Case Nos. 82467 and 82552

IN THE SUPREME COURT OF NEVADA

UNITE HERE HEALTH, a multi-employer health and welfare trust, as defined in ERISA Section 3(37); and NEVADA HEALTH SOLUTIONS, LLC, a Nevada limited liability company,

Appellants,

vs.

STATE OF NEVADA EX REL. COMMISSIONER OF INSURANCE, BARBARA D. RICHARDSON, IN HER OFFICIAL CAPACITY AS STATUTORY RECEIVER FOR DELINQUENT DOMESTIC INSURER, NEVADA HEALTH CO-OP; and GREENBERG TRAURIG, LLP,

Respondents.

UNITE HERE HEALTH, a multi-employer health and welfare trust, as defined in ERISA Section 3(37); and NEVADA HEALTH SOLUTIONS, LLC, a Nevada limited liability company,

Petitioners,

vs.

EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, THE HONORABLE TARA CLARK NEWBERRY, DISTRICT COURT JUDGE,

Respondent,

- and -

STATE OF NEVADA EX REL. COMMISSIONER OF INSURANCE, BARBARA D. RICHARDSON, IN HER OFFICIAL CAPACITY AS

STATUTORY RECEIVER FOR DELINQUENT DOMESTIC INSURER, NEVADA HEALTH CO-OP; and GREENBERG TRAURIG, LLP,

Real Parties in Interest.

District Court Case No. A-15-725244-C, Department XXI

APPELLANTS/PETITIONERS' REPLY IN SUPPORT OF (1) PETITION FOR EXTRAORDINARY WRIT RELIEF (NO. 82552), AND (2) APPELLANTS' OPENING BRIEF (NO. 82467)

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REPLY IN SUPPORT OF (1) PETITION FOR EXTRAORDINARY WRIT RELIEF (NO. 82552), AND (2) APPELLANTS' OPENING BRIEF (NO. 82467)

I. INTRODUCTION

Greenberg contends that UHH's Motion to Disqualify "was a baseless attempt by litigation adversaries to use disqualification to cause delay and obtain a strategic advantage." (Answer at 34.) However, this is not the first time Greenberg has faced allegations that it breached its fiduciary obligations for the financial benefit of its clients and its own bottom line. In fact, Greenberg recently agreed to settle an action for the breach of its fiduciary duties for $65 million to resolve claims that it facilitated and materially assisted in a massive ponzi scheme carried out by one of its clients. (1R.A.1[1]; 1R.A.3 at 3.) Thus, Greenberg's failure to disclose (and active concealment of) its conflicts of interest in the delinquency proceeding and the asset recovery actions, while billing the Receivership Estate over $6 million in fees and costs, appears to be par for the course.

The crux of the Receiver's and Greenberg's Combined Answering Brief and Answer to Petition ("Answer") is ***ipse dixit*** — essentially, "because we say so." The Receiver and Greenberg (jointly, "GT") contend that Greenberg had no

[1] For citations to the Appellants' Reply Appendix ("R.A."), the number preceding "R.A." refers to the volume of the Appendix, and the number succeeding "R.A." refers to the tab number of the exhibit.

conflicts to disclose to the Receivership Court because: (i) the scope of its representation is limited and does not include the administration of any of the creditors' claims or the evaluation or pursuit of any claims against Xerox, and (ii) the Receiver also retained conflicts counsel. (Answer at 6-7.) However, the only evidence GT provided in support of these *ipse dixit* contentions are self-serving declarations that are contradicted by undisputed evidence.

GT cannot dispute, in good faith, that counsel for a neutral party, like a receiver, has a duty to disclose all conflicts of interest at the time of appointment. GT has failed to cite to any legal authorities to the contrary. In fact, the relevant legal authorities hold that a limited-scope engagement and retention of conflicts counsel are only acceptable to cure a conflict when they are publicly disclosed at the time of counsel's appointment and the court determines that no conflict of interest exists. Because GT failed to make the required disclosures in this action, deprived interested parties (e.g., creditors such as UHH) of the right to object, and prevented the Receivership Court from conducting the necessary evaluation of its conflicts of interest and proposed cures, Greenberg should be disqualified as counsel for the Receiver and the Order Denying Disqualification should be reversed.

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II. ARGUMENT

A. <u>This Court Has Jurisdiction Over UHH's Appeal</u>.

GT claims that this Court has no jurisdiction over UHH's Appeal because a final judgment has not yet been entered in the delinquency proceeding. (Answer at 21.) However, the right to an interlocutory appeal may also be granted by statute. *See, e.g.*, *Taylor Constr. Co. v. Hilton Hotels Corp.*, 100 Nev. 207, 209, 678 P.2d 1152, 1153 (1984); *see also Kosor v. Olympia Cos.*, 136 Nev. Adv. Op. 83, 478 P.3d 390, 392 (2020) (appealing pursuant to NRS 41.670(4)); *Tallman v. Eighth Jud. Dist. Ct. ex rel. Cnty. of Clark*, 131 Nev. 713, 718, 359 P.3d 113, 117 (2015) (appealing pursuant to NRS 38.247(a)(1)).

Here, NRS 696B.190(5) provides UHH with the right to appeal from the Order Denying Disqualification. (*See* Opening Br. at xi-xiii.) GT asserts that NRS 696B.190(5) only applies to final judgments, (Answer at 21-25), but their proffered interpretation would render NRS 696B.190(5) nugatory. If the phrase "having the character of a final order as to the particular portion of the proceedings embraced therein" means the same as "final judgment," then NRS 696B.190(5) would provide for the same right to appeal as NRAP 3A(b) and NRCP 54. Thus, GT's contention, that the Nevada Legislature specifically enacted a statute bestowing the right to an appeal that is duplicative of a right already provided by these Rules — thereby rendering the statute irrelevant and mere surplusage — must be rejected.

Hefetz v. Beavor, 133 Nev. 323, 326, 397 P.3d 472, 475 (2017) ("When construing statutes and rules together, this court will, if possible, interpret a rule or statute in harmony with other rules and statutes . . . such that no part of the statute is rendered nugatory or turned to mere surplusage.") (internal quotation omitted).[2]

As GT correctly acknowledges, the Order Denying Disqualification fully resolved a ***tangential*** issue. (Answer at 21.) Thus, it is severable from the claims and issues in the delinquency proceeding and has the character of a final order as to the portion of the delinquency proceeding that concerned the issue of Greenberg's disqualification.

In a case upon which GT relies, the Delaware Supreme Court interpreted a statute similar to NRS 696B.190(5) and recognized that "[t]he case law from other jurisdictions addressing what constitutes a final order under statutes [like these] is limited and somewhat conflicting." *Protective Life Ins. Co. v. Navarro*, No. 217, 2020 WL 5405865 at *3 (Del. July 27, 2020). However, some courts have found the United States Supreme Court's recent interpretation of a similar ***bankruptcy*** statute to be instructive. *Id*. at **2-3. In *Ritzen Group, Inc. v. Jackson Masonry, LLC*, __ U.S. ___, 140 S. Ct. 582 (2020), the United States Supreme Court

[2] The other legal authorities upon which GT relies are inapposite because they concern orders addressing ongoing issues to be further addressed in the future. (Answer at 22-23 (citing *Protective Life Ins. Co.*, 2020 WL 5405865 at *1, *3, and *Moody v. State ex rel. Payne*, 351 So. 2d 547, 548, 550-51 (Ala. 1977)).)

examined 28 U.S.C. § 158(a), which provides an interlocutory right to appeal from orders which "'finally dispose of discrete disputes within the larger bankruptcy case.'" 140 S. Ct. at 587 (quoting *Bullard v. Blue Hills Bank*, 575 U.S. 496, 501 (2015)). Under this statute, the Court determined that orders resolving motions relating to the termination or modification of a bankruptcy stay are immediately appealable because they are discrete, independent orders that "do[] not occur as part of the adversary claims-adjudication process." *Id.* at 589. Thus, an order which fully and finally resolves a discrete, independent, tangential issue like the disqualification of Greenberg due to an improper and undisclosed conflict of interest, is also immediately appealable under NRS 696B.190(5). Because this is the only interpretation of the statute which does not render NRS 696B.190(5) nugatory or otherwise produces absurd results, this Court has jurisdiction over this appeal. *See In re Enron Corp.*, No. 02 Civ. 5638 (BSJ), 2003 U.S. Dist. LEXIS 1442 at **6-9 (S.D.N.Y. Feb. 3, 2003) (holding that orders resolving motions to disqualify counsel are final and appealable in bankruptcy proceedings, as they are orders which "finally dispose of discrete disputes within the larger case").

B. <u>This Court Can Also Exercise Its Discretion to Entertain UHH's Petition</u>.

1. <u>Writ Relief Is Appropriate for Orders Denying Disqualification</u>.

GT asserts that while this Court can review petitions for writs of mandamus for orders granting motions to disqualify, it is "less clear" that orders denying

motions to disqualify are reviewable. (Answer at 31-32.) However, this Court has never expressly limited writ relief to orders granting disqualification. In fact, this Court has repeatedly stated that writ relief "is the appropriate vehicle for challenging attorney disqualification ***rulings***" — suggesting that all orders granting or denying attorney disqualification are reviewable by petition for writ relief. *See, e.g., State v. Eighth Jud. Dist. Ct. ex rel. Cnty. of Clark*, 130 Nev. 158, 161, 321 P.3d 882, 884 (2014).

GT also misrepresents that there are no published cases demonstrating that this Court has entertained a petition for writ relief from an order denying a motion to disqualify. (Answer at 31-32). This Court has actually entertained several such petitions. *See, e.g., New Horizon Kids Quest III, Inc. v. Eighth Jud. Dist. Ct. ex rel. Cnty. of Clark*, 133 Nev. 86, 88, 392 P.3d 166, 168 (2017); *Merits Incentives, LLC v. Eighth Jud. Dist. Ct. ex rel. Cnty. of Clark*, 127 Nev. 689, 691, 262 P.3d 720, 721 (2011).

Finally, GT contends that this Court recently "determined that its intervention was not appropriate where the lower court denied disqualification." (Answer at 32.) However, GT lacks any support for this assertion. In both *Barnhart v. Eighth Jud. Dist. Ct. ex rel. Cnty. of Clark*, No. 82619, 2021 WL 1116286 (Nev. Mar. 23, 2021) (unpublished disposition), and *JMB Capital Partners Master Fund, L.P. v. Eighth Jud. Dist. Ct. ex rel. Cnty. of Clark*, No.

78008, 2019 WL 1324853 (Nev. Mar. 21, 2019) (unpublished disposition), the petitions were denied because the petitioners failed to demonstrate a manifest abuse of discretion — not because writ relief was improper for an order denying disqualification. *Barnhart*, 2021 WL 1116286 at *1; *JMB Capital Partners*, 2019 WL 1324853 at *1-2.

2. Writ Relief Is Warranted Because the Receivership Court Manifestly Abused Its Discretion.

GT contends that UHH cannot demonstrate that the Receivership Court manifestly abused its discretion because no Nevada law exists to govern the issues presented. (Answer at 28-29.) However, a court can abuse its discretion by ignoring persuasive authority from other jurisdictions on an issue of first impression in Nevada. *Merits Incentives, LLC*, 127 Nev. at 691, 695, 698-99, 262 P.3d at 721, 724, 726-27 (involving a petition from the denial of a motion to disqualify, where the ground for disqualification was an issue of first impression, this Court ultimately adopted persuasive authority from a case in Texas concerning a similar issue, and the new authority was applied to the facts of the case to determine if the district court abused its discretion in denying the motion to disqualify).

When addressing an issue of first impression, this Court (and the district courts) routinely turn to the laws in other jurisdictions for guidance. *See, e.g., Logan v. Abe*, 131 Nev. 260, 265, 350 P.3d 1139, 1142 (2015); *Whitemaine v.*

Aniskovich, 124 Nev. 302, 311, 183 P.3d 137, 143 (2008); *Rubio v. State*, 124 Nev. 1032, 1041, 194 P.3d 1224, 1230 (2008). Here, the Receivership Court manifestly abused its discretion by completely and unreasonably ignoring the overwhelming authority from other jurisdictions requiring counsel for receivers to disclose all conflicts of interest at the time of their appointment and disqualifying them if they failed to do so. UHH presented the Receivership Court with numerous cases involving counsel for receivers, trustees, and/or debtors who failed to disclose to the court conflicts of interest affecting the receivership or bankruptcy proceedings and who were ultimately disqualified to preserve the impartiality of the proceedings. (7A.A.37 at 1382:18-1385:17; 12A.A.48 at 2118:19-2121:13.) Despite the fact that GT failed to present any contrary legal authorities, or even demonstrate a split of decisions on the issue, the Receivership Court chose to ignore this persuasive authority. (13A.A.52.) Considering the uncontroverted persuasive authority, it was a manifest abuse of discretion for the Receivership Court to deny the Motion to Disqualify.

3. <u>UHH Will Suffer Irreparable Harm if Writ Relief Is Not Granted</u>.

Greenberg falsely asserts that UHH failed to explain how it will suffer irreparable harm if writ relief is denied. (Answer at 30.) However, UHH's Petition expressly describes the harm it will suffer if this Court chooses not to entertain the Petition. (Pet. at 8:11-9:11.) In addition to this anticipated harm,

UHH has suffered additional irreparable harm since the filing of the Petition as a result of Greenberg's continued participation in the Milliman Lawsuit. Because Greenberg's loyalty to Xerox has clouded the analysis of Xerox's liability and responsibility for the CO-OP's demise, UHH sought leave to implead Xerox and to consolidate the Milliman Lawsuit with the Silver State Lawsuit. (10A.A.41; 10A.A.43.) However, both motions were denied due to Greenberg's representation of Xerox (which is the subject of another Petition for Extraordinary Writ Relief pending before this Court). (13A.A.58; *see also* Petition filed in No. 83135 (July 1, 2021).)

Thus, as a result of Greenberg's conflicts of interest and the Receivership Court's failure to disqualify Greenberg, UHH can no longer argue at trial that Xerox is partially or significantly at fault for the CO-OP's demise. It must now argue that Xerox is *entirely* at fault—which is a significantly more difficult burden of proof. *Humphries v. Eighth Jud. Dist. Ct. ex rel. Cnty. of Clark*, 129 Nev. 788, 795-96, 798, 312 P.3d 484, 489, 491 (2013); *Banks ex rel. Banks v. Sunrise Hosp.*, 120 Nev. 822, 844-45, 102 P.3d 52, 67 (2004). Further, UHH cannot pursue a separate contribution claim against Xerox until it pays any judgment or settlement in the Milliman Lawsuit. NRS 17.225(2). Given the fact that the CO-OP is seeking over $142 million in damages in the Milliman Lawsuit, (2R.A.4 at 236), UHH could be driven into insolvency by the time it receives any contribution from

Xerox. *See* 3 Moore's Federal Practice – Civil § 14.03 (2020). Finally, UHH now faces a substantial risk of paying damages for which the Receiver could obtain a windfall in the form of a double recovery, as the Receiver is seeking the exact same damages against UHH in the Milliman Action as she seeks from Silver State in the Silver State Action. (10A.A.43 at 1825:15-1827:3.)

4. Advisory Mandamus Is Necessary and Appropriate.

As set forth in UHH's Petition, advisory mandamus is necessary and appropriate in this case because there are two issues of first impression in need of clarification concerning an attorney's fiduciary obligations in receivership actions. (Pet. at 10:3-13.) It is well settled that writ relief is appropriate "when 'an important issue of law needs clarification and considerations of sound judicial economy and administration militate in favor of granting the petition.'" *MDC Rests., LLC v. Eighth Jud. Dist. Ct. ex rel. Cnty. of Clark*, 134 Nev. 315, 318, 419 P.3d 148, 151 (2018) (quoting *Int'l Game Tech., Inc. v. Second Jud. Dist. Ct. ex rel. Cnty. of Washoe*, 124 Nev. 193, 197-98, 179 P.3d 556, 559 (2008)); *see also Direct Grading & Paving, LLC v. Eighth Jud. Dist. Ct. ex rel. Cnty. of Clark*, No. 81933, 137 Nev. Adv. Op. 31, __ P.3d ___, 2021 WL 2878599 at *3 (Nev. July 8, 2021). A writ of advisory mandamus is appropriate "'when the issue presented is novel, of great public importance, and likely to recur.'" *Archon Corp. v. Eighth*

Jud. Dist. Ct. ex rel. Cnty. of Clark, 133 Nev. 816, 822, 407 P.3d 702, 708 (2017) (quoting *United States v. Horn*, 29 F.3d 754, 769 (1st Cir. 1994)).

Because receivers are meant to be neutral parties with fiduciary duties owed to all persons and entities with an interest in the receivership estate, and counsel for receivers are held to the same standard of impartiality (which GT does not and cannot dispute), (Pet. at 20:5-21:11), it is extremely important that neither the receiver nor its counsel have any conflicts of interest which may affect or impair the impartiality and fairness of the proceedings. Accordingly, it is necessary for this Court to determine if conflicted counsel can keep its conflicts secret and attempt to cure such conflicts through its own devices, or whether such conflicts must be disclosed to the receivership court and all interested parties to allow for objections to be made and for consideration and analysis as to whether retention is appropriate.

Because these issues of public importance can arise in any receivership proceeding, whether governed by NRS Chapter 696B or NRS Chapter 32, advisory mandamus is appropriate. *See Pac. W. Bank v. Eighth Jud. Dist. Ct. ex rel. Cnty. of Clark*, 132 Nev. 793, 796-97, 383 P.3d 252, 254-55 (2016) (exercising discretion to hear petition raising a "significant and potentially recurring question" concerning an issue "novel to the state of Nevada").

5. Writ Relief Is Not Barred Merely Because UHH Can Appeal Upon Entry of a Final Judgment.

GT asserts that UHH's Petition should be denied because UHH can appeal the Order Denying Disqualification when a final judgment has been entered in the delinquency proceeding. (Answer at 33.) However, this Court has held that even where an adequate remedy at law is available, writ relief is still warranted in certain circumstances, like clarification of an important issue of first impression, where "sound judicial economy and administration favor the granting of the petition." *Cote H. v. Eighth Jud. Dist. Ct. ex rel. Cnty. of Clark*, 124 Nev. 36, 39, 175 P.3d 906, 908 (2008); *In re Beatrice B. Davis Family Heritage Trust*, 133 Nev. 190, 194, 394 P.3d 1203, 1207 (2017).

This Petition presents two important issues of first impression in need of clarification. (*See* Section II(B)(4), *supra*.) Sound judicial economy and administration weigh in favor of granting the Petition, as the resolution of the creditors' claims in the delinquency proceeding, as well as all of the asset recovery actions, will have to be retried by new counsel if UHH is forced to wait until entry of final judgment to seek review of the Order Denying Disqualification and the Order is ultimately reversed on appeal.

Therefore, if an interlocutory appeal is not appropriate, this Court should entertain UHH's Petition.

C. Greenberg Must Be Disqualified as Counsel for the Receiver.

1. The Motion to Disqualify Is Not a Litigation Tactic.

GT contends that UHH filed the Motion to Disqualify as a mere litigation tactic. (Answer at 34.) However, this is belied by the evidence. GT has failed to dispute any of the evidence demonstrating that Xerox is a significant target defendant responsible for the CO-OP's demise. (Opening Br. at 3:11-6:10; Pet. at 14:3-15:2.) In fact, GT essentially admitted that Xerox is a significant target defendant when it disclosed that Greenberg freely informed the Receiver about its conflict with Xerox before being retained as counsel for the Receiver — despite no indication that the Receiver intended to sue Xerox. (Answer at 34.) This shows that Greenberg recognized Xerox's liability to the Receivership Estate — even if the Receiver did not.

Moreover, GT has failed to explain what "strategic advantage" UHH gains from Greenberg's disqualification, as the disqualification does not terminate the Milliman Action. Surely, the Receiver's new conflicts counsel — Lewis Roca — is equally capable of litigating the Receiver's claims against UHH. Trial in the Milliman Action is not scheduled until May 2022, and the action is still in the discovery phase. (2R.A.5, at 336:4-16.)

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2. Greenberg's Conflict of Interest With Valley Cannot Be Waived.

GT asserts that Greenberg had no conflict of interest with Valley because Valley provided "written consent" or a conflict waiver for Greenberg's "limited representation" of the Receiver. (Answer at 44.) If this conflict waiver is in writing (as required by NRPC 1.7 and 1.9), why has it not been disclosed to UHH or submitted for *in camera* review? Likely, because GT is aware that this type of conflict of interest — involving a Receiver who represents the public interest and owes fiduciary duties to all persons or entities with an interest in the Receivership Estates — cannot be waived. *See State ex rel. Morgan Stanley & Co. v. MacQueen*, 416 S.E.2d 55, 60 (W. Va. 1992) ("'[W]here the public interest is involved, an attorney may not represent conflicting interests even with the consent of all concerned'") (quoting *Graf v. Frame*, 352 S.E.2d 31, 38 (1986)); *see also In re A & B*, 209 A.2d 101, 102-03 (N.J. 1965) ("Dual representation is particularly troublesome where one of the clients is a governmental body[, and] an attorney may not represent both a governmental body and a private client merely because disclosure was made and they are agreeable that he represent both interests.").

3. Greenberg's Representation of Xerox Was Not Limited to Prior, Unrelated Matters.

GT contends that no conflict of interest exists because Greenberg "represented Xerox in prior matters that are unrelated to [its] representation of the

Receiver." (Answer at 7, 40.) However, at the time that GT commenced the Milliman Lawsuit, Greenberg was still representing Xerox in a *related* action. *See Georgetown Co. v. IAC/Interactive Corp.*, No. 651304/2016, 2017 N.Y. Misc. LEXIS 1263 at *10 (N.Y. Sup. Ct. Mar. 3, 2017) (recognizing a well-settled rule that a conflict is analyzed at the time it arose, not when the motion to disqualify is filed). Specifically, the Consent Order in Xerox's administrative matter before the Department of Insurance is dated two months after the Milliman Lawsuit was commenced. (2A.A.17 at 0350; 9A.A.39 at 1692.)

Even if Greenberg's conflict was considered a former conflict under NRPC 1.9, the three other matters in which Greenberg represented Xerox were all substantially related to the Receiver's claims and allegations against UHH in the Milliman Lawsuit. Whether matters are substantially related for conflicts purposes depends on the scope of the prior representation, whether it is reasonable to infer that confidential information was given to the lawyer in the prior matter, and whether that information is relevant to the issues in the new matter. *Nev. Yellow Cab Corp. v. Eighth Jud. Dist. Ct. ex rel. Cnty. of Clark*, 123 Nev. 44, 52, 152 P.3d 737, 742 (2007).

Here, Greenberg was the sole attorney of record for Xerox in all three prior matters and negotiated the resolution of all three matters. (9A.A.39 at 1674-1690, 1692-1703). Greenberg represented Xerox in two class actions alleging

negligence-based claims centered on Xerox's administration of the Exchange and an NDOI administrative matter concerning consumer complaints similarly related to the administration of the Exchange. (*Id.* at 1693:1-10, 1693:18-1694:2.) Therefore, it is reasonable to infer that Xerox disclosed confidential information to Greenberg regarding its administration of the Exchange. Finally, all three matters concern the same allegations of harm and damage which the Receiver should have alleged against Xerox in the Milliman Lawsuit — i.e., premium processing issues resulting in "refunds being owed, insurance coverage issues, and overpayments of premium[s]." (*Id*. at 1693:8-10, 1693:25-1694:2; *see also* Opening Br. at 3:10-6:10 (regarding Xerox's failures and the damage caused to the CO-OP); Pet. at 14:3-15:2 (same).) Thus, the confidential information Greenberg received by defending Xerox in the prior matters is relevant to the issues the Receiver should have raised (and that UHH and the other defendants have raised) against Xerox in the Milliman Lawsuit.

4. Nothing Prevented the Receiver From Informing the Receivership Court of Greenberg's Conflicts.

There is no legitimate explanation for why GT concealed Greenberg's conflicts from the Receivership Court. When the Receiver recently sought appointment of Lewis Roca, the Receiver freely and fully disclosed Greenberg's prior representation of Xerox and Lewis Roca's role as conflicts counsel. (13A.A.55 at 2422-2423.) If GT could disclose this information for its most recent

engagement of counsel, it would appear that GT actively concealed Greenberg's conflicts from the Receivership Court and all interested parties when it sought the appointment of Greenberg and Santoro Whitmire ("Santoro") in 2017.

5. GT's Self-Serving Declarations Are Contradicted by the Undisputed Evidence.

GT alleges that the Motion to Disqualify was based on the incorrect "assumption" that it had been "retained to represent the Receiver in all her affairs," despite its actual retention "for the limited purpose of pursuing specific claims only." (Answer at 34.) However, UHH's "assumption" can hardly be faulted when GT never disclosed this alleged "limited engagement" to the Receivership Court. In fact, to this day, no evidence other than self-serving declarations have been produced in support of this "alleged" limited representation.

Moreover, the undisputed evidence in this action contradicts GT's assertion of a limited-scope representation. The Receiver asserts that she "did not retain [Greenberg] to evaluate or pursue any claims against Xerox, to defend or administer the claims of Valley, or to allocate assets among creditors." (*See, e.g.*, Answer at 34.) However, this contention is refuted by the Receiver's statements in her motion to approve the appointment of Greenberg. In the December 19, 2016 motion, the Receiver represented that she had an "***urgent need*** to ***evaluate and prosecute litigation and/or defend [herself] in claims matters***, which require[d] ***immediate assistance of legal counsel*** and consulting firms to allow [her] to act

quickly." (1A.A.10 at 0189:4-6 (emphasis added); *see also id.* at 0190:11-12 (claiming that immediate assistance was necessary for the "evaluation and resolution" of creditors' claims and the "pursuit of related counterclaims").) Further, the Receiver represented that she did "***not have access to the legal resources necessary*** to ***evaluate*** the prosecution and defense of litigation." (*Id*. at 0190:11-12 (emphasis added).) The Receiver then identified that she had "sought out and vetted" two law firms — Greenberg and Santoro — to assist with "***general receivership, claims, and asset recovery matters***." (*Id.* at 0192:24-28, 0193:20-21 (emphasis added).) The motion made no mention of Greenberg's alleged limited scope of representation or Santoro's alleged role as conflicts counsel.

Given that the Receiver was seeking approval of Greenberg's and Santoro's fee rates, the fact that both counsel would be providing only limited services (and had not been retained for "general receivership, claims, and/or asset recovery matters") would seem to be relevant to the Receivership Court's consideration. As such, why were these facts actively concealed from the Receivership Court? The only plausible explanation is to avoid disclosure of the conflicts, as it is likely that had the Receivership Court known of Greenberg's conflicts, it would not have approved of Greenberg's retention, but rather, would have advised the Receiver to retain unconflicted counsel.

6. GT Has Failed to Offer Any Documentary Evidence to Support the Self-Serving Declarations.

GT has failed to produce (or submit for *in camera* inspection) any engagement letters, conflict waivers, or billing statements to support the assertions in the self-serving declarations that Greenberg was retained for a limited-scope engagement and Santoro was engaged as conflicts counsel. In fact, it appears that such documentation may not exist, as GT contends that "[t]here is no ethical rule requiring GT to have memorialized the facts set forth in the declarations in a formal engagement letter at the outset of the representation." (Answer at 41-42.)

It defies credulity to believe that a written engagement letter does not exist for Greenberg's alleged limited-scope representation of the Receiver in these matters. NRPC 1.5(b) states that the scope of an attorney's representation "shall be communicated to the client, ***preferably in writing***, before or within a reasonable time after ***commencing the representation***." (Emphasis added). Similarly, when current or former clients are waiving conflicts of interest (assuming the conflicts are waivable), such waiver requires the informed consent of the client, ***confirmed in writing***. NRPC 1.7(b)(4), 1.9(a).

With breath-taking arrogance, Greenberg touts itself as an "international law firm with a broad range of clients," (Answer at 6); yet, it expects this Court to believe that it does not employ written engagement letters — not even when the

scope of representation is limited to avoid conflicts of interest? It is unfathomable that Greenberg would ignore its ethical duties under these circumstances.

7. GT Cannot Demonstrate That Greenberg's Limited-Scope Engagement Is Reasonable or That the Receiver Provided Informed Consent.

Even if this Court could finds sufficient evidence to support the existence of Greenberg's and Santoro's limited-scope engagements, GT has failed to produce sufficient evidence to demonstrate that such engagements are proper. Specifically, NRPC 1.2(c) only permits a limited scope of representation if the limitation is "***reasonable under the circumstances*** and the ***client gives informed consent***." (Emphasis added). NRPC 1.0(e) defines "informed consent" as an "agreement by a person to a proposed course of conduct ***after the lawyer has communicated adequate information and explanation*** about the material risks of and reasonably available alternatives to the proposed course of conduct." (Emphasis added).

Here, there is no evidence of the reasonableness of the limited-scope engagements or the Receiver's informed consent to the limitations. To date, GT has hidden behind attorney-client privilege and work product to shield the basis for the SDR's determination to forego pursuing claims against Xerox. (Answer at 10; Opening Br. at 13:13-15:14; 10A.A.46 at 1868:3-24, 1869:6-12.) GT has also failed to explain why the Receiver and the SDR administered the creditors' claims (including Valley's claim) themselves. (*See, e.g.*, Answer at 9; 10A.A.46 at

1868:25-1869:5, 1870:19-27.) The fact that the Receiver and the SDR have performed these functions is problematic for many reasons.

First, it is unclear how the Receiver and the SDR were able to conduct the evaluation of the claims against Xerox or administer the creditors' claims when they had expressly represented to the Receivership Court that they were in need of the immediate assistance of legal counsel to perform these tasks. (*See* Section II(C)(5), *supra*.) Second, it is unclear why the SDR and the Receiver performed these duties when they were represented by non-conflicted attorneys who could have performed these tasks (first, the Nevada Attorney General, and then Santoro). Most importantly, there is no basis for GT's assertion of privilege or work product, given that neither the Receiver nor the SDR were authorized to serve as attorneys for the Receivership Estate. As set forth in *SEC v. Nadel*, No. 8:09-cv-87-T-26TBM, 2012 WL 12910270 (M.D. Fla. Apr. 25, 2012), a case upon which GT relies, even when a receiver or special deputy receiver is an attorney, it does "not act as an attorney in the course of fulling [its] duties." *Id*. at *5. Further, neither the Order appointing the Insurance Commissioner as Receiver nor NRS Chapter 696B authorizes the Receiver to serve as counsel for the Receivership Estate. (1A.A.4; 1A.A.5.) Similarly, while the SDR is a Texas law firm, (10A.A.46 at 1866:11-15), it is not authorized to serve as counsel for the Receivership Estate because it is not licensed to practice law in Nevada, and its powers and

responsibilities are statutorily limited to be the same as the Receiver's. NRS 696B.255(1). Thus, the Receiver and the SDR were engaged in business services, not legal services, when they purportedly performed the evaluation of the Receivership Estate's claims against Xerox and administered the creditors' claims. As such, information related to these tasks is not privileged or work product.

Because GT has chosen not to publicly disclose the basis for the decision to forego claims against Xerox or to have non-attorneys evaluate and resolve the creditors' claims, there is no evidence that an independent lawyer has "communicated adequate information and explanation about the material risks and reasonably available alternatives" to the Receiver about Greenberg's and Santoro's limited-scope engagements. NRPC 1.0(e). Therefore, there is no basis for determining whether: (i) the limited-scope engagements were reasonable, or (ii) the Receiver provided informed consent to the limited representations.

8. Limited-Scope Engagements and Conflicts Counsel Are Only Effective Cures in Receivership Actions When They Are Disclosed to the Court for Evaluation.

GT contends that it is "routine" for fiduciaries, like the Receiver, to retain conflicted counsel for a limited purpose and to retain conflicts counsel to address areas of representation outside the scope of that engagement. (Answer at 35-36.) However, Greenberg overlooks the fact that in each of the cases it cites in support of this contention, (*id*. at 35-36 & n.10), the courts have only approved engagement

of the conflicted counsel after ***full disclosure*** of the conflict of interest and proposed cures, such that interested parties had the opportunity to object to the appointment of the conflicted counsel and the courts had the opportunity to analyze the conflict and proposed cures. *In re Arochem Corp.*, 176 F.3d 610, 616-28 (2d Cir. 1999) (approving trustee's retention of counsel, despite also representing a creditor and unsued target defendant, because the trustee informed the court, at the time of counsel's retention, of the conflicts and proposed limited scope of representation, and the court, based on these disclosures, was able to thoroughly review the proposed dual representation and the decision to forego claims against the target defendant, and it determined that no conflict of interest existed); *see also Bartelt v. Smith*, 129 N.W. 782, 784 (Wis. 1911); *In re Fondiller*, 15 B.R. 890, 891-93 (BAP 9th Cir. 1981); *In re Decade, S.A.C., LLC*, No. 18-11668 (CSS), 2020 WL 564903 at **2-3 (D. Del. Feb. 5, 2020); *In re Midway Motor Sales, Inc.*, 355 B.R. 26, 32, 35-36 (Bankr. N.D. Ohio 2006); *SEC v. Nadel*, No. 8:09-cv-87-T-26TBM, 2012 WL 12910270 at *3, *8 (M.D. Fla. Apr. 25, 2012); *In re REA Holding Corp.*, 2 B.R. 733, 736-37 (S.D.N.Y. 1980); *In re Lee Way Holding Co.*, 102 B.R. 616, 619-22 (S.D. Ohio 1988).

GT suppressed and actively concealed information regarding Greenberg's representation of Xerox. (*See* 3A.A.18 at 0461:1-18 (referring generically to "Counsel for Xerox" contacting the SDR about outstanding premium payments);

2A.A.15 (demonstrating that Greenberg was acting as "Counsel for Xerox" in these communications).)[3] GT also failed to disclose Greenberg's representation of Valley, Greenberg's limited-scope engagement, or the retention of conflicts counsel. (1A.A.10.) GT's concealment of these relevant facts casts doubt on its assertions that no conflicts of interest existed and/or that the conflicts had been cured. *See Keybank Nat'l Ass'n v. Michael*, 737 N.E.2d 834, 852-53 (Ind. Ct. App. 2000) (finding that counsel's "attempt to manipulate the record of proceedings constitutes tacit recognition of the perilous position upon which his appointment is perched").

Because GT chose not to make required disclosures to the Receivership Court at the time of Greenberg's appointment, GT cannot now claim that it cured the conflicts of interest and that non-disclosure is irrelevant. Only the Court — not GT — can determine if the proposed cures to the conflicts of interest are acceptable.

9. GT's Reliance on 11 U.S.C. § 327(c) Is Misplaced.

Similarly, GT contends that there is no conflict presented by its representation of both Valley and the Receiver in the delinquency proceeding

[3] In fact, it was not until after UHH filed its Opening Brief that the Receiver finally produced a copy of the letter referenced in the Eighth Status Report that "Counsel for Xerox" sent to the SDR on June 14, 2017. This confirmed, conclusively, that GT actively concealed from the Receivership Court that it was acting as counsel for both Xerox and the SDR in 2017. (1R.A.2, filed under seal.)

because both of their interests are aligned in recovering money for the Receivership Estate. (Answer at 35, 42-44.) In support of this argument, Greenberg relies on 11 U.S.C. § 327(c), which provides that an attorney for a bankruptcy trustee can also represent a creditor in the bankruptcy proceeding because their interests coincide. (*Id*.) However, 11 U.S.C. § 327(c) states that this dual representation is only permitted if ***no other creditor objects*** and ***no actual conflict of interest exists***. This suggests that full disclosure of all conflicts of interest is required to provide an opportunity for objection and the analysis of the existence of an actual conflict. *See generally In re Midway Motor Sales, Inc.*, 355 B.R. 26, 31-33 (Bankr. N.D. Ohio 2006).

GT failed to disclose Greenberg's representation of Valley at the time of its appointment. Thus, GT deprived the creditors, like UHH, of their opportunity to object, and prevented the Receivership Court from assessing whether Greenberg's dual representation presented a conflict of interest.

10. Greenberg's Limited-Scope Engagement and the Retention of Conflicts Counsel Are Not Acceptable Cures.

If GT had disclosed Greenberg's conflicts of interest and the alleged cures to the Receivership Court at the time of its appointment, Greenberg's retention would have been rejected because the proposed cures are not workable. The Receiver's claims against UHH and the other defendants in the Milliman Lawsuit are so interrelated with the CO-OP's unpursued claims against Xerox that Xerox will still

play a central role at trial. As a practical matter, GT cannot parcel out tasks for conflicts counsel to handle independent of Greenberg, as nearly every single witness who testifies at trial will be examined about Xerox's role in the CO-OPs demise. Thus, GT's proposed cures could never eliminate Greenberg's conflicts. *See Nasdaq, Inc. v. Miami Int'l Holdings, Inc.*, No. 17-6664-BRM-DEA, 2018 U.S. Dist. LEXIS 199167 at **10-11 (D.N.J. Nov. 26, 2018) (holding that the action could not be broken up into discrete parts to be handled by separate attorneys; thus, conflicts counsel did not cure the conflict of interest in the action).

11. The Prejudice to UHH if Greenberg Is Not Disqualified Far Outweighs the Prejudice to the Receiver if Disqualification Is Granted.

