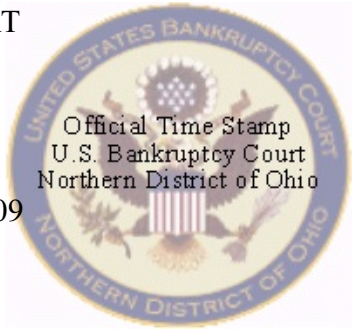
UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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| In re: | ) | Case No. 08-17309 |
| | ) | |
| RAFFUAH HEALTHCARE, INC., | ) | Chapter 7 |
| | ) | |
| Debtor. | ) | Judge Pat E. Morgenstern-Clarren |
| | ) | |
| | ) | **MEMORANDUM OF OPINION** |

In this involuntary chapter 7 case, the law firm of Roetzel & Andress LPA represents the trustee in litigation against Sharona Grunspan, Emerald Ridge Realty, L.P., and Kol Tuv, Ltd., among others. Grunspan, Emerald Ridge Realty, L.P. and Kol Tuv, Ltd. move to disqualify Roetzel from the entire case on the grounds that a former Roetzel partner represented Emerald Ridge Realty, L.P. and Kol Tuv, Ltd. in 2006 as special counsel in connection with a loan transaction, and that the transaction is connected to the bankruptcy litigation. As a result, movants argue that Roetzel has an actual conflict of interest, holds an interest adverse to the chapter 7 estate, and is not disinterested.[1] The trustee opposes the motion.[2] For the reasons stated below, the motion is denied.

## JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A).

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[1] Docket 113.

[2] Docket 116.

## FACTS[3]

### I. The Debtor and Certain Other Entities

The debtor Raffuah Healthcare, Inc. (Raffuah), a corporation, is owned 50% by Sharona Grunspan and 50% by the estate of her late husband, Will Grunspan.

Emerald Ridge Realty, L.P. (Emerald Ridge) is a limited partnership; Segulah, LLC owns 90% of Emerald Ridge and is also the general partner.

Sharona Grunspan and the estate of Will Grunspan are the sole members of Segulah.

The majority member of Kol Tuv Ltd. is Arthur Schamovic.

### II. The Lease and Tenancy in Common Agreement

In 1997, Emerald Ridge and Raffuah entered into a lease under which Emerald Ridge agreed to build a rest home, nursing home, and assisted living facility on real estate that it owned at 5625 Emerald Ridge Parkway, Solon, Ohio (collectively, the Property); on completion, Raffuah agreed to lease the Property from Emerald Ridge, with all personal property placed or installed by Raffuah to remain Raffuah's property.[4] On May 1, 2006, the parties amended the lease in ways not material to this dispute.

In July 2006, Emerald Ridge entered into a Tenancy in Common Agreement with Kol Tuv which provided that Emerald Ridge would have an 80% interest in the Property and Kol Tuv would have a 20% interest. At about the same time, Emerald Ridge and Kol Tuv entered into an

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[3] Neither party requested an evidentiary hearing. The court has drawn these findings from the briefs and uncontested statements made at oral argument held on November 18, 2010. Because of the limited record, time constraints, and the fact that the parties disagree as to the meaning and significance of numerous transactions and documents, the findings will apply only to this decision.

[4] Lease § 12(c) (Exh. A, Trustee's Opposition, docket 116).

Assignment and Assumption of Lease under which Emerald Ridge assigned the lease to itself and Kol Tuv, with Raffuah's consent.[5]

## III. The Opinion Letter

That same month, Emerald Ridge and Kol Tuv borrowed approximately $9.9 million from Beacon Hill Mortgage Corporation, which loan was insured by HUD and secured by a mortgage in favor of Beacon Hill. Roetzel served as special counsel to Emerald Ridge, Kol Tuv, and Segulah in connection with that transaction and, in that capacity, issued an opinion letter to Beacon Hill and HUD.[6] According to the letter, the loan proceeds were to be used "to refinance that certain care and nursing home project . . . known as Emerald Ridge Nursing and Rehabilitation Center." Raffuah also signed a security agreement in connection with the transaction.[7]

Before stating its opinion, Roetzel identified certain assumptions and qualifications. One such assumption was that it assumed and knew of no facts inconsistent with this statement: Emerald Ridge and Kol Tuv have "title or other interest in each item of (i) real and (ii) tangible and intangible personal property ("Personalty") comprising the Property in which a security interest is purported to be granted under the Loan Documents."[8] Roetzel then opined that:[9]

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[5] Exh. C, Trustee's Opposition (Docket 116).

[6] The opinion letter is attached to the Motion to Disqualify as exhibit A. (Docket 113).

[7] Security Agreement (Exh. 6, Answer and Counterclaim, docket 20, adv. p. 10-1055).

[8] Opinion Letter at pages 5 and 6, ¶ i.

[9] Opinion Letter at pages 7-9.

