IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	)	Chapter 11
	)	
MERVYN'S HOLDINGS, LLC, et. al.	)	Case No. 08-11586 (KG)
	)	
Debtors.	)	
	)	
THE OFFICIAL COMMITTEE OF, UNSECURED CREDITORS OF MERVYN'S HOLDINGS, LLC, et. al.	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adv. Proc. No. 08-51402 (KG)
	)	
LUBERT-ADLER GROUP IV, LLC, *et al.*,	)	
	)	
Defendant.	)	**Re: Docket No. 82**

MEMORANDUM ORDER

WHEREAS:

BACKGROUND

A. Mervyn's Holdings, LLC, Mervyn's LLC, and Mervyn's Brands, LLC (collectively, the "Debtors")[1] filed Chapter 11 petitions on July 29, 2008. Shortly thereafter, the Official Committee of Unsecured Creditors (the "Committee"), acting on behalf and in the name of Debtors,[2] brought this adversary proceeding (the "Adversary Proceeding")

[1] The Court will refer to Debtors, prepetition, as "Mervyn's."

[2] The Committee and the Debtors entered into a stipulation authorizing the Committee to prosecute this adversary proceeding on behalf of the Debtors. The Court approved the Stipulation by Order, entered on December 30, 2008, in the plenary case. Docket No. 691. The Court will therefore refer to the Committee as the moving party.

against numerous defendants, including Sun Capital Partners, Inc., Sun Capital Securities Fund, L.P., Sun Capital Securities Offshore Fund, Ltd., SCSF Mervyn's (US), LLC and SCSF Mervyn's (Offshore) Inc. (collectively "Sun Capital") alleging that Sun Capital, among others, is liable for fraudulent conveyances and breaches of fiduciary duty. The claims arise from a series of transactions in 2004 when Target Corporation ("Target") sold Mervyn's to an affiliate of Sun Capital (MDS Corporation) (the "2004 Transaction"). In the Adversary Proceeding the Committee has filed a motion to disqualify Sun Capital's lawyers, Kirkland & Ellis LLP ("K&E"), Docket No. 82 ("the Motion").

JURISDICTION

B. A motion to disqualify counsel is a core proceeding over which the Court has jurisdiction pursuant to 28 U.S.C. § 157(b)(2)(A). *See, e.g., Century Indem. Co. v. Congoleum Corp. (In re Congoleum Corp.)*, 426 F.3d 675, 686 (3d Cir. 2005) ("[O]ne of the inherent powers of any federal court is the admission and discipline of attorneys practicing before it."); *In re Johore Inv. Co.*, 157 BR. 671, 674 (D.Haw.1985) ("[A] motion to disqualify counsel of a major secured creditor is a matter integrally tied to the administration of the estate, and disposing of such a motion is clearly a necessary function of the bankruptcy judge in presiding over the orderly administration of the estate.").

FACTS

C. Sun Capital has been a client of K&E since February 2000 and, indeed, one of its largest clients. In July 2004, Target sold Mervyn's to a group of private equity holders

who had formed Mervyn's Holdings, LLC, a Delaware limited liability company, to purchase Mervyn's, i.e., the 2004 Transaction. Sun Capital was a member of the purchasing group. K&E represented Sun Capital in the 2004 Transaction. At the end of September 2004, K&E then began to represent Mervyn's at the request of Sun Capital. Mervyn's General Counsel, Ed Beck, signed a conflict waiver letter on December 19, 2005[3] providing that Mervyn's waived:

> [A]ny conflict or other objection with respect to K&E's representation of Investors [Sun Capital], their affiliates or portfolio companies, in connection with any and all (i) matters in which K&E currently represents any of the Investors, their affiliates or portfolio companies, including the Mervyn's Matters, (ii) past matters in which K&E represented Mervyn's, any of the Investors, any of the Investors' affiliates or portfolio companies (or any combination thereof) and (iii) future matters in which K&E might represent any of the Investors (whether or not such matter is related to the Mervyn's Matters).

Rogers Declaration ("Rogers Decl."), Exhibit 1, Docket No. 82.

Almost two years later, Mervyn's executed a second written conflict waiver in the form of an engagement letter that contained provisions waiving any past, present and future conflicts arising from K&E's representation of Sun Capital. Rogers Decl., Ex. 2. This engagement letter, dated September 11, 2007, and signed on September 12, 2007, provided for K&E's representation to cease at the earliest of "(a) [Mervyn's] termination of K&E's representation, (b) K&E's withdrawal, or (c) the completion of the Engagement." Rogers

[3] The letter from K&E is dated December 1, 2005, indicating that Mervyn's had ample opportunity to consider the letter.

