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.	)	

MOTION FOR LEAVE TO FILE AN APPEAL

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, pursuant to Rule 8003 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") hereby move for leave to file an appeal of that certain Order Regarding First Owners' Association of Forty-Six Hundred Condominium, Inc.'s Motion to Disqualify Reed Smith, LLP entered on January 29, 2013 (the "Disqualification Order") by the U.S. Bankruptcy Court for the Eastern District of Virginia, Alexandria Division (the "Bankruptcy Court"), and in support hereof, respectfully state as follows:

INTRODUCTION

Reed Smith LLP ("Reed Smith") previously represented First Owners Association of Forty-Six Hundred Condominium, Inc. ("FOA") in lawsuits with Condominium Services, Inc. ("CSI") and Gordon Properties, LLC ("Gordon Properties) that sought the recovery of money that CSI wrongfully converted from FOA and unpaid condominium assessments owed by Gordon Properties. CSI and Gordon Properties filed petitions for bankruptcy in 2009 and 2010, respectively, in an attempt to avoid paying FOA the monies they owe. These bankruptcy cases remain pending more than three years after they were filed. Through certain proceedings in its bankruptcy case, Gordon Properties was able to place three of its four members, Bryan Sells ("Sells"), Lindsay Wilson ("Wilson"), and Elizabeth Greenwell ("Greenwell"), on FOA's Board of Directors and to take control of FOA's Board.[1] Once in control of FOA's Board, Sells, Wilson, and Greenwell fired Reed Smith as counsel for FOA. Reed Smith had successfully represented FOA in multiple lawsuits filed against FOA by Gordon Properties and had also successfully represented FOA in a lawsuit against CSI that resulted in a judgment against CSI for more than $400,000. Led by Sells, Wilson and Greenwell, the FOA Board next voted to stop FOA's efforts to collect the debts owed by CSI and Gordon Properties and to engage in settlement discussions. They then voted to change the members of FOA's special litigation committee essentially naming the individuals who would negotiate with Gordon Properties.

On November 29, 2012, Reed Smith filed a complaint (the "Complaint") on behalf of certain unit owners—whom Reed Smith agreed to represent *pro bono* because they cannot afford counsel—in the Circuit Court for Alexandria against Sells, Wilson, and Greenwell, styled as

[1] The rulings of the Bankruptcy Court that allowed Sells, Wilson and Greenwell to be elected to the Board are pending on appeal with the District Court before Judge Ellis in Case No. 1:11cv1060-TSE-IDD. That appeal has been stayed pending the Bankruptcy Court's review of a proposed settlement between FOA and Gordon Properties.

Sobel, et.al. v. Bryan Sells, et al., Case No. CL-12005183 (the "State Court Action"). The Complaint raised the legal question of whether those individuals, as interested directors, could properly vote on the make-up of the special litigation committee, the re-hiring of CSI (who still owes FOA more than $400,000) and any other issues involving Gordon Properties and/or CSI. FOA was also named as a defendant in the lawsuit so that the state court could set aside any acts by Sells, Wilson and Greenwell it deemed to be *ultra vires*. Wilson subsequently removed the State Court Action to the Bankruptcy Court, even though she is not a party to any bankruptcy proceedings and even though neither Gordon Properties nor CSI are parties to the State Court Action. At or around that same time, Gordon Properties concluded its "negotiations" with its hand-picked special litigation committee and has moved for approval of a settlement agreement negotiated by the interested directors with entities they own or control.[2]

Reed Smith promptly filed a Motion to Remand and requested an expedited hearing, which was denied. FOA then filed a Motion to Disqualify Reed Smith from representing Plaintiffs, claiming that Reed Smith's prior representation of FOA in unrelated matters barred Reed Smith from representing Plaintiffs in the State Court Action. The Bankruptcy Court agreed to hear that matter promptly while ignoring the overarching jurisdictional issue of the improperly removed State Court Action. Reed Smith timely filed an opposition to the Motion to Disqualify arguing, among other things, that the Bankruptcy Court did not have jurisdiction to hear the State Court Action because it had been improperly removed and that Reed Smith should not be disqualified because its representation of Plaintiffs in this action is not substantially related to its prior representation of FOA or otherwise precluded by the Rules of Professional Conduct.

[2] A hearing is set for March 21, 2013 on the motion to approve the settlement agreement.

