

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

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In re: :

SOBOL, et al. : CASE NO. 12-01562-RGM

v. : Chapter 11

SELLS, et al. :

----- :

GORDON PROPERTIES, LLC and : CASE NO. 09-18086-RGM

CONDOMINIUM SERVICES, INC. : Chapter 11

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Tuesday, January 22, 2013
U.S. Bankruptcy Court
Alexandria, Virginia

The above-entitled matters 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 11:44 a.m.

Diversified Reporting Services, Inc.

(202) 467-9200

APPEARANCES:

For First Owners Association:

PHILIP J. HARVEY, ESQ.

For First Owners Association and Special
Litigation Committee:

JOHN T. DONELAN, ESQ.

For Gordon Properties and Condominium Services, Inc.:

DONALD KING. ESQ.

For Brian Sells and Elizabeth Greenwell:

PETULA MISLEH, ESQ.

For Plaintiffs (Adversarial Proceeding):

RICHARD SULLIVAN, ESQ.

MICHAEL S. DINGMAN, ESQ.

E X H I B I T S

FOR IDENTIFICATION IN EVIDENCE

FOA's Exhibit No. 1

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

2 THE CLERK: Items 47, 49, and 50 is Gordon
3 Properties, Case No. 09-18086, and Adversary Proceeding
4 12-01562.

5 MR. SULLIVAN: Good morning, Your Honor. Richard
6 Sullivan here for the Plaintiffs in the Adversary Proceeding.

7 MR. DINGMAN: Good morning, Your Honor. Michael
8 Dingman here for the Plaintiffs in the Adversary Proceeding.

9 MS. MISLEH: Good morning, Your Honor. Petula
10 Misleh here on behalf of Brian Sells and Elizabeth Greenwell.

11 MR. HARVEY: Good morning, Your Honor. Philip
12 Harvey for First Owners Association.

13 MR. DONELAN: John Donelan on behalf of FOA and the
14 Special Litigation Committee, Your Honor.

15 MR. KING: Good morning, Your Honor. Donald King
16 on behalf of Gordon Properties and Condominium Services, Inc.

17 THE COURT: All right. We have two matters.

18 MR. KING: I think there are three. There's a
19 status hearing --

20 THE COURT: 47 is the Order on the settlement, and
21 then 49 and 50 on the Remand and Disqualification Motions.

22 MR. KING: Yes, Your Honor. Did Your Honor have a
23 preference on the order?

24 THE COURT: Well, no, not really.

25 MR. KING: With respect to the Settlement Motion --

1 THE COURT: Why don't we take that. Tell me about
2 the status of that.

3 MR. KING: Yes. I think Your Honor knows that the
4 settlement was negotiated at the conclusion of the mediation
5 with Judge Hennigan. It took the parties some time to get
6 the actual terms of the agreement together. That was
7 resolved, and then the parties worked on the Motion to
8 approve the settlement.

9 I think Your Honor well appreciates that nothing
10 comes easy in this case, and even the Motion took a lot of
11 time to try to get the parties in agreement with respect to
12 the terms of it.

13 Mr. Donelan finally responded to the last revisions
14 yesterday afternoon. Unfortunately, Mr. Sells and his wife
15 were engaged in the inaugural ceremonies and didn't have a
16 chance to look at it. I suspect they will look at that
17 today.

18 Hopefully, we can get the Motion in final form and
19 get that filed within the next several days.

20 I think the approval process on that Settlement
21 Motion -- first of all, it's clearly going to be an
22 evidentiary hearing, so I don't know if the Court wants to
23 set it for a time certain or on one of its regular Motions
24 Dockets.

25 I think we are going to need a minimum of 30 days

1 on that. I know Your Honor wanted notice to all the unit
2 owners, which will occur, and Mr. Donelan will be doing that.

3 I know Your Honor mentioned a meeting with the unit
4 owners. Mr. Donelan has already conducted a town hall
5 meeting.

6 THE COURT: That came from Mr. Donelan?

7 MR. KING: Right; exactly. I think that part has
8 already been done. I think we are only talking about the
9 notice to the individual unit owners and then setting it down
10 for a time certain for an evidentiary hearing.

11 MR. DONELAN: That is correct, Your Honor. On
12 January 10, I conducted a town hall meeting. It was noticed
13 by notices on the bulletin board and also in the newsletter
14 which was put under everyone's door.

15 People came. I reviewed the settlement agreement
16 with them. There were 15 paragraphs to the settlement
17 agreement. I reviewed it in total. People held their
18 answers (sic) until after I went through it.

19 THE COURT: Held their questions?

20 MR. DONELAN: Excuse me. Held their questions. We
21 held our answers until the questions were posed on the
22 individual paragraphs.

23 Everyone asked as many questions as they wanted.
24 At the end, I asked if there were any additional questions.
25 They said no. That ended the meeting.

1 THE COURT: How long did the meeting last?

2 MR. DONELAN: It took about an hour and a half to
3 an hour and 45 minutes, Your Honor.

4 THE COURT: How many people were present?

5 MR. DONELAN: Your Honor, I did not take a head
6 count. I asked the members of the Committee afterwards if
7 they had counted and they said somewhere between 25 and 35.

8 THE COURT: How much notice of the meeting was
9 given?

10 MR. DONELAN: Approximately ten days, Your Honor.

11 THE COURT: All right. Have there been any follow
12 up questions?

13 MR. DONELAN: I have not received any follow up
14 questions, Your Honor.

15 THE COURT: All right. Has this settlement been
16 approved by the Board of Directors as a whole?

17 MR. DONELAN: Yes, it has.

18 THE COURT: There was a meeting and the Board of
19 Directors approved?

20 MR. KING: Actually, the Board of Directors, no. I
21 don't believe the Board of Directors ever even got involved
22 in it.

23 MR. DONELAN: What they did, Your Honor, was they
24 farmed it out to the Special Litigation Committee to take
25 charge of the litigation and to settle it.

1 My understanding was --

2 MR. KING: Actually, I stand corrected. There was
3 a Board vote on the settlement agreement. It was unanimous
4 including the disinterested Board members. I'm trying to
5 remember the vote. I think one interested Board member was
6 absent but the other three all voted in favor of the
7 settlement. It was either 3-0 or 2-0 with one abstaining,
8 Your Honor, of the interested Board members.

9 I'm sorry, of the disinterested Board members.

10 THE COURT: You have a seven member Board. What
11 was the total count? One was absent?

12 MR. KING: Yes. There were three interested and
13 four disinterested. One of the disinterested was absent.
14 The other disinterested voted unanimously in favor of the
15 settlement agreement.

16 THE COURT: It was a 6-0 vote?

17 MR. KING: Including the interested Board members,
18 their vote would have made it 6-0. Yes, Your Honor.

19 THE COURT: They didn't vote?

20 MR. KING: They didn't.

21 THE COURT: You had four disinterested, three voted
22 in favor, one was absent. I'm assuming the interested ones
23 are the Gordon Properties' representatives.

24 MR. KING: Correct, Your Honor.

25 THE COURT: Or related parties. They would have

1 voted in favor.

2 MR. KING: Correct, Your Honor. Just because I'm
3 not certain exactly, there were two votes that the Board was
4 asked to take that night. Both of them were unanimous, but
5 with respect to one of them, one of the disinterested Board
6 members abstained. I don't think it was the settlement
7 agreement. I think the settlement agreement was 3-0. It
8 could have been 2-0 with one abstaining.

9 THE COURT: Okay. All right. The bottom line is
10 the Board voted on it, it passed the Board vote.

11 MR. KING: Unanimously, yes.

12 THE COURT: Unanimously or perhaps with one
13 abstaining. When was that meeting?

14 MR. KING: About a week ago, Your Honor.

15 THE COURT: All right. What we need then is to
16 establish a Scheduling Order. I think you have held a town
17 meeting so there has been notice. I want to make sure
18 there's adequate notice and opportunity to people to
19 understand what's going on if they have questions, which you
20 have done.

21 I'll give you enough time for a hearing on that and
22 anyone who wishes to be heard is welcome to be heard at that
23 time.

24 Part of that, I think, may relate to what goes on
25 in the other matters, as far as the timing of that. I'd like

1 to postpone putting the dates out until we have heard the
2 other matters and schedule those as well.

3 MR. KING: Thank you, Your Honor.

4 MR. DONELAN: Thank you, Your Honor.

5 THE COURT: On the Sobol matter, we have the Motion
6 for Remand or Abstain and we have the Disqualification. I
7 think we need to address the Disqualification Motion first.

8 MR. HARVEY: Good morning, Your Honor.

9 THE COURT: Good morning.

10 MR. HARVEY: Philip Harvey for the First Owners
11 Association. I realize I'm new to this saga, but I think the
12 issue presented here is discrete and can easily be
13 understood.

