IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 7
	)	
UNITED TAX GROUP, LLC,	)	Case No. 14-10486 (LSS)
	)	
Debtor.	)	Re: Docket No. 47

MEMORANDUM ORDER
DENYING MOTION TO DISMISS BANKRUPTCY CASE[1]

Before the Court is SWZ Financial II, LLC's ("SWZ") motion to dismiss the bankruptcy case of United Tax Group, LLC (the "Motion to Dismiss").[2] After considering the opposition filed by George L. Miller, the chapter 7 Trustee ("Trustee"),[3] the reply filed by SWZ,[4] the evidence and exhibits submitted at the June 23, 2016 hearing as well as arguments of counsel,[5] and after due consideration, the Court **DENIES** the Motion for the following reasons.

Background

1. Prior to the filing of the petition in this case, United Tax Group, Inc. (the "Debtor") was in the tax resolution business. Allerand LLC ("Allerand") is the Debtor's managing member and owns 100% of the capital interest and 90.01% of the profit interest in the Debtor. (D.I. 1-2.) Richard J. Sabella is the managing member of Allerand LLC and an authorized agent of the Debtor. (D.I. 1-1, 1-2.)

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[1] This Order constitutes the Court's findings of fact and conclusions of law as required by the Federal Rules of Bankruptcy Procedure. *See* Fed. R. Bankr. P. 7052 and 9014(c).
[2] *Interested Party SWZ Financial II, LLC's Motion for an Order Dismissing Chapter 7 Bankruptcy Case* (D.I. 47).
[3] *Objection of George L. Miller, Chapter 7 Trustee, to SWZ Financial II, LLC's Motion to Dismiss Case* (D.I. 60).
[4] *Reply to Objection of George L. Miller, Chapter 7 Trustee, to SWZ Financial II, LLC's Motion to Dismiss Case* (D.I. 70).
[5] *Transcript of June 23, 2016 Hearing* (D.I. 81) ("Transcript").

2. Pre-bankruptcy, on April 11, 2012, SWZ and Debtor entered into that certain $1,000,000 Term Credit Facility (the "Credit Agreement"). (Miller Ex. 19.) Mr. Sabella has a non-voting interest in SWZ.

3. Pursuant to the Credit Agreement, SWZ agreed to advance loans totaling up to $1 million with interest at the rate of 18% per annum. At closing on the loan, SWZ was obligated to advance $501,000. In connection with the execution of the Credit Agreement, a UCC-1 financing statement was filed with the Delaware Secretary of State. On November 19, 2013, SWZ instituted a foreclosure action in the Circuit Civil Court in and for Palm Beach, Florida alleging a default under the Credit Agreement. On November 27, 2013, Debtor and SWZ entered into a stipulation of settlement regarding the foreclosure action (the "Stipulation of Settlement"). Under the Stipulation of Settlement, Debtor transferred substantially all of its assets to SWZ in exchange for a release of liability. To realize on the foreclosed assets, SWZ hired Tax Help MD, Inc. ("Tax Help") to service Debtor's customers.

4. SWZ describes the loan as a proper business transaction with syndication of the loan to unaffiliated entities, and the foreclosure and subsequent settlement as a proper remedy for the failure to repay the debt. The Trustee asserts that the loan is a sham and the foreclosure action and subsequent settlement were an attempt by Debtor to avoid payment of a judgment.

The Bankruptcy Case

5. This voluntary bankruptcy case was filed on March 5, 2014 as a no asset chapter 7 bankruptcy case. Mr. Sabella signed the petition on behalf of Debtor (D.I. 1-1) as

well as the Schedules of Assets and Liabilities and Statement of Financial Affairs for United Tax Group, LLC. (Miller Ex. 1.)

6. The Trustee was appointed the chapter 7 trustee by the Office of the United States Trustee. After the section 341 meeting of creditors was held on April 8, 2014, the Trustee filed a notice to change the case from a no asset to an asset case, and requested that the Clerk of the Court establish a bar date to file claims against the estate. (D.I. 14.)

7. There are, at most, a handful of creditors in this case. The Schedule F filed with the petition reflects 15 creditors with aggregate debt of $621,726.20 (D.I. 3-6), but the claims register summary in the ECF system reflects only four filed proofs of claim totaling $204,838.26, after eliminating the one duplicative claim and those claims withdrawn or amended to reflect no liability.