1. Based solely on the Certificate of Limited Partnership and the Full Force and Effect Certificate, Emerald Ridge is a Limited Partnership validly existing under the laws of the Organizational Jurisdiction and in good standing under the laws of the Organizational Jurisdiction.

2. Based solely on the Full Force and Effect Certificate, Segulah is a limited liability company, validly existing under the laws of the Organizational Jurisdiction and in good standing under the laws of the Organizational Jurisdiction.

3. Based solely on the Good Standing Certificate, Lessee [Raffuah Healthcare, Inc.] is a corporation, validly existing validly existing [sic] under the laws of the Organizational Jurisdiction and in good standing under the laws of the Organizational Jurisdiction.

4. Based solely on the Full Force and Effect Certificate, Kol Tuv is a limited liability company validly existing under the laws of the Organizational Jurisdiction and in good standing under the laws of the Organizational Jurisdiction.

5. Emerald Ridge has the partnership power and authority and possesses all necessary governmental certificates, permits, licenses, qualifications and approvals to own and operate the Property and to carry out all of the transactions required by the Loan Documents and to comply with applicable federal statutes and regulations of HUD in effect on the date of the FHA Commitment.

6. Segulah has the power and authority to act as the general partner of Emerald Ridge and to bind Emerald Ridge under the Loan Documents and to comply with applicable federal statutes and regulations of HUD in effect on the date of the FHA Commitment.

7. Lessee has the power and authority and possesses all necessary governmental certificates, permits, licenses, qualifications and approvals to operate the Property and to carry out all of the transactions required by the Loan Documents and to comply with applicable federal statutes and regulations of HUD in effect on the date of the FHA Commitment.

8. Kol Tuv has the requisite power and authority and possesses all necessary governmental certificates, permits, licenses, qualifications and approvals to own and operate the Property and to carry out all of the transactions required by the Loan Documents and to comply with applicable federal statutes and regulations of HUD in effect on the date of the FHA Commitment.

9. The execution and delivery of the Loan Documents by or on behalf of the [sic] Emerald Ridge, and the consummation by Emerald Ridge of the transactions contemplated thereby, and the performance by Emerald Ridge of its obligations thereunder, have been duly and validly authorized by all necessary partnership action by, or on behalf of, Emerald Ridge.

10. The execution and delivery of the Loan Documents by or on behalf of the [sic] Kol Tuv, and the consummation by Kol Tuv of the transactions contemplated thereby, and the performance by Kol Tuv of its obligations thereunder, have been duly and validly authorized by all necessary membership action by, or on behalf of, Kol Tuv.

11. All authorizations, consents, approvals, and permits have been obtained from, appropriate actions have been taken by, and necessary filings have been made with all necessary Organizational and Property Jurisdictions or federal courts or governmental authorities, as listed and set forth in Paragraph(s) A(i) through (iii) of this opinion [i.e. good standing certificate]. To the best of our knowledge, these represent all such authorizations, consents, approvals, permits, actions and filings that are required in connection with the execution and delivery by the Mortgagor [Emerald Ridge and Kol Tuv] of the Loan Documents and the ownership of the Property.

12. Each of the Loan Documents has been duly executed and delivered by the Mortgagor and Lessee, as applicable, and constitute the valid and legally binding promises or obligations of the Mortgagor, and Lessee, as applicable and enforceable against the Mortgagor and Lessee in accordance with its terms, subject to the following qualifications:

(i) the effect of applicable bankruptcy, insolvency, reorganization, moratorium and other similar laws affecting the rights of creditors generally; and

(ii) the effect of the exercise of judicial discretion in accordance with general principles of equity (whether applied by a court of law or of equity); and

(iii) certain remedies, waivers, and other provisions of the Loan Documents may not be enforceable, but, subject to the qualifications set forth in this paragraph at (i) and (ii) above, such unenforceability will not preclude (a) the enforcement of the obligation of the Mortgagor to make the payments as provided in the Mortgage and Note (and HUD's regulations), and (b) the foreclosure of the Mortgage upon the event of a breach thereunder.

Based solely on the Zoning Certificate, the Project complies with all applicable land use and zoning requirements.

13. Based solely on (a) our knowledge and (b) the Certification of Mortgagor, the execution and delivery of the Loan Documents by Mortgagor will not: (i) cause the Mortgagor to be in violation of, or constitute a default under the provisions of, any agreement to which Mortgagor is a party or by which Mortgagor is bound, (ii) conflict with, or result in the breach of, any court

judgment, decree or order of any governmental body to which Mortgagor is subject, or (iii) result in the creation or imposition of any lien, charge, or encumbrance of any nature whatsoever on any of the property or assets of Mortgagor, except as specifically contemplated by the Loan Documents.

14. Based solely on (a) our knowledge, (b) the Certification of Mortgagor and (c) the Docket Search; there is no litigation or other claim pending before any court or administrative or other governmental body or threatened in writing against Mortgagor, or the Property.