The prejudice to the Receiver from Greenberg's disqualification essentially is limited to a loss of the fees paid to Greenberg to date and a possible delay in litigation while the Receiver's new counsel "gets up to speed." However, even this prejudice is minimal. Lewis Roca, as the Receiver's "new" conflicts counsel, has been participating in this action since at least March 2021. (13A.A.55; 13A.A.56.) Presumably, they have used this time wisely and with a brief delay will be fully familiar with the litigation. Moreover, the Receiver can (and should), upon Greenberg's disqualification, seek the disgorgement of the fees it has paid to Greenberg to date. In fact, UHH has already sought this remedy as part of its Motion to Disqualify. (7A.A.37 at 1390:10-1391:14.) Most importantly, any

prejudice suffered by the Receiver would be a problem of her own making. She chose to retain counsel with known conflicts of interest and to actively conceal such conflicts from the court and all interested parties. Therefore, she cannot now complain about her self-inflicted wounds. *See El Camino Res., Ltd. v. Huntington Nat'l Bank*, 623 F. Supp. 2d 863, 886 (W.D. Mich. 2007) (holding that a thrust upon conflict "must truly be unforeseeable" and "no fault of the lawyer") (internal quotation omitted),

UHH and other interested parties, on the other hand, will suffer far greater prejudice if Greenberg is not disqualified. As detailed in the Opening Brief and Petition, UHH faces (i) decreased assets of the Receivership Estate to pay claims; (ii) potential liability for over $142 million in damages for harm caused by Xerox; (iii) the inability to implead Xerox in the Milliman Lawsuit; (iv) the potential of insolvency before obtaining contribution from Xerox; and (v) the risk of needlessly paying the Receiver for damages which she has already recovered from Silver State. (Opening Br. at 60:14-61:17; Pet. at 8:11-9:11; *see also* Section II(B)(3), *supra*.)

D. <u>UHH Has Standing to Seek Greenberg's Disqualification</u>.

GT contends that UHH is not one of its current or former clients and, therefore, has no standing to seek Greenberg's disqualification. (Answer at 26.) However, GT has repeatedly asserted in both the delinquency proceeding and the

Milliman Lawsuit that the Receiver — and, thus, Greenberg by extension — represents all of the CO-OP's creditors. (10A.A.40 at 1754:6-7; 13A.A.54 at 2415:7-9.) Thus, any creditor has standing to object to Greenberg's conflicts. (Opening Br. at 59:2-13; Pet. at 34:4-15.) Similarly, the fact that UHH has been sued for the harm and damages caused by Xerox, and has been harmed by GT's inability to pursue Xerox for the CO-OP's demise, provides UHH with standing to seek Greenberg's disqualification. (Opening Br. at 59:14-60:6; Pet. at 34:16-35:9.)

Contrary to GT's arguments, (Answer at 25-27), this Court also has recognized exceptions to the general rule that an attorney-client relationship is required for standing to seek disqualification. One such exception is where an attorney's conflict of interest "so infects the litigation in which disqualification is sought that it impacts the [nonclient] moving party's interest in a just and lawful determination of her claims . . . ." *Liapis v. Second Jud. Dist. Ct. ex rel. Cnty. of Washoe*, 128 Nev. 414, 420, 282 P.3d 733, 737 (2012) (internal quotation omitted). As set forth in detail in the Opening Brief, the Petition, and Section II(B)(3), *supra*, Greenberg's conflicts have seriously impacted Unite Here Health's interest in the just and lawful determination of its claim in the delinquency proceeding, and UHH's interest in the just and lawful determination of its defenses in the Milliman Lawsuit. (Opening Br. at 60:7-62:2; Pet. at 35:5-15.) As such, UHH has standing to seek Greenberg's disqualification as counsel for the Receiver.

E. UHH Did Not Waive Its Right to Seek Greenberg's Disqualification.

Despite acknowledging that UHH has never been a client of Greenberg (to support its argument regarding standing), GT hypocritically relies on inapposite legal authorities (regarding waiver by ***clients*** seeking to disqualify their current or former counsel) to contend that UHH delayed in filing the Motion to Disqualify and waived its right to seek disqualification. (Answer at 47-48.) UHH is a third party with no reason to know and no access to information regarding Greenberg's conflicts of interest. Like the Receivership Court, UHH had no duty to investigate Greenberg's conflicts of interest prior to its appointment as counsel for the Receiver. *In re Tinley Plaza Assoc., L.P.*, 142 B.R. 272, 278-79 (Bankr. N.D. Ill. 1992) ("[T]he court has no duty to rummage through files or conduct independent fact-finding investigations in order to determine whether prospective attorneys are involved in actual or potential conflicts of interest.") (internal quotation omitted). Moreover, Greenberg actively concealed its representation of Xerox from the Court and UHH and opposed all of UHH's attempts to obtain discovery relating to Greenberg's representation of Valley or Xerox. (Opening Br. at 11:9-13:9, 13:13-15:14).

Inexplicably, GT also complains that UHH waited several years after being named a defendant in the Milliman Lawsuit before filing the Motion to Disqualify. (Answer at 48.) However, GT fails to explain how being named a defendant in an

action automatically endows the defendant with knowledge of opposing counsel's current and past clients and conflicts of interest.

It is undisputed that UHH sought disqualification as soon it discovered the conflicts and obtained evidence confirming Xerox should be a target defendant in the asset recovery litigation. (7A.A.37 at 1377:9-1378:14.) Therefore, UHH did not waive its right to seek Greenberg's disqualification.

III. CONCLUSION

For the foregoing reasons, this Court should vacate the Order Denying Disqualification and order that Greenberg is disqualified to serve as counsel for the Receiver in the delinquency proceeding and all related asset recovery matters. This action should then be remanded with instructions to the Receivership Court to rule on the issue of disgorgement of the fees paid to Greenberg to date.

DATED this 10th day of September, 2021.

BAILEY❖KENNEDY

By: /s/ *Dennis L. Kennedy*
JOHN R. BAILEY
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Attorneys for Petitioners/Appellants

VERIFICATION

STATE OF NEVADA)

COUNTY OF CLARK)

I, Dennis L. Kennedy, am a partner of the law firm of Bailey❖Kennedy, counsel of record for UHH, and the attorney primarily responsible for handling this matter for and on behalf of UHH. I make this verification pursuant to NRS 34.170, NRS 53.045, and NRAP 21(a)(5).

I hereby declare under penalty of perjury under the laws of the State of Nevada, that the facts relevant to this Reply in Support of (1) Petition for Extraordinary Writ Relief (No. 82552), and (2) Appellants' Opening Brief (No. 82467) are within my knowledge as attorney for UHH and are based on the proceedings, documents, and papers filed in the underlying action, *State of Nevada ex rel. Comm'r of Ins. v. Nev. Health CO-OP*, No. A-15-725244-C, pending in Department XXI of the Eighth Judicial District Court, Clark County, Nevada.

I know the contents of the foregoing Reply, and the facts stated therein are true of my own knowledge except as to those matters stated on information and belief. As to any matters identified as being stated on information and belief, I believe them to be true.

True and correct copies of the orders and papers served and filed by the parties in the underlying action that may be essential to an understanding of the

matters set forth in the Reply are contained in the Reply Appendix, Appendix to Petition, and Joint Appendix.

EXECUTED on this 10th day of September, 2021.

/s/ Dennis L. Kennedy
DENNIS L. KENNEDY

NRAP 21(e) CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Reply in Support of (1) Petition for Extraordinary Writ Relief (No. 82552), and (2) Appellants' Opening Brief (No. 82467) complies with the formatting requirements of NRAP 21(d), NRAP 32(a)(4), and NRAP 32(c)(2), as well as the reproduction requirements of NRAP 32(a)(1), the binding requirements of NRAP 32(a)(3), the typeface requirements of NRAP 32(a)(5), and the type-style requirements of NRAP 32(a)(6), because:

[x] This Reply in Support of (1) Petition for Extraordinary Writ Relief (No. 82552), and (2) Appellants' Opening Brief (No. 82467) has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman font 14.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 21(d) and NRAP 32(a)(7) because it is proportionally spaced, has a typeface of 14 points or more, and contains 6,991 words.

3. I further certify that I have read this Reply in Support of (1) Petition for Extraordinary Writ Relief (No. 82552), and (2) Appellants' Opening Brief (No. 82467), and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this Reply in Support of (1) Petition for Extraordinary Writ Relief (No. 82552), and (2) Appellants' Opening Brief (No. 82467) complies with all applicable Nevada Rules

of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the Reply in Support of Petition for Extraordinary Writ Relief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

I understand that I may be subject to sanctions in the event that the accompanying Reply in Support of (1) Petition for Extraordinary Writ Relief (No. 82552), and (2) Appellants' Opening Brief (No. 82467) is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 10th day of September, 2021.

BAILEY❖KENNEDY

By: /s/ *Dennis L. Kennedy*
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CERTIFICATE OF SERVICE

I certify that I am an employee of BAILEY❖KENNEDY and that on the 10th day of September, 2021, service of the foregoing **REPLY IN SUPPORT OF (1) PETITION FOR EXTRAORDINARY WRIT RELIEF (NO. 82552), AND (2) APPELLANTS' OPENING BRIEF (NO. 82467)** was made by electronic service through Nevada Supreme Court's electronic filing system and/or by depositing a true and correct copy in the U.S. Mail, first class postage prepaid, and addressed to the following at their last known address:

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VIA E-MAIL

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/s/ Angelique Mattox
Employee of BAILEY❖KENNEDY

ADDENDUM

482 P.3d 697 (Table)
Unpublished Disposition
This is an unpublished disposition. See Nevada Rules of Appellate Procedure, Rule 36(c) before citing.
Supreme Court of Nevada.

Robert D. BARNHART; and Jill A. Barnhart, Petitioners,
v.
The EIGHTH JUDICIAL DISTRICT COURT of the State of Nevada, IN AND FOR the COUNTY OF CLARK; and the Honorable Eric Johnson, District Judge, Respondents,
and
Ventana Beaumont, Inc., Real Party in Interest.

No. 82619
|
FILED MARCH 23, 2021

Attorneys and Law Firms

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ORDER DENYING PETITION FOR WRIT OF MANDAMUS

***1** This emergency petition for a writ of mandamus challenges a district court order denying petitioners' motion to disqualify real party in interest's counsel.

Whether to entertain a petition for extraordinary writ relief is entirely discretionary with this court. *Leibowitz v. Eighth Judicial Dist. Court*, 119 Nev. 523, 529, 78 P.3d 515, 519 (2003). A writ of mandamus is available only to compel the performance of a legally required act or to cure a manifest abuse of, or an arbitrary and capricious exercise of, discretion. *Round Hill Gen. Improvement Dist. v. Newman*, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981). It is petitioners' burden to demonstrate that extraordinary relief is warranted. *Pan v. Eighth Judicial Dist. Court,* 120 Nev. 222, 228, 88 P.3d 840, 844 (2004).

Having considered the petition and its accompanying documents, we are not satisfied that our intervention by way of extraordinary writ is merited. The district court has "broad discretion in determining whether disqualification is required in a particular case," *Leibowitz v. Eighth Judicial Dist. Court,* 119 Nev. 523, 529, 78 P.3d 515, 519 (2003), and petitioners have not demonstrated that the district court manifestly abused or arbitrarily and capriciously exercised that discretion when it denied their motion to disqualify counsel. Accordingly, we

ORDER the petition DENIED.

All Citations

482 P.3d 697 (Table), 2021 WL 1116286

2021 WL 2878599
Supreme Court of Nevada.

DIRECT GRADING & PAVING, LLC, a Nevada Limited Liability Company, Petitioner,
v.
The EIGHTH JUDICIAL DISTRICT COURT of the State of Nevada, IN AND FOR the COUNTY OF CLARK; and the Honorable Rob Bare, District Judge, Respondents,
and
Century Communities of Nevada, LLC, a Nevada Limited Liability Company, and Argonaut Insurance Company, Real Parties in Interest.

No. 81933
|
FILED JULY 08, 2021

Synopsis
Background: Contractor filed petition for writ of mandamus challenging a district court order granting a motion for district court intervention during binding arbitration.

Holdings: The Supreme Court, Silver, J., held that:

as a matter of first impression, provisional remedies section of the Arbitration Act allows a district court to provide a temporary remedy to preserve the status quo if the arbitrator is not able to do so, but it does not allow the district court to withdraw a case from arbitration or award potentially case-ending sanctions that the arbitrator previously declined to award;

provisional remedies section of the Arbitration Act did not apply to allow district court to intervene to remedy alleged discovery misconduct; and

district court's inherent powers did not extend to intervening in arbitration to remedy discovery misconduct.

Writ granted.

Procedural Posture(s): Original Jurisdiction; Petition for Writ of Mandamus.

Original petition for a writ of mandamus challenging a district court order granting a motion for district court intervention during binding arbitration.

Attorneys and Law Firms

Johnson & Gubler, P.C., and Matthew L. Johnson and Russell Gene Gubler, Las Vegas, for Petitioner.

Santoro Whitmire and Nicholas J. Santoro and Oliver J. Pancheri, Las Vegas, for Real Parties in Interest.

BEFORE THE SUPREME COURT, PARRAGUIRRE, STIGLICH, and SILVER, JJ.

OPINION

By the Court, SILVER, J.:

***1** In this opinion, we address whether the district court has authority, either under NRS 38.222's provisional remedy allowance or through its inherent powers, to intervene in binding arbitration to sanction a party's misconduct. We clarify that NRS 38.222 provides limited authority to intervene in an arbitration only where the district court orders a provisional remedy. Because the parties here did not seek, and the district court did not provide, a provisional remedy, NRS 38.222 did not grant the district court authority to intervene in the arbitration. We further conclude that the district court did not have inherent authority to intervene in this arbitration to remedy alleged litigation misconduct because that matter was squarely before the arbitrator. Accordingly, we grant writ relief and instruct the district court to return the

case to arbitration.

FACTS AND PROCEDURAL HISTORY

Petitioner Direct Grading & Paving, LLC (Direct) and real party in interest Century Communities of Nevada, LLC (Century) entered into a Master Subcontract Agreement (MSA) and subsequent Project Work Authorizations for four construction projects to be performed on several of Century's properties. The MSA included an arbitration clause stating that "any disputed claim" between the parties "shall [be] settled by arbitration" unless both parties agreed not to arbitrate. Direct allegedly failed to timely perform the scope of the work, and Century fired Direct as a result. Direct then recorded the following four mechanic's liens in 2017: (1) $290,018.55 against the Inspirada property, (2) $301,043.48 against the Lake Las Vegas property, (3) $735,863.15 against the Freeway 50 property, and (4) $344,988.46 against the Rhodes Ranch property.

The parties agreed to Direct filing a complaint in district court, staying the action, selecting an arbitrator, and allowing the case to proceed through arbitration. During discovery in arbitration, Century hired an expert accountant who uncovered alleged discrepancies in Direct's documents suggesting that a Direct employee altered documents between the Bureau of Land Management and Direct to overstate the amount of dirt delivered to the Inspirada property. The alteration allegedly covered up Direct overcharging Century approximately $550,000 for the dirt. Century also learned that its former land development manager, Scott Prokopchuk, was employed by DGP Holdings, a company owned by Direct, in a possible conflict of interest, as Prokopchuk had the authority to approve invoices from Direct on Century's behalf.

Direct claimed it was unaware of the alterations and asserted the employee only altered the documents because she thought she was missing another document. Direct further asserted any errors in the Bureau of Land Management/Direct documents had "no legal bearing on Century," as Century ultimately received the materials needed for the project and was not actually overcharged. As to Prokopchuk, Direct claimed he worked for DGP Holdings, a legal entity separate and distinct from Direct, and that there was no conflict of interest because Century's upper management had to approve any Project Work Authorizations Prokopchuk processed.

***2** The arbitrator ordered that an independent third-party information technology specialist perform a sweep of Direct's computers, cell phones, and server and that other discovery be stayed. The specialist who performed the sweep opined that Direct intentionally used a Windows upgrade to complicate the sweep and also purposely concealed computer data by withholding the computer or hard drive used by the employee who allegedly altered the records.

After the sweep of Direct's technology, Century submitted its first motion for discovery sanctions, asking the arbitrator to strike Direct's claims and enter adverse findings against Direct, to remove Direct's mechanic's liens and dismiss any claims Direct had against Century's surety bonds, and to award Century its fees and costs. The arbitrator issued an order fining Direct $130,000. But the arbitrator declined to strike Direct's claims at that time, noting that while the evidence showed the employee altered the documents and that Direct as the employer was ultimately responsible, the arbitrator did not feel the altered documents required him to question all of Direct's documentation supporting its claims or necessarily strike any of Direct's claims. The arbitrator noted concern with evidence suggesting Direct had failed to preserve evidence, but he could not determine whether Direct engaged in spoliation of evidence and declined to rule on that issue at that time. Instead, the arbitrator reserved the right to supplement the order or make a further ruling at the close of discovery.

Century moved for clarification and reconsideration of the arbitrator's order, asking him to make an express ruling on Century's motion to expunge Direct's liens and release the bonds. Century specifically asserted that Prokopchuk's relationship with Direct was a clear breach of the parties' agreement and prevented Direct from

receiving payment for any of its projects. Century further requested the arbitrator hold an evidentiary hearing to obtain any additional necessary evidence, issue a final ruling on discovery sanctions, and issue an interim award "so that Century can seek relief with the District Court." While that motion was still pending, Century submitted another motion for additional sanctions, explaining that Direct had not paid Century for the previous $130,000 sanction.

The arbitrator's subsequent order explained that the prior ruling was clear and unambiguous and that expunging any lien at that time would be inappropriate. The arbitrator ordered that the $130,000 in sanctions would be deducted from one of Direct's mechanic's liens if Direct did not pay that sanction within 30 days. The arbitrator denied the demand for an evidentiary hearing and ordered the parties to prepare a joint recommendation for proposed additional discovery.

Century then filed a motion in the district court for provisional relief pursuant to NRS 38.222, requesting that the district court take action to remedy the misconduct. After conducting a hearing, the district court found that it had authority to address the issues raised in the motion because (1) the district court had jurisdiction over the lawsuit Direct filed in court; (2) the court had inherent authority and permission under NRCP 37 to address alleged discovery misconduct and alteration of documents; (3) NRS 38.222 allows the court to provide provisional relief; and (4) judicial economy would be served by resolving the issues because the arbitrator was "not doing what a trial judge would do," was "not providing an adequate remedy," and had erred by refusing to conduct an evidentiary hearing. The district court ordered Century and Direct to file points and authorities in support of their respective positions on whether Century should be granted relief for Direct's alleged misconduct and fraud upon the court. The district court stayed arbitration pending an evidentiary hearing and the court's ruling on Century's motion.

***3** In early March 2020, shortly before the Covid-19 pandemic took hold, Direct filed a motion for reconsideration. The motion was denied after pandemic precautions prevented a hearing. In late September, after Direct filed additional briefing, the district court denied the motion for reconsideration. Direct then filed the instant petition.

DISCUSSION

The primary issue raised by this petition is whether the district court had authority to intervene in a binding arbitration to remedy alleged misconduct. We first determine whether our consideration of this petition for writ relief is warranted, before turning to whether the district court had authority to hear the misconduct dispute.

We exercise our discretion to entertain the writ petition

"A writ of mandamus is available to compel the performance of an act which the law ... [requires] as a duty resulting from an office, trust or station, or to control a manifest abuse or an arbitrary or capricious exercise of discretion." *Cote H. v. Eighth Judicial Dist. Court,* 124 Nev. 36, 39, 175 P.3d 906, 907-08 (2008) (internal quotation marks and footnote omitted) (alterations in original). Mandamus is an extraordinary remedy, available only when there is no "plain, speedy and adequate remedy in the ordinary course of law." NRS 34.170; *see Cote H.,* 124 Nev. at 39, 175 P.3d at 908.

The decision to entertain a petition for a writ of mandamus is within our sole discretion. *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991). "Because an appeal is ordinarily an adequate remedy, this court generally declines to consider writ petitions challenging interlocutory district court orders." *Helfstein v. Eighth Judicial Dist. Court,* 131 Nev. 909, 912, 362 P.3d 91, 94 (2015). "But we may consider writ petitions when an important issue of law needs clarification and considerations of sound judicial economy are served." *Id.*

We elect to consider Direct's writ petition because it raises important issues of first impression, including whether NRS 38.222 authorizes the district court to intervene in binding arbitration to remedy alleged misconduct. Clarifying the available procedures here will serve judicial economy by ensuring that the matter, which has not progressed beyond the discovery stage at this point, proceeds in the correct forum.[1]

[1] Century argues that the doctrine of laches bars Direct's petition. We decline to apply the doctrine of laches here, as our review of the record shows that Direct filed its petition at most five months after the district court denied its motion for reconsideration, and moreover, we conclude the delay does not warrant application of the laches doctrine under the facts of this case. See, *e.g., State v. Eighth Judicial Dist. Court,* 118 Nev. 140, 148, 42 P.3d 233, 238 (2002) (acknowledging that writ relief is subject to the doctrine of laches and setting forth questions a court must consider in determining whether laches applies, including whether the delay was inexcusable); *Widdis v. Second Judicial Dist. Court,* 114 Nev. 1224, 1227-28, 968 P.2d 1165, 1167 (1998) (noting Nevada law does not set a specific time limit by which a petition for mandamus must be filed and finding that a petition was not barred by the doctrine of laches due to a seven-month delay in filing).

The district court erred by hearing a discovery dispute from parties involved in arbitration

***4** Direct argues the district court did not have authority under NRS 38.222 or through its inherent powers to remove Century and Direct's discovery dispute from arbitration. We agree.

NRS 38.222

Under NRS 38.222(2)(b), after an arbitrator has been appointed and is able to act, a party to the arbitration "may move the court for a provisional remedy only if the matter is urgent and the arbitrator is not able to act timely or the arbitrator cannot provide an adequate remedy." A provisional remedy is "[a] temporary remedy awarded before judgment and pending the action's disposition, such as a temporary restraining order, a preliminary injunction, a prejudgment receivership, or an attachment," that "is intended to maintain the status quo by protecting a person's safety or preserving property." *Remedy, provisional remedy, Black's Law Dictionary* (11th ed. 2019). Thus, the plain language of NRS 38.222 allows a district court to provide a temporary remedy to preserve the status quo if the arbitrator is not able to do so. It does not allow the district court to withdraw a case from arbitration or award potentially case-ending sanctions that the arbitrator previously declined to award. *Cf. Sea Vault Partners, LLC v. Bermello, Ajamil & Partners, Inc.,* 274 So. 3d 473, 478 (Fla. Dist. Ct. App. 2019) (addressing a statute identical to NRS 38.222(2)(b) and concluding "a plain reading of the statute ... does not confer jurisdiction on the trial court to award sanctions simply because the [a]rbitrator declined to do so").

Here, nothing about Century's motion suggests NRS 38.222 applies to allow the district court's intervention. There is no indication that the arbitrator lacked enough time or was unable, as opposed to unwilling, to remedy any demonstrated misconduct. Century did not show why this matter was urgent, and Century's desire to expunge the liens does not require the district court's interference, as the arbitrator had the authority to expunge the liens, declined to do so at the time, and remains able to act timely and provide Century's requested remedy if the evidence supports it. Moreover, Century did not request any type of provisional remedy to preserve the status quo. The district court stated in its order that it stayed arbitration pending an evidentiary hearing and the court's ruling on Century's motion. However, if the district court were to then grant Century's motion and expunge the liens, the district court effectively will have resolved the

entire case in Century's favor rather than preserve the status quo. Accordingly, the district court did not have authority under NRS 38.222 to intervene in this arbitration.[2] We next consider whether the district court had authority through its inherent powers to intervene in this arbitration.

[2] Century also argues the arbitrator improperly failed to rule on whether Direct established the validity of the mechanic's liens pursuant to NRS 108.2275 and, therefore, the district court can resolve the dispute. However, we are not convinced the arbitrator was bound by NRS 108.2275, which by its plain language concerns only the *district court's* actions following a hearing on frivolous or excessive liens. And while the arbitration agreement authorized the arbitrator to grant relief provided by NRS 108.2275, the agreement did not require the arbitrator to comply with NRS 108.2275's procedural requirements. Moreover, even if the arbitrator was required to comply with the statute and failed to do so, that issue is best suited for the district court's determination of whether to confirm the arbitrator's final award. Therefore, we decline to consider this argument further.

Inherent powers

***5** Generally, we recognize the district courts' inherent powers to sanction parties for litigation abuse occurring during district court proceedings. "[C]ourts have 'inherent equitable powers to dismiss actions or enter default judgments for ... abusive litigation practices.' " *Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 92, 787 P.2d 777, 779 (1990) (alteration in original) (quoting *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 916 (9th Cir. 1987)). Additionally, NRCP 37(b)(1) provides that a district court may issue discovery sanctions if a party "fails to obey an order to provide or permit discovery." However, both sources of power address a district court's ability to sanction parties for litigation abuses occurring in proceedings before that court. We have never held that district courts have inherent or rule-based power to sanction perceived abuses occurring in an ongoing arbitration. Moreover, we have a strong preference in favor of arbitration and upholding arbitration clauses that weighs against extending the courts' inherent powers to arbitration cases in this manner. *Cf. Int'l Ass'n of Firefighters, Loc. No. 1285 v. City of Las Vegas*, 112 Nev. 1319, 1323-24, 929 P.2d 954, 957 (1996) (explaining Nevada courts will uphold and enforce arbitration clauses unless it is clear that the arbitration clause does not cover the dispute).

Here, the district court found that because Direct filed a complaint in the district court, the court had inherent authority over the case and, by extension, discretion to address the misconduct raised during arbitration. However, while the district court had authority over the case before it, it did not similarly have inherent authority over the arbitration case. The district court's reasoning is flawed here because it relied on *Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. 606, 615, 245 P.3d 1182, 1188 (2010), *Bass-Davis v. Davis*, 122 Nev. 442, 452, 134 P.3d 103, 109 (2006), and *Young v. Johnny Ribeiro Building, Inc.*, 106 Nev. 88, 91, 787 P.2d 777, 779 (1990), and all of those cases concern the court's authority over its own pending case and say nothing about cases that have been stayed and removed to arbitration. Moreover, this court has routinely enforced arbitration agreements, and here, the parties expressly agreed to arbitrate and agreed on the presiding arbitrator. Further, Direct filed its complaint to preserve the statute of limitations while they arbitrated, and Century provides no adequate support for its assumptions that filing a complaint under these facts, or attempting to enforce a fraudulent lien during arbitration, would operate to remove the case from binding arbitration after the parties had contractually agreed to arbitrate.[3] Accordingly, the district court did not have inherent authority to remove Century and Direct's dispute from binding arbitration,[4] and writ relief is warranted.[5]

[3] As to the litigation abuse more specifically, discovery is ongoing and the alleged fraud regards only the Inspirada lien. Yet,

troublingly, the district court concluded it had authority to assume jurisdiction over *all* liens.

[4] Direct also argues the doctrines of res judicata and judicial estoppel preclude Century's arguments and that the district court's decision unfairly prejudiced Direct. In light of our decision, we do not consider these arguments.

[5] Century also argues we should direct the district court to grant Century's request to appoint a new arbitrator pursuant to NRS 38.226. NRS 38.226(1) allows for the court to appoint a new arbitrator when the current arbitrator "fails or is unable to act." Here, the district court did not take any issue with the timeliness of the arbitrator's actions, and the record does not show that the arbitrator failed or was unable to act. Therefore, we decline to issue the order Century requests.

CONCLUSION

We conclude the district court did not have the authority under NRS 38.222 to intervene in this arbitration because Century did not seek, and the district court did not provide, a provisional remedy. We further conclude the district court did not have inherent authority to intervene in the arbitration because neither Nevada law, nor Direct's lawsuit filed in the district court, gave the court that authority under the facts of this case. Accordingly, we grant Direct's petition and direct the clerk of this court to issue a writ of mandamus instructing the district court to vacate its order granting Century's motion for provisional relief and to return the case to arbitration.[6]

[6] We also lift the stay entered in this matter on November 13, 2020.

We concur;

Parraguirre, J.

Stiglich, J.

All Citations

--- P.3d ----, 2021 WL 2878599, 137 Nev. Adv. Op. 31

End of Document

Georgetown Co., LLC v IAC/Interactive Corp.

Supreme Court of New York, New York County

March 3, 2017, Decided; March 22, 2017, Filed

651304/2016

Reporter
2017 N.Y. Misc. LEXIS 1263 *; 2017 NY Slip Op 30676(U) **

[3]** THE GEORGETOWN COMPANY, LLC; GEORGETOWN 19TH STREET PHASE I, LLC; GEORGETOWN 19TH STREET DEVELOPMENT LLC; and IAC/GEORGETOWN 19TH STREET, LLC, Plaintiffs, -against- IAC/INTERACTIVECORP.; HTRF VENTURES, LLC; and IAC 19TH STREET HOLDINGS, LLC, Defendants. Index No. 651304/2016

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Subsequent History: Motion denied by *Georgetown Co., LLC v. IAC/Interactive Corp., 2018 N.Y. Misc. LEXIS 3646 (N.Y. Sup. Ct., Aug. 21, 2018)*

Core Terms

Engagement, disqualified, argues, bind, matrimonial, divorce, intervene, parties, withdraw, terms, conflicting interest, disqualification, concurrent, disqualification motion, prima facie, conflicted, unrelated, asserts, matters

Judges: **[*1]** O. PETER SHERWOOD, J.S.C.

Opinion by: O. PETER SHERWOOD

Opinion

DECISION AND ORDER

O. PETER SHERWOOD, J.:

I. BACKGROUND

In this action, the plaintiff entities (together, Georgetown) sue the defendants (together, IAC) for a declaratory judgment that Georgetown is entitled to 50% of a $35 million rights fee, associated with development rights on a property in Manhattan's West Chelsea District. The fee is being held in escrow.

On these motions sequence numbers 001 and 002 each side seeks to disqualify counsel for the other based on alleged conflicts of interest based on concurrent representation of adverse parties. In April 2016, shortly after this action was filed, IAC moved to disqualify DLA Piper (DLA) as counsel for Georgetown. The next day, Joseph B. Rose filed a motion by order to show cause to intervene and disqualify Kasowitz, Benson, Torres & Friedman (Kasowitz) from acting as IAC's counsel in this matter.

II. MOTION SEQUENCE NUMBER 001

A. Facts

The facts which are largely undisputed, are taken from

the parties' memoranda. Where material facts are disputed, they are noted.

In March 2015, DLA approached IAC about representing IAC in *DeWitt v Crazy Protocol Communications, Inc., et al.*, a California action **[*2]** brought by a pro se plaintiff complaining of violations of a California anti-spam statute. IAC believed its subsidiary, Match.com, was the proper defendant in that action, and that IAC would soon be replaced by Match.com in the case. Match.com signed a letter of engagement for DLA to represent it in the action (the Match.com Engagement Letter, attached as Exhibit C to Katz Aff, NYSCEF Doc. No. 7). DLA was already representing IAC in *DeWitt*, IAC's motion to quash DeWitt's proposed summons was granted. On October 30, 2015, DeWitt filed a notice of appeal. **[**4]** His opening brief was filed on March 24, 2016. IAC states that DLA was counsel of record for IAC on the appeal.

It is unclear exactly when DLA's representation of Georgetown began. However, DLA represented Georgetown at a pre-suit settlement meeting held in New York in October 2015 (the October Meeting). DLA describes the pre-suit negotiations as being more extensive. IAC characterizes it as a single meeting, at which DLA made a presentation, and at which no negotiation was held. IAC did not object, to DLA's representation of Georgetown at that meeting. DLA claims IAC was happy for DLA's involvement on behalf of Georgetown because it **[*3]** felt the relationship between the attorney front DLA (Anthony Coles) and IAC'S Associate General Counsel (Edward Ferguson) would help negotiations.

This action was filed on March 11, 2016. Five days later, IAC wrote to DLA, asserting a conflict of interest, declining to waive the conflict, and asking DLA to withdraw. DLA declined. On March 17, DLA reached out to Match.com's General Counsel seeking a waiver. He declined, on the grounds that Match.com did not speak for IAC, and referred DLA to IAC, On March 28, DLA filed a motion to be relieved as IAC's counsel in the DeWitt appeal. IAC objected, claiming, among other things, that DLA was dropping it like a hot potato in order to avoid a conflict with a preferred client.

On April 28, IAC filed the instant motion to disqualify DLA as Georgetown's counsel. On the same day, DLA's motion to withdraw from the California action was granted by the First Appellate District, Division Two, of the Court of Appeal for the State of California. The parties make divergent assertions about why that court granted the motion, but the court's decision is bare of explanation.

B. Arguments

IAC argues, that filing of this suit violated New York Rules of Professional **[*4]** Conduct, as DLA had a disabling conflict of interest, representing one client in litigation against another existing client. Rule 1.7 provides:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:
>
> (1) the representation will involve the lawyer in representing differing interests; or
>
> (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
>
> **[**5]** (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) the representation is not prohibited by law;
>
> 3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
>
> (4) each affected client gives informed consent, confirmed in writing.

"The duty to avoid the representation of differing interest prohibits, among other things; undertaking **[*5]** representation adverse to a current client without that client's informed consent" (Rule 1.7, Comment 6).

IAC argues that DLA represented IAC concurrently with suing it, which is "prima facie improper" (*Hempstead Video, Inc. v. Inc. Vill. of Valley Stream, 409 F3d 127, 133 [2d Cir 2005]* ["If the representation is concurrent, it is 'prima facie improper' for an attorney to simultaneously represent a client and another party with interests directly adverse to that client." (quoting *Cinema 5. Ltd. v Cinerama, Inc., 528 F2d 1384, 1387 [2d Cir. 1976])] see Merck Eprova AG v ProThera, Inc., 670 F Supp 2d 201, 208 [SDNY 2009])*. It maintains that "the

attorney must be disqualified unless he can demonstrate at the very least; that there will be no actual or apparent conflict in loyalties or diminution in the vigor of his representation" (*Hempstead Video, 409 F 3d at 133*, internal quotations omitted). Accordingly, IAC seeks to have DLA disqualified.

DLA argues that this motion is late, and IAC has waived any conflict by waiting five months after the October Meeting to file the motion. DLA also points to the conflict waiver in the Match.com Engagement Letter, which DLA argues also applies to IAC *(see Macy's Inc. v J.C. Penny Corp., Inc., 107 A D3d 616, 617, 968 N.Y.S.2d 64 [1st Dept 2013]*[advance conflict waiver in retainer agreement found enforceable][1]. DLA claims the argument made by IAC in response to DLA's motion to withdraw, that the Match.com Engagement Letter did not bind it, was so ludicrous, and so damaged **[*6]** their relationship, that DLA declined to further represent IAC in the *DeWitt* appeal, ending the relationship. DLA claims the California court discredited IAC's arguments by granting DLA's motion to withdraw.

DLA argues that the Match.com Engagement Letter applies to IAC, as this is the only retainer agreement covering DLA's work for both Match.com and IAC. DLA claims it was instructed by IAC to discuss terms of the engagement with Match.com and cites a letter in which IAC's assistant general counsel told DLA to work out the details with Match.com's counsel because "we'd like you to represent us in this **[**6]** matter" (Opp at 6, quoting Ferguson e-mail to Katz dated March 13, 2015, attached as Exhibit B to Katz Aff). Further, the Match.com Engagement Letter describes representation "in connection with the claims brought against the Company," when the claims were, at that point, brought, against IAC. DLA represented IAC in the *DeWitt* action, and invoiced Match.com, as per IAC'S instructions. DLA's invoices were paid, however, by IAC. DLA also argues that Curtis Anderson, Match.com's General Counsel, who signed the Match.com Engagement Letter, had "both actual and apparent authority to sign ... on IAC's **[*7]** behalf" (Opp at 16). To interpret the Match.com Engagement Letter not to bind IAC would be contrary to the intent of the parties (Opp at 17, citing *Cole v Macklowe, 99 AD3d 595, 596, 953 N.Y.S.2d 21 [1st Dept 2012]*, affd, *125 AD3d 44, 999 N.Y.S.2d 403 [1st Dept 2014]* [it is a "well settled principle that a contract should not be interpreted to produce an absurd result, one that is commercially unreasonable, or one that is contrary to the intent of the parties"]). Additionally, as IAC used and paid for DLA's services, it accepted the benefits of the contract, and should be bound by its terms *(see Goldston v. Bandwidth Tech. Corp., 52 AD3d 360, 363, 859 N.Y.S.2d 651 [1st Dept 2008])*.

DLA argues that, even without a conflict waiver, IAC's motion to disqualify should be denied, as IAC will not suffer any prejudice, and the balance of equities tips in Georgetown's favor. DLA contends there is no "mandatory disqualification" rule, and that counsel must have the "opportunity to show, at the very least that there will he no actual or apparent conflict in loyalties or diminution in the vigor of his representation" (*Develop Don't Destroy Brooklyn v Empire State Dev. Corp., 31 AD3d 144, 153, 816 N.Y.S.2d 424 [1st Dept 2006])*. Additionally, as the representation in the *DeWitt* action is now terminated, there is no longer a concurrent representation, and so an assumption that the representation is prima facie improper would no longer apply *(see MSKCT Trust v Paraneck Enterprises Inc., 296 AD2d 769, 770, 746 N.Y.S.2d 86 [3d Dept 2002])*. DLA notes that IAC points to no specific prejudice which would be caused **[*8]** if DLA continues to represent Georgetown, and argues that "there is no risk of divided loyalties or diminished vigor" in the *DeWitt* litigation, while Georgetown will be prejudiced by the loss of DLA as its counsel (Opp at 23-25).