On January 22, 2013, the Bankruptcy Court held a hearing on FOA's Motion to Disqualify. On January 29, 2013, the Bankruptcy Court granted the Motion to Disqualify. This decision leaves the Plaintiffs with no representation as the proposed settlement agreement heads toward approval with no resolution of the underlying state law issue regarding the propriety of the actions of Sells, Wilson and Greenwell. The Bankruptcy Court has continued until March 26, 2013 for "status" the motion to remand—after the hearing to approve the settlement agreement.[3] Plaintiffs now seek leave to appeal the Disqualification Order because: (1) the Bankruptcy Court lacked jurisdiction to hear any matters arising from the State Court Action; (2) Reed Smith's representation of Plaintiffs in the state court action is not substantially related to its prior representation of FOA; and (3) Plaintiffs are deprived of counsel and are unable to pursue their legitimate state law claims that will be mooted by the Bankruptcy Court's approval of the settlement agreement.

Gordon Properties—through its member, Lindsay Wilson—has orchestrated an improper removal of the State Court Action and the Motion to Disqualify to silence the members of FOA and to force through a settlement agreement before the propriety of the interested directors' actions can be reviewed. Unless the District Court accepts this appeal, Gordon Properties will have once again improperly used the federal court system because the legitimate interests of the members of FOA set forth in the State Court Action will not be heard before the settlement is approved—just as Gordon Properties planned it. For these reasons and for the reasons argued more fully below, Plaintiffs respectfully request that the Court grant them leave to file this appeal.

[3] Counsel for Plaintiffs also made a motion for a stay at the January 29, 2013 hearing which was denied.

BACKGROUND FACTS

Forty-Six Hundred Condominium, Inc. (the "Condominium") is a mixed-use condominium comprised of over 400 units that was created in 1975. The Condominium consists of a main high-rise multifamily residential building, with both residential and commercial units, and two street front commercial units—a restaurant and a gas station—that are adjacent to the high-rise building. It is a middle to low income condominium in which many of the unit owners, such as many of the Plaintiffs, are retired.

Starting in 2006, Gordon Properties engaged in a barrage of litigation against FOA that has continued now for almost seven years. After losing multiple lawsuits in state court, Gordon Properties filed for bankruptcy in September of 2009, though it reported assets that exceeded liabilities by more than $10 million. Reed Smith, which successfully defended FOA in the state court actions, also represented FOA in Gordon Properties' bankruptcy proceeding for several years. CSI, wholly owned by Gordon Properties, joined Gordon Properties in bankruptcy in January of 2010 after FOA obtained a judgment (with Reed Smith as counsel) against CSI for $450,000 for conversion and breach of contract. The judgment also contained a punitive damage award of $275,000, which was affirmed by the Virginia Supreme Court. *See Condominium Servs., Inc. v. First Owners Assoc. of Forty-Six Hundred Condominium, Inc.*, 281 Va. 561 (2011).

By manipulating and misusing the Bankruptcy Court, Sells, Wilson and Greenwell, along with Sells' father-in-law, Dennis Howland, took control of FOA's Board in June 2011 based upon certain decisions of the Bankruptcy Court that are on appeal to Judge Ellis. One of the first acts of the Gordon Properties-controlled Board was to terminate Reed Smith as counsel

for FOA.[4] While Mr. Howland was eventually removed from the Board, Sells, Greenwell, and Wilson breached the fiduciary duties they owed to FOA when they engaged in series of self-dealing transactions designed to prevent FOA from ever collecting the judgment against CSI or from obtaining a ruling on any of the matters that are on appeal in the District Court. Sells, Greenwell, and Wilson's breaches of their fiduciary duties include, but are not limited to, their decision to appoint members to FOA's special litigation committee who were loyal to CSI and Gordon Properties. FOA's special litigation committee has the authority to control all aspects of the litigation against CSI and Gordon Properties. Thus Sells, Wilson, and Greenwell used their position on FOA's Board to select those who, on behalf of FOA, would make decisions concerning the claims against Gordon Properties and CSI. They also voted to re-hire CSI as FOA's manager even though CSI stole money from FOA that it has never repaid.

The implications of these actions are that the Gordon Properties/CSI appointed Special Litigation Committee has the authority to negotiate on behalf of FOA and ostensibly settle all claims against Gordon Properties. Thus, Sells, Wilson, and Greenwell used their position on FOA's Board to appoint those who will negotiate against companies that they own and control—CSI and Gordon Properties.

