IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: WOODBRIDGE GROUP OF COMPANIES, LLC, *et al* Debtors.	Chapter 11 Case No. 17-12560 (KJC) Jointly Administered **Re: D.I. 2733**

JOSEPH SARACHEK'S OPPOSITION TO
MOTION TO REVOKE PRO HAC VICE ADMISSION

Joseph Sarachek, counsel to approximately 270 Woodbridge creditors, opposes the Motion to Revoke Pro Hac Vice Admission Of Joseph Sarachek (Dkt. 2733) filed by the Official Committee of Unsecured Creditors (the "**Committee**"). Though the Motion seeks to revoke pro hac vice admission, it is based on allegations of conflicts of interest. It is therefore effectively a motion to disqualify Mr. Sarachek and will be addressed as such.

This Court should deny the Motion for three principal reasons. ***First***, the Committee does not have standing to raise the purported conflict because it is not Mr. Sarachek's current or former client. ***Second,*** even if it had standing, the Committee has waived any objection through its strategic delay in raising disqualification, which appears to be solely aimed at prejudicing Mr. Sarachek's clients and gaining an advantage in this litigation. Mr. Sarachek's clients would be severely prejudiced if his pro hac vice admission were revoked at the upcoming confirmation hearing, and due process would require a delay in that hearing. ***Third***, any potential or actual conflict among the different creditors Mr. Sarachek represents may be cured by informed consent, which Mr. Sarachek's clients have all given—and recently reaffirmed—after detailed disclosures.

FACTUAL BACKGROUND

A. Sarachek Is Engaged And Discloses Potential Conflicts To His Clients.

This case was filed on December 4, 2017. Shortly thereafter, the United States Trustee appointed the Committee, consisting of three creditors, including two noteholders who waived security interests and agreed to be treated as unsecured creditors. (Dkt. 79.) As the case progressed, the Committee took the position that all creditors in this case were unsecured, despite credible arguments to the contrary. (Declaration of Joseph Sarachek ("Dec.") ¶ 3.) The position was unfavorable to creditors with potential secured claims, who were dissatisfied with the Committee's position and wanted independent representation.

In late January 2018, Mr. Sarachek began to meet with some of the dissatisfied creditors to represent them in this matter. (Dec. ¶ 3.) Mr. Sarachek is an experienced bankruptcy practitioner who is well situated to represent clients in this matter. (*Id.* ¶ 1.) Early in the process, along with attorney Jorian Rose of Baker Hostetler, Mr. Sarachek developed a legal theory that noteholders who did not hold original underlying notes and mortgages had a perfected security interest in the notes and mortgages, even though no Uniform Commercial Code financing statements had been filed. (*Id.* ¶ 5.) As clients sought his representation during January, February, and March 2018, Mr. Sarachek and his clients executed engagement letters. (*Id.* ¶¶ 3-4, 8.) A copy of the initial form engagement letter between Mr. Sarachek and his clients is attached as Exhibit A. The engagement letters contain a disclosure and conflict waiver:

> **Other Clients.** You acknowledge that we Represent, and may be retained by, other investors in the Woodbridge Group of Companies, LLC case(s) and that We intend to jointly litigate the claims of such other clients together with Your claims. You agree that any conflicts caused by such representation are waived.

Id.

B. The Committee Tactically Opposes Mr. Sarachek's Involvement.

Mr. Sarachek first began to enter appearances in this matter on February 5, 2018. (Dkt. 483.) From the beginning of Mr. Sarachek's representation, the Committee displayed its opposition to Mr. Sarachek's representation of any creditors. On February 9, 2018, Mr. Sarachek held a meeting for approximately 100 creditors in Vero Beach, Florida. (Dec. ¶ 6.) The Committee and its counsel were aware of the meeting and sent an email urging Sarachek to cancel the meeting, and an in-person representative to make clear their opposition to Mr. Sarachek's involvement in this bankruptcy. (*Id.* ¶ 6.) On February 13, 2018, Mr. Sarachek filed an objection and appeared at the final hearing for approval of the Debtor in Possession financing. (*Id.* ¶ 7.) Again, the Committee's counsel took the position at the hearing that Mr. Sarachek's representation of his clients was improper. (*Id*; Dkt. 2733 at 4 n.3.)