8. Of the four filed proofs of claim, Ms. Sarah Wonders' claim is by far the largest and she appears to be the only creditor who has taken any interest in the case. Her proof of claim is filed in the amount of $191,798.53, or over 93% of claims by amount. The proof of claim represents a $70,000 judgment obtained against the Debtor in connection with a lawsuit based on a hostile work environment, together with $118,322.46 in attorney's fees and $3,476.07 in costs.

9. SWZ is listed on Schedule D as a creditor holding a contingent, unliquidated and disputed claim in the amount of $0.00. SWZ did not file a proof of claim prior to the bar date established in this case.

10. On June 25, 2015, the Trustee filed a complaint against SWZ, Tax Help, Allerand and Mr. Sabella (the "SWZ Adversary Proceeding").[6] In the SWZ Adversary Proceeding, the Trustee alleges that certain transfers made to or for the benefit of the defendants were either preferential or constituted fraudulent transfers, and so are avoidable. The Trustee also alleges that Allerand breached its fiduciary duties of loyalty and care by causing Debtor to effect a prepetition transfer of Debtor's assets to SWZ by way of the Stipulation of Settlement, and causing Debtor to make the allegedly preferential transfers and fraudulent conveyances. And, the Trustee alleges that Mr. Sabella aided and abetted Allerand's breach of fiduciary duty. In addition to recovery of the allegedly avoidable transfers, the Trustee seeks damages in an amount not less than $3 million on account of the assets foreclosed upon prepetition.

11. On March 3, 2016, two days before the two-year anniversary of the filing of the petition, the Trustee filed a complaint against Edward Welke ("Welke") and John Does 1-100 (the "Welke Adversary Proceeding").[7] By commencing this adversary proceeding, the Trustee seeks to avoid and recover transfers made on an "AmEx" account in the amount of $821,402.69 on theories of preference and fraudulent conveyance.

12. The Motion to Dismiss was filed on March 30, 2016. In the Motion to Dismiss, SWZ contends that the bankruptcy case should be dismissed because: (i) the

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[6] *Complaint of George L. Miller, Chapter 7 Trustee, Against SWZ Financial II, LLC, Tax Help MD Inc., Allerand, LLC, and Richard L. Sabella Pursuant to 11 U.S.C. §§ 544 and 548, Florida Statutes Title XLI, § 726.105 et seq., Federal Rule of Bankruptcy Procedure 7001 and Applicable Law, Miller v. SWZ Financial II, LLC (In re United Tax Group, LLC)*, Ch. 7 Case No. 14-10486, Adv. No. 15-50880 (Bankr. D. Del. June 25, 2015), ECF No. 1.

[7] *Complaint of George L. Miller, Chapter 7 Trustee, Against Edward Welke and John Does 1-100 Pursuant to 11 U.S.C. §§ 544 and 548, Florida Statutes Title XLI, § 726.105 et seq., Federal Rule of Bankruptcy Procedure 7001 and Applicable Law, Miller v. Edward Welke (In re United Tax Group, LLC)*, Ch. 7 Case No. 14-10486, Adv. No. 16-50088 (Bankr. D. Del. March 3, 2016), ECF No. 1.

bankruptcy case is essentially a two party dispute between Debtor and Ms. Wonders; (ii) the Trustee is abusing his position and acting in bad faith in pursuing litigation against it and Mr. Welke seeking damages or recoveries, collectively, of almost $4 million when claims filed against the estate total approximately $70,000;[8] and (iii) the Trustee has converted SWZ's property (mail directed to the Debtor) and therefore interfered with SWZ's ability to realize on its foreclosed collateral, namely the taxpayer accounts.[9] Mr. Sabella's testimony at the June 23, 2016 evidentiary hearing sums up the Motion to Dismiss this way: "we're here because [the Trustee] has overzealously prosecuted this case and it has now occurred to me that we are better off litigating with Ms. Wonders in the state court than we would be continuing with this bankruptcy." Transcript at 59:11-15.

13. The Trustee has a multi-pronged response. He contends that: (i) SWZ lacks standing to be heard in the main bankruptcy case; (ii) SWZ has not shown "cause" as required under section 707(a) to dismiss the case; (iii) the Trustee did not improperly control or retain mail received post-filing addressed to the Debtor; and (iv) Mr. Sabella, having filed the bankruptcy case as a Debtor representative, cannot now seek to have the case dismissed as a SWZ representative. The Court need only address the first argument.

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[8] Ms. Wonders' proof of claim was amended to its current amount after the Motion to Dismiss was filed. The amendment makes no difference in the context of SWZ's argument.