14 The law firm of Reed Smith has represented First
15 Owners Association for upwards of six years and its services
16 for First Owners were terminated.

17 It is now representing the Plaintiffs in this
18 Adversary Proceeding adversely to First Owners Association.
19 It makes kind of a half hearted attempt to say it's really
20 not adverse, they are a nominal party, but I think if the
21 Court looks at the injunctive relief that's requested, it's
22 clear that Reed Smith is representing individuals adversely
23 to First Owners Association.

24 It cannot do that if the matter at issue is the
25 same as or substantially related to its earlier

1 representation of First Owners Association.

2 Who the constituent members were, the people on the
3 Board, whether they have changed or they are the same,
4 doesn't matter. Reed Smith's client was First Owners
5 Association.

6 I think it's clear that the representation by Reed
7 Smith of the Plaintiffs in this case is in fact substantially
8 related to if not in a matter the same as its earlier
9 representation.

10 In its Brief, it said, and what I thought was
11 clearly a bit of overstatement, that it's current
12 representation "has nothing to do with its prior
13 representation of FOA."

14 If you look at the Complaint, the first 50
15 paragraphs concern things that happened with regard to FOA
16 when it was represented by Reed Smith, going through its
17 litany of allegations and setting forth the history, Reed
18 Smith doesn't get discharged for the second time until
19 paragraph 51.

20 Those first 50 paragraphs involve a time when Reed
21 Smith represented First Owners Association.

22 To try to avoid the problem of representing clients
23 adversely to a former client, Reed Smith argues that it only
24 represented First Owners Association as to three discrete
25 issues.

1 It calls them the issues of the assessments, the
2 issues of the tortious conversion, which gave rise to the
3 earlier case that went to the Virginia Supreme Court, and
4 issues of breach of contract.

5 I think that is an improperly narrow, indeed,
6 myopic view of the scope of their representation. Indeed, I
7 think it is clear and I think it is probably clear to the
8 Court, that much of what has happened in this case is
9 jockeying for control of First Owners Association.

10 This position Reed Smith has been taking on behalf
11 of its client, First Owners Association, is that the members
12 of Gordon Properties or its designee's, should have no role
13 or an extremely limited role in the operation and management
14 of First Owners Association.

15 It has consistently sung that tune. It is still
16 singing it. It still has the same cause. It wants to make
17 sure that the Gordon Properties' people do not represent FOA
18 or do not operate or manage it in a manner that is adverse to
19 what they think is in its interest.

20 Now, they are adverse to FOA. The fact that the
21 management, the people in charge of FOA have changed doesn't
22 matter. FOA was Reed Smith's client, not the individuals,
23 not the Board members, not the people, but the entity, the
24 corporation.

25 It represented that corporation in matters of

1 corporate control. Indeed, as I think the Court found in an
2 earlier decision, it was Reed Smith's opinion that the Board
3 relied on at the time to deny Gordon Properties the ability
4 to vote, which led to the Motion concerning the violation of
5 the Automatic Stay, which led to the imposition of a sanction
6 of attorney fees or damages of attorney fees of about
7 \$270,000.

8 That was an issue of control. That wasn't an issue
9 of assessments or conversion or breach of contract. That was
10 who is going to run the place. That is what this has been
11 about for years, who is going to operate FOA.

12 On behalf of FOA, Reed Smith was arguing that.
13 This is the same matter. As you can see from the equitable
14 relief that has been requested, they want you to impose
15 restrictions on how First Owners Association can be operated.

16 That is the issue at stake. That is why this
17 matter is the same as what it was doing before. Reed Smith's
18 position has been consistent. They don't want Gordon
19 Properties involved. They made that argument on behalf of
20 First Owners Association but the issue was control.

21 Now they are outside of First Owners Association
22 making that same argument but it's adverse to the position
23 and interest of its former client.

24 Its former client gets to change its mind. It can
25 do something completely adverse or completely reverse to what

1 it had done before, but Reed Smith's continued duty of
2 loyalty to the former client as embodied in the rules
3 continues.

4 It cannot now take an adverse position on a matter
5 as to which it represented the Association. It represented
6 the Association as to matters of corporate control,
7 specifically what's the involvement of Gordon Properties'
8 representatives going to be, and now it's adverse to First
9 Owners Association on that exact same matter.

10 As to the argument that I can't identify specific
11 confidential information that they have, I don't have to.
12 The law says there is an irrebuttable presumption.

13 Their Complaint interestingly says one of the
14 reasons they need to have an injunction is because Brian
15 Sells, one of the Gordon Properties' representatives, now has
16 access to their confidential information.

17 If it doesn't bear on the same matter, it shouldn't
18 matter, it shouldn't make a difference, but it does.

19 That is why Reed Smith, while maintaining the
20 consistent legal position and consistent factual position is
21 now doing it in a manner that is adverse to its former client
22 in a matter that is the same as or substantially related to
23 the matter in which it represented that client, and it
24 represented that client for six years concerning those very
25 issues.

1 That is why Reed Smith should not be permitted to
2 continue to represent the Plaintiffs in this adversarial
3 proceeding.

4 THE COURT: All right. Thank you.

5 MR. SULLIVAN: Good morning, Your Honor. Richard
6 Sullivan. Good to see you again.

7 THE COURT: Good morning.

8 MR. SULLIVAN: Like Mr. Harvey, I am new to this
9 dispute, my firm is not. You are well familiar with the
10 history of the case. I am new to this dispute. I am the
11 firm's ethics partner. I'm on the Professional
12 Responsibility Committee for the firm. Issues like this come
13 across my desk, hence, my presence here this morning.

14 There was some suggestion in the papers that
15 certain of the issues that have been raised didn't occur to
16 Reed Smith. I think the language is it didn't occur to Reed
17 Smith there might be confidential information.

18 Let me assure the Court that the opposite is true.
19 This issue was closely vetted by the firm before the decision
20 was made to become involved in this case.

21 The issues were clear. FOA, former client, what's
22 the rule? 1.9. We did a very close analysis of the issue
23 because candidly, it's not particularly surprising that the
24 issue came up in the context of a litigation.

25 With all due respect to Mr. Harvey, I think where

1 we part ways, the reason we came out differently than Mr.
2 Harvey and his client did, is the way they frame the issue.

3 Mr. Harvey frames the current case, the State Court
4 case that we filed over in Alexandria Circuit Court, as a
5 fight for control of FOA. Their papers like to talk about
6 how this has been a fight for control for FOA for years and
7 years.

8 Frankly, Your Honor, that is what the State Court
9 litigation is about. We understand, our clients understand,
10 who currently controls FOA. There is a lot of litigation
11 over the propriety of who voted how and who did what. We
12 understand that.

13 As we stand here today (we know there's some
14 appeals) but we are no longer involved in any of that, we
15 understand who controls FOA.

16 THE COURT: Your papers say you're still counsel of
17 record in one of the appeals.

18 MR. SULLIVAN: We are not, Your Honor. We have
19 been --

20 THE COURT: Was there an Order of Withdrawal?

21 MR. SULLIVAN: Judge Ellis relieved us -- last
22 week?

23 MR. DINGMAN: It was a week ago Friday, an Order
24 granting both Reed Smith and LeClair Ryan's Motions to
25 Withdraw.

1 THE COURT: That's after you filed your pleading's.

2 MR. SULLIVAN: It is. Of course, we were fired
3 months and months ago. I don't think this analysis turns
4 on --

5 THE COURT: Your papers said you were still of
6 record and now you are not?

7 MR. SULLIVAN: We are no longer of record. I was
8 simply suggesting to the Court that I don't think the
9 analysis turns on how long it took Judge Ellis or Judge
10 Brinkema to grant the Motion, frankly.

11 I don't think Mr. Harvey is going to disagree with
12 me that the attorney/client relationship fractured many
13 months ago, certainly well before Reed Smith got involved in
14 the State Court litigation.

15 They want to make this about control issues. They
16 are going to frame the State Court litigation as about
17 control issues.

18 Frankly, Your Honor, that is simply not the case.
19 This is a very simple -- our case raises a very simple and
20 discrete issue that implicates state corporate law.

21 Frankly, in the first Motion you heard this
22 morning, Your Honor, the issue having to do with the
23 settlement agreement, I was intrigued to hear the vote
24 tallies as they were represented to you, talking about
25 interested and disinterested Directors, and who voted how and

1 was it 3-0 or 6-0, the interested Directors didn't vote, et
2 cetera.

3 That's all the State Court litigation is about.
4 What is an interested Director or what is not an interested
5 Director. What makes someone disinterested or interested.
6 That is the only issue implicated by our lawsuit.

7 It has nothing to do with who controls it. It has
8 to do with who can vote on a particular issue. In this case,
9 the issue of setting up a special settlement committee.

10 What the lawsuit asks the Court to find is if
11 someone is an interested Director, he or she can't vote on
12 that particular issue. It has nothing to do with control of
13 the entity. It has to do with a motion sitting before the
14 Board.