IAC replies that the Match.com Engagement Letter cannot apply to IAC, since, by its terms; it "does not create an attorney-client relationship with any other entity or person, including, without limitation, your corporate parents, subsidiaries, affiliates ... unless such entities or persons are specifically named in [the engagement letter]" (Match.com Engagement Letter, Terms of Service, ¶ 2). As the terms of the agreement specifically exclude binding any other entity, Match.com's General Counsel's alleged authority (which is denied by IAC) to bind IAC is irrelevant. IAC denies that Anderson instructed. DLA on how to write the engagement letter, or that it should omit mention of IAC. Anderson, in fact, crossed out the phrase "or your affiliates" in a section of the Terms of Service which would have represented that Match.com "agree[d] that an Allowed Adverse Representation does not breach

[1] The conflict waiver reads: "you acknowledge and agree that the Firm and its affiliated entities may, now or in the future, represent other persons or entities on matters adverse to you or any of your current or future affiliates, including, without limitation, in ... litigation, arbitration or other dispute resolution procedure, other than those for which the Firm had been or is engaged by you' (Match.com Engagement Letter, Terms of Service, ¶4).

any duty that the Firm owes to you or any of your affiliates" (Match.com Engagement Letter, **[*9]** Terms of Service. ¶ 4). IAC also claims **[**7]** to have been ignorant of the existence of the Match.com Engagement Letter until March 2016. Accordingly, IAC never consented to DLA's representation of Georgetown, and would not have consented, as that is not its practice.

IAC further disputes that the Match.com Engagement Letter binds it, by its terms, and that the document, drafted by DLA, should be construed against DLA. It denies Anderson had actual or apparent authority to bind IAC, and the document clearly shows him signing only on behalf of Match.com. IAC claims that disqualification is warranted because "DLA opportunistically dropped IAC as a client - - via its withdrawal from the *DeWitt* Litigation — only after IAC declined to provide it a waiver to allow it to represent Georgetown in this apparently more attractive and lucrative engagement" (Reply at 13-14).

C. Standard

"[W]hether to disqualify an attorney rests in the sound discretion of the Court" (*Harris v Sculco, 86 AD3d 481, 926 N.Y.S.2d 897 [1st Dept 2011]*). An attorney "may not place himself in a position where a conflicting interest may, even inadvertently, affect, or give the appearance of affecting, the obligations of the professional relationship" (*Flores v Willard J. Price Assocs., LLC, 20 AD3d 343, 344, 799 N.Y.S.2d 43 [1st Dept 2005]*, quoting *Matter of Kelly, 23 NY2d 368, 376, 244 N.E.2d 456, 296 N.Y.S.2d 937 [1968]*), and "doubts as to the existence of **[*10]** a conflict of interest must be resolved in favor of disqualification" (*Justinian Capital SPC v WestLB AG, NY Branch, 90 AD3d 585, 585, 934 N.Y.S.2d 807 [1st Dept 2011)*, quoting *Rose Ocko Found v Liebovitz, 155 AD2d 426, 428, 547 N.Y.S.2d 89 [2nd Dept 1989])*. However, [a] party's entitlement to be represented in ongoing litigation by counsel of his or her own choosing is a valued right which should not be abridged absent a clear showing that disqualification is warranted" (*Campolongo v Campolongo, 2 AD3d 476, 476, 768 N.Y.S.2d 498 [2nd Dept 2003]* [citations omitted]; *see Horn v Mun. Info. Servs., 282 AD2d 712, 724 N.Y.S.2d 320 [2nd Dept 2001])*. The party seeking disqualification "bears. the burden of establishing that" standard (*O'Donnell, Fox & Gartner. P.C. v R-2000 Corp., 198 AD2d 154, 604 N.Y.S.2d 67 [1st Dept. 1993] NYK Line (N. Am.) Inc. v Mitsubishi Bank, Ltd., 171 AD2d 486, 488, 567 N.Y.S.2d 409 [1st Dept 1991])*.

D. Discussion

At the time this action was filed, DLA was involved in simultaneous representation of and against IAC. A conflict, if any, must be assessed as Of that time *(see Burda Media, Inc. v Blumenberg, 1999 U.S. Dist. LEXIS 17336, 1999 WL 1021104, at *3 [SDNY Nov. 8, 1999]* ["It is well settled that whether an adverse attorney-client relationship is simultaneous or continuing is to be determined as of the time that the conflict arises, and not at the time the motion to disqualify is finally brought before the court"]; *see also Chemical Bank v Affiliated FM Ins. Co., 1994 U.S. Dist. LEXIS 5120, 1994 WL 141951, at * 11 [SDNY, Apr. 20, 1994]*; *Stratagem Devil Corp. v Heron Int'l N.V., 756 FSupp 789, 793 [SDNY 1991]*; *Fund of Funds, Ltd. v Arthur Andersen & Co., 435 F Supp 84, 95 [SDNY]*, aff'd in part, rev'd in part on other grounds, *567 F2d 225 [2d Cir 1977]*).

[8]** DLA asserts that the waiver clause of the Match.com Engagement Letter applies. IAC responds that the letter is not binding on it. "The fundamental rule of contract interpretation is that agreements are construed in accord with the parties' intent ... and '[t]he best evidence **[*11]** of what parties to a written agreement intend is what they say in their 'writing' .... Thus, a written agreement that is clear and unambiguous on its face must be enforced according to the plain terms, and extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous [internal citations omitted]" (*Riverside South Planning Corp. v CRP/Extell Riverside LP, 60 AD3d 61, 66, 869 N.Y.S.2d 511 [1st Dept 2008]*, *affd 13 NY3d 398, 920 N.E.2d 359, 892 N.Y.S.2d 303 [2009])*. Whether a contract is ambiguous presents a question of law for resolution by the court (*id. at 67*). The court should adopt an interpretation of a contract which gives meaning to every provision of the contract, with no provision left without force and effect *(see RM 14 FK Corp. v Bank One Trust Co., N.A., 37 AD3d 272, 831 N.Y.S.2d 120 [1st Dept 2007])*.

The terms of the Match.com Engagement Letter are clear and unambiguous that it only binds Match.com. DLA contends that the circumstances indicate the parties intended something else but that circumstance does not create an ambiguity in the document. Further, as DLA drafted the agreement, "applying standard principles of contract construction, we construe ambiguities, against the draftsman" (*Morrison Cohen Singer & Weinstein, LLP. v Network Indus. Corp., 292 AD2d 153, 154, 739 N.Y.S.2d 39 [1st Dept 2002])*. If

DLA had wanted to bind IAC to that document, it knew how to write an engagement tester that would so provide. It did not. Accordingly, DLA cannot base its conflict waiver defense on the terms of the Match.com **[*12]** Engagement Letter.

Even without finding a prima facie conclusion of conflict due to the concurrent representation *(see* Develop Don't Destroy Brooklyn v Empire State Dev. Corp., 31 AD3d 144, 152, 816 N.Y.S.2d 424 [1st Dept 2006]["Since ... the only simultaneous representation here involves totally unrelated cases ..., there was no prima facie showing of a conflict"]), there is an evidence of actual conflict. While DLA claims there is no diminution in representation, and no prejudice to IAC, the argument is akin to the defendant facing sentencing for killing his parents pleading for leniency because he's an orphan. IAC has already lost its preferred counsel for the *DeWitt* case because of this conflict. While DLA blames their parting of the ways on IAC's position that the Match.com Engagement Letter does not bind it, that position was raised in reference to DLA's attempt to withdraw from representing IAC so as to clear the conflict and represent a preferred client. Accordingly, IAC has already suffered prejudice. The controversy before the court is a prime example of what was intended to be avoided by Rule 1.7, which provides that "absent consent, a lawyer may not advocate in one matter against another client that the lawyer represents in some other matter, even when the matters are wholly unrelated. **[*13]** The client as to whom the representation is adverse is likely to feel betrayed and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's **[**9]** ability to represent the client effectively" (Rule 1.7, Comment 6). Additionally, the parties are at an early stage of the litigation, and prejudice to Georgetown from ending DLA's representation now will be limited.

III. MOTION SEQUENCE NUMBER 002

Joseph B. Rose moves to intervene pursuant to CPLR section 1012 and 1013 and to disqualify Kasowitz, Benson, Torres & Friedman LLP (Kasowitz) from representing IAC as counsel in this action.

A. Facts

Rose alleges that he has a substantial ownership interest in Georgetown, was heavily involved in the events giving rise to this action, has millions of dollars at stake in the outcome, and will be a key Georgetown witness. Kasowitz, who represents IAC in this action, has also represented Rose for six years in a separation and divorce proceeding. As of the time of oral argument on these motions, that trial had been adjourned. As a result of that representation, Kasowitz has been privy to Rose's personal and financial information, including information about Georgetown and the fees at issue in this litigation. **[*14]** Rose learned of Kasowitz's representation of IAC on or around March 14, 2016, and his counsel, Michael Feldberg, conferred with Marc Kasowitz (M Kasowitz) about a possible conflict on March 25. M Kasowitz took the position that there was no conflict. On April 15, Feldberg asked Kasowitz to withdraw from representing IAC. Kasowitz declined.

B. Arguments

Rose seeks leave "to intervene for the purpose of making this motion and argues that Kasowitz should he disqualified as IAC's counsel because of the conflict between IAC and his interests. Rose claims his motion is timely, and prejudice to IAC will be minimized.

As discussed above, Rule 1.7 of New York's Rules of Professional Conduct, prohibits simultaneous representation of clients with differing interests without a written waiver. Rule 1.8(b) provides that a "lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules." The conflicts covered by these rules apply to an attorney's entire firm *(see* Rule 1.10[a] ["While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone **[*15]** would be prohibited from doing so by Rule 1.7, 1.8 or 1.9, except as otherwise provided therein"]). An additional conflict is created here because Rose will be a key witness in this litigation, and Kasowitz can be expected to examine him, despite its possession of his confidential and privileged information. One can reasonably envision Kasowitz trying to diminish Rose's credibility at such examination and attempting the **[**10]** opposite in the divorce proceeding *(see* Tartakoff v New York State Educ. Dept., 130 AD3d 1331, 1333, 14 N.Y.S.3d 565 [3d Dept. 2015]).

Rose also argues that, if the court denies him leave to intervene, the court is now aware of the conflict and should disqualify Kasowitz *(see* Flushing Sav. Bank v FSB Properties, Inc.; 105 AD2d 829, 830, 482 N.Y.S.2d

29 [2d Dept 1984]).

Kasowitz argues that there is no disqualifying conflict, as the matrimonial attorneys representing Rose are leaving the firm the day after the filing of their opposition brief (in May 2016) to start their own boutique firm, taking the Rose case and files with them, and leaving Kasowitz with no confidential information about Rose or his divorce litigation. At that point, Rose will no longer be a Kasowitz client, and there will be no further grounds for disqualification *(see* New York Rule's of Professional Conduct 1.10[b] ["When a lawyer has terminated an association with a firm, the firm is prohibited from thereafter representing a person with interests **[*16]** that the firm know's or reasonably should know are materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm if the firm or any lawyer remaining in the firm has information protected by Rule 1.6 or Rule 1.9(c) that is material to the matter"]). Kasowitz claims that all the attorneys involved in representing Rose are leaving, all of the information is going with them (and all paper and electronic files will be purged from their systems), and the matrimonial group has effectively operated behind an ethical wall, so no other attorneys are privy to their matters.

Kasowitz claims that even if Rose were to be considered a current client, there is no conflict of interest between them, as diverging "economic interests" are insufficient *(see* Rule 1.7, comment 6 ["simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients"]).

Kasowitz also asserts that intervention is no permitted for a limited purpose, that intervention **[*17]** is for full joinder as a party, only *(see CPLR. 1013* ["any person may be permitted to intervene in any action when a statute of the state confers a right to intervene in the discretion of the court, or when the person's claim or defense and the main action have a common question of law or fact"]; *Rent Stabilization Ass'n of New York City v State Div. of Hous. and Community Renewal, 252 AD2d 111, 116, 681 N.Y.S.2d 679 [3d Dept 1998]* ["The CPLR does not recognize limited intervention; rather, a successful intervenor becomes a party for all purposes. Whereas the City could have moved to intervene and simultaneously make a preanswer motion to dismiss pursuant to *CPLR 3211* and *7804 (f)*, it could not "limit" its intervention" (quoting *Matter of Greater N. Y. Health Care Facilities Assn. v DeBuono, 91 NY2d 716, 720, 697 N.E.2d 589, 674 N.Y.S.2d 634 [1998])])*. Rose replies that the **[**11]** First Department has allowed just such an intervention *(see Anonymous v Anonymous, 262 AD2d 216, 691 N.Y.S.2d 769 [1st Dept 1999])*.

Rose contends that this matter should be considered as a current conflict, as Rose was represented by Kasowitz when Kasowitz first appeared in this action.. Rose argues that jettisoning the matrimonial practice is merely a convenient way of converting a current client into a former client, and attempting to get a more lenient standard for evaluating the conflict. Rose questions whether Kasowitz can rely on its ethical wall and other methods to safeguard Rose's personal information, after its conflicts check system failed. Rose maintains **[*18]** that Kasowitz will still be cross-examining Rose, and will still damage him financially if it succeeds for its other client *(id.* at 7).

As to Kasowitz' claim that there is no prejudice to Rose, because no remaining Kasowitz attorneys will have his information, Rose asserts that Kasowitz is keeping some matrimonial lawyers, and that information may have been shared already with other attorneys in the practice, even if they were not directly involved with his case. Further, matrimonial attorneys Alter and Wolff told Rose that they were leaving Kasowitz "in large part due to their concern about going to trial in the Divorce. Action with the conflict issue hanging over them" (Supp Rose Aff, ¶ 7), but could not leave immediately because of their partnership agreement. Once this motion was filed, Kasowitz allowed the matrimonial attorneys to leave early. Although Kasowitz represented to the court that the matrimonial partners would vacate the premises by May 13, they actually remained at Kasowitz until May 25). Rose states that Kasowitz continued to plate its own interests ahead of his by "distract[ing] Ms. Alter and Mr. Wolff from preparation for trial in the Divorce Action by, among other things, pressuring **[*19]** them to confirm that the Kasowitz firm can delete electronic flies in its possession containing confidential information about the Divorce Action".

As far as Kasowitz claims that there was an ethical screen surrounding its matrimonial practice, Rose argues that a waiver is still required, and that screens "do not arise passively based on historic conduct" (Reply at 14). Kasowitz attorneys learned his thoughts on the merits of this dispute during preparation for the divorce action, and should not be in a position to cross-

examine him in that action now.

Rose argues also that Kasowitz should be disqualified, even if Rose were to be considered a former client, as the law firm has placed, and, is still placing, its own interests over those of client Rose.

C. Discussion

As above, the conflict here must be evaluated as a current conflict, since Kasowitz represented. Rose in the divorce action at the time it appeared as counsel for IAC, It is undisputed that Rose did not waive the conflict. "A lawyer may not both appear for and oppose a client on substantially related matters **[**12]** when the client's interests are adverse. . . . The rule has been extended to provide that if one attorney in a firm is **[*20]** disqualified from representing a client, then all attorneys in the firm are disqualified. This is so because there is an irrebuttable presumption of shared confidences among attorneys employed by the firm which forecloses the firm from representing others in the future in substantially related matters" (*Solow v W. R. Grace & Co., 83 NY2d 303, 306, 632 N.E.2d 437, 610 N.Y.S.2d 128 [1994]*, citing *Greene v Greene, 47 NY2d 447, 451, 391 N.E.2d 1355, 418 N.Y.S.2d 379 [2004])*.

There is a distinction between the facts and cases cited, as Rose is not a party to the instant action and Kasowitz is not precisely adverse to its own client. However, this is not a situation where there are merely adverse economic interests. Kasowitz is not proposing to represent an economic competitor of a client in an unrelated matter. In this case, Kasowitz seeks to represent a party whose interests are not merely competing but are substantially adverse to Rose.

Rose swears, and Kasowitz does not dispute, that the funds at issue in this case are also at issue in the divorce proceeding, and Rose that has discussed his opinions on the merits of this case with Kasowitz The matter appear to be substantially related. Accordingly, an irrebuttable presumption that his matrimonial attorneys shared confidences with other attorneys at the firm would apply.

V. CONCLUSION

For the reasons **[*21]** discussed above, the motion to disqualify DLA must be granted as it is conflicted and the conflict has not been waived. The motion of Joseph B. Rose. to intervene shall be granted for the limited purpose of objecting to the representation of IAC by Kasowitz *(see Anonymous v Anonymous, 262 AD 2d 216, 691 N.Y.S.2d 769 [1st Dept 1999]*[granting ***nonparty*** intervenor's motion to ***disqualify*** counsel]). The motion to ***disqualify*** Kasowitz shall be granted as it already represents Rose and no waiver has been given.

Accordingly, it is hereby

ADJUDGED and DECLARED that the law firm of DLA Piper is declared to be conflicted in violation of New York Rule's of Professional Conduct, Rule 1.7, and accordingly is disqualified from continuing to represent plaintiffs in this action; and, it is further.

ADJUDGED and DECLARED that the law firm of Kasowitz, Benson, Torres and Friedman is declared to be conflicted in violation of New York Rules of Professional Conduct Rule 1.7, and accordingly is disqualified from continuing to represent defendants in this action; and it is further

[13]** ORDERED** that matter is hereby stayed for twenty (20) days in order to permit the respective parties time to retain new counsel and new counsel are directed to enter their appearance and to appear at a scheduling conference **[*22]** at Part 49, 60 Centre Street, Room 252, New York, New York on March 28, 2014 at 9:30 am.

This constitutes the decision and order of the court.

DATED: March 3, 2017

ENTER

/s/ O. Peter Sherwood

O. PETER SHERWOOD

J.S.C.

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133 Nev. 190
Supreme Court of Nevada.

In the MATTER OF the BEATRICE B. DAVIS FAMILY HERITAGE TRUST, Dated July 28, 2000, as Amended on February 24, 2014.
Christopher D. Davis, Appellant,
v.
Caroline Davis; Dunham Trust Company; Stephen K. Lehnardt; Tarja Davis; Winfield B. Davis; Ace Davis; and FHT Holdings, LLC, a Nevada Limited Liability Company, Respondents.
Christopher D. Davis, Petitioner,
v.
The Eighth Judicial District Court of the State of Nevada, in and for The County of Clark; and the Honorable Gloria Sturman, District Judge, Respondents,
and
Caroline Davis, Real Party in Interest.

No. 68542, No. 68948
|
FILED MAY 25, 2017

Synopsis
Background: Trust beneficiary filed petition asking District Court to assume jurisdiction over trust after investment trust adviser denied request for information on trust and limited liability corporation (LLC) managed by adviser. The Eighth Judicial District Court, Clark County, Gloria Sturman, J., treated trust situs as Nevada, assumed jurisdiction over trust and adviser, confirmed appointment of successor trustee and adviser, and ordered adviser to produce requested documents. Adviser appealed and petitioned for writ of prohibition or mandamus.

Holdings: On rehearing, the Supreme Court, Gibbons, J., held that:

as a matter of first impression, challenges to assumption of jurisdiction over trust and adviser and order to disclose documents were beyond scope of appellate jurisdiction, and

as a matter of first impression, exercise of specific personal jurisdiction over adviser satisfied long-arm statute as well as due process requirements.

Appeal dismissed, and petition denied.

Opinion, 388 P.3d 964, withdrawn.

Procedural Posture(s): On Appeal.

****1205** Petition for rehearing of an en banc opinion in a consolidated appeal from an order confirming appointment of a trustee and original petition for a writ of prohibition or mandamus in a trust matter. Eighth Judicial District Court, Clark County; Gloria Sturman, Judge.

Attorneys and Law Firms

Goodsell & Olsen and Michael A. Olsen and Thomas R. Grover, Las Vegas, for Christopher D. Davis.

Solomon Dwiggins & Freer, Ltd., and Joshua M. Hood and Mark A. Solomon, Las Vegas, for Caroline Davis.

Lee, Hernandez, Landrum, Garofalo and Charlene N. Renwick, Las Vegas, for Dunham Trust Company.

Clear Counsel Law Group and Jonathan W. Barlow, Henderson, for Stephen K. Lehnardt

FHT Holdings, LLC, Las Vegas, in Pro Se.

Ace Davis, Wakayama, Japan, in Pro Se.

Tarja Davis, Los Angeles, California, in Pro Se.

Winfield B. Davis, Wakayama, Japan, in Pro Se.
BEFORE THE COURT EN BANC.[1]

[1] The Honorable Lidia S. Stiglich, Justice, did not participate in the decision of this matter.

OPINION

By the Court, GIBBONS, J.:

***191** On January 26, 2017, this court issued an opinion examining a district court order accepting jurisdiction over a trust with a situs in Nevada and finding personal jurisdiction over an investment trust adviser (ITA). We ultimately dismissed appellant Christopher Davis' appeal and denied his original writ petition. We now grant Christopher's petition for rehearing to clarify an issue in the prior opinion: whether accepting a role as an ITA pursuant to NRS 163.5555 constitutes sufficient minimum contacts with Nevada to give rise to specific personal jurisdiction. We thus withdraw the January 26 opinion and issue this opinion in its place.

In this appeal and petition, we are asked to interpret (1) whether NRS 155.190(1)(h) grants this court appellate jurisdiction over all matters in an order instructing or appointing the trustee or if the statute only grants this court appellate jurisdiction over the instruction or appointment of the trustee, and (2) whether Nevada courts may exercise specific personal jurisdiction over persons accepting a position as an ITA in Nevada under NRS 163.5555. We conclude (1) NRS 155.190(1)(h) only grants this court appellate jurisdiction over the portion of an appealed order instructing or appointing a trustee, and (2) Nevada courts may exercise specific personal jurisdiction over persons accepting a position as an ITA under NRS 163.5555 should a suit arise out of a decision or action done while acting as an ITA. Accordingly, we dismiss Christopher Davis' appeal and deny his writ petition.

FACTS AND PROCEDURAL HISTORY

On July 28, 2000, Beatrice Davis, a Missouri resident, established the Beatrice B. Davis Family Heritage Trust (the FHT), under Alaska law, with the trust situs in the state of Alaska. The FHT was initially funded with a $35 million life insurance policy. Beatrice Davis died in January 2012.

On October 30, 2013, the trustee, Alaska USA Trust Company (AUTC), sent a letter of resignation indicating that its resignation would become official on December 5, 2013, or upon the appointment of a new trustee, whichever was earlier. On February 24, 2014, the trust protector executed the first amendment to the FHT, ***192** which transferred the trust situs to the state of Nevada and appointed appellant/petitioner Christopher Davis, Beatrice Davis' son, as the investment trust adviser (ITA). At the same time, AUTC signed a letter acknowledging that it was currently serving as trustee and agreeing to the transfer of situs and the appointment of the Dunham Trust Company (DTC) as the successor trustee.[2] Thereafter, the FHT created a Nevada limited liability corporation ****1206** (FHT Holdings) and appointed Christopher as the sole manager.

[2] Despite the lapse in time between AUTC's resignation and the execution of the first amendment, we conclude the parties consented to the transfer of the FHT's situs from Alaska to Nevada.

On August 26, 2014, respondent and real party in interest Caroline Davis, Christopher's sister and a beneficiary of the FHT, requested information related to the activities of the FHT and FHT Holdings. When Christopher failed to produce the information in his role as the ITA and manager of FHT Holdings, Caroline filed a petition for the district court to assume jurisdiction over the FHT. The district court issued an order assuming jurisdiction over the FHT under a constructive trust theory, assuming jurisdiction over Christopher as ITA, and confirming DTC as trustee. Christopher filed a notice of appeal. Thereafter, Caroline filed a motion to amend or modify the initial order, and the district court later certified its intent that, if

remanded, it would assume jurisdiction over the FHT and Christopher as the ITA. Christopher then filed an emergency writ petition. This court issued an order remanding the appeal to the district court to amend its order.

On December 31, 2015, the district court issued an amended order, which clarified that in its initial order it assumed jurisdiction over the FHT and found that, because the first amendment was properly executed, the trust situs is in Nevada. The amended order assumed jurisdiction over the FHT under NRS 164.010, found that the court had personal jurisdiction over Christopher as ITA and as the manager of FHT Holdings, and confirmed DTC's appointment as trustee and Christopher's appointment as ITA. Finally, the amended order required Christopher to produce the requested documents and all the information in his possession, custody, or control as the ITA and manager of FHT Holdings.

DISCUSSION

Christopher challenges the district court's exercise of jurisdiction over him under NRS 163.5555 through both his appeal and writ petition. In his appeal, we must interpret NRS 155.190(1)(h), the statute on which Christopher bases his appeal, to determine whether we have jurisdiction to consider the issues that Christopher raises in ***193** his appeal. In his writ petition, we interpret NRS 163.5555's grant of personal jurisdiction over ITAs. This court reviews questions of statutory interpretation de novo. *Zohar v. Zbiegien*, 130 Nev. ——, 334 P.3d 402, 405 (2014).

Christopher's appeal of the district court's order assuming jurisdiction over the FHT and over Christopher is beyond the scope of NRS 155.190(1)(h)

First, we consider the scope of our jurisdiction in an appeal from an order instructing or appointing a trustee under NRS 155.190(1)(h). Christopher argues that, in addition to considering the district court's confirmation of DTC as trustee in the amended order, in an appeal under NRS 155.190(1)(h), we may also consider other issues addressed in the order: here, the district court's assumption of jurisdiction over the FHT and over Christopher as the ITA and as a manager of FHT Holdings, and its order directing Christopher to make the requested disclosures. We disagree.

NRS 155.190(1)(h) provides that "an appeal may be taken to the appellate court of competent jurisdiction ... within 30 days after the notice of entry of an order: ... [i]nstructing or appointing a trustee." This court has not yet addressed whether an appeal under NRS 155.190(1)(h) grants this court jurisdiction over all matters included in an order that instructs or appoints a trustee or if such an appeal grants this court jurisdiction only over the instruction or appointment of the trustee. Based on a plain reading of NRS 155.190(1)(h), we conclude that nothing in NRS 155.190(1)(h) expressly grants this court the authority to address the district court's findings of fact or conclusions of law beyond the instruction or appointment of a trustee. In his appeal, Christopher argues that the district court erred in assuming jurisdiction over the trust and over Christopher, and erred in its order directing Christopher to make the requested disclosures. We conclude that such matters are beyond the scope of our appellate jurisdiction under NRS 155.190(1)(h). *See Bergenfield v. BAC Home Loans Servicing, LP*, 131 Nev. ——, 354 P.3d 1282, 1283 (2015) ("This court's ****1207** appellate jurisdiction is limited to appeals authorized by statute or court rule."). Therefore, Christopher's appeal is dismissed.

Christopher's writ petition is denied because Christopher accepted a position as an ITA and therefore submitted to personal jurisdiction in Nevada under NRS 163.5555

Next, we consider Christopher's writ petition, challenging whether a person accepting an appointment as a trust adviser under NRS 163.5555 submits to personal jurisdiction in Nevada. Christopher ***194** contends that the district court's exercise of jurisdiction over him as ITA is an abuse of discretion warranting extraordinary writ relief.[3]

[3] Christopher also argues Caroline's mailed notice under NRS 155.010 did not comport with due process. We disagree and conclude Christopher was properly served. We also conclude that the district court's conclusion that it had personal jurisdiction over Christopher as manager of FTC Holdings was not in error.

This court has original jurisdiction to issue writs of mandamus. Nev. Const. art. 6, § 4. "A writ of mandamus is available to compel the performance of an act that the law requires or to control an arbitrary or capricious exercise of discretion." *Las Vegas Sands Corp. v. Eighth Judicial Dist. Court*, 130 Nev. ——, 331 P.3d 876, 878 (2014); *see also* NRS 34.160. A writ of prohibition, in turn, may be available "when the district court exceeds its jurisdiction." *Las Vegas Sands*, 130 Nev. ——, 331 P.3d at 878; *see also* NRS 34.320. "Neither form of relief is available when an adequate and speedy legal remedy exists." *Aspen Fin. Servs., Inc. v. Eighth Judicial Dist. Court*, 128 Nev. 635, 639, 289 P.3d 201, 204 (2012). However, even if an adequate legal remedy exists, this court will consider a writ petition if an important issue of law needs clarification. *See Diaz v. Eighth Judicial Dist. Court*, 116 Nev. 88, 93, 993 P.2d 50, 54 (2000). We have not previously interpreted NRS 163.5555 and conclude this is an important issue of law in need of clarification. Accordingly, we exercise our discretion to consider this issue in Christopher's writ petition.

Christopher argues that the district court may not exercise personal jurisdiction over him because, despite accepting a position as an ITA for a trust with a situs in Nevada, he is a nonresident and doing so would offend traditional notions of fair play and substantial justice. We disagree.

NRS 163.5555 provides:

> If a person accepts an appointment to serve as a trust protector or a trust adviser of a trust subject to the laws of this State, the person submits to the jurisdiction of the courts of this State, regardless of any term to the contrary in an agreement or instrument. A trust protector or a trust adviser may be made a party to an action or proceeding arising out of a decision or action of the trust protector or trust adviser.[4]

[4] Christopher argues the second sentence of the statute grants only in rem jurisdiction over an ITA. We disagree. We conclude that, when read in its entirety, the statute grants courts in personam jurisdiction over a nonresident ITA, subject to the rigors of minimum contacts analysis.

An exercise of personal "[j]urisdiction over a nonresident defendant is proper only if the plaintiff shows that the exercise of jurisdiction satisfies the requirements of Nevada's long-arm statute and does not offend principles of due process." ***195** *Viega GmbH v. Eighth Judicial Dist. Court*, 130 Nev. ——, 328 P.3d 1152, 1156 (2014). NRS 14.065, Nevada's long-arm statute, "reaches the constitutional limits of due process under the Fourteenth Amendment, which requires that the [nonresident] defendant have such minimum contacts with the state that the [nonresident] defendant could reasonably anticipate being haled into court [in Nevada], thereby complying with traditional notions of fair play and substantial justice." *Id.* (internal quotation marks omitted). "Due process requirements are satisfied if the nonresident defendants' contacts [with Nevada] are sufficient to obtain either (1) general jurisdiction, or (2) specific personal jurisdiction and it is reasonable to subject the nonresident defendants to suit here." *Id.*

"A court may exercise general jurisdiction over a [nonresident defendant] when its contacts with the forum state are so ****1208** continuous and systematic as to render [the defendant] essentially at home in the forum State." *Fulbright & Jaworski LLP v. Eighth Judicial Dist. Court*, 131 Nev. ——, 342 P.3d 997, 1001–02 (2015) (alteration in original) (internal quotation marks

omitted). General jurisdiction analysis "calls for an appraisal of a [defendant's] activities in their entirety, nationwide and worldwide." *Id.* at 1002 (alteration in original) (quoting *Daimler AG v. Bauman*, 571 U.S. ——, —— n.20, 134 S.Ct. 746, 762 n.20, 187 L.Ed.2d 624 (2014)).

"Unlike general jurisdiction, specific jurisdiction is proper only where the cause of action arises from the defendant's contacts with the forum." *Id.* (internal quotation marks omitted). More specifically, in order for Nevada courts to exercise specific personal jurisdiction over a nonresident defendant,

> [t]he defendant must purposefully avail himself of the privilege of acting in [Nevada] or of causing important consequences in [Nevada]. The cause of action must arise from the consequences in the forum state of the defendant's activities, and those activities, or the consequences thereof, must have a substantial enough connection with [Nevada] to make the exercise of jurisdiction over the defendant reasonable.

Consipio Holding, BV v. Carlberg, 128 Nev. 454, 458, 282 P.3d 751, 755 (2012) (first alteration in original) (quoting *Jarstad v. Nat'l Farmers Union Prop. & Cas. Co.*, 92 Nev. 380, 387, 552 P.2d 49, 53 (1976)).

We conclude Nevada courts may exercise specific personal jurisdiction over persons accepting a position as an ITA in Nevada should the suit "arise[ ] out of a decision or action of the trust protector or trust adviser." NRS 163.5555. Accepting a role as an ITA manifests a defendant's purposeful availment of the privilege of acting in Nevada; where, as here, a suit arises out of a nonresident defendant's role as an ITA, the exercise of specific personal jurisdiction would satisfy the requirements of Nevada's long-arm statute, as well ***196** as traditional notions of fair play and substantial justice. Accordingly, we deny Christopher's writ petition.

CONCLUSION

We conclude that (1) NRS 155.190(1)(h) only grants this court appellate jurisdiction over the instruction or appointment of a trustee, and (2) Nevada courts may exercise specific personal jurisdiction over a person accepting a position as an ITA under NRS 163.5555 should the suit arise out of a decision or action of that ITA. Therefore, we dismiss Christopher's appeal and deny his writ petition.

We concur:

Cherry, C.J.

Douglas, J.

Pickering, J.

Hardesty, J.

Parraguirre, J.

All Citations

133 Nev. 190, 394 P.3d 1203

End of Document

394 P.3d 1203

2020 WL 564903
Only the Westlaw citation is currently available.
United States District Court, D. Delaware.

IN RE: DECADE, S.A.C., LLC, et al., Debtors.
Aaron Goodwin and Eric Goodwin, Appellants,
v.
David W. Carickhoff, in his capacity as Chapter 7 Trustee for the Estates of Decade S.A.C., LLC and Gotham S&E Holding, LLC, and 23 Capital Limited, Appellees.

Bankr. No. 18-11668 (CSS) (Jointly Administered)
|
C.A. No. 18-1880-MN
|
Signed 02/05/2020

Attorneys and Law Firms

Frederick B. Rosner, Jason A. Gibson, The Rosner Law Group LLC, Wilmington, DE; Keith Miller, Gary Eisenberg, Adam Mandelsberg, Perkins Coie LLP, New York, NY – Attorneys for Appellants.

William P. Bowden, Ricardo Palacio, Ashby & Geddes, P.A., Wilmington, DE – Attorneys for Appellees.

Alan Root, Archer & Greiner, P.C., Wilmington, DE – Attorneys for Chapter 7 Trustee.

MEMORANDUM OPINION

NOREIKA, U.S. DISTRICT JUDGE

***1** This dispute arose in the Chapter 7 cases of Decade, S.A.C., LLC and Gotham S&E Holding, LLC ("Debtors"). Before the Court is an appeal by Aaron and Eric Goodwin (the "Goodwins") from (i) the Order entered November 5, 2018 (A004)[1] ("Settlement Order") approving the motion (A059) ("Settlement Motion") filed by appellee David W. Carickhoff, as Chapter 7 Trustee for the Debtors' estates, seeking approval of a settlement stipulation by and between the Trustee and appellee 23 Capital Limited (f/k/a XXIII Capital Limited) ("23 Capital," and, together with the Trustee, "Appellees"), pursuant to 11 U.S.C. § 105(a) and Rule 9019 of the Federal Rules of Bankruptcy Procedure; and (ii) the Order entered November 13, 2018 (A001) ("Retention Order") authorizing the Chapter 7 Trustee's retention and employment of Ashby & Geddes, P.A. and Troutman Sanders LLP as special litigation counsel to the Chapter 7 Trustee. The Settlement Order and the Retention Order were entered for the reasons stated at the November 5, 2018 hearing (A017-A056). For the reasons set forth herein, the Settlement Order and the Retention Order are affirmed.

[1] The appendix (D.I. 8) filed in support of the Goodwins' opening brief (D.I. 7) is cited herein as "A__," and the appendix (D.I. 10) filed in support of the Trustee's answering brief (D.I. 9) is cited herein as "AA___."

I. BACKGROUND

A. Prepetition Facts and the Contract in Dispute

The Goodwins are leading sports agents who broker employment and endorsement contracts on behalf of their clients. (A245). In 1993, the Goodwins established Goodwin Sports Management, Inc. ("GSM") and Goodwin Associates Management Enterprises, Inc. ("GAME"; together with GSM, "the Goodwin Entities") to facilitate the Goodwins' management of their clients' endorsement contracts. (A243;

A251).

On February 22, 2016, prior to the Petition Date, Debtors, certain of their subsidiaries and affiliates, and their former principals, Christopher Aden ("Aden") and Dorsey James ("James") entered into a Loan, Guaranty and Security Agreement dated as of February 22, 2016 ("the Loan Agreement") with 23 Capital. The Debtors' obligations to 23 Capital under the Loan Agreement, totaling more than $25.8 million, are asserted to be secured by liens on substantially all of their assets. (A074).

Subsequently, the Goodwins agreed to sell an interest in the Goodwin Entities to Christopher Aden and Dorsey James via their newly formed entity, Decade S.A.C. Contracts, LLC. (*See* A243-246). The Goodwins assert that prior to signing the agreement, Aden, James, and Decade replaced the negotiated terms of the parties' agreement with terms that were almost entirely unfavorable to the Goodwins and to which the Goodwins never would have agreed, including making 23 Capital a third-party beneficiary. (A249).

Goodwins assert that they have fulfilled their obligations under the agreement with Decade in accordance with the terms negotiated, and that Decade failed to make any of its required payments under the agreement, including a $3.5 million payment due to the Goodwins in early 2017. (A261). In 2017, the Goodwins provided notice that Decade had violated the terms of the parties' agreement and sought rescission of the agreement.

B. The SDNY Litigation

***2** In September 2017, 23 Capital commenced litigation before Judge Gregory H. Woods, of the U.S. District Court for the Southern District of New York (Case No. 17-civ-06910-GHW), against the Debtors, Aden, James, and the Goodwins in connection with the agreement ("the SDNY Litigation"). (*See generally* A212-A284). 23 Capital asserted claims against the Debtors and the other defendants for breach of contract and various forms of equitable relief. In the SDNY Litigation, Debtors and the Goodwins filed counterclaims against 23 Capital and cross-claims against each other. (A161-A211; A212-A268). The Goodwins maintain that the agreement was invalid and unenforceable. (A263, A265, A266, A268).

The parties conducted document discovery in the SDNY Litigation pursuant to a case management order entered on October 31, 2017. (A269). On May 1, 2018, the SDNY Court entered an order substituting Troutman Sanders as counsel of record for 23 Capital. (A276). Following the suggestion of bankruptcy filed by the Debtors, the SDNY Court ordered the case automatically stayed as to those entities. (A280). On the Trustee's request, the SDNY Court subsequently ordered the SDNY Litigation stayed until November 12, 2018 (since further extended) to determine the question of ownership of the Goodwin Entities. (A282, A284).