Mr. Rose formally joined Mr. Sarachek's team in March 2018, and his firm, Baker Hostetler, entered into a second round of engagement letters with Mr. Sarachek's clients during March 2018.[1] (Dec. ¶¶ 9-10; Ex. C.) The engagement letters contained an explanation of the potential conflict and conflict waiver:

> In this engagement, we are representing both of you, personally, and similarly situated creditors (the "Group"). Whenever a law firm represents more than one client, the potential for a conflict of interest arises. For example, if members of the Group have claims against the same assets and the success of one member impacts the other member's rights to some or that member's entire share of the assets, a conflict can arise. At present, however, each Group member has determined that no actual or foreseeable conflict of interest exists in this firm representing both of you and the Group in connection with this matter. If, however, any conflict of interest exists, each Group member hereby waives such conflict. Alternatively, we will assist you in securing conflicts or other counsel in the event you want us to advance a position that would be materially disadvantageous to another member of the Group.

[1] Baker Hostetler later withdrew from the case.

(Ex. C.)

On March 27, 2018, Mr. Sarachek filed an adversary proceeding for several of his clients seeking to declare that the liens of many of his clients on the Owlwood estate notes and mortgage were valid. (Dec. ¶ 11.) Mr. Sarachek viewed this first adversary proceeding as a test case, intending to file additional adversary proceedings if the liens were ultimately declared perfected and enforceable. (*Id.*)

On March 28, 2018, Mr. Sarachek sought admission pro hac vice. (Dkt. 851.) Beginning on March 30, the Committee responded by seeking discovery—including depositions of Mr. Sarachek and Mr. Rose—about Mr. Sarachek's client engagements and fee arrangements. (Dkt. 869; Dec. ¶ 13.) Mr. Sarachek opposed this discovery. The Court encouraged the parties to negotiate a resolution, and the Committee and Mr. Sarachek were eventually able to negotiate a resolution rather than litigating a motion to quash the discovery requests and the motion for admission pro hac vice. (Dec. ¶ 14.) On May 31, 2018, this Court approved a Stipulation for Admission Pro Hac Vice. (Dkt. 1893.) Under the Stipulation, Mr. Sarachek sent all his clients a copy of a notice reminding them that they could terminate the engagement and explaining the relationships between the various creditors, the three Committees (including the Noteholders Committee and the Unitholders Committee), and Mr. Sarachek. (Dec. ¶ 14 and Ex. D.) The notice explained that the Committee and Mr. Sarachek had a "dispute . . . with respect to, among other things, whether [his] solicitation of clients, including you, complied with the applicable ethical rules." (Ex. D.) It also explained that Mr. Sarachek was advocating for his clients that various noteholders should be treated differently from each other depending on various factors:

> I believe that all Noteholders should not be treated the same because differences exist based on, among other factors, the value of the collateral, the jurisdiction of the property, the underlying security documents and perfection issues and we have filed an

> adversary proceeding seeking to enforce the perfection and security of certain Noteholders' interests.

Id.

As a result of the Stipulation, Mr. Sarachek entered into new engagement letters with his clients. (Dec. ¶ 14; Ex. F.) This version of the letter contained the same waiver language as the initial Sarachek engagement letter quoted above. (*Id.*) Only two clients terminated his representation after receiving the notice and new engagement letter, and Mr. Sarachek does not currently represent those clients. (Dec. ¶ 14.) Mr. Sarachek now represents approximately 270 Woodbridge creditors. (Dec. ¶2.)