15. The Mortgage is in appropriate form for recordation in Recorders Office of Cuyahoga County of the Property Jurisdiction, and is sufficient, as to form, to create the encumbrance and security interest it purports to create in the Property.

16. Filing of the Financing Statements in the Filing Offices will perfect the security interest in the Personalty of the Mortgagor located in the Project Jurisdiction, but only to the extent that, under the Uniform Commercial Code in effect in the Project Jurisdiction, a security interest in each described item of Personalty can be perfected by filing. The Filing Offices are the only offices in which the Financing Statements are required to be filed in order to perfect the Mortgagee's security interest in the Personalty.

17. The Loan does not violate the usury laws or laws regulating the use or forbearance of money of the Property Jurisdiction.

The letter is signed by "Mark McGrievey, Partner" as an authorized representative of Roetzel.

## IV. The Lease Termination and Assignment

In November 2007, in a transaction with no apparent connection to Roetzel, Emerald Ridge, Kol Tuv, and Raffuah entered into a Lease Termination and Assignment of Personal and Intangible Property. Under this agreement, Raffuah surrendered its tenancy and assigned certain defined property, including "all rights, title and interests in and to any License to operate the Facility[.]"[10]

[10] Exh. D., Trustee's Opposition (Docket 116).

## V. The Trustee's Retention of Roetzel

This involuntary chapter 7 case was filed on September 29, 2008 and the order for relief was entered on October 27, 2008. On November 21, 2008, the trustee filed an application to employ Roetzel as counsel to file fraudulent transfer avoidance actions. Roetzel partner Patricia Fugée filed an affidavit in support in which she disclosed based on a review of the firm's conflicts records that Mark McGrievey, a former partner in the firm, had served as counsel to "Emerald Ridge of Solon" and "Shope of Medina, Inc.," the first of which Roetzel believed to be a name used by the debtor. The disclosure stated further that Mr. McGrievey left the firm in 2006, and the firm had not done any work for those entities since then. No one objected to the application, and the court granted it. Roetzel represents the trustee in 14 adversary proceedings.[11]

In mid-2009, as part of a general exchange of information between the trustee and Jeffrey Levinson as counsel for Sharona Grunspan,[12] Mr. Levinson sent a binder of documents from the 2006 financing transaction to Ms. Fugée, which binder included the opinion letter. However, neither Mr. Levinson nor Ms. Fugée focused on the letter at that time.

Ms. Fugée filed a supplemental affidavit on July 22, 2010. She stated in it that the trustee "has concluded that the Debtor granted a security interest in its assets to Beacon Hill Mortgage,

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[11] *See Emerald Ridge Realty, L.P., et al. v. Estate of Raffuah Healthcare, Inc.*, adv. no. 10-1055; *Helbling v. Fromovitz*, adv. no.10-1207; *Helbling v. Schamovic*, adv. no. 10-1208; *Helbling v. ASIG, LLC*, adv. no. 10-1209; *Helbling v. SHCP Medina, Inc.*, adv. no. 10-1306; *Helbling v. Solon Pointe at Emerald Ridge, LLC*, adv. no. 10-1307; *Helbling v. Wadsworth Real Estate Group, LLC*, adv. no. 10-1308; *Helbling v. Mandelbaum*, adv. no. 10-1309; *Helbling v. Shmu-El, Inc.*, adv. no. 10-1316; *Helbling v. Norwood Retirement Community, LLC*, adv. no. 10-1317; *Helbling v. Norwood Health Care Center, LLC*, adv. no. 10-1318; *Helbling v. Grunspan*, adv. no. 10-1319; *Helbling v. Ezra Health Care, Inc.*, adv. no. 10-1320; and *Helbling v. Elder Life Services, Inc.*, adv. no. 10-1329.

[12] Letter dated April 13, 2009 from Mr. Levinson, attached as exhibit B to Ms. Fugée's Affidavit in Support of Trustee's Opposition. (Docket 117).

which security interest may be subject to avoidance under the Bankruptcy Code."[13] She further stated that Roetzel currently represents Beacon Hill in unrelated matters, as a result of which representation she cannot perform services on behalf of the trustee against this client. Consequently, the trustee retained separate counsel to pursue the Beacon Hill issues and an adversary proceeding was filed (the Beacon Hill proceeding).[14]

## VI. The Adversary Proceeding Initiated by Emerald Ridge and Kol Tuv

On February 10, 2010, Emerald Ridge and Kol Tuv filed an adversary proceeding against the chapter 7 estate seeking a declaration that a January 7, 2010 check from the Ohio Department of Job and Family Services payable to Raffuah is their property rather than property of the estate (the Emerald Ridge proceeding).[15] As support, they alleged in their second amended complaint filed April 14, 2010 that Raffuah assigned all of its assets to Emerald Ridge and Kol Tuv under the 2007 Lease Termination and Assignment.