15 Are they interested or not, can they vote on that
16 particular issue or not.

17 It's no different than if a Board member were
18 sitting in a meeting and a vote came up on whether his wife's
19 painting company could paint the lobby. You do an analysis,
20 is that person interested or not. Should he vote on that
21 particular motion.

22 The State Court lawsuit implicates only that very
23 discrete State Court issue. It is not anything that was
24 litigated or was even remotely related to anything that
25 happened during our representation of FOA.

1 We have not switched sides, as the papers of the
2 other side would like to accuse of. We have a new and
3 different client with different parties with a new and
4 different issue in a very new and very different dispute. We
5 have not switched sides.

6 We are surely mindful, Your Honor, of our duties
7 related to confidences. We can read. We know well Rule 1.6,
8 Rule 1.9(c). We understand these rules. We vetted them very
9 carefully.

10 The fact of the matter is there are no confidences
11 that we have material to this dispute that are implicated in
12 this litigation. Those issues which might be material to
13 this litigation are already generally known.

14 THE COURT: Generally known doesn't count. What
15 does count is whether you obtained them in the conduct of
16 your representation.

17 MR. SULLIVAN: What 1.9(c) says, Your Honor --

18 THE COURT: Gained in the course of the
19 representation.

20 MR. SULLIVAN: I understand. Or when the
21 information has become generally known, 1.9(c). A lawyer or
22 his firm may represent a client in a matter "Or whose present
23 or former firm has formally represented a client in a matter
24 shall not thereafter (1) use information relating to or
25 gained in the course of the representation to the

1 disadvantage of the former client except as Rule 1.6 or Rule
2 3.3 would permit or require with respect to a client, or when
3 the information has become generally known."

4 THE COURT: 1.9?

5 MR. SULLIVAN: I'm sorry, Your Honor. 1.9(c). The
6 operative language is the last clause, "or when the
7 information has become generally known."

8 Mr. Harvey likes to talk about the 50 some odd
9 paragraphs. What they do is provide some context to what is
10 publicly known, publicly available information having to do
11 with lawsuits that were filed, won, lost, appealed, things
12 that are now publicly known.

13 It has nothing to do with confidences that we
14 gained in the course of our representation which remained
15 private.

16 Remember, this was filed in a State Court to be
17 read by a Judge who doesn't know who these people might be,
18 so this is simply an attempt to give him or her context as to
19 who they are.

20 The only issues that we will need to prove when we
21 get either before you or back to State Court, depending on
22 the Remand Motion, is who are these people, what are their
23 association with CSI or Gordon Properties, and therefore,
24 were they interested Directors when they voted on the issue
25 of establishing a new litigation committee.

1 Those are the only issues that will be material to
2 that dispute.

3 Your Honor, we understand those issues. We looked
4 at them carefully, and we respectfully suggest to you that
5 even acknowledging the sort of soup that's been engulfing
6 this condominium for the last several years and our
7 involvement in it, we suggest to Your Honor this discrete,
8 separate, brand new issue involving brand new people does not
9 implicate the prescriptions of Rule 1.9. Excuse me, 1.6.

10 This is not -- I'm sorry, I'm right, 1.9. This is
11 not substantially related as the case law requires. It is
12 not, to use the words of the case law we cite to Your Honor,
13 "identical." It is not essentially the same. It is not
14 virtually congruent in terms of its issues. It is very
15 different.

16 There are other principles at work here, Your
17 Honor, which you need to keep in mind. Of course, first is
18 the principle of a party's freedom to engage counsel of their
19 choice.

20 The second is Reed Smith's ability, well recognized
21 in the case law both in terms of Court decision and Virginia
22 ethics decisions -- because you represent someone once does
23 not mean you are forever barred from being adverse to that
24 person or entity again.

25 There are situations, this being one of them, in

1 which a lawyer is permitted to be adverse to a former client.

2 We are not conflicted out, per se.

3 If you run the analysis of Rule 1.9, read the case
4 law of Judge Payne, Judge Davis and others, very clear,
5 lawyers can do these things, more importantly, a client can
6 hire a lawyer to be adverse to that lawyer's former client,
7 in situations that Rule 1.9 describes.

8 We fall squarely within Rule 1.9.

9 They are over framing the issue. We want to try a
10 very discrete question, which is not substantially related to
11 what we have done before.

12 THE COURT: You would agree, would you not, that
13 this Court directed the manner in which the election would be
14 run with respect to, what was it, 2011 and 2012?

15 MR. SULLIVAN: That's not an issue. Again, we are
16 not trying to re-litigate the issue of what happened in
17 2011 --

18 THE COURT: Your prayer for relief in Count I says
19 you would like the Court to declare that Sells', Greenwell's
20 and Wilson's election to the Board is invalid.

21 MR. SULLIVAN: It does, Your Honor. I should have
22 mentioned that. The papers made clear -- candidly, that
23 should not be in there. It is not an issue that we intend to
24 litigate.

25 In our papers relating to the Motion to Remand, if

1 you look at footnote one of our papers relating to the Motion
2 to Remand, we make very clear we are going to withdraw that
3 request for relief wherever the case goes forward, whether it
4 is in State Court or here.

5 It should not have been included. It is not an
6 issue. I'll make that point clear for the record right now.

7 If you look at the rest of all of the requests for
8 relief, they have nothing to do with questioning this Court's
9 ruling's.

10 THE COURT: What about Request (e)?

11 MR. SULLIVAN: You're in Count I, Your Honor?

12 THE COURT: Yes.

13 MR. SULLIVAN: That has to do with questions having
14 to do with -- again, a disinterested Director question.

15 THE COURT: This Court authorized it.

16 MR. SULLIVAN: Now I'm getting a little out of my
17 element, Your Honor. As you know, I was not part of that.
18 I'll turn to my partner, if I might, on that particular
19 question.

20 I want to assure the Court that from the
21 perspective of our conflict analysis, the issue has nothing
22 to do with trying to re-litigate anything that either was
23 litigated before this Court or which this Court has already
24 decided.

25 The relief we are looking for has to do simply with

1 the very narrow issue, which I gather everyone understands
2 what it is, interested or disinterested Director.

3 When it was represented to the Court earlier this
4 morning about who voted and who didn't vote or who was
5 interested and who wasn't interested on the issue of the
6 settlement agreement, we're simply suggesting that same
7 analysis should have taken place with respect to the creation
8 of the settlement -- special settlement committee.

9 It was not. It raises for our clients a question
10 of state corporate law as to whether those votes were
11 properly cast or should have been counted.

12 That's the extent of what we are seeking, and it is
13 a different issue, not substantially related to what we have
14 done before.

15 THE COURT: Mr. King?

16 MR. KING: Thank you, Your Honor. Donald King on
17 behalf of Gordon Properties and Condominium Services.

18 I have just a couple of points, Your Honor. First
19 of all, counsel for Reed Smith makes a point with respect to
20 the hearing before Judge Ellis last week that in fact, their
21 services had been terminated and they were just waiting for
22 the Order to be entered.

23 To leave Your Honor with the impression that's all
24 that happened at the hearing -- Judge Ellis agreed to let
25 them out. Judge Ellis has requested a transcript. I would

1 refer Your Honor to the transcript to establish exactly what
2 happened at that hearing.

3 Reed Smith appeared on behalf of FOA at that
4 hearing, and argued and asked Judge Ellis to take the case
5 from Your Honor specifically for the purpose of voiding the
6 settlement agreement. It's in the transcript.

7 It's pretty clear what they were doing. That was
8 clearly adverse to their client. Their client had already
9 approved the settlement agreement, and they were trying to
10 void that settlement agreement.

11 Your Honor, counsel for Reed Smith talks about what
12 the focus of their Complaint is, with respect to the
13 formation of the SLC. Essentially what they are saying is
14 they want to attack whether the settlement agreement -- the
15 creation of the SLC and ultimately the approval of the
16 settlement agreement was in accordance with applicable
17 corporate law.

18 Your Honor, those are exactly the issues that Your
19 Honor has to determine as part of the 90-19 Motion. You have
20 to determine that the parties had the authority to enter into
21 the settlement agreement. It is clear they are going to be
22 part of the evidence.

23 I raise that, Your Honor, for two reasons. One,
24 going to the conflict issue, which I think clearly indicates
25 there is a conflict, but secondly, it goes to the Remand

1 Motion, Your Honor.

2 It's very clear, Your Honor, that what is being
3 attempted by virtue of this Complaint is a race to the Court
4 to try to get the State Court to hear the issues as to the
5 settlement agreement when in fact that clearly is the
6 jurisdiction of this Court, and it is clearly the issues, the
7 very issues they are asking the State Court to decide are the
8 issues Your Honor has to determine in the context of the
9 90-19 Motion.

