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Hearing Date: October 27, 2009
Time: 11:00 a.m.
Place: Central Islip, NY

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

-----X

In re:

Case No. 09-75473
Chapter 11

Suffolk Ready Mix, LLC,

Debtors

-----X

In re:

Case No. 09-75485
Chapter 11

Antonio Enterprises, Inc.,

Debtors

-----X

In re:

Case No. 09-75484
Chapter 11

Anthony T. Persico,

Debtors

-----X

**MEMORANDUM OF LAW IN OPPOSITION TO DEBTORS' MOTIONS TO
DISQUALIFY MORITT HOCK HAMROFF & HORWITZ LLP FROM APPEARING IN
THESE CASES AS COUNSEL FOR ANTONIO LOPES**

PRELIMINARY STATEMENT

This Memorandum of Law is submitted in opposition to the separate motions (the

"Motions") filed by Suffolk Ready Mix, LLC ("Suffolk"), Antonio Enterprises, Inc. ("Antonio") and Anthony T. Persico ("Persico" and together with Suffolk and Antonio, the "Debtors") whereby the Debtors are seeking to disqualify Moritt Hock Hamroff & Horowitz LLP ("MHH&H") from further representing Antonio Lopes ("Lopes") in the Debtors' above-captioned cases (collectively, the "Bankruptcy Proceedings"). The facts concerning MHH&H's relationship with Persico are set forth at length in the accompanying (i) Affirmation of Leslie A. Berkoff, Esq. ("Berkoff") dated October 26, 2009 ("Berkoff Aff."), and Affirmation of Lee J. Mendelson, Esq. ("Mendelson") dated October 26, 2009 ("Mendelson Aff." and together with the Berkoff Aff., the "Affirmations") and will not be repeated here. As the Affirmations make clear, neither Mendelson, Berkoff, (collectively, the "Attorneys" and together with MHH&H, the "Firm") nor MHH&H ever represented Persico, nor did Persico discuss relevant privileged or confidential information with the Firm.

On March 25, 2009, an initial consultation (the "Meeting") was scheduled with the Attorneys, Persico and Persico's accountant, Marc Wagner ("Wagner") of Wagner & Zwerman, LLP. The Meeting was scheduled as a courtesy to Wagner because he is a colleague of Eric M. Mencher, Esq., a partner at MHH&H. Although the Attorneys did in fact meet with Persico and Wagner, the Meeting never progressed beyond the initial "meet and greet" and certain initial inquiries.¹ As is typical in a preliminary consultation, one of the very first questions addressed Persico's potential creditors. (*See id.* at ¶5; Mendelson Aff. at ¶ 7). Upon learning that two (2) of Persico's potential creditors were existing clients of the firm, the Meeting was immediately halted to enable Mendelson to ascertain whether a conflict existed. (*See*

¹ In fact, as the Debtors acknowledge, Ms. Berkoff barely participated in the Meeting. As a result of emergency circumstances that arose in another unrelated case, Ms. Berkoff, although present for the initial part of the Meeting, very quickly excused herself. (*See* Berkoff Aff. at ¶8; *See also*, ¶3 of the Affidavit of Anthony T. Persico dated October 19, 2009 submitted in support of the Debtors' Motions "Perisco Aff.")

Mendelson Aff. at ¶ 10).² This was done because: (i) MHH&H values its reputation within the legal community and would never knowingly take on representation in violation of the ethics rules, or any other rule governing legal decorum; and (ii) MHH&H values its existing client relationships and would not conduct meetings, proffer advice or enter into any substantive conversations that may place such relationships in jeopardy.

After conversations with certain of his partners, Mendelson concluded that a conflict existed and immediately upon returning to the Meeting advised Persico accordingly. (*See id.*). Thus, Persico could have had absolutely no expectation of forming a client-lawyer relationship with the Attorneys. To suggest that Mendelson would conduct a substantial review of documents and spend over two (2) hours engaging Persico in conversations related to the above-captioned cases, irrespective of the fact that MHH&H could not represent him or his companies is nonsensical. (*See Persico Aff. at ¶4*). Not only would it have been a complete waste of time - for Persico, Mendelson, and Wagner - to move forward in the fashion described by Persico, it would put MHH&H in a position where it would gain nothing, yet risk a great deal - both its reputation and relationships with two existing clients.

For all the reasons set forth herein, Debtors' Motions to disqualify MHH&H from representing Lopes with respect to the above-captioned cases should be seen for what it is, a motion filed simply for strategic purposes. Thus, the Motions should be denied in their entirety.