Focused solely on the issue of the propriety of the actions of FOA's interested directors, Plaintiffs filed the State Court Action asking the state court to declare that the actions of Sells, Wilson and Greenwell, in voting on the appointment of the Second Special Litigation

[4] Reed Smith was subsequently rehired by the Special Litigation Committee—in place before the Gordon Properties directors changed the membership of that committee—to pursue an appeal of a decision of the Bankruptcy Court which is pending before Judge Brinkema. As discussed below, when the Gordon Properties directors changed the membership of the committee, that committee then terminated Reed Smith—again. In granting Reed Smith's Motion to Withdraw, Judge Brinkema commented that she was "terribly troubled by the manner in which this this litigation is being conducted" by FOA and its new Board. *See* 10/24/12 Order in Case No. 1:12cv1155 (LMB/IDD).

Committee, requesting a stay of the Assessment and Sanctions Appeals, participating in the settlement negotiations, and voting to rehire CSI, were contrary to state law and *ultra vires*. The State Court Action also seeks a declaration as to whether Sells, Wilson and Greenwell can properly vote on future matters that come before the FOA Board that affect Gordon Properties and/or CSI. The State Court Action is based on established principles of state corporate law. Sells', Greenwell's and Wilson's relationship with CSI and Gordon Properties make them interested directors who are prohibited from voting on any matters relating to the disputes and litigation between FOA and Gordon Properties and CSI. As such, these actions were in violation of their fiduciary duties to FOA and are void and *ultra vires*.

It is important to note that the State Court Action does not attack the settlement agreement.[5] Indeed, the Complaint in the State Court Action was filed before the settlement agreement had been concluded. The State Court Action is directed solely at the propriety under state corporate law of the procedure by which the litigation committee was appointed and other actions taken by the FOA Board relating to Gordon Properties and CSI.

The state court scheduled a hearing on December 7, 2012 on Plaintiffs' request for a Preliminary Injunction to prohibit Sells, Wilson and Greenwell from continuing to breach their fiduciary duties by voting on matters that directly affect the interests of Gordon Properties and CSI. Realizing that any decision in the State Court Action would likely interfere with CSI and Gordon Properties' plans, the afternoon before the hearing Wilson improperly removed this

[5] The Court can review the settlement agreement and draw its own conclusions. In sum, it requires FOA to: (1) pay Gordon Properties $377,000, (2) pay CSI $225,000, (3) release its right to collect the CSI Judgment ($436,792) and Gordon Properties' Assessment ($315,673), (4) reduce the amount FOA can assess the units owned by Sells, Gordon Properties, and Gordon Residential, and (5) limit the amount of user fees that FOA can assess against Gordon Properties, Gordon Residential Holdings, LLC , or Sells. Further, it relieves CSI of its obligations to pay punitive damages and judgments which are final and not subject to any appeals.

matter to the Bankruptcy Court, even though Gordon Properties was not a defendant in the State Court Action. [Dkt. No. 1]. Plaintiffs immediately filed a Motion to Remand noting the Court's lack of jurisdiction over the State Court Action and the impropriety of Wilson's removal, and asked that their motion be heard at an expedited hearing. [Dkt. Nos. 4 and 5]. 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 asked the Court to delay any ruling so that CSI and Gordon Properties can finalize their settlement agreement with FOA. [Dkt. No. 6]. The Bankruptcy Court denied Plaintiffs' motion for an expedited hearing on the Motion to Remand.

FOA—controlled by the members of Gordon Properties—filed a Motion to Disqualify Reed Smith based on an alleged violation of Rule 1:9 of the Virginia Rules of Professional Conduct. [Dkt. No. 8]. Plaintiffs timely filed an opposition to the Motion to Disqualify, arguing that the Bankruptcy Court did not have jurisdiction to rule on the motion because the State Court Action had been improperly removed. [Dkt. No. 11]. The opposition also argued that Reed Smith should not be disqualified from representing Plaintiffs in the State Court Action because that representation concerns matters related to corporate governance issues that occurred *after* FOA had terminated Reed Smith's representation and implicates legal issues wholly unrelated to its prior representation of FOA in the CSI or Assessment Actions.

