set to vote at this special meeting and
3 FOA's attorney says: No. We're not going to let you vote
4 because you're more than 30 days delinquent. And I pointed
5 out the letter. I pointed out the --

6 MS. SARVADI: Objection, Your Honor. I'm sorry to
7 interrupt the witness but this is becoming very
8 non-responsive to the question.

9 MR. KING: I think it was exactly responsive, Your
10 Honor. That's what I was getting at.

11 THE COURT: The objection is overruled. Go ahead.

12 THE WITNESS: So, we were denied the right to vote
13 on the basis of this very thing even though we weren't 30
14 days delinquent because on the spot FOA's attorneys said that
15 the due date was actually the date that the letter was sent
16 rather than 15 days after the letter which would be
17 consistent with the bylaws or June 1st which would be
18 consistent with the letter itself.

19 So, it was another retroactive on us. They had
20 done it at the 2008 meeting. They did it at the special
21 meeting in 2009. That was again used to deny us the right to
22 vote at the fiasco in 2009.

23 BY MR. KING:

24 Q And then the May 2009 assessment that is the
25 subject of the claim objection, that itself -- Gordon

1 **Properties disputed that?**

2 A That's the subject of this.

3 **Q Did FOA express its intention to Gordon Properties**
4 **that its failure to pay that 2009 assessment would be the**
5 **basis for it denying it its right to vote in the 2009 annual**
6 **meeting?**

7 A I believe it did. It's pretty standard language to
8 throw out in either the call for candidates or the notice or
9 both, that delinquent unit owners can't vote.

10 **Q And other than the 2009 assessment that is the**
11 **subject of the claim objection, Gordon Properties is current**
12 **and has remained current on all of its assessments with**
13 **respect to all of its units?**

14 A Yes.

15 **Q As evidenced by Exhibit 9, I believe it is --**
16 **sorry. Exhibit 6, petition for special meeting in June.**

17 A Yes.

18 **Q And what was the purpose of that special meeting?**

19 A To elect successors for each director whose term
20 had expired.

21 **Q And did you have a sufficient number of unit owners**
22 **to sign that petition to call for a special meeting?**

23 A Yes. More than sufficient.

24 THE COURT: Excuse me. More than what?

25 THE WITNESS: More than sufficient. We built in a

1 little padding.

2 BY MR. KING:

3 Q In fact, I think FOA contested a couple of the
4 signatures because you maybe had a husband and a wife or
5 something? Is that --

6 MS. SARVADI: With respect to this petition or a
7 prior petition?

8 MR. KING: With respect to this request for a
9 special meeting.

10 MS. SARVADI: I don't believe that has been
11 established by any testimony thus far.

12 THE COURT: That's why he asked him the question.

13 BY MR. KING:

14 Q Did that --

15 A I'm not aware of that. It's possible; but I don't
16 think Miss Cuadros' letter denies that we had the right
17 number of votes.

18 Q So, you got to my next question. Exhibit No. 11
19 was the letter you got from Miss Cuadros denying your request
20 for a special meeting?

21 A Yes.

22 Q Other than policy resolution number 2009 that was
23 adopted, has FOA told you yet whether you will be entitled to
24 vote at the 2011 annual meeting? Any limitation on your
25 voting other than the 2009 policy resolution?

1 A Well, no; but I think the cover letter if it
2 doesn't it usually does mention that you have to be --

3 Q Well, that's in the policy.

4 A That's in the policy.

5 Q The delinquency you mean?

6 A Yes.

7 Q That's in the policy resolution itself.

8 A And the bylaws.

9 MR. KING: Thank you.

10 CROSS EXAMINATION

11 BY MS. SARVADI:

12 Q Mr. Sells, you would agree with me that the bylaws
13 do say that a delinquent owner, someone who's delinquent for
14 more than 30 days, may not vote; correct?

15 A That's a paraphrase but an accurate paraphrase.

16 Q Would it also be an accurate paraphrase to say that
17 the declaration and bylaws state that if a director who is
18 currently serving becomes more than 30 days delinquent they
19 are automatically terminated as a director?

20 A I think that's a correct paraphrase, as well.

21 Q With respect to 2008, when you have characterized
22 to the court that FOA went through certain steps to create,
23 as you seem to suggest, a delinquency that otherwise didn't
24 exist, did you file a lawsuit against FOA with regard to
25 that?

1 A With regard to specifically the retroactive
2 assessment part?

3 Q Yes.

4 A No. FOA filed a lawsuit against us about that; and
5 so, that came out in the testimony. There was a
6 counterclaim.

7 Q You are talking about the lawsuit that FOA filed
8 against CSI and Gordon Properties jointly, related to the
9 alleged conversion of the funds regarding the payment --

10 A Well, I think you're getting confused. The initial
11 counterclaim may have included CSI but I don't think it did.
12 If it were in there, CSI quickly got demurred out or whatever
13 you call it in the procedure. That was the lawsuit that was
14 initiated by Gordon Properties against FOA for a variety of
15 financial type things and FOA countersued, counterclaimed
16 over this what was then a retroactive delinquency.

17 Q Included in that claim that Gordon Properties
18 brought was there a breach of fiduciary duty count with
19 respect to the board's retroactive or improper assessment?

20 A I don't remember.

21 Q Do you know how many times Gordon Properties has
22 sued FOA in the past ten years?

23 A Probably not as many as they deserved to be sued.

24 Q There wasn't an election held in 2008, was there,
25 Mr. Sells?

1 A Nor in 2007 or 2009 or 2010.

2 Q And with respect to 2007 and 2008, that was because
3 no quorum was achieved; was it not?

4 A With respect to which?

5 Q 2007 and 2008.

6 A No. 2007 was unilaterally canceled by the board.
7 I'm glad you asked about that. On the night of the election
8 there was a paper like this posted on the door of the meeting
9 room where the meeting was scheduled to take place and it
10 said something to the effect of: Our bylaws say that
11 delinquent unit owners don't count for proxy and we have so
12 many delinquent unit owners. We're going to just go ahead
13 and cancel the meeting.

14 Q Do you have a copy of that?

15 A I don't.

16 Q Did Gordon Properties or you personally sue FOA
17 with regard to that alleged failure to hold the 2007 annual
18 meeting?

19 A Yes.

20 Q And you testified at that hearing; did you not?

21 A I did.

22 Q And isn't it true that the Circuit Court for the
23 City of Alexandria found that a meeting in fact had been
24 held?

25 A Yes.

1 Q And did not order another meeting to be held?

2 A That's exactly right. It found specifically that
3 simply calling a meeting was enough to satisfy the Non-Stock
4 Corporation Act requirement that a meeting be held.

5 Q Well, they didn't simply call it. They issued the
6 call for candidates; correct?

7 A I assume so; yes.

8 Q And they received petitions for people who were
9 running for election?

10 A Yes.

11 Q And people campaigned?

12 A Yes.

13 Q And they brought everyone together?

14 A No.

15 Q They didn't?

16 A No. The League of Women Voters wasn't there. All
17 of that was canceled; and in fact, the bylaws don't say that
18 delinquent unit owners can't be present at a meeting. They
19 say they can't vote. So, this was an extra wide
20 interpretation of that Article whatever. So, yeah, that's
21 what happened.

22 Q And did Gordon Properties appeal the ruling of the
23 judge's decision finding that they had held that meeting?

24 A We did.

25 Q And you lost?

1 A We did.

2 Q What was your role with CSI with respect to 2006,
3 Mr. Sells?

4 A I'm not sure.

5 Q You don't recall that you were the chief executive
6 officer of CSI on August 1st, 2006?

7 A I think I was; yeah.

8 Q So, in fact, it was you who sent the letter to all
9 of FOA's unit owners directing them to continue sending
10 payments to CSI after FOA terminated CSI?

11 A It was I who sent that letter; yes.

12 Q At any time has Gordon Properties ever circulated
13 an offer to unit owners offering compensation, money in
14 exchange for proxies?

15 A Yes.

16 Q And you signed that letter?

17 A Yes. It's actually not compensation for proxies.
18 We were offering to enter into voting agreements as allowed
19 under the Non-Stock Corporation Act.

20 Q And you were going to pay unit owners if they would
21 give you their voting right?

22 A Well, no. That's not exactly accurate. The offer
23 for a voting agreement can mean anything. Right? So, our
24 offer was not contingent on them giving us their right to
25 vote. The offer was, as I recall it, contingent simply on

1 their participating in the meeting.

2 So, in other words, you can vote against us and our
3 candidates and we will still give you the money. We are just
4 trying to encourage participation. So, it wasn't contingent
5 on voting a certain way although I think that that kind of
6 agreement would be absolutely, 100 percent legal under the
7 Non-stock Corporation Act.

8 **Q If I understand your history -- and of course, I**
9 **apologize. I don't have copies of any of these pleadings**
10 **before me. There was not a ruling that Gordon Properties was**
11 **out of the CSI dispute regarding assessments until February**
12 **of 2009?**

13 A The middle of February. Yes.

14 **Q So, therefore, at the time that the notice that**
15 **Gordon Properties was being assessed with respect to that**
16 **conduct, the issue was before a court but hadn't been**
17 **decided?**

18 A I don't think that's right because I think the
19 counterclaim was filed after that -- I think it was after --

20 **Q Do you remember the date?**

21 A No. No, I don't. I remember very clearly some of
22 the sequence. The meeting was supposed to be in October.
23 The call went out in -- the notice went out in August as it
24 usually does.

25 What we normally do is vote our rights under the

1 Condo Act documents, get a statement of our account to make
2 sure that we're current sometimes in early September so that
3 we know we won't be more than 30 days; and we got those
4 accounts. They showed us current and then, boom, it was
5 added after that point when we requested our accounts but it
6 was backdated to August.

7 **Q Do you have any documents that support that**
8 **timeline?**

9 A Yes.

10 **Q Do you have them or have you produced them to FOA?**

11 A No. I think they've just been judicially noticed.
12 It's the testimony of the guy from Cardinal Management whose
13 name I don't recall but he testified to all of that.

14 **Q So, you're saying the document that forms the basis**
15 **for your testimony is a ruling or a transcript of testimony**
16 **from a prior proceeding?**

17 A Well, that's not the only basis. I mean, I'm the
18 one who requested the certificate of account. I saw the
19 certificate of account. I'm the one who was later told, oh,
20 by the way -- I went down. I got new certificates of
21 account. I saw that the charges were posted prior to when we
22 requested the subsequent certificate of account. So, this
23 guy's testimony confirms what I knew.

24 **Q Did you produce any of those documents relating to**
25 **certificates of account or other materials in this case?**

1 A In that case?

2 Q In this case. In this action.

3 A No.

4 Q Mr. Sells, would I be correct if I said that Gordon
5 Properties and CSI filed for bankruptcy in the fall of 2009?

6 A I don't remember the date of the CSI petition. I
7 think it was 2010 but I could be wrong.

8 Q I apologize. Do you remember the hearing on the
9 preliminary injunction matter in the first adversary
10 proceeding filed by Gordon Properties against FOA?

11 A No, I do not.

12 Q Were you present for that meeting?

13 A No, I was not.

14 Q Would you have any reason to disagree with the fact
15 that it was October 7th if that is what PACER reflected?

16 A I think that's exactly when it was because that's
17 my anniversary -- the hearing.

18 Q And that was the same day as the scheduled 2009
19 annual meeting? Do you remember that?

20 A I think that's right. Yeah.

21 Q Do you know how many times Gordon Properties has
22 filed suit against the individual directors of FOA for
23 alleged breaches of their fiduciary duty?

24 A No, I don't.

25 Q Was that more than twice?

1 A I don't recall.

2 Q You can't estimate?

3 A No. I don't remember those, you know, minor
4 details of each pleading.

5 Q Did CSI object to its termination under the
6 management agreement when FOA terminated it?

7 A Yes.

8 Q Did you sue FOA -- did CSI sue FOA in connection
9 with that matter?

10 A I don't believe so. I believe that was part of our
11 counterclaim in a subsequent lawsuit brought by FOA.

12 Q It was -- well, the court has a copy of the record
13 related to the underlying state court action for the -- Judge
14 Kembler. So, I won't ask any questions about that.

15 THE COURT: Only what you provided in the summary
16 judgment.

17 MS. SARVADI: Yes.

18 THE COURT: You offered it once or it's going to be
19 offered? Is --

20 MS. SARVADI: I can do that later, Your Honor,
21 rather than take time with this witness.

22 THE COURT: However you wish.

23 BY MS. SARVADI:

24 Q Do you know, Mr. Sells, if Gordon Properties had a
25 representative of its company at the 2009 annual meeting?

1 A Yes.

2 Q And who was that?

3 A Lindsay Wilson, my cousin.

4 Q Did Gordon -- I'm sorry. I didn't mean to
5 interrupt you.

6 A She's my cousin.

7 Q Did you have counsel at that meeting?

8 A I think we did; yes.

9 Q Was it ever communicated to you explicitly from FOA
10 or shared with your counsel and passed to you that -- strike
11 that question, Your Honor.

12 MS. SARVADI: I have no further questions.

13 REDIRECT EXAMINATION

14 BY MR. KING:

15 Q There was one other representative of Gordon
16 Properties present at that meeting; wasn't there?

17 A Well, Rick Mendelson was at the meeting. He's I
18 think technically representing one of the Gordon Properties
19 or one --

20 Q He's the guardian for that member; is that right?

21 A He's the co-conservator.

22 Q So, Gordon Properties essentially had three people
23 at the meeting, Miss Wilson, Mr. Mendelson and your attorney?

24 A Yes.

25 THE COURT: In these actions that have been taken

1 since 2010 and now going into the 2011 meeting, do you feel
2 that there's pressure being brought on you to pay the
3 condominium fees that are assessed against you even though
4 you dispute them?

5 THE WITNESS: Oh, absolutely. If you look at --
6 well, if you take what Mr. Diamond said earlier about the
7 unit owners' recourse is to elect a new board, well, we can
8 do one of two things. We can try to elect our own members to
9 the board or we can join in coalitions with others and try to
10 provide for a claim. And this policy resolution takes care
11 of the number one threat which is Gordon Properties getting
12 people on the board. And I think the remaining restriction
13 on our ability to vote, meaning put on a plate of folks and
14 campaign normally, is that the delinquency provision. So,
15 they have effectively tied both of our hands.