² Unlike Persico, a conflict does not exist with respect to Lopes. Like the two existing clients, Lopes is a creditor in the Bankruptcy Proceeding thus, their interests are aligned. Prior to being raised by McAuliffe, the fact that the Attorneys had contact with Persico was not an issue for the Firm because at the time MHH&H agreed to represent Lopes, the Firm did not consider Persico as a client. Further, because the Firm did not view Persico as a client, no files were ever opened and no records were maintained thus, no concerns were raised when the Firm conducted an internal conflict check on account of Lopes.

I

CONTRARY TO DEBTORS' ASSERTION RULE 1.18 OF THE NEW YORK CODE OF PROFESSIONAL RESPONSIBILITY DOES NOT BAR MHH&H FROM REPRESENTING LOPES

It is not disputed that federal courts have the "inherent power to disqualify attorneys in order to 'preserve the integrity of the adversar[ial] process.'" *Hempstead Video, Inc. v. Incorporated Village of Valley Stream*, 409 F.3d 127, 132 (2d Cir. 2005) (citation omitted). However, the Debtors' reliance on Rule 1.18 of the New York Code of Professional Responsibility as an outright bar from representing Lopes is misplaced. This is because, "[i]n a technical sense the only truly binding authority on disqualification issues is [Second] Circuit precedent, because our authority to disqualify an attorney stems from the Court's inherent supervisory authority." *Skidmore v. Warburg Dillon Read LLC*, No. 99 Civ. 10525, 2001 WL 504876, at *2 (S.D.N.Y. May 11, 2001). Further, although federal courts may consider state disciplinary rules for guidance, "such rules merely provide general guidance and not every violation of a disciplinary rule will necessarily lead to disqualification." *Hempstead Video*, 409 F.3d at 132. In the instant case, it would appear that MHH&H did not violate Rule 1.18 of the New York Code of Professional Responsibility, let alone to the degree necessitating disqualification.

Contrary to the Debtors' characterization of Rule 1.18 of the New York Code of Professional Responsibility, Rule 1.18 does not prohibit MHH&H from representing Lopes. Pursuant to Rule 1.18 of the New York Code of Professional Responsibility, "[a] person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a 'prospective client'" (Subsection (a) of Rule 1.18 of the New York Code of Professional Responsibility). However, "a person who communicates information unilaterally to

a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship ... is not a prospective client" (Subsection (e) Rule 1.18 of the New York Code of Professional Responsibility).

Although the Firm maintains that the Attorneys had no relevant discussions with Persico regarding his businesses, claims against him or otherwise, the fact that he was advised within the first few minutes of the Meeting that MHH&H would not be able to represent him effectively negates his ability to claim a reasonable expectation of forming a client-lawyer relationship. Accordingly, Rule 1.18 of the New York Code of Professional Responsibility is not applicable in the instant case.

In addition, even assuming *arguendo* that Persico could be considered to be a 'prospective-client' within the meaning of Rule 1.18, as discussed in the Affirmations, the Attorneys learned of no pertinent information related to the above-captioned cases. (*See, generally*, Mendelson Aff.; Berkoff Aff.). Pursuant to the New York Code of Professional Responsibility, "[a] lawyer ... shall not represent a client with interests materially adverse to those of a prospective client ... if the lawyer received information from the prospective client that could be significantly harmful to that person in any manner" (Subsection (c) Rule 1.18 of the New York Code of Professional Responsibility).

The Attorneys did not obtain any relevant information during the course of the Meeting, let alone information that could be significantly harmful to Persico, as required by Rule 1.18 of the New York Code of Professional Responsibility. (*See id.*). Determining who Persico's potential creditors were was one of the very first inquiries at the Meeting. Upon learning that two such creditors were existing clients of MHH&H, the Meeting was immediately halted. (*See* Mendelson Aff. at ¶ 10). Any conversations that occurred after that point, occurred after Persico

was advised that MHH&H could not represent him, or his companies and were strictly limited to matters related to bankruptcy law in general. (*See id.* ¶ 11).

Further, in an effort to resolve the Debtors' issues amicably, Berkoff spoke with McAuliffe, ("McAuliffe") counsel to Antonio and Suffolk, to discern whether his allegations of a purported conflict of interest necessitating MHH&H's disqualification had any basis. (*See Berkoff Aff.* at ¶ 11). McAuliffe advised that during the course of the Meeting, Persico purportedly mentioned that UCC financing statements against certain of the Debtors, filed by Lopes, were about to expire. (*See id.*) It is unclear why this particular fact creates cause for concern for the Debtors because (i) the UCC financing statements have since expired and (ii) Lopes, through the offices of another law firm, filed his claims against the Debtors, as an unsecured creditor. (*See id.* at 12). Aside from the vague and ambiguous assertions contained in the Persico Aff., (Persico Aff. ¶¶ 4 and 5), this fact, is the sole fact McAuliffe raised in support of Debtors' Motions, thus, clearly the Debtors have failed to satisfy Rule 1.18 because knowing about a potential lapse with respect to UCC financing statements that have since expired – is simply not relevant, let alone significantly harmful to the Debtors.