C. The Settlement Motion

On July 16, 2018 (the "Petition Date"), the Debtors each filed a voluntary petition for relief under chapter 7 of the Bankruptcy Code. (A061). On July 17, 2018, the Trustee was appointed as chapter 7 trustee of the Debtors' estates pursuant to section 701(a) of the Bankruptcy Code. (*Id.*).

On October 15, 2018, the Trustee filed motions with the Bankruptcy Court seeking approval of his stipulation of settlement ("the Stipulation") with 23 Capital and the retention of Troutman Sanders (*i.e.*, 23 Capital's attorneys from the SDNY Litigation) and Ashby & Geddes (together, "Special Counsel") as special counsel to pursue certain claims ("the Claims") on behalf of the estates. (A059-137). The Trustee's general bankruptcy counsel is Archer & Greiner, P.C., and Special Counsel's role is limited to the matters identified in the Stipulation. (A075).

The Stipulation resolves 23 Capital's and the Debtors' claims against each other by granting 23 Capital an allowed, secured claim of $25 million in each of the Debtors' cases, and releases all claims the Debtors had against 23 Capital, including those claims that had been asserted in the SDNY Litigation. (A076-077). 23 Capital's allowed

secured claim includes a lien on the Claims, and any recoveries on them, and represents a resolution of a dispute between the parties concerning whether 23 Capital's liens attached to commercial tort claims asserted by the Debtors, if any, or only to the recovery received by the Debtors on such claims. (A076). In exchange, 23 Capital agreed that it would fund the Trustee's investigation and prosecution of the Claims, would partially waive its lien on the Claims and their proceeds by sharing any recovery on the Claims with the Debtors' estates from the first dollar received, and would make a non-refundable advance payment to the estates of $75,000 on account of those recoveries. (A077-078). 23 Capital also agreed that it would not pursue an unsecured deficiency claim against the estates to the extent the recoveries on the Claims are insufficient to satisfy its allowed, secured claim. (A078). The Stipulation further provides that the Trustee, not 23 Capital, is responsible for directing the litigation of the Claims. (A075). The Stipulation also provides that, absent consent of the Trustee in writing, Special Counsel may not represent 23 Capital in connection with any disputes with the Trustee. (AA074).

***3** The Goodwins objected to the proposed settlement and the proposed retention of 23 Capital's pre-petition counsel as a violation of the Bankruptcy Code's prohibition on the hiring of professional persons holding or representing interests adverse to the estate. (A138). The Goodwins assert that they are unsecured creditors by virtue of claims arising under the agreement, which agreement, the Goodwins have asserted in the SDNY Litigation, is invalid and void ab initio. The United States Trustee did not object to Special Counsel's retention, nor did any creditor other than the Goodwins.

On November 5, 2018, the Bankruptcy Court held a hearing on the Goodwins' objections to the proposed settlement and retention. (*See* A017). By way of proffer, counsel to the Trustee reiterated the points made in the Settlement Motion, including the Trustee's investigation of 23 Capital, through independent counsel, his evaluation of assets and claims, and the Trustee's exercise of his business judgment in determining to release 23 Capital on the terms reflected in the proposed Stipulation in order to obtain the best possible recovery to the estate on the Claims. With respect to the Settlement Motion, there was no objection to the proffer nor any request for cross-examination of the Trustee. (A031-042; A046-A050). With respect to the retention of Special Counsel, the Goodwins argued that case law makes clear that "representing the secured creditor and then representing the debtor is an inherent conflict" and "an actual conflict." (A039). The Goodwins further argued that Trustee had failed to establish that no law firm other than Troutman Sanders might be willing to take on the representation of the estates in the SDNY Litigation. (A041-A042). The Trustee argued that he should not be deprived of his choice of counsel unless his retention of Troutman Sanders presented an actual conflict of interest, and, by virtue of the Settlement Order, upon which entry of the Retention Order was conditioned, there would be no actual conflict of interest. The Trustee argued that, by virtue of the proposed Settlement, if approved by the Bankruptcy Court, the interests of the Trustee and 23 Capital would be completely aligned for the limited purpose for which litigation counsel was being retained. (A029).

In its bench ruling, the Bankruptcy Court noted that the two proposed orders, governing the retention of 23 Capital's prepetition counsel and settlement of claims asserted against the estates by 23 Capital, "really have to be discussed together; they're, obviously, meshed." (A051). The Bankruptcy Court first assessed the proposed settlement with 23 Capital and found that "the settlement, itself, clearly meets being superior to the lowest range of reasonableness and will be approved." (A052). The Bankruptcy Court further approved the proposed retention on the grounds that 23 Capital's lawyers "don't meet any of the criteria [outlined in 11 U.S.C. § 327(a)] except possibly do they represent an interest adverse to the estates." (A053). The Bankruptcy Court determined that 23 Capital's lawyers did not represent an interest adverse to the estates because their "retention is contingent on the settlement that releases claims of the estate to 23 Capital and, of course, preserves 23 Capital's rights as a secured creditor .... There is no actual conflict because there are no claims between the parties nor do I think there's an appearance of impropriety or anything along those lines." (*Id.*)

The Bankruptcy Court entered the Retention Order and Settlement Order on November 5, 2018, and November 13, 2018, respectively. This appeal followed and is now fully briefed. (D.I. 7, 9, 11). The Court did not hear oral argument because the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.

II. JURISDICTION AND STANDARD OF REVIEW

***4** The Court has jurisdiction to hear an appeal from a final judgment of the bankruptcy court pursuant to 28 U.S.C. § 158(a)(1). In conducting its review of the issues on appeal, this Court reviews the Bankruptcy Court's findings of fact for clear error and exercises plenary review over questions of law. *See Am. Flint Glass Workers Union v. Anchor Resolution Corp.*, 197 F.3d 76, 80 (3d Cir. 1999). The Court must "break down mixed questions of law and fact, applying the appropriate standard to each component." *Meridian Bank v. Alten*, 958 F.2d 1226, 1229 (3d Cir. 1992).

Bankruptcy courts have broad discretion to evaluate and approve, or not, proposed settlements and courts generally defer to a trustee's business judgment when there is a legitimate business justification for the trustee's decision to settle. *See, e.g.*, *Myers v. Martin (In re Martin)*, 91 F.3d 389, 393-95 (3d Cir. 1996). As a result, a bankruptcy court's decision to approve a settlement is reviewed under the abuse of discretion standard and should not be disturbed "unless there is a definite and firm conviction that the court committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." *Will v. Nw. Univ.* (*In re Nutraquest, Inc.*), 434 F.3d 639, 645 (3d Cir. 2006) (quoting *In re Orthopedic Bone Screw Prods. Liab. Litig.*, 246 F.3d 315, 320 (3d Cir. 2001)).

The Court also reviews a bankruptcy court's decision to approve an application for employment for abuse of discretion. *In re Pillowtex, Inc.*, 304 F.3d 246, 250 (3d Cir. 2002). "An abuse of discretion exists where the district court's decision rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact." *In re Marvel Ent'mt Group, Inc.*, 140 F.3d 463, 470 (3d Cir. 1998) (quoting *ACLU v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471, 1476 (3d Cir. 1996)).

III. ANALYSIS

A. Settlement Order

Bankruptcy Rule 9019 provides that "[o]n motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement." FED. R. BANKR. P. 9019(a). This Rule gives bankruptcy trustees broad authority to settle disputes so long as the settlement is fair, reasonable, and in the interest of the estate, *In re Martin*, 91 F.3d at 393, *In re Nutraquest,* 434 F.3d 639, 644 (3d Cir. 2006), and meets the lowest level of reasonableness. *In re Pa. Truck Lines, Inc.*, 150 B.R. 595, 598 (E.D. Pa. 1992), *aff'd*, 8 F.3d 812 (3d Cir. 1993). The record reflects that, following an investigation of the Debtors' books and records, assets and liabilities and the claims that had been filed by and against them in the SDNY Litigation (A026-27; A063-064), as well as the validity, nature, extent and priority of 23 Capital's claims, liens, and security interests under the loan agreement (A027; A063), the Trustee made a reasonable business decision to settle with the Debtors' senior secured lender. Among other things, the settlement avoided administrative insolvency for the estates by bringing in immediate cash and creating the potential for the estates to receive additional, unencumbered cash all without cost to the estates. Absent a settlement with 23 Capital, the Trustee would need to recover more than $25 million – without any practical ability to fund the necessary litigation – before other claimants would receive their first dollar.

The Goodwins contend that the Bankruptcy Court abused its discretion in entering the Settlement Order because that court did not apply the four-factor test established by the Third Circuit in *In re Martin* and approved the settlement even though it was not "fair and equitable." (*See* D.I. 7 at 18). The *Martin* factors require a court to consider the strengths and weaknesses of the claim being resolved, the cost and delay associated in pursuing the claim, and the general interest of creditors. *In re Martin*, 91 F.3d at 393. The record reflects that the *Martin* factors and related matters were discussed at length in the parties' submissions and at the Hearing. (A023-024, 027, 029-030, 051-052, 067). It is true that the Bankruptcy Court did not explicitly mention the *Martin* case in its analysis, but the record reflects that the Bankruptcy Court applied the relevant factors. Specifically, the Bankruptcy Court assessed and balanced the certain benefits afforded to the Debtors' estates by the entire settlement, with the possible, limited value of certain alleged claims held by the Debtors' estates against 23 Capital and compromised in the settlement, and the risks and complexities associated with litigating those claims. The Bankruptcy Court properly considered the benefits to the estates from the settlement, weighed them against the risk of not settling, and determined that the Trustee's business judgment in determining that the benefits outweighed the risks was sound.

***5** The Goodwins further argue that the Bankruptcy Court abused its discretion in entering the Settlement Order because "it is impossible to evaluate what, if any, process in which the Trustee engaged in order to evaluate the bases and prospective value of the Estates' already-asserted claims against 23 Capital." (D.I. 7 at 18). The record, however, reflects that the Trustee detailed the factual and legal investigation he and his counsel undertook to evaluate the Debtors' claims against 23 Capital in the pleadings and proffer as well as his conclusion that "the merits of any potential claims against 23 Capital were speculative at best, would likely bring little value to the Debtors' Estates, and, at the same time, would be prohibitively expensive to prosecute, especially in light of the uncertainty of any results." (AA070). The Bankruptcy Court deferred to the Trustee's business judgment in settling those claims. (A051) ("I think that the business judgment of the trustee on those points really cannot be questioned ..."); *In re Schipper*, 933 F.2d 513, 515 (7th Cir. 1991); *In re Martin*, 91 F.3d at 393-95 ("[c]ompromises are favored in bankruptcy" and courts generally defer to a trustee's business judgment when there is a legitimate business justification for the trustee's decision) (quoting 9 COLLIER ON BANKRUPTCY P 9019.03[1] (15th ed. 1993)); *In re Adelphia Commc'ns Corp.*, 327 B.R. 143, 159 (Bankr. S.D.N.Y. 2005) (in evaluating a settlement, the court "is permitted to rely upon 'opinions of the trustee, the parties and their attorneys' ") (quoting *Int'l Distrib. Ctrs., Inc.*, 103 B.R. 420, 423 (S.D.N.Y. 1989)). Although the Bankruptcy Court's analysis was not detailed, the Court finds the standard met on this record, where the issues were clearly set forth in the pleadings and proffer and canvassed by the Bankruptcy Court. Under controlling law, the Bankruptcy Court was not required to undertake a detailed analysis of the factual and legal support for the Debtors' claims against 23 Capital that were settled and conduct a mini-trial of those claims to determine the reasonableness of the Trustee's decision to settle. *In re Neshaminy Office Bldg. Assoc.*, 62 B.R. 798, 803 (E.D. Pa. 1986) ("In determining whether to approve the trustee's application to settle a controversy, the Bankruptcy Court does not substitute its judgment for that of the trustee. 'Nor is the court to decide the numerous questions of law and fact raised by objections but rather to canvass the issues to see whether the settlement falls below the lowest point in the range of reasonableness.") (quoting *In re Carla Leather*, 44 B.R. 457, 465 (Bankr. S.D.N.Y. 1984)); *In re Chemtura Corp.*, 439 B.R. 561, 594 (Bankr. S.D.N.Y. 2010) (holding the bankruptcy court "need not conduct an independent investigation into the reasonableness of the settlement," nor is it necessary for the court to "conduct a 'mini-trial' of the facts or the merits underlying the dispute.") (citations omitted).

Finally, the Goodwins argue that the Bankruptcy Court erred in approving that portion of the Stipulation that grants 23 Capital a lien on the Debtors' commercial tort claims because those claims were not described with specificity as

required by the Uniform Commercial Code. (D.I. 7 at 19). This argument is not persuasive. The UCC's rules about adequate descriptions of collateral in financing statements do not apply to settlements of disputed claims and resultant court orders approving those settlements. It is 23 Capital's position that even if its pre-petition lien did not cover commercial tort claims, it covered the proceeds of those claims such that any recovery on those claims would be for 23 Capital's benefit absent the Stipulation. (D.I. 9 at 12-13 (citing *City Sanitation, LLC v. Allied Waste Servs. of Mass., LLC (In re Am. Cartage, Inc.))*, 656 F.3d 82, 88-89 (1st Cir. 2011). Although the Goodwins may have meritorious arguments to the contrary, the Bankruptcy Court was not required to hold a mini-trial on each aspect of the parties' disputed claims against one another. The Trustee and 23 Capital resolved this dispute in the context of the global settlement, which was a reasonable exercise of the Trustee's business judgment and represented the only chance the Debtors had to try and realize any value flowing from the Debtors' commercial tort claims and was a good outcome in an uncertain litigation scenario, where it was unlikely any other party would agree to fund the pursuit of those claims knowing the recovery was going to someone else.

Here, the Goodwins argue that the settlement is improper because 23 Capital will receive a lien on the Debtors' commercial tort claims which prevents the Goodwins, as purported unsecured creditors, from sharing in the recovery on those claims at a higher level. As the Bankruptcy Court correctly noted during the Hearing, it is an open question whether the Debtors' claims against the Goodwins are, in fact, commercial tort claims as opposed to contract claims, and, assuming some claims are tort claims, whether it would even be possible for a court to differentiate between recoveries on contract claims vs. tort claims. (A052) ("... even if some of the claims being asserted, perhaps, aren't subject to the lien, most of the claims certainly are and we start to get into issues of whether a trial court is going to differentiate between which claim or which is subject to liability or not could be difficult. That could be litigated"). (A047). The Goodwins ignore this issue in the briefing. The Court agrees that the Trustee's decision to settle this disputed matter in the context of a global settlement with the Debtors' senior, secured lender is an appropriate exercise of his reasonable business judgment.

***6** The Bankruptcy Court did not abuse its discretion in approving the settlement between 23 Capital and the estates, as the Bankruptcy Court canvassed the issues and the record supports the Bankruptcy Court's determination that the settlement satisfied the requirements of Bankruptcy Rule 9019 and was superior to the lowest range of reasonableness.

B. Retention Order

The Goodwins argue that the Bankruptcy Court erred as a matter of law in approving the Trustee's retention of Special Counsel, which according to the Goodwins, did not meet the requirements of § 327, as Special Counsel serves as counsel to a prepetition creditor, is not "disinterested," and holds and represents interests adverse to the estates. (D.I. 7 at 10-19). The Goodwins also argue that the Bankruptcy Court erred because the "potential conflict" presented by Special Counsel's dual representation should have disqualified their retention. (D.I. 11 at 3-5). Because Special Counsel's retention was part of the Settlement, the Goodwins argue that both the Settlement Order and Retention Order must be vacated on this basis.

The Third Circuit has considered the statutory requirements for retention of counsel in several opinions. *See* *In re BH&P, Inc.*, 949 F.2d 1300 (3d Cir. 1991); *Marvel Ent'mt*, 140 F.3d 463; *Pillowtex*, 304 F.3d 246. In *Marvel Entertainment*, the Third Circuit "expressly reiterate[ed]" its earlier holding in *BH&P* that:

> (1) Section 327(a), as well as § 327(c), imposes a per se disqualification as trustee's counsel of any attorney who has an *actual conflict of interest*; (2) the district court

> *may within its discretion* – pursuant to § 327(a) and consistent with § 327(c) – disqualify an attorney who has a potential conflict of interest and (3) the district court may not disqualify an attorney on the *appearance of conflict* alone.

Marvel Ent'mt, 140 F.3d at 476 (emphasis added). Indeed, in *Marvel Entertainment*, the Third Circuit reversed the district court's disqualification of the trustee and the trustee's counsel because it was predicated on the appearance of a conflict. The Third Circuit held that, under section 327(a), the district court could disqualify counsel "only if it had an actual or potential conflict of interest." *Id.* at 477.

Under section 327(a) of the Bankruptcy Code, a trustee may employ one or more attorneys to represent him in carrying out his duties under the Bankruptcy Code, provided that such attorneys are "disinterested persons" and do not hold or represent an interest adverse to the estate. 11 U.S.C. § 327(a). The Third Circuit has explained that Section 327(a) sets forth two relevant standards for disqualification – one applicable to conflicts with the debtor's estate and one governing conflicts with other creditors. *Pillowtex*, 304 F.3d at 252 n.4. The first prohibits a professional from "hold[ing] or represent[ing] an interest adverse to the estate." 11 U.S.C. § 327(a). The second, contained in the definition of "disinterested person," prohibits the retention of a creditor and further requires that a professional be free of "an interest materially adverse to the interest of ... any class of creditors." 11 U.S.C. § 101(14). Thus, a professional may not have *any* conflict with the estate, but a conflict with creditors must be "material." *Id.*

The Goodwins argue that the Bankruptcy Court abused its discretion in approving Special Counsel's retention because Special Counsel is not disinterested and holds or represents interests adverse to the Estates. (D.I. 7 at 10-19).

1. Special Counsel Does Not Hold an Interest Adverse to the Estates

***7** The Goodwins claim that Special Counsel is not a "disinterested person" because a portion of the allowed secured claim granted to 23 Capital by the Stipulation includes legal fees owed to Troutman Sanders. (D.I. 7 at 15). In the SDNY Litigation, 23 Capital obtained summary judgment against Aden and James, the Debtors' former principals, in the amount of $25,813,306.85, reflecting their liability as of July 6, 2019 on their personal guaranties of the Loan. (AA 090). The record on that motion established that 23 Capital's claim included $1,409,679.05 for "fees and costs XXIII has incurred in enforcing its rights under the Loan Agreement." (AA090). The record, however, reflects that all of those fees and costs were incurred by 23 Capital's prior law firm, Loeb & Loeb, and not by Troutman Sanders. (AA093-097). The Trustee submitted the relevant evidence to the Bankruptcy Court, and addressed the matter at the Hearing. (A029) ("Putting aside the legal significance of that issue, factually that's irrelevant, Your Honor, because the prepetition legal fees that make up a portion of the secured claim do not relate to Troutman or Ashby & Geddes. They relate specifically to former counsel for [23 Capital], Loeb & Loeb"). Special Counsel is not disqualified from serving as special counsel based on fees owed to Loeb & Loeb.

2. Special Counsel Does Not Represent an Interest Adverse to the Estates

In addition to precluding estate professionals from themselves being creditors of a debtor's estate, section 327(a) of the Bankruptcy Code provides that such professionals may not "represent an interest adverse to the estate." The Goodwins argue that the dual representation of a secured creditor and the Debtor is an "inherent conflict." Appellees argue that 23 Capital is not adverse to the estates because those parties' claims against each other

have been resolved, and the interests of 23 Capital and the estates are fully aligned in attempting to recover from the Goodwins and others to maximize the value of the estates.

Although 23 Capital is a creditor of the Debtors, its claim has been allowed as a result of the Settlement Order, and any claims the Debtors had against 23 Capital have been released for the same reason. As the Bankruptcy Court determined, the Stipulation creates a unity of interest between 23 Capital and the Debtors relating to the matters for which Special Counsel has been retained by the Trustee. (A053 ("They do not represent an interest adverse to the estates because [their] retention is contingent on the settlement that releases claims of the estate to 23 Capital ... they're not adverse. They all pull in the same direction. There is no actual conflict because there are no claims between the parties nor do I think there's an appearance of impropriety or anything along those lines.")) There is no longer any dispute between 23 Capital and the Debtors because of the entry of the Settlement Order. As a result, Special Counsel's separate representation of 23 Capital does not constitute representation of an interest adverse to the Debtors.

Even absent such a settlement, courts in similar cases regularly permit a chapter 7 trustee to retain a creditor's attorney as his own to pursue claims designed to augment the debtor's estate. *See, e.g.,* *Stoumbos v. Kilimnik*, 988 F.2d 949 (9th Cir. 1993) (rejecting appeal from bankruptcy court order approving retention of creditor's lawyer as special counsel to chapter 7 trustee because, among other things, the interests of the creditor and the trustee are aligned in trying to increase the size of the debtor's estate); *Bank Brussels Lambert v. Coan (In re AroChem Corp.),* 176 F.3d 610 (2d Cir. 1999) (affirming order approving retention of creditor's lawyer as special counsel to chapter 7 trustee where counsel had previously represented creditor in action against other creditor because the clients' interests were fully aligned in pursuing recovery against the objecting creditor); *In re Midway Motor Sales, Inc.*, 355 B.R. 26 (Bankr. N.D. Ohio 2006) (granting chapter 7 trustee's motion to retain as special counsel law firm that represented an unsecured creditor and separate secured creditor where the interests of the creditors and the trustee were aligned in maximizing the value of the estate); *In re RPC Corp.*, 114 B.R. 116 (M.D.N.C. 1990) (approving retention as special counsel to chapter 7 trustee of law firm that was also representing one creditor in action against another, where the purpose of retention was to investigate and file claims against same creditor law firm was already pursuing for its other client).

3. The Goodwins Failed to Identify An Actual Conflict of Interest or Potential Conflict of Interest Requiring Disqualification

***8** The Bankruptcy Code itself clarifies that a professional is not disqualified from employment solely because the professional represents the trustee and a creditor. *See* 11 U.S.C. 327(c). Instead, where, as here, there is an objection to counsel's retention, "the court shall disapprove such employment if there is an actual conflict of interest." 11 U.S.C. § 327(c). The Third Circuit has stated that "a conflict is actual, and hence per se disqualifying, if it is likely that a professional will be placed in a position permitting it to favor one interest over an impermissibly conflicting interest. *Pillowtex*, 304 F.3d at 251 (citing *BH&P*, 949 F.2d at 1315). "The term 'actual conflict of interest' is not defined in the Code and has been given meaning largely through a case-by-case evaluation of particular situations arising in the bankruptcy context." *BH&P*, 949 F.2d at 1315. The alleged conflict must relate to the specific matter for which special counsel is retained. *Stoumbos*, 988 F.2d at 964. In other words, Special Counsel is disqualified only if there is a conflict between the Debtors and 23 Capital relating to the pursuit of the Claims.

The Goodwins raise several arguments to assert that there is an actual conflict of interest between Special Counsel's representation of 23 Capital and its representation of the Trustee as Special Counsel. The Goodwins also assert that the Bankruptcy Code categorically forbids retentions that pose a potential conflict of interest. (D.I 11 at 3-5). As set forth above, it was within the Bankruptcy Court discretion, pursuant to § 327(a)

and consistent with § 327(c) – to disqualify an attorney on the basis of a potential conflict of interest. *See* *Pillowtex*, 304 F.3d at 251. Having reviewed the issues raised below, the Court concludes that the Goodwins have failed to identify any actual conflict of interest, as the interests of the Debtors and 23 Capital in maximizing the value of the estates are fully aligned. The Court further finds no abuse of discretion in the Bankruptcy Court's decision not to disqualify Special Counsel on the basis of the potential conflicts of interest identified by the Goodwins on appeal.

First, the fact that 23 Capital has separate claims against the Goodwins does not create a conflict of interest with the Debtors' pursuit of their own claims against the Goodwins. *See, e.g., RPC Corp.*, 114 B.R. at 120 (holding that the interests of the estate and the law firm's creditor clients were aligned in maximizing the value of the estate by pursuing litigation against a bank where the law firm was involved in pending litigation against the same bank and the two proceedings "both involve the same basic issues and are essentially the same claim against the Bank.")

Second, the fact that the Trustee has decided to grant an allowed secured claim to 23 Capital does not create an actual conflict of interest. The Goodwins claim that an actual conflict of interest exists between the Debtors and 23 Capital because the Trustee purportedly "abandoned" challenges to 23 Capital's liens by entering into the Stipulation. (D.I. 7 at 12-13). This argument ignores underlying facts. Here, the Trustee investigated the nature, extent and validity of 23 Capital's liens and found them to be valid and duly perfected. The parties disagreed on the issue of whether 23 Capital's liens extended to the Debtors' commercial tort claims (if any) but resolved this dispute in the context of a global resolution that provided clear value to the estates. This is not an abandonment of any duty, but rather, as the Bankruptcy Court recognized, an appropriate exercise of business judgment in an effort to maximize the value of the estates for all creditors.

Next, the Goodwins argue that an actual conflict of interest exists because 23 Capital and the Debtors each have claims against them, and "the Goodwins may have offset rights against the Estates and/or 23 Capital." (D.I. 7 at 13). The unidentified and unexplained offset rights, according to the Goodwins, will manifest themselves when 23 Capital and/or the Debtors consider a "prospective resolution or settlement of claims" against the Goodwins and "will undoubtedly warp the loyalty of the common counsel for 23 Capital and the Estates." *Id*. The Trustee argues that this is but a reformulated version of the Goodwins' main argument that a lawyer cannot represent two clients that have different claims against a common adversary. The Court agrees. The Goodwins cite no authority for their claimed offset related actual conflict. With respect to the Goodwins' claim that a potential conflict may arise, the Court finds no abuse of discretion in the Bankruptcy Court's failure to disqualify Special Counsel on the basis of hypothetical offset rights the Goodwins may have in the future against claims that have not yet even been brought against them, or the other contingencies identified in the Goodwin's reply brief. (D.I. 11 at 4).

***9** Next, the Goodwins argue that an actual conflict exists between the Debtors and 23 Capital because one of the Goodwins may be successful in defeating the Debtors' claims against him while the other is not. (D.I. 7 at 13-14). This would, apparently, create a conflict between the Debtors and 23 Capital because Special Counsel would be then representing the Trustee as fiduciary for the victorious Goodwin brother while at the same time representing 23 Capital in the SDNY Litigation pursuing claims against that same brother. The Trustee argues that the SDNY Litigation is stayed, so to the extent this claimed actual conflict depends on that case proceeding, the Goodwins' argument is belied by the facts. The Court disagrees. It is clear, however, that Special Counsel is being retained to investigate and prosecute claims on behalf of the Debtors and not as general bankruptcy counsel – Archer & Greiner has that role. Any alleged conflict must relate to the specific matter for which special counsel is retained. *Stoumbos*, 988 F.2d at 964. The Court finds that, in the Goodwins' hypothetical, there would be no conflict because Special Counsel would not be representing the Trustee as a fiduciary for the victorious Goodwin brother. The

limited scope of Special Counsel's representation relates to the prosecution of the Claims and would not include the representation of the estates in such matters.

The Goodwins next argue that there is an actual conflict between the Debtors and 23 Capital concerning document production in the SDNY Litigation because the Debtors did not comply with their discovery obligations in that case. (D.I. 7 at 14). According to the Goodwins, Special Counsel will have to cure the Debtors' document production defects while at the same time "protecting and enhancing 23 Capital's litigation position" which, according to the Goodwins is "an untenable and inherent divergence of interests" that creates an actual conflict of interest between 23 Capital and the Debtors. *Id*. The Goodwins, however, do not explain how this conflict will manifest itself now, as the SDNY Litigation is stayed during the Debtors' bankruptcy. The Goodwins also argue that an actual conflict exists between the Debtors and 23 Capital concerning "disputes over disbursements of Estate proceeds" and "fundamental aspects of litigation strategy." (D.I. 7 at 10). This argument, again, ignores the terms of the Stipulation and the limited role for which Special Counsel is retained. The Trustee and 23 Capital have already agreed on the disbursement of the proceeds of the Claims and that agreement has become an order of the Bankruptcy Court by the entry of the Settlement Order. The parties also agreed that the Trustee, not 23 Capital, controls the prosecution of the claims. (A075). To the extent there are disagreements between the parties, the parties' agreement is clear that Special Counsel may not be involved in those. (AA074).

The Goodwins' final claimed conflict between the Debtors and 23 Capital is based on the Debtors' scheduling the Goodwins as creditors of the Debtors. (D.I. 7 at 14). According to the Goodwins, this means that "it is impossible to expect" that the Trustee will fulfill his fiduciary duty to the Goodwins as creditors because the lawyers representing the Trustee in suing the Goodwins also represent another party that is also suing the Goodwins. *Id*. The Goodwins' argument, however, if taken to its logical conclusion, would mean that, contrary to 11 U.S.C. § 327(c), a law firm could never represent a creditor and a trustee "as bankruptcy cases not infrequently require a trustee to act against the interests of some creditors for the benefit of the estate as a whole." *In re Johnson*, 312 B.R. 810, 824 (E.D. Va. 2004). *See, also, RPC Corp.*, 114 B.R. at 120 (holding that the interests of the estate and the law firm's creditor clients were aligned in maximizing the value of the estate by pursuing litigation against a bank where the law firm was involved in pending litigation against the same bank and the two proceedings "both involve the same basic issues and are essentially the same claim against the Bank.")

The Bankruptcy Court did not abuse its discretion in approving the Trustee's retention of Special Counsel. Following the Bankruptcy Court's approval of the Settlement, any conflict between 23 Capital and the estates was resolved thus removing any impediment to Special Counsel serving as estate professionals. The Stipulation creates a unity of interest between the parties and makes the law firms 'disinterested' within the meaning of the relevant provisions of the Bankruptcy Code. There is no actual conflict of interest between the Debtors and 23 Capital concerning their mutual claims against the Goodwins, and having considered the potential conflicts raised by the Goodwins, the Court finds no basis to conclude that Bankruptcy Court abuse its discretion in entering the Retention Order.

IV. CONCLUSION

***10** For the reasons set forth herein, the Settlement Order and Retention Order are affirmed. A separate Order shall be entered.

All Citations

Slip Copy, 2020 WL 564903

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2020 WL 564903

Exco Res. v. Milbank

United States District Court for the Southern District of New York

January 28, 2003, Decided ; February 3, 2003, Filed

02 Civ. 5638 (BSJ)

Reporter
2003 U.S. Dist. LEXIS 1442 *

In re ENRON CORP., et al., EXCO RESOURCES, INC., Appellant v. MILBANK, TWEED, HADLEY & MCCLOY LLP, et al., Appellees.

Disposition: [*1] Bankruptcy court's decision affirmed. Request to set aside bankruptcy court's decision and to disqualify counsel for Official Committee of Unsecured Creditors denied.

Core Terms

bankruptcy court, adverse interest, transactions, disclosures, alleges, investment banker, connections, conflicts, disinterested, structured, retention, matters, unsecured creditor, disqualify, asserts, argues, disqualification motion, supplemental, finance, agrees, bankruptcy proceedings, fail to disclose, representations, Remarketing, speculation, disclose, entities, bidders, parties, trading

Case Summary

Procedural Posture
Debtors filed voluntary petitions for relief under Chapter 11. The United States Bankruptcy Court approved appellee law firm as counsel for the committee of unsecured creditors. Appellant creditor later objected to the law firm's monthly fee statement and moved to disqualify the law firm as counsel for the committee. The bankruptcy court denied the motion. The creditor appealed the decision.

Overview

The creditor had standing to bring the appeal because as an unsecured creditor, it would have been directly and pecuniarily affected if the law firm's interests were adverse to the committee's interests and if the law firm had failed to disclose its relationships. The bankruptcy court's order denying the disqualification motion was a final, appealable order as a footnote related to the law firm's future involvement did not suggest that the bankruptcy court would have reconsidered its decision on the disqualification motion. Moreover, the creditor's failure to name the committee as an appellee did not warrant dismissal as it had named itself as required under *Fed. R. Bankr. P. 8001(a)*. On the merits, the law firm's disclosures complied with *Fed. R. Bankr. P. 2014* as they fully disclosed the relevant facts concerning its relationships and its relevant connections to potential parties. The law firm had not violated *11 U.S.C.S. § 1103(b)* as its alleged adverse interests relating to structured finance transactions pre-dated the firm's representation of the committee. The law firm also satisfied *11 U.S.C.S. § 101(14)* because it was disinterested and did not hold an adverse interest.

Outcome
The decision was affirmed.

LexisNexis® Headnotes

Bankruptcy Law > Procedural Matters > Judicial Review > General Overview

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

Constitutional Law > The Judiciary > Case or Controversy > General Overview

Civil Procedure > Preliminary Considerations > Justiciability > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

HN1 **Procedural Matters, Judicial Review**

In every federal case, the threshold question in determining the power of the court to hear the case is whether a claimant has standing. The criteria for standing in a bankruptcy proceeding is more stringent than the injury in fact requirement under U.S. Const. art. III. In the Second Circuit, a party appealing a bankruptcy court ruling must be an aggrieved person. An aggrieved person is one that is directly and adversely affected pecuniarily by the challenged order of the bankruptcy court.

Bankruptcy Law > Procedural Matters > Judicial Review > General Overview

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Adverse Determinations

Civil Procedure > ... > Justiciability > Standing > General Overview

HN2 **Procedural Matters, Judicial Review**

Generally, a creditor has standing to appeal a bankruptcy order that disposes of the estate's property because such orders directly affect the funds available to meet a creditor's claims. However, an unsubstantiated, speculative, and indirect effect on the party's pecuniary interests is not enough to establish appellate standing.

Civil Procedure > ... > Justiciability > Standing > General Overview

Governments > Fiduciaries

Torts > Intentional Torts > Breach of Fiduciary Duty > General Overview

Bankruptcy Law > Procedural Matters > Judicial Review > General Overview

HN3 **Justiciability, Standing**

In the context of a bankruptcy proceeding, the standing requirement is not entirely inflexible. The United States Court of Appeals for the Second Circuit, for instance, finds that an unsuccessful bidder, who calls into question the intrinsic fairness of a bankruptcy sale transaction, has appellate standing.

Bankruptcy Law > Procedural Matters > Judicial Review > Jurisdiction

Civil Procedure > Attorneys > Disqualification of Counsel

Bankruptcy Law > Procedural Matters > Judicial Review > General Overview

Civil Procedure > Attorneys > General Overview

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

HN4 **Judicial Review, Jurisdiction**

Pursuant to *28 U.S.C.S. § 158(a)(1)*, an appeal from a bankruptcy court order may be taken as of right if the order is final. In non-bankruptcy cases, an order denying a motion to disqualify counsel in a civil case is not an appealable, final order.

Bankruptcy Law > Procedural Matters > Judicial Review > General Overview

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

HN5 **Procedural Matters, Judicial Review**

A more flexible standard of finality applies in a bankruptcy case. Within a bankruptcy context, orders may be immediately appealable if they finally dispose of discrete disputes within the larger case. The United States Court of Appeals for the Second Circuit holds in a line of cases that bankruptcy court orders granting or denying the retention of counsel dispose of such disputes and are, therefore, final and appealable.

Bankruptcy Law > Procedural Matters > General Overview

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Timing of Appeals

Bankruptcy Law > ... > Bankruptcy > Case Administration > Notice

Bankruptcy Law > Procedural Matters > Judicial Review > General Overview

Bankruptcy Law > Procedural Matters > Judicial Review > Bankruptcy Appeals Procedures

HN6 **Bankruptcy Law, Procedural Matters**

Under Fed. R. Bankr. P. 8001(a), a notice of appeal shall contain the names of all parties to the judgment, order, or decree appealed from. Rule 8001(a) also states that an appellant's failure to take any step other than timely filing a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the district court deems appropriate, which may include dismissal of the appeal.

Bankruptcy Law > Procedural Matters > Judicial Review > Jurisdiction

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Timing of Appeals

Bankruptcy Law > ... > Bankruptcy > Case Administration > Notice

Bankruptcy Law > Procedural Matters > General Overview

Bankruptcy Law > Procedural Matters > Judicial Review > General Overview

HN7 **Judicial Review, Jurisdiction**

The time period for filing a notice of appeal is strictly enforced and failure to timely file deprives the district court of jurisdiction to review the bankruptcy court's order. Moreover, failure to name an appealing party may preclude that party's appeal. Because other defects are not jurisdictional, it is within the district court's discretion to take such action as it deems appropriate.

Bankruptcy Law > Procedural Matters > Judicial Review > Bankruptcy Appeals Procedures

Bankruptcy Law > Procedural Matters > Judicial Review > General Overview

HN8 **Judicial Review, Bankruptcy Appeals Procedures**

The standard by which the district court is to review an order of the bankruptcy court is set forth in Fed. R. Bankr. P. 8013.

Bankruptcy Law > Procedural Matters > Judicial Review > Bankruptcy Appeals Procedures

Bankruptcy Law > Procedural Matters > Judicial Review > General Overview

Bankruptcy Law > ... > Judicial Review > Standards of Review > Clear Error Review

HN9 **Judicial Review, Bankruptcy Appeals Procedures**

See Fed. R. Bankr. P. 8013.

Bankruptcy Law > ... > Judicial Review > Standards of Review > Clear Error Review

Civil Procedure > Appeals > Standards of Review > De Novo Review

Bankruptcy Law > Procedural Matters > Judicial Review > General Overview

Bankruptcy Law > ... > Judicial Review > Standards of Review > De Novo Standard of Review

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

HN10 **Standards of Review, Clear Error Review**

The district court will accept the bankruptcy court's findings of fact unless they are clearly erroneous. The district court will review the bankruptcy court's legal conclusions de novo.

