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.	)	

REPLY BRIEF IN SUPPORT OF 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 file this Reply Brief in support of their motion 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, which Order was stated from the bench on January 29, 2013 [Dkt. No. 20] and reflected in the written Memorandum Opinion [Dkt. No. 30] and Order entered on February 25, 2013 [Dkt. No. 31] (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:

FACTUAL BACKGROUND

In its answer to the motion for leave to file an appeal, First Owners Association of Forty-Six Hundred Condominium, Inc. ("FOA") engages in numerous unfounded attacks on the plaintiffs and their counsel, and relies upon numerous misstatements of fact—all in an attempt to justify depriving Plaintiffs of representation. Additionally, the Bankruptcy Court issued its Memorandum Opinion with respect to the motion to disqualify Reed Smith on February 25, 2013.[1] [Dkt. No. 30]. That Memorandum Opinion also contains numerous factual errors and errors of law that support the Plaintiffs' request for this Court to accept their appeal in this matter. These factual and legal issues are discussed below.

In its Memorandum Opinion the Bankruptcy Court engaged in a detailed discussion of "confidentiality" between attorney and client. [Dkt. No. 30, pp. 4-6]. The Court discussed the difference between what it referred to as "privileged communications; secret information and information relating to or gained by the lawyer in the course of his representation of his client." The Court engaged in this discussion to support its conclusion that in filing the State Court Action—which has been improperly removed—Reed Smith relied upon information gained during its prior representation of FOA. The undisputed facts demonstrate that the Bankruptcy Court's conclusion is erroneous.

In the State Court Action removed by Lindsey Wilson—who is not and has never been in bankruptcy—the Plaintiffs' claims are predicated upon two simple sets of facts that are public knowledge and that were not gained by Reed Smith through its prior representation of FOA. First, the Plaintiffs allege that Bryan Sells, Lindsey Wilson and Elizabeth Greenwell are

[1] The Disqualification Order was formally entered on February 25, 2013. [Dkt. No. 31].

members of Gordon Properties, LLC and are also members of FOA's Board of Directors. These facts are not only undisputed, but they are set forth in the records of FOA and were not gained by Reed Smith or the Plaintiffs as a result of Reed Smith's prior representation of FOA. Indeed, the Bankruptcy Court notes in its Memorandum Opinion that "Gordon Properties was successful in electing three members to the board." [Dkt. No. 30, p. 9].

The second set of facts supporting the complaint filed by the Plaintiffs is that the three members of Gordon Properties participated in votes as members of FOA's Board of Directors which determined the makeup of the special litigation committee—the committee given the responsibility to oversee FOA's litigation with Gordon Properties and its wholly-owned subsidiary, Condominium Services Inc. ("CSI")—as well as other decisions directly affecting Gordon Properties, LLC and/or CSI. The votes complained of by the Plaintiffs in their complaint are set forth in the meeting minutes from FOA's Board of Directors that are maintained among FOA's files as required by law. Again, these fact—which did not even exist when Reed Smith represented FOA—were not privileged and were not obtained as a result of Reed Smith's prior representation of FOA.

Based upon these facts, the legal question presented by the State Court Action—which is a pure matter of state law—is simple and straightforward: are the three members of Gordon Properties "interested" directors who were prohibited from engaging in the votes described in the complaint?

In coming to its decision to disqualify Reed Smith and to leave the Plaintiffs without counsel, the Bankruptcy Court improperly broadened the definition of "confidential information" in the context of a motion to disqualify, without any legal basis. The Court then made factual errors in concluding that the facts upon which the complaint is predicated were somehow gained

through confidential communications between Reed Smith and FOA. The Bankruptcy Court's erroneous expansion of the law—which it then misapplied to the facts—provides a basis for this Court to take the appeal immediately to address the Bankruptcy Court's misapplication of controlling law regarding the disqualification of counsel.