In addition to the disclosures that Mr. Sarachek and Mr. Rose made in their engagement letters and in the letter to clients under the Stipulation, Mr. Sarachek has explained the nature of his representation and the risks involved in representing potentially differently-situated creditors at the same time in many client meetings, calls, and email exchanges. (Dec. ¶ 18.)

Not satisfied with the Committee's agreement to resolve the objection to Mr. Sarachek's pro hac vice motion, the Committee's counsel reiterated its objections to Mr. Sarachek's involvement in a July 22 email to one of Mr. Sarachek's clients. (*Id.* ¶ 16; Ex. G.) In the email, Committee counsel emphasizes his belief that Mr. Sarachek has a conflict representing multiple noteholders and, without any evidence, charges that Mr. Sarachek did not disclose the conflict or its effect on his clients. The Committee's counsel wrote "I am frankly tired of Mr. Sarachek spreading inaccuracies and failing to make clear that he has horrible, irreconcilable conflicts[.]" (Ex. G.)

C. Mr. Sarachek's Repeated Disclosures To The Committee Regarding His Clients And Their Interests.

After the negotiated resolution, Mr. Sarachek continued to provide information about his client engagements to the Court and the Committee. Mr. Sarachek filed verified statements under

Bankruptcy Rule 2019 disclosing the creditors whom he represented on June 5, 2018 (Dkt. 1942) and August 21, 2018 (Dkt. 2385). Each of these disclosures shows Mr. Sarachek represents creditors with various types of claims. Both filings identify each client by name and each client's "Nature of Claim" as either "Notes" or "Notes and Units." *Id.*[2] Despite these disclosures, the Committee continued to ask Mr. Sarachek for information about his client engagements and proof that he had signed engagement letters. (Dec. ¶ 17.) Mr. Sarachek provided the letters to the Committee on September 7, 2018. (*Id.*)

In the meantime, as the case continues to progress, Mr. Sarachek has devoted considerable time and effort to it, including developing a theory that noteholders who did not hold the original notes and mortgages had a perfected interest in the notes and mortgages, even though no Uniform Commercial Code financing statements had been filed; conducting factual and legal research; meeting with numerous clients; and filing the adversary proceeding. (Dec. ¶ 19.)

On August 22, 2018, the Court scheduled the plan confirmation hearing for October 24, 2018. (Dkt. 2399.) Mr. Sarachek filed an objection to confirmation (Dkt. 2767) on behalf of his clients and is in the midst of detailed preparation for that hearing, which will be crucial to his clients' positions.

D. Mr. Sarachek's Clients Re-affirm Their Consent After The Committee Filed This Motion.

On October 3, 2018, the Committee filed its motion to revoke Mr. Sarachek's pro hac vice admission. (Dkt. 2733.) The Committee noticed the motion for the same date as the Confirmation Hearing. (*Id.*) While Mr. Sarachek believes that the Committee's motion is

[2] Some clients appear to be listed as holding only "Units," but each of those clients is also listed as holding Notes in a separate capacity, such as in an individual retirement account.

baseless, in an abundance of caution, he contacted all his clients in writing requesting they confirm their waiver of any potential or actual conflict of interest. His request repeats the engagement letter language quoted above, and also explains:

> In the context of the Woodbridge cases, [the previously-disclosed concurrent representations] would mean that successful litigation on behalf of secured noteholders might result in a lower recovery for mezzanine noteholders and unit holders, who might benefit by a higher recovery if the mortgages securing the secured notes were held to be invalid or unenforceable.
>
> As we have advised you, the Unsecured Creditors Committee has filed a motion challenging our ability to continue to represent you concurrently with other Woodridge investors. By this letter, we are asking you to confirm that, through prior conversations and correspondence on various occasions with Mr. Sarachek or his staff, the nature of the potential for a conflict of interest described above was explained to you, you understood the issue, and you consented to our continued representation of you and your interests in the Woodbridge cases and waived any potential or actual conflict of interest arising from our representation of holders of different instruments (secured notes, mezzanine notes, and units or any combination thereof) issued by Woodbridge companies. We are also asking you to re-confirm your knowing and voluntary waiver and consent to the continued concurrent representation by Joseph Sarachek and The Sarachek Law Firm of your interests and those of other clients, even though the concurrent representation might constitute the representation of potentially or actually conflicting interests.
>
> You have the right to seek independent legal counsel in connection with the advisability of confirming your waiver and consent, and the right to a reasonable opportunity to do so.
>
> If you agree with our request above and agree to confirm our continued concurrent representation of you and the other Woodbridge investors, including those with different types of interests, please sign below and return to me at your earliest convenience.