10 Finally, Your Honor, I want to say I think counsel
11 for Reed Smith does a pretty good job in trying to catch
12 themselves with respect to the specific allegations in the
13 Complaint that Your Honor points to that clearly lead to a
14 conflict. Now all of a sudden, oh, that shouldn't have been
15 there.

16 I want to remind Your Honor exactly what happened
17 with respect to Reed Smith in this case when I removed a
18 specific action to this Court and based on representations
19 from Reed Smith, Your Honor agreed to remand it.

20 Later on, when it went to arbitration and the
21 statement that was submitted to arbitration by Reed Smith
22 went far beyond the representations that they made to this
23 Court as to the relief that they were going to request
24 against Gordon Properties, and Your Honor had to yank it
25 back, and they come back and say oh, well, that's not what we

1 intended, we shouldn't have intended it.

2 First time, maybe, Your Honor.

3 THE COURT: Let me interrupt and then you can go
4 on. We're not arguing the Remand. It has to be related to
5 the conflict issue.

6 MR. KING: I understand. It does go to the
7 conflict issue, Your Honor. I'm simply saying that there is
8 a pattern here, Your Honor, that with all candor, Reed Smith
9 will only come before Your Honor and say oh, we didn't mean
10 to say that, only when they have been caught.

11 If the matter had gone forward, I think Your Honor
12 knows very well exactly what relief they would have asked the
13 State Court for.

14 MR. HARVEY: I guess this issue wasn't vetted quite
15 as closely as Reed Smith would represent when the first
16 requested relief in the first Count in their Complaint is
17 wholly contrary to the entire argument they made.

18 They said this is not about control of FOA, but yet
19 they want the three people removed from the Board, and their
20 answer is oops, sorry, didn't mean that, really, trust me.

21 It's there. When you carefully vet something, when
22 you're fully cognizant of your obligations under Rule 1.6 and
23 1.9, when you are as knowledgeable as they are about the
24 ethics rules, you don't miss it, you don't miss that (a) is
25 to un-do the entire Board, not disinterested, not limiting

1 their voting rights, throw them off. That's part of control.
2 It's clear. It's too late to drop it.

3 They want to un-do the action of the Board this
4 Court has approved. This Court approved it while they were
5 involved.

6 You can't do that. You can't turn on your client.
7 It's not this narrow who is an interested or disinterested
8 Board member, and even if that's the way you do it, it gets
9 back to who gets to control it. Who is on the Board and what
10 do they get to do.

11 That goes back to the election when Reed Smith said
12 gee, we don't know, you could follow the Judge's Order or you
13 could follow the by-laws. Gosh, we don't know what to do.
14 They followed the by-laws and that wasn't the right choice.

15 It was obvious at the time that was about control.
16 They wanted to keep these disinterested or the interested
17 Directors off the Board.

18 It's a question of who is there and what are they
19 doing when they get there. You can't slice it sort of we're
20 not going to argue about who is on the Board, just what they
21 can do when they get there.

22 It's the control issue. What is the result of the
23 Board ruling's, what is the power of the Board and who gets
24 to decide.

25 They have been involved in that issue from the

1 get-go, and now to say well, we're going to parse it out in
2 little pieces because we have carefully vetted this, is just
3 not sufficient.

4 One of the cases we cited said this Court is not
5 supposed to engage in hair splitting niceties. You shouldn't
6 say well, this is control only about interested and
7 disinterested as opposed to control about these other issues.

8 You are not supposed to engage in hair splitting
9 niceties but when there is a doubt, you should disqualify
10 them.

11 Reed Smith should not stand up in this Court or any
12 other Court on these issues and operate adversely to First
13 Owners Association. Even Reed Smith says in its Complaint
14 that they are concerned if Brian Sells has control that he's
15 going to get a hold of their confidential communications.

16 Well, it's the confidential communications that
17 belong to the company. Reed Smith clearly has confidential
18 information they don't want in the possession of FOA. They
19 can read Rule 1.6 and Rule 1.9 until they are blue in the
20 face.

21 They have to look at their carefully vetted
22 Complaint, which says there is an issue about confidentiality
23 and confidential communications.

24 It is a pretty fine read to say well, they
25 can -- excuse the pun -- they can bring an action based on

1 things that are generally known, but they can't bring things
2 on knowledge they acquired while representing the client if
3 it's not generally known, so they are going to set themselves
4 up as the arbiter of what's generally known as opposed to
5 things they learned while representing a client that's not
6 generally known as opposed to confidential communications or
7 secret communications, or things that the client requested be
8 held or things that would likely be embarrassing to the
9 client is disclosed.

10 They are going to decide that. All we get to do is
11 stand back and watch. That is not the way it is supposed to
12 work.

13 When a lawyer represents a client, yes, they can
14 take a position adverse to the client, but it has to be on
15 some completely unrelated -- this isn't. This is the same
16 thing.

17 Their Complaint wasn't carefully vetted. It was a
18 shot right at what they are not supposed to do. I think by
19 saying gosh, we will drop relief (a), sorry about that, where
20 we impugn what the Court approved, but other than that, it's
21 okay.

22 It's not. That's why they ought to be
23 disqualified.

24 THE COURT: Let me ask you a question before you
25 leave. You obviously weren't involved in the case from the

1 beginning, but this is a Bankruptcy Court and we deal with
2 money. We don't deal with who controls what Board. We deal
3 with who owes what money and if it's owed in a Chapter 11,
4 how and on what terms it is going to get paid.

5 In fact, that's what the case was about. It was
6 how much money is owed by Gordon Properties to the
7 condominium for condominium assessments.

8 In most cases, absent anything further, we would
9 have had a Plan proposed on how to pay it. There would have
10 been an objection to a Proof of Claim, which there was, and
11 the objection was sustained in part because one side decided
12 the method by which it was done, there was no evidence from
13 the Association that would allow me to compute it.

14 MR. HARVEY: I read that last night.

15 THE COURT: I think I read a reference that they
16 were shocked, I think that's a fair characterization of what
17 they would like to say.

18 Gordon Properties got off with paying nothing on
19 that, and yet that's not exactly what happened. They paid
20 the assessment. This was a retroactive or supplemental
21 assessment, whatever language, depending on what side you're
22 on, you will call it a different thing.

23 Nonetheless, it was an assessment made after the
24 fact based on what was asserted to be a mistake.

25 They certainly paid what was originally done five

1 years before, and then they came back and asked for more, and
2 I could not determine from what the evidence was based on how
3 I did it whether or not there was in fact any more that
4 should have been paid. There might have been. There might
5 not have been.

6 That is what the case was all about. It wasn't
7 control. Control only got into it when the Association
8 denied them the ability to vote at the Board election.

9 MR. HARVEY: Yes.

10 THE COURT: That's where the contempt issue arose.
11 It was under 332. Of course, when you vote, anyone gets to
12 vote, we don't know who is going to get elected on a Board of
13 Directors.

14 In that sense, you are correct. That would
15 necessarily have been an issue of control, but that wasn't
16 what it was about. It was how much is owed and under what
17 conditions will it be paid.

18 The parties after having fought for six years on
19 various fronts -- ultimately I resolved everything except a
20 consolidation, which is not a particularly central issue to
21 the case. It's relatively tangential.

22 That's the only thing I have left. Everything else
23 has been decided. Everything else is on appeal, as I see it.

24 The amount of the assessment that should be paid,
25 whether there was a violation of the Stay, the damages that

1 resulted from the violation of a Stay, all of which Reed
2 Smith was involved in from the get-go, establishing it in the
3 State Court, establishing it here in the Bankruptcy Court,
4 advising the clients as to how to go.

5 The objective of the representation was to collect
6 money and they wanted to collect 200,000 or \$300,000, I don't
7 remember what the number was, but a significant amount, and
8 in the process, would collect a substantial amount going
9 forward if their assessment was right.

10 That was the issue. How much money does Gordon
11 Properties owe. Adjudicated, on appeal, and now before the
12 appeal is resolved, the parties come back to Court and say we
13 have resolved the matter. It's settled. We are now on the
14 cusp of setting that hearing, which is what we discussed
15 earlier this afternoon, how to schedule it, when to schedule
16 it, what process to follow.

17 Is this action an action that would upset the
18 accomplishment of that representation, which is to resolve
19 how much these people owe in condominium assessments?

20 MR. HARVEY: Yes. This action seeks to have the
21 Special Litigation Committee and the negotiated settlement
22 declared powerless and un-do it, just shred it.

23 The Special Litigation Committee appointed by the
24 Board has no authority to act on behalf of FOA and is
25 enjoined from doing so.

1 THE COURT: Does that defeat the objective of the
2 client, FOA, which was to come to resolution on this issue?

3 MR. HARVEY: Absolutely. FOA appointed that
4 Special Litigation Committee to go negotiate the settlement.
5 The settlement has been negotiated, as Mr. King said.