II

THE DEBTORS HAVE FAILED TO CARRY THEIR BURDEN ESTABLISHING THAT MHH&H'S CONTINUED REPRESENTATION OF LOPES CONSTITUTES A VIOLATION OF THE APPLICABLE DISCIPLINARY RULES

The standard of professional conduct in federal courts is a matter of federal law. *In re Snyder*, 472 U.S. at 645 n.6. Attorneys practicing in this jurisdiction are required to follow the standards set forth in the American Bar Association's Model Code of Professional Conduct ("ABA Code"). *See NCK Org. Ltd. v. Bregman*, 542 F.2d 128, 129 n.2 (2d Cir. 1976) (noting that the ABA Code "is recognized ... in this circuit as prescribing appropriate guidelines for the

professional conduct of the bar"). Rule 1.9 of the ABA Code addresses lawyer conduct with respect to formerly represented clients and reads in pertinent part:

(a) 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 unless the former client gives informed consent, confirmed in writing.

(b) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

MODEL CODE OF PROF'L CONDUCT R. 1.9. In interpreting this Rule in the context of attorney disqualifications, the Second Circuit has applied the following standard: (i) the moving party is a former client of the adverse party's counsel; (ii) there is a substantial relationship between the subject matter of the counsel's prior representation of the moving party and the issues in the present lawsuit; and (iii) the attorney whose disqualification is sought had access to, or was likely to have had access to, relevant privileged information in the course of his prior representation of the client. *See Hempstead Video*, 409 F.3d 127 at 133.

A. Persico was never a former client of MHH&H.

The Debtors have failed to satisfy the first element in determining whether disqualification is appropriate because Persico was never a former client of MHH&H. The following six factors have been considered by many Second Circuit courts when determining whether an attorney-client relationship exists:

- 1) whether a fee arrangement was entered into or a fee paid;
- 2) whether a written contract or retainer agreement exists indicating that the attorney accepted representation;
- 3) whether there was an informal relationship whereby the attorney performed legal services gratuitously;
- 4) whether the attorney actually represented the individual in one aspect of the matter (e.g., at a deposition);
- 5) whether the attorney excluded the individual from some aspect of a litigation in order to protect another (or a) client's interest;
- 6) whether the purported client believes that the attorney was representing him and whether this belief is reasonable.

Adams v. Village of Keesville, No. 8:07-CV-452, 2008 WL 3413867, at *8 (N.D.N.Y. Aug. 8, 2008); *First Hawaiian Bank v. Russell & Volkening, Inc.*, 861 F. Supp. 233, 238 (S.D.N.Y. 1994); *Toussaint v. James*, No. 01 Civ. 10048, 2003 WL 21738974 at *8 (S.D.N.Y. July 25, 2003). None of these factors are satisfied in the instant case.

The Meeting occurred solely as a courtesy to Wagner. Thus, no fee arrangement was entered into nor was a fee paid by Persico. Documentation indicating that the Attorneys accepted a representation does not exist. The Firm never performed legal services on behalf of

Persico, nor was an informal relationship created between the parties. Moreover, the Firm never actually represented Persico. The sole contact Persico had with the Attorneys occurred at the Meeting. To the extent that general bankruptcy law was discussed, it was proffered on a conceptual basis without reference to any specific facts or circumstances; and such advice was only proffered after Persico was made aware of the fact that the Firm was not able to represent him. The Attorneys did not exclude Persico from any aspect of any litigation to protect another client's interests. The fact that Persico continues to maintain that an attorney-client relationship exists completely ignores the facts of this matter, and flies in the face of the fact that he was specifically advised that the Firm could not represent him. Thus, Persico's belief that an attorney-client relationship existed is unreasonable.

Furthermore, courts in this district have acknowledged that an attorney-client relationship exists if the party divulging confidences and secrets to an attorney "believes he is approaching the attorney in a professional capacity with an intent to secure legal advice." *First Hawaiian Bank v. Russell & Volkening, Inc.*, 861 F. Supp. at 238. However, owing to the facts in the instant case, even this more lenient analysis is not dispositive. It is conceivable that Persico intended to secure legal advice at the Meeting. Yet, because the Meeting was halted very early, and prior to an opportunity for Persico to disseminate any pertinent or relevant information related to the Bankruptcy Proceedings, such belief in this case is unfounded. Moreover, Persico was told the Firm could not represent him as a result of those conflicts.

