IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 7
	)	
DECADE. S.A.C., LLC, et. al.,	)	
	)	Case No. 18-11668 (CSS)
Debtors.	)	(Jointly Administered)
	)	
DAVID W. CARICKHOFF., solely in his capacity as chapter 7 trustee for the estates of DECADE, S.A.C., LLC., et al.,	)	
	)	
Plaintiff,	)	
v.	)	Adv. Proc. No.: 19-50095 (CSS)
	)	
AARON GOODWIN, AND ERIC GOODWN,	)	
	)	**Related D.I. 76, 81, 225 and Adv. D.I. 272**
Defendants.	)	

MEMORANDUM ORDER

WHEREAS, before the Court is the Order on Rule to Show Cause, issued on January 4, 2022 (D.I. 282; Adv. D.I. 272) (the "Order to Show Cause"), the Trustee's Response to the Court's January 4, 2022 Order on Rule to Show Cause, filed on January 18, 2022 (Adv. D.I. 277), the Goodwin's Response to the Trustee's Brief with Respect to the Order on Rule to Show Cause, filed on February 1, 2022 (Adv. D.I. 280), along with the Declaration of Keith W. Miller in Support of the Goodwins' Response to the Trustee's Brief with Respect to the Order on Rule to Show Cause (Adv. D.I. 281); the Trustee's Reply in Support of His Response to the Court's January 4, 2022 Order on Rule to Show Cause, filed on February 8, 2022 (Adv. D.I. 282), along with the Declaration of Patrick E. Fitzmaurice in Support of the Trustee's Reply in Support of His Response to the Court's

January 4, 2022 Order on Rule to Show Cause (Adv. D.I. 283) (the "Fitzmaurice Declaration"); and XXIII Capital Limited's ("23 Capital") Response to the Court's January 4, 2022 Order on Rule to Show Cause, filed on February 8, 2022 (D.I. 284); and the Court having held a status conference on the Order to Show Cause on February 11, 2022 (the "Status Conference"); and the Court having held an evidentiary hearing on February 16, 2022 (the "Hearing"); and notice of the Order to Show Cause having been adequate under the circumstances; and no further notice need be provided; and the Court having determined that the facts and circumstances have developed warranting the Court's review of Special Counsel's role in these cases; and after due deliberation and sufficient cause appearing therefor, and the Court having expressly reserved its right and retained its jurisdiction over any and all matters arising from the orders discussed herein[1]

THE COURT HEREBY FINDS, HOLDS, JUDGES and DECREES AS FOLLOWS:

A. Background

1. On July 16, 2018 (the "Petition Date"), Decade S.A.C., LLC (the "Debtor"), and its parent entity, Gotham S&E Holdings, LLC ("Gotham"), each filed a voluntary petition for relief under chapter 7 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware (the "Court"). Both chapter 7 cases are currently pending before the Court but have not been consolidated for procedural purposes at this time.

[1] D.I. 76 at ¶ 6; D.I. 81 ¶ 8; and D.I. 225 at ¶ 8.

2. On July 17, 2018, David W. Carickhoff, the chapter 7 trustee (the "Trustee") of the Debtors' estates, was appointed as chapter 7 trustee of the Debtor's estate (the "Estate"), pursuant to section 701(a) of the Bankruptcy Code.

3. Prior to the Petition Date, the Debtor and certain of its non-debtor subsidiaries acquired certain sports and marketing agencies and/or receivables owing to such agencies. The primary assets acquired appear to be revenue streams associated with commissions and other amounts owed to the sports and marketing agencies, including Goodwin Associates Management Enterprises, Inc. ("GAME"), purchased from Aaron Goodwin; and Goodwin Sports Management, Inc. ("GSM" and together with GAME, the "Goodwin Entities"), purchased from Aaron Goodwin's brother, Eric Goodwin.

4. 23 Capital is a lender from which Decade sought financing for its potential purchase of the Goodwin Entities.[2]

B. Stipulation Between the Trustee and 23 Capital

5. On October 15, 2018, the Trustee filed a Motion for Approval of Stipulation ("Stipulation") by and between 23 Capital and 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 (the "Motion to Approve Compromise").[3]

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[2] Undefined terms used herein have the meaning set forth in the Findings of Fact and Conclusions of Law. Adv. D.I. 270.

[3] D.I. 61.

