IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

In re Boy Scouts of America and Delaware BSA, LLC, Debtors.	Civil Action No. 20-cv-00798 (RGA)
Century Indemnity Company, Appellants, v. Boy Scouts of America, Appellee, Delaware BSA, LLC, Appellee, and Sidley Austin LLP, Appellee.	On appeal from the U.S. Bankruptcy Court for the District of Delaware Bankruptcy Case No. 20-10343 (LSS) Bankruptcy BAP No. 20-13

APPELLEES' ANSWERING BRIEF

MORRIS, NICHOLS, ARSHT &
TUNNELL LLP
Derek C. Abbott (No. 3376)
Andrew R. Remming (No. 5120)
Eric W. Moats (No. 6441)
1201 North Market Street, 16th Floor
P.O. Box 1347
Wilmington, Delaware 19899-1347
Telephone: (302) 658-9200
Email: dabbott@mnat.com
aremming@mnat.com
emoats@mnat.com

Attorneys for the Boy Scouts of America and Delaware BSA, LLC

SIDLEY AUSTIN LLP
James W. Ducayet
Robert N. Hochman
One South Dearborn Street
Chicago, Illinois 60603
Telephone: (312) 853-7000
Email: jducayet@sidley.com
rhochman@sidley.com

CROSS & SIMON LLC
Christopher P. Simon (No. 3697)
1105 North Market Street, Suite 901
Wilmington, DE 19801
Telephone: (302)777-4200
Email: csimon@crosslaw.com

Attorneys for Sidley Austin LLP

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Wilmington, Delaware

CORPORATE DISCLOSURE STATEMENT

The Boy Scouts of America is a non-profit corporation founded in 1910 and chartered by an act of Congress on June 15, 1916. The Boy Scouts of America has no parent corporation and has issued no stock. No publicly-held corporation holds any interest in the Boy Scouts of America. Delaware BSA, LLC is a wholly-owned subsidiary of the Boy Scouts of America. Delaware BSA, LLC has issued no stock, and no publicly-held corporation holds any interest in Delaware BSA, LLC.

Sidley Austin LLP is a limited liability partnership organized under the law of Illinois. It has no parent company and has issued no stock.

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STATEMENT OF THE ISSUES

1. Whether the bankruptcy court abused its discretion in approving BSA's retention of Sidley under 11 U.S.C. § 327(a).

2. Whether the bankruptcy court abused its discretion in denying Century's request to disqualify Sidley based on alleged violations of the ABA Model Rules of Professional Conduct.

STANDARD OF REVIEW

Century's statement of the standard of review is incomplete. This Court reviews the bankruptcy court's decision to approve Sidley's application for employment under 11 U.S.C. § 327(a) for an abuse of discretion. *In re Marvel Ent. Grp., Inc.*, 140 F.3d 463, 470 (3d Cir. 1998); *In re Decade, S.A.C., LLC*, 2020 WL 564903, at *4 (D. Del. Feb. 5, 2020). "An abuse of discretion exists where the [bankruptcy] court's decision rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact." *Decade*, 2020 WL 564903, at *4 (quoting *Marvel*, 140 F.3d at 470). Accordingly, while legal conclusions are reviewed *de novo*, the court reviews the bankruptcy court's findings of fact only for clear error. *Id.* Likewise, this Court reviews the bankruptcy court's decision to deny a motion to disqualify under the ethics rules for an abuse of discretion, with factual findings reviewed for clear error and the underlying legal question of whether counsel violated a particular rule of

professional conduct reviewed *de novo*. *Jackson v. Rohm & Haas Co.*, 366 F. App'x 342, 346 (3d Cir. 2010). A finding of fact is clearly erroneous "only if it is completely devoid of a credible evidentiary basis or bears no rational relationship to the supporting data." *Advance Cap. Partners, LLC v. Rossmann*, 495 F. App'x 235, 237 (3d Cir. 2012) (quotation omitted).

STATEMENT OF THE CASE

I. BSA Retains Sidley To Advise On Restructuring And Carves Out Insurance Coverage Issues.

On September 26, 2018, BSA engaged a team of Sidley restructuring attorneys to explore its restructuring options in light of, among other factors, the increasing number of abuse claims asserted against BSA. SA007-08, Boelter Decl. ¶¶ 3-4; APP000647-53 (engagement letter dated 10/3/2018).[1] Following its engagement, the Sidley restructuring team dedicated significant time and energy to this matter and leveraged its substantial experience in navigating restructurings involving mass tort claims to counsel BSA regarding a host of issues—both pre- and post-petition. *See* SA008, Boelter Decl. ¶ 5; SA004-05, Whittman Decl. ¶ 9.

[1] Citations to "APP__" are to the Appendix to Appellants' Opening Brief (D. Del. Dkt. 24), and citations to "SA__" are to Appellees' Supplemental Appendix filed contemporaneously herewith. Citations to "Bankr. Dkt." are to *In re Boy Scouts of America*, No. 20-10343-LSS (Bankr. D. Del.), and citations to "D. Del. Dkt." are to this Court's docket.

Sidley's engagement letter makes clear that Sidley "will not [be] advising [BSA] on insurance coverage issues." APP000651. As the bankruptcy court concluded, "from the outset and as reflected in Sidley's engagement letter with BSA, Sidley carved out from its engagement any advice on insurance coverage issues." APP001213-28 ("Ruling") at 11. Indeed, even before BSA retained Sidley in connection with its restructuring, BSA had already retained separate counsel, Haynes and Boone LLP ("Haynes and Boone"), to serve as dedicated insurance counsel. *See, e.g.*, SA009, Boelter Decl. ¶¶ 7-8; APP000564-76 (June 2018 petition filed by Haynes and Boone on behalf of BSA against insurer). The bankruptcy court approved Haynes and Boone's retention by BSA as special insurance counsel without objection. Bankr. Dkt. 463.

The bankruptcy court found it undisputed that "Haynes & Boone has taken the lead on all [insurance] coverage-related matters, [and] is the firm charged with both analyzing BSA's insurance policies and negotiating with its insurers." Ruling at 11. Haynes and Boone also "drafted the portions of BSA's placeholder plan of reorganization pertaining to insurance neutrality." *Id.* And Haynes and Boone "was involved from the outset of the restructuring negotiations and initiated substantive discussions with BSA's insurers, including Century." *Id.*

II. Century Retains Sidley In Reinsurance Collections Disputes Shortly After BSA Retained Sidley For Restructuring.

On October 5, 2018 (shortly after BSA retained Sidley), Century retained a separate team of Sidley lawyers, led by Sidley partner William Sneed, in connection with the first of two reinsurance disputes. These disputes arose under reinsurance agreements between Century, as insurer, and certain reinsurers following payments that had been made under Century's BSA policies. BSA was not a party to either of these reinsurance actions, in which Century was attempting to collect from its reinsurers, and which concerned the interpretation of the specific reinsurance contracts between Century and its reinsurers—not any of the underlying insurance policies issued by Century to BSA. APP000907-08, 913-15, Tr. 17:21-18:4, 23:22-25:2 (Sneed).