On April 28, 2010, the trustee through her counsel Roetzel answered and raised a counterclaim against Emerald Ridge and Kol Tuv seeking to recover "Raffuah's operating rights, accounts receivable, and other personal property" transferred by Raffuah in December 2007.[16] The trustee's theory is that the 2007 transaction was a fraudulent transfer from Raffuah to Emerald Ridge[17] under state law and bankruptcy law, as a result of which the trustee may avoid it

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[13] Docket 102.

[14] *Helbling v. Beacon Hill Mortgage Corporation*, adv. no. 10-1343.

[15] *Emerald Ridge Realty, L.P., et al v. Estate of Raffuah Healthcare, Inc.*, adv. no. 10-1055.

[16] Trustee's Opposition at 6.

[17] The trustee denies that the agreement transferred or assigned any rights or assets to Kol Tuv. This dispute is not material to the motion to disqualify.

and recover the transferred property or obtain a judgment for the value of the property. The plaintiffs answered, denied the substantive allegations, and raised among their affirmative defenses that the transferred property is fully encumbered to Beacon Hill and, therefore, that the claims for recovery should be abandoned by the trustee as worthless to the estate.

## VII. The Motion to Disqualify

The case proceeded uneventfully until September 2010. At that time, Ms. Fugée produced the opinion letter back to Mr. Levinson as part of a larger response to a discovery request in the Emerald Ridge proceeding. By letter dated September 28, 2010, Mr. Levinson sent a copy of the opinion letter back to Ms. Fugée, pointing out that her former partner Mr. McGrievey had represented Emerald Ridge and Kol Tuv in connection with the 2006 financing transaction. He identified this factual situation as presenting a conflict of interest:[18]

> In the Opinion Letter, [Roetzel] opined with respect to, among other things, the ownership of the assets at issue, including, but not limited to, the operating rights, and the efficacy of the security interest of [Beacon Hill]. Now, as counsel to the Trustee, [Roetzel] has in the Adversary Proceeding offered allegations, adverse to its prior clients and contra to the Opinion Letter, with respect to the ownership of assets, including the operating rights, as well as the efficacy and scope of the security interest that [Roetzel] had previously assessed.

As a result of these two representations, Mr. Levinson asked the firm to resign as counsel for the trustee in all matters.

Ms. Fugée investigated the situation, responded to Mr. Levinson, and filed a second supplemental affidavit stating that the names Emerald Ridge and Kol Tuv did not appear in the

[18] Exh. B, Motion to Disqualify, docket 113.

firm's conflicts records, acknowledging the representation based on the opinion letter provided by Mr. Levinson, but denying that the facts required Roetzel to resign.[19]

The movants filed this motion to disqualify Roetzel as counsel for the trustee on October 12, 2010. The court held oral argument on November 18, 2010 and heard from counsel for the movants and the trustee. Additionally, counsel for the United States trustee appeared. She stated that the UST had reviewed the original application to retain Roetzel when filed and concluded that he would not object to it. Similarly, when the movants filed the motion to disqualify, the UST reviewed the situation and concluded that he would not object to Roetzel continuing as counsel.

## THE POSITIONS OF THE PARTIES

The movants make four basic arguments:

(1) Roetzel is disqualified under § 327(a) because it has an actual conflict of interest and an interest that is adverse to the estate, and it is not disinterested within the meaning of § 101(14);

(2) Roetzel is disqualified under Bankruptcy Code § 327(c) because it has an actual conflict of interest representing the trustee against Emerald Ridge and Kol Tuv;

(3) Roetzel is disqualified under § 327 and Bankruptcy Rule 2014 because, for the disclosure to be adequate, Roetzel should have disclosed that its prior representation related to the 2006 loan transaction; and

(4) Roetzel is disqualified under Bankruptcy Code § 105 and Rule 1.9 of the Ohio Rules of Professional Conduct because it has an actual conflict of interest.

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[19] Docket 118.

The trustee responds:

(1) Roetzel does not hold an interest adverse to the estate and is disinterested because Emerald Ridge and Kol Tuv are former clients, and no attorney representing the trustee previously represented the movants;

(2) Roetzel is not taking positions in this case that are contrary to positions taken in the opinion letter;

(3) Roetzel adequately disclosed the information it had available in connection with the application to retain it as counsel, and timely updated the disclosure as additional information became available; and

(4) movants waived any objection to the trustee's application to employ Roetzel because the movants had actual knowledge of the 2006 representation and the opinion letter at least 18 months before filing the motion to disqualify.