Decl., Ex. 2 at 2. This letter and second waiver also provided that K&E's representation "may be terminated" by written notice. *Id.* The letter further provided:

> As you know, we have represented and represent Sun Capital Partners, Inc. and its affiliated investment funds and management companies (together, "Sun") on a variety of matters, including Sun's investment in you and anticipate that we will represent Sun in future matters. You are a portfolio company of Sun. This confirms that K&E LLP has informed you of its representation of Sun on a variety of matters, including Sun's investment in you, and that you consent to, and waive any conflict or other objection with respect to K&E LLP's representation of Sun, its affiliates or portfolio companies in connection with any and all (i) matters in which K&E LLP currently represents Sun, its affiliates or portfolio companies, including the Engagement, (ii) past matters in which K&E LLP represented you, Sun, Sun's affiliates or Sun's portfolio companies (or any combination thereof) and (iii) future matters in which K&E LLP might represent Sun (whether or not such matter is related to the Engagement). You also agree that K&E LLP's representation is solely of you, and no other person (other than Sun) has the status of a client for conflict of interest purposes in connection with the Engagement. In addition, you understand and agree that in the event that K&E LLP or Sun determine that any conflict exists in connection with K&E LLP's representation of you, K&E LLP may terminate its representation of you and continue its representation of Sun in any matter (whether or not such matter is related to the Engagement). All files relating to Sun, its affiliates or portfolio companies will be kept confidential and unavailable to you. In addition, we will not be obligated to disclose to you any confidential information of Sun, its affiliates or portfolio companies that K&E LLP learns in the process of representing Sun, its affiliates or portfolio companies.

K&E continued to represent Sun Capital, and also represented Mervyn's in various matters[4] until June 2008. Mervyn's filed for bankruptcy shortly thereafter. The Friedman Kaplan law firm initially represented the Committee. Shortly after the commencement of the Adversary Proceeding, the Cooley Godward law firm replaced Friedman Kaplan as the Committee's lawyers. On May 4, 2009, the Committee wrote a letter informing K&E that it believed K&E had a conflict and asking K&E to recuse itself and turn over its files. K&E denied there was a conflict and, in the alternative, stated that if there were a conflict, Mervyn's had properly waived it. The Committee filed the Motion on May 22, 2009. Docket No. 82.

D. The salient facts are these:

1. K&E represented Sun Capital long before the 2004 Transaction and long before it performed any work for Debtors. Kassof Decl., ¶ 4.

2. K&E did not perform work for Debtors after June 2008 and, by the terms of its engagement, K&E's representation terminated at that time. Declaration of Douglas C. Gessner, ¶ 5. Debtors moved for leave to pay ordinary course professionals and did not list K&E among the professionals it would employ. Docket No. 149, Ex. B.

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[4] K&E represented Mervyn's in matters, the nature of which included corporate, real estate, restructuring, tax, litigation, intellectual property and environmental. K&E also represented Mervyn's in matters which were the outgrowth of the 2004 Transaction, such as real estate transactions and various matters giving effect to the 2004 Transaction. Declaration of Andrew A. Kassof ("Kassof Decl."), *passim*.

3. Although the Committee claims otherwise and submitted declarations from credible and respected attorneys, the Court remains skeptical that the Committee did not learn of K&E's representation of Debtors until April 2008 - - some eight months after Debtors filed the bankruptcy case. Debtors' Statement of Financial Affairs listed K&E as a law firm which Debtors paid prior to the bankruptcy. Most determinative is Debtors' obvious knowledge from the outset that K&E handled a variety of legal matters on their behalf. It strains belief that the Committee's thorough investigation did not turn up such information. In any event, the Committee could and should have known early on that K&E represented Sun Capital.

4. The primary focus of the adversary proceeding is the 2004 Transaction which occurred prior to K&E's representation of Mervyn's.

5. The waiver letters are clear and executed by a knowledgeable and experienced general counsel, Mr. Beck, representing a sophisticated business. K&E specifically requested that Mr. Beck provide it with any comments and even reminded Mr. Beck that he should seek independent legal advice if he wished.

RULING

Model Rules

1. In this matter, the Committee asserts that K&E has violated both Model Rules[5] 1.7 and 1.9 and that any waiver Mervyn's gave to K&E was ineffective. Model Rule 1.7 provides that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest." Model Rule 1.7(a). A "concurrent conflict of interest exists when: 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 [or] former client." *Id.* However, these restrictions are not implicated when the four requirements of informed consent are met:

> "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."

Id.

2. The Model Rules define "informed consent" as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and

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[5] The Model Rules of Professional Conduct of the American Bar Association (the "Model Rules") govern the practice of law before this Court. Del. Bankr. L.R. 1001-1(b) (adopting the Local Rules of Civil Practice and Procedure of the United States District Court for the District of Delaware); D. Del. L.R. 83.6(d)(2) (incorporating the Model Rules).

explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Model Rule 1.0(e).