6. On November 5, 2018, the Court approved the Motion to Approve Compromise.[4]

7. Among other things, the Stipulation between the Trustee and 23 Capital designated Ashby & Geddes, P.A. ("Ashby") and Troutman Sanders, LLP as Special Counsel for the purpose of "investigat[ing] and prosecut[ing] certain claims … on behalf of the Debtors' Estates,"[5] and states that, "for the avoidance of doubt," the "Professionals … shall take their direction from the Trustee."[6] Pillsbury Winthrop Shaw Pittman LLP ("Pillbury Winthrop") was subsequently substituted for Troutman Sanders LLP.[7] Pillsbury Winthrop together with Ashby is collectively referred to herein as "Special Counsel." Special Counsel was retained pursuant to 11 U.S.C. 327(a) and 328.[8]

8. The Stipulation provides,

> 23 Capital shall be primarily responsible for all fees and costs incurred by Special Counsel … in connection with the investigation and prosecution of the Claims[9] …. The Professionals[10] shall not be required to file any fee applications with the Court or disclose any fee and/or expense detail to the Office of the United States Trustee.[11]

9. Notwithstanding the language in ¶ 4 of the Stipulation requiring Professionals to take direction from the Trustee, the Stipulation prevents the Trustee

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[4] D.I. 76

[5] *Id.* at Exh. 1, ¶ 3.

[6] *Id.* at ¶ 4.

[7] *See* D.I. 222 and 225.

[8] *See* D.I. 81 at ¶ 2 and 225 at ¶ 2.

[9] D.I. 76 at ¶ 5.

[10] *See id.* at ¶ 6.

[11] *Id.*

himself from accepting, "without 23 Capital's written consent, any settlement of less than an amount that has been agreed by the parties but remains confidential."[12]

10. Furthermore, the Stipulation granted 23 Capital "an allowed secured claim in the amount of $25,000,000,"[13] secured by all its collateral, including claims prosecuted by Special Counsel,[14] and released any claims the Debtors' estates may have against 23 Capital.[15]

C. Litigation between the Trustee and the Goodwins

11. On January 23, 2019, two-and-a-half months after the Court approved the Motion to Approve Compromise, the Trustee filed a Complaint against Aaron, Eric, and Regina Goodwin,[16] for Declaratory Judgment Determining Property of the Debtors' Estates.[17] Special Counsel, solely on behalf of the Trustee, filed the Complaint.[18]

12. On January 29, 2021, the Court entered a Summary Judgment Opinion[19] and Order[20] in response to the Trustee's motion for summary judgment, which granted the Trustee's motion for summary judgment and held that the Goodwins' counterclaims

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[12] *Id.* at ¶ 12 (referred to herein as the "23 Capital Veto").

[13] *Id.* at ¶ 8.

[14] *Id.*

[15] *Id.* at ¶ 9.

[16] On October 12, 2021, the Court ordered the immediate dismissal, with prejudice, of all claims against Regina Goodwin. *See* Adv D.I. 230.

[17] D.I. 107; Adv. D.I. 1.

[18] *Id.* at p. 1 (Introductory Paragraph) and ¶¶ 6-8.

[19] Adv. D.I. 132.

[20] Adv. D.I. 133.

of fraud (including fraud in the execution, fraudulent misrepresentation, and fraudulent inducement) were disallowed as a matter of law.

13. The Court conducted a trial on the remaining issues in the Trustee's Complaint on October 12, 13, 14, 15, 26, and 28, 2021.

14. During the trial, it became clear that the Court made an error in granting the Trustee's motion for summary judgment. The Court immediately vacated its Summary Judgment Opinion and Order and denied the Trustee's motion for summary judgment.[21] The remainder of the trial included evidence of the Goodwins' fraud counterclaims.

15. Following trial, on December 27, 2021, the Court entered its Findings of Fact and Conclusions of Law.

16. In sum, the Court found in favor of the Goodwins on their counterclaims for fraud in the execution, fraudulent misrepresentation, and fraudulent inducement, and against the Trustee on his claim for declaratory judgment.[22]

17. In so ruling, the Court specifically found that neither 23 Capital nor its attorneys ever communicated with the Goodwins prior to the closing of the Goodwin Entities share purchase transaction, despite believing that it was "important to convene … with each of the acquisition parties … so that everyone knew what was going on,"[23] and despite making substantive changes to the share purchase agreement (the "SPA"),

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[21] Adv. D.I. 232.

