UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

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

DEFENDANT FIRST OWNERS ASSOCIATION'S REPLY IN SUPPORT OF ITS MOTION TO DISQUALIFY REED SMITH

The law firm of Reed Smith LLP does not want to be disqualified from representing the plaintiffs in this proceeding because, it claims, it only previously represented defendant First Owners Association of Forty Six Hundred Condominium, Inc. ("FOA") concerning "questions of assessments, breach of contract and conversion by [Condominium Services, Inc.]," Opposition at 12, and none of those issues are involved here. Reed Smith's current view of the scope of its representation over the past six years constitutes willful myopia. Its representation was not antiseptically confined to three discrete legal issues but also squarely involved the issues of corporate control over FOA that the complaint raises. The matters involved in this case

are indeed substantially related, if not identical, to matters on which Reed Smith represented FOA. To clarify the issues raised by the motion to disqualify, FOA files this brief reply.[1]

1. The removed complaint repeatedly alleges facts in support of its claim for relief that involve actions taken by FOA while it was represented by Reed Smith. In its desire to impugn the defendants as much as possible – although the current membership of the Board of Directors of FOA resulted from compliance with the bylaws and the orders of this Court – Reed Smith has recounted at length in the complaint what transpired over the course of its prior representation of FOA. The allegations in paragraph 6 of the motion to disqualify concerning the nature and extent of that overlap between that representation and the current factual assertions have not been denied. If success of the claims advanced by the plaintiffs in this case necessitates the presentation of evidence concerning what FOA did while it was being represented by Reed Smith, as is unequivocally and repeatedly pleaded throughout the complaint, the issue of substantial relatedness seems undisputed.

That Reed Smith's representation went far beyond the discrete legal issues of "assessments, breach of contract and [the tort of] conversion" is

[1]Reed Smith also argues that this Court lacks jurisdiction over this proceeding and cannot rule on this motion, disagreeing with the Court's decision to decide the disqualification issue as a threshold matter. The propriety of removal is to be addressed by the removing defendant, Lindsay Wilson, on a schedule to be set by the Court on January 22, 2013. FOA will defer to her arguments. Until this case is remanded, FOA respectfully submits that the Court can control the compliance by the attorneys who appear before it with Virginia's Rules of Professional Conduct, even to argue jurisdictional motions.

shown by a fuller description of just one event briefly mentioned in the complaint. In paragraph 43 of the complaint, the plaintiffs allege that Gordon Properties was allowed to vote in the October 2011 election of members of the board of directors "in violation of FOA's Bylaws" and was able to have a favorable slate of candidates elected, taking control of FOA. To read the complaint, the impropriety of that election seems obvious. There was, however, nothing improper about this alleged violation of the bylaws; this Court had previously ruled that 11 U.S.C. § 362 prohibited FOA from denying Gordon Properties the right to vote in those elections. For purposes of this motion, the important aspect of the allegations about the October 2011 election is that the September 2010 memorandum on which FOA relied to deny Gordon Properties the right to vote – to create an excuse which this Court called "a ruse" – was prepared by Reed Smith.

This was not an anomaly in Reed Smith's representation of FOA. This Court's opinion, holding that FOA violated the automatic stay when it deprived Gordon Properties of the right to vote, was issued in September 2011. According to Reed Smith's Invoice Number 2281632, dated June 22, 2012, submitted to FOA, Reed Smith was still addressing this corporate control issue in May 2012, eight months later. The following is a quote from that bill; "Connolly" refers to Helenanne Connolly, a Reed Smith associate working with Michael Dingman, apparently on an appeal brief in *First Owners Association of Forty Six Hundred v. Gordon Properties, LLC,* Civil Action No. 1:11-cv-1060 (E.D. Va.):

Date	Name	Narrative	Hours
05/24/12	Connolly	Meeting with M. Dingman re arguments for Reply brief re authority of FOA to restrict delinquent unit owners from voting; Begin conducting legal research re same	1.80
05/25/12	Connolly	Continue conducting legal research re FOA's authority to restrict voting rights for nonpayment of assessments; Meeting with M. Dingman re same; Draft insert for brief re same[2]	2.40

That obviously had little to do with tortious conversion, assessments or breached contracts. It could not be clearer that Reed Smith was actively, aggressively and persistently representing FOA on issues of voting and corporate control. Now it wants to continue its representation concerning those same corporate control issues, but adversely to FOA. Counsel cannot represent an entity and then turn on it when new managers assume control, even if those new managers seek to reverse the results achieved by the former counsel. Loyalty to the client, FOA, runs deeper than that.[3]

2. If a law firm wants to cease representing a client because of what it learns that the client wants to accomplish, it cannot then turn on the client and try to stop it. When Reed Smith filed a motion to withdraw as counsel for FOA in *First Owners' Association of Forty Six Hundred*

[2] To avoid any inadvertent disclosure of confidences or secrets, FOA has not attached the entire statement as an exhibit to this reply. It will have a copy at argument, if the Court wants to review it. Reed Smith, of course, has a copy.