From the outset, Century made clear that it understood that Sidley would not perform services related to any underlying insurance policy issued to BSA by any of BSA's insurers. The Service Level Agreement ("SLA") that governs the relationship between Century and Sidley is explicit. It describes Sidley's work as "Non-Claims Legal Services," *i.e.*, "services performed by [Sidley] for [Century] that are *unrelated to the defense of an insurance claim or a related insurance coverage claim*." APP001239 (emphasis added). Sidley was representing Century in ***re***insurance disputes between Century, on the one hand, and two different reinsurance companies, on the other hand. Both of the reinsurance collections

matters pertinent here involved claims that Century had already paid. APP000915, 917, Tr. 25:3-7, 27:9-12 (Sneed); APP001096, 1098, Tr. 206:12-16, 208:2-18 (Schwartz).

More specifically, in October 2018, Sidley was retained to consult on an existing dispute between Century and Underwriters at Lloyd's, London. Century sought reimbursement under a reinsurance policy with Lloyd's Underwriters for payments Century had made as BSA's insurer in settling certain abuse cases in which Century had defended and indemnified BSA. APP000776, Sneed Decl. ¶ 4; *Certain Underwriters at Lloyd's, London v. Century Indemnity Co.*, 2020 WL 1083360, at *2 (D. Mass. Mar. 6, 2020). Lloyd's Underwriters had reinsured Century for losses arising from Century's entire book of business in a given year—*i.e.*, "treaty reinsurance"—which included, among many other insurance policies, coverage for eight annual policies that Century issued to BSA from 1963 to 1970. *Lloyd's*, 2020 WL 1083360, at *2. Beginning in or about February 2016, Century notified and billed its reinsurer, Lloyd's Underwriters, for a portion of the payments it had made in settling those cases. *Id.* Lloyd's Underwriters refused to pay Century under those reinsurance contracts. *Id.* That dispute had already been arbitrated and resolved adversely to Century when Century retained Sidley. *Id.* Following the arbitrators' ruling, Century submitted new reinsurance bills for the same abuse claims in August 2018. *Id*. at *2-3. At that point, the only remaining

substantive issue in the Lloyd's Underwriters dispute was whether Century could permissibly re-issue reinsurance billings to Lloyd's Underwriters that accumulated separate abuse claims as a single "occurrence" under the reinsurance treaty; the original arbitration panel had declined to decide that question. APP000777, Sneed Decl. ¶ 5 (citing *Lloyd's*, 2020 WL 1083360, at *3).

In late November 2018, the engagement expanded when Century requested that Sidley prepare to move a federal court to compel another arbitration—this time based on Lloyd's Underwriters having denied Century's re-submitted bills. *Id.* ¶ 6. Later, in July 2019, Century asked Mr. Sneed to represent Century in another dispute with a different reinsurer where Century was also seeking reimbursement for settled claims under policies issued to BSA. APP000916-17, Tr. 26:13-27:21 (Sneed); APP000778, Sneed Decl. ¶ 8. Joshua Schwartz, Managing Counsel, Director of Reinsurance Litigation for Century, was Sidley's primary point of contact at Century for both of these matters. APP000776, Sneed Decl. ¶ 3.

In the bankruptcy court, Sidley and Century disputed whether Sidley received any privileged or confidential information with respect to any coverage dispute involving the policies issued by Century to BSA. In its brief, Century asserts that counsel for Century "by necessity must be familiar with privileged issues concerning the underlying coverage." D. Del. Dkt. 23, Appellants' Opening Brief ("Br.") at 44. That characterization is based on testimony from Christine

Russell, Senior Vice President and Head of Reinsurance of a Chubb affiliate. But the person at Century who was actually the "day-to-day point of contact with Sidley"—Mr. Schwartz (Br. at 18)—said that he "can't think of anything privileged, you know, like legal advice from our coverage counsel that we shared in the Boy Scouts case …." APP001097, Tr. 207:5-18 (Schwartz). Consistent with Mr. Schwartz's testimony in that regard, Mr. Sneed testified that he received no confidential or privileged information with respect to any underlying coverage dispute between Century and BSA. APP000913-17, Tr. 23:22-25:7, 26:19-27:21 (Sneed). Ms. Russell, Mr. Schwartz, and Mr. Sneed—the three witnesses who addressed the scope of the reinsurance collections disputes—all agreed that Sidley was given only limited categories of documents in connection with those disputes. APP000911, Tr. 21:10-25 (Sneed); APP001041, Tr. 151:9-18 (Russell); APP001097, Tr. 207:5-18 (Schwartz).

Sidley had a historical relationship with Century prior to its engagement in the Lloyd's Underwriters matter in October 2018. *See* Br. at 3-4, 7-8. But by October 2018, Sidley had not done any work on behalf of Century or its affiliates (like Chubb) in nine or ten months. APP000909, Tr. 19:19-22 (Sneed). Century asserts that "Sidley was Chubb's counsel in another matter when Sidley started representing BSA, and had been ***since*** 'around May 2017.'" Br. at 7-8 (emphasis added) (quoting APP000778, Sneed Decl. ¶ 9). But that is not what Mr. Sneed's

declaration, on which Century relies, says. Rather, while he says that matter "[s]tart[ed] around May 2017," he later states that "there had been a lapse of active Century matters at the firm for about a year" at the time Century re-engaged Sidley in the fall of 2018. APP000778, 782, Sneed Decl. ¶¶ 9, 22.

Because of this lapse, under Sidley's standard protocol (which had changed since Century last opened a new matter with Sidley), Mr. Sneed sought a new engagement letter and opened a new matter. APP000782, Sneed Decl. ¶ 23. Sidley initiated these discussions, which included discussion of an advance conflict waiver, on or around November 30, 2018, and they continued into the following year. APP000782-83, Sneed Decl. ¶¶ 23-24. Century eventually proposed terms for an advance restructuring conflict waiver that would allow Sidley to represent an entity insured by a Century affiliate in a bankruptcy proceeding subject to certain conditions, including that an ethical wall would be put in place between Sidley lawyers working for Century and those working on the restructuring, and that Sidley would not have any involvement in moving to compel arbitration involving Century. APP000782-83, Sneed Decl. ¶ 24 (discussing APP000793). Ultimately, Sidley determined to proceed with the Century engagement without an advance conflict waiver to avoid imposing myriad individually negotiated obligations on an advance basis. APP000783, Sneed Decl. ¶ 24. As a result, the engagement was memorialized in the SLA between Sidley and Century. *Id.*

III. BSA's Retention Of Sidley Is Publicly Reported In December 2018 And Sidley's Representation Of Century Continues Without Objection.