(Dec. ¶ 21; Ex. H.) To date, all but about 10 of Mr. Sarachek's clients have returned this additional waiver, and all of the remaining approximately 10 remaining clients have indicated

that they agree to provide the additional waiver and are in the process of signing and returning the waiver. (Dec. ¶ 22.)

ARGUMENT

I. The Legal Standards

Disqualification is an "extreme remedy" that deprives litigants of the right "to retain the counsel of [their] choice" and deprives attorneys of the freedom "to practice without excessive restrictions." *Jackson v. Rohm & Haas Co.*, 366 F. App'x 342, 347 (3d Cir. 2010) (citation omitted). Accordingly, it is "disfavored, and the Court approaches motions to disqualify counsel with 'cautious scrutiny.'" *Regalo Int'l, LLC v. Munchkin, Inc.*, 211 F. Supp. 3d 682, 687 (D. Del. 2016) (citations omitted) (denying disqualification). The movant has "the burden to demonstrate that continued representation would be impermissible." *Id.* (citations omitted).

Disqualification is designed to protect a client's interest in conflict-free representation. As a result, the proper party to seek disqualification is usually either the current or former client. *In re Revstone Industries, LLC*, 551 B.R. 745, 748 (D. Del. 2015) (finding that a nonclient did not have standing to seek disqualification).

II. The Committee Does Not Have Standing To Seek Disqualification.

The Committee does not have standing because it is not Mr. Sarachek's client or former client. Ordinarily, only a current or former client has standing to seek disqualification of an attorney from a matter pending before a court.[3] *In re Revstone Industries*, 551 B.R. at 748; *see also In re Yarn Processing Patent Validity Litig.*, 530 F.2d 83, 88-89 (5th Cir. 1976) (collecting cases); *Tizes v. Curico*, No. 94 C 7657, 1997 WL 116797, at *2 (N.D. Ill. Mar. 12, 1997). This

[3] Although a non-client may have standing to seek disqualification in certain extreme circumstances calling into question the fair administration of justice, the Committee has made no attempt to argue that such circumstances are present here, and they are not. *See In re Revstone Industries*, 551 B.R. at 748.

rule draws its strength from the logic of the Rule itself, which is designed to protect the interests of those harmed by conflicting representations rather than serve as a weapon in the arsenal of a party opponent. Thus, "the proper party to raise the conflict of interest issue, in a motion to disqualify counsel, is the party that [Rule 1.7] was intended to protect—the client or the former client." *Tizes*, 1997 WL 116797, at *2 (alteration in original) (citation omitted). Here, the Committee has not identified any theory under which it has authority to make its motion; it is not a current or former client; and it is taking a position that deprives Mr. Sarachek's clients of the right to select their counsel of choice. Accordingly, the Committee's motion should be denied.