6 There is going to be a proceeding before this Court
7 to approve it when all the unit owners can come in, and Reed
8 Smith coming in on behalf of four unit owners trying to
9 torpedo --

10 THE COURT: There are more than four. Aren't there
11 ten?

12 MR. HARVEY: Yes, the Plaintiffs identified in the
13 Complaint, and trying to torpedo that settlement. They want
14 it un-done. The Special Litigation Committee in place prior
15 to the meeting, the earlier one, is reinstated, and it has
16 authority to act on behalf of FOA.

17 THE COURT: What role does the Special Litigation
18 Committee have? The Board of Directors itself has approved
19 the settlement. Does it matter how it gets to the Board?

20 MR. HARVEY: I don't have enough background to be
21 able to answer that question, but I can tell you that this
22 position of Reed Smith on behalf of these Plaintiffs will be
23 that they are going to go to Alexandria Circuit Court and
24 they are going to tell that Judge to stop this Litigation
25 Committee from doing anything, and then they are going to

1 come in here and say the Litigation Committee had no
2 authority to do this, because it was ultra vires, it was
3 improperly appointed.

4 They are going to try to stop the settlement.
5 That's the point of this. They don't want it settled on
6 whatever these terms are.

7 THE COURT: This is a matter to avoid the
8 settlement on these terms and taking it in a different
9 approach?

10 MR. HARVEY: It's their interested and
11 disinterested view. They want it un-done. They want the
12 three people thrown off the Board. We can't forget that.

13 The Court obviously is correct. This is a
14 Bankruptcy Court, it's about money and payment of money. It
15 morphed itself in part into an issue of control because of
16 the conduct of First Owners Association as to what is the
17 role of Gordon Properties going to be.

18 With the contested elections and the fight and the
19 Court ends up counting votes and deciding who is going to be
20 on the Board and who is not, the issues of control continued
21 in this Court.

22 THE COURT: The settlement will resolve those
23 issues as to the violation of the Automatic Stay?

24 MR. HARVEY: I think so but I don't know. I
25 haven't been involved --

1 THE COURT: It's global. It resolves the damages
2 arising from that. It resolves going forward that this issue
3 of the election is done. I'm asking. I haven't seen
4 anything.

5 MR. KING: It is global. It deals with both the
6 money issues and the control issues that counsel refers to.

7 THE COURT: By control, it puts to rest the issue
8 of the validity of the election of 2011 or the results?

9 MR. DONELAN: Correct. It leaves open certain
10 things in the future.

11 THE COURT: What does it leave open?

12 MR. DONELAN: It leaves open --

13 THE COURT: How many seats Gordon Properties can
14 hold? That was a late finding and caused, I think, one of
15 the seats to flip.

16 MR. DONELAN: That's right.

17 THE COURT: That came up very late in the day.

18 MR. DONELAN: It's been settled but the settlement
19 agreement provides that Judgment Order will be vacated.

20 However, the FOA --

21 THE COURT: Will abide by the result.

22 MR. DONELAN: The right in the future to make
23 essentially the same argument.

24 THE COURT: The pending period, they are not going
25 to -- I don't know what it is. I haven't seen it.

1 MR. KING: That's correct, Your Honor. There is no
2 change to the composition of the Board based on Your Honor's
3 ruling. It is with respect to future elections, the unit
4 owners have the right to raise the issue with respect to the
5 seating.

6 MR. DONELAN: Your Honor, just to complete that,
7 that is for this term, this particular term. In the
8 future --

9 THE COURT: Right. This Board won't change as a
10 result of that, but the issue is now left unresolved.

11 MR. DONELAN: It's resolved in that your Order,
12 Your Honor --

13 THE COURT: Well, prospectively.

14 MR. DONELAN: Correct.

15 THE COURT: It does not affect anything now done.
16 It does resolve the issue of damages, attorney fees, awarded
17 by the violation of the Stay?

18 MR. DONELAN: Yes, it does.

19 MR. KING: It also resolves the assessment issue,
20 Your Honor.

21 THE COURT: And the assessment issue. How was the
22 assessment issue resolved?

23 MR. KING: The settlement agreement specifically
24 says that FOA is required to comply with the Virginia
25 Condominium Act, the Condominium instruments, Judge Kemler's

1 Order and Your Honor's Order with respect to the methodology.

2 It specifically incorporates the 2013 budget which
3 created the categories that both Judge Kemler and Your
4 Honor --

5 THE COURT: As an example.

6 MR. KING: This is the correct methodology, this is
7 a template for future years, this is how you have to assess.

8 Then with respect to the street front unit itself,
9 there is a cap with respect to the amount of assessments that
10 can be made against there, that cap can be exceeded with the
11 consent of Gordon Properties but can't be unreasonably
12 withheld.

13 MR. DONELAN: One other issue has to do with user
14 fees. User fees are okay if they are levied against Gordon
15 Properties or Brian Sells up to \$200. If it's more than
16 \$200 --

17 THE COURT: Per unit?

18 MR. DONELAN: For any reason, Your Honor.

19 THE COURT: I'm not going to go into the details of
20 it. That is like, for example, the parameters of what's
21 going on there.

22 The impact of this litigation in the Circuit Court
23 is to prevent that resolution?

24 MR. HARVEY: Yes, that is what it asks for. Wants
25 to get another Special Litigation Committee in power, void

1 what the last one did, and let's start over again, because
2 disinterested/interested, whatever, and let's throw the
3 people off the Board. Let's void the Court's Order that said
4 hiring CSI was acceptable. They want to un-do it.

5 That is based on what Mr. King said that was said
6 during a hearing with Judge Ellis, they want Judge Ellis to
7 remove the matter from you so he can un-do the whole thing.
8 That's the goal.

9 THE COURT: What was the resolution of that? Taken
10 under advisement?

11 MR. KING: I think Judge Ellis is waiting to see
12 what you are going to do. Judge Ellis entered the Orders
13 allowing the withdrawal and hasn't taken any other action.

14 MR. HARVEY: According to the Docket sheet, there
15 wasn't a formal request to withdraw reference or anything.

16 What we are left with is Reed Smith has filed a
17 lawsuit on behalf of ten unit owners, the goal of which is to
18 torpedo the settlement being undertaken by First Owners
19 Association to resolve many of the issues as to which it
20 represented First Owners Association, and you don't get to do
21 that.

22 You can't turn on your former client even if you're
23 really irritated that your former client is doing something
24 that you don't want.

25 They filed this thing so they can undermine this

1 entire settlement. If it gets remanded, they're going to go
2 to Alexandria Circuit Court, as they say --

3 THE COURT: Either remand or here, it would be
4 heard.

5 MR. HARVEY: Right. They are going to ask some
6 Judge. This Court will have the procedure set up for
7 everybody to be heard, the individuals can be heard, maybe
8 with different counsel, about what they think about the
9 settlement. You are going to let all the unit owners be
10 informed.

11 I'm not about to preempt how the Court or how the
12 parties want the Court to do that because I'm not involved in
13 that aspect of it.

14 The settlement agreement with all the issues of
15 interestedness and disinterestedness and was it 6-0 or 3-0 or
16 2-1 or 2-0, that's all going to get resolved before this
17 Court, to find out if this settlement agreement is in fact
18 appropriate.

19 This lawsuit, Reed Smith wants to stop you. They
20 want to stop that. They don't want FOA to settle on these
21 terms that FOA wants to settle on. They think the people who
22 have done it are bad people and they are acting out of their
23 self interests and it's not fair.

24 Okay. You can't do that when it's your former
25 client on a matter where you represented them. You got the

1 Judgment. Shoot, you got one of these awards. Now they
2 don't want FOA to settle that claim because they think it's
3 wrong.

4 Okay. I understand. You don't get that choice.
5 Lawyers don't get to represent causes. You represent
6 clients. Their client was FOA, and now they can't turn on
7 FOA, and that's exactly what they are doing.

8 This thing wasn't vetted. It was just a shot right
9 at the heart, take those men off the Board, take those people
10 off the Board.

11 That's why they ought to be disqualified.

12 THE COURT: All right.

13 MR. SULLIVAN: Your Honor, may I be heard briefly?
14 Just a few points, Your Honor.

15 First off, this lawsuit filed in Alexandria Circuit
16 Court is about process. It wasn't about --

17 THE COURT: What is the effect of it?

18 MR. SULLIVAN: What the Plaintiffs want to
19 establish is that whatever settlement is reached, there is
20 going to be a settlement, right --

21 THE COURT: No, well --

22 MR. SULLIVAN: There was going to be an attempt for
23 a settlement.

24 THE COURT: I don't know that there would be a
25 settlement.

1 MR. SULLIVAN: Fair enough. The point simply is,
2 Your Honor --

3 THE COURT: They tried to negotiate one earlier --

4 MR. SULLIVAN: And it fell through.

5 THE COURT: In Magistrate's Court. I can't think
6 of the Magistrate Judge.

7 MR. KING: Davis.

8 MR. SULLIVAN: Judge Davis.

9 THE COURT: It was unsuccessful. You have had
10 arbitrations, unsuccessful. I'm sure there have been other
11 discussions, they have been unsuccessful.