B. Relevant privileged information was not disclosed during the course of the Meeting.

In *Hempstead Video*, the Court held that the party moving to disqualify a law firm for conflict of interest in connection with successive representation of a client, must prove that "the

attorney whose disqualification is sought had access to, or was likely to have had access to, relevant privileged information in the course of his prior representation of the client." *Hempstead Video*, 409 F.3d at 133. Here, Debtors' Motions merely assert that Persico provided MHH&H "confidential information, which should be sufficient to satisfy the third prong of the disqualification test." This vague, ambiguous and conclusory assertion, contrary to the Debtors' contention, does not satisfy the third prong of the disqualification test.

Furthermore, the presumption that an attorney is likely to have had access to his client's confidential information is rebuttable where an attorney states explicitly that no confidences were ever received from the client. *See Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751, 757 (2d Cir.1975) (the Court denied the movant's disqualification motion where the non-movant's attorney had previously performed services for the movant, based upon the affidavits used to rebut the inference that non-movant's attorney possessed confidential information); *Team Obsolete Ltd. v. A.H.R.M.A. Ltd.*, No. 01 CV 1574, 2006 WL 2013471, at *8 (E.D.N.Y. July 18, 2006)(the Court denied movant's application to disqualify the non-movant's law firm, because the non-movant law firm expressly denied ever having received "confidences or secrets from [the movant] of any kind"). As discussed at length above, Persico did not provide the Attorneys with any relevant information because the Meeting, from an informational gathering perspective, was halted almost as quickly as it started. Thus, not enough time transpired for the Attorneys to gain anything other than cursory information. Further, Mendelson has affirmed that: (i) he quickly terminated the Persico meeting upon sensing that Persico's interests may lay in conflict with certain of MHH&H's existing clients; (ii) during the brief interaction with Persico, Persico did not divulge to Mendelson any confidential information; (iii)

he did not take notes during the Persico meeting, since Persico had not divulged any information, let alone confidential privileged information. (*See generally*, Mendelson Aff.).

In addition, even assuming arguendo that the Firm had access to, or was likely to have had access to, information, the fact that Wagner participated in the Meeting, destroyed any privilege that may have otherwise attached. Further, Persico is aware of this because, prior to commencing the Meeting, Mendelson advised Persico of the fact that anything discussed would not be in confidence and subject to privilege because of Wagner's presence. (*See id.* at 6).

Even assuming arguendo that the Attorneys were informed of the information related to the UCC financing statements "[i]f a party is capable of securing confidential information by means other than through prior representation, disqualification may not be merited, even if there is a technical violation" *Medical Diagnostic Imaging, PLLC v. Carecore National, LLC*, 542 F. Supp. 2d 296, 315 (E.D.N.Y. 2008). As discussed above, the sole piece of information that McAuliffe alleges the Attorneys have knowledge of pertains to the now expired UCC financing statements. Given the fact that filed UCC financing statements are public record and are intended as a device providing notice to the world of the existence of an interest, it is unclear how this information could qualify as confidential.

As the Firm does not possess any confidential privileged information and the Debtors have failed to proffer any evidence, other than vague, ambiguous and conclusory assertions to the contrary, the Debtors have failed to satisfy the third prong of the disqualification test.

C. Contrary to Debtors' assertions, Fierro v. Gallucci – is not directly on point.

The Debtors' Motions assert that the facts present in this case are "virtually identical" to those presented to the Court in *Fierro v. Gallucci*, No. 06-CV-5189, 2007 WL 4287707 (E.D.N.Y. Dec. 4, 2007). However, this assertion is clearly misplaced.

In *Fierro*, the plaintiffs consulted with the defendants' counsel on two, possibly three, occasions, during which the plaintiffs' and defendants' counsel discussed: (i) the plaintiffs' potential claims against defendants; (ii) the underlying facts which gave rise to plaintiffs' potential claims; (iii) the defenses available to the defendants; (iv) dollar amounts at risk; and (v) the relevant case law and other legal theories applicable to the facts in issue. After these two or three consultations, the defendants' counsel sent the plaintiffs a fax reflecting the relevant case law pertaining to the plaintiffs' claims. Thereafter, the defendants' counsel was retained to represent the defendants in a lawsuit commenced against them by the plaintiffs.

In the *Fierro* case, counsel provided a range of services to the plaintiffs, and commenced work on plaintiffs' behalf. That is simply not the case here. By contrast, in the case at bar, Mendelson attended one brief meeting with Persico -- not two or three meetings with him. Further, the Meeting was immediately cut short by the fact that potential creditors of Persico were existing clients of the Firm. Most significantly, Mendelson never advised Persico of the potential claims against any third parties, defenses that Persico could employ against potential claimants, monies at risk or any applicable case law, in writing or otherwise. Lastly, in *Fierro*, the defendants' counsel could not remember if the plaintiffs had disclosed any confidential

information to him, where, as here, the Attorneys are certain that no confidential information was disclosed to them by Persico.

Accordingly, the facts in *Fierro* are vastly different -- not "virtually identical" -- from the facts in this case.

