IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
NNN 400 CAPITOL CENTER 16, LLC, *et al.*,	)	Case No. 16-12728 (JTD)
	)	(Jointly Administered)
Debtors.	)	
NNN 400 CAPITOL CENTER, LLC, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Adv. Pro. No. 18-50384 (JTD)
	)	
WELLS FARGO BANK, N.A., AS TRUSTEE FOR THE REGISTERED HOLDERS OF COMM 2006-C8 COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES; LNR PARTNERS, LLC, a Florida Limited Liability Company; BERKADIA COMMERCIAL MORTGAGE, LLC, a Delaware Limited Liability Corporation; LITTLE ROCK-400 WEST CAPITOL TRUST, a Delaware Statutory Trust; SOMERA ROAD, INC., a New York Corporation; and TACONIC CAPITAL ADVISORS, LP, a Delaware Limited Partnership.	)	
	)	
Defendants.	)	**Re D.I. No. 211**

MEMORANDUM ORDER

Before the Court is a Motion for a Rule to Show Cause filed by Little Rock – 400 West Capital Trust, Wells Fargo Bank, N.A., as Trustee for the Registered Holders of COMM 2006 C8 Commercial Mortgage Pass Through Certificates, Berkadia Commercial Mortgage, LLC, LNR Partners, LLC, Somera Road Inc., and Taconic Capital Advisors L.P. (collectively, the "Defendants"). (D.I. 211; the "Motion"). The Motion seeks an order for a rule to show cause why: 1) I. Mark Rubin and Guy Rubin (the "Rubins") and any related "Rubin & Rubin" law firm should not be disqualified from serving as special counsel; 2) the Retention Order should not be

revoked; 3) the Interim Fee Application Orders should not be revoked; 4) any compensation paid to Rubin & Rubin, P.A. or any other law firm or attorney based on the Interim Fee Application Orders should not be disgorged; 5) I. Mark Rubin should not be required to appear for a continued privilege deposition[1]; and 6) the Court should not grant any necessary and related relief.

On April 13, 2018, Plaintiffs initiated this adversary proceeding, which is currently in its discovery stage. On May 21, 2019, the Defendants took the deposition of I. Mark Rubin in an effort to determine the legitimacy of Plaintiffs' assertion of attorney-client privilege over numerous documents. During his deposition I. Mark Rubin testified that Rubin & Rubin, P.A was not an actual legal entity, but, rather, a "fictitious trade name".[2] This disclosure was brought to the Court's attention during a discovery dispute. Concerned about whether proper disclosure was made, the Court requested briefing on what, if any, impact this information had on the retention of Rubin & Rubin, P.A. The Defendants filed this Motion on July 1, 2019. Briefing was completed on July 18, 2019. (D.I. 212; D.I. 216; and D.I. 220) The Court heard oral argument on July 23, 2019 and took the matter under advisement.

Defendants seek an order disqualifying Rubin & Rubin, P.A. from the case and disgorgement of all fees paid to date. The Motion alleges numerous Rule 2014 disclosure violations related to the retention application of Rubin & Rubin, P.A. (D.I. 212). Among those alleged violations were the failure to disclose I. Mark Rubin's firm, (I. Mark Rubin, P.A.), Guy

[1] The requested relief regarding a continued deposition of I. Mark Rubin is not relevant here and can be raised, if necessary, in connection with a discovery motion.

[2] The State of Florida's "Fictitious Name" statute provides that a person may engage in business under a fictitious name if the name is properly registered with the Florida Division of Corporations. The statute further provides that a fictitious name can include the term "P.A." if the person or business for which the name is registered is organized as a professional corporation. Fla. Stat. § 865.09(3), (14). Although the fictitious name used in this case expired on December 31, 2015, the statute provides an exception for attorneys who are actively licensed to practice law and form a firm under a fictitious name, unless the fictitious name differs from that used in the law license application. Fla. Stat. § 865.09(7).

Rubin's firms, (Rubin Law Associates, P.A.) and (Guy Bennett Rubin, P.A.), as well as two attorneys associated with Rubin & Rubin, Michael Tessitore and William Li and their affiliated law firms. The Motion also alleges that Plaintiffs' counsel failed to disclose the fee sharing arrangement between the various attorneys and firms under the Rubin & Rubin umbrella.