In the midst of Sidley and Century's advance conflict waiver discussions, the *Wall Street Journal* published an article that publicly revealed Sidley's representation of BSA in its potential restructuring. *See* APP000796-98. On December 13, 2018, Mr. Schwartz forwarded the *Wall Street Journal* article to Mr. Sneed as an "FYI" without further discussion, and then discussed the transition of the Lloyd's Underwriters matter from Century's prior counsel to Sidley. APP000795-96.

The following day, Mr. Sneed and Mr. Schwartz spoke by phone. APP000784, Sneed Decl. ¶ 27. Mr. Sneed said he had spoken to one of his partners and—consistent with Sidley's duty of confidentiality memorialized in its engagement letter with BSA (APP000653)—he could not confirm or deny the *Wall Street Journal* report. APP000924-26, Tr. 34:11-36:8 (Sneed). Nonetheless, Mr. Sneed explained that it was Sidley's view that representation of an insurer with respect to collecting reinsurance due following payment to an insured does not constitute adversity to the insured. APP000784, Sneed Decl. ¶ 27. Thus, Sidley could, without conflict, continue to represent Century against Lloyd's Underwriters on the reinsurance dispute. *Id*. Mr. Schwartz did not contest Sidley's view regarding the lack of conflict or express concern that Century might view Sidley's representation of BSA as a conflict. *Id*.; *see also* APP001100-03, Tr. 210:2-213:5

(Schwartz). Despite this conversation and others,[2] Century continues to maintain that it was not until the end of October 2019 that anyone in its reinsurance group—including Mr. Schwartz—"discover[ed]" that Sidley represented BSA. Br. at 10.

Sidley represented Century without complaint into the fall of 2019. At that point, BSA was intensively trying to reach a global resolution among all interested stakeholders for a prepackaged bankruptcy to resolve all outstanding tort claims. SA009, Boelter Decl. ¶ 8. Through Haynes and Boone, which had been involved from the outset of the restructuring negotiations, BSA initiated substantive discussions with its insurers, including Century. SA009-10, Boelter Decl. ¶¶ 7-9. That resulted in a series of meetings—some of which included Sidley restructuring lawyers or were hosted at Sidley's offices—that would culminate in a mediation scheduled for November 4, 2020. SA010-12, Boelter Decl. ¶¶ 10-15, 17. Again, Century did not object to Sidley's participation. SA010-11, Boelter Decl. ¶¶ 10-15.

IV. Century Raises A Potential Conflict In Late October 2019 And The Attorney-Client Relationship Breaks Down.

On October 29, 2019, more than ten months after Mr. Schwartz forwarded the *Wall Street Journal* article about BSA retaining Sidley, Century first expressed

[2] Mr. Sneed and Century also discussed Sidley's representation of BSA several times during the advance waiver discussions mentioned above (APP000926, Tr. 36:9-25 (Sneed)) and again at an industry conference in early October 2019 (APP000784, Sneed Decl. ¶ 29). Century did not express any concern during these conversations or at any point prior to late October 2019. *See* APP000784-85, Sneed Decl. ¶¶ 29-30; SA010-11, Boelter Decl. ¶¶ 11-15.

its view that Sidley's role as BSA's restructuring counsel might create a conflict. On that date, Messrs. Sneed and Schwartz spoke by phone, after which Mr. Schwartz sent an email claiming that he had "just learned" that Sidley represented BSA, that Century did not "waive any conflict" presented by Sidley's "potential representation" of BSA in connection with its restructuring, and promising to "discuss this issue internally and circle back … after we conclude those discussions." APP000836. As Mr. Sneed reminded Mr. Schwartz on the phone call, which by Mr. Schwartz's own account was a cordial one, any claim that Century was surprised to learn of Sidley's role with BSA was simply not accurate given their prior discussions. APP000785, Sneed Decl. ¶ 30; APP001088, Tr. 198:1-6 (Schwartz). In the meantime, Century continued to participate in negotiations relating to BSA's restructuring with Sidley without raising concerns to the restructuring team about any alleged conflict. SA011, Boelter Decl. ¶ 15.

Then, on November 3, 2019, the night before the scheduled mediation, and without any further discussions with Mr. Sneed or anyone else at Sidley on the topic of a potential conflict, Century's counsel abruptly sent an email to Sidley's restructuring team stating Century's view that the mediation could not "go forward with Sidley Austin as a participant" due to "concern[s]" that Sidley's role as BSA's restructuring counsel put it in an adverse position to Century. APP000889. Following exchanges over email and in person, during which Sidley expressed its

view that no conflict existed, the parties agreed that the mediation should proceed and reserved their rights. SA011-12, Boelter Decl. ¶¶ 16-17. Though no information from Sidley's reinsurance work for Century had been shared with anyone on BSA's restructuring team (Ruling at 12), in an abundance of caution, and to assuage any concerns on Century's part, Sidley put in place a formal ethical screen between the BSA restructuring team and the team representing Century on November 4, 2019. SA012, Boelter Decl. ¶¶ 17-18.

In the weeks following, Sidley repeatedly asked Century representatives to schedule a meeting or phone call to more fully discuss the conflict Century perceived. *See, e.g.*, Bankr. Dkt. 500-4 (11/25/19 email); APP000839-43 (12/3/19, 12/11/19, and 12/16/19 emails). Century would not agree to discuss the issue, nor did Century articulate the basis for its view. *See* Bankr. Dkt. 532-7 (11/20/19 and 11/27/19 emails); APP000840-41 (12/12/19 email). Instead, as a precondition, Century continually requested Sidley send a written "General Counsel opinion" explaining the absence of a conflict. *See, e.g.*, Bankr. Dkt. 532-7 (11/27/19 email from Mr. Schwartz: "Before we have a discussion, we would like to review Sidley's General Counsel opinion"); APP000840-41 (12/12/19 email from Mr. Schwartz: "We will gladly discuss the conflict issue further with you once Sidley has supplied the information requested"). And, although Century claimed that "[n]umerous courts have held that dual representation of a debtor and a party that

may be liable to the debtor is an actual conflict," Century provided no such case (and still has not done so). APP000889 (11/3/19 email).

A conference call was ultimately scheduled for December 18, 2019, among Mr. Sneed, Mr. Schwartz, and Ms. Russell. Cordial relations between Sidley and Century had ended; this call was unpleasant. *See* APP000929-31, Tr. 39:19-41:13 (Sneed); APP001035, Tr. 145:3-19 (Russell); APP001088, Tr. 198:7-11 (Schwartz). Mr. Sneed explained that Sidley would not withdraw from representing BSA because no conflict existed, and due to the broad way that Century had framed its conflicts concerns, Sidley might be forced to withdraw from its representation of Century if the issue could not be resolved. APP000786, Sneed Decl. ¶ 34. Throughout the call, Mr. Sneed urged Century to schedule a management-level conference to resolve the issue and avoid continued letter-writing campaigns. APP000930-31, Tr. 40:25-41:13 (Sneed); APP000786, Sneed Decl. ¶ 35. Indeed, having a management-level discussion would have been consistent with Century's typical practice. *See* APP001081-82, Tr. 191:22-192:6 (Mr. Schwartz: "Most of the time when I'm involved in a conflict process … I work with senior leadership"); APP001062, Tr. 172:8-12 (Ms. Russell: authority to grant a prospective waiver "would not have come from me [or Mr. Schwartz] … [t]hat would have come from a much higher level in the organization").

