UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

In re:	)	
GORDON PROPERTIES, LLC,	)	**Case No. 09-18086-RGM**
CONDOMINIUM SERVICES, INC.,	)	(Jointly Administered)
Debtors.	)	
HOWARD SOBEL, et al.,	)	
Plaintiffs,	)	
v.	)	**Adv. Pro. No. 12-1562-RGM**
BRYAN SELLS, et al.,	)	
Defendants.	)	

OPPOSITION TO MOTION TO DISQUALIFY REED SMITH LLP

Plaintiffs Howard Sobel, Dewanda F. Cuadros, F.J. Pepper, Connie King, Steven Greenberg, Marietta Jones, Elizabeth Moore, Stephen Langone, Betty Gilliam, Evelyn Cantrell and Abdon Alexandre Zoghaib (collectively "Plaintiffs"), by counsel, file this opposition to Defendant First Owners Association's (" FOA") Motion to Disqualify Reed Smith LLP (the "Motion to Disqualify" or "Motion") and state as follows.

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Introduction

FOA's Motion to Disqualify is clearly part of what numerous courts have noted is a growing trend to use such motions purely for strategic reasons. *See Tessier v. Plastic Surgery Spec., Inc*., 731 F. Supp.724, 729 (E.D.Va. 1990).[1] Such is the case here. FOA concedes that there is no longer an attorney-client relationship between Reed Smith LLP ("Reed Smith") and FOA because the FOA Board of Directors—led by members of debtor Gordon Properties LLC ("Gordon Properties") or their family members—terminated Reed Smith as FOA's counsel. It is also patently clear that the issues raised in the improperly-removed state court action[2] have no connection with Reed Smith's prior representation of FOA. Reed Smith's prior representation of FOA did not involve any issues concerning the propriety of actions by the interested directors named as defendants in this lawsuit.

Moreover, the State Court action seeks review of decisions of the FOA Board made in the last several months—decisions that had not yet occurred during Reed Smith's prior representation of FOA. Indeed, if FOA were not controlled by interested directors, FOA would no doubt join in the state court action to seek determination and clarification of the actions and duties of its Board members. However, the FOA Board is controlled by the members of Gordon Properties and this Motion—just as the removal of this matter in the first place—is part of a

[1] As then-Circuit Court (now State Court of Appeals) Judge Kelsey put it: "If the truth be told, disqualification can itself be a weapon in the adversarial contest intended to accomplish strategic litigation goals of the requesting party, like retiring from the scene the very lawyers in whom an opponent has the most confidence, or distracting an opponent with a costly and potentially embarrassing pretrial diversion, or simply launching a thinly veiled *ad hominem* attack, all under the cover of a dutiful effort to reprove an ethically challenged lawyer. Only the naïve would discount the possibility of such motivations infecting modern litigation. For these reasons, courts should 'always remain mindful' of the 'possibility of misuse of disqualification motions for strategic reasons.'" *Gay v. Luihn Food Systems, Inc.*, 54 Va. Cir. 468 (2001) (citations omitted).

[2] It is Plaintiffs' position that this matter was improperly removed and that this Court has no jurisdiction over this case, including the pending Motion to Disqualify. Any issues pertaining to this state court action—including Reed Smith's role as counsel—can and should be resolved by the state court.

litigation tactic designed to delay judicial review of the actions of these FOA Board members by the state court and to deprive the Plaintiffs of counsel.[3] The Court should deny the Motion to Disqualify and should remand this matter to the state court so that the members of FOA can have that court review the actions of their Board.

BACKGROUND FACTS

In 2009, Reed Smith represented FOA in a lawsuit against Condominium Services, Inc. ("CSI") in the Circuit Court of the City of Alexandria, alleging that CSI had breached the terms of its management agreement with FOA and had wrongfully converted FOA's funds (the "CSI Action"). The CSI Action proceeded to trial in November of 2009. FOA was granted summary judgment on its conversion claim and awarded $91,125. The jury returned a verdict in favor of FOA on its breach of contract claim in the amount of $70,667, awarded prejudgment interest on the conversion claim beginning on October 1, 2007, and awarded punitive damages in the amount of $275,000 (the "CSI Judgment"). CSI appealed the jury's verdict and other issues decided at trial. The Supreme Court of Virginia granted CSI's petition for appeal, but affirmed the jury's verdict and other issues decided against CSI by the trial court.