On April 16, 2016, Plaintiffs/Debtors retained the firm Rubin & Rubin, P.A. to, among other things, advise them in evaluating and potentially restructuring of their tenants-in-common ownership interest in certain real property. On December 9, 2016, Debtors filed for relief under Chapter 11 of the Bankruptcy Code. Shortly thereafter, the Debtors filed their application to retain Rubin & Rubin, P.A. as special litigation counsel. The Court entered an order approving the retention of Rubin & Rubin, P.A. on March 1, 2017. The retention application and verified statement made no mention that Rubin & Rubin, P.A. was a fictitious trade name, nor did it identify any of the firms that operate under the Rubin & Rubin umbrella. The application also failed to disclose that two other attorneys, Messrs. Tessitore and Li, who would be working with Rubin & Rubin, were also associated with other law firms.[3] In fact, it was not until this Motion was brought that I. Mark Rubin supplemented his verified statement asserting that, in preparing for the retention application, Rubin & Rubin, P.A. performed conflict checks including I. Mark Rubin, P.A. and Rubin Law Associates, P.A., as well as Messrs. Tessitore and Li.

[3] Messrs. Tessitore and Li are both associated with other firms outside of the Rubin & Rubin umbrella. Mr. Tessitore is associated with the law firm Moran Kidd, and well as his own firm, The Tessitore Law Firm. Mr. Li is associated with the law firm Heekin Law.

Bankruptcy Rule 2014 is the mechanism by which the Court enforces the provisions of Bankruptcy Code section 327.[4] Rule 2014(a) requires, in relevant part, that:

> The application shall state the specific facts showing the necessity for the employment, name of the person to be employed, the reasons for the selection, the professional services to be rendered, any proposed arrangement for compensation, and, to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee.

Fed. R. Bankr. P. 2014(a). The disclosure mandated under Rule 2014 "goes to the heart of the integrity of the bankruptcy system". *In re B.E.S. Concrete Prods., Inc.*, 93 B.R. 228, 236 (Bankr. E.D. Cal. 1988). Therefore, disclosure under Rule 2014 is of the upmost importance, as it allows the bankruptcy court to make an informed decision on whether employment of the particular professional is in the best interest of the estate. *In re eToys, Inc.*, 331 B.R. 176, 189 (Bankr. D. Del. 2005) ("the duty to disclose under Bankruptcy Rule 2014 is considered sacrosanct because the complete and candid disclosure by an attorney seeking employment is indispensable to the court's discharge of its duty to assure the attorney's eligibility for employment"). Indeed, the professional must disclose all potential and actual connections, "not pick and choose which to disclose and which to ignore." *In re Universal Bldg. Products*, 486 B.R. 650, 663 (Bankr. D. Del. 2010).

At oral argument, the Rubins admitted to providing the court with "inaccurate information" in their application for retention. (Transcript of Hr'g; D.I. 240 at 18:9-10). Specifically, counsel admitted that the law firm "I. Mark Rubin, P.A." should have been disclosed, as well as Guy

[4] Under section 327(e), "the trustee, with the court's approval, may employ, for a specified 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." 11 U.S.C. 327(e).

Rubin's law firm, "Rubin Law Associates, P.A.". However, disclosure of those firms alone would not complete the necessary disclosures. It should also have been disclosed that Rubin & Rubin, P.A. is merely a fictitious trade name. In addition, disclosure should have included Messrs. Tessitore and Li, as well as the other firms with whom they associate.

The duty to disclose under Rule 2014 is so important that the failure to disclose is an independent ground for disqualification and/or disgorgement of fees. *In re Universal Bldg. Products,* 486 B.R. at 663. ("[f]ailure to disclose connections itself is enough to warrant disqualification of counsel from employment."); *In re Filene's Basement, Inc.* 239 B.R. 845 (Bankr. D. Mass. 1999) (false Rule 2014 disclosure alone justified disqualification). However, disqualification for failure to fully disclose under Rule 2014 is not required in all cases. The bankruptcy court's power to disqualify a professional derives from its inherent authority to supervise the professionals in proceedings before it, and the exercise of such authority is within the sound discretion of the bankruptcy court. *U.S. v. Miller*, 624 F.2d 1198, 1201 (3rd Cir. 1980); *Accord In re Leslie Fay Companies, Inc*. 175 B.R. 525, 663 (Bankr. S.D.N.Y. 1994) (declining to disqualify counsel but imposing economic sanctions for failure to adequately disclose).

Although it is clear that the disclosures filed in the retention of Rubin & Rubin, P.A. were defective, the Court finds that the facts here do not support disqualification. Disqualification would deprive the Plaintiffs of their chosen counsel, who have the most knowledge and understanding of the facts surrounding this adversary proceeding. Moreover, even if all of the information had been properly disclosed, the Court does not believe that the application for employment would have been denied. The Rubins have been practicing in the State of Florida under the fictitious Rubin & Rubin trade name for nearly 30 years. In Florida, it is legal to operate a law firm under a fictitious

name.[5] Further, it is not lost on the Court that the Rubins are not bankruptcy practitioners—and thus not accustomed to the stringent disclosure requirements mandated by the Bankruptcy Rules—and likely had no intent to deceive the court when they failed to adequately disclose the attorneys and entities that practice under the umbrella of Rubin & Rubin.