[22] Adv. D.I. 271.

[23] Adv. D.I. 270 at ¶ 87.

which were unacceptable to the Goodwins.[24] In fact, the Court found that "[n]either 23 Capital nor Decade nor any other person or entity relayed the SPA Edits to the Goodwins prior to the closing of the SPA,"[25] and that the Goodwins "never accepted the SPA Edits."[26] The Court further found that, "[h]ad the Goodwins been advised of the SPA Edits prior to the closing of the SPA, they would not have agreed to a transaction on those terms."[27]

18. Also, because the Goodwins "were not invited to the in-person closings,"[28] at which, among others, 23 Capital's principals and their attorneys were present, they were not provided with "a version of the Employment Agreements executed by

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[24] *Id.* at ¶¶ 90-91; ¶¶ 103-105.

[25] *Id.* at ¶ 110 ("Neither 23 Capital nor Decade nor any other person or entity relayed the SPA Edits to the Goodwins prior to the closing of the SPA. . . ." (citations omitted)).

[26] *Id.* at ¶ 111 ("The Goodwins never accepted the SPA Edits . . . ." (citations omitted)); *see also* ¶ 126 ("From February 9, 2016 through and including February 11, 2016, Aaron Goodwin repeatedly advised Mr. Aden, Mr. James, and Mr. Mulrain—via emails, text messages, and phone calls—that Sections 27 and 28 were unacceptable to the Goodwins and demanded that they be stricken from the Employment Agreements in their entirety." (citations omitted)); ¶ 132 (The following day, on February 11, 2016, Aaron Goodwin reiterated, via text messages, phone calls, and emails to Mr. Aden and Mr. Mulrain, that the Employment Agreements remained unacceptable to the Goodwins and that the Goodwins would not agree to the Employment Agreements unless Sections 27 and 28 were removed in their entirety." (citations omitted)).

[27] *Id.* at ¶ 112 ("Had the Goodwins been advised of the SPA Edits prior to the closing of the SPA, they would not have agreed to a transaction on those terms. . . ." (citations omitted)); *see also* ¶ 119 ("In response to Aaron Goodwin's inquiry regarding the terms of the share purchase transaction, Mr. Aden intentionally concealed from Aaron Goodwin the revised share purchase agreement. Instead, Mr. Aden responded, "From 11/2/2015," and forwarded to Aaron Goodwin an email Mr. Aden had sent him on November 4, 2015, reattaching the updated letter of intent dated November 1, 2015, that was substantively identical to the Executed LOI except that it identified the Goodwin Entities' purchaser as "Gotham S&E, LLC/Decade S.A.C., LLC." (citation omitted)); ¶ 145 ("At some point between February 12 and February 22, 2016, Mr. Aden or another agent of Decade affixed the Goodwins' signature pages from the February 12, 2016 fax transmittal to a version of the Employment Agreements that contained Sections 27 and 28, to which the Goodwins had objected and never agreed." (citations omitted)).

[28] *Id.* at ¶ 153.

Decade,"[29] "an executed version of any promissory note to which they were entitled to payments,"[30] nor "an executed version of any guaranty of payments."[31]

19. For the reasons mentioned above as well as those detailed in the Court's Findings of Fact and Conclusions of Law, the Goodwins were defrauded by entering into a transaction which contained terms they specifically opposed, and others which were intentionally concealed.[32]

20. As set forth above and in the Findings of Fact and Conclusions of Law, 23 Capital is implicated in the counts of fraud. 23 Capital insisted that the Goodwins' Employment Contracts contain various provisions,[33] 23 Capital was at the closing of the SPA,[34] and 23 Capital reached out directly to Aaron Goodwin concerning the lock-box payments.[35] Although the Court did not make any findings that 23 Capital's actions were fraudulent, 23 Capital was working hand-in-hand with the fraudulent actors.

D. Conflict Between the Trustee and 23 Capital

21. Since the Stipulation and through this litigation, Special Counsel has represented *both* 23 Capital and the Trustee. Pursuant to the Stipulation, *as modified by the*

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[29] *Id.* at ¶ 155; *see also* ¶ 128 ("Aaron Goodwin explained to Mr. Aden that 23 Capital's attorneys were not authorized to make edits to any agreement between Decade and the Goodwins." (citations omitted)).