## DISCUSSION

### I. Bankruptcy Code § 327(a)

#### A.

With court approval, a chapter 7 trustee may retain counsel to represent and assist her in performing her responsibilities under the Bankruptcy Code. In this case, the trustee employed Roetzel under Bankruptcy Code § 327(a), which states that the trustee may "employ one or more attorneys. . . that do not hold or represent an interest adverse to the estate, and that are disinterested persons . . . ." 11 U.S.C. § 327(a). The employed person must meet both requirements. *Michel v. Eagle-Picher Indus., Inc. (In re Eagle-Picher, Indus., Inc.)*, 999 F.2d 969, 971 (6th Cir. 1993). The "statutory requirements . . . [of] disinterestedness and no interest adverse to the estate . . . serve the important policy of ensuring that all professionals appointed

pursuant to section 327(a) tender undivided loyalty and provide untainted advice and assistance in furtherance of their fiduciary responsibilities." *Rome v. Braunstein*, 19 F.3d 54, 58 (1st Cir. 1994).

The term "disinterested person" means a person that –

> does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor, or for any other reason.

11 U.S.C. § 101(14)(C).[20] "[C]onsistent with the statutory requirement of 'disinterest,' [a professional] may not have a 'material adverse' interest to any party to the bankruptcy 'for any . . . reason,' either at the time of appointment or during the course of the bankruptcy." *United States v. Schilling (In re Big Rivers Elec. Corp.)*, 355 F.3d 415, 433 (6th Cir. 2004). "The interest in question may be materially adverse either for one of the specific reasons delineated in the statute or 'for any other reason.'" *In re Marvel Entm't Grp., Inc.*, 140 F.3d 463, 476 (3d Cir. 1998).

While the Bankruptcy Code does not define the term "to hold an interest adverse to the estate," courts generally apply this definition:

> for two or more entities . . . (1) to possess or assert any economic interest that would tend to lessen the value of the bankruptcy estate or that would create either an actual or potential dispute in which the estate is a rival claimant; or (2) to possess a predisposition under circumstances that render such a bias against the estate.

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[20] The movants have not alleged that the firm is not disinterested under 11 U.S.C. § 101(14)(A) or (B), which set out certain connections and interests that preclude disinterestedness and are intended to "disqualify professionals with the appearance of a conflict of interest as well as those who have an actual conflict of interest." *Michel v. Federated Dep't Stores, Inc. (In re Federated Dep't Stores, Inc.)*, 44 F.3d 1310, 1319 (6th Cir. 1995).

*In re Roberts*, 46 B.R. 815, 827 (Bankr. D. Utah 1985), *aff'd in relevant part and rev'd on other grounds*, 75 B.R. 402 (D. Utah 1987); *see also In re Fretter, Inc.*, 219 B.R. 769, 777-78 (Bankr. N.D. Ohio 1998). To represent an adverse interest, as opposed to holding an adverse interest, means to serve as the agent or attorney for an individual or entity that holds such an adverse interest. *In re Roberts,* 46 B.R. at 827. As the language of § 327(a) is in the present tense, "counsel will be disqualified under section 327(a) only if it presently 'hold[s] or represent[s] an interest adverse to the estate,' notwithstanding any interests it may have held or represented in the past." *Bank Brussels Lambert v. Coan (In re Arochem Corp.)*, 176 F.3d 610, 623 (2d Cir. 1999) (alterations in original).

The requirements of § 327(a) serve to "impose[] a *per se* disqualification as trustee's counsel of any attorney who has an actual conflict of interest[.]" *In re Marvel Entm't Grp., Inc.*, 140 F.3d at 476; *see also Michel v. Federated Dep't Stores, Inc. (In re Federated Dep't Stores, Inc.)*, 44 F.3d 1310, 1319 (6th Cir. 1995). An actual conflict of interest has been defined as "an active competition between two interests, in which one interest can only be served at the expense of the other." *In re Am. Energy Trading Inc.*, 291 B.R. 154, 157 (Bankr. W.D. Mo. 2003). The term is "given meaning largely through a case-by-case evaluation of particular situations arising in the bankruptcy context. Courts have been accorded considerable latitude in using their judgment and discretion in determining whether an actual conflict exists in light of the particular facts of each case." *In re BH & P Inc.*, 949 F.2d 1300, 1315 (3d Cir. 1991) (internal quotation marks and citations omitted). Absent an actual conflict of interest, the court has discretion under

§ 327(a) to disqualify counsel based on a potential conflict of interest. *In re Marvel Entm't Grp., Inc.*, 140 F.3d at 476-77.[21]

**B.**

The movants argue that Roetzel is disqualified under § 327(a) for three reasons: first, it has an actual conflict of interest because it earlier represented Emerald Ridge and Kol Tuv, while it now represents the trustee against those entities in a "connected" dispute, the Emerald Ridge proceeding. Second, Roetzel has an economic interest that is materially adverse to the estate. And third, Roetzel obtained unspecified confidential client information in the 2006 representation that "would likely prejudice [Emerald Ridge], Kol Tuv and perhaps the Trustee."[22]