III

LOPES IS ENTITLED TO FREELY CHOOSE HIS COUNSEL

When considering whether to discharge an attorney, courts must balance "the need to maintain the highest standards of the profession" against "a client's right freely to choose his counsel." *Hempstead Video*, 409 F.3d at 132 (citations omitted). However, courts in the Second Circuit have "been loathe to separate a client from his chosen attorney," *In re Bohack Corp.*, 607 F.2d 258, 263 (2d Cir. 1979), because "[d]isqualification has a serious and immediate adverse effect by denying the client his choice of counsel." *Society for Good Will to Retarded Children, Inc. v. Carey*, 466 F. Supp. 722, 724 (E.D.N.Y. 1979). Generally, courts in the Second Circuit view motions for disqualification with "fairly strict scrutiny" and view such motions with disfavor. *See Lamborn v. Dittmer*, 873 F.2d 522, 531 (2d Cir. 1989); *accord Ragdoll Prods. (UK) Ltd. v. Wal-Mart Stores, Inc.*, No. 99 CV 2101, 1999 WL 760209, at *1 (S.D.N.Y. Sept. 27, 1999) (noting that motions to disqualify are "subject to strict scrutiny"); *see also Stratavest Ltd. v. Rogers*, 903 F. Supp. 663, 666 (S.D.N.Y.1995) (stating that "[m]otions to disqualify opposing counsel are viewed with disfavor in this Circuit"); *United States Football League v. Nat'l Football League*, 605 F. Supp. 1448, 1452 (S.D.N.Y. 1985) (same).

Disqualification motions are approached with suspicion because there looms the overarching element that they are nothing more than tactical maneuvers. *D.R.T., Inc. v. Universal*

City Studios, Inc., No. 02 Civ. 0958, 2003 WL 1948798, at *2-3 (S.D.N.Y. Apr. 24, 2003). *Adams v. Village of Keesville*, 2008 WL 3413867, Civ. No. 8:07-CV-452 (N.D.N.Y. Aug. 8, 2008). At least one court has commented that "[d]isqualification motions are subject to abuse for tactical purposes," often resulting in "complex satellite litigation extraneous to the case." *Universal City Studios, Inc. v. Reimerdes*, 98 F. Supp. 2d 449, 455 (S.D.N.Y. 2000); *see also Evans v. Artek Sys. Corp.*, 715 F.2d 788, 790 (2d Cir. 1983) (noting that "even when made in the best of faith, such motions inevitably cause delay") (quoting *Bd. of Educ. v. Nyquist*, 590 F.2d 1241, 1246 (2d Cir. 1979)).

There is no dispute that any doubts should be resolved in favor of disqualification. *See Cheng v. GAF Corp.*, 631 F.2d 1052, 1059 (2d Cir. 1980); *Hull v. Celanese Corp.*, 513 F.2d 568, 571 (2d Cir. 1975). However, the burden rests squarely upon the Debtors to demonstrate that continued representation by the challenged attorney would result in serious prejudice. *See Ragdoll Prods. (UK) Ltd.*, 1999 WL 760209, at *2; *Stratavest Ltd.*, 903 F. Supp. at 667. As discussed above, aside from the vague and ambiguous assertions in the Persico Aff, (Persico Aff ¶¶ 4 and 5), information related to the UCC financing statements, is the sole fact we are aware of in support of Debtors' Motions, given that the UCC financing statements had expired, and are thus no longer relevant, the Debtors have failed to demonstrate how MHH&H's continued representation of Lopes would result in any prejudice let alone rising to the level of serious prejudice required when seeking to disqualify an adversary.

CONCLUSION

Given the lack of information provided in support of the Debtors' Motions, there is no doubt that the Debtors' Motions were filed strictly as a strategical measure – absent supporting evidence, what other reason exists? The fact that the Debtor's Motions fail to mention Wagner's

presence at the Meeting supports the fact that the Debtors' Motions were filed strictly as a strategic ploy. Given the fact that this 'oversight' goes to the heart of Debtors' Motion, as dissemination of privileged material is one of the three elements the Debtors must prove when moving to disqualify an adversary – and privilege cannot attach if a third party is present at the Meeting – one must question such a glaring omission.

Perhaps even more egregious is the fact that on the one hand the Debtors are taking this Courts time to consider whether the Firm should be disqualified for participating in an abbreviated meeting that occurred approximately seven (7) months ago, regardless of the fact that the Firm has not been provided with anything other than cursory information, while on the other hand, they have each requested that the Court approve the retention of Wagner's firm Wagner & Zwerman, LLP as accountants for each respective Debtor (*See, e.g.*, Application as filed in In re: Anthony T. Persico, Docket No. 33); and, based upon review of the docket report, Debtors' respective counsel apparently share office space.³

It is surprising that Debtors' respective counsel do not believe a conflict is created when one accountant is to be used for Suffolk, Antonio and Persico - the 99% owner of Suffolk and Antonio - especially in light of the fact that such accountants responsibilities apparently shall include assisting each respective Debtor formulate and develop plans of reorganization, among other things.