But no such conference was scheduled at that point (or at any point before BSA filed for bankruptcy). APP000786, Sneed Decl. ¶ 35. In fact, in its next communication on January 3, 2020, while Sidley's invitation to schedule a management-level meeting was still outstanding, Century sent a letter notifying Sidley that it had consulted with outside ethics counsel and could not "rule out" a conflict or potential conflict. APP000845-46. That letter further accused Sidley of "shocking and offensive" behavior. *Id.*

After Sidley received that letter, it determined that it needed to withdraw from representing Century and Chubb due to the breakdown of the attorney-client relationship. APP000786-87, Sneed Decl. ¶¶ 36-37. Sidley began an orderly withdrawal by providing written notice to Century on January 16, 2020. APP000848; APP000850-52. Century took two weeks to respond to those letters, and then took the position that Sidley could not withdraw from the representations. APP000854-56. Ultimately, the bankruptcy court found that Sidley took the last action to withdraw from any Century or Chubb matter on February 20 or 24, 2020. Ruling at 2.[3] A few weeks thereafter, and before Century appeared in the

[3] Century complains that Sidley withdrew "without allowing Century to better position itself." Br. at 12. However, as the correspondence makes clear, while Sidley was fully prepared to work with Century and Chubb to transition the matters, Sidley became increasingly concerned in one arbitration that Chubb was giving the misleading impression to the arbitration panel and other counsel that Sidley would continue to remain involved in the matter through its conclusion. APP000864-65 (2/18/20 and 2/19/20 emails). Once it became clear that Century

bankruptcy, Century notified Sidley that it would be invoking its right to arbitrate its dispute with Sidley (APP000881)—which is the "sole means" of addressing a dispute under the SLA. Ruling at 2 (emphasis in original). Century is pursuing that remedy. *Id.*

V. Bankruptcy Proceedings

BSA filed for bankruptcy on February 18, 2020. From the outset, BSA made clear that it had two primary objectives: (1) to provide equitable compensation for abuse survivors and (2) to preserve BSA's mission. *See* APP000083. To achieve these objectives, it was critically important that this bankruptcy proceed expeditiously. *Id.* To that end, Sidley coordinated numerous tasks aimed at facilitating an efficient resolution of the case.

On March 17, 2020, BSA filed its application to retain Sidley as debtors' counsel. APP000428-42.[4] Century filed its appearance on April 8, 2020 (Bankr.

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would not dispel that misimpression, Sidley was compelled to inform the relevant counterparties and arbitrators. *See* APP000870 (2/20/20 email); APP000878 (2/20/20 email).

[4] Although Century suggests that Sidley inappropriately "delayed" filing its application (Br. at 16, 28 n.105), it did no such thing. Numerous applications for employment of professionals were filed on the same day as Sidley's. *See, e.g.*, Bankr. Dkts. 205-10, 214, 220. Indeed, it is common practice to file such applications within 30 days seeking retroactive application to the petition date. *See, e.g.*, *In re Extraction Oil & Gas, Inc.*, No. 20-11548-CSS, Dkts. 1, 262-63 (Banrk. D. Del.); *In re API Americas Inc.*, No. 20-10239-CSS, Dkts. 1, 86-87 (Bankr. D. Del.); *see also In re United Cos. Fin. Corp.*, 241 B.R. 521, 526 (Bankr. D. Del. 1999) ("In fact, the UST recognizes that in large chapter 11 cases, given the press of urgent matters to be determined in the early days of the chapter 11 proceeding,

Dkt. 362), and filed its objection to Sidley's retention on April 14, 2020. Bankr. Dkt. 426.[5] Neither the U.S. Trustee nor any other party filed an objection. Following the parties' briefing and submission of ten declarations and numerous exhibits, the bankruptcy court held a full day evidentiary hearing on May 4, 2020, that included live testimony. APP000891-1162 (hearing transcript). The Court heard argument from Sidley, BSA, and Century two days later. *See* D. Del. Dkt. 4-3 (argument transcript). On May 29, 2020, the bankruptcy court denied Century's objection and approved Sidley's retention. APP001213-30.

The bankruptcy court began with Section 327(a) of the Bankruptcy Code, which governs Sidley's retention. Observing that "Section 327 does not seek to vindicate the rights of non-debtor entities," the bankruptcy court held that Sidley possessed no interest adverse to BSA that would preclude its retention. Ruling at 3-6.

The bankruptcy court also concluded that the rules of professional conduct did not support depriving BSA of its chosen counsel. Contrary to Century's

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the preparation and filing of retention applications for all professionals may be delayed. If such applications are filed within 30 days of the petition date, therefore, the UST will[] not ordinarily object.").

[5] After appearing, and before the bankruptcy court approved Sidley's retention, Century filed or joined no fewer than four objections on various matters in addition to Sidley's employment. *See* APP000526-29; APP001163-75; APP001184-93; APP001194-212.

suggestion (Br. at 23-24), at no point did the bankruptcy court find that any ethical rule had been violated. The bankruptcy court did not need to decide whether Sidley had ever received any confidential information regarding Century's coverage of BSA because it found that "any confidential or privileged information that Mr. Sneed received in his representation of Century in its reinsurance matters has not and will not be passed along to Sidley's restructuring team." Ruling at 12. The court also found that, given Haynes and Boone's involvement with the restructuring "since its inception," it was well-positioned as "conflicts counsel" to address all matters in which Sidley might be adverse to Century (in other words, matters concerning the "substantive treatment of BSA's insurance policies with Century, claims thereunder, proceeds therefrom or that otherwise implicate insurance coverage"). *Id.* at 11-14. And the bankruptcy court found it "unrefuted" that "significant prejudice … would befall BSA if it [were] forced to replace Sidley." *Id.* at 14.

SUMMARY OF ARGUMENT

This appeal is about whether the bankruptcy court abused its discretion in permitting BSA to retain Sidley as its counsel. Century is the sole objector. And its sole basis for objecting is that, because Sidley represented Century in reinsurance coverage disputes with Century's reinsurers, Sidley is conflicted from serving as restructuring counsel for BSA. The conflict supposedly arose because Century

insured BSA. Century maintains that this supposed conflict precluded BSA from retaining Sidley, even though BSA had separate coverage counsel to handle insurance-related matters both before and during its bankruptcy. Following extensive submissions by the parties and a contested evidentiary hearing, the bankruptcy court rightly concluded that there was neither a legal nor factual basis to deprive BSA of its chosen counsel. Century offers no reason to disturb the careful exercise of the bankruptcy court's discretion.