In 2009, Reed Smith also represented FOA in a lawsuit filed against it by Gordon Properties in the Circuit Court of the City of Alexandria, in which Gordon Properties engaged in a broad attack on FOA's assessment methodology on units it owned, and requested significant refunds of what it contended were overpaid assessments (the "Assessment Action"). FOA filed a counterclaim seeking a declaration that the owners of the street-front units in the Condominium, including Gordon Properties, owed certain assessment obligations to FOA. Trial Judge Kemler

[3] Reed Smith is representing the Plaintiffs on a *pro bono* basis because they are not able to incur the costs of litigation, as Mr. Sells well knows and is counting on. If Reed Smith is removed as counsel, it is likely that the Plaintiffs will be left with no representation.

granted FOA's motion for summary judgment regarding the assessment of the street-front units and held that Gordon Properties was liable for such assessments. Pursuant to Judge Kemler's Order, FOA assessed Gordon Properties' street-front unit for back assessments for 2003 through 2008 in the amount of $315,673.36 ("Assessment"). The other matters referenced in paragraph 1 of FOA's motion were adversary proceedings in the Gordon Properties and/or CSI bankruptcy cases.

CSI's chief executive officer and Gordon Properties' managing member, Bryan Sells, vowed that FOA would never collect a single cent on the CSI Judgment or Assessment. Under the direction of Sells, CSI and Gordon Properties since have embarked on a campaign of misusing the courts and causing FOA to incur unnecessary attorneys' fees with the intent of evading the CSI Judgment and Assessment. These actions included causing CSI and Gordon Properties to file petitions for bankruptcy in the United States Bankruptcy Court for the Eastern District of Virginia ("Bankruptcy Court"). Reed Smith continued its representation of FOA in the CSI and Gordon Properties' Bankruptcy Actions.

On January 9, 2011, Gordon Properties filed an adversary proceeding in the bankruptcy proceeding claiming that FOA, by following its bylaws and preventing Gordon Properties from voting, had intentionally violated the automatic stay provisions of 11 U.S.C. § 362(a)(6). On August 24, 2011, the Bankruptcy Court agreed and held that by following its bylaws, FOA violated the automatic stay. As a sanction, the Court ordered FOA to pay Gordon Properties' attorneys' fees and to permit it to vote in FOA's next election. FOA appealed that Order to the United States District Court for the Eastern District of Virginia ("Sanction Appeal"). The Sanction Appeal remains pending.

In a separate Order, the Bankruptcy Court also held that FOA's claim in the bankruptcy for the Assessment it owed FOA pursuant to Judge Kemler's Order was not valid and that it need not be paid. FOA also appealed that Order to the United States District Court for the Eastern District of Virginia ("Assessment Appeal"). That Assessment Appeal also remains pending.

In the CSI bankruptcy proceeding, FOA moved to substantively consolidate the bankruptcies of Gordon Properties and CSI to make Gordon Properties liable for the Judgment. The Bankruptcy Court denied that motion, but FOA appealed that decision to the District Court which reversed the decision and remanded the issue of substantive consolidation to the Bankruptcy Court. *See In re Gordon Prop., LLC and Condo. Servs., Inc*., 478 B.R. 750 (E.D. Va. 2012). Thus, there is a strong probability that Gordon Properties could be liable for the Judgment. The remanded decision is now pending before this Court.

In June of 2012, Bryan Sells, Elizabeth Greenwell, and Lindsay Wilson—who are all members of Gordon Properties—along with Mr. Sells' father-in-law, Dennis Howland, took control of FOA's Board per the Order of this Court. One of the first acts of the Gordon Properties-controlled Board was to terminate Reed Smith as FOA's counsel. This Court subsequently found that Mr. Howland's election to the FOA Board was improper and he was removed from the Board and was replaced with Elizabeth Moore. The FOA Board subsequently appointed a three person litigation committee, Betty Gilliam, Jane Brungart and Alex Zoghaib, to oversee the various litigation matters and disputes between FOA and Gordon Properties and CSI. This litigation committee rehired Reed Smith to pursue an appeal of this Court's denial of FOA's claim of unpaid assessments by Gordon Properties which appeal is pending before Judge Brinkema.