On January 22, 2013, the Bankruptcy Court held a hearing on FOA's Motion to Disqualify. On January 28, 2013, Gordon Properties and CSI filed a joint motion with the Bankruptcy Court asking the Bankruptcy Court to approve the settlement agreement. *See In Re Gordon Properties, LLC, Condominium, Inc*., Case No. 09-18086 [Dkt. No. 498]. This motion has been set for a hearing on March 21, 2013. Ironically, in support of their motion to approve the settlement agreement, CSI and Gordon Properties argue that one of the reasons why the

settlement agreement should be approved is because it will put an end to this litigation which has placed FOA on the verge of being "forced to seek bankruptcy relief." *See In Re Gordon Properties, LLC, Condominium, Inc.*, Case No. 09-18086 [Dkt. No. 498 pp. 8-9].

On January 29, 2013, the Bankruptcy Court issued the Disqualification Order, which granted FOA's Motion to Disqualify Reed Smith. In doing so, the Bankruptcy Court ignored its obligations to first determine whether it had jurisdiction to hear this matter and instead held that Reed Smith's representation in the State Court Action was substantially related to its prior representation of FOA. Plaintiffs' motion to remand is not set for a hearing "on status" until March 26, 2013. No date has been set by the Bankruptcy Court to determine whether it has jurisdiction over this matter. Thus, there is a strong possibility that the Bankruptcy Court will enter an order approving the settlement agreement before it ever determines whether it has jurisdiction over the State Court Action.

Plaintiffs respectfully ask the District Court to accept this appeal and to reverse the Disqualification Order because the Bankruptcy Court does not have jurisdiction over the State Court Action as it was improperly removed. Additionally, Plaintiffs ask the District Court to reverse the Disqualification Order because the Bankruptcy Court's analysis of Rule 1.9 of the Virginia Rules of Professional Conduct, found in part six of the Virginia Supreme Court Rules, and application of case law from this Circuit is incorrect. If the Court does not accept this appeal, there likely will never be an appeal and fair hearing of the critical issues raised by the Plaintiffs in the State Court Action. Whipsawed between two courts, Plaintiffs will be denied their voice in the courts. For these reasons and the reasons argued more fully below, Plaintiffs' respectfully request that they be granted leave to appeal the Bankruptcy Court's decision granting FOA's Motion to Disqualify.

ARGUMENT

I. Plaintiffs Satisfy The Requirements For Granting Interlocutory Review Of The Disqualification Order Pursuant To 28 U.S.C. § 158(a)(3).

28 U.S.C. §158(a) grants United States District Courts with jurisdiction to hear appeals from interlocutory orders issued by a Bankruptcy Court at their discretion. Although Section 158(a) is silent on the question of how this discretion is to be exercised, courts look to the factors set forth in 28 U.S.C § 1292 defining the scope of appellate jurisdiction over interlocutory appeals from the district courts. *First Owners' Ass'n of Forty Six Hundred v. Gordon Properties, LLC*, 470 B.R. 364, 371 (E.D. Va. 2012) (citations omitted); *Herrington v. Swyter* (*In re Swyter*), 263 B.R. 742, 748-49 (E.D. Va. 2001). This Court has held that leave should be granted "when (1) the order involves a controlling question of law, (2) as to which there is substantial ground for a difference of opinion, and (3) immediate appeal would materially advance the termination of the litigation." *First Owners' Ass'n of Forty Six Hundred v. Gordon Properties, LLC*, 470 B.R. at 373. Plaintiffs' issues on appeal satisfy each of these requirements.

A. The Appeal involves a controlling question of law.

Multiple controlling questions of law are presented by this Appeal. "'[A] question of law is 'controlling' if reversal of the [lower] court's order would terminate the action.'" *Id.* at 373 (citing *Klinghoffer v. S.N.C. Achille Lauro*, 921 F.2d 21, 24 (2d Cir.1990)). Here, whether the Bankruptcy Court had jurisdiction over the State Court Action is a controlling question of law because "bankruptcy courts, like the federal district courts, are courts of limited jurisdiction." *In re Kirkland*, 600 F.3d 310, 315 (4th Cir. 2010). It is firmly established that subject matter jurisdiction is a threshold question that should be the first question addressed in every case. *In re Carrington Gardens Associates*, 248 B.R. 752, 765 (E.D. Va. 2000). This is because "[s]ubject matter jurisdiction defines a court's power to adjudicate cases or controversies—its adjudicatory

authority—and without it, a court can only decide that it does not have jurisdiction." *U.S. v. Wilson*, 699 F.3d 789, 793 (4th Cir. 2012).