Clearly, Verdi and McAuliffe represent clients with competing interests. Yet they are representing them as if this were not a factor – apparently sharing information and strategy. To file joint Motions alleging harm from the same set of circumstances is one thing, filing identical Applications to retain Wagner & Zwerman, LLP thereby creating a conflict, is another. Yet, the

³ As stated on the docket report, Persico is represented by Raymond W Verdi, Jr., with an address at: 48 South Service Road, Suite 102, Melville NY 11747; and each of Antonio and Suffolk are represented by McAuliffe who lists his address as: 48 South Service Road, Suite 102, Melville NY 11747.

fact that the Meeting occurred over seven months ago agitates and unsettles Persico. (Persico Aff. ¶ 9).

For all the foregoing reasons and for the reasons set forth in the Affirmations, Debtors' Motions should be denied.

Dated: October 26, 2009
Garden City, New York

MORITT HOCK HAMROFF & HOROWITZ LLP
Attorneys for Antonio Lopes

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UNITED STATES BANKRUPTCY COURT
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**AFFIRMATION IN OPPOSITION TO
DEBTORS' MOTIONS TO DISQUALIFY
ATTORNEYS FOR ANTONIO LOPES**

LESLIE A. BERKOFF, an attorney admitted to practice before the Courts of the State of New York, affirms under penalties of perjury as follows:

1. I am a partner in the firm of Moritt Hock Hamroff & Horowitz LLP ("MHH&H"), attorneys of record for Antonio Lopes, a creditor and a party in interest in the above-captioned cases. I make this affirmation in opposition to the separate motions (the "Motions") filed by Suffolk Ready Mix, LLC ("Suffolk"), Antonio Enterprises, Inc. ("Antonio") and Anthony T. Persico ("Persico")(collectively, the "Debtors") seeking to disqualify MHH&H from further

representing Mr. Lopes in the Debtors' cases. I submit this Affirmation based upon my personal knowledge of the facts and circumstances involved in this matter.

2. I have read the Affidavit of Persico dated October 19, 2009 submitted in support of the Debtors' Motions (the "Persico Aff.") purportedly providing a summary of the brief meeting conducted on March 25, 2009 (the "Meeting"), as well as, background information concerning the relationship between MHH&H and Persico. I was dumbfounded by the level of fabrication with respect to conversations that did not occur and legal advice that was simply not proffered. The lengths to which Persico has gone to purposely contort facts and create circumstances that did not exist - solely to support the Motions for strategic purposes – are quite remarkable.

3. I have never represented Persico, let alone with respect to matters that pertain to the above-captioned bankruptcy proceedings. Nor have I ever excluded Persico from some aspect of a litigation in order to protect another client's interest.

4. It is not my practice to provide substantive advice to individuals over the phone unless or until I have had an opportunity to run an internal conflict check and confirm that no conflicts exists with our existing clients. Prior to arranging a meeting with a potential new client, it is MHH&H's customary practice to run a conflicts check to ensure that the potential representation of a party or parties, would not create a conflict. Further, when taking meetings with prospective bankruptcy clients, it is our customary practice and procedure to inquire about potential creditors to ensure no conflicts exists.¹

¹ Although standard practice is to conduct a conflict check to ensure new matters do not create any issues or ethical concerns. In the instant case, the originating partner may have neglected to run such a check prior to the Meeting.

5. In addition, upon meeting prospective clients, it is my customary practice to ascertain the names of creditors and potential adversaries prior to delving into detailed conversations or reviewing any materials with a prospective client to ensure that no internal conflicts exist.

6. Contrary to Persico's assertions, I never discussed sending a "scare letter" to his creditors. Moreover, given that the verbiage "scare letter" is not part of my vernacular, I have reason to doubt that I have ever used such a phrase in a conversation with Persico, or otherwise.

7. The Meeting was scheduled through Marc Wagner ("Wagner") of Wagner & Zwerman, LLP because he is a colleague of Eric M. Mencher, Esq., a partner (the "Relationship Partner") at MHH&H. Wagner is also Persico's accountant.

