

STATE OF NORTH CAROLINA  
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
08 CVS 18768

THE COTTAGES OF STONEHENGE )  
CONDOMINIUM HOMEOWNERS )  
ASSOCIATION, INC., DAVID MOKRAUER )  
KAREN C. GEORGE and FORREST HARRELL, )

Plaintiffs, )

v. )

DOMINION MID-ATLANTIC )  
PROPERTIES II, LLC, f/k/a )  
DANIEL MID-ATLANTIC PROPERTIES II, LLC )  
ALEX B. ANDREWS, BRIAN PARKER, )  
KATHERINE S. ADAMS, )  
DONNY M. GRUNDHOEFFER )

Defendants. )

BRIEF IN SUPPORT OF  
MOTION TO DISQUALIFY  
PLAINTIFFS' COUNSEL

Defendants, by and through undersigned counsel, move the Court, pursuant to BCR 15, submits this Brief in Support of Defendants' Motion to Disqualify Counsel in which they show the Court as follows:

NATURE OF THE CASE

This is a lawsuit filed by a condominium homeowners association and its current member-controlled Board of Directors against the original Declarant of the condominium and the former Declarant-controlled Board members claiming that these Defendants failed to properly and adequately set reserves for the maintenance, repair, and replacement of the association's common areas. This matter is currently before the Court upon motion of the Defendants to disqualify Plaintiffs' counsel from further representation in this case on the basis of conflict of interest.

## FACTS

The Cottages of Stonehenge is a 188-unit condominium complex located in Raleigh, Wake County, North Carolina. This property was originally constructed as an apartment complex, but then converted into a condominium in July 2003. [Complaint, at ¶ 16]. The original Declarant for the condominium was Dominion Mid-Atlantic Properties II, LLC f/k/a Daniel Mid-Atlantic Properties II, LLC (Dominion). In conjunction with the formation of the condominium, Dominion also incorporated The Cottages of Stonehenge Condominium Homeowners Association, Inc. (Plaintiff or the Association), a non-profit corporation that would administer the condominium.

Consistent with Declaration of Condominium, Dominion exercised the right to appoint the initial Board of Directors of the Association to manage the condominium. [Parker Affidavit, at ¶ 4]. In August 2006, the Board of Directors for the Association was comprised of James T. (Tim) Lake, Katherine Adams, Bill Herpich, Catherine Haskins, and Brian Parker. At that time, Tim Lake, Defendant Adams, and Defendant Parker were employees of Dominion. [Parker Affidavit, at ¶ 5]. Herpich and Haskins were Unit owner members of the Board.

On or about August 1, 2006, Tim Lake contacted the firm of Jordan Price Wall Gray Jones & Carlton, PLLC for legal advice regarding the Association's responsibility for certain maintenance issues, specifically the Association's responsibility (if any) for damage inside a condominium Unit due to water intrusion from common areas maintained by the Association. At that time, Mr. Lake was requesting this legal advice on behalf of both the Association and Dominion, which still controlled the Association as its Declarant. [Parker Affidavit, at ¶ 6]. The phone conversation from Mr. Lake was followed up with an August 3, 2006, letter that formally requested legal advice on these issues. [Parker Affidavit, at ¶ 7 and

Exhibit A]. On information and belief, there was at least one follow up communication between Mr. Lake and the Jordan Price firm. [Parker Affidavit, at ¶ 8].

On September 5, 2006, Mr. Lake received an opinion letter from Brian Edlin of the Jordan Price firm which set forth his legal advice and opinions as to “the maintenance responsibilities between Unit Owners and the Association.” [Parker Affidavit, at ¶ 9 & Exhibit B]. Based on Mr. Edlin’s legal advice, the Association Board ultimately voted to deny a request by the owner of Unit 7751 (Kim Coman) for reimbursement for the cost of cleaning interior damaged caused by flooding from the exterior of the unit. [Parker Affidavit, at ¶ 10 & Exhibit C].

At the annual meeting of the Association in November 2007, the Unit Owners elected a Unit-owner controlled Board of Directors. [Parker Affidavit, at ¶ 11]. The next communication that Dominion received from Mr. Edlin or the Jordan Price firm was an October 13, 2008, letter which threatened to file suit against Dominion and the original Board members of the Association based on alleged breach of fiduciary duty in adequately setting reserves for common area expenses and maintenance. [Parker Affidavit, at ¶ 12 & Exhibit D]. This lawsuit followed shortly thereafter on or about November 18, 2008.

The claims set forth in Plaintiffs’ Complaint allege, in part, that Dominion and the original Board members failed to properly and adequately set reserves for the common area expenses and maintenance obligations of the Association. Additionally, the Complaint alleges that the Defendants committed fraud or an unfair/deceptive trade practice by virtue of intentionally setting the assessments low for purposes of maximizing their own profit by increasing and expediting sales of the condominium units. [Complaint, at ¶s 104-128]. Furthermore, the Complaint alleges that in serving as the original management of the

Association, the Defendants breached the business judgment rule and failed to act in the best interests of the Association. [Complaint, at ¶ 100-03]. Based on Plaintiffs' counsel's prior representation of Dominion, Defendants believe they should be disqualified from serving as Plaintiffs' counsel in this matter.

### ARGUMENT

Plaintiffs' current counsel previously represented Dominion in conjunction with the legal advice sought by Dominion and the Association back in August-September 2006.<sup>1</sup> Plaintiffs' counsel is now adverse to Dominion and the former Association Board members (all of whom were employees of Dominion) in this action. While the North Carolina Rules of Professional Conduct do not automatically preclude a lawyer from suing a former client, they do provide protection to the former client so that information shared with the attorney cannot later be used against them to their detriment.

Rule 1.6 provides that, except in limited circumstances, a lawyer shall not reveal information acquired during the professional relationship with a client unless the client gives informed consent. The duty of confidentiality continues even after the client-lawyer relationship has terminated. See Comment 19 to Rule 1.6. Specifically, Rule 1.9 provides that:

- (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

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<sup>1</sup> Any argument by Plaintiffs' counsel that they did not represent Dominion in the prior matter is simply without merit. The contact from the Association in August 2006 was by Tim Lake, then an employee of Dominion and President of the Association, in his dual role on behalf of Dominion (as the Declarant) and the Association's Board of Directors. Indeed, the correspondence from Mr. Lake was on letterhead for "Cottages of Stonehenge Condominium Homeowners Association, Inc. c/o Dominion Realty Partners, LLC" and was copied to all of the Board members (who were employees of Dominion). [Parker Affidavit, at ¶s 6-7 & Exhibit A].

- (b) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter: (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known.

Matters are considered to be “substantially related” for purposes of Rule 1.9 if there “is a substantial risk that information as would normally have been obtained in the prior representation would materially advance the client’s position in the subsequent matter.” See Comment 3 to Rule 1.9. Defendants contend that Plaintiffs’ counsel should be disqualified from any further representation of the Plaintiffs in this matter for at least three reasons.

First, the matters in question are arguably “substantially related” within the meaning of Rule 1.9. The prior “matter” involved Dominion’s request for legal advice regarding the responsibility of the Association for repair and maintenance of Units as compared to common areas of the condominium. The current matter involves issues surrounding whether Dominion properly and adequately set reserves for the repair and maintenance of the common areas of the Association. In both instances, there are issues concerning what is a common area, what is required to maintain the same, and who should bear that cost (the Association or the Unit owners).