16 THE COURT: How does that relate to getting you to
17 pay the assessment?

18 THE WITNESS: Because if we paid that wouldn't
19 obtain. They would not be able to prevent from voting.

20 THE COURT: And why is voting important in the
21 context of this case, the proof of claim that has been filed?

22 THE WITNESS: Well, Your Honor, we may disagree
23 about this but I'm of the view that who sits on the board
24 matters quite a bit.

25 Now, we all have to play by the same set of rules

1 but I think we've heard in the last couple of days of
2 testimony that different people have different
3 interpretations of the rules, and I think having our people
4 up there interpreting is better than having their people up
5 there interpreting these rules. Our side would not have
6 written something like Plaintiff's Exhibit 11, for example.

7 So, you could say, well, ultimately the courts will
8 decide that and if Miss Cuadros is wrong about Article 5,
9 Section 5, it will eventually get resolved. Sure, after
10 \$150,000 worth of litigation. It shouldn't happen that way.
11 The board ought to be making decisions the right way. This
12 board is not making decisions the right way.

13 And again, you know, I respectfully disagree with
14 perhaps your view that who sits on the board doesn't matter
15 that much. In my experience over the last five years, it
16 matters a great deal.

17 THE COURT: How would it change the amount that
18 you're obligated to pay by way of assessments?

19 THE WITNESS: You know, I don't know that because a
20 lot of that is bankruptcy procedure that's way over my head.
21 But I can tell you that on a, let's say, going-forward basis
22 the next board will have to decide how much to put into
23 reserves, how -- whether to spend money doing X or Y.

24 If you look at the budget template for FOA, it's
25 very complex. There are lots of little numbers on the

1 spreadsheet and the board gets to say whether money goes here
2 or here, over here, over there, and those are the kinds of
3 decisions that are virtually unreviewable and have, I think,
4 a large impact on not only the quality of life but the
5 property value at Forty Six Hundred Duke Street.

6 THE COURT: If hypothetically speaking you had a
7 board that was favorable to you -- and I'm not sure what
8 favorable to you means -- what would happen with respect to
9 the proof of claim?

10 THE WITNESS: I don't know.

11 THE COURT: What could happen? What would you
12 anticipate would be under consideration?

13 THE WITNESS: I think that's something that the
14 next board would have to tread on very, very carefully. So, I
15 don't know. I certainly haven't had those discussions with
16 our attorneys now. FOA with the next board would have to
17 have those discussions, you know.

18 I think the answer is, we don't know. If you're
19 asking me if I'm going to cancel the entire claim on May 1, I
20 think the answer is probably no.

21 THE COURT: Would you agree that -- I believe Judge
22 Kembler said the storefront unit was responsible for 11.32
23 percent of the common expenses whatever those common expenses
24 are. There's a methodology apparently to determine what the
25 11.32 percent applies to. Would you agree if that ruling is

1 a ruling that is binding on Gordon Properties that the board
2 of directors has no discretion to accept Gordon Properties in
3 any other way than Judge Kember has indicated?

4 THE WITNESS: No, I wouldn't agree with that, Your
5 Honor.

6 THE COURT: Why is that? Why would you disagree?

7 THE WITNESS: Because I think, for example, that
8 the board would have the authority to settle the claim. They
9 could settle tomorrow.

10 THE COURT: Well, separate and besides the past
11 claim, the proof of claim here but going forward for an
12 assessment in 2011. You're starting fresh. Would the board
13 have any discretion to assess Gordon Properties, storefront
14 unit, storefront commercial unit, any differently than Judge
15 Kember has ruled, assuming that ruling is binding on Gordon
16 Properties and in this case FOA?

17 THE WITNESS: You know, I -- beyond authority to
18 settle litigation or for a genuinely good-faith dispute, I
19 don't know.

20 (Pause.)

21 THE COURT: Why do you think that this action on
22 the part of the board is an effort to collect a condominium
23 fee rather as opposed to a political effort to keep you off
24 the board because they don't like or they fear what you might
25 do? If you had the choice between the two of those, why would

1 you say it's an effort to collect the money?

2 THE WITNESS: I don't think those two are mutually
3 exclusive, Your Honor, but I think about how they ever since
4 2006 ratcheted up the amount we have to pay. The association
5 is not in great financial shape. I think they would be
6 delighted to have our money and I think you can see that, for
7 example, in the fact that when they supposedly did this
8 retroactive assessment they did not give a credit out.

9 If what they're really doing is recalculating the
10 2008, 2007, 2006 budgets, there should be a credit on the
11 other side of the ledger. There's not; just a debit. This
12 is an effort to get cash and particularly from us.

13 (Pause.)

14 THE COURT: Well, if this assessment were paid, you
15 paid it and you were current, you're not delinquent, what
16 would prevent you from participating in a meeting and
17 selecting a board favorable to you, that you call coalition
18 members and getting to the result that you're suggesting
19 which is political change?

20 THE WITNESS: Well, I have my doubts about the
21 fruitfulness of coalition politics in that building. We
22 tried that once. It didn't work. I'm not so eager to try it
23 again.

24 (Pause.)

25 THE WITNESS: I don't think that that policy

1 resolution is proper.

2 THE COURT: Well, leaving that aside, has there
3 ever been any comment to you or other members of the LLC or
4 your property managers or people you employ at the building
5 that if you'd only pay the condominium assessment this would
6 come to an end and you could participate fully?

7 THE WITNESS: I seem to recall some statements to
8 that effect from the association newsletters and campaign
9 materials produced by the board using association funds.
10 They campaigned against us and I can't remember which meeting
11 it was but they sent around something to the effect of we're
12 not -- we're trying to get out of paying our debts.

13 THE COURT: Is that after you filed bankruptcy?

14 THE WITNESS: No. It must have been before. I
15 want to say it was under the '08 meeting because we were
16 delinquent to that point. It could have been the 2009
17 special meeting. But that's part of why I don't think that
18 coalition politics -- or why I don't have much faith in
19 coalition politics in that building, Your Honor, because Miss
20 Cuadros has used the association's newsletter and association
21 funds to smear us among our fellow unit owners and doesn't
22 allow criticism to appear on those issues.

23 THE COURT: But since the filing of the petition
24 you haven't -- have you heard any comments that if you would
25 only pay this would be over; why don't they pay; they're

1 trying to get out of it, or anything like that?

2 THE WITNESS: I don't recall anything after the
3 petition.

4 THE COURT: All right. Any other questions?

5 MR. KING: I just wanted to follow up, Your Honor.

6 BY MR. KING:

7 Q Mr. Sells, with respect to the questions that the
8 court was asking you about, the discretion of the board
9 impacting the amount of the assessment against the
10 street-front unit, I think you and the court agreed that the
11 11.32 percent, or whatever the number was that Judge Kemberler
12 found, whatever the appropriate percentage was, obviously the
13 board doesn't have the discretion to change that.

14 But you were testifying with respect to the manner
15 in which expenses are cubbyholes on the budget and the
16 discretion that the board has with respect to placing those
17 expenses in certain cubbyholes. Does that discretion affect
18 the amount of the assessment the street-front unit has to
19 pay?

20 A Well, it does in that, you know, if the board
21 decides to spend a lot of money on stuff that Judge Kemberler
22 had ruled that the rest of us have to pay for as opposed to,
23 say, terminating inside the building which the storefront
24 wouldn't have to pay for, that would affect the bottom line.

25 Q Right. But for example, if the board of directors

1 were to designate an expense as an expense associated with
2 the general common elements which is what Judge Kemberler ruled
3 that Gordon Properties' street-front unit was responsible
4 for, if they delegated an expense as a general common
5 expense, that would be an expense that Gordon Properties
6 would have to pay as part of its percentage; is that right?

7 A Under Judge Kemberler's ruling.

8 Q Right. And the discretion with respect to whether
9 that expense is a general common expense or another expense
10 lies in the board and its determination of the budget; is
11 that right?

12 A I'm sure it has some discretion on that. Yeah.

13 (Pause.)

14 RE CROSS EXAMINATION

15 BY MS. SARVADI:

16 Q The newsletter to which you referred a moment ago,
17 was that the Crier?

18 A I think it's called the Forty-Six Hundred Crier.

19 Q And you believe that's a publication by the board?

20 A Yes.

21 MS. SARVADI: I don't have any other questions.

22 THE COURT: Thank you very much. You can have a
23 seat with Mr. King.

24 Did you have further evidence you wanted to
25 present?

1 MR. KING: I did not.

2 THE COURT: Is that your case?

3 MR. KING: That is my case, Your Honor. I just
4 want to make sure I've cleaned up with respect to the
5 exhibits. I know we did not admit Exhibits 3, 4, 5, 7, 8 and
6 9. Those are the exhibits that go to the damage claim; and
7 so, those were subject to an objection. We decided --

8 THE COURT: Which ones do you think we've admitted?

9 MR. KING: Well, the only ones we've admitted with
10 regard to today's hearing are 1, 2, 6, 10 and 11.

11 THE COURT: Do you agree?

12 MS. SARVADI: I believe that's correct, Your Honor.

13 MR. KING: And the others I guess we'll address
14 when we get to the bifurcated hearing on damages.

15 THE COURT: One, 2, 3, 6, 10 and 11 --

16 MS. SARVADI: One, 2, 6, 10. "Three" was one of
17 the set of bills.

18 MR. KING: Right.

19 THE COURT: I'm sorry. One, 2, 6, 10 and 11?

20 MS. SARVADI: Yes, Your Honor.

21 THE COURT: All right. Those are admitted.

22 (Plaintiff Exhibit Nos. 1, 2, 6, 10
23 and 11 were received in evidence.)

24 THE COURT: And that's your case?

25 MR. KING: Yes, Your Honor.

1 MS. SARVADI: I would have a motion, Your Honor, if
2 you want to hear it, simply that there has been no testimony
3 that this was an effort to collect a debt. They failed to
4 meet --

5 THE COURT: I'll deny it. I think there is
6 sufficient evidence. Whether or not they can prove that in
7 the end is a different matter. The question at this point
8 is, is there sufficient evidence to proceed with that? The
9 answer is yes.

10 How much do you have?

11 MS. SARVADI: I only have one witness, Your Honor,
12 assuming Mr. Diamond may be excused. Mr. Claggett will be
13 recalled for the witness purpose and I think 15 minutes.

14 THE COURT: Fifteen minutes? All right.

15 MR. KING: I do think Mr. Diamond can be excused,
16 Your Honor. I have no other witnesses.

17 THE COURT: I can either take Mr. Claggett now if
18 he's going to be ten or 15 minutes and conclude all the
19 evidence and come back after lunch or I can go to lunch now.

20 MS. SARVADI: I'm inclined to move forward with Mr.
21 Claggett and then take a break.

22 MR. KING: That way Mr. Claggett can go home if he
23 wants to.

24 THE COURT: All right. Mr. Claggett, you can go
25 ahead and have a seat in the witness stand again. You were

1 already sworn and need not be sworn a second time.

2 MS. SARVADI: If I may, the court's indulgence for
3 one moment, Your Honor.

4 THE COURT: All right. Go ahead and have a seat in
5 the witness stand.

6 Whereupon,

7 JAMES L. CLAGGETT, JR.

8 was recalled as a witness and, having been
9 previously duly sworn, was examined and testified further as
10 follows:

11 FURTHER DIRECT EXAMINATION

12 BY MS. SARVADI:

13 Q Hello, Mr. Claggett. You testified earlier in the
14 plaintiff's case with regard to some efforts that had been
15 undertaken with respect to the 2011 annual meeting. Have you
16 in addition to circulating a call for candidates done
17 anything else personally as the manager of FOA to begin the
18 process for 2011?

19 A No.

20 Q Is the Crier a newsletter published by the board?

21 A No.

22 Q Do you know who publishes the Crier?

23 A It's a newsletter of general information for all of
24 the residents. The editor of the Crier is one Mr. Michael
25 Ulan. The purpose of the Crier is to keep the residents

1 informed as to current events. So, generally the Crier would
2 have legal updates with respect to where pending litigation
3 stands and, also, it usually has a very detailed summary of
4 the previous month's board actions.

5 **Q Has Mr. Ulan, the editor of the Crier, been on the**
6 **board of directors since 2009?**

7 A No.

8 **Q There was a statement made by Mr. Sells that the**
9 **association allows certain members free use of facilities or**
10 **provides assistance without charge to people campaigning who**
11 **might be adverse to Mr. Sells. Do you believe that to be an**
12 **accurate statement?**

13 A No.

14 **Q Do you know if members of the association may use**
15 **the facilities of the association?**

16 A Not for that purpose.

17 **Q Are they allowed to make copies at the association?**

18 A We allow all association owners to make copies of
19 documents in accordance with the Virginia Condominium Act.

20 **Q Do they pay for those services if they're related**
21 **to campaign materials?**

22 A There are campaign materials that get copied. I've
23 only been at FOA -- the only thing I can comment on is 2010
24 and the board did not come into the office to produce
25 campaign materials. I used the copier to prepare for the

1 election and all the documents before they went to the
2 mailing company but that's the extent of it.

3 **Q Prior to the June 28, 2011 meeting of the board of**
4 **directors of FOA had you ever been instructed that the board**
5 **did not intend to hold the 2010 annual meeting?**

6 A No.

7 MS. SARVADI: No further questions, Your Honor.

8 CROSS EXAMINATION

9 BY MR. KING:

10 **Q Where does the money come from to publish the**
11 **Crier?**

12 A That is a budgeted line item.

13 **Q Of the association?**

14 A Yes, sir.

15 **Q And isn't it true that Dee Cuadros approves every**
16 **Crier before it's published and distributed?**

17 A I don't know if "approves" is the right word. I
18 think she sees it.

19 **Q Have you ever known a Crier to go out without her**
20 **approval?**

21 A No.

22 THE COURT: Are you making any special efforts this
23 year to get a quorum?

24 THE WITNESS: The election committee is going to
25 meet this Wednesday and I believe it's their desire to try to

1 have a quorum.