After the 2012 annual meeting, the FOA Board voted to change the composition of the litigation committee. But for the votes of the Gordon Properties members of the Board—Sells, Greenwell, and Wilson—the motion to change the composition of the litigation committee would have failed. The FOA Board also passed a motion to rehire CSI which would have failed but for the votes of the Gordon Properties members. Plaintiffs contend that Sells, Greenwell, and Wilson breached their fiduciary duties by participating in the decisions to appoint members to FOA's special litigation committee and to rehire CSI, among other actions. These issues have no relationship to the matters in which Reed Smith represented FOA.

To ensure that their actions would go unchallenged, the new and improperly-appointed litigation committee again terminated Reed Smith as FOA's counsel and has refused to proceed with the appeals in the District Court, which have been fully briefed and are ripe for decision.[4] In granting Reed Smith's motion to withdraw, Judge Brinkema stated that she was "troubled" by the decision to terminate Reed Smith because it made no sense for FOA to do so. Meanwhile, Gordon Properties has pursued collection actions against FOA and garnished FOA's bank account, throwing FOA into default under its loan agreement with Virginia Commerce Bank. All of this was done as part of Sells, Greenwell, and Wilson's plan to force FOA to agree to an unfavorable settlement agreement with Gordon Properties and CSI.

[4] Upon receiving notice that their services had been terminated, Reed Smith filed motions to withdraw as FOA's counsel in the appeals pending before the District Court in the CSI and Gordon Properties Bankruptcies. The Honorable Leonie M. Brinkema issued an order granting Reed Smith's motion to withdraw on October 23, 2012. Reed Smith's motion to withdraw in the matter pending before Judge Ellis is still pending. There can be no dispute, however, that FOA's termination of Reed Smith as its counsel terminated Reed Smith's attorney-client relationship with FOA. *See Reese v. Virginia Int'l Terminals, Inc*., No. 2:11cv216, 2012 WL 3202875 * 7 (E.D. Va. Aug. 2, 2012) (citing *SWS Fin. Fund A. v. Saloman Bros., Inc*., 790 F. Supp. 1392, 1398 (N.D. Ill. 1992) (client's express statement ending attorney's employment terminates the attorney-client relationship). FOA concedes this fact in its motion to disqualify. [Dkt. No. 8 ¶ 4].

Faced with the foregoing facts, Plaintiffs filed an action in the Alexandria Circuit Court ("State Court Action") that poses questions of corporate and board governance, and which asks the State Court to declare that the actions of Sells, Wilson and Greenwell in voting on the appointment of the second litigation committee and the rehiring of CSI were contrary to state law and *ultra vires*. The State Court Action also seeks a declaration that Sells, Wilson and Greenwell cannot properly vote on future matters that come before the FOA Board that affect Gordon Properties and/or CSI. In essence, Plaintiffs seek to set aside Sells, Wilson, and Greenwell's actions that violate the fiduciary duties they owe to FOA as members of its Board.

Realizing that any decision in the State Court Action would likely interfere with their plans, Defendant Lindsay Wilson improperly removed this matter to this Court by claiming that this Court had jurisdiction over the State Court Action by virtue of her status as one of Gordon Properties' members. [Dkt. No. 1]. Plaintiffs immediately filed a motion to remand noting the lack of this Court's jurisdiction over the State Court Action and the impropriety of Wilson's removal. [Dkt. No. 4]. Wilson filed an opposition to Plaintiffs' motion to remand that sweeps aside the fact that this Court lacks jurisdiction over the State Court Action and instead asks the Court to delay any ruling so that Gordon Properties and CSI can finalize their settlement agreement with FOA. [Dkt. No. 6].

Sells, Wilson, and Greenwell have used their control over FOA's Board to file this Motion to Disqualify Reed Smith, claiming a violation of Rule 1:9 of the Virginia Rules of Professional Conduct. Yet FOA's motion fails to provide any argument whatsoever that explains how Reed Smith's representation of Plaintiffs in this case is "substantially related" to Reed Smith's prior representation of FOA. For this reason alone, FOA's Motion must be denied.