[9] On March 30, 2016, SWZ and Tax Help also filed a so-called "Barton" motion in the SWZ Adversary Proceeding for permission to file a complaint against the Trustee related to his alleged improper confiscation and holding of mail directed to the Debtor, which SWZ claims an interest in by virtue of its prepetition security agreement, the UCC-1 and the Stipulation of Settlement. *See Motion for Leave to File Complaint Seeking Damages against Bankruptcy Trustee (Barton Motion), Miller v. SWZ Financial II, LLC (In re United Tax Group, LLC)*, Ch. 7 Case No. 14-10486, Adv. No. 15-50880 (Bankr. D. Del. March 30, 2016), ECF No. 20.

SWZ Lacks Standing to Prosecute the Motion to Dismiss

14. Section 707(a) of the Bankruptcy Code provides:

> The court may dismiss a case under this chapter only after notice and a hearing and only for cause, including—
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> (1) Unreasonable delay by the debtor that is prejudicial to creditors;
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> (2) Nonpayment of any fees or charges required under chapter 123 of title 28; and
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> (3) Failure of the debtor in a voluntary case to file, within fifteen days or such additional time as the court may allow after the filing of the petition commencing such case, the information required by paragraph (1) of section 521(a), but only on a motion by the United States trustee.

11 U.S.C. § 707(a). Unlike § 707(b), which specifies that a motion to dismiss under that subsection may be heard by the court on its own motion, or on the motion of the United States Trustee, the trustee, or any party in interest, subsection (a) is silent as to who may file such a motion.

15. The Trustee argues that SWZ does not have standing to be heard in the main bankruptcy case because it is not a creditor. He argues that in a chapter 7 case—as opposed to a chapter 11 case—courts construe standing narrowly, and that there is no equivalent "party in interest" analogue to section 1109. At argument, the Trustee's counsel relied on *In re Pantazelos*, No. 15-BK-08916, 2016 WL 2342905 (Bankr. N.D. Ill. Apr. 29, 2016), for what he called a long line of cases holding that a defendant in an adversary proceeding has no standing to be heard in the main bankruptcy case.[10]

16. SWZ responds that given the specific party-in-interest requirement in section 707(b), the silence in section 707(a) does away with that requirement. SWZ also argues that

[10] This line of cases begins with *Still v. Fundsnet, Inc. (In re Southwest Equip. Rental)*, 152 B.R. 207 (Bankr. E.D. Tenn. 1992).

the Third Circuit's decision in *Unofficial Committee of Zero Coupon Noteholders v. Grand Union Company*, 179 B.R. 56 (Bankr. D. Del. 1995), which provides that a party in interest under § 1109(b) is one who "has a sufficient stake in the proceeding so as to require representation," *Id.* at 58, should be extended to chapter 7 cases. SWZ argues, therefore, that SWZ has a real interest in this case because the Trustee has sued it on unsupported theories.

17. Standing is a threshold issue. If a party lacks standing to assert its action, the court lacks subject matter jurisdiction "as there is no case or controversy, or injury in fact, upon which relief can be granted." *In re APF, Co.*, 264 B.R. 344, 352 (Bankr. D. Del. 2001) (citations omitted). Accordingly, the Court must address the standing issue before reaching any ruling on the merits. *See Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583, 119 S.Ct. 1563, 1569 (1999). The determination is made on a case by case basis. *See In re Ofty Corp.*, 44 B.R. 479, 481 (Bankr. D. Del. 1984) (citing J. Moore, Moore's Federal Practice, 17.07, p. 17–65 (2d ed. 1984)) ("An entity may be real party in interest and have standing in one respect while he may lack standing for another purpose.").

18. For a party to have "bankruptcy standing," it must satisfy the constitutional requirements that all litigants in federal cases must meet. *See In re Global Industrial Technologies, Inc.*, 645 F.3d 201, 209-10 (3d Cir. 2011). The party must demonstrate "an 'injury in fact' that is 'concrete', 'distinct and palpable', and 'actual and imminent.'" *Id.* at 210 (citing *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). In addition, the party must establish that its injury "fairly can be traced to the challenged action and is likely to be

redressed by a favorable decision." *Id.* A party meets the standard if he alleges "a 'specific, 'identifiable trifle' of injury'" or a personal stake in the outcome. *Id.* (citations omitted).[11]

19. As applied here, SWZ does not complain about the main bankruptcy case as much as it complains about the Trustee's action in commencing the adversary proceedings against SWZ and Welke.

20. SWZ is a defendant in an adversary proceeding. It has not asserted that it is a creditor in any of the briefing on this motion, nor has it filed a proof of claim. And, it has not asserted a pecuniary interest in the estate. As espoused by SWZ, its "injury" is that it has been subjected to suit by an overzealous trustee who is abusing the bankruptcy process.[12] While there may be remedies for such actions, SWZ has not cited any authority that this type of harm conveys constitutional standing (or, for that matter, cause) to seek the dismissal of a bankruptcy case.