First, Sidley's retention satisfied Section 327 of the Bankruptcy Code. The purpose of Section 327 is not to vindicate the rights of third parties, but rather to protect the interests of the debtor's estate by requiring that counsel not hold or represent an interest adverse to the estate. And the bankruptcy court rightly concluded that Sidley holds no such adverse interest. Century entirely ignores this primary basis of the bankruptcy court's ruling. Instead, Century complains that Sidley's representation of BSA undermined obligations Sidley owed *to Century* under the rules of professional conduct. But, as the bankruptcy court correctly recognized, if such obligations did not create an interest adverse to the estate, they are irrelevant for the purposes of Section 327.

Second, with respect to Century's own interests under the rules of professional conduct, the bankruptcy court chose not to resolve whether Sidley violated any ethical rule, and concluded that, regardless, BSA was allowed to

retain Sidley because it was clear that disqualifying Sidley would have caused severe prejudice to the debtor, BSA. Once again, Century simply ignores the bankruptcy court's reasoning, and the substantial factual basis for it. Century points to no clearly erroneous factual findings supporting the bankruptcy court's well-reasoned exercise of discretion—most notably the bankruptcy court's finding that *even if* Sidley received confidential information in representing Century, it had not been and would not be passed on to the Sidley lawyers representing BSA.

Third, Century failed to demonstrate that Sidley violated the rules of professional conduct. As noted above, the bankruptcy court did not reach this issue and this Court need not either. Nonetheless, the record is clear. Sidley withdrew from its representation of Century for a permissible reason, *i.e.*, a breakdown in the attorney-client relationship, so Rule 1.9 applies and Rule 1.7 does not. And Sidley's representation of BSA is not "substantially related" to its prior representation of Century in reinsurance collections actions, as Century itself understood when it defined Sidley's role in the SLA governing those reinsurance matters as "unrelated to the defense of an insurance claim." APP001239. Moreover, Sidley received no privileged or confidential information from Century that would materially advance BSA's positions in the bankruptcy. And Haynes and Boone has handled and, under the bankruptcy court's order, would continue to handle insurance coverage issues for BSA in the bankruptcy proceedings.

Finally, even if it applied, Century failed to prove a violation of Rule 1.7—which relates to current clients. Representing a debtor in connection with a restructuring does not create "direct adversity" to that debtor's insurer under Rule 1.7. A contrary rule, as Century advocates, would severely inhibit the ability of debtors to retain high quality restructuring counsel of their choice. Century proposes a world where a law firm could not represent a debtor if it represented any other person or entity that possesses any interest that the debtor might conceivably view as an "asset" of the estate. No court has so held, and this Court should not become the first.

ARGUMENT

I. The Bankruptcy Court Did Not Abuse Its Discretion In Holding That Sidley Satisfies The Requirements Of Section 327.

Section 327(a) of the Bankruptcy Code requires that professionals retained by a debtor "do not hold or represent an interest adverse to the estate" and are "disinterested persons," 11 U.S.C. § 327(a), which is in turn defined in relevant part as someone without "an interest materially adverse to the interest of the estate." *Id.* § 101(14)(C).[6] The purpose of Section 327 is to protect the interests of

[6] To be disinterested, an attorney also cannot "have an interest materially adverse to the interest … of any class of creditors or equity security holders." 11 U.S.C. § 101(14)(C). There has been no argument raised—either here or below—that Sidley possessed any such interest, and Century is neither a creditor nor equity security holder.

the debtor's estate. Ruling at 3-5 ("The purpose … is to ensure effective representation of the estate."); *see generally In re Jade Mgmt. Servs.*, 386 F. App'x 145, 148-50 (3d Cir. 2010); *In re AroChem Corp.*, 176 F.3d 610, 621 (2d Cir. 1999). More specifically, Section 327 seeks to "ensure that the professional is able to act in the best interest of the estate and can competently and vigorously represent the … debtor-in-possession." Ruling at 3-4; *see also In re Art Van Furniture, LLC*, 617 B.R. 509, 514 (Bankr. D. Del. 2020) ("The purpose of this fact-intensive test is to ensure effective representation of the estate …." (quotation omitted)).

That is why courts have said that a professional holds a prohibited "adverse interest" where that professional holds or represents interests in competition with the debtor that would *actually* (as opposed to speculatively) impair its service as an estate fiduciary. *See In re First Jersey Sec., Inc.*, 180 F.3d 504, 509 (3d Cir. 1999); *In re Marvel Ent. Grp., Inc.*, 140 F.3d 463, 477 (3d Cir. 1998). Consistent with the plain language of the statute, a court must assess "the factual scenario in front of it *from the perspective of the estate*." Ruling at 5 (emphasis added). Importantly, Section 327 "does not seek to vindicate the rights of non-debtor entities." *Id.* at 4.

The bankruptcy court had considerable discretion in approving BSA's retention of Sidley under the standards of Section 327 in light of the specific facts and circumstances of the case. *Marvel*, 140 F.3d at 477; *Jade Mgmt. Servs.*, 386 F.

App'x at 148. And the burden of showing that Sidley's retention violated Section 327 rested with Century. *See Art Van Furniture*, 617 B.R. at 515 & n.34. This burden is substantial: Disqualification is mandated only where there is "an actual conflict" with the interests of the debtor's estate, and a "court may not disqualify an attorney on the appearance of conflict alone." *Marvel*, 140 F.3d at 476. That is, to deprive a debtor of the counsel it has selected and come to rely upon, the bankruptcy court must conclude that allowing the debtor's chosen counsel to proceed will undermine the interests of the debtor's estate.

The bankruptcy court carefully considered the evidence and rightly concluded that it was "in no way convinced that Sidley generally cannot effectively represent BSA." Ruling at 5. Century ignores this reasoning. It simply has no response. On this basis alone, this Court can affirm the ruling with respect to Section 327. Century skips this primary basis of the bankruptcy court's ruling and attacks only its alternative reasons.

First, Century claims that the bankruptcy court's analysis "starts from the erroneous premise" that Section 327 has no application here because it is written in the present tense and thus applied only to current conflicts. Br. at 26-27 (citing Ruling at 5-6). But the provision consistently uses present-tense language: "hold," "represent," "are disinterested." And other courts have likewise read the present-tense language to require a present conflict inhibiting vigorous representation of

the estate. *See, e.g.*, *In re Ampal-Am. Israel Corp.*, 691 F. App'x 12, 15 (2d Cir. 2017) ("counsel will be disqualified under section 327(a) *only if it presently* holds or represents an interest [adverse] to the estate, *notwithstanding any interests it may have held or represented in the past*" (emphasis in original) (quoting *AroChem*, 176 F.3d at 623)); *In re Muma Servs., Inc.*, 286 B.R. 583, 591 (Bankr. D. Del. 2002). Indeed, the Supreme Court has instructed that "Congress' use of a verb tense is significant in construing statutes." *United States v. Wilson*, 503 U.S. 329, 333 (1992); *see also Marvel*, 140 F.3d at 475 (interpreting Section 327(a): "we must, of course, begin with the language of the statute").[7]

Nonetheless, Century argues that the bankruptcy court wrongly focused on whether Sidley holds a present interest adverse to BSA because, as of the petition date (and for a few days thereafter), Sidley was formally representing both BSA and Century. But any short period following the petition date where Sidley continued to represent Century[8] did not matter. Ruling at 6. It is undeniable that

[7] To be clear, and contrary to Century's suggestion (Br. at 29), Sidley has not argued that a prior representation cannot create a present interest. *See* D. Del. Dkt. 4-3, Tr. 14:8-16:7. What matters is a *present* obligation to someone else that inhibits vigorous representation of the debtor. A lawyer may have ongoing obligations with respect to any former client. But unless that obligation interferes with representing the debtor, it is an issue outside the ambit of Section 327(a).