The Actual Conflict Claim: As to the actual conflict, the movants claim that Roetzel has taken opposite positions in the Emerald Ridge proceeding and the opinion letter on two issues: who owned the operating rights and whether the lien given to Beacon Hill is valid. On the first point, they argue that "Pursuant to the Adversary Proceeding, Roetzel contends that the assets were owned by Raffuah, whereas in the Roetzel Opinion Letter Roetzel concludes the assets were owned by [Emerald Ridge]."[23] To show that Roetzel opined that Emerald Ridge owned the assets, the movants point to that part of the opinion letter where Roetzel stated as part of its assumptions that it knew of no facts contrary to the assumption that Emerald Ridge and Kol Tuv had "title or other interest" in real and personal property involved in the loan transaction. On the second point, which relates to the Beacon Hill lien, they argue that " Roetzel assert[s] the Beacon

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[21] The court has reviewed the cases cited by the parties as being factually similar, but does not discuss them here as none is controlling or dispositive.

[22] Motion to Disqualify at 8.

[23] Motion to Disqualify at 8.

Hill Lien is invalid as to Raffuah and in the Roetzel Opinion letter Roetzel opines that the Beacon Hill Lien is valid as to Raffuah."[24] Additionally, the movants argue that they have asserted affirmative defenses to the trustee's counterclaim in the Emerald Ridge proceeding which focus on the Beacon Hill lien. Specifically, they assert that the trustee's counterclaim fails to state a claim because the Beacon Hill lien encumbers the assets the trustee is seeking to recover. They also allege that the Beacon Hill lien is under-secured, which requires the trustee to abandon the counterclaim as having inconsequential value or benefit to the estate.

The Economic Interest that is Adverse to the Estate: This argument also relates to the Beacon Hill lien. The movants contend that Roetzel opined on behalf of Emerald Ridge, Kol Tuv, and Raffuah in 2006 that the Beacon Hill lien was valid, and now the trustee is arguing that the lien is invalid. If the Beacon Hill lien is set aside in the Beacon Hill proceeding, they continue, Roetzel may face claims from third parties, including Beacon Hill, for having made a misrepresentation in the opinion letter. It is, therefore, in Roetzel's economic self-interest for the trustee to lose on that issue, which would eliminate any risk that Roetzel would be sued. This, they conclude, renders Roetzel "biased" against the estate.

The trustee responds:

The trustee's position in the Emerald Ridge proceeding is not inconsistent with the position that Roetzel took in the opinion letter regarding the assets, because it is not inconsistent to say that Emerald Ridge and Kol Tuv, as owners of the real estate, had an interest in the assets that Raffuah owned based on the lease. The trustee does not challenge the HUD refinancing

[24] Motion to Disqualify at 8.

transaction and her position in the counterclaim is that the representations made by the parties in the transaction are true.

Additionally, the trustee argues that her position with respect to the Beacon Hill lien is not inconsistent with the opinion letter. The position Roetzel took in 2006 is that the Beacon Hill lien was valid; the trustee is also saying in the Emerald Ridge proceeding that the lien is valid. To the extent that the trustee makes a factual allegation in the Emerald Ridge proceeding that the Beacon Hill lien is not an impediment to the trustee's counterclaim, the trustee is not saying that the lien was invalid *when it was given*. As to the Beacon Hill proceeding, the trustee says that the filing of the bankruptcy case created rights in the trustee that allow the trustee to avoid an otherwise properly granted lien. Moreover, the trustee argues that her position in the Beacon Hill proceeding is irrelevant to the question of whether Roetzel has a general disqualifying conflict because she is represented by different counsel in that proceeding.

The court concludes that Roetzel does not have an actual conflict of interest on the issue of the ownership of the assets based on its having issued the opinion letter. Roetzel's representation of Emerald Ridge and Kol Tuv in the HUD refinancing involved an entirely separate transaction from the lease termination and assignment between and among Raffuah, Emerald Ridge, and Kol Tuv, occurring nearly two years later, which is being challenged in the trustee's counterclaim. Additionally, there is no inconsistency regarding the HUD transaction between the trustee's allegations in the Emerald Ridge proceeding and the opinion letter. Finally, to the extent the two can be characterized as inconsistent, there is no conflict because the answer to the question regarding which entity owned the assets (including the operating rights) is not found in the opinion letter, but in the actual documents which establish the parties' property rights, including those referenced in the opinion letter.

The court further concludes that the Beacon Hill lien argument does not establish that there is an actual conflict based on Roetzel's role as the trustee's counsel and its role as former counsel to Emerald Ridge and Kol Tuv. Roetzel states in the opinion letter that it "assumes" for purposes of its opinion that the lien is valid and knows no facts contrary to that position. The trustee's position here is that the lien was valid when given, but the chapter 7 case created rights in the trustee to set aside certain liens even though they were valid when created. This is accurate. *See* 11 U.S.C. § 544. Moreover, the opinion letter presages this possibility when it states that the loan documents are valid, subject to the effect of bankruptcy laws that affect creditors generally. Additionally, the movants' argument that the trustee must abandon the litigation against them because the assets are fully encumbered by the Beacon Hill lien and cannot yield any recovery for the estate is an argument on the merits which is not relevant to the issue of whether Roetzel should be disqualified. As a result, Roetzel's position on behalf of the trustee that the existence of the Beacon Hill lien is not a complete defense to the counterclaim is not inconsistent with its earlier position in the opinion letter.