2 THE COURT: Do you have any idea what they're
3 thinking about, how it's going to be approached or there have
4 been no discussions as to that?

5 THE WITNESS: If they had discussions they've been
6 apart from me. I'm just getting back to FOA. The election
7 committee was appointed by the board June 28th. I spoke to
8 the chairperson of the committee and informed her I was going
9 on vacation, and I have no spoken with her since.

10 THE COURT: Fair enough.

11 Any other questions?

12 BY MR. KING:

13 **Q When does the notice of the annual meeting have to**
14 **be sent out?**

15 A I believe it's no more than 90 days but no less
16 than -- it's either 14 or 21. I'd have to look.

17 **Q We're well within that 90-day period; aren't we?**

18 A Yes.

19 **Q And no notice of the meeting has been sent out; has**
20 **it?**

21 MS. SARVADI: Objection, Your Honor.

22 THE COURT: All right. I don't know the
23 significance of that but you can argue that.

24 MR. KING: I needed the evidence anyway. Thank
25 you, Your Honor.

1 MS. SARVADI: We will stipulate that notice hasn't
2 been sent out.

3 THE COURT: Notice hasn't gone out. All right.
4 Any other questions for Mr. Claggett?

5 MS. SARVADI: No, Your Honor.

6 THE COURT: Thank you. You can have a seat with
7 counsel.

8 Is that your case?

9 MS. SARVADI: Yes, Your Honor. It concludes
10 defense.

11 THE COURT: All right. Bring Mr. Diamond back in,
12 if you would, please.

13 We will go ahead and take a lunch break. How much
14 time do you want? An hour at least?

15 MR. KING: No more, Your Honor.

16 THE COURT: No more? The items I've taken judicial
17 notice of, I was careful to make sure I have copies of. If
18 you need to point something out, you may do that.

19 (Mr. Diamond enters courtroom.)

20 THE COURT: Mr. Diamond, they have concluded their
21 evidence; so you're not going to be called back, and you're
22 released and free to go. They're going to go eat lunch and
23 you're welcome to do that or go back to your office or go
24 home and have a nice night's sleep after your long flight in.

25 MR. DIAMOND: All right. Thank you very much.

1 THE COURT: All right. Thank you for coming.

2 All right. We will go ahead and recess until 2:15.

3 MS. SARVADI: Your Honor, would you like the
4 materials related to the judicial notice before you take this
5 --

6 THE COURT: What are you referring to?

7 MS. SARVADI: I simply printed out for the court's
8 reference the docket from PACER for the appeal that went to
9 Judge Hilton. I think the timeline is relevant.

10 THE COURT: Is this the District Court?

11 MS. SARVADI: It is the District Court.

12 MR. KING: I think we stipulated to the date. I'm
13 not sure you need it, Your Honor.

14 MS. SARVADI: Well, there are other dates I might
15 refer to.

16 THE COURT: Hand it up. I'll take that. Is there
17 an objection?

18 MR. KING: No. I accept that it's accurate, Your
19 Honor.

20 THE COURT: Does Mr. King have a copy of it?

21 MS. SARVADI: I don't believe he has a copy of the
22 PACER printout, Your Honor.

23 THE COURT: All right. Well, why don't we make
24 sure. I'm going to give that to you so Mr. King can get a
25 copy over lunch.

1 MS. SARVADI: I will also copy a copy of, which I
2 believe he has, the ruling in CSI v. First Owners, appeal,
3 handed down on April 21st since there has been reference to
4 the causes of action. We intend to refer to them in our
5 argument.

6 MR. KING: I don't believe any of that has any
7 relevance to the relief from stay action, Your Honor.

8 THE COURT: Adversary proceeding?

9 MR. KING: I'm sorry. To the adversary proceeding,
10 Your Honor. The only thing we referred to was the underlying
11 jury verdict that said that Gordon Properties wasn't liable.
12 The opinion of the Supreme Court is irrelevant for that.

13 THE COURT: Is this a Supreme Court opinion?

14 MS. SARVADI: This is the Supreme Court of Virginia
15 decision handed down April 21, 2011, affirming the judgment
16 of the Circuit Court from Alexandria in the case of CSI
17 against First Owners. It was also the subject of Mr. Sells'
18 testimony about who sued whom.

19 THE COURT: And what am I going to look at?

20 MS. SARVADI: The facts as they have set forth,
21 Your Honor, with regard to, first of all, the timing, the
22 claims, and also with respect to -- they keep saying that
23 there are alleged causes of action but such defense was found
24 to have been confirmed.

25 THE COURT: I'll take notice of it. I don't know

1 that it has any relevance. What they were trying to set out
2 was a timeline. Beyond that, I don't know that I really care
3 who won or lost except they're saying Gordon Properties was
4 not liable for the amount that was requested.

5 MS. SARVADI: That is correct but if you --

6 THE COURT: I'll take judicial notice of it and you
7 can inform me as to what parts are relevant and I'll take
8 that into account.

9 Does Mr. King have a copy?

10 MS. SARVADI: I believe he has a copy but whether
11 he has it with him -- I'll make another.

12 THE COURT: Make a copy. Submit them to chambers
13 before we come back so I'll get a chance to read through
14 them. All right. Two-fifteen then. Thank you.

15 (Whereupon, a luncheon recess was taken.)

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1 A F T E R N O O N S E S S I O N

2 THE COURT: Ready, Mr. King?

3 MR. KING: I am, Your Honor. Thank you.

4 Your Honor, what I would like to do in my closing
5 argument is to start by summarizing the evidence from the
6 April hearing. I don't want to go into it. Your Honor has
7 that and the transcript. I certainly would incorporate the
8 argument that I made at that hearing into my argument now.
9 So, I won't spend a whole lot of time dealing with it. But I
10 certainly want to summarize the evidence because I think it's
11 important to the court.

12 THE COURT: You should know, I read the transcript
13 but I didn't read the closing argument.

14 MR. KING: Okay. Well, at least Your Honor will
15 recall the evidence. If you would look at the argument so
16 you can see how I at least at that time tried to connect the
17 dots, and I'm going to try to do so now, as well.

18 I believe, Your Honor, that you will conclude from
19 the evidence introduced at the last hearing and evidence that
20 was introduced today that FOA not only violated the automatic
21 stay but they did so knowingly and also has made it very
22 clear that it intends to violate the automatic stay at the
23 upcoming 2011 meeting unless Your Honor tells them to do
24 something else.

25 Before I get to summarizing the evidence though,

1 Your Honor, I sort of want to digress very slightly because I
2 must confess that I was somewhat alarmed, concerned, I guess,
3 by Your Honor's questioning of witnesses earlier, and I just
4 want to make sure that the court and I are on the same wave
5 length with respect to this issue of the violation of the
6 automatic stay.

7 It somewhat goes to the court's ruling after the
8 2009 preliminary injunction hearing about -- Your Honor said,
9 you can't enforce the bylaws if it's to collect a debt but
10 you found that the conduct was really directed at everyone as
11 opposed to Gordon Properties by itself.

12 THE COURT: That's done as an element.

13 MR. KING: I'm sorry, Your Honor.

14 THE COURT: That was an element.

15 MR. KING: Right.

16 THE COURT: That was only one element.

17 MR. KING: Right. Understood, Your Honor. The
18 point I'm trying to make right now though is at least how I
19 understand Section 362 works.

20 I understand 362 essentially to be sort of in the
21 nature of strict liability. It either is or is not a
22 violation of the automatic stay. It doesn't require an
23 intent on the part of the creditor to violate the automatic
24 stay or even necessarily to take the actions that are
25 specifically given under 362.

1 I have always viewed 326 as an effect. If the
2 conduct that you engage in has the effect of doing the things
3 that are outlined in 362 then it's a violation of the
4 automatic stay and the issue of intent or knowledge certainly
5 then becomes relevant with respect to damages.

6 So, hypothetically, the paradigm that I have with
7 respect to this case is: If FOA elects to enforce the bylaw
8 provision that says that owners who are delinquent on
9 assessments can't vote, it doesn't matter really if the -- it
10 almost doesn't matter if the intent was to coerce payment of
11 a debt. If the effect of it was that it had the effect of
12 collecting a debt and that's what the purpose of enforcing
13 the provision was, then it's a violation of the automatic
14 stay.

15 But also remember that there are other types of
16 actions that are set forth in 362, as well, Your Honor, and
17 it's not just the collection of a debt.

18 I think what we tried to make very clear to Your
19 Honor in this case is that this right to vote is a property
20 right. It's a right that we hold. It's integral to the
21 ownership of a unit.

22 And it also says, any act to control, to exercise
23 control of property of the estate, and I think enforcement of
24 the bylaw provision that denies the right to vote is
25 exercising control over property of the estate.

1 I hope that Your Honor will conclude from the
2 evidence that we're introducing that there was knowledge and
3 there was intent. But it's very clear, Your Honor, from what
4 FOA has said to you that they certainly intend to enforce the
5 bylaw provision at the 2011 annual meeting. They certainly
6 intended to enforce the bylaw at every meeting prior to the
7 2011 annual meeting and they are looking for Your Honor to
8 tell them: No, you can't do that. That's a violation of the
9 automatic stay.

10 Even if you find that all of the conduct up until
11 now was not intentional in the sense that it gives rise to
12 the damage claim -- we certainly think it was. But even if
13 that's Your Honor's conclusion, Your Honor I think can still
14 give Gordon Properties the relief it's asking for and enter
15 the injunction and specifically tell FOA, you can't deny
16 Gordon Properties its voting rights at this meeting that's
17 coming up because of the fact they owe you money. That would
18 be a violation of the automatic stay. You clearly could do
19 that regardless of what you think their intention may be.

20 But what's important, Your Honor, is: FOA has not
21 presented any paradigm to Your Honor as to what legitimate
22 purpose enforcement of the bylaws would have other than
23 collection of the debt. They have not tried to refute the
24 theory at all. All they have said is: No. It's a provision
25 of the bylaws. We're bound by it. Plain and simple, and

1 Your Honor can't change that because it's a matter of the
2 contract. It's in the bylaws. You just simply can't enforce
3 it.

4 But they have no paradigm to explain to Your Honor
5 why enforcement of that bylaw is important to the association
6 other than for purposes of collecting the debt.

7 So, I think based on that, I think Your Honor can
8 find an intention.

9 More importantly, Your Honor, we believe the
10 evidence established that conduct -- we went back through it.
11 The conduct at the 2009 annual meeting was intended to deny
12 Gordon Properties its right to vote and that the cancellation
13 of the 2010 annual meeting was clearly intended to deny
14 Gordon Properties the right to vote. It clearly had the
15 effect of that and that's why I think it's a violation of the
16 stay plain and simple. But we also say it was intentional
17 and that's the basis of our damage claim.

18 With respect to the 2009 annual meeting, again,
19 Your Honor, it's clear what Your Honor concluded after the
20 preliminary injunction hearing on the 2009 action, that it
21 was really more of an abuse of power than specifically
22 directed at Gordon Properties. But that was based on Your
23 Honor's evaluation of the evidence that existed at that time.

24 When we had the April hearing, we asked Your Honor
25 to view anew the conduct of FOA in 2009 in light of the new

1 evidence that we had discovered after that hearing about what
2 actually happened at the 2009 meeting and we asked the court
3 to infer from that conduct that FOA had intended to violate
4 the automatic stay.

5 You certainly couldn't make that leap. I
6 understand I could make the leap but I understand Your Honor
7 couldn't make the leap back in 2009 but I think Your Honor
8 can make that leap now based on everything that has been
9 presented to the court.

10 The evidence was clear. The evidence was from the
11 records of the League of Women Voters and FOA's auditor,
12 Debbie Rivers and they clearly show that the voter rolls
13 shown on -- and this was evidence we didn't have at the 2009
14 meeting. This wasn't produced until later. The voter rolls
15 clearly showed on its face that FOA deemed Gordon Properties'
16 votes ineligible due to the alleged delinquency. You saw
17 that. That notation was made next to every Gordon Properties
18 unit, that they were ineligible to vote.

19 In addition, both Linda Miller and Debbie Rivers
20 acknowledged on the stand. They admitted that the vote
21 tallies that they prepared were clearly prepared reflecting
22 that Gordon Properties' votes had not been counted.

23 So, for FOA to suggest that it didn't intend to
24 deny Gordon Properties its right to vote, to enforce the
25 bylaws of the 2009 annual meeting which is essentially the

1 meeting testimony that Miss Sarvadi was able to elicit from
2 her witnesses is simply incredible in light of the actual
3 evidence of what happened at the 2009 meeting.

4 We also suggested, Your Honor, and based on the
5 evidence that FOA had improperly influenced the voting
6 process by circumventing the very controls that it purported
7 to put in the process to maintain the integrity of the
8 meeting, the suspicion regarding the access to the post
9 office box, suspicion regarding the access to the drop box,
10 and very importantly the fact that the independent election
11 person that they engaged to maintain the integrity, the
12 League of Women Voters, acknowledged that midway through the
13 registration process they just stopped. They just turned it
14 over to Debbie Rivers and said: You take care of it. You
15 check everybody in. You tally all the votes.

16 Debbie Rivers was their agent. That wasn't an
17 independent, Your Honor, and the League of Women Voters -- I
18 don't want to castigate the conduct of the League of Women
19 Voters. I don't think they truly understood what was going
20 on there and the importance of their role but they simply
21 abdicated, and I think for that reason the integrity of the
22 process was clearly suspect.

23 But what's important is that it's a process that
24 was driven, controlled and knowingly controlled by FOA to
25 ensure that Gordon Properties' votes wouldn't be counted.

1 That's the evidence Your Honor had after the April
2 hearing as to what actually happened in 2009 and I think Your
3 Honor no longer needs to make the leap that I was asking it
4 to make. I think the evidence is clear now in that regard.

5 What's very important, Your Honor, is that the
6 evidence I think clearly establishes now that the conduct was
7 not directed at a large group of people but one and it's
8 clearly directed at Gordon Properties.

9 After going through that evidence with respect to
10 2009, what we did at the April hearing, we now have -- we
11 also went through the evidence with respect to the 2010
12 meeting.

13 The court recalls, I hope, the notice that was sent
14 out postponing the 2010 meeting; and again, if you go back
15 and read that notice, Your Honor, it says very clearly -- and
16 not only that, the memorandum that Mr. Diamond prepared and
17 sent to his client, that they clearly did not want to allow
18 Gordon Properties the right to vote.

19 Again, it's under this what I call subterfuge:
20 Well, our bylaws tell us we can't let them vote. So,
21 consequently, we don't want to have an annual meeting because
22 if we have to have an annual meeting, we're going to have to
23 let them vote and that would be a violation of the bylaws.
24 Notwithstanding the fact that Your Honor told them back in
25 2009 that they couldn't do that.

1 So, it was clearly intended. There's no other
2 description but that it was clearly intended to deny Gordon
3 Properties the right to vote, and that was based upon the
4 testimony of FOA's representatives and its own attorney, Bob
5 Diamond.

6 In addition, Your Honor, at the April hearing, we
7 spent a lot of time analyzing the issue of this door prize
8 that was offered to encourage attendance. After all the
9 evidence is considered, Your Honor, and the evidence being
10 the notice itself and this -- I don't know what to call it,
11 the memorandum opinion that Mr. Diamond wrote, you know. But
12 he's better than that. His law firm is better than that. It
13 just has no credibility. It's a very poor legal product,
14 Your Honor, and it's unfortunate.

15 You can only come to one conclusion when you
16 evaluate all that, Your Honor, and that this issue of the
17 door prize, as we suggested at the time, was mere pretext. It
18 was a subterfuge. The subterfuge was to cover their
19 intention to cancel the meeting to avoid having to give
20 Gordon Properties its right to vote.

21 Now, Your Honor, the other reason why it's pretty
22 evident it was subterfuge, Your Honor, is that in response
23 why canceling the meeting was important, you'll recall that
24 what Mr. Diamond said was and in the notice and in the
25 memorandum was: We're going to correct this alleged tainting

1 of the proxies by canceling this meeting, reissuing the proxy
2 and rescheduling the meeting. It never happened, Your Honor.
3 That's pretty good evidence that it was subterfuge right
4 there. They never did it.

5 When asked at the April hearing, you know, why
6 didn't you do it, then they fall back on this other issue of,
7 well, we're waiting for the decision of the 4th Circuit so we
8 have guidance on the appeal issue.

9 So, what happens? The 4th Circuit issues its
10 opinion and notwithstanding a formal demand from us that
11 "Hey, look, this is the position you took with the court.
12 You said that you were waiting for the 4th Circuit decision.
13 Here it is. Reschedule the meeting." they didn't do it. I
14 think that also is pretty evidence of what their intention
15 was with respect to canceling the 2010 meeting, Your Honor.

16 Then it gets worse. After we get the word back
17 from FOA's attorneys that they're not going to reschedule the
18 2010 annual meeting, Gordon Properties then submits a
19 petition for a special meeting with all the signatures on it,
20 and they deny that one, as well, Your Honor.

21 It just adds on, adds on, adds on, Your Honor.
22 It's any one by itself.

23 Maybe Your Honor is justified in not making the
24 leap but when you add all of this together, the footprint as
25 Your Honor called it earlier, I don't think you can come to

1 any conclusion but that they intended to violate the
2 automatic stay, that they intended to enforce the bylaw
3 provision that would prevent Gordon Properties from voting
4 because of the delinquency, because of the assessment.

5 It was pretty clear that if they had the meeting
6 they knew -- they knew based on the notice, what was said in
7 the notice. They knew that they were going to have to give
8 Gordon Properties the right to vote and they didn't want to
9 do that. That was pretty clear from the face of the notice
10 itself. There's no circumstantial evidence there. It says
11 it right on the notice, Your Honor.

12 Now, Your Honor, the evidence that was produced
13 today with respect to the 2011 meeting is more than
14 equivocal. It's pretty clear. It was pretty clear from the
15 testimony of Mr. Claggett and from Miss Cuadros, as well,
16 that they don't know what to do with the 2010 meeting because
17 of the voting rights.

18 It's pretty clear that they are concerned that they
19 have to provide Gordon Properties with the right to vote, and
20 they have said to you, Your Honor, we're waiting for this
21 definitive answer, definitive ruling, and Mr. Claggett has
22 acknowledged that your ruling would be the definitive ruling.
23 Miss Cuadros has said, yes, we want the ruling from the court
24 that tells us we have to do this. Well, Your Honor, that's
25 the purpose of the injunction that we're asking for.

1 There are two components. We want the finding that
2 the stay was violated and we want damages. But we also want
3 Your Honor to issue an injunction enforcing the injunction,
4 and we want Your Honor to say to these people: Yes, it's a
5 violation of the automatic stay. You can't do it. If you're
6 going to have your 2011 meeting, you have got to let Gordon
7 Properties vote.

8 Your Honor, as the remedy, we obviously have a
9 structure in mind with respect to how this meeting can be
10 conducted in a way that maintains the integrity and ensures
11 that Gordon Properties has its right to vote. I don't want
12 to go through that now.

13 If as I hope Your Honor agrees with us and rules
14 that way, we are happy to present a proposed structure of how
15 this meeting can be done with respect to the appointment of
16 an independent administrator and everything else. We
17 actually have been talking about that; and so, we certainly
18 can provide something to Your Honor in that regard.

19 At the end of the day, Your Honor, we believe Your
20 Honor can rule that there was a violation of the automatic
21 stay in both the 2009 and, particularly, in the 2010 meeting.
22 Based on the evidence, it's pretty clear that FOA intends to
23 violate the stay. That may be an overstatement. They intend
24 to enforce the bylaws against Gordon Properties which is a
25 violation of the automatic stay, and we would ask as a remedy

1 an order requiring them to have the meeting, to allow Gordon
2 Properties to vote and setting forth the structure for
3 maintaining the integrity.

4 THE COURT: Thank you.

5 MS. SARVADI: Your Honor, I must first start out by
6 saying, I think the reason Mr. King devoted the time he did
7 in the beginning of his closing argument to his position that
8 he didn't really have to establish that this was an effort to
9 collect a debt in order to prevail in his client's claim is
10 because he recognizes implicitly that it fails to do so.

11 But as this court is aware, the allegation and
12 count on the complaint found at paragraph 72 is that, quote,
13 FOA's cancellation of the 2010 annual meeting was intended to
14 deny Gordon Properties its right to vote as an act to collect
15 the disputed assessments. That is the basis of their claim.
16 That is the cause of action which they brought to this court,
17 and they failed to meet their burden of proof on that issue.

18 THE COURT: Did they vote in the 2010 meeting?

19 MS. SARVADI: No, sir, they didn't, but the
20 evidence this court has heard from every witness is that
21 prior to the recommendation of its lawyer the board had not
22 voted either in 2009 or in 2010 and made an affirmative
23 decision whether to let them vote and whether to hold a 2010
24 annual meeting.

25 THE COURT: Does that matter?

1 MS. SARVADI: It does matter, Your Honor, because
2 their whole theory, what they've tried to tell you, is that
3 these parties dislike each other, and we don't generally
4 disagree with that fundamental position. But their whole
5 theory is that everything FOA has been doing is an attempt to
6 frustrate Gordon Properties' votes in particular, and that's
7 simply not the case.

8 The board has never voted, never made an
9 affirmative decision that they intended to deny Gordon
10 Properties the right to vote in 2010.

11 The evidence was unequivocal from Mr. Diamond and
12 Mr. Claggett and Mr. Terry that the advice given was: You've
13 petitioned for an appeal. That appeal is pending. That
14 appeal is pending as of August 30th of 2010. There was a
15 request to expedite and that request was not ruled upon and
16 there was --

17 THE COURT: When was the appeal decided?

18 MS. SARVADI: The appeal wasn't decided until June
19 2nd of this year.

20 THE COURT: Why haven't they called the meeting?

21 MS. SARVADI: Because they were waiting for an
22 answer from the court on the advice of their counsel.

23 THE COURT: You got it?

24 MS. SARVADI: Yes, sir, we did.

25 THE COURT: Why didn't you hold the meeting?

1 MS. SARVADI: For the same reason that this court
2 felt --

3 THE COURT: In order to get an injunction, I weigh
4 and balance various aspects, as you're aware, and I did that,
5 and I decided that after a particular point it wouldn't be
6 appropriate for a court to order that but I had to balance
7 the weight. That doesn't change your obligation, nor your
8 statements, your client's statements to this court that you
9 would hold a meeting after the Court of Appeals made a
10 decision. You haven't done that. Why not?

11 MS. SARVADI: Your Honor, the decision came down on
12 June 2nd. In order for them to conduct the meeting, they
13 would have had to go through a process to issue a call for
14 candidates. They would have had to receive --

15 THE COURT: They didn't do that; did they?

16 MS. SARVADI: No, sir, they didn't, but we're
17 talking about four months. It would have literally been
18 almost to the day, four months from --

19 THE COURT: You could have expedited it?

20 MS. SARVADI: We could have expedited it and had
21 probably less success at achieving a quorum than going
22 through the process in 2011.

23 THE COURT: But you didn't even try.

24 MS. SARVADI: They made the affirmative decision to
25 start the 2011 process earlier in order to try and have --

1 THE COURT: You moved the date of the 2011 meeting
2 up?

3 MS. SARVADI: No. What I mean is, they issued the
4 notice for the call for candidates earlier in the year than
5 they otherwise had to in order to get the process started.

6 There is a cost to the meeting. There is a time
7 frame in which they can do it reasonably and efficiently, and
8 that simply didn't provide them enough time.

9 THE COURT: And what is the definitive ruling that
10 you want?

11 MS. SARVADI: Your Honor, FOA believes from the
12 advice of its counsel set forth in the memo they have a
13 fiduciary duty to enforce the bylaws. Their lawyers have
14 told them, if you don't enforce the bylaws and you allow
15 Gordon Properties to vote you risk having a board elected
16 that is ultra vires because --

17 THE COURT: I didn't hear any evidence that there's
18 any threat to sue if Gordon Properties was permitted to vote.

19 MS. SARVADI: Your Honor, I believe that it was
20 argued. It was presented in the evidence in April and it was
21 also in the memorandum --

22 THE COURT: Can you show me where it is in the
23 evidence that you received a threat that a unit owner would
24 sue the association if you allowed Gordon Properties to vote?

25 (Pause.)

1 MS. SARVADI: I believe it was in Mr. Claggett's
2 testimony. I am reviewing that, Your Honor.

3 THE COURT: Pardon.

4 MS. SARVADI: I believe it was Mr. Claggett who
5 testified with respect to that and I am looking for that.

6 THE COURT: Well, go ahead.

7 MS. SARVADI: In any event --

8 MR. KING: Your Honor, I'll stipulate that Mr.
9 Claggett said that the board was concerned about that but he
10 did not testify that there was any threat. There's no
11 evidence as to that.

12 THE COURT: That's what I'm looking for.

13 MS. SARVADI: The evidence of a specific statement
14 by a specific owner?

15 THE COURT: Right.

16 MS. SARVADI: I don't believe that testimony was
17 elicited. I believe the testimony was they believed they had
18 concerns they would be sued by potentially other members.

19 THE COURT: Well, you said, they could be. There's
20 nothing in there that said they would be or that there was
21 any threat. It was just their thought, you might say, on the
22 part of counsel, you might get sued if you do this.

23 Go ahead.

24 MS. SARVADI: I believe I've answered your question
25 with regard to why they haven't set a meeting since June 2nd

1 of --

2 THE COURT: You're saying they didn't have enough
3 time?

4 MS. SARVADI: And the costs, coupled with the fact
5 that they are preparing for the meeting and that they made
6 the decision in June to start the preparation for --

7 THE COURT: My question after that: What is the
8 definitive ruling? We've had one already. I'm going to
9 render another one. What do I have to do to make it
10 definitive? Because last time you said it wasn't. You took
11 an appeal to the District Court; and when you didn't prevail
12 there, you took an appeal to the Court of Appeals. And each
13 time you said: Well, it's not definitive here. It's not
14 definitive there. It's not definitive from the Court of
15 Appeals. And now, I suspect that you're saying that my old
16 opinion isn't definitive even though you've lost on two
17 appeals. It's not a definitive opinion at this point?

18 MS. SARVADI: No. It is my understanding that FOA
19 never took the position in the District Court or on the 4th
20 Circuit that your ruling wasn't a ruling. In fact, that's
21 the whole issue, Your Honor.

22 We were the prevailing party in the first adversary
23 proceeding on the initial PI motion. FOA -- because you
24 denied the preliminary injunction motion. FOA appealed that
25 ruling to the District Court judge and Gordon Properties

1 opposed it on the basis that it wasn't a final order; it was
2 interlocutory in nature, and that it wasn't binding.

3 THE COURT: Well, the ruling of the District Court
4 and the Court of Appeals is you had no standing. You were
5 the prevailing party, yet appealed. What I think Judge
6 Hilton said, and I think he's correct on that, is that you
7 appeal through judgments, not opinions.

8 MS. SARVADI: Yes, sir.

9 And so, that is the understanding that the board
10 had, was that having tried to appeal the opinion, they were
11 hoping the 4th Circuit most likely would have remanded back
12 to Judge Hilton and asked him to address the issue. If they
13 had been successful to the 4th Circuit then Judge Hilton
14 would have had to make the decision on the underlying issues
15 as to whether the statements in the memorandum opinion were
16 enforceable.

17 THE COURT: Well, my question is: Do you have a
18 definitive opinion now?

19 MS. SARVADI: They don't, Your Honor, and it would
20 not --

21 THE COURT: Why is that?

22 MS. SARVADI: I'm sorry.

23 THE COURT: Why is that? I'm trying to figure out
24 what a definitive decision is.

25 MS. SARVADI: The first adversary proceeding was

1 dismissed. So, there is no order of the court that orders
2 them to allow Gordon Properties to vote, and the advice given
3 by --

4 THE COURT: Meaning you won?

5 MS. SARVADI: We did win; yes, and I will honestly
6 say, while I have not been asked to render this advice to the
7 association, it certainly makes sense to me that if this
8 association is successful before this court in this action,
9 the prudent step would be to seek relief from the stay, ask
10 for leave to file a suit in the Circuit Court for the City of
11 Alexandria and have the Circuit Court of the City of
12 Alexandria construe the bylaws because that would apply to
13 not just Gordon Properties but any unit owner who might be
14 delinquent.