Here, the Bankruptcy Court does not have jurisdiction to hear any matters arising from the State Court Action because it was improperly removed. 28 U.S.C. § 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). As argued in Plaintiffs' motion to remand [Dkt. No. 4] and their opposition to FOA's Motion to Disqualify [Dkt. No. 11], the State Court Action was improperly removed by Defendant Wilson because Wilson is *not* a party to any proceeding before the Bankruptcy Court and Gordon Properties is *not* a party to the State Court Action. Therefore, any attempt by Defendant Wilson to remove the State Court Action (on behalf of Gordon Properties or CSI) is a legal nullity which rendered the Bankruptcy Court without jurisdiction to decide the motion to disqualify. *See In re John Tilley v. G&C Constr. Corp*., 42 B.R. 827, 829-30 (E.D. Va. 1984) (remanding matter to state court that was removed by corporation's member when the corporate member was not a party to any bankruptcy proceeding). Had the Bankruptcy Court ruled on the jurisdiction issue at the outset of these proceedings as it was required to, the Bankruptcy Court would been required to remand the State Court Action. As such, there can be no doubt that the Bankruptcy Court's lack of jurisdiction is a controlling issue of law. A decision to this effect will end this Adversary Proceeding and will return it to the state court where it belongs.

Likewise, the decision to grant or deny the Motion to Disqualify presents a controlling question of law because it effectively terminates the State Court Action. Reed Smith was representing Plaintiffs on a *pro bono* basis and Plaintiffs are unable to obtain other counsel.

Despite the suggestion of the Bankruptcy Court that they can continue *pro se*, Plaintiffs are not able to present the jurisdictional and other arguments upon which their case is premised—especially with three different law firms collectively representing Gordon Properties and its members in this matter. As such, there is a strong probability that the issues raised in the State Court Action will never be effectively presented to any court unless the Disqualification Order is reviewed and reversed.

Moreover, although the Fourth Circuit has issued a number of opinions in recent years clarifying the rules for attorney disqualification, the law in this area is still evolving and issues of disqualification have significant impact on the underlying case. This case involves a factual scenario not addressed in any of those cases. A ruling by the District Court would therefore substantially contribute to the development of the law. Further, as clearly recognized by the parties and the Bankruptcy Court itself, the issues presented in the State Court Action are important and could have significant impact on the legitimacy of the bankruptcy proceedings below, but only if the Plaintiffs have representation and are thereby able to present these issues to the appropriate court. This line of reasoning is in accord with other courts which have treated disqualification of counsel as a controlling question of law. *See In re Sharpe*, 98 B.R. 337, 340 (N.D. Ill. 1989) (granting appeal of order disqualifying counsel because "an error on the bankruptcy court's part could do long term damage not easily remediable in a later appeal."); *In re Capen Wholesale, Inc.*, 184 B.R. 547, 549 (N.D. Ill. 1995) (granting appeal when "underlying bankruptcy proceeding is all but concluded, …and…that considerations of judicial economy and efficiency…weigh heavily in favor of exercising appellate jurisdiction.").

B. There is substantial ground for difference of opinion on the issues presented by the Appeal.

There is a substantial ground for difference of opinion on 1) whether the Bankruptcy Court has jurisdiction to hear the State Court Action, and 2) whether Reed Smith's representation of Plaintiffs' claims in the State Court Action are substantially related to Reed Smith's prior representation of FOA.

With respect to the first issue, it is firmly established that subject matter jurisdiction is a threshold question that should be the first question addressed in every case. *In re Carrington Gardens Associates*, 248 B.R. at 765. This is because without jurisdiction, the Court is without power to proceed. As the United States Supreme Court explained, once a court determines that it does not have jurisdiction to hear an action, "the only function remaining to the court is that of announcing the fact and dismissing the cause." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94, 118 S.Ct. 1003 (1998). As explained above, the Disqualification Order flies in the face of these established principles, and the Bankruptcy Court lacked authority to issue any orders except to order that the State Court Action be remanded.

With respect to the second issue, the Disqualification Order is based on a strained construction of the law. Reed Smith should only be disqualified if its representation of Plaintiffs in the State Court Action is "substantially related" to its prior representation of FOA. "Substantially related" has been interpreted to mean "identical" or "essentially the same." *Sunbeam Prods., Inc. v. Hamilton Beach Brands, Inc.*, 727 F. Supp. 2d 469, 473 (E.D. Va. 2010); *In re Stokes v. Firestone*, 156 B.R. 181, 187 (E.D. Va. Bankr. 1993); *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). Here, the

Bankruptcy Court's ruling ignores the "substantial relationship test." Its ruling flies in the face of settled principles of law. *See e.g. Atlantic Textile Group, Inc. v. Neal*, 191 B.R. 652, 653 (E.D. Va. 1996) ("the fact that the majority position is contrary to the bankruptcy judge's ruling is sufficient to constitute such a difference."). Accordingly, there are grounds for a substantial difference of opinion with respect to the issues presented to this Court by the Appeal.