[30] *Id.* at ¶ 156.

[31] *Id.* at ¶ 158.

[32] *Id.* at ¶¶ 246-336.

[33] *Id.* at ¶¶ 103-106; *see also* ¶ 110 ("Neither 23 Capital nor Decade nor any other person or entity relayed the SPA Edits to the Goodwins prior to the closing of the SPA . . . " (citations omitted)).

[34] *Id.* at ¶ 152 ("At some point between February 12 and February 22, 2016, Decade's principals, 23 Capital's principals, and the transactional attorneys from Gordon Rees and Loeb attended two in-person closings of the Goodwin Entities share purchase transaction . . ." (citations omitted)).

[35] *Id.* at ¶¶ 189-197.

parties, and in the Retention Order, 23 Capital can only seek reimbursement of Special Counsel's fees if Special Counsel has recovered more than $20 million for the Estates.[36] Furthermore, 23 Capital has a "veto" right over a settlement under a certain amount with the Goodwins (the "23 Capital Veto").[37] Although Special Counsel filed the Complaint in the above-captioned adversary and litigated this matter before the Court, when the Trustee and 23 Capital decided to renegotiate the threshold settlement amount for the 23 Capital Veto[38] (at which time the Trustee's and 23 Capital's interests were not aligned

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[36] *See* Adv. D.I. 282 p. 2. ("It is also the case here that modification of Special Counsel's fee arrangement is not appropriate because Special Counsel has not received a single penny of estate funds; all of Special Counsel's fees and costs have been borne by 23 Capital (or XL Bermuda, Ltd., it's insurer), which has even made a non-refundable payment of $75,000 to the Estates to assist with estate administration. And, as provided in the Stipulation, as modified by the parties, and in the Retention Order, 23 Capital can only seek reimbursement of Special Counsel's fees if Special Counsel has recovered more than $20 million for the Estates.").

[37] D.I. 61 (Stipulation at ¶ 12 ("The Trustee shall not accept, without 23 Capital's written consent, any settlement of the Claims of less than an amount that has been agreed by the parties but remains confidential.").

[38] Adv. D.I. 292 (Tr. Hr'g Feb. 11, 2022; 8:8-14) ("The parties have renegotiated that provision, sort of downwards, right, to give the trustee substantially greater flexibility in settle -- in negotiating -- in accepting settlements. It is -- the present negotiation between the parties is not that the trustee has sort of full discretion, but that the level is much lower than it was.").

The Court notes that a Court approved Stipulation was purportedly modified *without* further Court approval and without an amended or revised stipulation, which contradicts the very terms of the Stipulation approved by the Court. *Compare* D.I. 61 (Stipulation at ¶ 16 ("Entire Agreement. This Stipulation constitutes the entire agreement between the Parties with respect to the subject matter hereof and supersedes all prior and contemporaneous oral and written agreement and discussions. This Stipulation may not be modified, amended or terminated except by an instrument in writing signed by an authorized representative of each of the respective Parties.")) *with* Adv. D.I. 277 at p. 15-16 ("Following entry of the Court's [Order to Show Cause], the Trustee and 23 Capital have agreed to modifications to the Stipulation to the benefit of the Estates. Specifically, the Trustee and 23 Capital have modified the Stipulation as follows . . . ") *with* Adv. D.I. 283 (Fitzmaurice Declaration at ¶ 12 ("Regardless, the Trustee and 23 Capital have agreed to modify the agreement between them to provide the Trustee with additional settlement leeway.")).

and became adverse) Mr. Fitzmaurice negotiated with the Trustee's bankruptcy counsel, Mr. Alan Root, while still representing the Trustee as Special Counsel.[39]

22. At the time of the Stipulation, the interests of 23 Capital and the Trustee appeared aligned.[40] But, as key terms of the Stipulation have been renegotiated, and 23

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[39] As discussed at the Status Conference:

> THE COURT: Are you representing both, 23 Capital and the trustee, and negotiating with yourself?
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> MR. FITZMAURICE: No, I'm not, Your Honor.
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> THE COURT: They have independent counsel?
>
> MR. FITZMAURICE: I'm representing 23 Capital and speaking with Mr. Root and Mr. Carickhoff, for the trustee.
>
> THE COURT: You're negotiating with Mr. Root and Mr. Carickhoff?
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> MR. FITZMAURICE: I'm sorry, Your Honor cut out for a second.
>
> THE COURT: I'm just trying to figure it out. So, you are negotiating with the trustee on behalf of 23 Capital (audio interference) going to be.
>
> MR. FITZMAURICE: So, again, Your Honor, the sound comes in and out, but I think I understand the question, so I'm going to say it back to make sure that I've got it right. Your Honor is asking whether I am speaking with Mr. Root and Mr. Carickhoff, where I am talking on behalf of 23 Capital and they are obviously talking on behalf of Mr. Carickhoff and Mr. Carickhoff for himself; if that's Your Honor's question, the answer is yes.

Adv. D.I. 292 (Tr. Hr'g Feb. 11, 2022; 8:25-9:20).

[40] *But see* Mr. Fitzmaurice's statements about the mediation between the Trustee and the Goodwins:

> prior to the mediation, the Trustee submitted a mediation submission to Magistrate Judge Peck indicating what he thought an appropriate range for mediation discussions would be and, consistent with the Stipulation between the Trustee and 23 Capital, the Trustee had the requisite authority to agree to a settlement within that range. It is also the case that representatives of 23 Capital and XL Bermuda were available by telephone throughout the mediation session. Unfortunately, the parties' settlement discussions never approached the settlement range that the Trustee and 23 Capital thought reasonable.

Fitzmaurice Declaration at ¶ 14. Mr. Fitzmaurice was at the mediation on behalf of the Trustee – how does the Trustee disagree and pursue a settlement when Mr. Fitzmaurice has to call his other client for approval and potential veto? Does Mr. Fitzmaurice strong-arm the Trustee into pursuing a higher amount to the benefit of his other client? Has the Trustee always been aligned with 23 Capital regarding the settlement amount? We will never know, because at some point, Mr. Fitzmaurice had to negotiate on the Trustee's behalf and then call his other client who could veto the proposed settlement amount.

Capital's improper behavior in connection with the Goodwin Entities Transaction has come to light, Special Counsel cannot, on one hand, represent the Trust, and then, on the other hand, negotiate *against* the Trust as counsel to 23 Capital. The interests of the Trust and 23 Capital have diverged, and a conflict has arisen from representing *both* 23 Capital and the Trust.

23. "An analysis of the issue of employment of bankruptcy counsel must begin with the premise that debtors should be free to select counsel of their choice."[41] However, this "general principal [*sic*] is tempered by ethical restraints placed upon attorneys by the [Model] Rules and the Code."[42] It is "controlled by statutory restrictions contained in the Bankruptcy Code which prohibit the attorney from representing an interest materially adverse to the estate."[43]

24. To that end, "the ethical requirement that an attorney be free of conflicting interests in representing a client … is central to Section 327 of the Code governing retention of professionals to represent a debtor's estate."[44]

25. Pursuant to 11 U.S.C § 327(a), only disinterested persons, who do not hold or represent interests adverse to the estate, may "represent or assist the trustee in carrying out the trustee's duties" with court approval. Notwithstanding same, 11 U.S.C. § 327(c) provides that, "a person is not disqualified for employment … solely because of such

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[41] *In re 7677 East Berry Ave. Assocs., L.P.*, 419 B.R. 833, 840 (Bankr. D. Colo. 2009).

[42] *Id*. (internal citations and quotations omitted).

[43] *Id.*

[44] *In re Mercury*, 280 B.R. 35, 53 (S.D.N.Y. 2002).

person's employment by or representation of a creditor…." However, the court "shall" disapprove such employment if there is an "actual conflict" of interest upon an "objection by another creditor or the United States trustee."[45]

26. "Assuming § 327(c) requires an objection from a creditor or from the U.S. trustee before the court can examine conflicts arising from simultaneous representation of a creditor … § 327(a) does not include similar language."[46] Also, where the "Bankruptcy Code provides for the raising of an issue by "a party in interest," such provision shall not be construed to preclude the court from, *sua sponte*, taking any action or making any determination necessary or appropriate to … prevent an abuse of process."[47] Accordingly, the Court may consider the issue of whether Special Counsel has a disqualifying conflict of interest *sua sponte* and independent of the issue of whether the terms of Special Counsel's employment were improvident at the time the parties entered into the Stipulation under 11 U.S.C. § 328(a).[48]

27. The Third Circuit, in interpreting 11 U.S.C. § 327(a) and (c), has held that:

> Section 327(a), as well as § 327(c), imposes a *per se* disqualification of trustee's counsel of any attorney who has

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[45] 11 U.S.C. § 327(c).