15 THE COURT: Why the Circuit Court? Construed to do
16 what?

17 MS. SARVADI: The condominium statute provides that
18 the Circuit Court has authority to provide aid and direction
19 to an association.

20 THE COURT: I understand that. But what are they
21 providing aid and direction on; whether enforcement violates
22 the automatic stay which is a bankruptcy issue?

23 MS. SARVADI: My fear is, I don't know what this
24 court is going to do. I'm simply suggesting if they were not
25 to get an order that the association will need to be

1 definitive enough --

2 THE COURT: Well, that's what I'm trying to figure
3 out. What is a definitive order? That's the question I've
4 got. If the last one wasn't definitive and if I write an
5 opinion this time -- now, if it's favorable to you, it's all
6 over. But if it's not favorable to you and it says, well,
7 they'll hold an election, is that definitive; or is it not
8 definitive because you don't have the District Court's review
9 on it?

10 MS. SARVADI: I think there are two issues there.
11 One is, if the order says I find it's a violation of the stay
12 and therefore I find you must allow them to vote in the
13 upcoming election, that is a definitive order.

14 Because I'm engaged as limited counsel in this
15 action, I don't know what the advice would be by their
16 general counsel as to whether to appeal that.

17 If you're asking do I know as I stand here that the
18 association will in fact appeal, I don't know.

19 THE COURT: No, I'm not asking that. I'm trying to
20 figure out what's definitive. You're saying, the decision I
21 make this time will be definitive if it's adverse to you?

22 MS. SARVADI: I think it would be if it's set forth
23 in the order. And to be honest, while we may all believe in
24 this room that it is not likely that a particular unit owner
25 at FOA might choose to sue the association, that is certainly

1 something they have generally expressed a concern about; and
2 having an order which they could turn to and say, you might
3 disagree as we did that this isn't a violation of the stay
4 but we have an order that says we don't have to enforce our
5 bylaws which we otherwise have a fiduciary obligation to do
6 -- and they do have a fiduciary obligation to fulfill the
7 terms of those bylaws as best they can and they sought the
8 advice of their counsel as to how to do that.

9 THE COURT: Well, what if the advice of counsel is
10 wrong? Would that protect you from being in violation of the
11 automatic stay?

12 MS. SARVADI: No. The advice of counsel isn't
13 actually an absolute defense to the ultimate issue of whether
14 there was a violation. It goes to damages and punitive which
15 we discussed at the last hearing.

16 But respectfully, I don't think that seeking advice
17 from your counsel as to how to construe your documents and
18 interpret a memorandum opinion for the purpose of conducting
19 business is an effort to collect a debt.

20 And Your Honor elicited statements from Mr. Sells
21 and I think he was candid. Since the filing of the
22 bankruptcy petition, Mr. Sells has heard nothing directly or
23 anything indirectly, even the so-called smear campaign
24 through the flyer, that suggested if you pay this assessment
25 we go away.

1 That assessment is being fully litigated in the
2 court. It's set for a final hearing and hopefully that will
3 resolve the issue as to what is the amount that was due at
4 the time.

5 There has been no evidence, not from any witness,
6 that said that in fact the board was attempting to do
7 anything with respect to collecting money from Gordon
8 Properties.

9 THE COURT: But you do intend to not permit them to
10 vote as long as they're delinquent.

11 MS. SARVADI: I think the board feels compelled to
12 follow its bylaws, Your Honor, and absent an order of this
13 court or I would ask and recommend an order from the Circuit
14 Court over which the association believes has jurisdiction
15 over it generally on corporate governance issues. They feel
16 obligated to comply with their bylaws.

17 I'll say this. If they had made an affirmative
18 decision regardless of what was happening in this case to
19 just deny Gordon Properties the right to vote, the easy thing
20 would have been to hold a meeting and simply say no and stand
21 up in front of this court and say: Respectfully, we
22 disagree. You issued an opinion but not an order. We
23 intentionally violated it. Please go ahead and issue another
24 order. And then they could have appealed that. They didn't
25 do that. They went to their counsel and said, we don't know

1 what to do, not we don't know what to do about Gordon
2 Properties.

3 But the testimony from Mr. Claggett was his first
4 communication with Mr. Diamond on September 15 of 2010 was
5 what do I do about this flyer?

6 THE COURT: Is enforcement of this provision, that
7 is not permitting Gordon Properties to vote in its meeting of
8 2010, a violation of the automatic stay?

9 MS. SARVADI: Respectfully, Your Honor, I do not
10 believe that it is.

11 THE COURT: Why not?

12 MS. SARVADI: The reason I don't is that -- and
13 this goes back to a general principle which is that the
14 declaration and bylaws recorded form a contract and this
15 contract in particular has a number of provisions that say --
16 we all know the provision, Article 4, Section 7 which is
17 found at page 160 of Plaintiff's Exhibit 12. It says, "No
18 member shall be eligible to vote either in person or by proxy
19 or to be elected to the board of directors who is shown on
20 the books or management account of the owners association to
21 be more than 30 days delinquent in any payment due."

22 But the bylaws go further than that, Your Honor.
23 They provide remedies to the association on such default and
24 those remedies are found under the assessment section of the
25 bylaws, and they provide that under Article 9, Sections 4 and

1 5, on page 128 of Plaintiff's Exhibit 12, that their remedies
2 are -- well, the nonpayment of assessment becomes a lien
3 against the real property pursuant to Section 4, and they
4 have the right to institute suit on that lien. That would be
5 an effort to collect a debt.

6 Under Section 5, their further remedy for
7 nonpayment is to file suit seeking both interest and attorney
8 fees from the member whose personal liability is to satisfy
9 that assessment in the event that there is a 30-day
10 delinquency. Certainly that is also an effort to collect a
11 debt.

12 The provision in and of itself is designed to
13 institute a level playing field, fairness among unit owners.

14 THE COURT: What do you mean?

15 MS. SARVADI: What I mean is, if you look at the
16 Articles of this association, all owners have an obligation
17 to pay the costs associated with respect to the association.
18 Those costs are to be borne among both residential and
19 commercial owners. Those are found in Article 5 of the
20 declaration.

21 One can't opt out of their responsibility to pay
22 even by agreeing not to use or take advantage of any of the
23 common elements. That's found in Article 6, Section B. All
24 owners are bound by the declaration and the bylaws. That's
25 found in Article 7 of the declaration, and each owner is

1 personally liable for the assessment. Everyone has to pay.
2 Everyone gets to participate.

3 The declaration goes on to say, if you are
4 delinquent, you won't get to vote. You don't have a right to
5 control how the association is managed, the decisions it
6 might undertake or have a role with respect to its
7 management, with respect to the provisions and restrictions
8 of board membership because if you don't pay, you don't get
9 to participate. That is a contractual restriction on that
10 right to vote.

11 The right to vote only exists by operation of the
12 recording of the declaration and bylaws and incorporation of
13 the Condo Act. Other than the creation of this Condo, there
14 is no right to vote. That right to vote is restricted by the
15 expressed terms of the document and certainly Virginia law is
16 --

17 THE COURT: Is that permitted by the Condo Act?

18 MS. SARVADI: Yes, Your Honor.

19 THE COURT: Where?

20 MS. SARVADI: There is no expressed provision. I
21 know that I'm not here to present evidence but I will
22 represent there are a number of declarations of which I'm
23 aware that are of record, because I litigate for associations
24 regularly, where this provision is routinely found in them.

25 THE COURT: Well, that doesn't matter; does it? Are

1 they in bankruptcy?

2 MS. SARVADI: No, but you asked if the provision in
3 and of itself was a violation. My argument is --

4 THE COURT: No, I didn't ask that or if I did, I
5 didn't intend that to be the question. The question is
6 whether or not there's a provision in the Condominium Act
7 which supports your argument that the right to vote is
8 separate from ownership and is contingent on --

9 MS. SARVADI: Well, I didn't mean that it was
10 separate. What I meant to say was, there is no condominium
11 structure, the creation of the condominium through the
12 declaration and the bylaws being recorded and those
13 declarations and bylaws invoke the power of the Act.

14 What I meant simply is, without a condo there is no
15 vote and that vote is restricted as set forth in the
16 contractual context.

17 THE COURT: But there's no restriction in the
18 condominium.

19 MS. SARVADI: No, there's not.

20 THE COURT: Is there any provision in the
21 Condominium Act that allows you to restrict it?

22 MS. SARVADI: Off the top of my head, I don't
23 believe anything expressly says that but I think what the
24 documents say is that all rights and restrictions are subject
25 to the recorded documents, and that's certainly the case law

1 in Virginia.

2 The White v. Boundary case which was decided by the
3 Supreme Court of Virginia in 2006 dealt with the very issue
4 about the power of an association act and in that case they
5 talk about the fact that these are contractual obligations
6 and rights and duties that flow to the members, for the
7 benefit of the members and that the powers and duties of the
8 board are set forth in that document. I have a copy for the
9 court's reference, if you would like a copy.

10 THE COURT: You can hand that up.

11 (Document handed to the court.)

12 MS. SARVADI: In the White v. Boundary case, the
13 court said that the declaration forms the parties' contract.

14 Now, I will say that White deals with an HOA. This
15 is a condo association. So, the difference is that in a
16 condo, the bylaws are recorded along with the declaration and
17 in an HOA, they're not necessarily; and in In re: White,
18 they were not.

19 But certainly, what they're saying is, the
20 declaration is what is recorded. It forms the contract.

21 THE COURT: What was the issue in White?

22 MS. SARVADI: The White issue was: There was a
23 common area that the board of directors had sought to
24 segregate into assigned parking spaces. The issue is whether
25 the board had the power to do that under its declaration.

1 So, I concede to the court that the ultimate issue
2 of whether parking spaces may be assigned to one unit or
3 another is not what's before the court.

4 But the court set out in citing Sulley Station and
5 the Gilman matter which you referred to earlier that these
6 recorded documents determine the meaning of the contract from
7 its related provision and reflect the unitary expression of
8 the parties' agreement.

9 The court also said you look to the plain meaning
10 if the contract is unambiguous, and in that case they found
11 that it was. Similarly here --

12 THE COURT: Well, are you telling me that the
13 Bankruptcy Code which is a federal law does not supersede
14 these documents, that you can contract around 362?

15 MS. SARVADI: I'm not saying you can contract
16 around it and I would absolutely agree with Your Honor. If
17 they had sent a letter 60 days before a meeting saying, "You
18 are delinquent, dear homeowner or dear condo owner. If you do
19 not satisfy your obligation to pay, we will not allow you to
20 vote at the upcoming meeting. You may address your concerns
21 to the management or make payment arrangements." that would
22 be a violation because that would be an effort to collect
23 that prepetition debt. That's not what they did.

24 And again, they simply sought the advice of their
25 counsel and asked how to deal with what at the time was

1 simply the flyer issue. And it was the lawyer who came back
2 and said: You know, we have the flyer issue but our prior
3 advice that we have a ruling from the 4th Circuit. It turns
4 out we're not going to have one.

5 THE COURT: Well, I'm still worried about your
6 argument about the contract being determinative of the rights
7 of the parties and that's generally true. Bankruptcy though
8 affects those rights many times. They can change contractual
9 terms, particularly repayment terms and things of that
10 nature. Bankruptcy, if the debtor is successful, results in
11 a discharge of an obligation through bankruptcy. The
12 question is, does bankruptcy affect this provision and your
13 documents?

14 MS. SARVADI: I believe that it does affect the
15 provision to the extent the board makes a specific effort to
16 collect that debt. They cannot do so. Maybe I'm not
17 answering your question.

18 THE COURT: I'm not sure that you are. Certainly
19 if they made any efforts, those efforts don't have anything
20 to do with this bylaw provision. Sending a letter, suing
21 them, anything like that, doesn't deal with this bylaw
22 provision.

23 What you're telling me as I hear it -- and tell me
24 if I heard it wrong -- is that this bylaw provision is a
25 contract between parties and therefore is binding on the

1 parties. If you have a delinquent homeowner who goes to an
2 annual meeting, he may not vote; and outside of bankruptcy,
3 that would be true. Once you file bankruptcy though, you can
4 be in the position of the automatic stay under Section
5 362(a). What I think you're telling me is, the automatic
6 stay does not apply to this.

7 MS. SARVADI: I believe it doesn't apply for the
8 further reason, as I believe FOA's prior counsel articulated
9 in our first case, which as Mr. King had noted, this is all
10 about property rights; and because this set of documents
11 restricts the rights of the owner with respect to these
12 property rights and they take that right away at the time the
13 petition was filed, they don't bring that right into the
14 estate and therefore it isn't property of the estate that's
15 being affected by the stay.

16 THE COURT: And you have a case that supports that?

17 MS. SARVADI: There is no case to support that,
18 Your Honor. I'm sure Mr. Dingman's firm searched. I
19 searched high and low for some other decisions besides your
20 2010 decision that addressed this issue and there is no case
21 that says that.

22 I will also, however, note for the court that as
23 Mr. Sells conceded, Article 5 of the bylaws at Section 7,
24 page 119, also automatically terminates a board member's role
25 as a board member the moment they become 30 days late. It's

1 an automatic termination under the expressed rules of the
2 contract. I think that evidences a further intent of the
3 drafter of this declaration, that one can't participate in
4 management of the association if you're delinquent and you're
5 not paying.

6 THE COURT: That's certainly what it says. That's
7 not the issue. The issue is whether permitting the act to
8 continue is a violation of the automatic stay.

9 Take a simpler issue. You haven't paid for your
10 car. They come and tow it away and it's at the repo man's
11 shop. File bankruptcy.