ARGUMENT

I. THIS COURT DOES NOT HAVE JURISDICTION OVER THE STATE COURT ACTION AND THEREFORE DOES NOT HAVE JURISDICTION TO RULE ON THIS MOTION.

As noted in Plaintiffs' motion to remand, this Court is without jurisdiction to hear this matter. [Dkt. No. 4]. Under a plain reading of the applicable removal statute (28 U.S.C. § 1452), Wilson and indirectly Gordon Properties are *not* entitled to remove Plaintiffs' declaratory judgment action to this Court because Lindsay Wilson is *not* a party to any proceeding before the Bankruptcy Court and Gordon Properties is *not* a party to the State Court Action. Section 1452 provides that a "***party*** may remove any claim or cause of action in a civil action . . . to the district court for the district where such civil action is pending if such district court has jurisdiction of the such claim or cause of action under section 1334 of this title." 28 U.S.C. § 1452(a) (emphasis added). At no time has Wilson (or Sells or Greenwell for that matter) filed for bankruptcy. As such, Wilson's reliance upon Section 1452 as the basis for her removal of the State Court Action is improper and this matter must be remanded.

Nor is there any authority to support Wilson's claim that she can remove this matter pursuant to Section 1452 as the representative of Gordon Properties, because only a "party" to the action can effectuate a removal. *See* 28 U.S.C. § 1452. The definition of the term "party" was narrowly construed in *In re John Tilley v. G&C Constr. Corp.*, 42 B.R. 827, 829 (E.D.Va. 1984), involving the analogous removal statute 28 U.S.C. § 1478 (repealed) which permitted a "party" to "remove any claim or cause of action in a civil action…to the bankruptcy court for the district court where such civil action is pending, if the bankruptcy courts have jurisdiction over such claim or cause of action."). In *Tilley*, the Bankruptcy Court was asked to abstain from hearing and to remand to state court two separate but related lawsuits that were filed against the

debtor and a company owned by him. The Bankruptcy Court held that the debtors could not remove the lawsuit filed against the corporation they owned because a "corporation is a separate an independent entity apart from those who may control the actual operations of the corporation. Because the [debtors] were not parties to [the lawsuit filed against the corporation they owned], the Application for Removal filed with [the bankruptcy c]ourt had no effect." *Id*. at 829. (citations omitted).

Here, just as in *Tilley*, the Removed Matter was filed against Sells, Wilson and Greenwell as individuals—not Gordon Properties, CSI or any other company they own, control or operate. The fact that the Removed Action seeks relief against one or more of Gordon Properties' members does not make Gordon Properties a "party" to the Removed Action. It is well settled that there "is a substantial difference between the individual and the debtor corporations he owns [or controls]." *KFC Corp. v. Milton*, 27 B.R. 158, 160 (E.D. Va. 1983). Because Gordon Properties is not a party to the Removed Action, Wilson's removal based on her relationship to Gordon Properties is improper and this matter should immediately be remanded to the state court for adjudication.

Other courts have applied similar narrow interpretations of removal statutes while construing the scope of other analogous general removal statutes (28 U.S.C. § 1441) that used the term "defendant" to define who may remove. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941) (interpreting the predecessor statute to 28 U.S.C. § 1441 that also used the term "defendant"). Since the *Shamrock* decision, legions of cases in the Fourth Circuit and elsewhere have construed the removal statutory scheme narrowly to limit the right of general removal (in non-bankruptcy actions) only to defendants named in the original state court action. *See, e.g.*, *Palisades Collections LLC v. Shorts*, 552 F.3d 327, 332 (4th Cir. 2008) (third party defendants

may not remove under 28 U.S.C. § 1441(a)); *Cross Country Bank v. McGraw*, 321 F. Supp. 2d 816, 821-22 (S.D. W. Va. 2004) (same); *Galen-Med, Inc. v. Owens*, 41 F. Supp. 2d 611, 614 (W.D. Va. 1999) (same).

The admonishment from the courts to strictly construe removal statutes applies with equal force to Section 1452. In seeking to remove Plaintiffs' declaratory judgment action against the Defendants, Wilson and Gordon Properties are essentially taking the position that this Court may exercise jurisdiction over any state court action that may have any supposed tangential effect on Gordon Properties, however attenuated. For example, if Plaintiffs were to bring a declaratory judgment action seeking to determine the validity of any action by FOA's Board of Directors, under Gordon Properties' view it would have the right to remove *that* lawsuit to this Court. Such a result would be an absurd construction of the removal statute and would amount to an impermissible exercise of jurisdiction by this Court. Moreover, this is the exact construction that this Court previously rejected in *Tilley* and *KFC*. For these reasons, the matter should be remanded to the State Court.