12 MR. SULLIVAN: That's a fair point. My point, Your
13 Honor, is this lawsuit was filed before there was any
14 settlement agreement. I think we have only learned the terms
15 of the proposed settlement agreement, some of them, just this
16 morning. Some of them, I think, recently through Mr.
17 Donelan.

18 The issue posed by this lawsuit is not what's the
19 settlement agreement. The issue is has it been arrived at in
20 a proper manner.

21 THE COURT: Isn't that exactly what I will do when
22 the settlement approval motion comes up?

23 MR. SULLIVAN: The issue, Your Honor -- I don't
24 know that's the case. If I could just ask Your Honor your
25 indulgence on a couple of things.

1 One, there is this allegation that Reed Smith made
2 a mistake and then got caught and changed its tune.

3 THE COURT: I'm not worried about --

4 MR. SULLIVAN: I just want the record to reflect
5 that our Motion to Remand was filed on December 14 with
6 footnote one in it, which made very clear on behalf of the
7 client that claim for relief was going to be withdrawn.

8 It wasn't until December 17 that the other side
9 filed their Motion.

10 THE COURT: You could have withdrawn it here, it
11 could have been done, rather than saying I will do it, you
12 could have done it.

13 MR. SULLIVAN: Fair enough. We committed ourselves
14 to make that before we were using Mr. Harvey's term "caught."

15 THE COURT: I understand.

16 MR. SULLIVAN: I just want the record to make that
17 very clear.

18 THE COURT: That's not a particularly persuasive
19 issue one way or the other.

20 MR. SULLIVAN: It's important to me, Your Honor.

21 THE COURT: I'm not going to say it's not. I'm
22 just telling you that sort of thing does not sway me a great
23 deal.

24 MR. SULLIVAN: I appreciate hearing that from Your
25 Honor.

1 THE COURT: There has been a lot of vitriol in this
2 case. One would think inflammatory remarks on all
3 sides -- they think Judges are influenced by prejudice and
4 bias, and that is somewhat disrespectful to the Court. I
5 don't think that happens.

6 Or they think someone is being really smart and
7 clever and can get that in without the Judge recognizing it.

8 In any event, I hope the parties refrain from that,
9 and it is of no effect.

10 MR. SULLIVAN: Your Honor, one disadvantage I have
11 which I admitted to the Court early on, is my new involvement
12 in the case.

13 There have been some representations made about --

14 THE COURT: You have a clearer sight than any of
15 the participants.

16 MR. SULLIVAN: I appreciate that comment as well,
17 Your Honor.

18 There have been some representations made about
19 last week's hearing. Mr. Dingman was there. With the
20 Court's permission, I'd like to ask him to at least give our
21 view of what happened at that hearing.

22 THE COURT: Why does it matter?

23 MR. SULLIVAN: Again, it does matter, Your Honor,
24 because there have been representations made about what Judge
25 Ellis said or didn't say or whether we entered an appearance

1 on behalf of FOA, which I understand to not be what happened.

2 THE COURT: I don't think that resolves the issue I
3 have. My question originally was are you still -- is FOA
4 still a client.

5 The general rule is you are counsel as long as you
6 are -- once you make the appearance, you are counsel until
7 that Order of Withdrawal is executed, signed and entered by
8 the Court.

9 I clearly recognize Reed Smith has not been active
10 in the representation, but would that fact have made a
11 difference, would it have changed a former client to an
12 existing client, I'm not sure since the Order of Withdrawal
13 has been entered, it now makes any difference.

14 MR. SULLIVAN: I agree with Your Honor. I don't
15 think it does. I'm not sure it did before.

16 THE COURT: I'm not sure it did before. It does
17 not now because that issue no longer exists. That was the
18 point of my inquiry, when the papers were filed, there was a
19 disclosure that you were still counsel of record, and now you
20 are telling me that you are not counsel of record, and that
21 answers my question. That's all I need to know.

22 If there is more than that, that is something else.
23 That was the thrust of my question, to understand which rule,
24 if any, we are working under or what we are dealing with.

25 Mr. Harvey?

1 MR. HARVEY: Just one last thing, Your Honor.

2 There is a suggestion that this is just a matter of process,
3 not substance, but process.

4 The Complaint in paragraph 60 talks about the
5 settlement agreement that they haven't seen. It says "The
6 terms are extremely unfavorable to FOA and most importantly
7 its unit owners."

8 That's not a question of process. That's a
9 question of result. I think it's clear that what Reed Smith
10 on behalf of its clients wants to do is stop the settlement
11 agreement.

12 It's not a question of process. It's a question of
13 result. They don't like it and they want to stop it. That's
14 all.

15 MR. SULLIVAN: If we are going to back and forth,
16 the process has to be fair. Whatever the deal is going to
17 be, if there is a deal, it has to be the result of a fair
18 process. That's what the lawsuit is about.

19 THE COURT: It seems to me that if I hold a
20 settlement hearing as Mr. King has said, I'm going to hold it
21 on all issues, and if one of those issues is that the Board
22 does not have authority to enter into it, I can't approve an
23 agreement if the parties don't have authority to enter into
24 it.

25 If it's improperly entered into, that's another

1 issue. If it's improvidently entered into, that may well be
2 an issue, too. If they meet the other criteria, all those
3 are things I would consider in a settlement motion.

4 Typically, they are pretty apparent when someone
5 has authority or they don't. Issues of authority arise. We
6 have them on whether or not the people who signed the
7 Petition are authorized to have put that company into
8 bankruptcy or to have filed an involuntary against them.

9 All those are issues of authority and have to be
10 addressed by the Court.

11 One of the things that is made clear is that I need
12 to have a careful analysis of what's going on.

13 What I don't see is any evidence presented here
14 today. What am I basing a decision on?

15 MR. SULLIVAN: We have responded to their Motion,
16 Your Honor. It's their burden to prove their case, I guess.

17 MR. HARVEY: You are basing the Motion on what is
18 in the record, what it is Reed Smith has done. I can't put
19 evidence on the stand about their confidential communications
20 with the client.

21 THE COURT: You don't need to do that. The issue
22 is what was the prior representation?

23 MR. HARVEY: The scope of the representation is
24 revealed in what it is they have done. That's why we put
25 before the Court the evidence of what they have done. It's

1 not disputed.

2 When it came time to figure out how the vote was
3 going to occur, Reed Smith represented the Association and
4 said that, they have a conundrum, so the Board decided not to
5 hold the election. The Court concluded that was wrong.

6 That was an issue where Reed Smith on the record
7 before the Court earlier represented FOA on an issue of
8 control. I don't think there is any doubt about that.

9 Now you look at the Complaint they filed. It's all
10 you really need to do. Is this about the same issue, the
11 same matter. I don't need an engagement letter. I don't
12 even know if there was one way back when.

13 A lawyer's representation of matters concerns
14 practically what it is they have done, not what the letter
15 says. What they have done is represent FOA on control
16 matters, and what they are doing now, as you can see from
17 their own Complaint, their own language, they think the
18 process was flawed and they want to stop the settlement
19 agreement.

20 They say oh, it's just a process matter. If you
21 like the result and hate the process, why go through an
22 argument about the process.

23 THE COURT: What was the relationship between Ms.
24 Sarvadi's law firm and Reed Smith? How do you separate the
25 two firms' representation? Did they overlap?

1 MR. HARVEY: I think they did. I don't separate
2 them at all. In the matters I've seen, they both entered
3 appearances for the client in the cases. I think Ms.
4 Sarvadi's law firm got involved initially on litigation, and
5 I think Reed Smith began on representation of the Association
6 through Mr. Diamond.

7 In terms of segregating the firms, I don't. I see
8 hearings where Ms. Sarvadi and Mr. Dingman are both there. I
9 don't think there is any difference at all.

10 In terms of what evidence you need, all you need to
11 do is look at what they have done in your Court and what they
12 are trying to do in Alexandria Circuit Court, as shown by
13 what has been removed to your Court.

14 THE COURT: You cited to excerpts from billing
15 records.

16 MR. HARVEY: Yes. That was a continuation. I
17 wanted to un-do this idea that somehow these were discrete
18 issues.

19 What they say is they only represent them on
20 tortious conversion. That was over with the Supreme Court.
21 Then assessments, which I guess is the argument about how
22 much do these units get assessed, which ends up in the
23 Court's ruling on the Claim, and then breach of contract,
24 whatever that is.

25 It's like they have three matters. A, B and C, and

1 they're done, but they're not.