Bankruptcy Law > ... > Professional Services > Retention of Professionals > General Overview

Civil Procedure > Attorneys > General Overview

Criminal Law & Procedure > Counsel > Right to Counsel > General Overview

HN11[] Professional Services, Retention of Professionals

A party's choice of counsel is entitled to great deference. Disqualification motions are viewed with disfavor because they interfere with a party's right to employ the counsel of its choice. Mere speculation will not suffice to establish sufficient grounds for disqualification.

Bankruptcy Law > Procedural Matters > Judicial Review > Bankruptcy Appeals Procedures

Bankruptcy Law > Procedural Matters > Judicial Review > General Overview

HN12[] Judicial Review, Bankruptcy Appeals Procedures

On appeal, the district court will only consider the record that was before the bankruptcy court. Fed. R. Bankr. P. 8006. The district court, therefore, will disregard any argument or document that appears for the first time on appeal.

Bankruptcy Law > ... > Professional Services > Retention of Professionals > Debtors in Possession & Trustees

Bankruptcy Law > Case Administration > Examiners, Officers & Trustees > United States Trustee

Bankruptcy Law > ... > Professional Services > Retention of Professionals > General Overview

HN13[] Retention of Professionals, Debtors in Possession & Trustees

Under Fed. R. Bankr. P. 2014(a), a professional seeking employment in a bankruptcy case is required to submit an application that states to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, and any other party in interest. Rule 2014(a) also requires the applicant to submit a verified statement setting forth these connections. The purpose of Rule 2014(a) is to provide the court and the United States trustee with information to determine whether the professional's employment is in the best interest of the estate. Fed. R. Bankr. P. 2014 disclosures are to be strictly construed and failure to disclose relevant connections is an independent basis for the bankruptcy court to disallow fees or to disqualify the professional from the case.

Bankruptcy Law > ... > Professional Services > Retention of Professionals > General Overview

HN14[] Professional Services, Retention of Professionals

Although Fed. R. Bankr. P. 2014(a) does not expressly require supplemental disclosures, they are necessary to preserve the integrity of the bankruptcy system.

Bankruptcy Law > ... > Professional Services > Retention of Professionals > General Overview

HN15[] Professional Services, Retention of Professionals

Under Fed. R. Bankr. P. 2014, an attorney seeking employment in a bankruptcy case must ensure that all relevant connections have been brought to light. The rule does not, however, require detailed description of those connections, such as every possible consequence resulting from the attorney's connections or a prediction as to the outcome of any possible litigation that may relate to the attorney's connections. The United States District Court for Southern District of New York finds that such disclosures are beyond the scope of Fed. R Bankr. P. 2014.

Bankruptcy Law > ... > Professional Services > Retention of Professionals > General Overview

HN16[] Professional Services, Retention of Professionals

See 11 U.S.C.S. § 1103(b).

Bankruptcy Law > ... > Professional Services > Retention of Professionals > General Overview

HN17[] Professional Services, Retention of Professionals

An attorney violates 11 U.S.C.S. § 1103(b) if the attorney simultaneously represents both a committee of unsecured creditors and another party, with an interest adverse to the committee, in matters related to the bankruptcy proceeding. Section 1103(b) is not violated if the attorney represents an entity with an adverse interest in a matter unrelated to the bankruptcy case or in a matter that pre-dates the attorney's representation of the committee.

Bankruptcy Law > ... > Professional Services > Retention of Professionals > Debtors in Possession & Trustees

Criminal Law & Procedure > Counsel > Right to Counsel > General Overview

Bankruptcy Law > Case Administration > Examiners, Officers & Trustees > General Overview

Bankruptcy Law > Case Administration > Professional Services > General Overview

Bankruptcy Law > ... > Retention of Professionals > Compensation > Limitations on Compensation

Bankruptcy Law > ... > Professional Services > Retention of Professionals > General Overview

Bankruptcy Law > ... > Professional Services > Retention of Professionals > Retention by Committees

HN18[] Retention of Professionals, Debtors in Possession & Trustees

The requirements of 11 U.S.C.S. § 327(a) concern solely the employment of professionals by a trustee or a debtor. Section 327(a) requires that the professional not hold an adverse interest to the estate and that the professional be disinterested under 11U.S.C.S. § 101(14). However, 11 U.S.C.S. § 328(c) of the Bankruptcy Code allows a bankruptcy court to deny compensation to a professional employed under either 11 U.S.C.S. §§ 327 or 1103 if that professional is not disinterested or holds an adverse interest. Consequently, at least one case has held that, notwithstanding the language of § 1103, the disinterested and adverse interest requirements of § 327(a) also apply to the initial retention of counsel for a committee under § 1103.

Bankruptcy Law > ... > Professional Services > Retention of Professionals > General Overview

HN19[] Professional Services, Retention of Professionals

Under 11 U.S.C.S. § 101(14), a disinterested person is defined, in part, as any person that (1) has not been, within three years before the date of the filing of the petition, an investment banker for a security of the debtor, or an attorney for such an investment banker in connection with the offer, sale, or issuance of a security of the debtor; and (2) does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor or an investment banker or for any other reason. 11 U.S.C.S. § 101(14)(C), (E).

Bankruptcy Law > ... > Professional Services > Retention of Professionals > General Overview

HN20[] Professional Services, Retention of Professionals

Merely hypothesizing that conflicts may arise is not sufficient to warrant the disqualification of an attorney in a bankruptcy proceeding.

Bankruptcy Law > ... > Professional Services > Retention of Professionals > General Overview

HN21[] Professional Services, Retention of Professionals

For purposes of determining whether an attorney's prior representations disqualifies that attorney in a bankruptcy proceeding, an adverse interest is defined as follows: (1) to possess or assert any economic interest that would tend to lessen the value of the bankruptcy estate or that would create either an actual or potential dispute in which the estate is a rival claimant; or (2) to possess a predisposition under circumstances that render such a bias against the estate.

Bankruptcy Law > Procedural Matters > Professional Responsibility

Legal Ethics > Client Relations > Appearance of Impropriety

Bankruptcy Law > ... > Professional Services > Retention of Professionals > General Overview

Legal Ethics > Client Relations > Conflicts of Interest

HN22[] **Procedural Matters, Professional Responsibility**

Bankruptcy courts look to the Code of Professional Responsibility in analyzing attorney conflicts of interest.

Counsel: For Exco Resources, Inc, APPELLANT: Michael P Cooley, Gardere Wynne Sewell, LLP, Dallas, TX USA.

For Milbank Hadley Tweed & McCloy, LLP, APPELLEE: Luc A Despins, Milbank, Tweed, Hadley & McCloy, LLP, New York, NY USA.

For Enron Corp, DEBTOR: John C Nabors, Deirdre B Ruckman, Michael P Cooley, Gardere Wynne Sewell, LLP, Dallas, TX USA.

Carolyn S Schwartz, TRUSTEE.

Judges: BARBARA S. JONES, UNITED STATES DISTRICT JUDGE.

Opinion by: BARBARA S. JONES

Opinion

MEMORANDUM & ORDER

BARBARA S. JONES

UNITED STATES DISTRICT JUDGE

On December 2, 2001, and periodically thereafter, Enron Corporation and certain of its affiliated entities (collectively, the "Debtors") filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. The U.S. Trustee formed the Official Committee of Unsecured Creditors ("Committee"), which sought to retain Appellee Milbank, Tweed, Hadley & McCloy LLP ("Milbank") as its counsel in the bankruptcy proceedings. On January 28, 2002, the **[*2]** bankruptcy court signed an order approving Milbank as the Committee's counsel. On March 19, 2002, Appellant Exco Resources, Inc. ("Exco"), a creditor of Enron North America, filed an objection to a monthly fee statement of Milbank and moved to disqualify Milbank as counsel for the Committee. Several creditors joined the motion. The bankruptcy court held a hearing on May 15, 2002 and, in a decision and order dated May 23, 2002, denied Exco's motion to disqualify Milbank. Exco now appeals the bankruptcy court's decision and order. In addition to Milbank, the Committee, the United States Trustee and the Debtors have all submitted briefs in opposition to Exco's motion. For the reasons set forth below, this Court affirms the decision of the bankruptcy court denying Exco's motion to disqualify Milbank as counsel for the Committee.

Jurisdiction

As a preliminary matter, this Court must address whether it has appellate jurisdiction in this case. Appellees Milbank and the Committee challenge this Court's jurisdiction on the following grounds: first, Exco lacks standing to appeal; second, the bankruptcy court's order was not final; and third, Exco failed to name the Committee as an **[*3]** appellee.

HN1[] In every federal case, the threshold question in determining the power of the court to hear the case is whether a claimant has standing. See *Warth v. Seldin, 422 U.S. 490, 498, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975)*. The criteria for standing in a bankruptcy proceeding is more stringent than the "injury in fact" requirement under Article III. See *Kane v. Johns-Manville Corp., 843 F.2d 636, 642 n.2 (2d Cir. 1988)*. In the Second Circuit, a party appealing a bankruptcy court ruling must be an "aggrieved person." *Licensing by Paola, Inc. v. Sinatra, 126 F.3d. 380, 388 (2d Cir. 1997)*.

An aggrieved person is one that is "directly and adversely affected pecuniarily by the challenged order of the bankruptcy court." Id.

The Committee argues that Exco lacks standing because it is not an aggrieved person and because it is asserting the rights of the Committee, rather than its own rights. HN2[] Generally, a creditor has standing to appeal a bankruptcy order that disposes of the estate's property because such orders directly affect the funds available to meet a creditor's claims. Id.; Kane, 843 F.2d at 642. However, **[*4]** an "unsubstantiated, speculative, and indirect effect" on the party's pecuniary interests is not enough to establish appellate standing. See In re Victory Markets, Inc., 195 B.R. 9, 15-16 (N.D.N.Y. 1996) (rejecting appellant's claim that committee's inadequate representation resulted in pecuniary loss).

Exco alleges that the bankruptcy court should never have approved Milbank as counsel for the Committee because Milbank's disclosures of conflicts were inadequate. Exco also alleges that Milbank's interests in the Chapter 11 cases are adverse to the interests of the Committee and the unsecured creditors. While this Court is aware that granting appeals to any person affected by a bankruptcy court order "will sound the death knell of the orderly disposition of bankruptcy matters," In re Gucci, 126 F.3d 380, 388 (2d Cir. 1997), Exco's appeal is not outside the limits of appellate standing. If Milbank's interests were indeed adverse to those of the Committee and if Milbank did fail to adequately disclose its relationships, Exco, as an unsecured creditor, would be directly, pecuniarily affected. In In re Arochem Corp., 176 F.3d 610 (2d Cir. 1999), **[*5]** appellants, certain creditors, objected to the trustee's employment of counsel, arguing that counsel's retention conflicted with its representation of a certain unsecured creditor. See Arochem 176 F.3d at 616. When the bankruptcy court approved counsel's employment, the creditors appealed. See id. at 618. Both the district court and the Second Circuit heard the appeal and affirmed the bankruptcy court's retention order on the merits. See id. at 620.

Moreover, HN3[] the standing requirement is not entirely inflexible. The Second Circuit, for instance, has found an "unsuccessful bidder," who calls into question the "intrinsic fairness" of a bankruptcy sale transaction, also has appellate standing. See In re Colony Hill Assocs., 111 F.3d 269, 274 (2d Cir. 1997). Exco alleges, among other things, that Milbank, to the detriment of the unsecured creditors, failed to disclose relationships with certain bidders. Exco alleges that the Committee consequently breached its fiduciary duty to ENA creditors such as Exco. Like the unsuccessful bidder, Exco questions the intrinsic fairness of this bankruptcy proceeding if Milbank is permitted **[*6]** to continue to represent the Committee. Accordingly, Exco has standing to appeal the bankruptcy court's denial of its motion to disqualify Milbank as counsel for the Committee.

Appellee Milbank further contends that the Court should dismiss Exco's appeal because the bankruptcy court's decision is not a final order. HN4[] Pursuant to 28 U.S.C. § 158(a)(1), an appeal from a bankruptcy court order may be taken as of right if the order is final. In non-bankruptcy cases, an order denying a motion to disqualify counsel in a civil case is not an appealable, final order. See Firestone Tire & Rubber Co v. Risjord, 449 U.S. 368, 379, 66 L. Ed. 2d 571, 101 S. Ct. 669 (1981).

However, HN5[] "a more flexible standard of finality" applies in a bankruptcy case. In re Johns Manville Corp., 920 F.2d 121, 126 (2d Cir. 1990). Within a bankruptcy context, orders "may be immediately appealable if they finally dispose of discrete disputes within the larger case." Id. The Second Circuit has held in a line of cases that bankruptcy court orders granting or denying the retention of counsel dispose of such disputes and are, therefore, final and appealable. **[*7]** See Arochem, 176 F.3d at 620; In re Kurtzman, 194 F.3d 54, 57 (2d Cir. 1999); see also In re Palm Coast, Matanza Shores Ltd. P'ship, 101 F.3d 253, 256 (2d Cir. 1996) (order authorizing trustee to retain real estate consultant was a final order).

Milbank attempts to distinguish these cases by noting that they involved an order granting or denying counsel's employment *in the first instance,* rather than, as here, an order denying a *midstream* motion to disqualify counsel previously appointed without objection. Such distinction is without consequence. In both scenarios, the bankruptcy court is deciding a conflict issue. In AroChem, the Second Circuit made no such distinction. The court began its analysis of the order's finality with the Supreme Court's non-bankruptcy rule that "orders granting or denying motions to disqualify counsel are not considered final and are not immediately appealable." Arochem, 176 F.3d at 619 (citing Richardson-Merrell, Inc. v. Koller, 472 U.S. 424, 440, 86 L. Ed. 2d 340, 105 S. Ct. 2757 (1985); Firestone, 449 U.S. at 379)). Then the court held the **[*8]** order to be final and appealable because of the

more flexible standard of finality that applies in bankruptcy cases -- not because the order involved the initial retention of counsel. See Arochem, 176 F.3d at 620; see also In re Vebeliunas, 246 B.R. 172, 173 (S.D.N.Y. 2000) (noting that Arochem, Palm Coast and Kurtzman "affirm jurisdiction over appeals from orders granting or denying motions to disqualify counsel" in bankruptcy proceedings).

In Palm Coast, Arochem, and Kurtzman, the Second Circuit ultimately determined that the bankruptcy order was final because "nothing in the order of the bankruptcy court … indicates any anticipation that the decision will be reconsidered." Arochem, 176 F.3d at 620 (quoting Palm Coast, 101 F.3d at 256); Kurtzman, 194 F.3d at 57. In the instant appeal, Milbank contends that the bankruptcy court's order is not final because in a footnote the court stated that "the better course of action is to address these issues if and when the events were to occur." This statement, however, relates to Exco's speculation concerning Milbank's potential involvement **[*9]** in future litigation regarding Enron transactions. The court explained that "considering the limited scope of Milbank's retention concerning the transactions and the involvement of conflicts counsel in the investigation of the transactions, at this point, the speculation that Milbank may become a defendant or a witness is not sufficient to warrant a finding of adverse interest on Milbank's part." The court does not suggest that it will reconsider its decision relating to Exco's present motion. Moreover, in denying Exco's motion, the bankruptcy court also denied a request to hold the motion in abeyance. Accordingly, this Court finds that the bankruptcy court's order is a final, appealable order.

In its final argument challenging this Court's jurisdiction, Appellee Committee asserts that, by failing to name the Committee as an appellee, Exco did not comply with Bankruptcy Rule 8001(a). HN6[↑] Rule 8001(a) provides that "the notice of appeal shall … contain the names of all parties to the judgment, order, or decree appealed from …." Fed. R. Bankr. P. 8001(a). Rule 8001(a) also states that "an appellant's failure to take any step other than timely filing a notice of appeal does not affect **[*10]** the validity of the appeal, but is ground only for such action as the district court … deems appropriate, which may include dismissal of the appeal." Fed. R. Bankr. P. 8001(a).

HN7[↑] The time period for filing a notice of appeal is strictly enforced and failure to timely file deprives the district court of jurisdiction to review the bankruptcy court's order. See In re New York Hostel, Inc., 194 B.R. 313, 316 (S.D.N.Y. 1996). Moreover, failure to name an *appealing* party may preclude that party's appeal. See In re Pettibone Corp., 145 B.R. 570, 574 (N.D. Ill. 1992). Exco adequately named itself as the appellant in the notice of appeal. Because other defects are not jurisdictional, it is within the Court's discretion to take such action as it deems appropriate. See Medford Industries v. Lennar Partners, Inc., 205 B.R. 23 (E.D.N.Y. 1996). This Court finds that Exco's failure to name the Committee as an appellee does not warrant dismissal. [1] Accordingly, the Court will hear Exco's appeal.

[*11] Merits [2]

HN8[↑] The standard by which this Court is to review an **[*12]** order of the bankruptcy court is set forth in Rule 8013 of the Federal Rules of Bankruptcy Procedure:

> HN9[↑] On an appeal the district court or bankruptcy appellate panel may affirm, modify, or reverse a bankruptcy judge's judgment, order, or decree or remand with instructions for further proceedings. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of witnesses.

Fed. R. Bankr. P. 8013.

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[1] Moreover, even if the Court decided that the deficiency warranted dismissal, its jurisdiction would be curtailed only with respect to the Committee, and not as to the parties that Exco properly named. See In re Novon Int'l Inc., No. 98cv0677E(F), 2000 U.S. Dist. LEXIS 5169, 2000 WL 432848, *1 (W.D.N.Y. March 31, 2000).

[2] In its decision, the bankruptcy court discussed Exco's delay in bringing this motion and concluded that such delay would provide a separate ground to deny the relief sought by Exco. The Committee's application to retain Milbank and Milbank's affidavit in support of that application were filed by January 16, 2002. Exco did not file any objections to the application. Nor did Exco appeal the bankruptcy court's January 28, 2002 order approving Milbank's retention. Exco did not file its motion seeking to disqualify Milbank until March 9, 2002, even though, as the bankruptcy court noted, the "underlying basis for the motion" was known to Exco no later than mid-January. This Court agrees with the bankruptcy court's finding that there was an unjustified delay on the part of Exco in bringing this motion. However, because of the seriousness of the allegations, the bankruptcy court addressed the merits and did not deny Exco's motion as untimely.

Thus, HN10[] the Court will accept the bankruptcy court's findings of fact unless they are clearly erroneous. See In re Manville Forest Products Corp., 896 F.2d 1384, 1388 (2d Cir. 1990). This Court will review the bankruptcy court's legal conclusions de novo. See id.

HN11[] A party's choice of counsel is entitled to great deference. See, e.g., Board of Educ. v. Nyquist, 590 F.2d 1241, 1246 (2d Cir. 1979). Disqualification motions are viewed with disfavor because they interfere with a party's right to employ the counsel of its choice. See A.V. By Versace, Inc. v. Gianni Versace, S.p.A., 160 F. Supp. 2d 657, 662-63 (S.D.N.Y. 2001); **[*13]** Universal City Studios, Inc. v. Reimerdes, 98 F. Supp. 2d 449, 455 (S.D.N.Y. 2000). Mere speculation will not suffice to establish sufficient grounds for disqualification. See A.V. By Versace, Inc., 160 F. Supp. 2d at 663.

Exco contends that three reasons exist to warrant Milbank's disqualification: first, during the retention application process, Milbank allegedly failed to disclose substantial conflicts and connections between itself and Debtors, creditors and Committee members; second, under Bankruptcy Code §§ 101, 327, 328 and 1103, Milbank allegedly fails to satisfy the "disinterested person" standard and violates the requirement that it not hold or represent an "adverse interest" and; and third, Milbank's retention allegedly violates the Canons of Professional Ethics and the Disciplinary Rules. [3]

[*14] *Disclosures*

HN13[] Bankruptcy Rule 2014(a) requires a professional seeking employment in a bankruptcy case to submit an application that states "to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, and any other party in interest …." Fed. R. Bankr. P. 2014(a). Rule 2014(a) also requires the applicant to submit a "verified statement" setting forth these connections. Id. The purpose of Rule 2014(a) is to provide the court and the United States trustee with information to determine whether the professional's employment is in the best interest of the estate. See In re The Leslie Fay Co., Inc., 175 B.R. 525, 532 (S.D.N.Y. 1994). Rule 2014 disclosures are to be strictly construed and failure to disclose relevant connections is an independent basis for the bankruptcy court to disallow fees or to disqualify the professional from the case. See id. 175 B.R. at 533.

Exco argues that Milbank failed to disclose numerous conflicts and connections. For instance, Exco alleges that Milbank failed to timely disclose its involvement in a transaction relating to Enron Wind Corporation ("Enron Wind"), an affiliated **[*15]** Enron debtor. On December 27, 2001, the bankruptcy court issued an order approving Enron's application to sell some assets of Enron Wind's non-debtor subsidiary, Enron Wind Development Corp. Exco asserts that Milbank did not completely disclose until its March 11, 2002 fee application that, during the transaction, it had represented both Enron Wind Development Corp. and the Committee and it simultaneously billed both the Enron estate and Enron Wind.

The bankruptcy court found, however, that Milbank's disclosures concerning the Enron Wind transaction complied with the requirements of Rule 2014 and that its disclosures "provided the court, the United States Trustee and any party in interest with adequate information to enable them to take whatever action, if any, deemed necessary regarding Milbank's retention." The bankruptcy court found that Milbank fully disclosed its relationships relating to the Enron Wind transaction in the January 15, 2002 affidavit in support of the application to retain Milbank as counsel for the Committee ("January 15th Affidavit"). The bankruptcy court also found that the relevant facts were fully disclosed in the pleadings filed by Weil, Gotshal & Manges **[*16]** LLP and that Milbank's dual representation was due to exigent circumstances. Moreover, American Electric Power Company, not Enron Wind, paid Milbank. Having reviewed Milbank's January 15th Affidavit and Milbank's several supplemental affidavits, this Court agrees with the bankruptcy court's findings.

Next, Exco alleges that Milbank allowed only its own clients to bid on the sale of Debtors' Trading Unit, which generated a $ 2 billion profit over a nine to twelve month period of time prior to the bankruptcy. The sale of the trading unit involved Citibank, JP Morgan Chase and UBS Warburg, as the three bidders, and The Blackstone Group L.P. as the investment banker conducting the

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[3] HN12[] On appeal, this Court will only consider the record that was before the bankruptcy court. See In re Davis, 169 B.R. 285, 293 (E.D.N.Y. 1994); Fed. R. Bankr. P. 8006. The Court, therefore, will disregard any argument or document that appears for the first time on this appeal, including but not limited to, the newspaper articles that appeared after the bankruptcy court's May 23, 2002 order.

auction. The bankruptcy court approved the sale of the trading unit to UBS Warburg on January 18, 2002. Exco alleges that Milbank failed to disclose its connections to the parties involved in the sale, namely Enron, Citibank, JP Morgan Chase, UBS Warburg and The Blackstone Group.

At the May 15, 2002 hearing before the bankruptcy court, however, counsel for Debtors argued that the Committee did not make any decisions regarding how the sale of Debtors' trading units would be conducted. As Debtors explained, their **[*17]** counsel -- not Milbank -- controlled the sale. Moreover, the bankruptcy court correctly found that Milbank disclosed in its January 15th Affidavit that it had represented the bidders in matters unrelated to the Enron trading unit transaction.

Exco also alleges that Milbank failed to adequately disclose its relationship with certain underwriters in structured finance transactions, such as Mahonia, Marlin I, Osprey I, Osprey II, and six credit-linked note transactions. Exco argues that Milbank should have specified the names of the underwriters and the amounts involved so that an interested party could determine whether there was a problem with Milbank's representation of the Committee. Exco also argues that Milbank failed to disclose the nature and magnitude of the Credit-Linked Note transactions.

The bankruptcy court found, however, that Milbank's disclosures of the Mahonia transaction in the January 15th Affidavit complied with *Rule 2014*. Milbank also disclosed in the January 15th Affidavit that it had represented the six investment bankers in the credit-linked note transactions. Moreover, Milbank disclosed in its "Engagement Limitations" that, because of prior representations of **[*18]** certain Enron companies, there were limitations on the scope of its representation of the Committee and that conflicts counsel would handle matters outside of Milbank's scope. As is evident from the "Engagement Limitations," Milbank is not representing the Committee in any matters that Exco has identified as situations in which Milbank has an adverse interest. This Court has reviewed Milbank's disclosures concerning the structured finance transactions and concludes that the bankruptcy court's findings are not clearly erroneous.

Milbank's January 15th Affidavit was twenty-nine pages long and contained four exhibits. In this affidavit and exhibits, Milbank extensively disclosed connections with potential parties of interest in the case. Milbank also disclosed its former representations of Enron entities and of other clients involved with Enron. In the January 15th Affidavit, Milbank agreed to provide regular supplements to the affidavit to provide additional disclosure of its relevant connections. To that end, Milbank has submitted six supplemental disclosures to continually reflect the nature of any relationship with new parties in interest and to expand upon prior disclosures. **[*19]** See *In re Granite Partners, L.P., 219 B.R. 22, 35* (noting that ***HN14***[⬆] although *Rule 2014(a)* does not expressly require supplemental disclosures, they are necessary to preserve the integrity of the bankruptcy system). While Exco maintains that the supplemental disclosures demonstrate that Milbank's disclosures are untimely and inadequate, this Court finds that the supplemental disclosures support the bankruptcy court's finding that Milbank's disclosures have been "meaningful, forthright, continuous and sufficiently detailed."

HN15[⬆] *Rule 2014* requires Milbank to ensure all relevant connections have been brought to light. See *In re Leslie Fay Co., Inc., 175 B.R. at 533*. The rule does not, however, require the detailed description of those connections that Exco proposes in this case. The bankruptcy court found that Exco would require Milbank to disclose information beyond the requirements of *Rule 2014*, such as every possible consequence resulting from Milbank's connections, as well as a prediction as to the outcome of any possible litigation that may relate to its connections. This Court agrees with the bankruptcy court that such disclosures are beyond the scope of **[*20]** *Rule 2014* and that Milbank's disclosures complied with *Rule 2014*. *Adverse Interests/ Disinterestedness*

Exco alleges that Milbank has adverse interests that require its disqualification under *11 U.S.C. §§ 1103*, *327*, and *328*. The bankruptcy court found Milbank does not hold or represent an adverse interest under any of these sections. *§ 1103(b)* states:

> ***HN16***[⬆] An attorney or accountant employed to represent a committee appointed under section 1102 of this title may not, while employed by such committee, represent any other entity having an adverse interest in connection with the case. Representation of one or more creditors of the same class as represented by the committee shall not per se constitute the representation of an adverse interest.

11 U.S.C. § 1103(b).

HN17[↑] Milbank violates § 1103(b) if it simultaneously represents both the Committee and another party, with an interest adverse to the committee, in matters related to the bankruptcy proceeding. See Daido Steel Co., Ltd., v. Official Comm. Of Unsecured Creditors, 178 B.R. 129, 132 (N.D. Ohio 1995). Section 1103(b) is not violated if Milbank represents **[*21]** an entity with an adverse interest in a matter *unrelated* to the bankruptcy case or in a matter that *pre-dates* Milbank's representation of the Committee. See Id.; In re Firstmark Corp., 132 F.3d 1179, 1182 (7th Cir. 1997) (emphasis added).

Exco's argument under § 1103 fails because Milbank's alleged adverse interests relating to the structured finance transactions pre-date Milbank's representation of the Committee. Moreover, Conflicts Counsel represents the Committee with respect to all matters in which Milbank was previously involved. Accordingly, the bankruptcy court was correct in finding that Milbank complies with the requirements of § 1103(b).

While Milbank asserts that § 1103(b) is the only statutory provision that applies to the Committee's right to select counsel, Exco argues Milbank must also satisfy the requirements of § 327(a). HN18[↑] Section 327(a) concerns solely the employment of professionals *by a trustee or a debtor* and requires that the professional not hold an adverse interest to the estate and that the professional be disinterested under § 101(14). However, § 328(c) of the bankruptcy code allows a bankruptcy court to deny compensation **[*22]** to a professional employed under either § 327 *or* § 1103 if that professional is not disinterested or holds an adverse interest. See 11 U.S.C. § 328(c) (emphasis added). Consequently, at least one case has held that, notwithstanding the language of § 1103, the disinterested and adverse interest requirements of 327(a) also apply to the initial retention of counsel for a committee under § 1103. See In re Caldor, 193 B.R. 165, 170-171 (Bankr. S.D.N.Y. 1996).

In the instant case, the bankruptcy court concluded that, even if the stricter requirements of § 327(a) are applied to Milbank's representation of the Committee, Milbank satisfies these requirements because it is disinterested under § 101(14) and because it does not hold an adverse interest. This Court agrees.

HN19[↑] § 101(14) defines a disinterested person, in pertinent part, as any person that:

> (C) has not been, within three years before the date of the filing of the petition, an investment banker for a security of the debtor, or an attorney for such an investment banker in connection with the offer, sale, or issuance of a security of the debtor; and …
>
> (E) does **[*23]** not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor or an investment banker … or for any other reason.

11 U.S.C. § 101(14).

Exco alleges that Milbank is not disinterested under 11 U.S.C. § 101(14) because it was counsel to investment bankers in connection with the offer, sale or issuance of a security of Debtors in the Marlin transactions, the Osprey I transactions and certain credit linked note transactions. Exco asserts that Milbank represented certain clients as arrangers of a structured finance offering in senior secured notes issued by the Marlin Water Trust II and by the Osprey Trust. Exco argues that as part of the Marlin and Osprey transactions, Enron issued preferred stock and entered into a Remarketing Agreement with Milbank's clients that, under certain provisions, required Milbank's clients to sell the preferred stock. Exco maintains, therefore, that Milbank's clients are underwriters or investment bankers in violation of 101(14).

Milbank, on the **[*24]** other hand, asserts that it represented certain investment bankers for securities issued by only non-Debtor entities prior to the petition date and disclosed these representations in its application. While Milbank acknowledges that some of its clients were parties to Remarketing Agreements with Enron, Milbank maintains that certain specified conditions would have to be met before the investment bankers would remarket Enron stock. Milbank asserts that the investment bankers never purchased, offered, sold or issued Enron securities.

Exco alleges, however, that the transactions are the Debtors' attempt to disguise the sale of Enron shares through trust vehicles and that Milbank's representation of investment bankers in connection with the secured notes is truly representation of those investment bankers in the sale of Enron stock.

The bankruptcy court found "absolutely no evidence … to prove, much less substantiate, Exco's allegations that the form of these vehicles was an artifice for a roundabout issuance of Enron securities." This Court

concurs with the bankruptcy court's finding that Exco's allegations are based on mere conjecture and speculation insufficient to support a motion **[*25]** for disqualification. See *A.V. by Versace, Inc., 160 F. Supp. 2d at 663*; *TWI Int'l, Inc. v. Vanguard Oil And Service Co., 162 B.R. 672, 675 (S.D.N.Y. 1994)* ***HN20***[⬆] ("merely hypothesizing that conflicts may arise is not sufficient to warrant the disqualification of an attorney") (quoting *In re Stamford Color Photo, Inc., 98 B.R. 135, 138 (D. Conn. 1989)*.

The bankruptcy court relied on the Remarketing Agreements filed under seal in concluding that Milbank is disinterested pursuant to *§ 101(14)*. Having reviewed the Remarketing Agreements, this Court agrees with the bankruptcy court's findings that the conditions required for investment bankers to become underwriters of Enron stock have not been satisfied.

Exco argues that Milbank's prior representations, relating to the structured finance transactions, create an adverse interest. ***HN21***[⬆] An adverse interest is defined as follows:

> (1) to possess or assert any economic interest that would tend to lessen the value of the bankruptcy estate or that would create either an actual or potential dispute in which the estate is a rival claimant; or (2) to possess a predisposition under circumstances that **[*26]** render such a bias against the estate.

In re Arochem Corp., 176 F.3d at 623 quoting *In re Roberts, 46 B.R. 815 (Bankr. D. Utah 1985)*.

The bankruptcy court found that the procedures Milbank has in place are satisfactory to handle its adverse representations in prior matters. This Court agrees.

Milbank's scope of employment is limited so that Milbank will not be handling any matter regarding Mahonia or any structured finance transaction that involved Milbank's representation. See N.Y. Bar Op. 2001-3 at 2-3 ("representation may be limited to eliminate adversity and avoid a conflict of interest"). Conflicts counsel reviews, on a daily basis, the docket and all pleadings to identify any matters from which Milbank should be excluded. Milbank has also created a "firewall" to prevent the transfer of information between Milbank employees who are representing the Committee and Milbank employees who previously represented parties with an adverse interest.

Moreover, conflicts counsel investigates the structured transactions relating to Milbank and the Examiner will investigate all of the structured transactions. The bankruptcy court explained that **[*27]** either Conflicts Counsel or the Examiner would discover any action by Milbank that would constitute a breach of Milbank's fiduciary duty in its own investigation of structured transactions. Accordingly, the bankruptcy court correctly concluded that there "is effectively no adverse interest in Milbank continuing these investigations."

The bankruptcy court also found that Milbank's receipt of alleged preferential transfers does not create an adverse interest between Milbank and the unsecured creditors. As the bankruptcy court explained, the Examiner will determine whether Milbank received an avoidable preference and Milbank, having waived its right to litigate the preference issue, will be bound by the Examiner's findings. The bankruptcy court found that Milbank's agreement to waive its rights to challenge the Examiner's findings has the same effect as the accepted practice of waiving a claim in order to comply with the disinterested person standard of *§ 101(14)(A)*. On appeal, Exco has not challenged the bankruptcy court's findings regarding Milbank's alleged preferential transfers. Because Milbank has agreed to be bound by the Examiner's determination, this Court agrees with the bankruptcy **[*28]** court that Milbank does not hold an adverse interest.

Ethical Violations

HN22[⬆] Bankruptcy courts also look to the Code of Professional Responsibility in analyzing conflicts of interest. See *In re Caldor, 193 B.R. at 178*. Exco, therefore, alleges that Milbank should be disqualified under Canon 5 and Canon 9 of the Code of Professional Responsibility. This Court concurs with the bankruptcy court that, having found both that Milbank is not involved in any matter in which it has an adverse interest and that the use of conflicts counsel and ethical walls are appropriate, there is no basis for a violation of the Code of Professional Responsibility.

Conclusion

For the foregoing reasons, this Court affirms the Bankruptcy Court's Decision and Order dated May 23, 2002. Exco's request to set aside the bankruptcy court's decision and to have Milbank disqualified as counsel for the Official Committee of Unsecured Creditors is denied.

SO ORDERED:

BARBARA S. JONES

UNITED STATES DISTRICT JUDGE

Dated: January 28, 2003

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437 P.3d 174 (Table)
Unpublished Disposition
This is an unpublished disposition. See Nevada Rules of Appellate Procedure, Rule 36(c) before citing.
Supreme Court of Nevada.

JMB CAPITAL PARTNERS MASTER FUND, L.P.; Caldwell FB I LLC; Fulcrum Credit Partners LLC; Steelman Partners LLP; Joint China Commerce Limited; and Concave Investors, LLC, Petitioners,
v.
The EIGHTH JUDICIAL DISTRICT COURT of the State of Nevada, IN AND FOR the COUNTY OF CLARK; and the Honorable Elizabeth Goff Gonzalez, District Judge, Respondents,
and
Soneet R. Kapila, Not Individually but as Chapter 7 Trustee of Fontainebleau Las Vegas Holdings, LLC, Fontainebleau Las Vegas, LLC, Fontainebleau Las Vegas Capital Corp., Fontainebleau Las Vegas Retail Parent, LLC, Fontainebleau Las Vegas Retail Mezzanine, LLC, Fontainebleau Las Vegas Retail, LLC; W&W-AFCO Steel LLC; Commercial Roofers, Inc.; Dielco Crane Service, Inc.; Desert Mechanical, Inc., f/k/a Desert Plumbing & Heating Co., Inc.; American Building Supply, Inc., f/k/a Door & Hardware Management, Inc.; Eberhard Southwest Roofing, Inc.; Fisk Electric Company; L.A. Nevada, Inc., d/b/a G&G Systems; Geo Cell Solutions, Inc. : J.F. Duncan Industries, Inc.; JS&S, Inc.; Lally Steel, Inc.; Northstar Contracting Group, Inc., f/k/a LVI Environmental of Nevada, Inc.; Marnell Masonry, Inc.; Midwest Pro Painting, Inc.; Modernfold of Nevada, LLC; Aggregate Industries-SWR, Inc.; Water FX, LLC; F. Rodgers Corporation; Coreslab Structures (L.A.) Inc.; Keenan, Hopkins, Suder & Stowell Contractors, Inc.; Dayco Funding Corporation; Air Design Technologies, LLC; Airtek Products LLC; Johnson Controls International, PLC; Allegheny Millwork & Lumber Co.; L&P Interiors, LLC; Honeywell International, Inc.; The Penta Building Group, Inc.; Ram Construction Services of Michigan, Inc.; Graybar Electric Company, Inc.; Giroux Glass Inc.; Farmstead Capital Management, LLC; JBA Consulting Engineers, Inc.; Bergman, Walls & Associates; YWS Architects, Ltd.; TMCX Nevada, LLC; John A. Martin & Associates of Nevada, Inc.; Scoggin Worldwide Fund, Ltd.; Scoggin International Fund, Ltd.; Scoggin Capital Management II, LLC; Lockwood, LLC; American Crane and Hoist Erectors, LLC; Republic Towers and Hoist, LLC; Republic Crane Service, LLC; Tracy & Ryder Landscape; Cashman Equipment Company; GCP Applied Technologies, Inc., f/k/a W.R. Grace & Co.; Superior Tile & Marble, Inc.; Midwest Drywall Co., Inc.; West Edna & Associates, d/b/a Mojave Electric, Inc.; Tractel, Ltd.; Tractee, Inc.; Technicoat Management, Inc.; Cemex Construction Materials Pacific, LLC; Gerdau Reinforcing Steel, f/k/a Pacific Coast Steel and Century Steel, Inc.; Schwimmer Drapery, Inc.; Las Vegas Sands Corp.; Derr and Gruenewald Construction Co.; and Roncelli, Inc., Real Parties in Interest.