III. The Committee Waived Any Argument For Disqualification.

The Motion should also be denied because it was unreasonably delayed and is a tactical attempt to prejudice Mr. Sarachek's clients by disqualifying the messenger rather than simply addressing the message. "A court should only reluctantly order disqualification because of the immediate adverse effect on the client of separating him from counsel of his choice. Such motions for disqualification are often made for tactical reasons, and even when made in the best of faith, inevitably cause delay." *Nemours Found. v. Gilbane, Aetna, Fed. Ins. Co.*, 632 F. Supp. 418, 431 (D. Del. 1986) (citation omitted). Judges in this court routinely deny motions for disqualification where the party did not bring the motion to disqualify until months after learning of the alleged conflict. *In re Kaiser Grp. Int'l, Inc.*, 272 B.R. 846, 852 (Bankr. D. Del. 2002) (denying a motion to disqualify because of a five-month delay in seeking disqualification); *In re Muma Servs., Inc.*, 286 B.R. 583, 589 (Bankr. D. Del. 2002) (denying a motion to disqualify because of a one-year delay); *accord Conley v. Chaffinch*, 431 F. Supp. 2d 494, 499-500 (D. Del. 2006) (denying a motion to disqualify because of a nine-month delay). Disqualification motions should be denied in these circumstances in the interest of "fairness and judicial economy."

Conley, 431 F. Supp. 2d at 500. For example, the District Court for this District denied a disqualification motion that was brought after the attorney "invested much time and effort" in the case, and where "the trial date [was] imminent." *Id.*

Mr. Sarachek filed his first appearances in this case eight months ago. The Committee immediately began opposing his involvement. The Committee sent an email urging Sarachek to cancel the meeting in an attempt to prevent him from meeting with creditors in February, sought discovery regarding his pro hac vice admission in March, and entered into a stipulation regarding his representation in May. (Dec. ¶¶ 6, 13-14.) Mr. Sarachek disclosed extensive client lists in June and August. The Committee has been aware of any potential conflict, as well as the language of the consents in Mr. Sarachek's and Mr. Rose's engagement letters, for the entire time, and Committee counsel even detailed his view of issue in an email to one of Mr. Sarachek's clients in July. If the Committee truly believed that Mr. Sarachek was conflicted and that the consents he obtained were inadequate, it has had ample opportunity to bring that matter to the Court's attention. It failed to do so until after eight months of work, on the eve of the plan confirmation hearing.

Further, disqualifying Mr. Sarachek will inevitably delay the case. Disqualification of Mr. Sarachek on the same day as the confirmation hearing would strand his clients, who have objected to confirmation. If Mr. Sarachek is disqualified, Delaware co-counsel Rosner Law Group would likely be subject to the same issues; they would not be able to proceed either. Basic due process would require a continuance of the confirmation hearing so they could have an opportunity to retain new counsel. That process will delay the proceedings considerably. Mr. Sarachek represents approximately 270 clients here. Each of them will have to interview and

obtain new counsel. The delay and gamesmanship of filing this Motion on the eve of a significant hearing are further reasons to deny the Motion.

IV. Mr. Sarachek's Clients Have Consented To His Representation After Repeated And Complete Disclosures.

Finally, any conflict among Mr. Sarachek's clients was waivable, and they have provided informed consent to the concurrent representation. ABA Model Rule 1.7 provides that if a lawyer's representation involves a concurrent conflict of interest, the representation may nevertheless proceed 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.

ABA Model Rule 1.7(b). Each of these four conditions is satisfied here.

First, Mr. Sarachek reasonably believes that he can provide competent and diligent representation to all of his clients. (Dec. ¶ 23.)

Second, the representation is not otherwise prohibited by law. Attorneys may properly represent multiple classes of bankruptcy creditors after obtaining informed consent from their clients. *See, e.g.*, William L. Norton Jr., *Representation of Multiple Creditors*, 9 Norton Bankr. L. & Prac. 3d § 172:22 (2018) ("one creditor can object to its current or former counsel's appearance for another creditor and obtain an order of disqualification if there is an ***unwaived*** conflict of interest") (emphasis added); William I. Kohn et al., *Deciphering Conflicts of Interest in Bankruptcy Representation: An Update* 105 Com. L.J. 95, 149 and Tables V.A.5-6 and

VI.A.5-6 (2000) (concurrent representation of secured and unsecured creditors other than the Creditors' Committee is permissible but "may require disclosure and consent").