[8] Century entirely ignores that Sidley communicated its withdrawal to Century on January 16, 2020, over a month before BSA filed its Chapter 11 petition. APP000848; APP000850-52. Century waited two weeks to acknowledge Sidley's withdrawal, and when it finally sent a letter in response, Century declared that it did not consent. APP000854-56. Accordingly, the reason Sidley was unable to

Sidley's representation of Century in reinsurance collections matters, even if still technically active on the petition date, was in no way adverse *to BSA*. BSA was not a party to any of those disputes, and the outcome of the reinsurance collections actions would have no impact on BSA, much less a negative impact; BSA had already received payment under its insurance policies with Century.

Indeed, Century fails to describe even a single situation in which Sidley may have been unable to take actions necessary to zealously represent BSA's interests in the bankruptcy. That failure is hardly surprising especially in light of BSA's retention of Haynes and Boone as special insurance counsel. Ruling at 11, 14.[9] Century asserts that Haynes and Boone's advice in this matter is "simply … carrying out instructions of Sidley's conflicted counsel, which taints them with the same conflict." Br. at 48. That assertion contradicts the bankruptcy court's factual findings. As the bankruptcy determined, "from the outset" of its retention by BSA, "Sidley carved out from its engagement any advice on insurance coverage issues."

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complete the withdrawal process until after the February 18 petition date was because *Century* dragged the formal process out by wrongly insisting that it could refuse to accept Sidley's withdrawal in light of the breakdown of the attorney-client relationship. *See* APP001111, Tr. 221:25 (Mr. Schwartz: "I, frankly, thought that you [Sidley] can't break up with us [Century] …").

[9] While the bankruptcy court rightly focused on Haynes and Boone given its handling of insurance issues, it bears mention that Morris, Nichols, Arsht & Tunnell LLP is BSA's Delaware-based bankruptcy co-counsel and can likewise serve as "conflicts" counsel should the need arise. Bankr. Dkt. 339 (approving retention without objection).

Ruling at 11. "The evidence is unrefuted that Haynes & Boone has taken the lead on all coverage-related matters, is the firm charged with both analyzing BSA's insurance policies and negotiating with its insurers," and "drafted the portions of BSA's placeholder plan of reorganization pertaining to insurance neutrality." *Id.* The bankruptcy court made clear that "[c]onflicts counsel is often used by debtors" given that "mega bankruptcies can pose retention issues for debtors." *Id.*[10] And, as the bankruptcy court explained, Haynes and Boone's role as insurance counsel "is consistent with the self-imposed restriction in Sidley's engagement letter with BSA that does not permit Sidley to work on coverage matters." *Id.* at 14; *see* APP000651 (engagement letter: Sidley's services will "not include advising [BSA] on insurance coverage issues").

Put simply, insurance issues have been (and under the bankruptcy court's order, would continue to be) the province of Haynes and Boone. So any concern that BSA's interests will not be vigorously advanced in light of any surviving obligation Sidley might owe to Century has been fully addressed. *See In re Relativity Media, LLC*, 2018 WL 3769967, at *5-6 (Bankr. S.D.N.Y. July 6, 2018) (approving debtor's retention of law firm subject to debtor retaining separate conflicts counsel to address disputes with law firm's client where law firm was in

[10] *See also* SA032, Rapoport Decl. ¶ 27 ("The shifting, impermanent alliances in chapter 11 cases and the inapposite application of state ethics rules have led to the use of conflicts counsel, especially in large cases.").

process of withdrawing from representation of that client); *In re Wash. Mut., Inc.*, 442 B.R. 314, 327 (Bankr. D. Del. 2011) ("in most cases the use of conflicts counsel solves the problem"). For this additional reason, the ruling with respect to Section 327 was correct.

Second, Century asserts that, because the Bankruptcy Code does not define what constitutes an interest adverse to the estate, that determination "must be made by reference to the lawyer's current ethical obligations." Br. at 29. Because, accordingly to Century, Sidley violated ABA Model Rules 1.7 and 1.9, Century asserts that Sidley's retention violated Section 327. Century's position is deficient in several respects.

As an initial matter, Century's argument misreads Section 327. It does not bar appointment of counsel to represent a debtor whenever such appointment would amount to a violation of an ethical rule by the lawyer. As discussed above and noted by the bankruptcy court, Section 327, both in language and purpose, ensures that counsel appointed to represent the debtor would not be impaired in any way in doing so. Ruling at 4. The rules of professional conduct address concerns going far beyond that, including obligations between counsel and third parties that in no way impact counsel's ability to represent a debtor in bankruptcy. What has to be shown is an ethical obligation *that inhibits the lawyer from vigorously representing the debtor*. And, as noted repeatedly, Century does not

even try to argue Sidley cannot vigorously represent the debtor as its restructuring counsel, especially given the presence of Haynes and Boone as insurance coverage counsel. Instead, it has asserted, without any citation to authority and without any reasoned basis, that *any* ethical obligation to a current or former client that has some interest in a bankruptcy is *necessarily* an interest adverse to the estate that mandates disqualification under Section 327. Br. at 29. But it takes no effort to imagine an example of an obligation—the continuing obligation of confidentiality to a former client in some unrelated matter, for instance—that in no way inhibits a lawyer from vigorously representing the estate.

To be sure, as the bankruptcy court's ruling indicates, the rules of ethics apply in bankruptcy proceedings. *See* Ruling at 6. But, where those rules operate to protect the interest of a third party without creating a present interest adverse to the debtor's estate, they have no bearing on whether Section 327 has been satisfied. That is apparent even in the authority Century cites, which indicates that the rules of professional conduct apply in bankruptcy proceedings "***apart*** from the particular requirements of the Bankruptcy Code or rules." Br. at 30 (emphasis added) (quoting 1 Collier on Bankruptcy, § 8.03[2] (16th ed. 2020)).[11] In the words of the

[11] *In re Congoleum Corp.*, 426 F.3d 675, 679 (3d Cir. 2005), on which Century relies, further underscores this point. In *Congoleum*, the Third Circuit separately concluded that a representation violated both the rules of professional conduct and the Bankruptcy Code. *Id.* at 679 ("conflicts existed … under the Rules of Professional Conduct *and* the Bankruptcy Code" (emphasis added)). The court

bankruptcy court, a lawyer has "ethical responsibilities that do not implicate section 327." Ruling at 6.