In addition to its clearly erroneous conclusions concerning confidential information, the Bankruptcy Court made numerous factual errors in its Memorandum Opinion which further warrant immediate redress by this Court. First, throughout its Memorandum Opinion the Bankruptcy Court suggests that it is improper for Reed Smith to represent the Plaintiffs because their complaint, if successful, could undermine the efforts of Gordon Properties and FOA—represented by counsel selected by the Gordon Properties directors—to have the Bankruptcy Court approve the settlement agreement.[2] [Dkt. No. 30, pp. 12-18]. Further, in its answer to the motion for leave to file an appeal FOA repeatedly states that the complaint was filed as an effort to attack the settlement agreement. [Dkt. No. 29, p. 3]. Both the Bankruptcy Court and FOA have inaccurately stated the facts.

The complaint in this case was filed on November 29, 2012, several weeks before there was even a draft settlement agreement circulating between FOA and Gordon Properties. The Bankruptcy Court acknowledges as much in its Memorandum Opinion. [Dkt. No. 30, p. 12]. Further, a simple review of the complaint discloses that it does not ask the state court to set aside the settlement agreement, because none existed when the complaint was filed.

Additionally, as is clear from the Bankruptcy Court's Memorandum Opinion, Reed Smith had absolutely no involvement in the mediation that led to the settlement agreement that Gordon Properties and FOA (and apparently the Bankruptcy Court) so hastily want to have approved

[2] This is the exact same argument that Gordon Properties made in its opposition to Plaintiffs' motion to remand. [Dkt. No. 6, pp. 2-3].

while the Plaintiffs are deprived of counsel. As the Bankruptcy Court stated in its Memorandum Opinion, the Gordon Properties-led FOA board terminated Reed Smith as counsel on June 19, 2012. [Dkt. No. 30, p. 11]. It was not until October of 2012 that the Bankruptcy Court directed FOA and Gordon Properties to engage in mediation. [Dkt. No. 30, p. 12]. Plainly, Reed Smith was never involved on behalf of FOA in the mediation or the negotiation of the settlement agreement the Bankruptcy Court now appears ready to approve. Despite these undisputed facts, both the Bankruptcy Court and FOA premise their positions with respect to the disqualification of Reed Smith on the erroneous contention that Reed Smith must be disqualified simply because the settlement agreement may be impacted by the complaint. The facts show, however, that the complaint does not seek any relief with respect to the settlement agreement and that, in any event, Reed Smith was never involved in the mediation and negotiation that led to the settlement agreement.

Further, as argued below, the Bankruptcy Court has applied an expanded and improper view of the phrase "substantially related," to essentially conclude that an attorney or law firm can never be adverse to a former client if the engagement might somehow negatively impact the former client. This is not only contrary to settled law, but it also defies common sense because any subsequent engagement could result in some type of adverse result for the former client. To expand the narrow scope of disqualification of counsel in this manner is not only unwarranted by settled law, but will have the effect of broadening the basis for disqualification and furthering the mischief that comes with it.

In addition to the foregoing, there are numerous other inaccurate factual conclusions set forth in the Bankruptcy Court's Memorandum Opinion that should be considered here.[3]

[3] The Plaintiffs point out that in an appeal in this same bankruptcy case to the Honorable Leonie Brinkema, the District Court reversed a decision of the Bankruptcy Court concluding that it had made errors of both law and fact.

Throughout the Memorandum Opinion the Court refers to Reed Smith as FOA's "general counsel." The Bankruptcy Court cites no evidence to support this conclusion, because none exists and the conclusion is wrong. The law firm of Whiteford, Taylor & Preston was general counsel for FOA until, as Plaintiffs understand it, they too were terminated. Further, the Bankruptcy Court does not point to any activity undertaken by Reed Smith as the supposed general counsel of FOA that relates to the issues set forth in the complaint at issue.

The Bankruptcy Court also suggests that the portion of the complaint challenging the rehiring of CSI—an entity which was found by the Supreme Court of Virginia to have stolen money from FOA[4]--creates a conflict for Reed Smith. Once again the facts show otherwise. As the Bankruptcy Court itself states in its Memorandum Opinion, Reed Smith was terminated as FOA's counsel on June 19, 2012. [Dkt. No. 30, p. 11]. At page 12 of the Memorandum Opinion the Bankruptcy Court discusses a motion presented on October 12, 2012, filed by Jennifer Sarvadi of LeClair Ryan, seeking approval for the rehiring of CSI. Obviously, Reed Smith was not counsel for FOA with respect to that motion.