Third, none of Mr. Sarachek's clients are asserting claims directly against each other in the same litigation. *See* ABA Model R. Prof'l Conduct 1.7(b)(2-3). Creditors competing for the "same pool of assets . . . may have adverse positions, but not direct adversity in the sense of a contest"—for example, bankruptcy creditors are rarely in the position of "one creditor suing another or seeking relief against another." Michael P. Richman, *Multiple Clients in Bankruptcy Cases: When Do You Need Consent?*, 21 Mar. Am. Bankr. Inst. J. 14 14 (2002).

Fourth, the clients provided informed consent, confirmed in writing. "'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." ABA Model Rule 1.0(e). "The language of the agreement is a primary source for determining whether or not a particular client's consent is informed." *In re Fisker Auto. Holdings, Inc.*, No. CV 13-2100-DBS-SRF, 2018 WL 3991470, at *3 (D. Del. Aug. 20, 2018) (citation omitted). Mr. Sarachek and Mr. Rose obtained informed consent from their clients more than once, fully satisfying the standards of Rule 1.7. The waivers identified a course of conduct: "we Represent, and may be retained by, other investors in the Woodbridge Group of Companies, LLC case(s) and that We intend to jointly litigate the claims of such other clients together with Your claims." (Ex. A; *see also* Ex. H; Ex. C.) This language adequately "identifies a course of conduct for the parties." *In re Fisker Auto. Holdings.*, 2018 WL 3991470, at *3-*4 (statement that "[firm] can continue to represent, or can in the future represent, existing or new clients in any matter. . . so long as the Other

Matters are not sufficiently related to our work for you" adequately described the course of conduct).

The waivers also explain the potential risks to the clients. For example, Mr. Rose's engagement letter explained that "if members of the Group have claims against the same assets and the success of one member impacts the other member's rights to some or that member's entire share of the assets, a conflict can arise." (Ex. C.) Mr. Sarachek advised his clients that:

> [S]uccessful litigation on behalf of secured noteholders might result in a lower recovery for mezzanine noteholders and unit holders, who might benefit by a higher recovery if the mortgages securing the secured notes were held to be invalid or unenforceable.

(Ex. H.) This language exceeds the threshold to "adequately explain[] the material risk." *In re Fisker Auto. Holdings,,* 2018 WL 3991470, at *3-*4 (statement that firm "can continue to represent, or can in the future represent, existing or new clients in any matter … even if those clients' interests are adverse to you …." adequately explained risk).

Finally, the waivers identify for the clients reasonably viable alternate courses of conduct. For example, Mr. Rose's engagement letter states: "Alternatively, we will assist you in securing conflicts or other counsel in the event you want us to advance a position that would be materially disadvantageous to another member of the Group." (Ex. C; *accord* Ex. H (reminding clients of "right to seek independent legal counsel").) This language adequately "identifies reasonably available alternatives to the proposed course of conduct." *In re Fisker Auto. Holdings*, 2018 WL 3991470, at *4 (statement that "you consent to our resignation from our representation of you, and agree to support a motion … to withdraw" adequately identified a reasonable alternative). Each component of informed consent has been satisfied. *See* ABA Model R. Prof'l Conduct 1.0(e).

The record shows all of Mr. Sarachek's clients have provided informed consent for his representation of multiple classes of creditors in this bankruptcy. None of Mr. Sarachek's clients are seeking to undo this waiver and disqualify him. Instead, the Committee seeks to interfere in the Mr. Sarachek's client relationships and prevent him from representing his clients at the upcoming Confirmation Hearing to squelch the arguments Mr. Sarachek advances on behalf of his clients. The Court should reject this strategic conduct and deny the Committee's motion.

CONCLUSION

For all of these reasons, the Court should deny the Committee's motion to revoke pro hac vice admission.

Dated: October 17, 2018
Wilmington, Delaware

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