[46] *In re Interwest Bus. Equip.*, 23 F.3d 311, 317 (10th Cir. 1994) (declining to conclude that 11 U.S.C. § 327(c) requires an objection from a creditor or the U.S. trustee before the court can examine conflicts and, instead, discussing how bankruptcy judges are given the "responsibility and power to oversee professionals involved in a bankruptcy case without any requirement that the issues be raised by a party in interest.").

[47] *Id.* (quoting 11 U.S.C. § 105).

[48] However, 11 U.S.C. § 327(a) and § 328(c) work in conjunction with one another. Pursuant to 11 U.S.C. § 328(c), "the court may deny allowance of compensation for services and reimbursement of expenses of a professional person employed under section 327 … if, at any time during such professional person's employment under section 327 … such professional person is not a disinterested person, or represents or holds an interest adverse to the interest of the estate with respect to the matter on which such professional person is employed."

> an *actual* conflict of interest; 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 the district court may not disqualify an attorney on the appearance of conflict alone.[49]

28. "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."[50] On the other hand, where a conflict is "potential," the district court has "wide discretion in deciding whether to approve the appointment."[51]

29. In sum, "[h]aving to divide one's allegiance between two clients is what Section 327 attempts to prevent."[52] "Section 327(a) is plainly concerned with a professional's divided loyalties and ensuring that professionals employed by the estate have no conflicts of interest with the estate."[53] Moreover, the requirements of 11 U.S.C. § 327(a) are threshold requirements to be met in an application for employment of a professional person. Even if employment is permissible, the professional can be disqualified if the court finds joint representation creates an actual conflict."[54]

30. At the time this Court approved the Stipulation and Special Counsel's retention,[55] the Stipulation satisfied Fed. Bankr. R. 9019 by being "superior to the lowest

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[49] *In re Marvel Ent'mt*, 140 F.3d 463, 476 (3d Cir. 1998).

[50] *In re Pillowtex, Inc.*, 304 F.3d 246, (3d Cir. 2002).

[51] *Marvel Ent'mt*, 140 F.3d at 477.

[52] *In re Mercury*, 280 B.R. at 54 (internal citations and quotations omitted).

[53] *Id*. (internal citations and quotations omitted).

[54] *See Interwest Bus. Equip.*, 23 F.3d at 316.

[55] D.I. 81 and 225.

range of reasonableness," and Special Counsel and the Trustee's interests appeared aligned in light of the terms of their Stipulation.[56] Moreover, at that time, the Trustee had not yet filed a complaint (and, obviously, the Goodwins had not yet filed their answer and counterclaims), so, the Court was unaware as to any actual (or potential) conflicts between Special Counsel acting as counsel to the Trustee and as counsel for 23 Capital.[57] To the contrary, at the time the parties entered into the Stipulation, their negotiations had concluded and their interests appeared to be fully aligned, thereby eliminating any suggestion that Special Counsel represented interests adverse to the estate or was not disinterested.

31. However, the circumstances have changed. Due to the Court's vacatur of summary judgment on the second day of trial and subsequent findings of fraud after trial (including possible suspect behavior by 23 Capital), an actual conflict of interest with respect to Special Counsel's representation of both 23 Capital and the Trustee has materialized.

32. Specifically, this conflict became evident at the Status Conference, when the Court raised its concerns regarding 23 Capital's authority to veto any potential settlement

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[56] D.I. 211 ("Following the Bankruptcy Court's approval of the Settlement, any conflict between 23 Capital and the estates was resolved thus removing any impediments 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.").