12 MS. SARVADI: And the question is whether I can go
13 back and --

14 THE COURT: Well, you can certainly go back and get
15 it. Does the repo man have to open the doors and say, "Here
16 it is. Come and get it."? I don't care whether he has to
17 say "Come get it." or "Here it is." or "I'll return it."
18 That's not the issue. Can he just sit there and do nothing?

19 MS. SARVADI: Well, if it's done within the 90 days
20 prior to the institution there would be a preference action
21 and presumably there would be an order of the court that --

22 THE COURT: Well, let's do another one. You've got
23 a judgment. You garnish a bank account. The return date
24 hasn't come in General District Court but the bank has frozen
25 \$500. What does the plaintiff's attorney have to do or the

1 plaintiff have to do? Can they just sit there and say, "Oh,
2 okay. I'm not violating the stay."?

3 MS. SARVADI: No. I mean, certainly, because there
4 would be further action required to prosecute that claim, and
5 then they would have to notify court if the court presented
6 this under bankruptcy that there was a filed objection to the
7 stay but that's different.

8 THE COURT: And what would they do? What are they
9 supposed to do, just --

10 MS. SARVADI: And not seek further enforcement of
11 their claim.

12 THE COURT: They can sit there while the bank
13 freezes the money?

14 MS. SARVADI: The lawyer would file the stay
15 suggestion in this case and --

16 THE COURT: Well, what about plaintiff's lawyer.
17 He's the one who issued the fifa directly to the bank and the
18 bank is holding it? Does that lawyer have to do anything?

19 MS. SARVADI: I think he has to notify the bank
20 that there is a bankruptcy. I've never looked at the
21 garnishment statute to know if they have then an obligation
22 to release the funds affirmatively or if they answer the
23 garnishment and then wait for an order. I don't know the
24 answer to that.

25 THE COURT: But on both of those examples there's

1 the question of can the creditor knowing that the bank --
2 having taken collection activity and towing the car away from
3 the debtor, continuing the freeze on the funds because the
4 return date hasn't come. Does that violate the stay because
5 that was part of an act to collect a debt?

6 In both of those instances what you have is a
7 creditor who would like to sit back and say: No, I'm not
8 going to do anything. The debtor is supposed to -- he can't
9 get his money out of the bank. He can't get his car back
10 because the creditor won't do anything. The lot isn't going
11 to do anything without instruction. The bank is not going to
12 do anything without instruction. Those are violations of the
13 stay because you're part of an act to collect. The
14 similarity is that you are doing nothing when this comes, and
15 you just say: Well, it's there. I'm just going to enforce
16 it. So, your similarity is: I'm going to sit back and do
17 nothing. Therefore, I'm not guilty of anything. I'm not
18 violating the automatic stay.

19 Well, what happens when the stay -- let's assume
20 for a moment that they're right. What happened when they get
21 to the annual meeting? They have the right to attend. They
22 show up and they get counted, so you've got a proxy, and now
23 you've got a quorum. Now they submit their ballot.

24 MS. SARVADI: I would submit, Your Honor, in this
25 context the appropriate thing for the association to do is

1 what I believe they were doing in 2009 which is, count the
2 votes and see if there is a quorum.

3 THE COURT: My hypothetical is, they've got a
4 quorum.

5 MS. SARVADI: They have a quorum. In my view, if I
6 were asked to give advice this is what it would be:
7 Determine if the result of the election is impacted by
8 counting Gordon Properties voting. If the same slate of
9 board members are elected, it's irrelevant whether you count
10 them or you don't.

11 THE COURT: Suppose it does make a difference.

12 MS. SARVADI: If it does make a difference,
13 assuming we didn't have an order of the form of which we
14 anticipate would come from the court, we would seek aid and
15 direction. Because what do they do? Let's --

16 THE COURT: Do you take the vote? Do you accept
17 their ballots or do you say I'm not going to accept it?

18 MS. SARVADI: I think that the election is not
19 concluded until further order of the court.

20 I think that's the prudent thing for the board to
21 do in an effort to try and have a meeting that the members
22 are entitled to but in the absence of something that says you
23 are protected from a suit from a third-party owner from not
24 enforcing these documents -- as Mr. Sells even indicated, he
25 attempted to get some group of people on the board to support

1 his series of beliefs in prior years.

2 THE COURT: You're saying: I don't know. Since
3 you don't know, I'll go to the court and I will continue the
4 status quo without doing anything until there is an
5 adjudication that this violates the automatic stay or does
6 not, and the court would come to this court.

7 MS. SARVADI: I think that --

8 THE COURT: This court determines whether there's a
9 stay or violation.

10 MS. SARVADI: My recommendation would be personally
11 to seek relief from the stay and go to Alexandria which can
12 adjudicate the claim of other persons who are not parties to
13 this action, including all members. If you decline the
14 relief motion --

15 THE COURT: This court can do that. I'm not
16 telling you which is the better forum. I'm not quite sure
17 why you need the relief from the stay. What you're saying
18 is, you need some adjudication and I'm saying, it could be
19 this court or if you got relief from the stay, it could be
20 another court. I don't think that's the relevant issue as to
21 where. The question is, you're making them do so. You're
22 making them litigate for their rights.

23 The only purpose in there is to collect the money.
24 It has no other purpose in there.

25 MS. SARVADI: I'm not sure it's the sole purpose.

1 As I was trying to represent earlier, I think it's an issue
2 of fairness, that you shouldn't get to make decisions about
3 how they spend their money if you're not paying your freight.

4 THE COURT: I understand. If you're not permitted
5 to vote at the 2009 meeting or 2010 meeting, you will never
6 get that back, even if you pay the freight and you're in full
7 compliance.

8 So, on one side you say, yeah, everyone ought to
9 carry his fair share of the burden but because you're late,
10 you can't vote this time, even if you pay three days after
11 the meeting. It doesn't make a whole lot of sense to me. In
12 the end, they have carried their burden. They have paid the
13 freight. It's just late, and that's true.

14 MS. SARVADI: Well, I think that's part of the
15 issue.

16 THE COURT: That seems to me to work against you.

17 The second thing I find very troubling in that
18 argument is that the debtor has 40 units and only one is
19 delinquent. If you want them to pay the freight, 39 of them
20 are paying the freight. Why aren't they allowed to vote?

21 MS. SARVADI: And that's because it's the language
22 of the document --

23 THE COURT: I understand exactly what. It's
24 directed towards the members, taking away from. You're not
25 paying the freight, so don't vote. You're saying, I'm going

1 to punish you until you do and I want you to pay it and I'm
2 going to put the greatest burden on you that I can in order
3 to get you to pay it. It's not this unit alone but every
4 other unit that they may own.

5 Now, concededly, there are very few condominiums
6 where a unit owner owns more than one. Gordon Properties is
7 actually more unusual than actually any condominium unless
8 there's a developer -- I don't know the genesis of that.

9 So, I think that strikes very much at the heart of
10 your argument. I don't see that you can sustain that argument
11 to say, well, you're not paying your freight and you don't
12 get to vote. They are.

13 MS. SARVADI: And I understand that the court's
14 view. I would just like to point out, as I mentioned earlier,
15 that there was not expectation from the board that it would
16 generate a payment, and I think that's different in this
17 context and perhaps in an otherwise random delinquent owner
18 who files for bankruptcy.

19 The claim objection is pending. Everyone
20 understands that this court is going to have to decide what
21 effect Judge Kember's ruling has on the ultimate amount of
22 what's past due and whether, as you set forth in your
23 memorandum, I believe it was last week, if their methodology
24 was appropriate and if the result of the calculation applying
25 that methodology is correct.

1 There was no belief by any person who testified
2 that they thought that was going to change anything. They
3 were trying to not violate the stay by holding the meeting
4 and saying no vote, not violating their bylaws and therefore
5 complying with their bylaws and at the same time felt like
6 they were being told and from what they understood from the
7 statute, their fiduciary obligation.

8 THE COURT: Why didn't they ask for relief from the
9 stay?

10 MS. SARVADI: I wasn't counsel and so I can't --

11 THE COURT: I mean the association.

12 One of the ways you would do that is ask for relief
13 from the stay and enforce their bylaw provision if they view
14 the fact as they ought to be able to enforce it in these
15 circumstances, and that litigation now has been pending since
16 October of 2009, going on two years in a couple of months.
17 There was never any motion brought by the association.

18 If you're trying get a definitive answer, isn't
19 that the quickest way to do it, hold those hearings?

20 MS. SARVADI: Well, I don't know --

21 THE COURT: People come in and say, I don't really
22 know if it applies and I don't think it really does but I
23 really want the comfort of an order so that I know that what
24 I'm going to do is right, and then the questions came out.
25 They may be wrong.

1 MS. SARVADI: I haven't researched this but I think
2 I remember the rule being once the appeal is pending to
3 District Court that at least the adversary proceeding is
4 probably stayed as a result of that pending appeal.

5 So, if your question is, in general bankruptcy why
6 didn't they seek relief from the stay, I can't answer that
7 question.

8 THE COURT: Well, doesn't that go to the intention
9 of the parties, what they intended to do? I think that Mr.
10 King is right. You either violate the stay or you don't.
11 I've been looking at intention to understand what's going on
12 and certainly it goes down to the type of remedy.

13 The question of whether there's a stay violation
14 goes to what you can do within your documents, whether you
15 can contract around 362 and some disingenuous language. The
16 answer is, no you can't do that and that's pretty clear. You
17 can't waive the automatic stay prior to the filing and all
18 these sorts of things. The law is very clear. Even though
19 you tried the contract, you cannot.

20 And the issue here is -- you see, what I don't
21 understand about a definitive ruling is: You had a ruling, I
22 think somewhat clear, coming out of this court, and the
23 District Court said, no, you can't. So, what I don't see is
24 the condominium association coming back and saying, well, I
25 know what the ruling of the court is. We had an option. But

1 none of those were going to resolve in any point in the near
2 future with what you call a definitive resolution. It would
3 have had to go up to the Court of Appeals. It would have had
4 to have come back down. It would have gone back up to the
5 Court of Appeals. It just doesn't strike me in those
6 circumstances that you're going to get what you want; and
7 having seen Judge Hilton's order, I find it very difficult to
8 get around that if I were appealing it.

9 It just gives me the further impression the board
10 is just not interested in going forward with the meeting. I
11 further see from the evidence presented, the board didn't
12 know what was going on until the September 21st meeting. Was
13 it August that the --

14 MS. SARVADI: It was only August 30th that the
15 appeal was noted.

16 THE COURT: Judge Hilton's opinion came back down
17 or Judge Hilton made his opinion -- was it August?

18 MS. SARVADI: The 27th.

19 THE COURT: The 27th, 2010, and at that point it
20 should have been very clear. You're not going to get a
21 different answer any time soon.

22 I think it has been argued as one of the issues,
23 the board was kept in the dark apparently as to what was
24 going on.

25 The first question, is there a violation of the

1 automatic stay to preclude a unit owner at this condominium
2 from voting at an annual meeting when he's delinquent pre-
3 petition, not postpetition but prepetition? Does that
4 violate the automatic stay?

5 The issues that you put forward are, one, it's a
6 matter of contract between the parties, and I understand that
7 except that you can't contract around 362; that it is not an
8 effort to collect a debt, that this should be a level playing
9 field. There are indications that that's not what happened.
10 The board has enforced it as to all units, Gordon Properties,
11 and Gordon Properties has never contested it as far as I can
12 see.

13 I think there was testimony at the first hearing
14 and last adversary -- I don't need to rely on it and I do
15 not. But I think it was Miss Brungart. Yeah, I ran down
16 there and paid the fees that I didn't think I owed because I
17 wanted to run for the board.

18 Being denied the right to vote is a detriment and
19 people will go ahead and get down there and pay that condo-
20 minimum fee.

21 You are correct. You cannot opt out of your
22 assessment obligations but it also seems to me that there's
23 some basis in the argument in the state court. Wait. They
24 owe so much money and they can't opt out of it. They can't
25 rearrange the document. It is what it is.

1 I think one has to look at the types of remedies
2 that one has but in bankruptcy you run across the rules.
3 That's the first issue. I haven't seen a whole lot here that
4 contradicts that.

5 Intent is important for different reasons,
6 enforcement or not, and that comes to the second question,
7 should you consider utilizing enforcement on performing some
8 sort of act on that. If you have some comments on that, I
9 would be interested in hearing it.

10 MS. SARVADI: Your Honor, I do. It is FOA's
11 position -- and the testimony of Mr. Claggett, Mr. Terry and
12 Miss Cuadros are consistent, that they were not specifically
13 trying to extract satisfaction as to assessments. That is
14 the subject of the claim objection. There was no evidence of
15 that. Miss Cuadros said she didn't even expect to get
16 anything out of the decision to postpone the meeting from
17 Gordon Properties. In fact, Mr. Diamond said, the only thing
18 they were going to get out of it was another lawsuit, and yet
19 the board members felt upon the advice of counsel the best of
20 three bad alternatives that they had, that they were told
21 they were facing.

22 So, the evidence of whether it's an attempt to
23 collect a debt, I -- as I stated, if they had made an
24 affirmative statement that maybe this will go away or maybe
25 this --

1 THE COURT: Not quite there. That would be very
2 easy to do and we wouldn't be here for a whole day trying to
3 figure that one out. The issue goes back to, can you sit
4 back and do nothing? And the second one is credibility.
5 Quite clearly, as was said, they're not enamored with each
6 other, and that has to be a factor to be taken into account.

7 MS. SARVADI: And I think it goes both ways because
8 the litigation that has been repeatedly filed by Gordon
9 Properties against these particular board members and also as
10 against FOA has been ongoing since the 2006 termination of
11 CSI.

12 THE COURT: I'm not going to characterize who hates
13 who or whether they can get together or anything of that
14 nature. They're just not getting along. It doesn't matter
15 where it started or who shot John. We're a little bit older
16 than people of that age.

17 MS. SARVADI: Agreed but I think -- I'm sorry. I
18 didn't mean to interrupt.

19 THE COURT: No. That's fine. Go ahead.

20 MS. SARVADI: The board didn't know what to do
21 about the flyer and the layer said postpone the meeting.

22 THE COURT: The flyer was a pretext.

23 MS. SARVADI: Well, it wasn't created by FOA. It
24 certainly wasn't FOA's pretext.

25 THE COURT: The response was a pretext. I don't

1 have any doubt about that. Mr. Diamond was sitting there.
2 He knew what -- I'm certainly disappointed with his advice.
3 The recitations are excellent. This does not reach the level
4 of their recitations.

5 I think Mr. Diamond was sitting there and he saw
6 this and said: Well, here's a way to justify postponing the
7 meeting.

8 I'm not very impressed with the opinion. It's not
9 very comprehensive. I'm not impressed with the board's
10 response to it because they could have said: Hey, we need a
11 quorum. This isn't a bad idea. Why don't we adopt it? Or
12 they could have said, hey, I don't like this because I don't
13 know who signed it. We'll adopt it and we'll sign it and
14 send it out. And they could have done that within a week or
15 two, postpone the annual meeting for a week or two and use
16 that. But they said no. Not only did they say, no, you can't
17 use that: We're going to cancel the meeting. We'll
18 reschedule it later.

19 I think that was a pretext. I think it was a
20 convenient item to come in -- "pretext" may be too strong.
21 It was a convenient hook to hang a postponement on. I don't
22 see much there.

23 The real issue is, they did not in fact hold the
24 meeting and they could have. If that had been an issue, they
25 could have rescheduled it. The issue there then is: Well,

1 what do we do? We've got bad choices all the way around.

2 Well, the court has made clear what the rule is. I
3 think that is where it stands. You don't have the option of
4 sitting back and doing nothing. The documents say there will
5 be an annual meeting? Are they not mandatory?

6 MS. SARVADI: It is "shall," Your Honor.

7 THE COURT: In deciding, how do you ignore the
8 "shall?"

9 MS. SARVADI: And then I'll ask you, what would you
10 have done? Do you hold a meeting and then see -- as I think
11 they did in 2009 --

12 THE COURT: There might be a good way to do it.
13 Your proposal sounded very good. But there are ways to have
14 held the meeting, counted the votes and then come into court
15 promptly and determine what those votes meant.

16 It was a tough call, in my opinion, as to why this
17 was going on. It's not just bad blood. There was abuse. I
18 know the meeting up to this point -- I realize Miss Cuadros
19 is an experienced chairperson. We may be talking about
20 different levels of experience. She's not experienced enough
21 with these things. The meeting did get away from her. There
22 was a cancellation of a meeting before.

23 I don't know anything about the lawsuit in the
24 Circuit Court and I'm not going to second guess. Was it Judge
25 Dawkins who heard that?

1 MS. SARVADI: It was. It's what we cited in our
2 opening briefs --

3 THE COURT: I don't know what happened. I don't
4 know the facts. I don't know the law that has been applied
5 on it. But in the purest sense that's spilling out of this
6 particular circumstance, a cancellation by putting a notice
7 on the door canceling the meeting that was going to be held
8 is not a reason not to hold the meeting because even if you
9 don't get the quorum -- there's a number of people who don't
10 constitute a quorum. You have limited authority to take
11 action and one of those actions is, postpone the meeting,
12 continue it for a week, two weeks, three weeks, to determine
13 if you can round up the needed people for a quorum.

14 So, I see the posting of the notice as avoiding
15 that issue and that's the same thing that was avoided in two
16 thousand and I guess it was nine where there was no quorum.
17 So, I see a pattern here.

18 Mr. Sells made a good point and I'll let you
19 address it. He said, sometimes you can have mixed motives,
20 mixed intentions on a particular action.

21 I think one of the difficulties understanding "09"
22 was was this a stay violation and how much of it was
23 politicking? I can well understand that Mr. Sells says they
24 were denied the right to vote.

25 So, I get down past that and I say, well, we've

1 still got this pattern and we still have these two things.
2 One is political. Who controls was an issue, and there are a
3 lot of issues with who should control, who has a better idea
4 than the other and all those things involved, and I think
5 there's a lot of politics. I think there has been abuse in
6 the past. I can't do anything about that. It's not my
7 jurisdiction. But if it is a violation of the stay, I do
8 have the right involving the issue.

9 I don't think you can sit back and do nothing. I
10 don't think you can say, I had only bad choices and so I just
11 went ahead and violated the stay.

12 The clients knew. They had a very explicit
13 opinion. They had good lawyers who were advising them. The
14 lawyers said: You've got an option of violating the
15 automatic stay and you may be held accountable. You have
16 other options that do not.

17 They knew about the automatic stay. They knew what
18 constituted an automatic stay and they rushed -- "rushed" may
19 be wrong but they went forward and they went ahead and made
20 the choice, and that's the context in which the case seems to
21 be.

22 MS. SARVADI: I want to address the latter portion
23 first and then I'll circle back.

24 If they were willing to run directly afoul of their
25 understanding of what would be a violation, as I mentioned

1 earlier, they would have held that meeting and just said no,
2 you may not vote.

3 There's nothing in Mr. Diamond's memo -- I
4 understand you disagree with the sufficiency of it but
5 there's nothing that says, this too will be a violation, and
6 there's been no testimony --

7 THE COURT: This too?

8 MS. SARVADI: Meaning postponement would be a
9 violation. What he said is, it could subject you to
10 litigation but it doesn't say it would be a violation because
11 if they were willing to take the heat for a direct violation,
12 as I said, they would have held the meeting and said no.
13 They were simply trying to --

14 THE COURT: They were trying to evade it. They
15 were trying to get out of making a decision, is what it was,
16 and that's why I called the flyer a means because it looks
17 like hooks on which Mr. Diamond could say, you can postpone
18 it for this reason.

19 MS. SARVADI: I don't agree with Mr. King's
20 assertion that it's a door prize for the reasons I went
21 through with Miss Cuadros. I'm not necessarily saying that I
22 disagree with Mr. Diamond.

23 THE COURT: I'm not worried about that. I think
24 the point that nothing ever happened, that it was not
25 co-opted or that he just said, we can't do this; we're not

1 going to do it -- clearly if they had to start over, hold the
2 meeting at the end of October that would be -- and that's the
3 telling point.

4 MS. SARVADI: And I believe one of the things that
5 they had thought they were faced with is electing a board
6 that was not ultimately going to -- let's assume for the sake
7 of argument that there could be an appellate decision either
8 by the District Court or the 4th Circuit on the ultimate
9 issue about whether these provisions violated 362. Then if
10 by some chance the 4th Circuit remanded, sent it back to
11 Judge Hilton. Judge Hilton says, now that I'm going to
12 consider that issue, I find that it doesn't violate 362 and
13 the board should enforce its provisions and the bylaws. Then
14 they would have elected a board of directors that was without
15 authority because the later decision would have unwound that.
16 So, then --

17 THE COURT: That's right. There's a problem.

18 MS. SARVADI: There's a problem.

19 THE COURT: I understand. The product of violating
20 the automatic stay. You knew the choices. You picked the
21 wrong one.

22 MS. SARVADI: I understand that's your sentiment,
23 Your Honor. There was no testimony nor do I genuinely
24 believe that these individuals thought that it was a
25 violation of the stay.

1 So, I think they thought they might be sued for
2 breach of fiduciary duty as Mr. Sells sort of authentically
3 threatened the future board in dealing with their
4 responsibilities going forward. Sure. But I don't believe it
5 was understood that it was a violation of the stay because
6 they would have just done it more directly. It would have
7 been faster. They could have done an expedited appeal and it
8 would have been decided much before this time.

9 With respect to the 2008, I did want to address
10 that. The testimony to my recollection in the Judge Dawkins
11 hearing didn't deal with the posting of a notice. If it did,
12 I missed --

13 THE COURT: I'm not worried about that. That's not
14 part of my decision. There was a meeting that was called. It
15 was not held. It's that issue. Now, whether it was rightly
16 canceled or not canceled or notice given to satisfy what was
17 required under the Non-Stock Corporate Act -- those were
18 issues. He decided it. He said it was okay and I'm fine
19 with that. But I'm saying, distilling that from all of
20 then-issues which I don't know anything about and I'll be the
21 first to admit it, the meeting wasn't held. That's my only
22 point. I'm not contradicting him. I don't know any- thing
23 about that. What we do know is, it wasn't held and it's a
24 consistent issue, 2008, nine, ten, for whatever reason. I
25 think Mr. Sells is right, mixed motives. But all you have to

1 do is a partial motive to violate the stay. But motive
2 -- it's not even a motive.

3 I can reasonably understand why people make
4 arguments that are different from that. The way I see it,
5 this is a provision of the bylaws that's intended to collect
6 condominium assessments in violation of 362.

7 MS. SARVADI: I understand. The only other thing I
8 would address with the court: It doesn't sound like the
9 court is going to rely on the special meeting issue. But do
10 you want me to address that, the basis for --

11 THE COURT: I think it's just part of the pattern.
12 I think it fills out the picture. Actually, I think that
13 fills out more of the political context and the issues that
14 are there. But there are other things. If there's an
15 obligation to hold a special meeting then there's an
16 obligation to hold a special meeting. But that goes to
17 politics. I don't think it goes to the right to vote at that
18 particular point. I don't see anything denying it based on
19 delinquencies. I'm not looking to decide whether this style
20 is proper or improper. It is a pattern.

21 MS. SARVADI: If the court has any further
22 questions may I try to adopt them and --

23 THE COURT: I probably adopted you, as well. But
24 no, unless you have further comments.

25 MS. SARVADI: Thank you, Your Honor.

1 MR. KING: I will be very brief, Your Honor. I
2 wanted to just hit a couple of points on intent and maybe
3 this is just simply a matter of personal perspective but I
4 think a more cogent analogy with respect to condominium
5 instruments and the violation of the automatic stay is a
6 purchase money note, deed of trust, if someone signs on their
7 real estate. Nobody would even question I think even the
8 noteholder that he can't force the note because that's a
9 violation of the automatic stay.

10 The condo association can no more deny someone the
11 right to vote under this argument of contractual rights as
12 the trustee under the deed of trust can say, you conveyed
13 this property to me in reliance and security for the payment
14 to buy this document. You agreed with these contractual
15 provisions that said you can't stay here, that you have to
16 give up ownership and I have the right to foreclose. None of
17 that goes into the bankruptcy. I'm entitled to enforce it.

18 THE COURT: I think you're right. If you want to
19 make it even more accurate, you probably could turn the deed
20 of trust and waive the automatic stay.

21 MR. KING: Exactly, Your Honor.

22 THE COURT: I can't find quickly any cases that are
23 identical to this but what I do find are cases that
24 consistently say that you cannot contract around 362.

25 Now, the second thing they say is, well, they never

1 got the right in the first place because this is somehow
2 different and separate. It terminates under a lease. It
3 terminates prepetition. You can't resurrect that. It's
4 gone. I'm not impressed by that. I think it's the right to
5 vote and the interest that goes -- you know, your 2.4
6 interest or whatever it may be and it's never conditional
7 that you have the right to vote. You always have the
8 obligation to pay the assessments.

9 MR. KING: And then three brief comments with
10 respect to intent.

11 First of all, Miss SARVADI is relying upon the
12 statements of the representatives of FOA, essentially that
13 they didn't intend to violate the automatic stay, those
14 statements are clearly self-serving. They may or may not be
15 true but I think the candor of those statements is -- it
16 begins to melt away when you, as Your Honor said, put things
17 together and look at all the circumstantial evidence. I
18 think that puts a serious question on the self-serving
19 statements.

20 Secondly, FOA seems to think that holding out this
21 advice of counsel somehow immunizes them from liability. The
22 case law is very clear, Your Honor, that advice of counsel
23 does not shield the violator with respect to the violator's
24 conduct.

25 In this context, for example, the case law is clear

1 that the advice of counsel might be used by the board to
2 determine whether in fact it was proper exercise of their
3 discretion with respect to canceling the meeting and denying
4 the right to vote.

5 And I think with respect to all the evidence that
6 Your Honor has put forward, the lack of quality, if you will,
7 with respect to the legal opinion, why the board didn't
8 question it, the fact that they purport to want to encourage
9 participation but attack the very scheme that was designed to
10 encourage participation, I think that goes very importantly
11 to the question of whether they relied on the advice of
12 counsel as a proper exercise of business judgment, and I
13 would suggest to you that they can't.

14 And then, lastly and I find very interesting, I
15 didn't spend a whole lot of time in my closing argument about
16 the 2009 resolution but what I find very important is the
17 case that Miss Sarvadi relies upon, White v. Boundary
18 Association, supports the very proposition that we're trying
19 to suggest to the court.

20 We have owners that buy a unit. Recorded
21 instruments give every unit owner a right to vote and then
22 they purport by rule or regulation to take that right away.
23 That's exactly what the Supreme Court reading says they can't
24 do, Your Honor.

25 That's all.

1 THE COURT: Did you want to add anything else?

2 MS. SARVADI: I wasn't trying to suggest that
3 there's a law that says they're immunized from liability but
4 simply that, what were they trying to do? It was Mr.
5 Claggett getting advice about what to do with the flyer. It
6 was not "How do we go collect this debt?" or something else.
7 That was the point I was trying to make and I wanted to make
8 sure that was clear.

9 Also, White simply says that because the right to
10 restrict the access to the common area wasn't in the
11 declaration, they couldn't do it. But clearly, in our
12 situation the restriction of the voting right is what is set
13 forth in the recorded documents and bylaws.

14 THE COURT: In White, they tried to assign the
15 parking spaces in common elements and basically any other
16 denomination? They become those common elements?

17 MS. SARVADI: Correct, Your Honor. So, the court
18 said that that amounts to a licensing of the common area
19 that's reserved to the membership and because it's not a
20 power specifically in recorded documents, they couldn't do
21 it.

22 THE COURT: The policy that was enacted in 2009,
23 Policy 2009-03, I think has an interesting history, and the
24 chronology of it suggests that it is directed towards Gordon
25 Properties. In the absence of any real problems before this

1 of any kind suggests that it was direct towards Gordon
2 Properties.

3 How it came to be is less important to me than the
4 fact it was put in the call that just went out in July and it
5 refers both to the delinquent, not being able to vote for a
6 candidate, and it proffered to members of the board of
7 directors for who is eligible, who is qualified, who can be
8 eligible.