2 They involve this bi-play between Gordon Properties
3 and the Association. That is what those billing records
4 show, they are working on an Appeal Brief --

5 THE COURT: My point is the billing records are not
6 before me as evidence.

7 MR. HARVEY: I have a copy. I didn't attach it.
8 That's correct. Reed Smith doesn't deny that's what it says.
9 They have a copy, too.

10 I didn't put in -- the Docket sheet is before this
11 Court, and the Court obviously can take judicial notice of
12 what it's done and what's gone before it, and you can just
13 look at this Complaint that they filed.

14 I've been involved on these kinds of Motions
15 before. I don't know quite what else you need to see.

16 THE COURT: Usually -- I don't know what usually
17 would be. These Motions are rare. I suppose 10 or 20 years
18 ago, they became a way of life, and that has abated
19 substantially.

20 I don't think the Bankruptcy Court was engaged in
21 that, but I understand in other jurisdictions, they were.

22 MR. HARVEY: They're not frequent, but in this
23 case --

24 THE COURT: I'm just saying they're not frequent at
25 this point but they are brought and as the rules suggest,

1 they should be brought, but you have to be careful and
2 evaluate them.

3 What I would look at to determine the scope of the
4 prior representation is the pleading's in the prior cases,
5 the Orders, obviously, and the Briefs filed, and then
6 anything -- I don't know what else.

7 I mentioned billing records is a possibility. I
8 don't know if there is anything else that would be outside of
9 the pleading's that would be helpful.

10 It is true that the Complaint sets out various
11 matters. I can take judicial notice of everything that has
12 happened in this Court.

13 I can't take judicial notice of everything in any
14 other Court because I simply don't have the documents to do
15 that. "Judicial notice" means I would do it, but the parties
16 provide the documents so I can have them.

17 That is the state of the record. I can take
18 judicial notice of what we have done here. I obviously have
19 the Complaint, which is now before this Court, to see what is
20 done there.

21 Is there anything else I need to consider?

22 MR. HARVEY: No, I don't think so.

23 THE COURT: All right. Mr. Sullivan?

24 MR. SULLIVAN: Your Honor, two brief points. A
25 couple of things we cited to Your Honor, I just want to

1 emphasize, this is a high standard of proof, if you read the
2 Tessia case at 731 F.2nd at 729.

3 This is a moving party bears a high burden again
4 because of those countervailing principles that I talked
5 about, a client's right to counsel of his or her or its own
6 choosing.

7 Finally, Your Honor, and then I'll sit down, I know
8 you're probably ready to move on, Mr. Harvey said in his
9 argument a lawyer can represent a former client but it better
10 be on a completely unrelated matter.

11 That is not the standard. The standard is set
12 forth by the rules of the State Bar and by the Courts which
13 have looked at their rules and considered those rules, and
14 you can represent a new party against a former client under
15 certain circumstances.

16 We are within those circumstances. This is not
17 substantially related. That's the test.

18 THE COURT: Substantially related is the test and
19 using a non-legal term, I don't think he meant anything other
20 than that. It's a negative of it. It may overstate it a
21 little bit.

22 MR. SULLIVAN: I would say completely unrelated is
23 dramatically different.

24 THE COURT: Substantially related is not
25 necessarily completely unrelated, but there is a correlation

1 between them.

2 What about evidence? Is there anything I need to
3 consider other than what's in the Complaint and the other
4 pleading's filed in this Court? Any other matters?

5 MR. SULLIVAN: Not from us, Your Honor.

6 MR. HARVEY: Your Honor, I have the bills here and
7 I am happy to call Mr. Dingman to the stand to have him
8 identify the bills from Reed Smith from June 22, 2012.

9 THE COURT: Mr. Sullivan?

10 MR. SULLIVAN: Your Honor, we don't need any
11 testimony and frankly I've never understood the bill issue,
12 as to why Mr. Harvey views it as so important to this case.

13 MR. HARVEY: It's not a question of why it's
14 important. I have it here. Do you want to stipulate?

15 MR. SULLIVAN: I don't have a problem with the
16 Judge looking at the bill. That's fine.

17 MR. HARVEY: Will you stipulate this is the bill?

18 MR. SULLIVAN: Sure.

19 MR. HARVEY: Okay.

20 THE COURT: Hand them up.

21 MR. SULLIVAN: Again, time billed for an issue that
22 has nothing to do with whether an interested or
23 disinterested -- how a Director becomes disinterested or
24 interested and whether he or she can vote on a particular
25 question.

1 MR. KING: Your Honor, on behalf of Gordon
2 Properties, I would say the record is very clear that Reed
3 Smith represented FOA in every single facet in this case,
4 every dispute that FOA has entered an appearance in, Mr.
5 Dingman has personally appeared.

6 As a subset of that, LeClairRyan handled some
7 issues. If Your Honor remembers, they came in originally
8 when the Complaint, the Adversary Proceeding, was filed
9 against the individual Board members, LeClairRyan was engaged
10 as counsel for them.

11 They came in, represented the individuals. Since
12 they were already involved, the decision was they would take
13 the lead on the litigation, but Reed Smith was still
14 co-counsel.

15 THE COURT: They were both counsel.

16 MR. KING: They were both counsel. In fact, they
17 are both counsel -- well, now they have been relieved -- they
18 were both counsel on the appeal of those issues, jointly.

19 THE COURT: Wherever Ms. Sarvadi came in, she was
20 co-counsel?

21 MR. KING: Correct, Your Honor.

22 THE COURT: What were you looking at in this
23 Exhibit 1, the billing?

24

25

1 (FOA Exhibit No. 1 was marked
2 for identification and received
3 in evidence.)

4 MR. HARVEY: Yes, Your Honor. The time entry on
5 page four, the reference is to "Connelly." Just checking the
6 website, that's a reference to a Reed Smith attorney, Helen
7 Ann Connelly, where she is doing research to restrict
8 delinquent unit owners from voting, and to restrict voting
9 rights for non-payment of assessments, which has to do with
10 Gordon Properties.

11 I think that is further evidence that Reed Smith's
12 representation, contrary to what they say in their Brief, was
13 not narrowly circumscribed to the issues of tortuous
14 conversion, assessments, and breach of contract, but in fact
15 had to do with the control of FOA.

16 THE COURT: I don't think they ever contested they
17 were involved with the issues of whether a delinquent owner
18 who has filed bankruptcy retains the right to vote or may
19 vote because of the Automatic Stay under 362.

20 MR. SULLIVAN: That's correct, Your Honor. From
21 our point of view, this is a red herring. This has nothing
22 to do with -- as we said, the suit filed in Alexandria is not
23 over control of the Board. Control of the Board is what it
24 is.

25 THE COURT: I understand.

1 MR. HARVEY: The reason I put it in was because
2 that position was not expressed in their Brief. Their Brief
3 said this was just unrelated to their three issues where they
4 represented them.

5 They didn't slice it this disinterested/interested
6 Board member thing in their Brief. That wasn't the position
7 they took.

8 What Mr. Sullivan today has said quite ably is it's
9 really different, it's really this interested/disinterested
10 matter, which involves -- when this is over, somebody from
11 Reed Smith is going to be standing up here saying you
12 shouldn't approve this settlement. That is what this is
13 about.

14 If you like the result, who cares about the
15 process. Why spend your client's money worrying about the
16 process, if the result is okay. The only reason you argue
17 about process is you don't like the result.

18 THE COURT: Thank you.

19 MR. SULLIVAN: Your Honor, I keep getting accused
20 of things, so I just want to make clear, we're not changing
21 positions.

22 On page 12 of our Brief, we make clear our view of
23 this case, which is "The legal issues in this action
24 implicate questions of corporate law, Board governance, and
25 questions related purely to what makes one an interested or

1 disinterested Director."

2 Our position has been quite clear from the
3 beginning.

4 THE COURT: Let me find where you're reading.

5 MR. SULLIVAN: Page 12, second paragraph, starts
6 "Reed Smith's." Second sentence, Your Honor. "The legal
7 issues in this action," Mr. Harvey just suggested that we
8 dreamt up yet another new thing that we hadn't made clear in
9 our papers. That is just not the case.

10 Our position in response to their Motion was the
11 Alexandria litigation involved purely questions of corporate
12 law, Board governance, and questions related purely to what
13 makes one an interested or disinterested Director, and the
14 propriety of actions in which the members of Gordon
15 Properties participated.

16 That's all it is about.

17 THE COURT: Is there an LEO or a comment about not
18 being able to represent someone -- if you represent someone
19 drafting a contract, you cannot then represent another party
20 that would upset that contract?

21 MR. SULLIVAN: I'm reading from Judge Payne's
22 Sunbeam decision, Your Honor. He makes note that one of the
23 comments to Rule 1.9 says that a lawyer who is prosecuting an
24 accused person -- excuse me -- it says a lawyer could not
25 properly seek to rescind on behalf of a new client a contract

1 drafted on behalf of the former client. There is a comment
2 to 1.9 that says that.