In their motion to remand, Plaintiffs' raise numerous other arguments that support remanding this matter to the State Court. So as to not burden the Court with repetitive briefing, and pursuant to Fed. R. Civ. P. 10(c), Plaintiffs adopt and incorporate by reference their motion to remand. [Dkt. No. 4].

II. REED SMITH'S FORMER REPRESENTATION OF FOA AND PLAINTIFFS IS *NOT* "SUBSTANTIALLY RELATED".

Disqualification of an attorney "is a serious matter which cannot be based on imagined scenarios of conflict." *Tessier,* 731 F. Supp. at 729 (citing *Richmond Hilton Assocs. v. City of Richmond*, 690 F.2d 1086, 1089 (4th Cir. 1982). In determining whether to disqualify counsel for a violation of the Professional Rules of Conduct, district courts are instructed to make their

"assessment…in perspective of the realities of the case" and "not to weigh the circumstances 'with hair-splitting nicety.'" *Reese v. Virginia Intern. Terminals, Inc.*, 2012 WL 3202875 * 5 (E.D. Va. Aug. 2, 2012) (citations omitted). *United States v. Clarkson*, 567 F.2d 270, 273 n.3 (4th Cir. 1977) and *Sanford v. Virginia*, 687 F. Supp.2d 591, 602 (E.D. Va. 2009)). Moreover, 'the asserted conflict must be a real one and not a hypothetical one or a fanciful one." *Reese*, 2012 WL 3202875 * 6. As such, the moving party must meet a high standard of proof to prove that counsel should be disqualified.[5] *Clarkson*, 567 F.2d at 273.

A motion to disqualify brought pursuant to Rule 1:9 of the Professional Code of Conduct involves a two-part test. The movant must establish the following: (1) an attorney-client relationship existed with the alleged former client, and (2) the former representation and the current controversy must be substantially related.[6] *Sunbeam Prods., Inc. v. Hamilton Beach Brands, Inc.*, 727 F. Supp. 2d 469, 472 (E.D. Va. 2010); *In re Stokes v. Firestone*, 156 B.R. 181, 185 (E.D. Va. Bankr. 1993); *Tessier*, 731 F. Supp. at 730. While there is no question as to the first part of the test, FOA's *ipse dixit* pronouncement that there is a substantial relationship between this matter and the former representation falls well short of meeting the second prong of the test.

[5] It is "important in our system of justice that the parties be free to retain counsel of their choice." *Reese*, 2012 WL 3202875. As such, Courts are instructed to remain vigilant for the misuse of motions to disqualify given the "recent practice indulged in by some to use disqualification motions for purely strategic purposes." *Tessier*, 731 F. Supp. at 729 (citations omitted); *Shaffer v. Farm Fresh, Inc.*, 966 F.2d 142, 146 (4th Cir. 1992) (courts should "always remain mindful of the opposing possibility of misuse of disqualification motions for strategic reasons."); *see also Sanford v. Commonwealth of Virginia*, 687 F. Supp.2d 591, 602 (E.D. Va. 2009) (noting that conflict of interest claims should be viewed with caution because they "can be misused as a technique of harassment.")

[6] A legion of Virginia Legal Ethics Opinions support the proposition that it is not improper for an attorney to represent a plaintiff against a defendant who is a former client if the matters are not substantially related to the earlier representation and no confidences or secrets were learned in the prior representation which could be used to disadvantage the former client. *See, e.g.*, Virginia Legal Ethics Opinion No. 1196 (February 22, 1989); No. 1032 (February 2, 1988); No. 933 (June 11, 1987); No. 803 (May 27, 1986); No. 774 (March 11, 1986); No. 672 (February 20, 1985); No. 622 (November 13, 1984); No. 538 (January 18, 1984); No. 295 (February 17, 1978).