For the same reasons, the court concludes that the movants' allegations regarding the Beacon Hill proceeding are too attenuated to show that Roetzel has any interest adverse to or bias against the estate.

The movants' third argument is that Roetzel obtained confidential information in 2006 that would "likely prejudice" Emerald Ridge, Kol Tuv, and perhaps the trustee. The movants do not identify any such information and Roetzel denies having any. There is, therefore, no evidence to support this claim.

## II. Bankruptcy Code § 327(c)

Section 327(c) provides that a professional is not disqualified for employment in a chapter 7 case solely by reason of the professional's employment by or representation of a creditor, unless another creditor objects and there is an actual conflict of interest. 11 U.S.C. § 327(c). By its terms, this provision permits a trustee to employ a professional that represented a creditor prior to the appointment. *Hunter Savings Assoc. v. Baggott Law Offices Co., L.P.A. (In re Georgetown of Kettering, Ltd.)*, 750 F.2d 536, 540 (6th Cir. 1984). "This provision prevents disqualification based *solely* on the professional's prior representation of or employment by a creditor–it does not preempt the more basic requirements of subsection (a)." *In re Arochem Corp.*, 176 F.3d at 621 (internal quotation marks and citation deleted); *see also In re Dev. Corp. of Plymouth*, *Inc.*, 283 B.R. 464, 468 (Bankr. E.D. Mich. 2002). Because the court has found that Roetzel does not have an actual conflict of interest, it is not subject to disqualification under this section.

## III. Duty of a Proposed Counsel to Disclose Under Bankruptcy Rule 2014

A trustee who wishes to employ an attorney under § 327 must file an application accompanied by a verified statement of the proposed professional stating the professional's connections with the debtor, creditors, or any other party in interest, among other things. FED. R. BANKR. P. 2014(a). "Complete and accurate disclosure by attorneys is required to permit the court to make informed decisions regarding their employment." *In re Fretter, Inc.*, 219 B.R. at 776. The failure to disclose timely and completely "is sanctionable and sanctions may be appropriate regardless of actual harm to the estate." *Id.* However, the court has a great deal of latitude when fashioning an appropriate sanction for the failure to make a timely disclosure. *Id.* (citing *Mapother & Mapother, P.S.C. v. Cooper (In re Downs)*, 103 F.3d 472, 477 (6th Cir.

1996)). Technical breaches are treated more leniently than willful ones. *Vergos v. Mendes & Gonzales PLLC (In re McCrary & Dunlap Constr. Co.)*, 79 Fed. Appx. 770, 779-80 (6th Cir. 2003).

In this case, Roetzel's affidavit in support of the application states that the firm represented an entity believed to be Raffuah in 2006. That statement is correct. Roetzel did not disclose that it also had represented Emerald Ridge and Kol Tuv because it did not have that information in its conflicts system. No party asked Roetzel for additional information concerning the Raffuah representation and there is no evidence that Roetzel concealed any such information. Raffuah presumably knew about the representation, but did not oppose the application. When Roetzel received additional information about the 2006 representation, it disclosed it via a second supplemental affidavit filed on October 29, 2010. The disclosure in this case was deficient; however, the circumstances do not show that Roetzel willfully failed to disclose or that any sanction is required.

**IV. Ohio Rules of Professional Conduct**

A professional in a bankruptcy case must not only meet the Bankruptcy Code requirements, but must also comply with the Ohio Rules of Professional Conduct that govern attorneys practicing in Ohio. *See* Local Rule of the United States District Court for the Northern District of Ohio 83.7(a) (binding attorneys admitted in the Northern District of Ohio to the ethical standards of the Ohio Rules of Professional Conduct). A bankruptcy court has the inherent power to supervise counsel and to disqualify counsel from a representation based on a violation of those rules, including a conflict of interest. *See* 11 U.S.C. § 105(a); LOCAL. BANKR. R. 2090-2(c); *David Cutler Indus., Ltd. v. Direct Group, Inc. (In re David Cutler Indus., Ltd.)*, 432 B.R. 529, 539-40 (Bankr. E.D. Pa. 2010); *In re Mount Vernon Plaza Comm. Urban*

*Redevelopment Corp.*I, 85 B.R. 762, 765 (Bankr. S.D. Ohio 1988). Motions to disqualify are not favored, however, and the party requesting disqualification bears the burden of establishing that disqualification is necessary. *Official Unsecured Creditors Committee of Valley-Vulcan Mold Co. v. Ampco-Pittsburgh Corp. (In re Valley-Vulcan Mold Co.)*, 237 B.R. 322, 337 (B.A.P. 6th Cir. 1999), *aff'd* 5 Fed. Appx. 396 (6th Cir. 2001).