8. I admit that I met with Persico at the Meeting. However, our meeting was, as conceded by the Debtors, extremely brief. My time was dedicated to an emergency matter for another client that consumed my entire day. Therefore, I did not discuss anything of substance with Persico. As such, I have no notes with respect to such Meeting. In fact, my contact with Persico was so brief that it did not even warrant an entry on my time sheets.²

9. I never had any discussions with Persico relating to his businesses, potential claims against third parties or defenses to any potential claimants. Nor have I received any information from Persico that could be harmful to Persico or any of the other Debtors. In addition, I proffered no legal advice to Persico during the course of the Meeting. Nor did we discuss any type of strategy or plans to go forward. In fact, since, as noted in the accompanying Affidavit of Lee J. Mendelson, two of the Debtors' creditors are existing clients of MHH&H (albeit not on these

² As a further indication of how insignificant the Meeting was, the issue of a potential conflict by my representation of Lopes simply never arose. The Meeting occurred seven (7) months ago, no files were ever opened and no records were ever kept thus, nothing was picked up when the conflict checks for Lopes were conducted.

matters), it would not have made any sense, nor would we have, engaged in any strategy discussion as we never would have taken on this matter as counsel to the Debtors.

10. I have no information, let alone confidential or privileged information, concerning Persico or the Debtors.

11. In early October, 2009, I spoke with Michael G. McAuliffe, ("McAuliffe") counsel to Persico, to discern whether his allegations of a purported conflict of interest necessitated MHH&H's disqualification on any basis. McAuliffe asserts that I was advised that during the course of the Meeting, that Persico had purportedly mentioned that UCC financing statements, which had been filed by Lopes against certain of the Debtors, were about to expire. It is my understanding, based on my telephone call with McAuliffe, that this information represents the sole piece of "confidential information".

12. As I advised McAuliffe during our conversation, the expiration of the UCC financing statements, could not possibly be confidential information that could be utilized in an adverse fashion to the Debtors. First, and foremost, the UCC financing statements did indeed expire, over seven months ago, months before MHH&H took on the representation of Lopes. Second, the expiration of such statements inured to the benefit of the Debtors and the detriment of Lopes. Third, the existence and status of UCC financing statements is a matter of public record. Accordingly, it is unclear how this information would qualify as "confidential". Additionally, the fact that the UCC financing statements have in fact expired raises questions with respect to relevancy. As does the fact that Lopes, through the offices of another law firm, filed his claims against the Debtors, as an unsecured creditor.

13. Furthermore, as stated above, MHH&H did not enter into a fee arrangement

with Persico, nor was a fee paid by Persico to MHH&H. No written contract or retainer agreement exists that would indicate MHH&H or I agreed to represent Persico. Further, MHH&H never agreed to informally represent either Persico or the Debtors or perform legal services for them, gratuitously or otherwise. In fact, other than the Meeting in which I briefly met Persico, I am not aware of any relationship between MHH&H and Persico.

I contacted an ethics expert in early October, to confirm that the Meeting did not create a conflict for me or MHH&H, and that proceeding to represent Lopes was not in violation of any ethics or disciplinary rules. I was advised that the Meeting did not create a conflict for me or MHH&H, and that proceeding to represent Lopes was not in violation of any ethics or disciplinary rules.

Dated: Garden City, New York
October 26, 2009

/s/ Leslie A. Berkoff
LESLIE A. BERKOFF

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

-----X

In re:

Case No. 09-75473
Chapter 11

Suffolk Ready Mix, LLC,

Debtors

-----X

In re:

Case No. 09-75485
Chapter 11

Antonio Enterprises, Inc.,

Debtors

-----X

In re:

Case No. 09-75484
Chapter 11

Anthony T. Persico,

Debtors

-----X

**AFFIRMATION IN OPPOSITION TO
DEBTORS' MOTIONS TO DISQUALIFY
ATTORNEYS FOR ANTONIO LOPES**

LEE J. MENDELSON, an attorney admitted to practice before the Courts of the State of New York, affirms under penalties of perjury as follows:

1. I am a partner in the law firm of Moritt Hock Hamroff & Horowitz LLP ("MHH&H"), attorneys of record for Antonio Lopes, a creditor and a party in interest in the above-captioned cases. I submit this affirmation in opposition to the separate motions (the "Motions") filed by Suffolk Ready Mix, LLC ("Suffolk"), Antonio Enterprises, Inc. ("Antonio") and Anthony T. Persico ("Persico")(collectively, the "Debtors") seeking to disqualify MHH&H from further

representing Mr. Lopes in the Debtors' cases. I submit this Affirmation based upon my personal knowledge of the facts and circumstances involved in this matter.

2. I have read the Affidavit of Persico sworn to on October 19, 2009 submitted in support of the Debtors' motions (the "Persico Aff.") and, frankly, I am surprised by the level of false inferences and distortions of fact contained therein. Rather than providing a true account of a brief meeting between Persico and MHH&H on March 25, 2009 (the "Meeting"), in which Persico was advised of a potential conflict and MHH&H's inability to represent him, Persico has mischaracterized the events and circumstances relating to the Meeting, in order to deceive this Court into believing that a conflict exists and that MHH&H should be disqualified from representing Lopes in the above-captioned matters. Persico has purposely skewed the facts in an effort to strategically remove Lopes from his chosen counsel.