21. On the other hand, cases cited by the Trustee are instructive. Multiple decisions, many out of the Northern District of Illinois, and summarized in *Pantazelos*, espouse a general proposition that "the interests of [defendants in adversary proceedings] are not aligned with those of estate creditors, and that [motions or objections brought by them] appear to be asserted for strategic or defensive purposes only—to challenge the estate's ability to prosecute claims against them." *In re Pantazelos*, 2016 WL 2342905, at *3. But, contrary to the Trustee's contention, this observation does not provide a basis for a

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[11] The Third Circuit also discussed standing in chapter 11 cases governed by the § 1109(b) "party-in-interest" standard, noting that it comports with the Circuit's more general definition of a "party in interest" as one "who has a sufficient stake in the proceeding so as to require representation." *Global Industrial*, 645 F.3d at 210 (citing *In re Amatex Corp.*, 755 F.2d 1034, 1042 (3d Cir. 1985)).

[12] At argument, counsel argued that dismissal was appropriate because the Trustee: (i) filed the Welke Adversary Proceeding with very little research; (ii) is pursuing claims against SWZ and Welke that are outsized relative to the claims filed against the estate; and (iii) caused harm to SWZ by his handling of the mail correspondence. *See* Transcript at 68:4-23.

blanket prohibition against standing for all adversary defendants on any issue in the main bankruptcy case. Instead, starting from this premise, courts look at the specific action the adversary defendant seeks to take to determine whether it has the requisite injury to obtain standing. So, for example, in *Pantazelos*, the court found that a non-creditor defendant in an adversary proceeding lacked standing to object to fees paid to the debtors' attorneys under § 329(b) of the Bankruptcy Code because he was not a party protected under § 329(b) and he was not affected by any determination of whether the fees were excessive. *Id.*

22. Similarly, in *In re Kaiser*, 525 B.R. 697 (Bankr. N.D. Ill. 2014), the court held that a non-creditor adversary defendant in a fraudulent conveyance suit did not have standing to pursue a motion to disallow the Internal Revenue Service's (the "IRS") proof of claim. *Id.* at 706. The defendant's purpose in filing the motion to disallow was to eliminate the IRS as a creditor of the estate in order to limit the trustee's ability to take advantage of a longer statute of limitation under the Internal Revenue Code. The court ruled that the defendant did not have standing to move to disallow the IRS claim as the defendant had no direct interest in the amount of claims against the estate, and thus was not a party-in-interest under § 502(a) of the Bankruptcy Code. *Id.* at 705-06. It did, however, address the IRS claim in the context of the statute of limitations analysis in the adversary proceeding. *Id.* at 706-11.

23. In perhaps the most closely analogous case cited by the Trustee, the bankruptcy court for the Southern District of Florida rejected the argument that a non-creditor defendant in an adversary proceeding has standing to file a motion to convert a chapter 11 case to a chapter 7 case, or alternatively to appoint a chapter 11 trustee. The decision was based on multiple grounds, including that the defendant did not have a

pecuniary interest in the case or an interest in how or by whom it was administered. *See In re E.S. Bankest, L.C.*, 321 B.R. 590, 598 (Bankr. S.D. Fla. 2005). It also held that the defendant did not have a legally protected interest in the relief it sought by way of the motion to dismiss, finding that the defendant was asserting rights of others in arguing that the case was a misuse of the bankruptcy process and that it was in the best interest of legitimate creditors and the estate to convert the case. *Id.* at 599-600.

24. Further, SWZ has not shown that it is a party protected by § 707(a) of the Bankruptcy Code. SWZ is correct that § 707(a) does not list the entities that may bring a motion to dismiss under that subsection.[13] But, the statute's silence on this matter does not negate constitutional standing requirements; rather, it impacts only a prudential standing analysis.[14] And, while delay prejudicial to *creditors* may be cause for dismissal of a case, SWZ has cited no cases (and the Court has found none) holding that benefit to non-creditor defendants is a factor for a court to consider in a dismissal decision making such parties protected by § 707(a). Further, while it is true that granting the Motion to Dismiss would affect SWZ—as SWZ's desired result is to curb an overzealous trustee—this is not the type

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[13] Subsection (b) was substantially amended in the 2005 amendments to the Bankruptcy Code. 6 COLLIER ON BANKRUPTCY ¶ 707.04[1] (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2016). Language under former section 707(b) permitting only the court or the United States Trustee to bring a motion under that section was deleted as was language prohibiting a party in interest to file a motion. *Id.* Thus, it seems likely that the silence in subsection (a) and the list in subsection (b) are unrelated.