3. Model Rule 1.9, in pertinent part, states that: "A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client . . . ." The comments to Rule 1.9 clearly define "substantially related" as a matter involving "the same transaction or legal dispute or if there otherwise is a substantial risk that confidential information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." Model Rule 1.9, cmt. 3. Lastly, in determining whether a client has properly waived any conflict, the ABA has provided in Comment 22 to Model Rule 1.7 that:

> The effectiveness of [future] waivers is generally determined by the extent to which the client reasonably understands the material risks . . . . The more comprehensive the explanation of the types of future representations that might arise . . . the greater the likelihood that the client will have the requisite understanding . . . . If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved.

Model Rule 1.7, cmt 22.

4. The Committee asks the Court to grant the Motion based on three propositions: 1) a violation of Model Rule 1.7; 2) a violation of Model Rule 1.9; and 3) Mervyn's waiver was invalid. As to the first alleged violation, the Committee asserts that K&E's representation of Sun Capital violates Model Rule 1.7 because K&E still represents Debtors (Mervyn's) and Sun Capital (a party with adverse interests to Debtors in the Adversary

Proceeding). Sun Capital in reply argues that K&E does not currently represent any of the Debtors, and that their representation ended in June 2008 in accordance with the terms of the Engagement Letter.

5. As to the alleged Model Rule 1.9 violation, the Committee asserts that K&E advised Mervyn's on matters that are, at the very least "substantially related" to the Adversary Proceeding. Sun Capital argues that the matters are not substantially related since K&E only advised Mervyn's as to real estate and non-related matters subsequent to the 2004 Transaction and prior to the commencement of the Adversary Proceeding. The Committee also claims that if a conflict exists, then K&E did not properly execute a valid waiver and that no implied waiver exists. Specifically, the Committee alleges that not only did Sun Capital compel Mervyn's to employ K&E, but also that any consent to a waiver was involuntary based on this forced representation. Alternatively, the Committee claims that the written waiver is too vague and failed to fully inform Mervyn's of any specific past, present or future conflict. Finally, the Committee contends that K&E never terminated its representation of Mervyn's. For this reason, the Committee urges the Court to disqualify K&E. Sun Capital answers the claim of coercion by asserting: 1) Mervyn's signed two written conflict waivers on two different occasions; 2) Mervyn's waiver was voluntary because Mervyn's General Counsel had the discretion to reject or modify the waiver and Sun Capital invited him to seek independent advice; 3) the waiver was narrowly tailored to waive only conflicts that K&E might have with Sun Capital as it related to the representation of

Mervyn's, i.e., limited to real estate matters; and (4) even if the waiver is invalid, Debtors implicitly waived any conflict by failing to object to K&E's representation of Sun Capital at the commencement of both the bankruptcy case and the adversary proceeding.

6. The foregoing facts compel the Court to conclude that K&E has violated neither Model Rule 1.7 nor Model Rule 1.9 and to conclude further that Mervyn's properly executed an effective waiver. As to the first claim, Model Rule 1.7 is not implicated because K&E terminated its relationship with Mervyn's before the bankruptcy and thus there is no "concurrent conflict of interest". In any event, upon the filing of its bankruptcy case, Debtors did not seek to retain K&E and, therefore, the representation ended. Under Model Rule 1.7., a lawyer cannot represent a client if: 1) representing one client will be "directly adverse" to another; or 2) there is a "significant risk" that the representation of a client will be "materially limited" by counsel's duties to another or former client. Model Rule 1.7 (a)(1), (a)(2). Neither concern is present here. The allegations the Committee makes in the Adversary Proceeding concerning the 2004 Transaction are not germane as K&E did not represent Mervyn's until later and in non-material matters.

7. Similar in part to the Court's reasoning on the Model Rule 1.7 issue, this Court also finds no Model Rule 1.9 violation. There are two issues for the Court to consider: 1) whether the matters that K&E was involved with were "substantially related" to the 2004 Transaction; and 2) if the matters were substantially related, whether they were "materially adverse" to the Debtors. The language of Model Rule 1.9 is clear – it applies only to

attorneys who represent a client in a matter that is the "same or substantially related" to a matter of the former client. Model Rule 1.9. Whether a matter meets this threshold is subject to the "substantially related" test. In this case, few of the numerous allegations that the Committee asserted in their Amended Complaint relate to matters K&E performed, all of which were *post facto*. The Court finds that the twenty or so allegations in the Amended Complaint which pertain to actions of Mervyn's on which K&E worked do not satisfy the "same or substantially related" test. Comment 3 to Rule 1.9 defines "substantially related" as: "the same transaction or legal dispute or if there otherwise is a substantial risk that confidential information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." Model Rule 1.9 cmt. 3. K&E represented Mervyn's on matters arising after the 2004 Transaction, the subject of the Adversary Proceeding. K&E's representation was not the same or substantially related to its former client's matter at hand.