No. 78008
|
FILED MARCH 21, 2019

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ORDER DENYING PETITION FOR WRIT OF MANDAMUS

****1** This original petition for extraordinary writ relief challenges a district court order denying, in part, a motion to disqualify counsel. Certain real parties in interest have filed an answer, as directed, and petitioner JMB Capital Partners Master Fund, L.P., has filed a reply.

In this mechanic's lien action, JMB Capital, along with other petitioners who have joined in this matter, asserts that the district court should have disqualified certain real parties in interest's counsel, Peel Brimley LLP, based on an RPC 1.9 conflict of interest between the firm's current representation of lienholder parties and its former representation in a related matter of other lienholders whose lien rights have been assigned to JMB Capital and the other petitioners. In particular, JMB Capital argues that, by attacking its own previous lien work on behalf of its clients in the current litigation, Peel Brimley has compromised the integrity of the district court proceedings and created an impropriety in carrying out its duties of loyalty and confidentiality to its former clients.

In extraordinary circumstances, we may exercise our discretion to issue a writ of mandamus to compel the performance of a legally required duty or to control an arbitrary or capricious exercise of discretion. *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008); *see also Archon Corp. v. Eighth Judicial Dist. Court*, 133 Nev., Adv. Op. 101, 407 P.3d 702, 706, 707 (Nev. 2017). Although JMB Capital raises serious concerns about the propriety of Peel Brimley's representation in this matter, after considering the petition, answer, and reply, we are not convinced that these circumstances are so extraordinary as to warrant our intervention by writ of mandamus.

Lawyers typically may not switch sides or attack their own work, and former clients may uphold this rule through a motion to disqualify. RPC 1.9; *see Restatement (Third) of the Law Governing Lawyers* § 132 (2000). Here, however, it is not the former client who moved to disqualify Peel Brimley, but an assignee of the former client. Further, an outside firm is ostensibly handing the matters related to Peel Brimley's former clients on behalf of its current clients (although the extent of the outside firm's associations with Peel Brimley are questioned), the underlying lien litigation has been

pending for years, and trial is scheduled to begin soon. Ultimately, the district court not only recognized the serious concerns potentially posed by Peel Brimley's current representation but also acted to balance those concerns with other interests by refusing to disqualify Peel Brimley but also precluding Peel Brimley from alleging fraud in its previous work. *See Brown v. Eighth Judicial Dist. Court*, 116 Nev. 1200, 1205, 14 P.3d 1266, 1269-70 (2000) ("Courts deciding attorney disqualification motions are faced with the delicate and sometimes difficult task of balancing competing interests: the individual right to be represented by counsel of one's choice, each party's right to be free from the risk of even inadvertent disclosure of confidential information, and the public's interest in the scrupulous administration of justice. While doubts should generally be resolved in favor of disqualification, parties should not be allowed to misuse motions for disqualification as instruments of harassment or delay." (internal citations omitted)). Thus, the district court recognized the relevant interests in this matter and addressed them, and we have every confidence that the court will continue to recognize and address any conflict-of-interest concerns as they arise in the future. Given the circumstances, we cannot conclude that the district court exercised its discretion in a manner so as to warrant our extraordinary intervention under the standards governing mandamus, and we thus decline to consider the merits of this matter at this time. Accordingly, we

****2** ORDER the petition ***175** DENIED.[1]

[1] In light of this order, we deny JMB Capital's emergency motion for stay.

All Citations

437 P.3d 174 (Table), 2019 WL 1324853

End of Document

Nasdaq, Inc. v. Miami Int'l Holdings, Inc.

United States District Court for the District of New Jersey

November 26, 2018, Decided; November 26, 2018, Filed

Civil Action No. 17-6664-BRM-DEA

Reporter
2018 U.S. Dist. LEXIS 199167 *; 2018 WL 6171819

NASDAQ, INC, et al., Plaintiffs, v. MIAMI INTERNATIONAL HOLDINGS, INC., et al., Defendants.

Notice: NOT FOR PUBLICATION

Prior History: *Nasdaq, Inc. v. Miami Int'l Holdings, Inc., 2018 U.S. Dist. LEXIS 151813 (D.N.J., Sept. 6, 2018)*

Core Terms

patents, disqualification, former client, matters, confidential information, technology, disqualification motion, clearly erroneous, trade secret, prosecuted, contrary to law, disqualified, Counts, district judge, infringed, magistrate judge, law firm, parties, trading

Counsel: **[*1]** For NASDAQ, INC., NASDAQ ISE, LLC, FTEN, INC., Plaintiffs: AMY DANIELLE LURIA, LEAD ATTORNEY, MICHAEL D. CRITCHLEY, CRITCHLEY KINUM & DENOIA LLC, ROSELAND, NJ.

For MIAMI INTERNATIONAL HOLDINGS, INC., MIAMI INTERNATIONAL SECURITIES EXCHANGE, LLC, MIAX PEARL, LLC, MIAMI INTERNATIONAL TECHNOLOGIES, LLC, Defendants: JULIA ALEJANDRA LOPEZ, LEAD ATTORNEY, Reed Smith LLP, Princeton, NJ; LISA ANN CHIARINI, LEAD ATTORNEY, REED SMITH LLP, NEW YORK, NY; MICHAEL THEODORE ZOPPO, FISH & RICHARDSON PC, NEW YORK, NY.

For FISH & RICHARDSON, PC, Interested Party: DAVID M. WISSERT, LEAD ATTORNEY, LOWENSTEIN SANDLER PC, ROSELAND, NJ; MICHAEL B. HIMMEL, PETER MATTHEW SLOCUM, LEAD ATTORNEYS, Lowenstein Sandler LLP, Roseland, NJ.

Judges: HON. BRIAN R. MARTINOTTI, UNITED STATES DISTRICT JUDGE.

Opinion by: BRIAN R. MARTINOTTI

Opinion

MARTINOTTI, DISTRICT JUDGE.

Before this Court is an appeal by Fish & Richardson, PC ("Fish") (ECF No. 107) of Magistrate Judge Douglas E. Arpert's September 6, 2018 Memorandum and Order (ECF No. 105) granting Nasdaq, Inc. ("Nasdaq"), Nasdaq ISE, LLC ("ISE"), and Ften, Inc.'s ("FTEN") (collectively, "Plaintiffs") Motion to Disqualify Fish as Miami International Holdings, Inc, Miami International Securities Exchange, **[*2]** LLC, MIAX Peral, LLC, and Miami International Technologies, LLC's (collectively, "MIAX") counsel. (ECF No. 54.) Plaintiffs opposed the appeal. (ECF No. 109.) Having reviewed the parties' submissions filed in connection with the appeal and having declined to hold oral argument pursuant to *Federal Rule of Civil Procedure 78(b)*, for the reasons set forth below and for good cause having been shown, Fish's Appeal (ECF No. 107) is **DENIED** and Judge Arpert's September 6, 2018 Memorandum and Order (ECF No. 105) is **AFFIRMED**.

I. BACKGROUND

Fish does not dispute Judge Arpert's recitation of facts to Nasdaq's Motion to Disqualify. *See* (ECF No. 107-1 at 9 ("[T]he core facts on Plaintiff's Motion to Disqualify Fish were not in dispute. Rather, the dispute was the legal conclusions to be drawn based on those facts, i.e., whether disqualification under *RPCs 1.9* and *1.10* was appropriate.").) Indeed, Judge Arpert noted "[t]he relevant facts [were] generally not contested." (ECF No. 105 at 6.) As such, the Court incorporates Judge Arpert's comprehensive recitation of the background, in relevant part:

> Plaintiffs [Nasdaq], [ISE] and [FTEN] bring this action alleging patent infringement and

misappropriation of trade secrets against four entities **[*3]** collectively referred to by the parties as MIAX. The Complaint contains ten counts. Counts I and II of the Complaint allege that MIAX has infringed two separate patents owned by ISE. Counts III, IV, V and VI allege that MIAX has infringed four separate patents owned by Nasdaq. Count VII alleges that MIAX infringed a patent owned by FTEN. The final three counts, Counts VIII through X, allege that MIAX misappropriated certain of Nasdaq's trade secrets.

The seven patents-in-suit relate generally to electronic trading technology. More specifically, ISE's patents are directed to how an automated exchange allocates trades between traders. FTEN's patent relates to automatically cancelling orders by monitoring market data from a plurality of exchanges. Nasdaq's patents are directed to displaying quotes in a particular way, monitoring whether a trader's trading terminal is online, and assigning orders to designated securities processors. ECF No. 69-6 at ¶ 22. All of the patents-in-suit are alleged to be infringed by the same accused products and services relating to electronic trading platforms.

MIAX is represented in this action by [Fish] and Reed Smith LLP ("Reed Smith"). Plaintiff Nasdaq is **[*4]** a former client of Fish. Fish represented Nasdaq with respect to intellectual property matters from 1998 until 2011, during which time Fish prosecuted many patents on behalf of Nasdaq, including the four patents that Nasdaq is asserting in the present case (the "Nasdaq Patents"). The Nasdaq Patents were filed between 1998 and 2002, and the patents issued between 2009 and 2011. ECF No. 54-1 at 3.

In 2011, Fish's representation of Nasdaq was terminated. ECF No. 69-1 at ¶ 6. Fish transferred Nasdaq's patent portfolio to another law firm, Nixon & Vanderhye, P.C. *Id.* Fish did not retain any copies of the physical files from Nasdaq after the representation was terminated. *Id.* at ¶ 8. Most of the Fish attorneys that worked on prosecuting the Nasdaq Patents still practice with Fish today, and all reside in the firm's Boston office. *Id.* ¶ 5.

When approached about representing MIAX in the instant case, Fish apparently recognized that there was a conflict -- it could not be adverse to its former client, Nasdaq, in any matter substantially related to Fish's prior representation. As such, Fish and MIAX entered into a "limited-scope engagement agreement" with respect to the present action. *Id.* ¶ 9. **[*5]** Under this agreement, MIAX would be required to retain an additional law firm as "***conflicts counsel***" to handle all matters where Fish would have a conflict with Nasdaq. *Id.* MIAX retained Reed Smith as ***conflicts counsel***. Consequently, according to Fish, Fish is lead counsel for aspects of the case pertaining to ISE, FTEN and the trade secret claims, but Fish will have no input into the defense of the four Nasdaq Patents. ECF No. 69 at 7. Reed Smith, on the other hand, is lead counsel for issues relating to the Nasdaq Patents. *Id.*

When challenged by Nasdaq regarding its appearance in this matter, Fish asserted that its appearance on behalf of MIAX presents no conflict because its representation excludes the Counts in the Complaint involving the Nasdaq Patents. ECF No. 54-1 at 4. Fish advised Plaintiffs that in order to meet its ethical obligations to Nasdaq, Fish screened every lawyer who previously represented Nasdaq and has "walled off" its entire Boston office from participation in this case (the Fish attorneys working on this case are located in the firm's New York, Texas, California and Washington D.C. offices). *Id.*

(ECF No. 105 at 1-3.)

Nevertheless, on March 2, 2018, Plaintiffs moved **[*6]** to disqualify Fish, arguing Fish's efforts to avoid a conflict were "woefully deficient." (ECF No. 54 at 4.) In their Motion to Disqualify, they argued Fish's participation in this matter will prejudice Nasdaq because "(1) Fish prosecuted four of the seven patents that are asserted of this action; (2) the remaining three patents involve the same field of technology for which Fish provided IP counseling to and prosecuted patents for Nasdaq; and (3) the trade secret claims similarly involve the same technological field and may implicate confidential information that Nasdaq provided to Fish during its previous relationship." (ECF No. 105 at 3.) On September 6, 2018, Judge Arpert granted Plaintiffs' Motion to Disqualify Fish, finding in part, "[a]s opposing parties, and given the fact that the other Plaintiffs, IFE and FTEn, are wholly-owned subsidiaries of Nasdaq, there can be no dispute that Nasdaq and MIAX have adverse interest with respect to this litigation." (ECF No. 105 at 7.) Now, Fish appeals Judge Arpert's decision. (ECF No. 107.)

II. Legal Standard

With respect to a district judge's review of a magistrate judge's decision, Federal Rule of Civil Procedure 72(a) states: "The district judge . . . must consider timely **[*7]** objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law." *Id.* Similarly, this Court's Local Rules provide that "[a]ny party may appeal from a Magistrate Judge's determination of a non-dispositive matter within 14 days" and the District Court "shall consider the appeal and/or cross-appeal and set aside any portion of the Magistrate Judge's order found to be clearly erroneous or contrary to law." *L.Civ.R. 72.1(c)(1)(A)*.

A district judge may reverse a magistrate judge's order if the order is shown to be "clearly erroneous or contrary to law" on the record before the magistrate judge. 28 U.S.C. 636(b)(1)(A) ("A judge of the court may reconsider any pretrial matter [properly referred to the magistrate judge] where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law."); Fed. R. Civ. P. 72(a); *L.Civ.R. 72.1(c)(1)(A)*; *Haines v. Liggett Grp., Inc., 975 F.2d 81, 93 (3d Cir. 1992)* (describing the district court as having a "clearly erroneous review function," permitted only to review the record that was before the magistrate judge). The burden of showing that a ruling is "clearly erroneous or contrary to law rests with the party filing the appeal." Marks v. Struble, 347 F. Supp. 2d 136, 149 (D.N.J. 2004). A district judge may find a magistrate judge's decision "clearly erroneous" when it is "left with the **[*8]** definite and firm conviction that a mistake has been committed." Dome Petroleum Ltd. v. Employers Mut. Liab. Ins. Co., 131 F.R.D. 63, 65 (D.N.J. 1990) (quoting United States v. U.S. Gypsum Co., 333 U.S. 364, 395, 68 S. Ct. 525, 92 L. Ed. 746 (1948)); *accord* Kounelis v. Sherrer, 529 F. Supp. 2d 503, 518 (D.N.J. 2008). However, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." United States v. Waterman, 755 F.3d 171, 174 (3d Cir. 2014) (quoting Anderson v. Bessemer City, 470 U.S. 564, 574, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985)). The magistrate judge's ruling is "contrary to law" if it misinterpreted or misapplied applicable law. Kounelis, 529 F. Supp. 2d at 518; Gunter, 32 F. Supp. 2d at 164.

III. Decision

A. Limiting the Scope of Representation

Fish argues the threshold legal issue to be determined prior to deciding whether Fish is averse to a "former client" in a "substantially related" matter under *RPC 1.9(a)* is whether Fish was permitted to limit the scope of its representation of IMAX. (ECF No. 107-1 at 9-10.) Plaintiffs argue Fish's limited scope representation does not work to immunize the conflict of interest at hand. (ECF No. 109 at 7-8.)

Rule of Professional Conduct 1.2(c) states, "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." *The Restatement (Third) of the Law of Lawyering*, Section 121, comment c(iii), notes "[s]ome conflicts can be eliminated by an agreement limiting the scope of the lawyer's representation if the limitation can be given effect **[*9]** without rendering the remaining representations objectively inadequate." Illustration 4 of the Restatement is instructive:

> Lawyer has been retained by Client to represent Client in general business matters. Client has a distribution contract with Manufacturer, and there is a chance that disputes could arise under the contract. Lawyer represents Manufacturer in local real estate matters completely unrelated to Client's business. An agreement between Lawyer and Client that the scope of Lawyer's representation of Client will not extend to dealing with disputes with Manufacturer would eliminate the conflict posed by the chance otherwise of representing Client in matters adverse to Manufacturer (see § 128). Such an agreement would not require the consent of Manufacturer.

Id. § 121 ill. 4. To eliminate the conflict, the Lawyer was required to craft a representation agreement that avoided *all* disputes involving the Client and Manufacturer to avoid the chance of the Lawyer having to represent the Client in matters adverse to the Manufacturer. *Id.*

Although a lawyer may limit the scope of its representation, Judge Arpert was correct in finding that the limitation here was unreasonable under the circumstances of this matter. **[*10]** (ECF No. 105 at 7.) It is undisputed that Fish is representing MIAX in this case and that Nasdaq is an opposing party to the matter. An attorney-client relationship existed between Fish and Nasdaq for over a decade, which means Fish has familiarity with Nasdaq's strategic approaches to managing its technology and inventions. In fact, Fish prosecuted Nasdaq Patents asserted in this case, and,

as such, there is no doubt that during the course of that relationship Fish obtained confidential information that is likely to bear upon the current dispute between Nasdaq and MIAX whether as to the patents or misappropriate on trade secrets claims. *See* Essex Chem. Corp. v. Hartford Acc. & Indem. Co., 993 F. Supp. 241, 246 (D.N.J. 1998) (finding that, where the matters are substantially related, "the court will presume that the attorney has acquired confidential information from the former client"); *see also* Audio MPEG, Inc. v. Dell, Inc., 219 F. Supp. 3d 563, 569 (E.D. Va. 2016) ("It is well settled that once an attorney-client relationship has been established, an irrebuttable presumption arises that confidential information was conveyed to the attorney in the prior matter.").

As opposing parties and given that IFE and FTEN are wholly-owned subsidiaries of Nasdaq, Nasdaq and MIAX clearly have adverse interests in this litigation. Despite MIAX's **[*11]** attempt to parcel individual claims in this case for conflict purposes, this is one lawsuit, all claims are contained in a single Complaint, and IMAX elected to file a single motion to dismiss in response to the Complaint. The single brief on the motion to dismiss filed by Fish and Reed Smith attacked all the patents in the case on practically identical grounds, including those that Fish had previously prosecuted and won for Nasdaq. In addition, the brief contained a joint introduction, fact section, and joint exhibits. This demonstrates a collaborative effort in representing MIAX against Nasdaq, irrespective of their limited scope representation agreement. As such, Judge Arpert's conclusion that Fish and MIAX's limited-scope agreement was not appropriate under the circumstances is not "clearly erroneous or contrary to law." *L.Civ.R. 72.1(c)(1)(A)*. Unlike the Illustration 4 in the Restatement, Fish is representing IMAX in a matter adverse to Nasdaq and the limited scope agreement did not avoid all disputes between Nasdaq and IMAX. Accordingly, Fish's Appeal is **DENIED** for this reason alone. Nevertheless, the Court will briefly address Fish's *RPC 1.9* and *1.10* arguments.

B. *RPC 1.9*

Fish argues Plaintiffs did **[*12]** not carry their burden to justify disqualification. (ECF No. 107-1 at 19.) Plaintiffs argue Judge Arpert correctly disqualified Fish under City of Atl. City v. Trupos, 201 N.J. 447, 992 A.2d 762 (N.J. 2010). (ECF No. 109 at 19.)

A motion for disqualification calls for the Court to "balance competing interests, weighing the need to maintain the highest standards of the profession against a client's right freely to choose his counsel." Dewey v. R.J. Reynolds Tobacco Co., 109 N.J. 201, 536 A.2d 243, 251 (N.J. 1988) (citation omitted). However, "a person's right to retain counsel of his or her choice is limited in that there is no right to demand to be represented by an attorney disqualified because of an ethical requirement." *Id.* The burden of production is borne by the party seeking disqualification. Trupos, 992 A.2d at 771. If the burden is met, the burden shifts to the attorney sought to be disqualified to demonstrate the matter in which they represented the former client is not the "same or substantially related" to the matter in which the disqualification motion is brought. *Id.* Therefore, the burden of persuasion on all elements under *RPC 1.9(a)* remains with the moving party, it "bears the burden of proving that disqualification is justified." *Id.* (citation omitted). Lastly, "a determination of whether counsel should be disqualified is, an issue **[*13]** of law, subject to de novo plenary appellate review." *Id.*

The *Rule of Professional Conduct 1.9(a)* states, "[a] lawyer who has represented a client in a matter shall not thereafter represent another client in the same or a substantially related matter in which that client's interests are materially adverse to the interests of the former client unless the former client gives informed consent confirmed in writing." There are "three necessary predicates to the application of *R.P.C. 1.9(a)*'s disqualification bar." Trupos, 992 A.2d at 772. First, the law firm must have "formerly represented" the plaintiff asserting disqualification. *Id.* Second, the subsequent matter must be "materially adverse" to the interests of the former client. *Id.* Third, the two matters must be "the same or substantially related." *Id.*

As to the first element, Fish's argument that this Court should only evaluate whether ISE and FTEN are former clients of Fish is erroneous. Although neither ISE nor FTEN were ever clients of Fish, Nasdaq was indisputably a "former client" of Fish and is an adverse party to IMAX in this action. In fact, Fish is representing IMAX against Nasdaq in Counts VIII through X, alleging that MIAX misappropriated certain **[*14]** of Nasdaq's trade secrets. Therefore, the former client element is met. The fact that neither ISE nor FTEN were ever clients of Fish is not an issue germane to disqualification.

As to the second element, Fish does not contest the "materially adverse" finding. It does not discuss this requirement in its brief. Nevertheless, this matter is

clearly "materially adverse" to the interests of the Nasdaq. Fish prosecuted four of the seven patents that are asserted in this action, the remaining three patents involve the same field of technology for which Fish allegedly provided intellectual property counseling to and prosecuted patents for Nasdaq, and the trade secret claims involve the same technological field and may implicate confidential information that Nasdaq provided to Fish during its prior relationship. (ECF No. 105 at 3.)

As to the third element, Fish claims the matters are not "substantially related." Specifically, it contends that just because it represented Nasdaq years ago and the matters share similar subject matter, is not enough to call the matters "substantially related." (ECF No. 107-1 at 26.) Pursuant to *RPC 1.9*,

> matters are deemed to be "substantially related" if (1) the lawyer **[*15]** for whom disqualification is sought received confidential information from the former client that can be used against that client in the subsequent representation of parties adverse to the former client, or (2) facts relevant to the prior representation are both relevant and material to the subsequent representation.

Trupos, 992 A.2d at 764. The Court finds Fish received confidential information from Nasdaq that can be used against Nasdaq in this matter and facts relevant to Fish's representation of Nasdaq are relevant and material to this matter.

Through a decade long relationship with Nasdaq, Fish possessed information relating generally to Nasdaq's patent prosecution strategy and approach to defending the validity of its patents, and knowledge of what Nasdaq protected as trade secrets apart from its patented inventions in the electronic trading technology field. (ECF No. 109 at 23.) Fish's prior intellectual property counseling and prosecution work for Nasdaq unquestionably allowed Fish to gain access to confidential information that can be used to Nasdaq's detriment in this case. In fact, "[t]he seven asserted patents and the alleged trade secrets involve the same general field of technology, and the accused **[*16]** instrumentalities are the same for all the patent infringement claims." (ECF No. 105 at 7.) Moreover, Fish unquestionably possesses direct knowledge of four of the seven patents in this matter and has chosen to jointly participate in this matter with Reed Smith by filing a single motion to dismiss. *Kaselaan & D'Angelo Associates, Inc. v. D'Angelo, 144 F.R.D. 235, 239 (D.N.J. 1992)* ("Recognizing that plaintiff's attorney's longstanding relationship with Commercial Union would necessarily have mad him privy to confidential and proprietary information of Commercial Union, including its claims and litigation philosophy, its methods and procedures for defending claims and litigation, and its information regarding the administration of various business operations, the court held that plaintiff's attorney could use such information to the substantial disadvantage of his former client Commercial Union."); *Essex Chem. Corp.. Co., 993 F. Supp. at 246* (finding that, where the matters are substantially related, "the court will presume that the attorney has acquired confidential information from the former client"). Furthermore, the Fish attorneys involved in Nasdaq's past representation are still members of Fish in the Boston office.

Although approximately seven years have passed since Fish's representation of Nasdaq, **[*17]** the passage of time does not dilute the significance of the confidences provided and the overwhelming substantial relationship between the issues here and the past relationship. Accordingly, the matters are substantially related, and Fish's Appeal is **DENIED**.

C. *RPC 1.10*

Fish argues in the alternative that even if there was a conflict, disqualification is inappropriate. (ECF No. 107-1 at 31.) Plaintiffs argues disqualification was appropriate because "whatever alleged prejudice that befalls MIAX is mitigated by the fact that 'MIAX has been represented by two sets of attorneys form the outset of this litigation,' and 'Reed Smith's representation of MIAX can continue uninterrupted." (ECF No. 109 at 32.)

While disqualification typically is the "result of finding that a disciplinary rule prohibits an attorney's appearance in a case, disqualification never is automatic." *United States v. Miller, 624 F.2d 1198, 1201 (3d Cir. 1980)*. In fact, "[m]otions to disqualify are viewed with 'disfavor' and disqualification is considered a drastic measure which courts should hesitate to impose except when absolutely necessary." *Alexander v. Primerica Holdings, Inc., 822 F. Supp. 1099, 1114 (D.N.J. 1993)* (citation omitted). A court "should disqualify an attorney only when it determines, on the facts of the particular case, that disqualification **[*18]** is an appropriate means of enforcing the applicable disciplinary rule." *Id.* In doing so, "[i]t should consider the ends that the disciplinary rule is designed to serve

and any countervailing policies, such as permitting a litigant to retain the counsel of his choice and enabling attorneys to practice without excessive restrictions." *Id.* The question of whether disqualification is appropriate is essentially a balancing test, with the "client's right to freely choose his counsel" on one side of the scale, and "the need to maintain the highest standards of the legal profession" on the other. *Strategic Envtl. Partners, LLC v. Bucco, No. 13-5032 CCC, 2014 U.S. Dist. LEXIS 159483, 2014 WL 6065816, at *2 (D.N.J. Nov. 12, 2014)*.

In *Wyeth v. Abbott Labs., 692 F. Supp. 2d 453, 459 (D.N.J. 2010)*, the court provided several factors this Court should consider in determining whether disqualification is warranted: (1) prejudice to the former client; (2) prejudice to the new client; (3) whether the law firms representation of the former client in the former matter has allowed the new client to gain access to any confidential information relevant to this case; (4) "the cost—in terms of both time and money—"for the new client to retain new counsel; (5) "the complexity of the issues in the case and the time **[*19]** it would take new counsel to acquaint themselves with the facts and issues"; (6) "which party, if either, was responsible for creating the conflict."

Weighing these factors, the Court finds disqualification was appropriate. "Indeed, finding otherwise would allow the same law firm that argued for the patentability of Nasdaq's inventions to represent parties adverse to Nasdaq in this suit who are arguing those very same patens are invalid." (ECF No. 105 at 9.) On balance, Nasdaq would suffer more prejudice and hardship if Fish's representation of MIAX was allowed, being that Fish has access to confidential information and is familiar with Nasdaq's strategic approaches to managing its technology and inventions. By contrast, prejudice to MIAX would be minimal because: (1) this case is still at the pleading stage, (2) MIAX has also voluntarily hired Reed Smith to represent it in this matter on several issue and Reed Smith is already familiar with this case; and (3) Fish is responsible for creating its own conflict in this case by choosing to represent MIAX in a litigation where it previously prosecuted the same patents for Nasdaq. Accordingly, disqualification was proper.

IV. CONCLUSION

For **[*20]** the reasons set forth above, Fish's Appeal (ECF No. 107) is **DENIED** and Judge Arpert's September 6, 2018 Memorandum and Order (ECF No. 105) is **AFFIRMED**.

Date: November 26, 2018

/s/ Brian R. Martinotti

HON. BRIAN R. MARTINOTTI

UNITED STATES DISTRICT JUDGE

ORDER

THIS MATTER is opened to the Court by Fish & Richardson, PC ("Fish") (ECF No. 107) of Magistrate Judge Douglas E. Arpert's September 6, 2018 Memorandum and Order (ECF No. 105) granting Nasdaq, Inc. ("Nasdaq"), Nasdaq ISE, LLC ("ISE"), and Ften, Inc.'s ("FTEN") (collectively, "Plaintiffs") Motion to Disqualify Fish as Miami International Holdings, Inc, Miami International Securities Exchange, LLC, MIAX Peral, LLC, and Miami International Technologies, LLC's (collectively, "MIAX") counsel. (ECF No. 54.) Plaintiffs opposed the appeal. (ECF No. 109.) Having reviewed the parties' submissions filed in connection with the appeal and having declined to hold oral argument pursuant to *Federal Rule of Civil Procedure 78(b)*, for the reasons set forth in the accompanying Opinion and for good cause having been shown,

IT IS on this 26th day of November 2018,

ORDERED that Fish's Appeal (ECF No. 107) is **DENIED**; it is further

ORDERED that Judge Arpert's September 6, 2018 Memorandum and Order **[*21]** (ECF No. 105) is **AFFIRMED**; and it is finally

ORDERED that Fish & Richardson P.C.'s Letter Request (ECF No. 125) to decide the Renewed Motion to Stay before addressing the merits of the Appeal of the Motion to Disqualify is **DENIED**.

/s/ Brian R. Martinotti

HON. BRIAN R. MARTINOTTI

UNITED STATES DISTRICT JUDGE

End of Document

238 A.3d 193 (Table)
Unpublished Disposition
This unpublished disposition is referenced in the Atlantic Reporter.
Supreme Court of Delaware.

PROTECTIVE LIFE INSURANCE COMPANY, Protective Life and Annuity Insurance Company, West Coast Life Insurance Company, and Mony Life Insurance Company, Interested Parties Belowa, Appellants,
v.
The Honorable Trinidad NAVARRO, Insurance Commissioner of the State of Delaware, in his capacity as Receiver for Scottish re (U.S.), Inc., Petitioner Below, Appellee.
Protective Life Insurance Company, Protective Life and Annuity Insurance Company, West Coast Life Insurance Company, and Mony Life Insurance Company, Interested Parties Below, Appellants,
v.
The Honorable Trinidad Navarro, Insurance Commissioner of the State of Delaware, in his capacity as Receiver for Scottish re (U.S.), Inc., Petitioner Below, Appellee.

No. 217, 2020
|
No. 218, 2020
|
Submitted: July 27, 2020
|
Decided: September 4, 2020

Court Below—Court of Chancery of the State of Delaware, C.A. No. 2019-0175-AGB

Before SEITZ, Chief Justice; TRAYNOR and MONTGOMERY-REEVES, Justices.

ORDER

Tamika R. Montgomery-Reeves, Justice

***1** After consideration of the notices to show cause, the responses, the notice of interlocutory appeal, and the supplemental notice of interlocutory appeal, it appears to the Court that:

(1) The appellants, Protective Life Insurance Company, Protective Life and Annuity Insurance Company, West Coast Life Insurance Company, and MONY Life Insurance Company (collectively, "the Protective Entities"), filed these appeals from a Court of Chancery order ("the Order") dismissing their petition in the rehabilitation proceeding of Scottish Re (U.S.), Inc.[1] The events leading to these appeals are described below.

[1] *In re Scottish Re (U.S.), Inc.*, 2020 WL 2549288 (Del. Ch. May 19, 2020).

(2) Beginning in the 1970s, the Protective Entities entered into or assumed reinsurance agreements under which Scottish Re reinsured a portion of their life insurance policies. The Protective Entities also entered into agreements with third-party life insurers under which the Protective Entities coinsured and administered third-party business reinsured with Scottish Re. In January 2018, Scottish Re and each of the Protective Entities entered into a global settlement resolving rate disputes and other issues that had arisen between the parties ("Settlement Agreement"). The Settlement Agreement included an offset provision, which the Protective Entities argue authorizes a group offsetting methodology to calculate offsets.[2]

[2] Under the group offsetting methodology, premium amounts owed by one Protective Entity are offset against reimbursed claims owed to a different Protective Entity. *Id.* at *1.

(3) On March 6, 2019, the Court of Chancery

entered a Rehabilitation and Injunction Order ("the Rehabilitation Order") pursuant to the Delaware Uniform Insurers Liquidation Act ("DUILA"), 18 *Del. C.* § 5901 *et seq.* The Rehabilitation Order placed Scottish Re in rehabilitation, appointed the Honorable Trinidad Navarro, Insurance Commissioner of the State of Delaware as Receiver for Scottish Re ("the Receiver"), and enjoined the ability of cedents like the Protective Entities to offset obligations owed to Scottish Re.

(4) On June 20, 2019, the Court of Chancery approved the Receiver's plan for addressing contractual offset rights during the rehabilitation proceeding ("the Offset Plan"). The Offset Plan provided that, in the event of a dispute concerning offsets, the Receiver or offset claimant could file a petition with the Court of Chancery for a determination of the offset amount or other appropriate relief. On July 10, 2019, the Court of Chancery approved a stipulation between the Receiver and Protective Entities under which the Receiver agreed to certain offsets, but objected to others.

(5) On August 5, 2019, the Protective Entities filed a petition, which they amended on October 28, 2019 ("the Petition"), under the Offset Plan. In the Petition, the Protective Entities sought an order directing the Receiver to honor Scottish Re's obligations under the Settlement Agreement by allowing the Protective Entities to use a group offsetting methodology for calculating offsets. On December 13, 2019, the Receiver filed a motion to dismiss the Petition for failure to state a claim under Court of Chancery Rule 12(b)(6).

(6) On May 19, 2020, the Court of Chancery dismissed the petition. First, the Court of Chancery held that the Settlement Agreement did not create the mutuality required by 18 *Del. C.* § 5927 for offsets during rehabilitation or liquidation proceedings.[3] Second, the Court of Chancery concluded that the Settlement Agreement did not satisfy the single integrated transaction requirement for recoupment.[4] Third, the Court of Chancery held that the Receiver was not obligated to accept or reject an executory contract before providing a final rehabilitation plan for approval.[5]

3 *Id.* at *3-4.

4 *Id.* at *5.

5 *Id.* at *5-6.

***2** (7) On June 30, 2020,[6] the Protective Entities filed an application for certification of an interlocutory appeal. The Receiver took no position on the application. On July 20, 2020, the Court of Chancery denied the application for certification.[7]

6 Under Supreme Court Rule 42, an application for certification of an interlocutory appeal must be filed within ten days of the entry of the interlocutory order and the notice of appeal must be filed in this Court within thirty days of the entry of the interlocutory order. Supr. Ct. 42(c)(i), (d)(i). Rule deadlines were extended under the judicial emergency declared by the Chief Justice in response to the COVID-19 pandemic. Administrative Order No. 7 ¶ 7 (Del. June 5, 2020) (extending deadlines that expired between March 23, 2020 and June 30, 2020 through July 1, 2020), available at https://courts.delaware.gov/rules/pdf/COVID-19AdminOrderNo7.pdf.

7 *In re Scottish Re (U.S.), Inc.*, 2020 WL 4048289 (Del. Ch. July 7, 2020).

(8) In denying the application for certification, the Court of Chancery found that the Order decided three issues (described in ¶ 6) of material importance.[8] As to the Rule 42(b)(iii) criteria, the Court of Chancery concluded that the three issues were a matter of first impression in Delaware (Rule 42(b)(iii)(A)). In addition, the first issue—the mutuality required by § 5927 for offsets—related to the construction or application of a statute that has not been settled by this Court (Rule

42(b)(iii)(C)).[9] Considering the most efficient and just schedule for resolving the case, the Court of Chancery noted that it would soon be considering the Receiver's proposed plan of rehabilitation.[10] The Court of Chancery recognized the possibility that the plan confirmation process could result in the parties settling their disputes (making appellate review unnecessary) as well as the possibility the Protective Entities or other objectors might wish to appeal different aspects of the final rehabilitation plan.[11] Given the possibility of piecemeal appeals in a complex insurance receivership proceeding, the Court of Chancery concluded that the balance of the likely benefits and probable costs of an interlocutory appeal was uncertain and required denial of the application for certification.[12]

8 *Id.* at *4.

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.* at *5.

(9) The Protective Entities filed two appeals from the Order in this Court—interlocutory Appeal No. 217, 2020 and Appeal No. 218, 2020. According to the Protective Entities, they filed two appeals from the same Order because there is limited guidance concerning whether the Order is interlocutory or final. The Senior Court Clerk issued a notice directing the Protective Entities to show cause why Appeal No. 218, 2020 should not be dismissed as interlocutory.

(10) In response to the notice to show cause, the Protective Entities argue that the Order is final because the dismissal of the petition for failure to state a claim under Rule 12(b)(6) was similar to the dismissal of a complaint, which is generally appealable as a final judgment. The Protective Entities acknowledge the conflicting case law in other jurisdictions regarding what constitutes an appealable final order under statutes similar to DUILA, but rely on language in the U.S. Supreme Court's recent decision in *Ritzen Group, Inc. v. Jackson Masonry, LLC*[13] to argue that the Order is final and appealable. In *Ritzen*, the U.S. Supreme Court recognized that "[o]rders in bankruptcy cases qualify as 'final' when they definitively dispose of discrete disputes within the overarching bankruptcy case" and concluded that a bankruptcy court order conclusively denying a motion for relief from the automatic stay constitutes a final, appealable order.[14]

13 140 S.Ct. 582 (2020)

14 *Id.* at 586-92.

(11) At the Court's request, the Receiver filed a reply to the Protective Entities' response to the notice to show cause. The Receiver argues that the Order does not have the characteristics of a final order because it does not finally determine the Protective Entities' right to recover. The Receiver distinguishes the cases discussing statutory provisions similar to § 5902(e) that the Protective Entities relies upon.