9 I think that putting it there is further evidence
10 of the continuous conduct and it ties together the
11 delinquency and the politics that are going on. Politics
12 refers to the delinquency, the inability to vote and it
13 refers also to who is eligible. Of course the eligibility
14 runs to a political issue across the board.

15 I think Mr. Sells said, well, coalitions don't work
16 and I can see all sorts of issues that arise there.

17 So, all of that ties together. I think that is
18 evidence of a dual purpose of what's going on here.

19 I think it was the intention of the board of
20 directors not to let them vote because they wanted to collect
21 their money. They still want to collect their money. They
22 are doing everything they can do to collect their money. This
23 is just an added bonus to put a little pressure on which
24 Gordon Properties is resistant to. It's not particularly
25 effective. I don't have to look towards -- and Gordon

1 Properties may have the ability and wherewithal or
2 stubbornness to resist it and someone else doesn't and
3 therefore the other case violates it and this one doesn't.
4 It's the effect.

5 I think it's pretty clear from what was said. I
6 see a pattern here. I see unfortunate circumstances that
7 have arisen between the parties. It's going to take a long
8 time to heal that riff.

9 I think Mr. Sells pointed out the importance of the
10 vote, who could be on the directors, how you set the budget,
11 the priorities that you set in the budget, and that's one of
12 the important issues on condominium ownership. I think it has
13 a direct effect on them and every other unit owner because
14 -- I did see the chart, I think one of your exhibits we're
15 not using today which was described as having all of these
16 little cubbyholes, spreadsheets as to a line item spread over
17 within common elements that are residential, commercial and
18 all that good stuff.

19 His suggestion was, well, they have the discretion
20 of putting it in any box they wanted and that will affect how
21 much I've got to pay. I'm not quite sure I agree with that.
22 There possibly is some but I think that but I think Judge
23 Kembler's decision was you have to calculate out for these
24 things. On the other hand, you shouldn't have to box it
25 every time there's a budget involved. It's counterproductive

1 for everyone that's involved.

2 I think in most condominiums, there's a general
3 sense of business judgment rules. It really got down to the
4 wire on how close it is.

5 I don't know whether the business judgment rule
6 applies or whether it is, this is -- and there are cases
7 where there have been questions. Replacing windows with
8 insulated windows is not maintenance. That's replacement or
9 improvement and that's not in the documents and you can't
10 force the unit owner to do that. So, there are lines that
11 can be drawn. So, those raise issues but it is important and
12 it could have a monetary impact.

13 He suggested that maybe the new board might settle
14 the controversy and put this one behind them. I don't know.

15 My comment in the opinion was that, I don't think
16 that it matters who is on the board. When you assess a unit,
17 if they are at 2.2 percent, they get 2.2; if you're 11.32,
18 you get 11.32. There's no discretion on that. There's no
19 way to change that.

20 There is discretion on how you budget, where you
21 put the priorities. Do you put them over on commercial or
22 residential, and stuff like that. There's a limit to the
23 discretion, and it does matter who's on the board.

24 I think that enforcement is a violation of the
25 automatic stay. I think that the board cannot take refuge in

1 the fact that there are courses and lawyers who postpone.
2 Sometimes you make the choice and the choice is the wrong
3 choice.

4 I think that in light of the history that has gone
5 on -- I have nothing to do with the politics or the healing
6 of the wounds that are there, just to make sure that the
7 automatic stay is respected, put the parties back in the
8 position they ought to have been had the automatic stay not
9 been violated.

10 It occurred to me in rereading the transcript, at
11 that 2009 meeting, you might well have had a quorum. I can't
12 say that within that one week you wouldn't have had enough
13 for a quorum. I'm disappointed that that happened in the
14 manner in which it did. It's unfortunate.

15 I'm going to put you back where you would have been
16 which is to hold a meeting. I told you I didn't want to hold
17 a 2010 meeting because it makes no sense and when I weigh the
18 things back and forth -- I can't remember when I did it. A
19 few weeks ago. A month or so ago. It didn't seem that I
20 should force that upon you. Whether you all could have done
21 it conveniently or not is a different issue. I think you and
22 the board would view it differently and have different
23 perspectives. You have more freedoms than I do in deciding
24 those things. That's water under the bridge at this point.

25 There's the 2011. I want to make sure there's a

1 full, fair, honest and transparent election and I want
2 enthusiastic effort to get a quorum.

3 I'm going to impose a sanction on the association
4 of \$100,000 for violating the automatic stay. I will
5 consider remitting all or part of that at the conclusion of
6 this meeting.

7 I want a quorum. I want you to make the effort to
8 get a quorum. But if the unit owner association owns various
9 units, they should be there. The proxies should be counted.
10 Gordon Properties' proxies or presence must be there.
11 Everyone who is present who is a unit owner must be counted
12 as part of the quorum. If they don't want to participate
13 then they don't come; but if they enter the room, they are
14 part of the meeting.

15 We need a professional, paid, independent
16 parliamentarian. If Miss Cuadros says she's not experience,
17 we will provide the experience, and that person will assist
18 if any issues come up. I hope there are not. But at least
19 we'll have someone who is independent with professional
20 experience dealing with those. There is adequate time to
21 resolve those issues.

22 Proxies. You need a process by which they can be
23 fairly and honestly solicited. I think that you need to make
24 duplicate proxies available or packages available so that
25 people so inclined can vote for who they want.

1 I'm not saying anyone must attend but everyone
2 should have that availability. Facilities in common elements
3 should be made available that are all ready where they can
4 meet the candidates, campaign things and whatever.

5 I will reconsider the sanction after the meeting,
6 taking into account the good faith effort to get that meeting
7 organized, a quorum there and the meeting completed.

8 Gordon Properties has a right to vote. They have a
9 right to serve on the board of directors, and this relates to
10 the disqualifications you mentioned and after that you're
11 kicked off the board. That doesn't apply to their
12 representative who was appointed.

13 I don't have any authority on the Policy 2009-03.
14 That's not a violation of the stay. That deals with
15 political issues within the community.

16 Frankly, and it's not been briefed, I don't know I
17 do agree with Mr. Diamond. The qualifications for directors
18 are set in a separate paragraph immediately above the general
19 authority for board of directors, and qualifications to run
20 and serve are different than the policies and procedures on
21 how to conduct an election. In the United States
22 Constitution, you would have a real problem if Congress tried
23 to say that in addition to the qualifications set forth in
24 the Constitution you must also do this and that. You can't do
25 that.

1 I don't see immediately any authority for the
2 condominium to modify that and make it more restrictive. That
3 is not an issue of collections. It's a different issue that
4 has not been brought before me.

5 The packages that are mailed out: We always run
6 into the problem that they don't sign it and so they're
7 returned. The only thing that comes by certified mail,
8 return receipt requested, is bad news.

9 MS. SARVADI: It is required under the provisions
10 of the bylaws. What I think they've done in the past is try
11 to get people to pick them up in person for those who are on
12 site and then mail those who don't --

13 THE COURT: I understand. What I have found in
14 practice to work is, if you want to receive a reply which is
15 always nice to have because then they can't complaint that I
16 didn't get it -- if you're required to send it, send it
17 regular mail.

18 When I was doing foreclosures, all the certified
19 mail came back. None of the regular mail ever came back. My
20 purpose was to make sure that people knew who had an interest
21 in their house, that they would come to terms.

22 So, I think that that's something you need to
23 consider. You're not required to limit yourself to the
24 document. What you want to do is get full participation and
25 if it's additional notice, if that's the problem, then give

1 additional notice. If it's additional enthusiasm, however
2 you're going to do it, additional enthusiasm. You've got
3 plenty of time. It's now the end of July. You've got August
4 and September.

5 I picked the hundred thousand because the budget is
6 \$3.2 million or somewhere in that range and that's not
7 excessive on that sort of a budget, and there are about 450
8 units. So, that's about \$200 per unit owner if they don't
9 come through, and that might be enough. It's not
10 overwhelming for any particular unit owner but it is enough
11 for them to wake up and say, I've got to do something. Sign
12 your name on a proxy. Make notaries available, whatever it
13 takes.

14 The purpose of this is to make sure that what
15 should have been done is done and is done fully and fairly.

16 MR. KING: Your Honor, as I had indicated to the
17 court, we actually already have almost a final draft of
18 procedures. Because of the short time, I'm prepared to
19 present that to the court within a matter of a couple of days
20 and allow Miss Sarvadi an opportunity to review it; and if
21 necessary, we can have a hearing before the end of the week,
22 the beginning of next week so that FOA can address any
23 concerns in that procedure.

24 THE COURT: I would like you to do that. These are
25 suggestions I put out, what needs to be there. Hopefully

1 they're in there. I want this done fairly and honestly. I
2 don't care what the outcome is. I just want it correct.

3 I will schedule this so you can come back. I think
4 you have both been working on this procedure?

5 MR. KING: Yes, Your Honor.

6 MS. SARVADI: As part of a settlement.

7 MR. KING: Yes. I must say, the document we're
8 going to submit to the court is not going to be as generous
9 as the document we have been discussing for settlement
10 purposes but I think it's consistent with what Your Honor
11 outlined.

12 THE COURT: I'm only interested in having an
13 election and put you where you should have been.

14 We were going to have a hearing on Thursday, the
15 28th, on substantive consolidation. Were you out of town?

16 MR. KING: No. Actually, Mr. Dingman had problems
17 scheduling a deposition of the accountant and asked for it to
18 be adjourned.

19 THE COURT: I will give you a date this week but
20 not Friday and not next week.

21 MS. SARVADI: Unfortunately, I'm taking my only
22 vacation of the entire year. I fly out on the morning of the
23 28th. I am back on Wednesday, the 3rd, and I don't know that
24 I can get board input on all the procedures in 24 hours. So,
25 could we look at the 4th or 5th of August?

1 THE COURT: I'll hold a hearing whenever you want.
2 I won't be here next week. I can hold it on the 8th.

3 I don't want the condominium to wait, and the
4 particular procedures that you may work out -- there's a
5 meeting Wednesday?

6 MS. SARVADI: Of the election committee.

7 THE COURT: Of the election committee. I want them
8 to know that this is how it's going to be. They're going to
9 do a good job. I trust that they will do that.

10 MR. KING: I am very concerned about letting this
11 go past the end of this week with the short amount of time we
12 have before the meeting. It's already within the 90-day
13 period --

14 THE COURT: What do your procedures do that can't
15 be done on --

16 MR. KING: It has to do with the delivery of
17 meeting notices. What we have in our procedures is that the
18 FOA staff would prepare the notices packages but the
19 independent administrator will take care of distributing and
20 mailing them out because of the suspicion that we have.
21 Those notices have to get out very soon and I want to make
22 sure that that process is in place.

23 THE COURT: What's the deadline for that?

24 MS. SARVADI: It is 21 days prior. We have time.
25 But I wanted to alert the court. The call for candidates

1 that's in the exhibit says, return your solicitation terms. I
2 think we're looking at the 15th of August. So, it doesn't
3 make sense to send the meeting proxies when you won't have
4 your candidates concluded until August 15th. I'm sorry.
5 It's August 12th.

6 MR. KING: That's a fair comment. It's
7 unfortunate; but in any event, I guess that's the time period
8 we have to work with. So, August the 8th, I guess.

9 MS. SARVADI: The 8th I'm in an all-day hearing.

10 MR. KING: We are already here on August 8th on a
11 status hearing.

12 MS. SARVADI: I'm not here on the 8th. I'm in Anne
13 Arundel.

14 MR. KING: That's right. Can anybody else handling
15 the hearing that date?

16 THE COURT: If you agree on it, there's no problem.

17 MS. SARVADI: If we agree. My problem is, I don't
18 know how I can get --

19 MR. KING: The next day is fine, if Your Honor has
20 that available.

21 MS. SARVADI: The 9th. I can do the 10th. The
22 11th. All those days are good for me.

23 THE COURT: The 9th is a motions day. The 10th is
24 a Chapter 13 day.

25 MR. KING: Can we do it in the afternoon of the

1 9th?

2 THE COURT: One never knows how many I've got.

3 MR. KING: No. I understand. But we are more
4 likely to be heard sooner in the afternoon than --

5 THE COURT: If you would like the 9th, I can put
6 you at 2:00 o'clock. The only thing I have to tell you, I
7 don't know what the morning will be like.

8 MR. KING: Hopefully because it's August everybody
9 will be out of town.

10 THE COURT: I encourage that. I'll put that down.
11 Do an order, as well.

12 MR. KING: I will, Your Honor. Obviously any of
13 the other relief that we requested by way of monetary damages
14 is going to be adjourned to another day. We will have to
15 deal with that. I guess we can address it at that point
16 because, Your Honor, we do ask as one of the sanctions that
17 Gordon Properties not be assessed for any of the legal fees
18 that FOA incurred in defending this action. I guess that's
19 part of the monetary damages.

20 THE COURT: Well, we'll address that. That's not
21 something to be addressed today.

22 MR. KING: We will prepare an order and submit it
23 with the proposed guidelines, and I'll get the transcript of
24 Your Honor's suggestions so we comply.

25 THE COURT: Those are suggestions. That's the sort

1 of things that I want to make sure that you take into
2 account, something along those lines.

3 All right. Then the 9th of August. If you have
4 agreed to the order in advance of that, you can submit it. I
5 won't be in -- I guess you won't either.

6 MS. SARVADI: Right. So, I will do what I can
7 before I leave but it may be the end of that first week.

8 MR. KING: Thank you, Your Honor. I think we can
9 prepare it.

10 THE COURT: All right. Thank you very much. We
11 will adjourn.

12 (Whereupon, at approximately 4:07 p.m., the
13 proceedings were adjourned.)

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5 (A) The foregoing pages represent an accurate and complete
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7 Bankruptcy Court, the Honorable Robert G. Mayer, Judge,
8 Presiding, in the matter of GORDON PROPERTIES, LLC (Debtor);
9 GORDON PROPERTIES, LLC v. FIRST OWNERS ASSOCIATION OF FORTY
10 SIX HUNDRED, ET AL, and (B), these pages constitute the
11 original transcript of the proceedings.

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