Ohio Rule 1.10 applies to the situation presented here, where the attorney who represented Emerald Ridge and Kol Tuv is no longer associated with Roetzel and the movants seek to disqualify the firm.[25] That rule imputes the attorney's conflict of interest in this fashion:

> (b) When a lawyer is no longer associated with a firm, no lawyer in that firm shall thereafter represent a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, if the lawyer knows or reasonably should know that either of the following applies:
>
> (1) the formerly associated lawyer represented the client in the same or a substantially related matter;
>
> (2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

OHIO R. PROF. CONDUCT 1.10 (b). A substantially related matter is defined as–

> one that involves the same transaction or legal dispute or one in which there is a substantial risk that confidential factual information that would normally have been obtained in the prior representation of a client would materially advance the position of another client in a subsequent matter.

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[25] While movants cited Ohio Rule 1.9 as the applicable rule with regard to the firm's disqualification, that rule deals with a lawyer's duties to former clients. Rule 1.9 is germane, however, to the extent that it provides that lawyers in the firm may not use information relating to the representation to the disadvantage of the former clients except as provided by rule or when the information is generally known, and they may not reveal information relating to the representation except as the rules permit or require.

OHIO R. PROF. CONDUCT 1.0 (n). Although the court could not locate any Ohio case law discussing the Rule 1.10 (b)(2) confidential information requirement, the Official Comments suggest that the firm bears the burden of proving that it does not possess confidential client information. *See* Official Comment 6 to OHIO R. PROF. CONDUCT 1.9 (stating that the burden of proof as to confidential information should rest on the attorney whose disqualification is sought); *N. Am. Deed Co. v. Joseph (In re N. Am. Deed Co.)*, 334 B.R. 443, 450 (Bankr. D. Nev. 2005) (citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 124(2), cmt. c(i) (2000) for the proposition that the firm opposing disqualification under Model Rule 1.10 bears the burden of showing that it does not possess such information).

The July 2006 opinion letter representation and the Emerald Ridge proceeding in which the trustee seeks to set aside the November 2007 Lease Termination are not "substantially related" within the meaning of this rule. They are not the same transaction or dispute; one transaction was a financing transaction involving Kol Tuv, Emerald Ridge, and Raffuah on the one side and HUD and Beacon Hill on the other, with Roetzel serving as special counsel. The other is an agreement made almost a year and a half later between Kol Tuv and Emerald Ridge on the one hand and Raffuah on the other, to terminate a lease and transfer property. There is no evidence that Roetzel played any role in this second transaction. Nor is there any evidence that the kind of factual information that Emerald Ridge, Kol Tuv or Raffuah normally would have given to Roetzel to facilitate writing the opinion letter would "materially advance the position" of the trustee in this bankruptcy matter. As noted above, the movants do not identify any information that might fall into this category, and Roetzel denies having any. Additionally, the information which Emerald Ridge and Kol Tuv gave to Roetzel in connection with the prior representation appears to be set out in the opinion letter, which was given to third parties and is

available in pleadings filed in this case. And, for the most part, the opinion letter states matters of public record, such as the legal existence and authority of certain entities to enter into the transaction. Consequently, Roetzel has not violated the Ohio rule.[26]

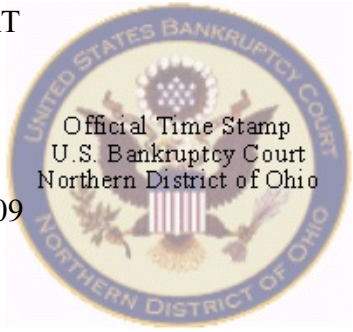
## CONCLUSION

For the reasons stated, the motion to disqualify Roetzel is denied. A separate order will be entered reflecting this decision.

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

[26] Roetzel also argued that the movants waived the right to seek disqualification based on their delay in raising the issue. *See In re Valley-Vulcan Mold Co.*, 237 B.R. at 337 (stating that waiver is a valid basis for denying a motion to disqualify). That issue is mooted by the court's conclusion that disqualification is not appropriate.

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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| In re: | ) | Case No. 08-17309 |
| | ) | |
| RAFFUAH HEALTHCARE, INC., | ) | Chapter 7 |
| | ) | |
| Debtor. | ) | Judge Pat E. Morgenstern-Clarren |
| | ) | |
| | ) | **ORDER** |

For the reasons stated in the memorandum of opinion entered this same date, the motion of Sharona Grunspan, Emerald Ridge Realty, L.P., and Kol Tuv, Ltd. to disqualify the law firm of Roetzel & Andress LPA from serving as counsel for the chapter 7 trustee is denied. (Docket 113).

IT IS SO ORDERED.

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge