# EXHIBIT E

Securities and Exchange Commission v. Nadel et al Doc. 766 Att. 5

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# UNITED STATES DISTRICT COURT
## MIDDLE DISTRICT OF FLORIDA
### ORLANDO DIVISION

**SECURITIES AND EXCHANGE COMMISSION,**

**Plaintiff,**

**-vs-** **Case No. 6:06-cv-183-Orl-28KRS**

**PATRICK KIRKLAND, TROPICAL VILLAGE, INC., CLARITY DEVELOPMENT CORPORATION, and SENIOR ADULT LIVING CORPORATION,**

**Defendants,**

**SUNSET BAY CLUB, INC., SUMMERHILL VENTURES, INC., PELICAN BAY CLUB, INC., and ISLEWORTH ADULT COMMUNITY, INC.,**

**Relief Defendants.**

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## ORDER TO SHOW CAUSE

This cause came on for consideration by the Court after review of the Receiver's Notice of Retention of Special Counsel. Doc. No. 386. In that document, the Receiver, Judith M. Mercier, who is a partner with the law firm of Holland & Knight, revealed that Holland & Knight is the sole legal counsel in the United States for Banco Popular North America ("BPNA"), an intervenor in this case. *Id.* at 1. The Court must consider whether it is in the best interests of the receivership estate to replace Mercier and appoint another Receiver under these circumstances.

## I. RELEVANT FACTUAL ALLEGATIONS.

BPNA, an intervenor in this case, provided the construction financing for a senior residential housing project being developed by relief defendant Pelican Bay Club, Inc. (the "Project"). BPNA holds a first mortgage and senior security interest on the Project in the principal amount of $10,650,000.00.

At the time the Receiver was appointed, the Project was not yet complete. BPNA's loan was scheduled to mature on January 7, 2007. The Receiver, BPNA and representatives of Watermark Construction, L.P. ("Watermark"), the general contractor for the Project, entered into discussions about the viability and cost effectiveness of completing the Project. BPNA alleges that it agreed to honor the construction loan if the Receiver would endeavor to complete the Project. Watermark, who also intervened in this case, alleges that it agreed to continue construction in order to complete the Project based on representations that its monthly payment applications for work performed would be paid.[1] The Receiver, in turn, allegedly agreed to make debt service payments to BPNA and conclude the construction of the Project. This agreement was memorialized in a letter dated January 29, 2007.[2]

BPNA further alleges that the Receiver breached the agreement to make debt service payments and to finish the Project. Watermark alleges that neither the Receiver nor BPNA paid its April and May 2007 payment applications. As a result, both Watermark and at least one subcontractor have filed construction liens on the Project. Doc. No. 300 ¶¶ 10, 11; doc. No. 384 at 6 n. 4.

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[1] Watermark alleges that BPNA and the Receiver made separate arrangements for payment of Watermark's work. Doc. No. 300 ¶ 7.

[2] The record does not reflect who represented BPNA in its negotiations with the Receiver. Greenberg Traurig, P.A., represents BPNA as the intervenor in this case.

BPNA now opposes the Receiver's request to abandon the Project and suggests that, if that occurred, it would name the Receiver, Pelican Bay Club, Inc., or both in a foreclosure action. Doc. No. 380 ¶ 3. It also opposes an award of attorneys' fees to the Receiver and her counsel until such time as the Receiver satisfies her obligations to creditors of the receivership estate, including BPNA. Doc. No. 379.

## II. CONFLICT OF INTEREST ANALYSIS.

The RulesRe gulatingt heFl oridaBa r( the" Rules")g overnt hep rofessionalc onduct of all memberso ft he bar of this Court. Local Rule 2.04(d). Rule 4-1.7 of the Rules provides that "a lawyer shall not represent a client if: (1) the representation of 1 client willb e directly adverse to another client" except in certain circumstances provided that "each affectedc lientg ivesi nformed consent" waiving the conflict. Rule 4-1.10 of the Rules imputes this disqualification to all other lawyers associated in a law firm with the disqualified lawyer.

The Receiver concedest hath er interests as the representative of the receivership entities are adverse to the interests of BPNA with respect to the dispute about the Project. Because both the Receiver and BPNA are clients of Holland & Knight, Holland & Knight cannot represent the Receiver in this dispute unless a waiver of the conflict were obtained, assuming the conflict is waivable. It is clear from BPNA's papers that it has notw aivedt hec onflict. Because the Mercier is a partner in Holland & Knight, she would also be disqualified from acting as the lawyer for the receivership estate at least in connection with the dispute regarding the Project.

Mercier neverthelessc ontendsth ats hed oesn oth ave a conflict of interest precluding her from actingas t heRecei veri nt hedi sputeb ecausesh e" isa n eutralagent o ft heCo urt,m aking business

judgments concerning the Receivership Estate rather than representing the interests of any particular party." Doc. No. 386 n.1. She offers no legal support for this position. While I find no controlling law on this issue, I note that other lawyers and courts disagree with the Receiver's conclusion.

For example, in *In re Blinder, Robinson & Co.*, 131 B.R. 872 (D. Colo. 1991), the court considered whether a trustee for Blinder, Robinson & Co. ("Blinder"), who was appointed pursuant to the Securities Investor Protection Act ("SIPA"), 15 U.S.C. § 78aaa-78lll, should be removed because he was not "disinterested" as that term is defined under SIPA. The facts showed the trustee was a partner in a law firm that represented a client who was suing Blinder in an unrelated case. After reviewing a number of cases, the court concluded that "courts take a strict view of the disinterestedness standard under SIPA. Thus . . . even the appearance of impropriety may merit disqualification." *Id.* at 878. The court found that the trustee and his law firm failed the disinterestedness standard both because the pending litigation against Blinder was not minor and because neither the trustee nor the law firm were forthright in disclosing the potential problem promptly when it was identified. *Id.* at 880-81.

In *In re Southern Diversified Properties, Inc.*, 110 B.R. 992 (N.D. Ga. 1990), a partner in a law firm was solicited to serve as a Chapter 11 trustee in a bankruptcy proceeding. After beginning work in connection with the bankruptcy proceeding, the lawyer learned that one of his partners previously represented two entities that were creditors of the bankruptcy estate. Accordingly, the lawyer declined to act as trustee due to conflict of interest. The bankruptcy court observed that the lawyer "acted properly by declining to serve as trustee once he concluded that a conflict of interest existed and he was not disinterested." *Id.*

Similarly, in *In re Paolino*, 80 B.R. 341 (E.D. Pa. 1987), Howard Stern, Esq., who was serving as a trustee in bankruptcy, became affiliated with a law firm that represented defendants in a case filed by the debtors in bankruptcy before the bankruptcy petition was filed. *Id.* at 343. When objections were raised to his continuation as the trustee, Stern withdrew. He later sought trustee fees for the time he had served as the trustee. The court concluded that Stern was not entitled to trustee fees after the date he joined the law firm because, "upon becoming affiliated with [the law firm], Mr. Stern was no longer a disinterested person eligible to serve as trustee. When one member of a firm is disqualified for interest, all members of that firm must be similarly disqualified." *Id.* at 345. The court specifically found that there was not a "lower standard of eligibility to serve as trustee than as counsel to the trustee." *Id.*

In the present case, BPNA, a client of Holland & Knight, is in a dispute with and threatening to file a complaint against the Receiver, a partner of Holland & Knight. The imputed disqualification rules preclude Mercier from acting as an attorney for the receivership estate, which she has done from time to time while acting as a Receiver. There is no showing that Holland & Knight has terminated its representation of BPNA or that Mercier is no longer affiliated with Holland & Knight. Finally, Mercier has repeatedly asked the Court to disburse funds to her and Holland & Knight before distributing funds to the victims of the underlying fraud and other professionals. *See* Doc. No. 169 at 7 ("Although this Application seeks authorization to compensate the Receiver and Holland & Knight, there are insufficient funds at the present time in the receivership accounts to pay such fees. . . . Accordingly, upon approval by the Court . . . , the Receiver intends to issue Receiver's Certificates to Holland & Knight LLP in evidence of the amounts owing which it is entitled from the accounts of the

estate."); Doc. No. 391 at 2 n.1 ("The Receiver seeks this partial distribution for her fees and her counsel fees only at this point, because they are the ones with the vast majority of hours invested in this matter and have advanced considerable out-of-pocket costs in order to benefit the Receivership."). Accordingly, I am persuaded that Mercier is not a disinterested person with respect to the present receivership.

Accordingly, it is **ORDERED** that, on or before February 8, 2008, the Securities and Exchange Commission shall show cause why the Court should not appoint it to administer the receivership estate in place of the current receiver, on an interim or permanent basis, or take other action to replace the current receiver in light of conflicts discussed herein. Should the Securities and Exchange Commission propose that the Court appoint a substitute receiver, it shall provide the Court with at least three proposed receivers, each of whom must have previously served with distinction as a receiver or bankruptcy trustee in a case of similar or greater complexity than the present case.

**DONE** and **ORDERED** in Orlando, Florida on January 31, 2008.

Karla R. Spaulding
KARLA R. SPAULDING
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Parties