***3** (12) We first address whether the Order is final. If the Order is final, then it is unnecessary to address interlocutory Appeal No. 217, 2020 and that appeal will be dismissed. Under the DUILA, "[a]n appeal shall lie to the Supreme Court from an order granting or refusing rehabilitation, liquidation or conservation and from every order in delinquency proceedings having the character of a final order as to the particular portion of the proceedings embraced therein."[15]

15 18 *Del. C.* § 5902(e).

(13) This Court has not addressed the meaning of an "order in delinquency proceedings having the character of a final order" under § 5902(e).[16] In

other contexts, we have held that an order constitutes a final judgment when "it leaves nothing for future determination or consideration."[17] As the Protective Entities note, the dismissal of a complaint is generally appealable as a final order.[18]

16 In *Cohen v. State ex rel. Stewart*, we concluded that it was unnecessary to address whether three orders, which imposed sanctions for violation of an injunction, were appealable under § 5902(e) because we found those orders appealable under the collateral order doctrine. No. 545, 2013, Order ¶ 4 (Del. Nov. 12, 2013).

17 *Showell Poultry, Inc. v. Delmarva Poultry Corp.*, 146 A.2d 794, 796 (Del. 1958).

18 *Braddock v. Zimmerman*, 906 A.2d 776, 784 (Del. 2006).

(14) "Cases from other jurisdictions provide persuasive guidance about how to interpret the Insurers Liquidation Act."[19] The case law from other jurisdictions addressing what constitutes a final order under statutes like § 5902(e) is limited and somewhat conflicting.[20] After considering those cases and the nature of the Order, we conclude that the Order does not have the characteristics of a final, appealable order under § 5902(e).

19 *Cohen v. State ex rel. Stewart*, 89 A.3d 65, 93 (Del. 2014).

20 *Compare In re Pac. Marine Ins. Co. of Alaska in Liquidation*, 877 P.2d 264, 268 (Alaska 1994) (holding that no orders in a liquidation or receivership have the character of a final order until the receivership action is terminated or the trial court certifies the order under Rule 54(b)) *and PrimeHealth Corp. v. Ins. Comm'r of State*, 758 A.2d 539, 547-48 (Md. Ct. Spec. App. 2000) (describing process that leads to approved rehabilitation plan as one proceeding and finding that order authorizing the Insurance Commissioner as rehabilitator to withdraw HMO's demand for an administrative hearing was not a final, appealable order) *with* *Fewell v. Pickens*, 57 S.W.3d 144, 150-52 (Ark. 2001) (holding that trial court was not divested of subject matter jurisdiction to hear liquidation petition while an appeal was pending on the order appointing a receiver because the appeal provision of the Arkansas Uniform Insurers Liquidation Act contemplated that appeals would arise piecemeal).

(15) The process leading to a court-approved rehabilitation plan remains ongoing. As the Court of Chancery noted in denying the application for certification of an interlocutory appeal, it is possible that the Protective Entities could recover on their unpaid claims as part of this process. The Protective Entities may also raise the issues decided in the Order (as well as other issues) in an appeal of the Court of Chancery's approval of a final rehabilitation plan. The Protective Entities' suggestion that the Order is analogous to the denial of a motion for relief from the automatic stay under the federal Bankruptcy Code is unpersuasive. The Order, which involved the application of state law and determined offset rights that would also be addressed in the final rehabilitation plan, is not analogous to a bankruptcy court's ruling on a stay-relief motion, which the U.S. Supreme Court has described as occurring apart from proceedings on the merits of creditors' claims and apart from the adversary claims-adjudication process that is typically governed by state law.[21] We therefore conclude that the Order is interlocutory and that Appeal No. 218, 2020 must be dismissed.

21 *Ritzen*, 140 S. Ct. at 589.

(16) Finally, we address whether interlocutory Appeal No. 217, 2020 should be accepted.

Applications for interlocutory review are addressed to the sound discretion of the Court.[22] In the exercise of our discretion and giving great weight to the Court of Chancery's thoughtful analysis in denying the application for certification, this Court has concluded that the application for interlocutory review does not meet the strict standards for certification under Supreme Court Rule 42(b). The case is not exceptional,[23] and the potential benefits of interlocutory review do not outweigh the inefficiency, disruption, and probable costs caused by an interlocutory appeal.[24] We therefore refuse interlocutory Appeal No. 217, 2020.

22 Supr. Ct. R. 42(d)(v).

23 Supr. Ct. R. 42(b)(ii).

24 Supr. Ct. R. 42(b)(iii).

***4** NOW, THEREFORE, IT IS ORDERED that Appeal No. 218, 2020 is DISMISSED and interlocutory Appeal No. 217, 2020 is REFUSED. The filing fee paid by the appellants shall be applied to any future appeal they file from an interlocutory appeal that is certified by the Court of Chancery or a final order entered in the case.

All Citations

238 A.3d 193 (Table), 2020 WL 5405865

End of Document

2012 WL 12910270
Only the Westlaw citation is currently available.
United States District Court, M.D. Florida, Tampa Division.

SECURITIES AND EXCHANGE COMMISSION, Plaintiff,
v.
Arthur NADEL; Scoop Capital, LLC; and Scoop Management, Inc., Defendants,
Scoop Real Estate, L.P.; Valhalla Investment Partners, L.P.; Valhalla Management, Inc.; Victory IRA Fund, Ltd.; Victory Fund, Ltd.; Viking IRA Fund, LLC; Viking Fund, LLC; and Viking Management, LLC, Relief Defendants.

CASE NO: 8:09–cv–87–T–26TBM
|
Signed 04/25/2012

Attorneys and Law Firms

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ORDER

RICHARD A. LAZZARA, UNITED STATES DISTRICT JUDGE

***1** Before the Court is Wells Fargo Bank, N.A.'s Motion (I) to Disqualify Receiver, (II) to Disqualify Wiand Guerra King P.L. and (III) to Disallow All Fees Payable to the Receiver and his Counsel (Dkt. 766), the Receiver's Corrected Response in Opposition (Dkt. 818), Wiand Guerra King P.L.'s Response in Opposition (Dkt. 788), and Plaintiff Securities and Exchange Commission's Memorandum Opposing Wells Fargo Bank's Motion (Dkt. 792). After carefully reviewing the motion, the applicable law, and the entire file, the Court concludes that all of the relief sought in the motion should be denied.

PARTIES AND OTHER ENTITIES

In this motion, Wells Fargo Bank, N.A. (Wells Fargo Bank or the Bank) seeks the disqualification of not only the Receiver, but also one of the law firms representing the Receiver, Wiand Guerra King P.L. (WGK). From the date of his appointment on January 21, 2009, the Receiver, Mr. Wiand, was first represented by his former firm, Fowler White Boggs P.A. (Fowler White).[1] He and several attorneys from Fowler White separated from the firm to form WGK, and WGK has represented the Receiver since that date, November 13, 2009.[2] Two other law firms that have represented and continue to represent Mr. Wiand as the Receiver are Johnson, Pope, Bokor, Ruppel & Burns, LLP (Johnson Pope), and James, Hoyer, Newcomer & Smiljanich, P.A. (James Hoyer). These two firms have represented the Receiver in matters where the potential for a conflict of interest has arisen with WGK or where another firm had specific knowledge and expertise.[3] In the matter at hand, James Hoyer represents the Receiver, and WGK has retained its own counsel.

1 See docket 8, Order Appointing Receiver, and docket 10, Notice of Appearance dated January 21, 2009.

2 See docket 229, Notice of Change of Law

Firm, and docket 232, Notice of Change of Law Firm.

[3] See docket 174, Receiver's Motion for Leave to Retain Counsel. On August 11, 2009, the Receiver sought to hire Johnson Pope to pursue claims in the receivership against Holland & Knight, LLP, as counsel for the hedge funds during the Nadel Ponzi scheme. Because Johnson Pope was already suing Holland & Knight on behalf of a putative class of investors of the hedge funds, that firm was already familiar with the claims and had provided advice to the Receiver on the validity of the claims. This Court granted the Receiver's motion on August 12, 2009, and Johnson Pope filed suit in Sarasota County, Florida. See docket 175 & docket 787, para. 5.

Initially Mr. Wiand was appointed as the Receiver over Scoop Capital LLC and Scoop Management, Inc., as the Defendants, and Scoop Real Estate, L.P., Valhalla Investment Partners, L.P., Valhalla Management, Inc., Victory IRA Fund, Ltd., Victory Fund, Ltd., Viking IRA Fund, LLC, Viking Fund, LLC, and Viking Management as the relief Defendants. Wachovia Bank, N.A., which is now Wells Fargo Bank, was the actual entity that dealt with Mr. Nadel in the activities and transactions that occurred prior to January 2009. Wells Fargo Bank asserts conflicts of interest with respect to two entities other than itself: Wells Fargo Advisors, LLC (WFA), formerly Wachovia Securities, LLC, an affiliate of Wells Fargo Bank;[4] and Wells Fargo Securities International, Ltd. (Wells Fargo Securities International), formerly Wachovia Securities International, Ltd.[5] Wells Fargo Bank is a secured lender with respect to specific properties which are now or have been subject to the receivership, and for which Wells Fargo asserts a conflict of interest exists.

[4] See docket 730.

[5] The Receiver filed a clawback case against Wells Fargo Securities International in 8:10–cv–243–T–17MAP (M.D. Fla.), on January 20, 2010, and subsequently filed a motion to approve a settlement of the action on June 9, 2011, which was granted. See docket 639, Motion to Approve Settlement, and docket 640, Order Approving Settlement. Johnson Pope represented the Receiver in that case.

PERTINENT FACTS

***2** The facts surrounding the allegations of conflict of interest on the parts of the Receiver, as well as WGK, unfold as follows. Both Wells Fargo Bank and WFA have been clients of WGK in connection with twenty-eight (28) matters at various times from mid-November 2009 through February 2012, for which WGK has received a substantial sum of money, predominantly from WFA.[6] Of the twenty-eight matters, twenty-seven concerned WFA, and WFA has not been connected to this receivership proceeding, and is no longer represented by WGK. As to the sole, unrelated matter for which Wells Fargo Bank was a client of WGK, it involved two lawsuits concerning the same parties and issues.[7] WGK withdrew from representation in that matter effective February 22, 2012, and Wells Fargo Bank is no longer represented by WGK.[8]

[6] See docket 766, Exh. A, Affidavit of Kevin Heiser, senior in-house counsel for Wells Fargo Bank at para. 3.

[7] In May 2010, Wachovia Bank (now Wells Fargo Bank) contacted WGK to represent it in the case of NAC Group, Inc. v. Wachovia Bank, N.A., Case No. 10–6459CI8, filed in Pinellas County, Florida, which was removed to the Middle District in Case No. 8:10–cv–1195–T–23TGW. See docket 789,

Affidavit of Attorney George L. Guerra at para. 2. The matter was dismissed on September 3, 2010, because the Plaintiff failed to amend the complaint. See dockets 6 & 7 in Case No. 8:10–cv–1195–T–23TGW. On August 17, 2011, the same plaintiff filed another suit in Hillsborough County, Florida, titled NAC Group, Inc. v. Wells Fargo Bank N.A. f/k/a Wachovia Bank, N.A. See docket 789 at para. 7. The case was removed on August 29, 2011, to the Middle District in Case No. 8:11–cv–1967–T–23TGW, and remains pending. See docket 789 at para. 7. The total fees received by WGK for this entire matter was $48,170.02. See docket 789 at para. 11.

[8] See dockets 28 & 29 in Case No. 8:11–cv–1967–T–23TGW.

Wells Fargo Bank takes issue with one other representation: a clawback case filed by the Receiver on January 29, 2010, against Wells Fargo Securities International and another entity to recover monies invested in the hedge funds.[9] According to Wells Fargo Bank, neither the Receiver nor WGK ever represented Wells Fargo Securities International.[10] As of May 2010, however, WGK represented Wells Fargo, and WGK had been representing WFA since mid-November 2009. The Receiver secured a different law firm, Johnson Pope, to represent himself in the case against Wells Fargo Securities International. The clawback case was dismissed with prejudice on June 28, 2011.[11]

[9] See Case No. 8:10–cv–243–T–17MAP, and the order approving the settlement in this case at docket 640.

[10] There is some confusion in the record, however, as to exactly what entity the Receiver as attorney temporarily represented in September 2009. The Receiver disclosed that in September 2009, while the receivership was pending and while he was a member of Fowler White, he was asked to assist in the defense of Wachovia Securities, LLC, now WFA, in a matter unrelated to the receivership. See docket 730 & docket 787, para. 7. The Receiver in his response, however, states that "WF Securities is successor-in-interest to Wachovia Securities International, Ltd." See docket 818, at p. 14 n. 11. This Court will rely on the sworn allegations made in the Receiver's declaration. See docket 787.

[11] See docket 39 in Case No. 8:10–cv–243–T–17MAP.

Apart from the unrelated matters concerning WFA and the unrelated case in which WGK represented Wells Fargo Bank, Wells Fargo Bank is a secured creditor with respect to four properties involved in the receivership: (1) the "Rite Aid Property" in Graham, North Carolina;[12] (2) the "Laurel Mountain Property" near Asheville, North Carolina;[13] (3) the "Evergreen Property" in Evergreen, Colorado;[14] and (4) the "Sarasota Property" in Sarasota, Florida.[15] Wells Fargo Bank, however, filed only one proof of claim in the receivership by September 2, 2010, the claim bar date.[16] The proof of claim identified only the Rite Aid Property.[17] While the exact time Wells Fargo Bank became aware of the conflict of which it now complains is disputed, it was clear upon the filing of the claims determination motion on December 8, 2011, that the Receiver was contesting Wells Fargo Bank's position as secured creditor with respect to some of the properties.[18]

[12] Wells Fargo Bank filed a Motion for Relief from the Injunction of this Court, or to Compel the Receiver to Abandon the Rite Aid Property on January 19, 2012, which is currently pending before this Court. See docket 719. The Rite Aid Property has been subject to the receivership since January 21, 2009, pursuant to the many

orders expanding the receivership, as the Rite Aid Property was purchased in May 2005 by Relief Defendant Scoop Real Estate, L.P. See dockets 17, 44, 68, 81, 153, 172 & 454. The Rite Aid Property's encumbrance was mentioned in the receiver's first interim report. See docket 103–2, p. 32. Wells Fargo lent money to Scoop Real Estate, L.P. for the purchase of the Rite Aid Property, and Wells Fargo is claiming to be owed $3,147,427.00 pursuant to a promissory note. See docket 766 and docket 719 at para. 5.

[13] The Laurel Mountain Property became subject to the receivership pursuant to an order of this Court entered February 11, 2009, expanding the receivership to include the Laurel Mountain Property. See docket 44, Order, and docket 37, Affidavit of Wiand as Receiver at paras. 16–24. The encumbrance on the Laurel Mountain Property was mentioned in the receiver's first interim report. See docket 103–2, p. 24. The encumbrance was also noted in a letter from former counsel to Wells Fargo Bank on March 17, 2009. See docket 713–6. Wells Fargo Bank is a first priority secured lender pursuant to a deed of subordination dated May 2, 2008, and is allegedly owed $2,046,256.50. See docket 766. This order does not pass on the issue of whether Wells Fargo Bank properly preserved its status as a secured creditor by filing a proof of claim.

[14] Wells Fargo Bank is a loan servicer for Freddie Mac on a first priority secured loan as to the Evergreen Property. Freddie Mac is currently owed $389,407.16 on the loan. See docket 766. The Receiver contends that "the Evergreen Property was not funded with scheme proceeds and is not owned by a Receivership Entity." See docket 755, p. 1 n. 1. The Receiver therefore claims that because the Evergreen Property was neither owned by Nadel, any other insider, or any receivership entity, nor purchased with the scheme proceeds, the reasons for contesting the Laurel Mountain and Sarasota Properties do not apply. See docket 755, p. 1 n. 1.

[15] Wells Fargo Bank is a loan servicer for Bank of America, N.A. (BOFA) on a first priority secured loan on the Sarasota Property, and BOFA is currently owed $1,183,530.66 on the loan. See docket 766. Wells Fargo Bank is a second priority secured lender with respect to the Sarasota Property and is currently owed $1,060,812.55. See docket 766. This order does not pass on the issue of whether Wells Fargo Bank properly preserved its status as a secured creditor by filing a proof of claim.

[16] See docket 713–10.

[17] See dockets 755, p. 5; 712, p. 9 & 713–11, 713–12.

[18] See docket 675.

***3** The claims determination motion asserted that "shadow" bank accounts at Wachovia Bank, which bank was acquired by Wells Fargo & Company in December 2008, were used by Nadel to perpetrate his fraudulent scheme.[19] The motion alleges that the bank not only should have known of the improprieties associated with the accounts but was also an investor in the Nadel hedge funds.[20] The motion also seeks to disallow Wells Fargo Bank's secured claim with respect to the Rite Aid Property,[21] and seeks to disallow the secured claims related to the Laurel Mountain and Sarasota Properties because no proofs of claim were filed.[22]

Wells Fargo Bank filed an objection to the motion on December 21, 2012.[23]

19 See docket 675, pp. 55–59.

20 See docket 675, pp. 55–59.

21 See docket 675, pp. 55–59.

22 See docket 675, pp. 21–22. See also dockets 712, 714 at p. 2 n. 1, 728 & 755, wherein the Receiver claims that Wells Fargo Bank's claims should be disallowed for failure to file proofs of claim by the bar date.

23 See docket 690.

While the Receiver does not pinpoint the exact moment when he realized Wells Fargo Bank participated in the Ponzi scheme, he does refer to the fact that it took him "several months" to explore which law firm would best represent him in a case against the Bank.[24] He made his decision to retain James Hoyer the second full week of September 2011.[25] The Receiver does aver that he became aware in mid–2011 that Wells Fargo Bank itself, not an affiliate, had become a holder of an interest in one of the hedge funds.[26] The Receiver kept the SEC informed about his findings with respect to Wells Fargo Bank, and at the SEC's request, postponed hiring James Hoyer until one last attempt was made at negotiating a settlement before suit was filed.[27] The Receiver avers that WGK was not involved in the negotiations with Wells Fargo Bank before he retained James Hoyer to proceed against the Bank.[28]

24 See docket 787, para. 16.

25 See docket 787, para. 16.

26 See docket 787, para. 24.

27 See docket 787, para. 17.

28 See docket 787, para. 17.

Finally, on December 22, 2011, the Receiver sought to retain James Hoyer to pursue the claims against Wells Fargo Bank, which included the Wachovia shadow accounts and Wachovia's investment in two of Nadel's hedge funds.[29] The motion also noted Wells Fargo Bank's objection to the motion for claims determination. The motion to appoint counsel was granted December 27, 2011.[30]

29 See docket 691.

30 See docket 696.

Another material adverse position was taken by the Receiver on January 6, 2012, with the filing of a motion to approve the sale of the Rite Aid Property for a price that would not cover the secured debt.[31] This Court denied that motion based on the Receiver's failure to comply with 28 U.S.C. § 2001(b).[32] The parties then endeavored to select the requisite number of appraisers.[33] On January 19, 2012, Wells Fargo Bank filed an objection to the sale as well as a motion seeking the right to foreclose on the Rite Aid Property, which remains pending.[34] The Receiver opposed the motion on February 1, 2012.[35] From this point forward, WGK has not represented the Receiver in any matter concerning Wells Fargo Bank.

31 See docket 706.

32 See docket 726.

33 See dockets 747, 748, 781, 783 & 784, Order Appointing Appraisers.

34 See dockets 718 & 719.

35 See docket 728.

When it became apparent that litigation against Wells Fargo Bank for its role in the Ponzi scheme was necessary and that the bank had objected to the claims determination motion, WGK sought to obtain a waiver of conflict from Wells Fargo Bank.[36] At that time, WGK was also still counsel for WFA on a number of matters, none of which involved the receivership, and was still counsel of record for Wells Fargo Bank in the sole, unrelated case. On January 13, 2012, WGK wrote a letter documenting previous conversations between WGK and Wells Fargo Bank regarding the potential conflicts and requesting that it waive a direct conflict of interest in the sole, unrelated matter involving Wells Fargo Bank and NAC Group, Inc., and waive any conflict with respect to the adverse positions taken regarding the properties.[37] On February 2, 2012, the Receiver filed a letter to the Court explaining the status of the relationship among WGK, Wells Fargo Bank and WFA.[38] At that time, WGK was still counsel of record for Wells Fargo Bank in the sole, unrelated case brought by NAC Group, Inc.

36 See docket 787, para. 9.

37 See docket 766, Exh. C.

38 See docket 730.

***4** On February 9, 2012, James Hoyer filed a suit on behalf of the Receiver in Sarasota County circuit court to recover damages against Wells Fargo Bank based on the "shadow" accounts. Finally, on February 29, 2012, Wells Fargo Bank filed this motion to disqualify. WFA never agreed to waive conflict and terminated its relationship with WGK after the Receiver, through James Hoyer, filed suit against Wells Fargo Bank.[39] At present, WGK no longer represents either Wells Fargo Bank or WFA in any capacity.

39 See docket 787, para. 8.

Wells Fargo Bank asserts that the conflicts of interest with the Receiver and WGK were not fully realized until December 2011.[40] According to attorney Kevin J. Hieser of the bank's legal department, it was at that time that Wells Fargo Bank's in-house counsel became aware of the adverse positions held by the Receiver and WGK with respect to the bank in the claims determination motion and the shadow account claims, in view of WGK's representation of the bank and its affiliate, WFA.[41] The Receiver, on the other hand, avers that Wells Fargo Bank had been aware of the receivership and WGK's representation of him from the very least November 2009 when WGK formed. On November 8, 2010, a senior in-house lawyer for the Bank participated in a hearing pursuant to Rule 16 of the Federal Rules of Civil Procedure on the clawback case involving Wells Fargo Securities International.[42] Again, on March 25, 2011, two senior in-house attorneys for Wells Fargo entities participated in the mediation of that clawback case.[43] At that mediation at which the Receiver was represented by Johnson Pope, the mediator contacted an attorney with WGK to explain the Receiver's position in all of the numerous clawback cases.[44] The Bank's attorneys were also aware that the Receiver had retained Johnson Pope to avoid WGK from becoming adverse to a Wells Fargo entity.[45] Finally, the Bank's attorneys were aware and involved in the negotiations with the Receiver in mid-2011 through October 2011 concerning the Bank's involvement with the Ponzi scheme, and the Receiver told them that they would be dealing only with the Receiver so as to avoid a conflict with WGK.[46]

40 See docket 766–1, para. 5.

41 See docket 766–1, para. 5.

42 See docket 22 in Case No. 8:10–cv–243–T–17MAP.

43 See docket 787, para. 13.

44 See docket 787, para. 13.

45 See docket 787, para. 14.

46 See docket 787, para. 17.

ANALYSIS

Wells Fargo Bank contends that the Receiver and WGK should be disqualified for violating ethical rules regulating conflict of interest, specifically Rules 4–1.7, 4–1.9, and 4–1.10 of the Rules Regulating The Florida Bar. Because WGK was representing the Receiver and WGK has also been representing Wells Fargo Bank and WFA on matters for over three years, Wells Fargo Bank argues that WGK should be disqualified because there was no consent and an irrebutable presumption exists that confidences were shared pursuant to Rules 4–1.9 and 4–1.10. See Health Care & Retirement Corp. of Am., Inc. v. Bradley, 944 So.2d 508, 511 (Fla.Dist.Ct.App. 2006). Wells Fargo Bank urges this Court to treat the Receiver as an attorney for all purposes and thereby conclude that the Receiver has tainted this entire proceeding through conflicts of interest, since January 2009.

The Receiver

In civil cases brought by the Securities and Exchange Commission (the SEC) for injunctive relief, the statutory authority for the court's appointment of a receiver stems from the general bestowal of equity powers on the district courts. See, e.g., SEC v. First Fin. Group of Tex., 645 F.2d 429, 438 (5th Cir. Unit A 1981) (citing Section 22(a) of the Securities Act of 1933, 15 U.S.C. § 77v(a); and Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa; and cases such as SEC v. Manor Nursing Ctrs., Inc., 458 F.2d 1082, 1103 (2d Cir. 1972)).[47] The appointment of a receiver by a federal court applying equity, as opposed to statutory law, is governed by Federal Rule of Civil Procedure 66.[48] Because statute governs the appointment and course of receiverships in bankruptcy court, Rule 66 does not always apply to receivers appointed in bankruptcy. See Fed. R. Civ. P. 66 advisory committee's note. The bankruptcy courts, however, may rely on federal equitable law outside the bankruptcy scheme when those equitable principles are applicable to the general conduct of receivers. See CFTC v. Eustace, 2007 WL 1314663, * 6 (E.D.Pa. 2007) (referring to the relevancy of some bankruptcy cases discussing equitable receivership law in relation to receivers in bankruptcy, independent of bankruptcy doctrine). Conversely, although federal district courts presiding over federal equity receiverships, such as this SEC case, may look for guidance from bankruptcy law,[49] they are not restricted by the dictates of bankruptcy law. See Quilling v. Trade Partners, Inc., 2007 WL 107669, *1 (W.D. Mich. 2007) (citing SEC v. Forex Asset Mgmt. LLC, 242 F.3d 325, 332 (5th Cir. 2001)).[50]

47 The SEC will often ask the court to appoint a receiver in a case involving a massive Ponzi-type scheme, such as in the instant case. See, e.g., SEC v. Elliott, 953 F.2d 1560 (11th Cir. 1992); SEC v. Shiv, 379 F.Supp.2d 609 (S.D.N.Y. 2005).

48 An equity receivership is "increasingly rare." Liberte Capital Group, LLC v. Capwill, 462 F.3d 542, 551 (6th Cir. 2006). "There remains a class of cases, however, in which the federal courts may exercise their equitable powers and institute receiverships over disputed assets in suits otherwise falling within the federal court's jurisdiction, but which fall outside the statutory bankruptcy proceedings or other legislated domain." Id.

49 See SEC v. Capital Consultants, LLC, 397 F.2d 733, 745 (9th Cir. 2005) (considering equitable mootness doctrine from the bankruptcy context in receivership's interim distributions); SEC v. Basic Energy & Affiliated Res., 273 F.3d 657, 665 (6th Cir. 2001) (considering "person aggrieved" doctrine from bankruptcy context in non-party litigant's standing to appeal receivership).

50 See also additional cases cited in the Receiver's Response at docket 786 such as SEC v. TLC Inv. & Trade Co., 147 F.Supp.2d 1031, 1039 (C.D. Cal 2001) (denying request to administer equitable receivership estate as trustee would administer bankruptcy estate, thereby refusing to require receiver to follow bankruptcy code); SEC v. Sunwest Mgmt, Inc., 2009 WL 324879, *8 (D. Or. 2009) (holding that "federal equity receivership courts are not required to exercise bankruptcy powers nor to strictly apply bankruptcy law."); CFTC v. Eustace, 2008 WL 471574 (E.D. Pa. 2008) (stating that in a federal equity receivership, "case law concerning equity receiverships is generally more applicable than bankruptcy case law."); SEC v. Heartland Group, Inc., 2003 WL 1089366, *1 n. 1 (N.D. Ill. 2003) (denying request to ignore requirement of formal intervention based on rejection of argument that receivership actions are more akin to bankruptcy court proceedings).

***5** Under general federal receivership law, a receiver is an officer of the court that appointed the receiver. 1 Clark on Receivers, § 34 (3d ed. 1959). "The receiver is a neutral court officer appointed by the court." Sterling v. Stewart, 158 F.3d 1199, 1201 n. 2 (11th Cir. 1998).[51] "The receiver is but the creature of the court; he has no powers except such as are conferred upon him by the order of his appointment and the course and practice of the court." Booth v. Clark, 58 U.S. 322, 331, 17 How. 322, 15 L.Ed. 164 (1854); SEC v. American Principals Holding, Inc. (In re San Vicente Medical Partners Ltd.), 962 F.2d 1402, 1409 (9th Cir. 1992). A receiver does not represent a particular party but rather acts on behalf of the receivership entities to gather and collect assets for the court to distribute to those entitled to the funds, often the injured investors. While a receiver may also be an attorney, the receiver does not act as an attorney in the course of fulfilling the duties of the receiver, and usually hires his or her own attorney, with the court's permission, when legal representation of the receiver is necessary.

51 The receiver has also been described as "an indifferent person between the parties, appointed by the court ... [to] secure[ ] funds which this court ... will have the means of distributing among the persons entitled to those funds." Gulf Refining Co. of La. v. Vincent Oil Co., 185 F.87, 89–90 (5th Cir. 1911).

The receiver, who does not function as an attorney in the receivership, does not maintain an attorney-client relationship in the receivership other than the position of client. The receiver is the client of the law firm or firms chosen and approved to represent the receiver in the conduct of the receivership. Even though the receiver may not act

as a lawyer in the receivership, the Rules Regulating the Florida Bar (the Rules) continue to apply to lawyers in their nonrepresentational roles.[52] The Preamble to Chapter 4 of the Rules articulates that rules other than Rule 4–1.7 through 4–1.10 apply to the nonrepresentational, neutral roles undertaken by lawyers. Alternatively, this Court recognizes that there may be situations that may arise in the conduct of the receivership which would cause concern with respect to the confidences he may have received from his or, through imputation, a member of his firm's prior or present representation of another client that may be some how intertwined with the receivership entities or creditors.

52 "In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these rules apply directly to lawyers who are or have served as third-party neutrals. See, e.g., Rules 4–1.12 and 4–2.4. In addition, there are rules that apply to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. See Rule 4–8.4.

Wells Fargo Bank argues that despite the receiver's status as a client, Mr. Wiand's title of attorney subjects him to the Rules pertaining to conflict of interest and thereby taints his neutral, disinterested status as a receiver. Wells Fargo Bank relies primarily on two cases: SEC v. Kirkland, 2008 WL 4144424 (M.D. Fla. 2008), and SEC v. Founding Partners Capital Mgmt., (M.D. Fla. 2009).[53] Some courts, and in particular the Kirkland court, have commented negatively on the SEC's choice of lawyers as receivers based on the increased chance for conflicts of interest to arise in connection with the receiver's law firm of which he or she is a member.[54] Additionally, the ensuing risk of disqualification of the receiver exposes the receivership estate to significant financial loss and harm through the additional time and fees required to bring a successor receiver and law firm up to speed on the case.

53 Wells Fargo also relies on two bankruptcy court cases concerning conflicts of interest: In re Southern Diversified Prop., Inc., 110 B.R. 992 (N.D. Ga. 1990); In re Blinder, Robinson & Co., Inc. v. Keller, 131 B.R. 872 (D. Colo. 1991). Southern Diversified is distinguishable, and Blinder lends support to the Receiver in this case securing counsel other than WGK to handle the matters involving Wells Fargo. In Southern Diversified, the bankruptcy court had not approved the trustee's counsel and the trustee was serving a dual role as an attorney and trustee. In Blinder, the bankruptcy court permitted the trustee and his firm to remain given the disruption that would be caused by a substitution and given the fact that a conflict no longer existed—the trustee's firm had withdrawn from representation of the creditor of the bankruptcy estate.

54 See Kirkland, 2008 WL 4144424, * 8 n. 7 (stating that the SEC should "seek a business professional experienced in the business of the company to be placed in receivership rather than seeking appointment of an attorney as the receiver.").

***6** The receiver in Kirkland, unlike Mr. Wiand, had practiced law for twelve years and her expertise at the time leaned toward ERISA law. While the receiver in Kirkland had previously served as lead counsel to a receiver, she had never been appointed as the receiver. Mr. Wiand, on the other hand, enjoys a lengthy resume of expertise spanning forty or so years as a lawyer, having served as a receiver in several significant SEC actions and having particular expertise in securities law.[55] His performance in this case indicates he has been diligent and has vigilantly identified and gathered assets of the receivership, amassing $30 million.[56]

55 See docket 6.

[56] See docket 787, para. 3.

The Founding Partners Capital case is also distinguishable from this case. There, the lawyer-receiver's law firm was performing lobbying services for a factoring affiliate client of one of the relief defendants. The court found that the client was "sufficiently intertwined with the issues" in the receivership to warrant substitution of the receiver. The receiver had been appointed less than one month before the court learned of the necessity to substitute the receiver. There were no issues in the case concerning any harm to the receivership. Conversely, in this case, there has been no showing that WFA was intertwined with the issues in these receivership proceedings.[57] Although Wells Fargo Bank is now embroiled in this case, for almost three years the Receiver's position toward Wells Fargo Bank was not adverse. In this case, the Receiver has been fulfilling his duties for over three years. The potential harm done to the receivership by removing the Receiver and his law firm with respect to the vast majority of claims would cripple the ability of the investors to recoup their losses.

[57] To the extent Mr. Wiand and his firm in September 2009 represented Wachovia Securities LLC (now WFA) on an unrelated matter, Wells Fargo Bank does not take issue with that isolated incident.

Weighing the benefits of removing a receiver and disqualifying his law firm against continuing the receiver's representation is a necessary step in resolving any ethical dilemma arising in the receivership proceedings. See Eustace, 2007 WL 1314663, * 10; Scholes v. Tomlinson, 1991 WL 152062, * 9 (N.D. Ill. 1991). At the outset, disqualification is disfavored. Eustace, 2007 WL 1314663, * 10. Factors to be considered in resolving any conflict issues and retaining the receiver include the delay in the progress and termination of the receivership case, the additional expense of appointing a new receiver, the strength of the qualifications and experience of the receiver, the diligence of the law firm representing the receiver, the familiarity of the receiver with the details of the underlying government case and the related litigation, the position of the governmental entity, in this case the SEC, with respect to retention of the receiver, whether separation of one of the creditor's matters in the receivership is feasible with the representation of the receiver by another law firm in these matters, and whether any prior representation has tainted the proceedings in any way. Eustace, 2007 WL 1314663, * 10–12; Scholes, 1991 WL 152062, * 9.

Applying these factors to this Receiver, the Court finds that removing the Receiver at this stage would "wreak havoc" and militate against the best interests of the investors and creditors. The Receiver as well as his law firm have diligently marshaled the assets which now total $30 million. The cost of appointing a new receiver with a new law firm would be prohibitive by dissipating the assets already gathered. The SEC continues to believe that the Receiver in place is the most qualified and best individual, touting years of significant experience. It would be feasible to separate the matters involving the Bank because the Receiver has acted prudently each time he perceived a potentially adverse situation and has secured a law firm other than WGK. In the clawback case against Wells Fargo Securities International, he retained Johnson Pope, the same firm who was already familiar with the Nadel Ponzi scheme. The Receiver retained James Hoyer to file the shadow accounts claims against Wells Fargo Bank. The Receiver, acting as a client, was trying to prevent adverse positions between WGK and Wells Fargo Bank.

***7** The Receiver in this case has not hidden his plan of action with respect to Wells Fargo Bank. Far from showing favoritism toward the Bank as a creditor of the receivership, the Receiver has fulfilled his responsibilities to the receivership in unraveling the elaborate scheme devised by Nadel. As the facts unfolded, he discovered Wells Fargo Bank's role in the Ponzi scheme and Wells Fargo Bank's adverse position with respect to their secured interests in certain properties as set forth in the claims determination motion. As encouraged by the SEC, the Receiver attempted to negotiate the

litigation matter with Wells Fargo Bank apart from any other attorneys in his firm. When it became apparent to the Receiver in late December 2011 that filing the lawsuit was necessary, the James Hoyer firm was prepared to move forward quickly with the lawsuit in Sarasota County, Florida, in early February 2012. Earlier in December 2011, the Receiver had filed the claims determination motion, and Wells Fargo Bank filed an objection in late December 2011. The Receiver then made the decision to retain James Hoyer for the purpose of representing him in all the matters of the receivership pertaining to Wells Fargo Bank. Since that time, James Hoyer has represented the Receiver on this disqualification motion and matters pertaining to the appraisers for the Rite Aid Property, one of Wells Fargo Bank's secured claims. By the time of the hearing on the motion in early March 2012, WGK no longer represented Wells Fargo Bank or WFA on any matters. At the hearing, Wells Fargo Bank's counsel could not identify any damage that had been done to the receivership by virtue of the Receiver's handling of the case.

Perhaps the most telling evidence supporting the Receiver's remaining in place with the James Hoyer firm handling the Wells Fargo matters, is revealed by the shear time table leading up to the hearing in early March. The hearing was not initially set for a motion for disqualification, but was set for February 2, 2012, to hear argument on this Court's jurisdiction in view of the forfeiture orders entered in the criminal case of Arthur Nadel in the Southern District of New York.[58] Just two days before the scheduled March hearing, Wells Fargo Bank finally filed its motion for disqualification, along with a motion to continue the hearing. The Bank clearly had knowledge of its status as a creditor as early as September 2010 when it filed its proof of claim and delivered it to WGK as counsel for the Receiver. The senior in-house counsel were aware of the Receiver's decision to bring a clawback case against the bank's affiliate in January 2010, if not in November 2010 and March 2011 at the respective status and mediation hearings. At least six months before the motion for disqualification was filed, Wells Fargo Bank hired WGK to represent it in an unrelated matter, a continuation of a previously-filed case. Wells Fargo Bank knew that the Receiver was contemplating bringing an action against the bank for its complicity in the scheme at some point in the fall of 2011. The Bank, however, was apparently not contemplating the disqualification of the Receiver and WGK until the conflict became adverse upon the filing of the claim determination motion in early December 2011. Nevertheless, the motion was timed to derail, or perhaps retaliate against, as the Receiver and WGK suggest, the receivership proceedings. Unfortunately for the receivership, the gravamen of the contentions made warranted a thorough examination of the history of this case, which is not an easy task.

[58] See dockets 733 & 734.