"Substantially related" has been interpreted to mean "identical" or "essentially the same." *Sunbeam Prods., Inc.*, 727 F. Supp. 2d at 473 (E.D. Va. 2010)*; Tessier*, 731 F. Supp. at 730; *see also In re Stokes*, 156 B.R. at 187; *In re Chantilly Constr. Corp.*, 39 B.R. 466, 469 (E.D.Va. Bankr. 1984). "The substantial relationship test requires a 'virtual congruence of issues', and the relationship between issues in the prior and present case must be 'patently clear.'" *In re Stokes*, 156 B.R. at 187 (citation omitted). FOA has failed to meet this burden and cannot meet this burden.

Reed Smith's representation of Plaintiffs in this matter has nothing to do with its prior representation of FOA. The legal issues in this action implicate questions of corporate law, board governance, and questions related purely to what makes one an interested or disinterested director and the propriety of Board actions in which the members of Gordon Properties participated. These issues were not present in, and are distinct and completely unrelated to the issues involved in Reed Smith's earlier representation of FOA, which implicated questions of assessments, breach of contract and conversion by CSI. None of the prior matters in which Reed Smith represented FOA dealt with the actions of Board members who were also members of Gordon Properties. Obviously, none of the issues relating to the actions of the FOA Board since the 2012 annual election were implicated in Reed Smith's prior representation because the election had not yet taken place. Accordingly, the legal issues in this action are surely not "identical" or even "essentially the same." Rather, they are wholly unrelated to the issues in the Gordon Properties and CSI Bankruptcies, the CSI Action, or Assessment Action.

Nor can FOA legitimately claim that Reed Smith's representation of Plaintiffs will prejudice FOA at trial. Indeed, all of the issues raised in the State Court Action—that is, the information FOA suggests has created a conflict because they are referenced in the Complaint

can be easily derived from the public records of the courts and the parties' pleadings filed subsequent to Reed Smith's representation of FOA. Reed Smith well knows, understands, and takes seriously its obligations under Rule 1:9, but Reed Smith gained no confidential, privileged or non-public information in the course of its prior representation of FOA that has any relevance to the issues in this case.[7] FOA has not and cannot identify any such information. Any suggestion that Plaintiffs' claims might be colored by confidential information in the files of Reed Smith is misguided, wholly speculative and in any event insufficient to support its Motion.[8] There is simply no evidence that Reed Smith has engaged in any conduct which would warrant its disqualification. This is especially true when, as here, Plaintiffs do not seek any relief from FOA and have named FOA as a defendant only as a nominal party given the derivative nature of the claim.

WHEREFORE, Plaintiffs respectfully request that this Court deny First Owners Association of Forty Six Hundred Condominium, Inc.'s motion to disqualify Reed Smith LLP, award Plaintiffs their attorneys' fees and costs and provide such additional relief as the Court deems just and appropriate.

[7] "The [Virginia State Bar Legal Ethics] committee has repeatedly opined that the earlier representation of a client who is now the adverse party in a suit brought on behalf of another client is not *per se* sufficient to warrant disqualification of the lawyer on ethical grounds. *See e.g.* LE Op. 1399, LE Op. 1139". LE Op. 1596. This is especially true, when as here, there is no indication that any secrets or confidences of FOA relating to the issues in this action were obtained by Reed Smith. The committee has held that "an [a]ttorney's familiarity with the [former client's] operations or the personalities of its management, without more, is not a disqualifying conflict of interest." *Id*.

[8] *See Kirk v. Slocum, Boddie & Murray, P.C.*, 38 Va. Cir. 85 (1995) ("The Court is not convinced that defendants have shown the existence of any confidences, nor how they would, if established, result in the detriment or be otherwise 'substantially related' to the case.").

CONCLUSION

WHEREFORE, Plaintiffs respectfully request that this Court enter an Order: (1) denying First Owners Association of Forty Six Hundred Condominium, Inc.'s Motion; (2) remanding this matter to the Circuit Court for the City of Alexandria, Virginia, where it was pending as Civil Action No. CL12005183 and (3) awarding Plaintiffs such further relief as is just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this 4th day of January, 2013, caused a copy of the foregoing to be served electronically through the CM/ECF system upon all persons entering their appearance and requesting notice in this adversary proceeding.

/s/ Alison R.W. Toepp
Alison R.W. Toepp