Further, the Bankruptcy Court suggests that Reed Smith somehow assisted Ms. Sarvadi in a trial before Judge Mayer that occurred in the May-June time frame of 2012. [Dkt. No. 30, p. 13 n. 16]. The Bankruptcy Court refers to "Exhibit 1 in the disqualification hearing," which is an

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In that appeal, Case No. 1:12cv394-LMB/TRJ, Judge Brinkema issued a memorandum opinion on September 5, 2012 in which she reversed the denial of a motion for substantive consolidation concluding, among other things, that "The bankruptcy court afforded heavy weight in its analysis to the state court proceedings; however, its characterization of those proceedings was clearly erroneous." *See* Memorandum Opinion at p. 28. Judge Brinkema stated at page 23 of her memorandum opinion that "A careful review of the state court proceedings reveals that the bankruptcy judge's view of the record is mistaken." The Bankruptcy Court's memorandum opinion here reprises its erroneous characterization of the state court record to support his decision to disqualify Reed Smith.

[4] FOA obtained a judgment against CSI for conversion which included a punitive damage award of $275,000. The judgment was affirmed by the Virginia Supreme Court in *First Owner's Association of Forty-Six Hundred Condominium v. Condominium Services, Inc.*, 281 Va. 561 (2011). The award for punitive damages was affirmed based on a finding that '[t]he evidence presented at trial…provided many examples of how CSI's actions exhibited a conscious disregard of FOA's rights." *Id.* at 579. The Virginia Supreme Court's opinion identified several examples of CSI's wrongful conduct in support of its findings. In its Memorandum Opinion the Bankruptcy Court ignores these findings in an attempt to rewrite history (and the law) by referring to CSI's conversion of FOA's funds as mere "self-help." [Dkt. No. 30 p. 7-8].

excerpt of Reed Smith bills to FOA dated June 22, 2012. The Bankruptcy Court concluded from its review that there was significant interaction between attorneys for Reed Smith and Ms. Sarvadi regarding the trial. In fact, what the invoices actually show is that interaction related to an appeal brief that was filed with Judge Ellis in case number 1:11-cv-1060-TSE-IDD on May 29, 2012. Reed Smith and Ms. Sarvadi and her firm were co-counsel in that matter. With all due respect, the Bankruptcy Court simply gets this wrong.

There are numerous other inaccuracies in the Bankruptcy Court's Memorandum Opinion—just as there were numerous similar factual errors in the matter reversed by Judge Brinkema—but they do not directly bear on the issues before this District Court. They have the effect, however, of placing Reed Smith and the Plaintiffs in a bad light. What should be obvious to any observer is that FOA and Gordon Properties are doing everything in their power to assure that the settlement agreement—referred to as "the train coming down the tracks" by Gordon Properties' counsel at the disqualification hearing—is not derailed by the Plaintiffs actually having competent counsel. These legal issues should not be resolved by tactics such as the disqualification of counsel. Rather, the Plaintiffs are entitled to present their case—in the proper forum—using counsel of their choice, and before the decision of the State Court is rendered moot by the maneuverings in the Bankruptcy Court.

Finally, with respect to the status of the Bankruptcy Court's jurisdiction over this matter and Plaintiffs' motion to remand, both FOA and the Bankruptcy Court appear to consider the question of federal court jurisdiction to be a minor one that can be ignored and that can be addressed at some unscheduled time in the future while substantive decisions are made. This matter was removed from the State Court on December 6, 2012—less than 24 hours before a scheduled injunction hearing in the State Court—by Lindsey Wilson, a member of Gordon