3 That, of course, is not what is going on here.

4 Judge Payne cited that on page 473 of the Sunbeam
5 decision, Your Honor.

6 MR. KING: Your Honor, if I may, counsel is very
7 good at drafting briefs, but the statement that was just
8 referred to is not as sanitary as one would suggest.

9 Again, apart from the references that Mr. Harvey
10 has already alluded to with respect to upsetting the
11 settlement agreement, I won't go there, I have to come back
12 to the CSI agreement.

13 The CSI agreement was approved by this Court on
14 Motion that everybody had an opportunity to be heard.

15 THE COURT: By consent, I thought.

16 MR. KING: It was by consent between CSI and FOA,
17 but it was --

18 THE COURT: Ms. Sarvadi was here on that.

19 MR. KING: That's exactly right, Your Honor. The
20 point of the matter is that they are now asking the State
21 Court to upset that by attacking their own client and
22 saying -- this is during the course of their representation,
23 well, maybe they had withdrawn at that time, maybe only Ms.
24 Sarvadi was in at the time, but the point of the matter is
25 they are attacking their client with respect to the approval

1 of that agreement and trying to end run the approval process
2 and Your Honor's Order in that regard.

3 MR. SULLIVAN: Again, just to protect the record,
4 Your Honor, we were out as counsel during all that, not
5 present here, not present in the lawsuit. We were out.
6 Didn't know anything about it. Didn't have any involvement
7 in it.

8 THE COURT: All right.

9 MR. KING: They were involved, Your Honor, in the
10 dispute where Your Honor entered a specific Order placing
11 parameters on what the Board could do, and that was approved
12 by Your Honor.

13 There were specific parameters, and one of them was
14 the CSI agreement. Reed Smith was counsel for FOA during
15 that litigation and when the Order was entered. They know
16 what Your Honor ordered with respect to the parameters of
17 approval, and they are now trying to attack that and attack
18 their own client's compliance with Your Honor's Order.

19 THE COURT: The other Motion here deals with the
20 Remand and Abstention Motion and scheduling on the other
21 matters.

22 MR. KING: The Remand Motion, if my understanding
23 is correct, is on for status or scheduling. That is correct,
24 Your Honor.

25 No responses have been filed to that at this point.

1 In addition, I believe counsel for the Plaintiffs filed a
2 Motion this morning requesting an extension of time to
3 respond to the underlying Complaint that was removed.

4 The hope is that all these collateral issues will
5 be resolved before an obligation to file a response to the
6 Complaint.

7 That was filed this morning. That has been set for
8 a hearing in February.

9 THE COURT: Do you know the date?

10 MR. KING: The 5th, I think, Your Honor.

11 MS. MISLEH: Petula Misleh, Your Honor.

12 MR. KING: When was that set for hearing?

13 MS. MISLEH: I'm not sure.

14 MR. KING: I think it is February 5. It might not
15 be February 5 since Your Honor doesn't have a Docket on
16 February 5.

17 THE COURT: The 5th is an adversary date, and that
18 would be adversary.

19 MR. KING: It is February 5, Your Honor.

20 THE CLERK: February 5, 11:00, Your Honor.

21 THE COURT: All adversaries start at 9:30. It's
22 confusing.

23 MR. DINGMAN: Your Honor, we fully briefed our
24 positions. I think at this point the next step would be a
25 reply or response brief and then setting a hearing date to

1 have the Motion heard.

2 MR. KING: Your Honor, if I may, with respect to
3 scheduling, I don't want to represent that -- if this
4 approval process on the settlement Motion goes forward and
5 Your Honor, based on the evidence presented, approves the
6 settlement, it certainly would be my view that most if not
7 all of the issues raised in the underlying Complaint would
8 become moot.

9 That's part and parcel why there is a conflict,
10 because they are so interrelated. There may be some issues
11 remaining that would be subject to a Remand, but the point
12 that I'm trying to make, Your Honor, is I don't believe it
13 makes sense to address the Remand Motion and our response
14 until after we get past the settlement Motion, since most of
15 the issues in the Complaint and the Remand are being
16 addressed in the settlement Motion.

17 MR. DINGMAN: Your Honor, our position on that is
18 the jurisdictional question of whether the matter is properly
19 before the Court has nothing to do with what the Court may or
20 may not do with respect to the settlement.

21 The Complaint goes beyond simply the Litigation
22 Committee. It asks the Court to decide on what other matters
23 the interested Directors should be permitted to vote on, and
24 that could be a variety of things.

25 The question of whether the Court has jurisdiction

1 as opposed to the State Court to decide those state law
2 issues -- Your Honor, there is no reason to stay that pending
3 the settlement process because they are not connected.

4 The Court properly has jurisdiction over this
5 Adversary Proceeding, removed from State Court, or it does
6 not. That is an issue that we have briefed fully and there
7 is no reason to delay its resolution.

8 MR. KING: Your Honor, with the Court's permission,
9 may I refer to my PDA for my calendar?

10 THE COURT: Sure.

11 MR. KING: Thank you.

12 THE COURT: As I understand it, you are finalizing
13 the Motion to be filed?

14 MR. KING: Yes, Your Honor.

15 THE COURT: Will you have that filed by next
16 Tuesday?

17 MR. KING: You know, that is certainly my hope,
18 Your Honor. I have had hopes dashed in the past with respect
19 to scheduling and getting things done, but we will endeavor
20 to do our best to get it filed by then.

21 THE COURT: It needs to be done. We need to get
22 that before the Court so we can settle. I don't want to set
23 hearing dates without that being done.

24 MR. KING: Understood.

25 THE COURT: On the other hand, I can't allow it to

1 go on much further. It has to be resolved one way or the
2 other.

3 MR. KING: Yes, sir.

4 THE COURT: What I'm going to do is I'm going to
5 continue the Motion for the Settlement Order to next Tuesday.
6 That is January 29. That is at 9:30.

7 I will go ahead and continue this until next
8 Tuesday and I will give my opinion at that time and rule on
9 the matter at that point. That is No. 50.

10 No. 49 is the status hearing on the Remand and
11 Abstention. Mr. Dingman has suggested, and he's correct,
12 once we decide whether Reed Smith can represent Mr. Sobol and
13 others, we need to move on the jurisdiction before we get to
14 the merits of it.

15 How much time do you need to respond to that?

16 MR. KING: 21 days, Your Honor. Is it only the
17 jurisdictional issue?

18 THE COURT: I'm limiting it only to that at this
19 point. That is February 12, but not before I rule on the
20 representation issue. You have a minimum of a week and a
21 maximum of three weeks. Don't file a response tomorrow. I
22 want to dispose of the representation issue, so you
23 understand who you have to serve.

24 MR. KING: But not later than February 12?

25 THE COURT: It's due by the 12th of February, which

1 as I have observed in practice here, that's probably when it
2 will come in.

3 (Laughter.)

4 THE COURT: You're welcome to file it earlier but I
5 want it after the ruling on the representation issue.

6 MR. KING: Understood.

7 THE COURT: That is Item 49. Then 47, that's the
8 settlement. That goes to the 29th, which is next week. 49
9 is the Remand. I think that disposes of everything.

10 Is there one left?

11 MR. KING: Your Honor has told me when to file the
12 response to the Remand Motion, but we have not scheduled a
13 hearing on that.

14 THE COURT: I'm going to continue it for status to
15 the 29th, which is next week.

16 MR. KING: That may before my response is due.

17 THE COURT: That is correct. I'm aware of that. I
18 just want to keep it on the Docket.

19 MR. KING: Understood. Thank you, Your Honor.

20 THE COURT: I'm going to schedule it based on what
21 we do on the other matters.

22 MR. KING: Those dates and times are all acceptable
23 to Gordon Properties and Condominium Services, Your Honor.

24 THE COURT: Mr. Harvey, are those good dates for
25 you? Anyone else have any issue with those dates?

1 MR. DONELAN: Your Honor, I'm going to be out of
2 town. I don't think there are any matters here that involve
3 me with the exception of the settlement agreement. I think
4 this whole matter that you are going to do at that time --

5 THE COURT: It is a scheduling for that. I would
6 like to see it in so I can see what it says, see if I need to
7 take any special notice, what the deal is. I want to make
8 sure when I schedule it, it in fact exists, it is approved
9 and ready to go.

10 I understand the settlement agreement, per se, has
11 been ratified. That is fixed, and we are talking about the
12 Motion. I'd like to see that.

13 MR. DONELAN: I'll have my associate here with the
14 Court's approval, and he will have my available dates.

15 THE COURT: That will be fine.

16 MR. DONELAN: Thank you, Your Honor.

17 THE COURT: All right. Thank you.

18 (Whereupon, at 1:08 p.m., the hearing was
19 concluded.)

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