Second, even if the matters are not considered to be substantially related, there is a substantial risk that information obtained by Plaintiffs’ counsel in the prior representation of Dominion could be used to materially advance Plaintiffs’ position and to Dominion’s detriment in the instant case. That is true whether the “information” consists of specific facts shared by Dominion with Plaintiffs’ counsel in 2006 or the perceived lack of sophistication of Dominion on matters concerning a condominium homeowners’ association’s responsibility and obligations with regard to common areas. Plaintiffs’ counsel will likely argue that any information obtained

from Dominion back in 2006 – specifically, reviewing the Declaration of Condominium, Articles of Incorporation of the Association, etc. -- was “generally known” information within the meaning of Rule 1.9(c)(1). Dominion’s level of sophistication in managing a condominium, as the perception that Plaintiffs’ counsel may have garnered from his prior representation, however, is certainly not generally known. The Affidavit of Defendant Brian Parker indicates that Mr. Parker and Dominion are very concerned about this risk of information being used to their disadvantage in this litigation. [See Parker Affidavit, at ¶s 14-15]. This Court has previously recognized that “the goal of maintaining public confidence in our system of justice demands that courts prevent the appearance of impropriety and thus resolve any and all doubts in favor of disqualification. In prevent the appearance of impropriety, the client’s perception of events is of paramount importance and overshadows the details of his attorney’s conduct.” Chemcraft Holdings Corp. v. Shayban, 2006 NCBC 13, at ¶ 34 (N.C. Super. 2006).

Third, there is some potential for the fact that Plaintiffs’ counsel may be a witness at any trial of this matter to the substance of his communications with Dominion back in 2006. One of the primary issues in this case is whether the Defendants acted in good faith and complied with the business judgment rule in making decisions about the management of the Association. As this Court is well aware, in discharging duties as director of non-profit corporation, the individual defendants were entitled to rely on opinion provided to them by legal counsel. See G.S. § 55A-8-30(b). Consequently, while Plaintiffs are attempting to prove that the Defendants committed constructive fraud or an unfair/deceptive trade practice with regard to their management of the Association, the Defendants will counter with evidence regarding their good faith and the reasonableness of their conduct, including the fact that they previously sought legal advice on the issue of the Association’s responsibility with regard to common areas and

unit areas. Whether or not Plaintiffs' counsel becomes a material witness, there is the realistic possibility that the jury will hear evidence about counsel's prior representation of Dominion. See CPR 147 (An attorney cannot defend an action brought by a former client when confidential information obtained during the prior representation would be relevant to the defense of the current action).

Defendants' Motion to Disqualify is made for purposes of protecting the interests of the Defendants and is certainly not intended to demean or be critical of Plaintiffs' counsel. Indeed, this Court has recognized that "the conduct of an attorney need not constitute a violation of the Rules of Professional Conduct, and certainly need not rise to the level of professional negligence, in order to warrant disqualification." Chemcraft, supra, 2006 NCBC at ¶ 34. Nonetheless, Defendants believe that the Court should exercise this discretion to disqualify Plaintiffs' counsel based on all the circumstances. Robinson & Lawing, LLP v. Sams, 161 N.C.App. 338, 339, 587 S.E.2d 923, 925 (2003) (decisions whether to disqualify counsel are properly viewed as being within the discretion of the trial court).

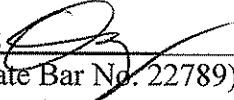
#### CONCLUSION

Rule 1.9 of the North Carolina Rules of Professional Conduct is designed to protect a party from having information obtained by the opposing attorney during prior representation of the party used against them to their detriment. The facts of Plaintiffs' counsel's prior representation of Dominion, coupled with the allegations of Plaintiffs' Complaint, make that a substantial risk in this litigation. Plaintiffs' counsel, therefore, should be disqualified and prohibited from any further representation of the Plaintiffs in this matter.

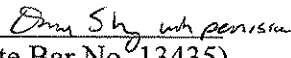
I further certify that this Brief meets the requirements in BCR 15.8 based upon a word count by the word processing software used to prepare this Brief.

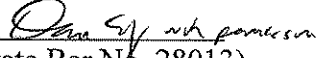
This the 28<sup>th</sup> day of January, 2009.

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**CERTIFICATE OF SERVICE**

The undersigned attorney for Defendant Dominion hereby certifies that the foregoing Brief was on this day was served on the attorneys for all other parties in this action by depositing a copy thereof in the United States mail, postage prepaid, and addressed as follows:

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This the 28<sup>th</sup> day of January, 2009.

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