Properties who is not in bankruptcy. The Bankruptcy Court ignored Plaintiffs' motion to remand and denied their request for an expedited hearing on the motion. The Bankruptcy Court has scheduled a "status hearing" on the motion to remand for March 21, 2013.[5] [Dkt. No. 32]. In other words, almost four months after what the Plaintiffs believe was an improper removal, the Bankruptcy Court will finally get around to having a hearing to determine *when to have a hearing* to actually decide whether it had jurisdiction in this matter in the first place. Yet, the Bankruptcy Court has scheduled a hearing on approval of the settlement agreement for March 21, 2013. Ignoring settled law, the Bankruptcy Court has set a schedule that will deprive the State Court of jurisdiction, deprive the Plaintiffs of a remedy and allow the settlement agreement to proceed while the bankruptcy court usurps the State Court jurisdiction to decide the issues set forth in the complaint. The Bankruptcy Court concludes in its Memorandum Opinion that it had the authority—without first deciding jurisdiction—to disqualify Reed Smith, but the Court cites no authority for its conclusion.[6] [Dkt. No. 30, p. 18]. Likewise, FOA makes the same argument and cites no authority for the proposition that a federal court can make decisions in a case before addressing the predicate issue of whether it has jurisdiction, especially when that jurisdiction has been challenged in a removal setting. As argued below, and as argued previously by FOA, this is a controlling issue of law that warrants the Court accepting this appeal.

[5] The status conference order is clear that the motion to remand will not be argued that day.

[6] The Bankruptcy Court cites *Creasy v. Coleman Furniture Corp.*, 763 F.3d 656, 660 (4th Cir. 1985), and suggests that the *Creasy* opinion supports a finding that the State Court Action was properly removed. A close reading of *Creasy* shows that the Bankruptcy Court's interpretation is wrong. *Creasy* interpreted the statutes for removing state actions to the United States District Courts and United States Bankruptcy Courts in effect at that time. In doing so, the *Creasy* court held that a party to a bankruptcy proceeding could remove a state action without obtaining the consent from all of the other defendants in the State Court Action. *Creasy* did not expand the definition of the term "party," as the Bankruptcy Court incorrectly suggests.

ARGUMENT

I. Plaintiffs Satisfy The Requirements For Granting Interlocutory Review Of The Disqualification Order Pursuant To 28 U.S.C. § 158(a)(3) Because It (1) Involves A Controlling Question of Law, (2) As To Which There Is A Substantial Ground For A Difference Of Opinion, And (3) Immediate Appeal Would Materially Advance The Termination Of The Litigation.

A. The Appeal involves multiple controlling questions of law.

Whether the Bankruptcy Court had jurisdiction over the State Court Action is a controlling question of law because if the State Court Action is remanded, then the Disqualification Order must be vacated. The Bankruptcy Court argues that its decision to postpone ruling on Plaintiffs' motion to remand is proper because it had an obligation to first determine if Reed Smith was permitted to represent the Plaintiffs. [Dkt. No. 30, p. 18]. It is not surprising that the Bankruptcy Court failed to cite any legal authority to support its reasoning because it is firmly established that "subject matter jurisdiction must, when questioned, be decided before any other matter." *U.S. v. Wilson*, 699 F.3d 789, 792 (4th Cir. 2012) (emphasis added). The reason "questions of subject matter jurisdiction must be decided first [is] because they concern the court's very power to hear the case." *Owens-Illinois, Inc. v. Meade*, 186 F.3d 435, 442 n. 4 (4th Cir. 1999). Based on these established principles of law, the Bankruptcy Court had an obligation to determine whether it had jurisdiction over the State Court Action before it did anything else.

"[B]ankruptcy courts, like the federal district courts, are courts of limited jurisdiction." *In re Kirkland*, 600 F.3d 310, 315 (4th Cir. 2010). As such, the Bankruptcy Court is only permitted to only rule upon matters that come within its jurisdiction. Because the State Court Action was improperly removed, the Bankruptcy Court only had one decision to make—whether

it had jurisdiction to hear the State Court Action (and the disqualification motion). Unfounded concerns about an alleged conflict of interest do not excuse a court for exceeding its jurisdiction.

This is especially true in this circuit where district courts are instructed to raise jurisdictional issues *sua sponte* when parties fail to raise its own their own. *Ellenburg v. Spartan Motors Chassis, Inc.*, 519 F.3d 192, 196 (4th Cir. 2008) (citations omitted). "[B]ecause the lack of subject matter jurisdiction may be noticed by the district court *sua sponte*.…the court may enter a remand order based on a lack of subject matter jurisdiction *sua sponte*." *Id.* As such, if the District Court determines that the State Court Action was improperly removed, then it should enter an order remanding it to the appropriate State Court. A decision to this effect will end this Adversary Proceeding and will return it to the State Court where it belongs. Accordingly, there can be no doubt that the Bankruptcy Court's lack of jurisdiction is a controlling issue of law.