Having balanced the equities in this case, the Court finds in its broad discretion that the magnitude of the perceived conflict, when considered within the context of the progress and success of this particular receivership and the particular lack of swiftness with which the Bank acted, does not justify disqualification of the Receiver as to any entity. The monetary cost to the injured investors by the depletion of the receivership funds collected to date would effectively cancel a large portion of the work done thus far. The Receiver is directed to continue to secure counsel other than WGK for any matters involving Wells Fargo Bank or its affiliates.

The Receiver's Attorney, WGK

WGK represented Wells Fargo Bank in the unrelated NAC matter beginning May 2010 through September 2010, and again beginning August 2011. At the time of the first hiring, the Receiver had not taken any position adverse to the Bank over the first fifteen months of the receivership. When WGK was again retained two years and eight months into the receivership, the Receiver was apparently exploring options of hiring another firm to represent the receivership in possibly bringing claims against the Bank related to the shadow accounts. WGK was preparing the claims determination motion which related to the

legitimacy of claims made and the distribution of assets to creditors. The Bank's position became adverse when the Bank objected, and the Receiver thereafter retained James Hoyer to handle all matters with Wells Fargo Bank.

***8** WGK also represented WFA, an affiliate of Wells Fargo Bank, from mid-November 2009 to February 2012 on matters unrelated to the receivership. Because no presumption arises that a firm who represents or has represented a corporation also represents its affiliate, the firm is not "ethically precluded from undertaking representations adverse to affiliates of an existing or former client." Commentary to Rule 4–1.13, R. Regulating Fla. Bar. Thus, concurrent adverse representation of a corporation and its affiliate does not create a conflict.[59]

[59] Wells Fargo Securities International, as Wells Fargo Bank admits, was not a client of WGK when the Receiver filed the clawback case in January 2010.

Any direct adverse position did not exist between the Receiver and the Bank until the Receiver denied the Bank's claim as evidenced by the filing of the claims determination motion and decided to retain James Hoyer for the filing of a suit against the Bank, all occurring in December 2011. The Bank refused to consent, and WGK withdrew from the NAC case in mid-February 2012. WGK no longer represents the receivership in matters against the Bank. James Hoyer now represents the Receiver in all matters involving Wells Fargo Bank. Under Rule 4–1.7 pertaining to conflicts of current clients, a conflict arising after the representation has been undertaken which requires an attorney to withdraw is governed by Rule 4–1.9.[60]

[60] See Commentary to Rule 4–1.7 "Loyalty to Client" (stating that "[w]here more than 1 client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by Rule 4–1.9.").

Rule 4–1.9 provides that a lawyer who has formerly represented a client may not represent another person in a substantially related matter unless the former client consents, may not use information relating to the representation to the disadvantage of the former client, and may not reveal information relating to the representation. This rule permits WGK to continue to represent the Receiver because the receivership proceeding is not related to the NAC matter in any way, there is no evidence that WGK or the Receiver have used information gained from the NAC matter in the receivership, and there is no evidence that any attorney at WGK revealed information relating to the NAC matter to anyone.

To the extent any conflicts existed, however, the Receiver always hired another firm to pursue claims against the Bank, and in the case of the clawback action, an affiliate of the Bank. Courts in the bankruptcy setting have held that the retention of separate counsel to handle a particular class of creditors "eliminates any question of divided loyalty." Matter of REA Holding Corp., 2 B.R. 733, 735 (S.D. N.Y. 1980); see also Blinder, 131 B.R. at 883. Although the law governing bankruptcy proceedings is not binding on a federal equity receivership,[61] as the case at bar, this Court may take note of the fact that curing conflict by the hiring of alternative counsel has been recognized as acceptable.

[61] See discussion in text at footnote 48 and cases cited therein.

Assuming there was a conflict that was not waived by the Bank,[62] the Bank delayed in seeking disqualification. Delay is but one factor to be considered. See In re Jet 1 Center, Inc., 310 B.R. 649, 654 (Bankr. M.D. Fla. 2004). Other factors that may be considered include when the movant learned of the conflict, whether the movant was represented by counsel during the delay, why the delay occurred, whether disqualification would result in prejudice to the non-moving party, and whether disqualification was delayed for tactical reasons. Id. Although Wells Fargo Bank claims it did not realize the conflict until some time in December 2011 after WGK filed the claims determination motion, there is no question that at

the time the Bank hired WGK, it knew that WGK also represented the Receiver. No other reason has been given for the delay in seeking disqualification. Accordingly, the Court finds that WGK may continue to represent the Receiver in this case with the exception of matters specifically involving Wells Fargo Bank or its affiliates.

62 Nothing in the record indicates that WGK agreed to the particular conflict policy promulgated by Wells Fargo Bank, and no authority requires that the policy be considered binding on this Court.

***9** It is therefore **ORDERED AND ADJUDGED** that Wells Fargo Bank, N.A.'s Motion (I) to Disqualify Receiver, (II) to Disqualify Wiand Guerra King P.L. and (III) to Disallow All Fees Payable to the Receiver and his Counsel (Dkt. 766) is **DENIED.**

DONE AND ORDERED at Tampa, Florida, on April 25, 2012.

All Citations

Not Reported in Fed. Supp., 2012 WL 12910270

End of Document

NRS 17.225 Right to contribution.

1. Except as otherwise provided in this section and NRS 17.235 to 17.305, inclusive, where two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.

2. The right of contribution exists only in favor of a tortfeasor who has paid more than his or her equitable share of the common liability, and the tortfeasor's total recovery is limited to the amount paid by the tortfeasor in excess of his or her equitable share. No tortfeasor is compelled to make contribution beyond his or her own equitable share of the entire liability.

3. A tortfeasor who enters into a settlement with a claimant is not entitled to recover contribution from another tortfeasor whose liability for the injury or wrongful death is not extinguished by the settlement nor in respect to any amount paid in a settlement which is in excess of what was reasonable.

(Added to NRS by 1973, 1303; A 1979, 1355)

NRS 38.247 Appeals.

1. An appeal may be taken from:

(a) An order denying a motion to compel arbitration;

(b) An order granting a motion to stay arbitration;

(c) An order confirming or denying confirmation of an award;

(d) An order modifying or correcting an award;

(e) An order vacating an award without directing a rehearing; or

(f) A final judgment entered pursuant to NRS 38.206 to 38.248, inclusive.

2. An appeal under this section must be taken as from an order or a judgment in a civil action.

(Added to NRS by 2001, 1283)

NRS 41.670 Award of reasonable costs, attorney's fees and monetary relief under certain circumstances; separate action for damages; sanctions for frivolous or vexatious special motion to dismiss; interlocutory appeal.

1. If the court grants a special motion to dismiss filed pursuant to NRS 41.660:

(a) The court shall award reasonable costs and attorney's fees to the person against whom the action was brought, except that the court shall award reasonable costs and attorney's fees to this State or to the appropriate political subdivision of this State if the Attorney General, the chief legal officer or attorney of the political subdivision or special counsel provided the defense for the person pursuant to NRS 41.660.

(b) The court may award, in addition to reasonable costs and attorney's fees awarded pursuant to paragraph (a), an amount of up to $10,000 to the person against whom the action was brought.

(c) The person against whom the action is brought may bring a separate action to recover:

(1) Compensatory damages;

(2) Punitive damages; and

(3) Attorney's fees and costs of bringing the separate action.

2. If the court denies a special motion to dismiss filed pursuant to NRS 41.660 and finds that the motion was frivolous or vexatious, the court shall award to the prevailing party reasonable costs and attorney's fees incurred in responding to the motion.

3. In addition to reasonable costs and attorney's fees awarded pursuant to subsection 2, the court may award:

(a) An amount of up to $10,000; and

(b) Any such additional relief as the court deems proper to punish and deter the filing of frivolous or vexatious motions.

4. If the court denies the special motion to dismiss filed pursuant to NRS 41.660, an interlocutory appeal lies to the Supreme Court.

(Added to NRS by 1993, 2848; A 1997, 1366, 2593; 2013, 624)

NRS 696B.190 Jurisdiction of delinquency proceedings; venue; exclusiveness of remedy; appeal.

1. The district court has original jurisdiction of delinquency proceedings under NRS 696B.010 to 696B.565, inclusive, and any court with jurisdiction may make all necessary or proper orders to carry out the purposes of those sections.

2. The venue of delinquency proceedings against a domestic insurer must be in the county in this state of the insurer's principal place of business or, if the principal place of business is located in another state, in any county in this state selected by the Commissioner for the purpose. The venue of proceedings against foreign insurers must be in any county in this state selected by the Commissioner for the purpose.

3. At any time after commencement of a proceeding, the Commissioner or any other party may apply to the court for an order changing the venue of, and removing, the proceeding to any other county of this state in which the proceeding may most conveniently, economically and efficiently be conducted.

4. No court has jurisdiction to entertain, hear or determine any petition or complaint praying for the dissolution, liquidation, rehabilitation, sequestration, conservation or receivership of any insurer, or for an injunction or restraining order or other relief preliminary, incidental or relating to such proceedings, other than in accordance with NRS 696B.010 to 696B.565, inclusive.

5. An appeal to the appellate court of competent jurisdiction pursuant to the rules fixed by the Supreme Court pursuant to Section 4 of Article 6 of the Nevada Constitution may be taken from any court granting or refusing rehabilitation, liquidation, conservation or receivership, and from every order in delinquency proceedings having the character of a final order as to the particular portion of the proceedings embraced therein.

(Added to NRS by 1971, 1886; A 1995, 1635; 1997, 3037; 2013, 1796)

NRS 696B.255 Commissioner as receiver, rehabilitator or liquidator authorized to appoint special deputies and advisory committee.

1. The Commissioner, as receiver, rehabilitator or liquidator, may appoint one or more special deputies who have all the powers and responsibilities of a receiver, rehabilitator or liquidator, and the Commissioner may employ such counsels, clerks and assistants as the Commissioner considers necessary. The compensation of such special deputies, counsels, clerks and assistants and all expenses of taking possession of the insurer and of conducting the proceedings must be fixed by the Commissioner with the approval of the court, and paid out of the money or other assets of the insurer. The persons appointed pursuant to this section serve at the pleasure of the Commissioner. The Commissioner, as receiver, rehabilitator or liquidator, may, with the approval of the court, appoint an advisory committee of policyholders, claimants or other creditors, including guaranty associations, if the Commissioner considers such a committee necessary. The committee serves at the pleasure of the Commissioner and serves without compensation other than reimbursement for reasonable travel and other expenses. No other committee of any nature may be appointed by the Commissioner or the court in proceedings for receivership, rehabilitation or liquidation conducted pursuant to this chapter.

2. If the property of the insurer does not contain sufficient cash or liquid assets to defray the costs incurred, the Commissioner may advance the costs so incurred out of any appropriation for the maintenance of the Division. Any amounts so advanced for expenses of administration must be repaid to the Commissioner out of the first available money of the insurer.

(Added to NRS by 1995, 1634)

28 U.S. Code § 158 - Appeals

(a) The district courts of the United States shall have jurisdiction to hear appeals [1]

(1)

from final judgments, orders, and decrees;

(2)

from interlocutory orders and decrees issued under section 1121(d) of title 11 increasing or reducing the time periods referred to in section 1121 of such title; and

(3)

with leave of the court, from other interlocutory orders and decrees;

of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

(b)

(1) The judicial council of a circuit shall establish a bankruptcy appellate panel service composed of bankruptcy judges of the districts in the circuit who are appointed by the judicial council in accordance with paragraph (3), to hear and determine, with the consent of all the parties, appeals under subsection (a) unless the judicial council finds that—

(A)

there are insufficient judicial resources available in the circuit; or

(B)

establishment of such service would result in undue delay or increased cost to parties in cases under title 11.

Not later than 90 days after making the finding, the judicial council shall submit to the Judicial Conference of the United States a report containing the factual basis of such finding.

(2)

(A)

A judicial council may reconsider, at any time, the finding described in paragraph (1).

(B)

On the request of a majority of the district judges in a circuit for which a bankruptcy appellate panel service is established under paragraph (1), made after the expiration of the 1-year period beginning on the date such service is established, the judicial council of the circuit shall determine whether a circumstance specified in subparagraph (A) or (B) of such paragraph exists.

(C)

On its own motion, after the expiration of the 3-year period beginning on the date a bankruptcy appellate panel service is established under paragraph (1), the judicial council of the circuit may determine whether a circumstance specified in subparagraph (A) or (B) of such paragraph exists.

(D)

If the judicial council finds that either of such circumstances exists, the judicial council may provide for the completion of the appeals then pending before such service and the orderly termination of such service.

(3)

Bankruptcy judges appointed under paragraph (1) shall be appointed and may be reappointed under such paragraph.

(4)

If authorized by the Judicial Conference of the United States, the judicial councils of 2 or more circuits may establish a joint bankruptcy appellate panel comprised of bankruptcy judges from the districts within the circuits for which such panel is established, to hear and determine, upon the consent of all the parties, appeals under subsection (a) of this section.

(5)

An appeal to be heard under this subsection shall be heard by a panel of 3 members of the bankruptcy appellate panel service, except that a member of such service may not hear an appeal originating in the district for which such member is appointed or designated under section 152 of this title.

(6)

Appeals may not be heard under this subsection by a panel of the bankruptcy appellate panel service unless the district judges for the district in which the appeals occur, by majority vote, have authorized such service to hear and determine appeals originating in such district.

(c)

(1) Subject to subsections (b) and (d)(2), each appeal under subsection (a) shall be heard by a 3-judge panel of the bankruptcy appellate panel service established under subsection (b)(1) unless—

(A)

the appellant elects at the time of filing the appeal; or

(B)

any other party elects, not later than 30 days after service of notice of the appeal;

to have such appeal heard by the district court.

(2)

An appeal under subsections (a) and (b) of this section shall be taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district courts and in the time provided by Rule 8002 of the Bankruptcy Rules.

(d)

(1)

The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.

(2)

(A) The appropriate court of appeals shall have jurisdiction of appeals described in the first sentence of subsection (a) if the bankruptcy court, the district court, or the bankruptcy appellate panel involved, acting on its own motion or on the request of a party to the judgment, order, or decree described in such first sentence, or all the appellants and appellees (if any) acting jointly, certify that—

(i)

the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance;

(ii)

the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or

(iii)

an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken; and if the court of appeals authorizes the direct appeal of the judgment, order, or decree.

(B) If the bankruptcy court, the district court, or the bankruptcy appellate panel—

(i)

on its own motion or on the request of a party, determines that a circumstance specified in clause (i), (ii), or (iii) of subparagraph (A) exists; or

(ii)

receives a request made by a majority of the appellants and a majority of appellees (if any) to make the certification described in subparagraph (A); then the bankruptcy court, the district court, or the bankruptcy appellate panel shall make the certification described in subparagraph (A).

(C)

The parties may supplement the certification with a short statement of the basis for the certification.

(D)

An appeal under this paragraph does not stay any proceeding of the bankruptcy court, the district court, or the bankruptcy appellate panel from which the appeal is taken, unless the respective bankruptcy court, district court, or bankruptcy appellate panel, or the court of appeals in which the appeal is pending, issues a stay of such proceeding pending the appeal.

(E)

Any request under subparagraph (B) for certification shall be made not later than 60 days after the entry of the judgment, order, or decree.
(Added Pub. L. 98–353, title I, § 104(a), July 10, 1984, 98 Stat. 341; amended Pub. L. 101–650, title III, § 305, Dec. 1, 1990, 104 Stat. 5105; Pub. L. 103–394, title I, §§ 102, 104(c), (d), Oct. 22, 1994, 108 Stat. 4108–4110; Pub. L. 109–8, title XII, § 1233(a), Apr. 20, 2005, 119 Stat. 202; Pub. L. 111–327, § 2(c)(1), Dec. 22, 2010, 124 Stat. 3562.)

11 U.S. Code § 327 - Employment of professional persons

(a)
Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

(b)
If the trustee is authorized to operate the business of the debtor under section 721, 1202, or 1108 of this title, and if the debtor has regularly employed attorneys, accountants, or other professional persons on salary, the trustee may retain or replace such professional persons if necessary in the operation of such business.

(c)
In a case under chapter 7, 12, or 11 of this title, a person is not disqualified for employment under this section solely because of such person's employment by or representation of a creditor, unless there is objection by another creditor or the United States trustee, in which case the court shall disapprove such employment if there is an actual conflict of interest.

(d)
The court may authorize the trustee to act as attorney or accountant for the estate if such authorization is in the best interest of the estate.

(e)
The trustee, with the court's approval, may employ, for a specified special purpose, other than to represent the trustee in conducting the case, an attorney that has represented the debtor, if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed.

(f)
The trustee may not employ a person that has served as an examiner in the case.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2563; Pub. L. 98–353, title III, § 430(c), July 10, 1984, 98 Stat. 370; Pub. L. 99–554, title II, §§ 210, 257(e), Oct. 27, 1986, 100 Stat. 3099, 3114.)

RULE 3A. CIVIL ACTIONS: STANDING TO APPEAL; APPEALABLE DETERMINATIONS

(a) Standing to Appeal. A party who is aggrieved by an appealable judgment or order may appeal from that judgment or order, with or without first moving for a new trial.

(b) Appealable Determinations. An appeal may be taken from the following judgments and orders of a district court in a civil action:

(1) A final judgment entered in an action or proceeding commenced in the court in which the judgment is rendered.

(2) An order granting or denying a motion for a new trial.

(3) An order granting or refusing to grant an injunction or dissolving or refusing to dissolve an injunction.

(4) An order appointing or refusing to appoint a receiver or vacating or refusing to vacate an order appointing a receiver.

(5) An order dissolving or refusing to dissolve an attachment.

(6) An order changing or refusing to change the place of trial only when a notice of appeal from the order is filed within 30 days.

(A) Such an order may only be reviewed upon a timely direct appeal from the order and may not be reviewed on appeal from the judgment in the action or proceeding or otherwise. On motion of any party, the court granting or refusing to grant a motion to change the place of trial of an action or proceeding shall enter an order staying the trial of the action or proceeding until the time to appeal from the order granting or refusing to grant the motion to change the place of trial has expired or, if an appeal has been taken, until the appeal has been resolved.

(B) Whenever an appeal is taken from such an order, the clerk of the district court shall forthwith certify and transmit to the clerk of the Supreme Court, as the record on appeal, the original papers on which the motion was heard in the district court and, if the appellant or respondent demands it, a transcript of any proceedings had in the district court. The district court shall require its court reporter to expedite the preparation of the transcript in preference to any other request for a transcript in a civil matter. When the appeal is docketed in the court, it stands submitted without further briefs or oral argument unless the court otherwise orders.

(7) An order entered in a proceeding that did not arise in a juvenile court that finally establishes or alters the custody of minor children.

(8) A special order entered after final judgment, excluding an order granting a motion to set aside a default judgment under NRCP 60(b)(1) when the motion was filed and served within 60 days after entry of the default judgment.

(9) An interlocutory judgment, order or decree in an action to redeem real or personal property from a mortgage or lien that determines the right to redeem and directs an accounting.

(10) An interlocutory judgment in an action for partition that determines the rights and interests of the respective parties and directs a partition, sale or division.

[As amended; effective January 20, 2015.]

Rule 54. Judgments; Attorney Fees

(a) **Definition; Form.** "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment should not include recitals of pleadings, a master's report, or a record of prior proceedings.

(b) **Judgment on Multiple Claims or Involving Multiple Parties.** When an action presents more than one claim for relief — whether as a claim, counterclaim, crossclaim, or third-party claim — or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

(c) **Demand for Judgment; Relief to Be Granted.** A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings, except that if the prayer is for unspecified damages under Rule 8(a)(4), the court must determine the amount of the judgment. Every other final judgment should grant the relief to which each party is entitled, even if the party has not demanded such relief in its pleadings.

(d) **Attorney Fees.**

(1) **Reserved.**

(2) **Attorney Fees.**

(A) **Claim to Be by Motion.** A claim for attorney fees must be made by motion. The court may decide a postjudgment motion for attorney fees despite the existence of a pending appeal from the underlying final judgment.

(B) **Timing and Contents of the Motion.** Unless a statute or a court order provides otherwise, the motion must:

(i) be filed no later than 21 days after written notice of entry of judgment is served;

(ii) specify the judgment and the statute, rule, or other grounds entitling the movant to the award;

(iii) state the amount sought or provide a fair estimate of it;

(iv) disclose, if the court so orders, the nonprivileged financial terms of any agreement about fees for the services for which the claim is made; and

(v) be supported by:

(a) counsel's affidavit swearing that the fees were actually and necessarily incurred and were reasonable;

(b) documentation concerning the amount of fees claimed; and

(c) points and authorities addressing the appropriate factors to be considered by the court in deciding the motion.

(C) **Extensions of Time.** The court may not extend the time for filing the motion after the time has expired.

(D) **Exceptions.** Rules 54(d)(2)(A) and (B) do not apply to claims for attorney fees as sanctions or when the applicable substantive law requires attorney fees to be proved at trial as an element of damages.

[Amended; effective March 1, 2019.]

Rule 1.0. Terminology. As used in these Rules, the following terms shall have the meanings ascribed:

(a) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(c) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

(d) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.

(e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

(f) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(g) "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

(h) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(i) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(j) "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(k) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

(l) "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(m) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

(n) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording and electronic communications. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

(o) "Organization" when used in reference to "organization as client" denotes any constituent of the organization, whether inside or outside counsel, who supervises, directs, or regularly consults with the lawyer concerning the organization's legal matters unless otherwise defined in the Rule.

[Added; effective May 1, 2006; as amended; effective April 4, 2014.]

Rule 1.2. Scope of Representation and Allocation of Authority Between Client and Lawyer.

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decision concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Rule 1.5. Fees.

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) The fee customarily charged in the locality for similar legal services;

(4) The amount involved and the results obtained;

(5) The time limitations imposed by the client or by the circumstances;

(6) The nature and length of the professional relationship with the client;

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) Whether the fee is fixed or contingent.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing, signed by the client, and shall state, in boldface type that is at least as large as the largest type used in the contingent fee agreement:

(1) The method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal;

(2) Whether litigation and other expenses are to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated;

(3) Whether the client is liable for expenses regardless of outcome;

(4) That, in the event of a loss, the client may be liable for the opposing party's attorney fees, and will be liable for the opposing party's costs as required by law; and

(5) That a suit brought solely to harass or to coerce a settlement may result in liability for malicious prosecution or abuse of process.

Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) Any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(2) A contingent fee for representing a defendant in a criminal case.

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) Reserved;

(2) The client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and

(3) The total fee is reasonable.

[Added; effective May 1, 2006.]

Rule 1.7. Conflict of Interest: Current Clients.

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) The representation of one client will be directly adverse to another client; or

(2) There is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) The lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) The representation is not prohibited by law;

(3) The representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) Each affected client gives informed consent, confirmed in writing.

[Added; effective May 1, 2006.]

Rule 1.9. Duties to Former Clients.

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a 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.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) Whose interests are materially adverse to that person; and

(2) About whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;

(3) Unless the former client gives informed consent, confirmed in writing.

(c) 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; or

(2) Reveal information relating to the representation except as these Rules would permit or require with respect to a client.

[Added; effective May 1, 2006.]

§ 14.03 Impleader Permits Defending Party to Join Absentee Who Is or May Be Liable for All or Part of Underlying Claim Against Defending Party

[1] Impleader Promotes Efficiency and Consistency by Allowing Defending Party to Override Plaintiff's Structure of Litigation by Joining Third Party Who Is Derivatively Liable

The third-party practice, or impleader, rule permits a defending party (usually a defendant) to bring a new party into a pending case, but only if that absentee "is or may be liable to [the defending party] for all or part of the claim against it."[1] The joinder provisions of the Federal Rules repose in the plaintiff great discretion to select the party structure of litigation. The impleader rule shows that this discretion is not absolute, but may be overridden in narrow circumstances. Other joinder rules reflect similarly narrow intrusions into plaintiff autonomy. For instance, the compulsory joinder rule permits the court or the defendant to force the joinder of a nonparty, but only to avoid specific harm that may occur if the nonparty is not joined.[2] Similarly, intervention of right permits an absentee to join pending litigation to avoid potential harm that could be inflicted by nonjoinder.[3]

Impleader basically permits a defending party to join an absentee for the purpose of deflecting to that absentee all or part of its potential liability to the plaintiff on the underlying claim.[3.1] Almost always, this deflection will be based on an assertion that the absentee owes the defending party a duty of indemnity or contribution. Third-party practice fosters efficient litigation by packaging the underlying claim for liability and any indemnity or contribution claims in a single case.[4] This inclusive packaging spares the judicial system and at least some of

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[1] *Fed. R. Civ. P. 14(a)(1)*.

[2] *Fed. R. Civ. P. 19*; *see* Ch. 19, *Required Joinder of Parties.*

[3] *Fed. R. Civ. P. 24(a)(2)*; *see* ***Ch. 24, Intervention.***

[3.1] **Deflecting liability.** *Ortiz v. Cybex Int'l, Inc., 345 F. Supp. 3d 107, 117 (D.P.R. 2018)* (quoting **Moore's**, impleader under *Fed. R. Civ. P. 14* permits "defending party to join an absentee for the purpose of deflecting to that absentee all or part of its potential liability to the plaintiff on the underlying claim. … based on an assertion that the absentee owes the defending party a duty of contribution or indemnity").

[4] **Efficiency.**

1st Circuit *Lehman v. Revolution Portfolio L.L.C., 166 F.3d 389, 394–395 (1st Cir. 1999)* (core purpose of *Fed. R. Civ. P. 14(a)* is to avoid unnecessary duplication and circuity of action); *Ortiz v. Cybex Int'l, Inc., 345 F. Supp. 3d 107, 117 (D.P.R. 2018)* (citing **Moore's**, impleader "fosters efficient litigation" by permitting underlying liability claims to be resolved simultaneously with indemnity and contribution claims).

2d Circuit *Hicks v. Long Island R.R., 165 F.R.D. 377, 379 (E.D.N.Y. 1996)* (purpose of impleader is to avoid circuity of actions).

3d Circuit *Erkins v. Case Power & Equip. Co., 164 F.R.D. 31, 32 (D.N.J. 1995)* (impleader avoids circuity of actions); *Saunders v. Jim Emes Petroleum Co., 101 F.R.D. 405, 407 (W.D. Pa. 1983)* (avoids "circuity of actions").

5th Circuit *Harrison v. Glendel Drilling Co., 679 F. Supp. 1413, 1422 (W.D. La. 1988)* (joining third-party defendant promotes efficiency).

the parties the waste and expense of multiple suits.[4.1] Concomitantly, it avoids the possibility of inconsistent judgments. Joinder of all persons interested in the ultimate resolution of the dispute binds them to a single judgment. Without such joinder, the defendant who loses on the underlying dispute must bring a separate action for indemnity or contribution. Because the alleged indemnitor or contributor is not bound by the judgment in the first case (because it was not a party) the defendant might be unsuccessful, and thereby incur a liability it should have been able to pass on to another.[5] Even when the defendant is successful in the second suit, it will be required to pay for separate litigation, and may suffer adverse consequences because of the delay between judgments in the two suits. Effecting joinder of the indemnitor or contributor in a single case thus promotes judicial economy and fosters a consistent outcome that allows the defendant to avoid these potential harms.

It bears repeating that impleader is available only for the assertion of derivative claims or "claims over" against the third party. It does not permit joinder of a new party for the assertion of any other claims, even transactionally related claims (*see* *§ 14.04*).

[2] Only Defending Parties May Implead

The rule provides that any "defending party" may assert an impleader claim. Obviously, this reference includes a defendant. But it also includes any other party against whom an affirmative claim for relief is pending. For example, the rule expressly allows a third-party defendant to "proceed under this rule" to implead an absentee who may be liable to indemnify or contribute to a judgment.[6] This provision seems unnecessary in view of the general language that impleader is available to any "defending party." Because a third-party defendant is a litigant against whom an affirmative claim for relief is pending, the third-party defendant is a "defending party"

6th Circuit *American Zurich Ins. Co. v. Cooper Tire & Rubber Co., 512 F.3d 800, 805 (6th Cir. 2008)* (underlying *Fed. R. Civ. P. 14* is desire to promote economy by avoiding situation in which defendant has been adjudicated liable and then must bring totally new action against third party for indemnity or contribution); *Hood v. Security Bank of Huntington, 562 F. Supp. 749, 751 (S.D. Ohio 1983)* (avoids "circuity of actions" and multiple suits; eliminates unnecessary expense; saves time).

7th Circuit *Leaseway Warehouses, Inc. v. Carlton, 568 F. Supp. 1041, 1043 (N.D. Ill. 1983)* (avoids "circuity of actions" and multiple suits; eliminates unnecessary expense; saves time).

10th Circuit *First Nat'l Bank of Strasburg v. Platte Valley State Bank, 107 F.R.D. 120, 123 (D. Colo. 1985)* (disposes of related claims in single suit; simplifies and expedites litigation).

[4.1] **Avoids multiple suits.** *Ortiz v. Cybex Int'l, Inc., 345 F. Supp. 3d 107, 117 (D.P.R. 2018)* (citing **Moore's**, simultaneous resolution of main claims and indemnity and contribution claims through impleader spares parties and courts "the waste and expense of multiple lawsuits").

[5] **Nonparty not bound by judgment.** *Richards v. Jefferson County, Ala., 517 U.S. 793, 798, 116 S. Ct. 1761, 135 L. Ed. 2d 76 (1996)* (Due Process permits judgment to bind only parties to litigation and those represented by parties to litigation; nonparties may not be bound, even if they share essentially identical interests with those who were joined as parties); *Martin v. Wilks, 490 U.S. 755, 761–762, 109 S. Ct. 2180, 104 L. Ed. 2d 835 (1989)* (only parties actually joined and nonparties represented by them may be bound by judgment). *See generally* Robert Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, *67 N.Y.U. L. Rev. 193 (1992)* (discussing due process restriction).

[6] *Fed. R. Civ. P. 14(a)(5)*.

and clearly is entitled to assert impleader. Such assertions by a third-party defendant are often called "fourth-party claims."[7] In what may be the record, parties in one case impleaded five successive absentees.[8]

There is a similarly unnecessary provision regarding plaintiffs. The plaintiff impleader rule provides: "When a claim is asserted against a plaintiff, the plaintiff may bring in a third party if this rule would allow a defendant to do so."[9] The subdivision is unnecessary because it is obvious that a plaintiff against whom a claim has been asserted is a "defending party," who is able to implead under the general language of the impleader rule.[10]

Prior to the 2007 amendments, the plaintiff impleader provision was limited to when a counterclaim was brought against a plaintiff (*see* *§ 14App.06[1]* (setting out text of rule as of 1987)), creating some confusion as to exactly which sort of claims asserted against a plaintiff would entitle that plaintiff to proceed with impleader. The current version of the rule simply refers to a "claim" asserted against a plaintiff.[11] This substantive amendment to the Rule makes it clear that the plaintiff is on equal footing with the defendant (or any "defending party") in terms of the ability to implead.[11.1]

A litigant may lose its status as a "defending party." For instance, a defendant who defaults is no longer a defending party, because there is no affirmative claim pending against it; such a defendant may not implead a third-party.[12] A nonparty, of course, is not a "party" at all and likewise cannot be a "defending party" under Rule

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[7] **Fourth party claims.**

2d Circuit *See, e.g.*, *International Paving Sys. v. Van Tulco, Inc., 866 F. Supp. 682, 693 (E.D.N.Y. 1994)* (referring to fourth-party claim).

8th Circuit *See, e.g.*, *Interstate Power Co. v. Kansas City Power & Light Co., 992 F.2d 804, 806 (8th Cir. 1993)* (referring to impleader by third-party defendant as fourth-party claim).

10th Circuit *See, e.g.*, *TBG, Inc. v. Bendis, 841 F. Supp. 1538, 1554 (D. Kan. 1993)* (referring to fourth-party claim).

[8] **Five successive absentees.** *Bevemet Metais, Ltda. v. Gallie Corp., 3 F.R.D. 352, 352 (S.D.N.Y. 1942)* (five successive impleader claims; court ordered separate trials).

[9] *Fed. R. Civ. P. 14(b)*.

[10] *Fed. R. Civ. P. 14(a)(1)*.

[11] *Fed. R. Civ. P. 14(b)*.

[11.1] *Fed. R. Civ. P. 14(b)*, advisory committee note of 2007 (*reproduced verbatim at § 14App.09[3]*).

[12] **Must be affirmative claim pending against defending party.**

2d Circuit *MetLife Investors USA Ins. Co. v. Zeidman, 734 F. Supp. 2d 304, 310 (E.D.N.Y. Aug. 31, 2010)*, *aff'd*, *442 Fed. Appx. 589 (2d Cir. 2011)* (claimant to interpleader fund faces no potential for liability, so it is not "defending party" and cannot file third party complaint).

6th Circuit *Newhouse v. Probert, 608 F. Supp. 978, 985 (W.D. Mich. 1985)* (defendant who defaulted could not assert impleader, because he was no longer "defending party;" although relief from default granted, court struck third party complaint).

11th Circuit *Faser v. Sears, Roebuck & Co., 674 F.2d 856, 860 (11th Cir. 1982)* (summary judgment for defendant moots impleader claims).

14, even if its interests are implicated by an existing party to the action.[12.1] Instead, the nonparty must either intervene under Rule 24, or be brought in by one of the existing parties.

[3] Impleader Is Permissive, Not Compulsory

The impleader rule provides that a defending party *may* implead, not that it *shall* or *must.* [13] Because of this language, impleader claims are permissive and not compulsory.[14] Accordingly, a defending party who asserts impleader in state court waives its right to remove the case to federal court.[15] Also, if a defending party fails to use impleader, or if the court refuses to let it use impleader, that defending party remains free to sue the third-party separately to assert a right of indemnity or contribution. In that case, the third-party would not be bound by any findings from the original case, because it was not a party to that action.[16] On the other hand, the third-party may be able to assert collateral estoppel against the party who sues it in the second case (*see* *Ch. 132, Collateral Estoppel and Issue Preclusion*).

[4] Use of Impleader May Be Limited by Restrictions on Jurisdiction and Venue

The impleader rule is merely a procedural provision; it cannot affect the independent requirements of jurisdiction and venue. The court must have personal jurisdiction over the third-party defendant and, unless the third party submits to that jurisdiction, must serve process to effect joinder (*see* *§ 14.22*). In addition, the impleader claim, as every claim asserted in federal court, must be supported by federal subject matter jurisdiction. Because subject matter jurisdiction is not a waivable requirement, it can pose a serious obstacle to joinder of the third party. If a claim is not supported by an independent basis of subject matter jurisdiction such as federal question jurisdiction[17] or diversity of citizenship jurisdiction[18] the court and counsel will assess whether the claim can nonetheless invoke supplemental jurisdiction.[19] In contrast to the often difficult hurdle of

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[12.1] **Nonparty cannot seek impleader**

1st Circuit *Kodar, LLC v. United States FAA, 879 F. Supp. 2d 218, 229 (D.R.I. 2012)* (insurer of defendant was not party to action, and could not file third-party complaint).

9th Circuit *Retcal, Inc. v. Insular Lumber Co. (Phil.), Inc., 379 F. Supp. 62, 64 (C.D. Cal. 1973)* (in admiralty action, persons who were neither defendants, defending parties, nor claimants were not authorized to file third party complaints).

[13] *Fed. R. Civ. P. 14(a)(1)*.

[14] **Impleader permissive, not compulsory.** *Knudsen v. Samuels, 715 F. Supp. 1505, 1506 (D. Kan. 1989)* ("third-party complaint is a permissive pleading"); *Southeast Guar. Trust Co. v. Rodman & Renshaw, Inc., 358 F. Supp. 1001, 1010 (N.D. Ill. 1973)* ("third-party claim is not compulsory").

[15] **Waives removal.** *See* *Knudsen v. Samuels, 715 F. Supp. 1505, 1506 (D. Kan. 1989)* (impleader is permissive, and assertion of impleader claim in state court manifests its desire to litigate in state court); *California Republican Party v. Mercier, 652 F. Supp. 928, 931 (C.D. Cal. 1986)* (citing **Moore's**, filing impleader claim in state court waives right to remove because impleader is permissive claim).

[16] **Nonparty not bound by judgment.** *Richards v. Jefferson County, Alabama, 517 U.S. 793, 797–801 (1996)* (Due Process permits judgment to bind only parties to litigation and those represented by parties to litigation; nonparties cannot be bound, even if they share essentially identical interests with those who were joined as parties); *Martin v. Wilks, 490 U.S. 755, 761–762, 109 S. Ct. 2180, 104 L. Ed. 2d 835 (1989)* (only parties actually joined and nonparties represented by them can be bound by judgment).

[17] *28 U.S.C. § 1331*.

[18] *28 U.S.C. § 1332(a)(1)*

subject matter jurisdiction, venue rarely poses a serious problem for joinder of the third-party defendant. In most instances, courts will simply treat the impleader claim as ancillary to the main action for venue purposes (*see* § 14.42).

Even if all requirements for jurisdiction and venue of an impleader claim are met, if the claim is subject to a mandatory forum selection clause or arbitration clause, the court may decline to decide the claim and instead transfer it to the designated forum, or dismiss it in lieu of the alternative forum.[20] This issue rarely arises, however, because such a clause typically applies to all claims asserted in the action, or to none.

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[19] 28 U.S.C. § 1367; *see* § 14.41.

[20] **Forum selection clause or arbitration clause.** *See, e.g.*, CNH Indus. Am. LLC v. Jones Lang Lasalle Ams., Inc., 882 F.3d 692, 700 n.2 (7th Cir. 2018) (noting that defendant's impleader claim against product manufacturer had been dismissed in lieu of arbitration, and that arbitration proceeding had been stayed pending outcome of main claims).