3. I have never represented Persico with respect to matters that pertain to the above-captioned bankruptcy proceedings or otherwise. Nor have I ever excluded Persico from some aspect of a litigation in order to protect another client's interest.

4. Prior to arranging a meeting with a potential new client, it is MHH&H's customary practice to run a conflicts check to ensure that the potential representation of a party or parties, would not create a conflict. Further, when taking meetings with prospective bankruptcy clients, it is our customary practice and procedure to inquire about potential creditors to ensure no conflicts exists.¹

5. The Meeting was scheduled through Marc Wagner ("Wagner") of Wagner & Zwerman, LLP because he is a colleague of Eric M. Mencher, Esq., a partner (the "Relationship

¹ Although standard practice is to conduct a conflict check to ensure new matters do not create any issues or ethical

Partner") at MHH&H. Wagner is also Persico's accountant.

6. Wagner attended the Meeting. As is my practice, I advised Persico that because Wagner was present, any communications that may take place during the course of the Meeting would not be privileged or protected as confidential.

7. When discussing possible debtor representation with potential clients, it is my customary practice to ascertain the names of the potential clients' creditors prior to delving into detailed conversations or reviewing any materials with a prospective client to ensure that no internal conflicts exist. Our firm has developed relationships with many institutional lenders over the years, and we try to avoid taking on matters which may create a conflict with our institutional clientele. Upon meeting with Persico, it quickly became apparent that two of the Debtors' creditors are existing clients of MHH&H and that as a result our firm could not and would not represent Persico or his companies.

8. I have recorded two (2) hours of time on my time sheets for this matter. However, that does not imply that I was engaged in discussion with Persico for such an extended period. Instead, I spent time attending the Meeting, and in discussions with my partners, both during and after the course of the Meeting.

9. Discussions that took place during the course of the Meeting barely touched upon Persico's interests. Quite a bit of time at the start of the Meeting was spent on introductions and general niceties; my secretary brought us coffee and we discussed non-germane topics. In addition, at some point, the Relationship Partner joined the Meeting and additional time was taken on general niceties. In fact, Persico and I only spoke for a few minutes before I uncovered that two

concerns. In the instant case, the originating partner may have neglected to run such a check prior to the Meeting.

of Persico's potential creditors were also clients of MHH&H.

10. Immediately, upon learning that at least two (2) of MHH&H's institutional clients were creditors of Persico, I excused myself from the conference room and proceeded to have extended discussions with several of my partners as to the best way to proceed with respect to relationship management, given that Wagner had clearly wasted his time attending the Meeting. Upon my return to the conference room, I immediately informed Persico that we would not be able to represent him as a result of these conflicts. At that point there could have been no expectation of representation by Persico.

11. However, instead of simply ending the Meeting, I took some time to explain, in general terms, how bankruptcy proceedings worked and provided Persico with information regarding bankruptcy law. This was done strictly as a courtesy to Wagner and to foster our relationship with him. The Relationship Partner conducted similar relationship management when he joined the Meeting to try to smooth things over. Once Persico and Wagner took their leave, I spent additional time debriefing my partners.

12. Nothing substantive was discussed with Persico, and no notes were taken. Furthermore, my customary practice is to keep records of meetings and conferences on one legal pad in chronological order. Upon review of my legal pad for the date of the Meeting, there are no entries with respect to Persico, his businesses or the Meeting.

13. I never had anything but perfunctory discussions with Persico relating to his businesses. Nor did I review any documents, let alone documents pertaining to the financial affairs of the Debtors. Stated simply, I did not receive any information from Persico that could be harmful

to the Debtors.

14. Because Persico was informed both that there was no privilege with respect to our conversation due to his accountant being present at all times and because we informed Persico early in the meeting that MHH&H could not and would not represent him as his creditor body included existing institutional clients of MHH&H, Persico could not have reasonably believed that any of the Debtors had retained MHH&H as their attorneys.

15. MHH&H neither entered into a fee arrangement with Persico nor was paid a fee for the consultation. No written contract or retainer agreement exists that would indicate MHH&H or I agreed to represent Persico or the other Debtors. Further, there was no informal relationship consummated whereby MHH&H would perform legal services for any of the Debtors. I have never represented Persico with respect to matters related to the above-captioned cases or otherwise, nor have I had any contact with Persico, his accountant or any of the Debtors, since the date of our meeting in March, 2009. Notwithstanding the foregoing, as an aside, I have never met Lopes nor have I ever discussed this or any other matter with him whatsoever.

Dated: Garden City, New York
October 26, 2009

/s/ Lee J Mendelson
LEE J. MENDELSON