C. Immediate appeal would materially advance termination of the litigation.

Immediate appeal of the Disqualification Order will materially advance termination of the litigation. A decision by this Court that the Bankruptcy Court erred in exercising jurisdiction over this matter or in finding that Reed Smith was disqualified from representing Plaintiffs would end this litigation or materially hasten its termination. If the Court agrees that the State Court Action was improperly removed and that the Bankruptcy Court had no jurisdiction over this matter, the State Court Action will be remanded to the state court and this Adversary Proceeding will be over. In the alternative, even if the Court finds that the Bankruptcy Court had jurisdiction to hear the Motion to Disqualify, but incorrectly granted the motion, that will allow counsel for the Plaintiffs to re-engage and to move the matter to a conclusion. Not taking this appeal and leaving the Plaintiffs without counsel will certainly not lead to the fair or expeditious resolution of this matter.

II. The Disqualification Order *Is* A Collateral Order That Is Immediately Reviewable Under 28 U.S.C. § 158(a)(3).

The Fourth Circuit recognizes that interlocutory appeals are appropriate under the collateral order doctrine or in "exceptional circumstances." *In re Urban Broadcasting Corp.*, 401 F.3d 236, 247 (4th Cir. 2005); *KPMG Peat Marwick, LLP v. Estate of Nelco, Ltd., Inc*., 250 B.R. 74, 78 (E.D. Va. 2000). The collateral order doctrine allows a district court to entertain an appeal of a bankruptcy court's interlocutory order in limited circumstances. "To be reviewable

despite the absence of finality, an order 'must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment.'" *In re Looney*, 823 F.2d 788, 791 (4th Cir. 1987) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468, 98 S.Ct. 2454, 2457, 57 L.Ed.2d 351 (1978)); *see also In re Swyter*, 263 B.R. 742, 746 (E.D. Va. 2001) (citing *Cohen v. Beneficial Industrial Loan Corp*., 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949)). All of these factors are met here. Clearly a "conclusive" decision has been made as to the Motion to Disqualify which affects a paramount issue; the right to representation by counsel. Without review of this decision now, the bankruptcy proceedings will lead to decisions that cannot be effectively reviewed on appeal, such as proper consideration of how the settlement agreement was negotiated.[6]

Similarly, courts allow for immediate review of an interlocutory order in situations with "exceptional circumstances." *KPMG Peat Marwick, LLP*, 250 B.R. at 78 (A district court will only entertain an appeal from the interlocutory order of a bankruptcy court under "exceptional circumstances."). "Exceptional circumstances that warrant interlocutory review include cases where prohibiting review would force an appellant to irrevocably lose an important right, and cases where an appellant will effectively be denied review if the proceeding progresses to its natural end." *In re Fox*, 241 B.R. 224, 233 (B.A.P. 10th Cir. 1999).

Here, the Disqualification Order conclusively determined Plaintiffs' right to be represented by the counsel of its choosing. It is "important in our system of justice that the parties be free to retain counsel of their choice. *Reese v. Virginia Intern. Terminals, Inc*., 2012 WL 3202875, at * 5 (E.D. Va. Aug. 2, 2012) (citations omitted). As explained above, Reed

[6] The Bankruptcy Court stated on the record that it did not believe that Reed Smith could represent the Plaintiffs with respect to objections to the settlement agreement.

Smith is representing Plaintiffs on a *pro bono* basis. A denial of review by this Court will leave the Plaintiffs without representation making it virtually impossible for Plaintiffs to raise the jurisdictional issues implicated by the improper removal of the State Court Action and to continue to pursue the claims alleged in the State Court Action. Certainly "exceptional circumstances" includes a decision that effectively prevents Plaintiffs from pursuing their rights with the courts.

WHEREFORE, for the foregoing reasons, Plaintiffs respectfully requests that the Court grant them leave to file this Appeal of the Bankruptcy Court's grant of FOA's Motion to Disqualify Reed Smith as counsel for Plaintiffs and such other relief as is just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this the 11th day of February, 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, including the following:

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