Similarly, the Bankruptcy Court's decision to grant the Motion to Disqualify presents a controlling question of law because it is based on an expanded and improper view of the application of Rule 1:9 of the Rules of Professional Conduct, which only prevent Reed Smith from representing Plaintiffs in this matter if the State Court Action involves issues that are substantially related to its former representation of FOA. "Substantially related" has been interpreted to mean "identical" or "essentially the same." [Dkt. No. 11, pp. 10-13]. "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 State Court Action seeks to determine whether interested directors may vote on certain matters that occurred after Reed Smith was terminated as counsel for FOA. This discrete issue is not related to any of the issues in which Reed Smith had previously represented FOA.

The Disqualification Order expands the interpretation of "substantially related" matters to include any matter against a former client that might somehow negatively impact the former client. In doing so, the Bankruptcy Court misapplies the test for disqualification by focusing solely on the possibility that Plaintiffs will benefit from confidential information that Reed Smith might have obtained during its prior representation of FOA.[7] This has the effect of creating new law and a relaxed standard for disqualification that would disqualify any law firm or attorney from ever representing a party against a former client. As such, a ruling by the District Court is necessary to prevent the Bankruptcy Court's opinion from being misused to gain an unfair tactical advantage to deny other parties their choice of counsel.

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

As explained above, it is firmly established that 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). Thus, the Bankruptcy Court lacked authority to issue any orders except to order that the State Court Action be remanded. The Bankruptcy Court's decision to ignore this settled principle of law demonstrates a difference of opinion on this issue.

Moreover, the Disqualification Order is based on a strained construction of the law. Here, the Bankruptcy Court's ruling ignores the "substantial relationship test" and instead seeks

[7] Any concern that Plaintiffs may benefit from FOA's confidential information is unfounded. As explained above, all of the information contained in the State Court Action was readily obtained from the meeting minutes that FOA distributes to the unit owners, information contained in pleadings filed by Gordon Properties and CSI in the Bankruptcy Court, and the various factual findings that are contained in publicly-available judicial opinions from the United States Court of Appeals for the Fourth Circuit, the United States District Court for the Eastern District of Virginia, the United States Bankruptcy Court for the Eastern District of Virginia, and the Supreme Court of Virginia. *In re Gordon Properties, LLC*, 478 B.R. 750 (E.D. Va. 2012); *First Owners' Ass'n of Forty Six Hundred v. Gordon Properties, LLC*, 470 B.R. 364 (E.D. Va. 2012); *In re Gordon Properties, LLC*, 460 B.R. 681 (E.D. Va. 2011); *Condominium Services v. First Owners' Ass'n*, 281 Va. 561 (2011). As such, these facts are matters of public record and cannot serve as a basis for disqualification.

to create a new test that would disqualify an attorney from ever being adverse to any former client. *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.

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. Likewise, a reversal of the Disqualification Order will allow counsel for the Plaintiffs to re-engage and to move the matter to a conclusion. Alternatively, if the District Court denies Plaintiffs' motion to file an appeal, Plaintiffs will be left without counsel and there will be no one to prevent Gordon Properties and CSI from causing further harm to FOA's unit owners.

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

Alternatively, the Disqualification Order should be heard on appeal because of the "exceptional circumstances" that exist in this case.[8] *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). (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

[8] FOA argues that the decision in *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424 (1985), prevents Plaintiffs from appealing the Disqualification Order under the collateral order doctrine. However, *Koller* did not hold that "prejudice" could not serve as a basis "to reverse a judgment following erroneous disqualification of counsel in either criminal or civil cases." *Id*. at 438.

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. The Bankruptcy Court's refusal to hear Plaintiffs' motion to remand prior to holding its hearing to approve the Settlement Agreement is a clear indication that it is prepared to deny Plaintiffs' their opportunity to have the issues raised in the State Court Action decided until after the Settlement Agreement is approved. This will leave the Plaintiffs without representation making it virtually impossible for Plaintiffs 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 4th day of March, 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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