Confidentiality

8. The Committee also expresses concern that K&E might have confidential information which it might now use to gain an unfair advantage in the Adversary Proceeding. The Committee's concern is mere speculation without specifics. The Committee's worry ignores (1) the ancillary nature of K&E's work and (2) that it occurred after the 2004 Transaction. It also ignores Sun Capital's management role after the 2004 Transaction and its direct access to confidential information, without K&E. The Court should not and will

not "hypothesize' or "imagine" the possibility of the disclosure of confidential information, particularly given these facts. *Satellite Fin. Planning Corp. V. First Nat'l Bank of Wilmington*, 652 F.Supp. 1281, 1284 (D.Del. 1987).

Waiver

9. Even assuming, contrary to the Court's finding, that a concurrent conflict of interest exists, K&E properly obtained a valid waiver. In order to have a properly executed waiver counsel must: 1) reasonably believe that he/she 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 a claim asserted by one client against another represented by the same lawyer in the same litigation; and 4) every client gives informed consent, confirmed in writing. Model Rule 1.7. The Mervyn's waivers meet all of the requirements for a valid waiver. "Informed consent" is defined by the Model Rules as "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." Model Rule 1.0(e). Many, if not all, of the arguments the Committee raises go to the definition of "informed consent." The facts show that Mervyn's signed two documents waiving any conflicts that K&E would have with Mervyn's in its representation of Sun Capital. In its motion to disqualify, the Committee raises three issues in reference to these waivers. First, the Committee claims that Mervyn's signed both waivers on an involuntary basis because Sun Capital owned Mervyn's and forced

K&E upon it. The Court does not agree. K&E forwarded a draft of the waivers to Mervyn's General Counsel, Ed Beck. With both waivers, K&E asked Mr. Beck for his comments and "if acceptable" to countersign and return the draft to K&E. This exchange demonstrates that Mervyn's voluntarily and knowingly signed the waiver. The Court concludes that Mervyn's did not enter into these waivers involuntarily. Second, the Committee contends that Mervyn's waiver was not informed and therefore invalid. The Committee argues that Mervyn's did not contemplate litigation when it signed the waiver. Neither did K&E, and thus K&E could not inform Mervyn's of what it didn't know would happen. Third, the Committee asserts that even if the waivers were voluntary, they are *per se* invalid because their terms are overly broad and vague. Again, the Court does not agree. The waivers which include all past, present, and future conflicts with Sun Capital, are limited to conflicts that K&E might have with Sun Capital as it relates to the specific work K&E did for Mervyn's. The scope of the waivers for this Adversary Proceeding is narrow.

Lateness

The Committee's delay in bringing the Motion is obvious and the reasons it gives are weak. The facts show that:

1. Debtors' were aware of the conflict from the outset and that knowledge is imputed to the Committee. The Committee does not have greater entitlement to relief than do Debtors and surely Debtors could not raise disqualification at this late date.

2. The Committee represented that it made an "intensive review and analysis of thousands of documents. . .provided by the Debtors." Rogers Decl., Ex. 11, ¶ 29. The documents produced to the Committee included documents showing work K&E performed, particularly the Amended/Restated Unitary Leases. Rogers Decl., Ex. 12 at 3. Debtors' Statement of Financial Affairs also discloses that K&E represented Mervyn's. Docket No. 691. K&E filed a proof of claim for prepetition unpaid fees and served the Committee. Rogers Decl., Ex. 7. Given K&E's disclosures, the waivers and the prejudice to Sun Capital were the Court to grant the Motion, the delay is especially egregious. *See In re Kaiser Group Intern., Inc.*, 272 BR. 846 (Bankr. D. Del. 2002) (five month delay unreasonable).

CONCLUSION

Disqualifications are disfavored for good reasons, most importantly because a party is denied the lawyer of its choice and there is the potential for abuse. The Motion borders closely on being used as litigation strategy - - an effort by the Committee to gain an advantage over Sun Capital by depriving it of its lawyers. The Court bases this harsh conclusion on the facts, the importance and complexity of the Adversary Proceeding, the importance of the relationship between Sun Capital and K&E, the plain validity of the waivers, the limited nature of the work K&E performed for Mervyn's, Debtors' own recognition that its relationship with K&E had ended prior to the bankruptcy and, last but far from least, the unreasonable delay between commencement of the Adversary Proceeding and the Committee filing the Motion.

The Motion is neither well founded nor timely. IT IS THEREFORE ORDERED this 1st day of October, 2009, that the Motion to disqualify K&E and to compel K&E to turn over its files to the Committee is DENIED.

KEVIN GROSS, U.S.B.J.