[57] *In re Mercury*, 280 B.R. at 57 ("Section 327(a) acts prospectively by telling those professionals who fail to meet the substantive requirements for retention by the estate that they are disqualified from obtaining court approval, which is the prerequisite to such employment. Section 328(c) acts retrospectively by telling those professionals whose retention under § 327(a) was improper or who, during the case, failed to live up to the substantive requirements of § 327(a) on an ongoing basis while working for the estate that they might lose some or all compensation to which they might otherwise be entitled.").

between the Trustee and the Goodwins under a certain confidential amount. At that time, Special Counsel informed the Court that the veto amount was *currently* being re-negotiated, with Special Counsel representing the interests of 23 Capital in the negotiations.[58]

33. Thus, it is apparent that Special Counsel acting on behalf of the Trustee throughout this litigation, whilst also re-negotiating the Stipulation on behalf of 23 Capital, has created a situation where Special Counsel is in a position to favor one interest over another, thereby creating an actual, non-waivable conflict requiring Special Counsel's disqualification.[59]

34. To further exacerbate the Court's concerns, during the Hearing on the Order to Show Cause, Mr. Fitzmaurice testified that he represented the Trustee and 23 Capital in a declaratory judgment action against the Goodwins seeking a declaration that the Goodwin Entities Transaction was valid and not the product of fraud, *and* he was also in the process of negotiating tolling agreements on behalf of 23 Capital with the law firm that represented 23 Capital, Loeb & Loeb LLP ("Loeb & Loeb"), and the law firm that represented Decade's principals, Gordon Rees Scully Mansukhani, LLP ("Gordon Rees"), in connection with the Goodwin Entities Transaction.[60] Mr. Fitzmaurice informed the

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[58] *See supra* n. 39.

[59] Another clear example of this is in the pleadings related to the Court's Order to Show Cause. Mr. Fitzmaurice submitted pleadings on behalf of the Trustee (Adv. D.I. 277, 282, and 283) *and* 23 Capital (Adv. D.I. 284).

[60] Mr. Fitzmaurice's testimony at the Hearing is as follows:

> A XXIII Capital has separate claims against the Gordon Rees law firm and Loeb & Loeb.

Court that 23 Capital currently has, and is considering pursuing, claims against Loeb & Loeb and Gordon Reese in connection with the Goodwin Entities Transaction. This crystalizes the Court's belief that Mr. Fitzmaurice is 23 Capital's counsel and acting

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> BY MR. MILLER:
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> Q What are those claims?
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> A It has claims against Gordon Rees under -- in connection -- in connection with the trans -- in connection with the transaction. It has not filed or asserted any claims against Gordon Rees. XXIII Capital has entered into a tolling agreement with the firm.
>
> Q When was that tolling agreement entered into?
>
> A I don't recall.
>
> Q Was it before or after the trustee produced the two attachments to your declaration? I think they're Exhibits A and B [referring to DX 150 and DX 151].
>
> A I believe it was before, although I don't recall.

Adv. D.I. 295 (Tr. Hr'g Feb. 16, 2022, 29:3-17).

primarily for the benefit of 23 Capital.[61] Mr. Fitzmaurice is pursuing all the claims that 23 Capital may have because of the failure of the Goodwin Entities Transactions.[62]

35. Accordingly, Special Counsel is hereby disqualified from further representing the Trustee and 23 Capital in connection with this litigation.[63]

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[61] The Trustee's testimony made it clear at the Hearing that even the Trustee believed that Mr. Fitzmaurice was 23 Capital's attorneys and not his own Special Counsel. The Trustee's testimony at the Hearing is as follows:

> A Sure. You will recall from Mr. Fitzmaurice's testimony there is a modification agreement between 23 Capital and the estates with respect to the dollar threshold at which 23 Capital may seek reimbursement of any counsel fees that it paid for the estate. That is one piece. The other was with respect to the threshold for settlement authority. Those are the two specific things that are referenced there.
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> Q When did the parties agree to that modification?
>
> A To that modification, shortly after the order to show cause was issued by Judge Sontchi.
>
> Q Was there a conference call at which 23 Capital the trustee discussed these modifications?
>
> A There was a call with myself, and Mr. Root, and special counsel where we had discussed that, yes; potential changes.
>
> Q And who represented 23 Capital on the call?
>
> A I don't know that anybody represented 23 Capital on the call. It was me reaching out to special counsel saying there is an order to show cause that has been entered, let's see if we can improve on the stipulation.
>
> Q When you say reached out to special counsel who specifically did you reach out to?
>
> A Probably Mr. Fitzmaurice.
>
> Q And what did Mr. Fitzmaurice say?
>
> A I think he said I will talk to 23 Capital or something to that effect.
>
> Q What happened then?
>
> A 23 Capital came back and said this is what we are willing to do.
>
> Q Were there any further negotiations?
>
> A No, I don't believe there were.
>
> Q When 23 Capital came back was that a principal of 23 Capital who relayed the message to you?
>
> A No, it was not.