Century's position also entirely ignores the Third Circuit's guidance on the issue. In *First Jersey*, the Third Circuit stated that a "Court may consider an interest adverse to the estate when counsel has a competing economic interest tending to diminish estate values or to create a potential or actual dispute in which the estate is a rival claimant." 180 F.3d at 509 (quotation omitted). Century did not even attempt to satisfy that standard below, and makes no mention of it here.

At bottom, Century is simply (and understandably) concerned only with *Century's* interests. Century believes (erroneously) that Sidley's representation of BSA as restructuring counsel will undermine Century's position as one of BSA's liability insurers. *See* Br. at 28, 32. But even if that representation violated the rules of professional conduct, which it does not (*see* Part II.B, *infra*), it does not undermine *BSA's* interest or Sidley's ability to vigorously represent BSA, particularly in light of the presence of Haynes and Boone to address insurance-

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found a violation of Rule 1.7 because a law firm "simultaneously represent[ed]" a manufacturer whose products contained asbestos in connection with its restructuring and individuals in connection with their asbestos-related claims against that manufacturer. *Id.* at 689-90. (That would be the equivalent here of Sidley representing abuse victims with claims against BSA.) Thus, the law firm could not satisfy Section 327 because the obligation to the individual claimants "prevent[ed] [the law firm] from being completely loyal to [the debtor manufacturer]'s interests." *Id.* at 692.

related issues. Rather, this is fundamentally a dispute between Sidley and its former client Century implicating contractual and ethical duties—not the Bankruptcy Code—that is currently being addressed in the pending arbitration, which the parties contractually agreed would be the sole forum for resolving their disputes. *See* Ruling at 2.

II. The Bankruptcy Court Did Not Abuse Its Discretion In Rejecting Century's Attempt To Disqualify Sidley Based On Purported Violations Of The ABA Model Rules Of Professional Conduct.

Century argues that the bankruptcy court should have disqualified Sidley based on what Century describes as obvious and intractable violations of Sidley's ethical obligations to Century. Century entirely ignores, however, that the bankruptcy court possessed "wide discretion" in that regard. *TQ Delta, LLC v. 2Wire, Inc.*, 2016 WL 5402180, at *6 (D. Del. Sept. 26, 2016). The Third Circuit has made clear that disqualification of counsel is an "extreme remedy." *Jackson v. Rohm & Haas*, 366 F. App'x 342, 347 (3d Cir. 2010). "In the Third Circuit, and under this court's precedent, whether disqualification is appropriate depends on the facts of the case and is ***never automatic***." *Bos. Sci. Corp. v. Johnson & Johnson Inc.*, 647 F. Supp. 2d 369, 374 n.7 (D. Del. 2009) (emphasis added). Courts approach motions to disqualify with "'cautious scrutiny,' mindful of a litigant's right to the counsel of its choice." *Regalo Int'l, LLC v. Munchkin, Inc.*, 211 F. Supp. 3d 682, 687 (D. Del. 2016) (quotation omitted); *see also Macheca Transp.*

Co. v. Phila. Indem. Co., 463 F.3d 827, 833 (8th Cir. 2006) ("A party's right to select its own counsel is an important public right and a vital freedom that should be preserved; the extreme measure of disqualifying a party's counsel of choice should be imposed only when absolutely necessary." (quotation omitted)).

Century failed to carry its burden to "show clearly that continued representation would be impermissible." *TQ Delta*, 2016 WL 5402180, at *2 (quotation omitted); *see also In re Onejet, Inc.*, 614 B.R. 522, 530-31 (Bankr. W.D. Pa. 2020) ("The burden is an exceptionally heavy one as motions to disqualify are viewed with disfavor within our Circuit because of the potential for abuse as a litigation tactic."). Even if Sidley had violated its ethical obligations to Century (and it did not), the bankruptcy court did not abuse its discretion in declining to disqualify Sidley in light of how clearly and substantially disqualification would have harmed BSA. The ruling also was bolstered by the court's undisputed factual finding that no confidential information related to Sidley's representation of Century in reinsurance matters was in fact passed to the Sidley restructuring team (or would be going forward), as well as BSA's retention of Haynes and Boone as insurance coverage counsel.[12]

[12] To the extent Century relies on the opinions of its expert Charles Slanina (Br. at 18-20), which are based on Century's own disputed version of the facts, that legal opinion is not entitled to weight. *See GST Telecomm., Inc. v. Irwin*, 192 F.R.D. 109, 111 (S.D.N.Y. 2000) ("[T]estimony of legal experts on ethics in the

A. The Bankruptcy Court Did Not Abuse Its Discretion In Declining To Disqualify Sidley Irrespective Of Any Violations Of The Rules Of Ethics.

Exercising the discretion afforded to it, and recognizing that "[d]isqualification is never automatic," the bankruptcy court held that it would not disqualify Sidley from representing BSA even if it had violated its ethical obligations to Century. Ruling at 11-14. Remarkably, Century does not address that holding, much less argue that it was an abuse of discretion. Nor could it. The bankruptcy court's decision rests on the clear application of well-established law to its undisputed factual findings.

Century does not dispute that there is an "overwhelming body of caselaw (including in this district) in which courts deny disqualification motions in the face of what appear to be obvious conflicts." *Id.* at 13 & n.15 (collecting authority). That includes where courts find violations of the very ethical rules Century invokes here. *See, e.g.*, *TQ Delta*, 2016 WL 5402180, at *6-7 (denying motion for disqualification despite violation of Rule 1.9); *Bos. Sci. Corp.*, 647 F. Supp. 2d at 374-75 ("[counsel's] violation of Model Rule 1.7 notwithstanding, the court concludes that disqualification is not the appropriate remedy under the circumstances"); *End of Rd. Tr. v. Terex Corp.*, 2002 WL 242464, at *2-3 (D. Del.

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profession is hardly an occasion for which credible experts supply legal opinions." (quotation omitted)). The bankruptcy court gave it none. *See* Ruling at 16.

Feb. 20, 2002) (denying motion for disqualification despite admitted violation of Rule 1.7); *Wyeth v. Abbott Labs.*, 692 F. Supp. 2d 453, 458-60 (D. N.J. 2010) (denying motion for disqualification even though there was "no dispute" that counsel violated Rule 1.7); *cf. Elonex I.P. Holdings, Ltd. v. Apple Computer, Inc.*, 142 F. Supp. 2d 579, 583 (D. Del. 2001) (holding that even if Rule 1.7 was violated, disqualification still would not have been warranted). In doing so, courts routinely consider the prejudice that could result to a client—here BSA—from being dispossessed of its chosen counsel, including as a result of the complexity of the matter, nature and degree of chosen counsel's involvement, and costs to obtain new counsel. *See, e.g.*, *TQ Delta*, 2016 WL 5402180, at *7; *End of Rd. Tr.*, 2002 WL 242464, at *3; *Elonex*, 142 F. Supp. 2d at 584; *Wyeth*, 692 F. Supp. 2d at 460.