[14] Prudential standing is "a set of judge-made rules," that serves to "limit access to the federal courts to those litigants best suited to assert a particular claim." *Joint Stock Soc'y v. UDV N. Am., Inc.*, 266 F.3d 164, 179 (3d Cir. 2001) (citation omitted); *Gen. Instrument Corp. of Delaware v. Nu-Tek Elecs. & Mfg., Inc.*, 197 F.3d 83, 87 (citation omitted) (same). If a statute is silent with respect to who may bring a cause of action, it "is presumed to incorporate background prudential standing principles." *See, e.g.*, *Nu-Tek Elecs. & Mfg., Inc.*, 197 F.3d at 87 (emphasis added) (citation omitted) (analyzing whether plaintiff had satisfied both the constitutional and prudential requirements for standing, and holding that "[w]here Congress has expressly conferred standing by statute, *prudential* standing concerns are superseded.").

of effect that Congress envisioned in permitting parties to seek to dismiss a bankruptcy case.[15]

25. Finally, SWZ's general reference to *Grand Union* is unavailing. In *Grand Union*, bondholders of a debtor's parent company sought to participate in the wholly-owned subsidiary's bankruptcy case. *See Grand Union*, 179 B.R. at 57-58. The district court held that it was not necessary for the bondholders to show that they were a creditor or equity holder to appear and be heard (under § 1109(b)) in the subsidiary's case. *See Id.* at 59. Rather, the court found standing in the bondholder's practical/pecuniary interest in the case because the subsidiary's plan proposed to eliminate the parent's equity interest, thus diminishing the bondholder's chances of being repaid by the parent. *Id.* The district court also found that because the parent and subsidiary had common officers and directors, their interests might be aligned such that the parent did not adequately represent the interests of its creditors, the bondholders. *Id.* It was in this highly distinguishable context—and "under the particular facts and circumstances of [that] case"—that the district court held that the bondholder need only show "a sufficient stake to require representation" in order to have a right to be heard under § 1109(b) in connection with the plan of reorganization that wiped out equity. *Id.*

26. Unlike the bondholders in *Grand Union*, SWZ has not articulated a sufficient stake in the debtor's bankruptcy case justifying standing to bring a motion to dismiss under the particular facts of this case. At argument, the Court *sua sponte* explored with the parties

[15] *Cf. In re QDN, LLC*, 363 Fed.Appx. 873, 875-76 (3d Cir. 2010) (finding that a non-filing creditor has no standing to contest an involuntary bankruptcy filing under § 303(d), which allows only a debtor to contest such a filing. The Court further observed that the creditor was objecting to protect itself from a potential preference, which is not a scenario envisioned by Congress.).

SWZ's status as the holder of a claim and a potential future creditor.[16] If the Trustee's damages theory is to be believed and he recovers almost $4 million in his adversary proceedings, SWZ might well be entitled to a distribution from the estate given the currently filed claims. Conversely, if SWZ is correct and the Trustee's claims are misguided, there will be no distribution to SWZ, and perhaps to any creditor. While this "in-between status" might give SWZ a sufficient stake in the main bankruptcy case for some purposes, SWZ's speculative injury from this status is not sufficiently "concrete," "distinct and palpable," and/or "actual and imminent" to provide SWZ with standing to move to dismiss the case. *Global Industrial*, 645 F.3d at 210.

27. Accordingly, while the Court understands the arguments articulated by SWZ and cannot state unequivocally that they are without any merit whatsoever, the Court concludes that SWZ does not have standing to prosecute its motion to dismiss. This is a narrow holding. The Court does not, and should not, determine whether SWZ has standing

[16] Pursuant to § 101(5), "claim" means a right to payment, including a contingent right to payment. *See* 11 U.S.C. § 101(5). And, pursuant to § 101(10)(B), a "creditor" includes an entity that has a claim against the estate arising from the recovery of property from a defendant in an adversary proceeding, such as SWZ. *See* 11 U.S.C. § 101(10)(B).

to bring any other motion in the main bankruptcy case or to seek some other remedy for its perceived wrongs.

WHEREFORE, THE MOTION TO DISMISS IS DENIED.

BY THE COURT:

Dated: December 12, 2016

LAURIE SELBER SILVERSTEIN
UNITED STATES BANKRUPTCY JUDGE