Q Who relayed that message to you?

A Mr. Fitzmaurice.

D.I. 295 (Tr. Hr'g Feb. 16, 2022, 88:4-89:13).

[62] The Court casts no aspersions to the Trustee for choosing this path. The Court is aware that the Trustee is in his own right a lawyer, and had his own, disinterested counsel. However, the offer by 23 Counsel to pursue these claims was probably "too good" to pass up. The Trustee was able to pursue claims it might not have otherwise had the funding to pursue and with counsel already familiar with the facts and circumstances. If the claims had been successful, the estates would have recovered millions of dollars which would have then been available for distribution to creditors. If not, the Debtors' estates would bear no responsibility in paying fees and costs which the estate did not and does not have. However, regardless of the Trustee's ability (as well as his own counsel's ability) to negotiate a settlement on behalf of the Trust, it does not excuse Mr. Fitzmaurice's conflict which the Court cannot allow to continue.

Nor does the Court fault Mr. Fitzmaurice for being an over-zealous advocate. In fact, the issue raised as to DX 150 and DX 151 does not form a basis for this ruling. The documents were produced, albeit late, but the adversary Defendants had the benefit of those documents, along with their own recollection and memory, in preparing their opposition to the Motion for Summary Judgment. Marking DX 150 and DX 151 as privileged was improper but was eventually corrected. The Defendants and the Court both relied on these documents in forming arguments and the Findings of Fact and Conclusions of Law, as justice so required.

[63] Although not necessary for the purposes of this ruling, this ruling is consistent with the Model Code of Pro. Conduct R. 1.7 (Am. Bar Ass'n 2002), which states:

> (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.

THE COURT HEREBY ORDERS AS FOLLOWS:

36. Approval of the Stipulation (D.I. 76), and the Orders retaining Special Counsel (D.I. 81 and 225), are **VACATED WITH PREJUDICE** as of the entry of this Order.

37. Special Counsel must file fee applications with the Court, retroactive to the date of the Retention Order, through the date of this Order, within twenty (20) days of the date of this Order for the Court's review under 11 U.S.C § 328(c). All fees and expenses already paid to Special Counsel that are not ultimately allowed by the Court, from whatever source, may be subject to disgorgement to the payor, as Special Counsel was representing the Trustee, the Court has never reviewed nor approved such fees and expenses, and such fees and expenses must be approved by the Court, pursuant to 11 U.S.C. § 328(c).

See Kaiser Grp. Int'l v. Nova Hut, a.s. (In re Kaiser Grp. Int'l, Inc.), 272 B.R. 846, 851 (Bankr. D. Del. 2002). This is a strict standard:

> As a general principle, professional persons employed by the trustee should be free of any conflicting interest which might in the view of the trustee or the bankruptcy court effect the performance of their services or which might impair the high degree of impartiality and detached judgment expected of them during the administration of the case.

In re Star Broad., Inc., 81 B.R. 835, 840 (Bankr. D.N.J. 1988) (*quoting Roger J. Au & Son, Inc. v. Aetna Ins. Co.*, 64 B.R. 600, 604 (N.D. Ohio 1986) (*quoting* 2 W. Collier, Collier on Bankruptcy ¶ 327.03.[3][a], at 327–13 (L. King ed. 1985))). Here, Special Counsel is in an impossible position of representing both the Trustee and 23 Capital, renegotiating the 23 Capital Veto, and, eventually, 23 Capital may pursue reimbursement of fees and expenses against the Trust. It would be impossible to be impartial or detached. Upon renegotiation of the Stipulation, all impartiality was lost. Thus, a non-waivable conflict has arisen which the Court cannot now ignore. Accordingly, Special Counsel can represent neither the Trustee nor 23 Capital. *See, e.g.*, *In re Star Broad., Inc.*, 81 B.R. at 44 (disqualifying law firm from representing two related debtors due to conflicts between the two entities).

38. The Court will convene a status conference on March 9, 2022 at 1:00 p.m. EST in this litigation to discuss, among other things, the trial currently scheduled to commence on April 4, 2022.

39. This Court retains jurisdiction in connection with this Order and all matters related thereto.

Christopher S. Sontchi
United States Bankruptcy Judge

Dated: February 17, 2022