However, the negligent failure to disclose does not relieve the Rubins from the consequences of failing to make a fulsome and accurate disclosure. *In re Hathaway Ranch Partnership*, 116 B.R. 208, 219-220 (Bankr. C.D. Cal. 1990); see also *In re B.E.S Concrete Products, Inc.*, 93 B.R. at 237 ("Negligent omissions do not vitiate the failure to disclose."). While the Court is not willing to disqualify counsel, the Court does believe that economic sanctions, as outlined below, are warranted.

Defendants also assert that because Rubin & Rubin is a fictitious entity made up of separate law firms, the payment of fees to Rubin & Rubin constitutes impermissible fee sharing. Section 504 of the Bankruptcy Code provides, in relevant part, that a professional receiving compensation from estate assets shall not share or agree to share that compensation with another person, unless that person is a member, partner, or regular associate of the professional's firm. 11 U.S.C. § 504(a)-(b). The Rubins rely on *Lemonedes* and *Worldwide Direct* to argue that Guy Rubin, as well as Messrs. Tessitore and Li, merely acted in an "of counsel" relationship and should be considered as employees of the firm for purposes of sharing compensation under section 504. The *Lemonedes* case involved an attorney who was retained by a law firm to work on a case-by-case basis, each instance effectuated by a separate agreement. *Lemonedes v. Balaber-Strauss* (*In re* Coin Phones, Inc.), 226 B.R. 131, 132 (S.D.N.Y. 1998). *Worldwide Direct* involved a law firm hiring temporary employees through a staffing agency, where those employees were held to be regular associates

[5] *See supra* note 3

because the law firm directly supervised the attorneys and provided everything necessary to do the work. *In re Worldwide Direct Inc.*, 316 B.R. 637, 648 (Bankr. D. Del. 2004). Though informative, neither of these cases are directly on point.

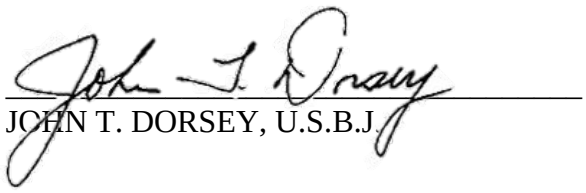
Given the unusual nature of the facts in this case, the Court is tasked with making a determination on the relationship between the attorneys and entities under the Rubin & Rubin umbrella. After a review of the record, the Court has determined that the primary attorneys operating under the umbrella are Guy Rubin and I. Mark Rubin, and their respective individually owned firms, Rubin Law Associates, P.A. and I. Mark. Rubin, P.A. Mr. Li works as an associate at I. Mark Rubin, P.A., and Mr. Tessitore appears to have an of counsel relationship with Rubin Law Associates, P.A.. While the firms operating under the Rubin & Rubin umbrella are two distinct legal entities, they share the same office space. Also, as a matter of longstanding practice, the two firms regularly represent themselves to the public as Rubin & Rubin, which is the name displayed outside of the office building. Furthermore, the record establishes that the fees shared on every case are based on the hours each put into the case, as opposed to a retainer or a referral fee. The Court concludes that the two firms operating as Rubin & Rubin are for all intents and purposes a partnership, with fee sharing among its partners, I. Mark Rubin, P.A. and Rubin Law Associates, P.A.. Thus, the Court finds no impermissible fee sharing arrangement.

For the reasons set forth above, the Motion is denied. The Court will, however, exercise its inherent authority to supervise the professionals appearing before it and impose certain sanctions on I. Mark Rubin and Guy Rubin. The Rubins will update the required disclosures to provide full and accurate information. No fees will be allowed for updating the disclosures, and any fees collected by the Rubins related to the initial disclosures must be disgorged. The Rubins will provided the Court with a sworn statement outlining the amount to be refunded to the Debtors

within five (5) business days after the entry of this order. Furthermore, I. Mark Rubin and Guy Rubin will pay the Defendants' attorneys' fees and costs in bringing this Motion. Defendants will provide a statement of fees and costs to the Court as well as the Rubins within five (5) business days after the entry of this order. The Rubins will have three (3) business days to either pay the fees and costs or file an objection contesting the amount. If the Court subsequently determines that any challenge to the Defendants' fees and costs was meritless, the Court will award further fees and costs to the Defendants for defending against the objection. Finally, the Court will not approve any fee application including a request for any fees or costs to the Rubins or Debtors' counsel in defending against this Motion.

SO ORDERED.

Dated: August 9, 2019



JOHN T. DORSEY, U.S.B.J.