[3] Reed Smith makes a half-hearted attempt to claim that FOA is only a nominal party in this derivative suit and therefore not adverse to the plaintiffs. Even the complaint identifies only one of the two counts, Count II, as a derivative claim. Count I seeks an injunction (1) voiding actions of the board of FOA, (2) forcing on FOA a new Special Litigation Committee populated with people that the plaintiffs like and (3) imposing procedural requirements on any future votes of the board. Reed Smith's statement that the plaintiffs "do not seek any relief from FOA," Opposition at 13, is false.

Condominium, Inc. v. Gordon Properties, LLC, 1:11-cv-1155 (E.D. Va.), it said that its client, FOA, was engaged in a course of conduct that was "repugnant." Reed Smith did not simply say that it had been discharged but went much further in its motion, a copy of which is attached as Exhibit A. That allegedly repugnant conduct, which so distressed Reed Smith that it did not want to be FOA's counsel any more, is precisely the conduct that constitutes the core of the factual allegations in this proceeding. Control of FOA has shifted and Reed Smith does not like the actions taken by the new board members, but Rule 1.9 has no "repugnant former client" exception. The core issues in this case – who properly controls FOA and the nature of its relationship with Gordon Properties – are the same issues as to which Reed Smith previously advised FOA. It cannot now represent the other side, even if the parties' positions have changed.

3. It is irrebuttably presumed that Reed Smith had confidential communications with its client concerning the matters involved in its representation; control of FOA was one of those matters. As the Court held in *Stokes v. Firestone,* 156 B.R. 181, 186 (Bankr. E.D. Va. 1993), it is well-settled that:

> [A] lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and **not to a stockholder, director, officer, employee, representative or other person connected with the entity.**

(Emphasis added). Even though the Code of Professional Responsibility, in effect when this opinion was issued in 1993, has since been replaced by the Rules of Professional Conduct, this principle has not changed. *See* Rule 1.13.

Reed Smith owed its allegiance to FOA and has a continuing duty of confidentiality to its former client. At a minimum, the law firm cannot disclose to anyone, including its current clients, any confidential communications it had with members of FOA's board while it represented FOA. As noted in the Comment [2] to Rule 1.13, "When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6." Rule 1.6(a) in turn provides that:

> A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).[4]

The client whose confidences are at issue is FOA. This rule applies even if the authorized constituents of FOA with whom Reed Smith dealt – the former members of the board – have changed and even if those former directors, as well as Reed Smith, do not like what FOA is currently doing. Reed Smith can disclose nothing about what it did while counsel for FOA, even if it thinks its cause is noble (a subject as to which there is serious disagreement), absent consent of FOA, which no one alleges has been given. That fundamental restriction on attorneys does not seem to have occurred to Reed Smith, but it is basic to the attorney-client relationship. And it is not up to FOA to identify

[4] Paragraphs (b) and (c) concern various exceptions to the general rule that confidences and secrets can only be disclosed with client authorization. None applies here; Reed Smith has not argued to the contrary.

what those confidential communications were. That is the reason for the irrebuttable presumption.

In *United States v. Clarkson,* 567 F.2d 270, 273 (4th Cir. 1977), the Fourth Circuit admonished that, when deciding motions such as this one:

> [T]he trial court is not to weigh the circumstances 'with hair splitting nicety,' but in the proper exercise of its supervisory power over the members of the bar and with a view of preventing 'the appearance of impropriety' it is to resolve all doubt in favor of disqualification.

(Internal citations omitted). Having represented FOA on issues of corporate control, Reed Smith should be disqualified from representing the plaintiffs adversely to FOA in a suit concerning these very same issues.

Conclusion. FOA respectfully requests that its motion be granted and that Reed Smith be disqualified from any further representation of the plaintiffs in this proceeding.

Dated: January 15, 2013

FIRST OWNERS ASSOCIATION OF FORTY SIX HUNDRED CONDOMINIUM ASSOCIATION, INC.
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CERTIFICATE OF SERVICE

I hereby certify that on January 15, 2013, I filed the foregoing using the Clerk's CM/ECF system, which will provide notice to all counsel of record.

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