Applying this principle, the bankruptcy court found that the evidence was "unrefuted" that "significant prejudice … would befall BSA if it is forced to replace Sidley, which has been working with BSA for almost 18 months." Ruling at 14. Century ignores this unassailable finding. Sidley's bankruptcy lawyers had become intimately familiar with BSA, its mission, its culture, its complex structure, and the unique challenges presented by the bankruptcy. SA004-05, Whittman Decl. ¶ 9. They formed ongoing relationships with representatives of abuse survivors, the future claimants' representative, insurers, Local Councils, and other constituents. *Id.* They spent time and resources representing BSA in pre- and

post-petition negotiations, structuring, and planning regarding the restructuring. *Id*. And they were closely involved in negotiations with many key stakeholders. *Id.*

If BSA had been forced to obtain new counsel, BSA would have needed to spend significant time selecting replacement counsel, educating replacement counsel about the history of its organization and its financial struggles, and bringing replacement counsel up to speed on the details of the restructuring (the first involving a congressionally chartered non-profit corporation), including pleadings and other documents and the myriad of complex legal issues at play. *See id*. Replacement counsel would have needed to familiarize itself not only with BSA's non-profit operations, financial affairs, abuse claims history, and organizational structure, but also the interests and legal positions of the other stakeholders in the restructuring. *Id.* The resulting delay to the bankruptcy proceeding would have significantly prejudiced BSA—precluding an efficient exit from bankruptcy vital to preserving its mission.

Relatedly, hiring replacement counsel would have been expensive for BSA. BSA would have needed to compensate replacement counsel for the time spent to develop the understanding that its lawyers at Sidley had obtained—including learning about BSA's operations and restructuring, performing diligence and analyses, and completing other work product. *Id.* ¶ 10. Such financial harm would prejudice any debtor in the midst of a restructuring, but the impact on BSA, a non-

profit, would have been particularly destructive due to the continuing COVID-19 pandemic, which had already significantly impaired BSA's financial position and general operations. SA003-04, Whittman Dec. ¶ 7. Such costs would have further depleted the funds available to abuse survivors. As the bankruptcy court noted, all of this is undisputed. Ruling at 14.

Courts have denied motions to disqualify under similar—and in some cases, less dire—circumstances. *See, e.g.*, *TQ Delta*, 2016 WL 5402180, at *7 (noting that counsel's "extensive familiarity with the factual and legal issues in th[e] complex … case cannot be overstated," if counsel was disqualified, the litigant "would be prejudiced beyond mere inconvenience," and "[r]replacing [counsel] and getting new counsel up to speed[] would come at a substantial cost—in terms of both time and money" (quotation omitted)); *End of Rd. Tr.*, 2002 WL 242464, at *3 (client would suffer "great prejudice" if law firm was disqualified because the case is "complex," the law firm "invested a substantial amount of time and effort," and disqualification would "delay th[e] case"); *Elonex*, 142 F. Supp. 2d at 584 ("[I]n light of [law firm]'s knowledge of the case, it is certain that [client] will be prejudiced if it has to retain new counsel."); *Wyeth*, 692 F. Supp. 2d at 460 ("depriving [client] of its counsel of choice deprives [it] of [counsel]'s depth of experience and expertise," and "if [client] were required to obtain new counsel,

there would likely be some delay in this litigation as well as certain additional costs incurred by [client] while new counsel familiarized itself with this case").

The bankruptcy court's exercise of discretion is further supported by its finding—based on "unrefuted testimony" and the operation of an ethical screen—that "any confidential or privileged information that Mr. Sneed received in his representation of Century in its reinsurance matters has not and will not be passed along to Sidley's restructuring team." Ruling at 12; *see also id.* at 11 ("Mr. Sneed has not passed on any information he received in the course of his representation of Century in the reinsurance matters."); *id.* at 14 ("I am comfortable that no privileged information that Sidley obtained in its work for Century can or will be used in this bankruptcy case in any way."). This was "not … surprising given the nature of large firms with specialized departments." *Id.* at 12. And Century does not identify *any* evidence (and there is none) suggesting this conclusion was incorrect, much less that it was clear error.

Instead, Century resorts to insinuation and obfuscation. For example, Century vaguely suggests that some unspecified "information-sharing" "might have occurred" prior to Haynes and Boone being appointed. Br. at 46-47; *see also id.* at 46 ("there is [a] risk that confidential, privileged, or disadvantageous material

could have already been disclosed").[13] But such speculation comes nowhere close to showing a clear error in the bankruptcy court's emphatic factual finding.

Century also asserts that the rules of professional conduct "presume[] that such information-sharing occurs" and thus Sidley cannot "cure" a violation of Rules 1.7 or 1.9 through use of an ethical screen because it did not implement one in a timely fashion. Br. at 23, 25-26, 44-46. That argument misses the point. Neither Sidley nor the bankruptcy court rely on the ethical screen erected by Sidley to "cure" violations of Rules 1.7 or 1.9. Rather, noting expressly that a "retroactive ethical screen may not work for purposes of violations of the Rules of Professional conduct," the bankruptcy court nevertheless found as a factual matter that the screen provided further assurance that confidential information regarding Century's reinsurance maters had not been and, importantly, would not be shared with the Sidley restructuring team. Ruling at 12.

Because the Sidley attorneys representing BSA did not in fact receive any confidential information from the Sidley attorneys that worked on Century's matters, Sidley's prior representation of Century has had and will have no impact

[13] Why Century emphasizes the time period before Haynes and Boone's appointment is a mystery. Haynes and Boone is BSA's longtime insurance counsel and, as the bankruptcy court found, has been involved "from the outset of the restructuring negotiations." Ruling at 11. Indeed, Century has been litigating against Haynes and Boone in connection with its BSA insurance policies since before BSA retained Sidley. *See* Bankr. Dkts. 210, 463.

on the integrity of the bankruptcy proceeding or Century's interactions with BSA. In circumstances like these, disqualification of counsel is not proper, and the dispute is best left to another forum. *See United States v. Prevezon Holdings Ltd.*, 839 F.3d 227, 241 (2d Cir. 2016) ("[D]isqualification is called for only where an attorney's conduct tends to taint the underlying trial, because federal and state disciplinary mechanisms suffice for other ethical violations." (quotation omitted)); *In re Tate*, 2019 WL 3294073, at *1 (Bankr. D.D.C. July 22, 2019) ("courts are admonished that 'unless an attorney's conduct tends to taint the underlying trial'"—either because "there is a serious question of the attorney's ability to zealously represent the client" or "the attorney is in the position to potentially create an unfair advantage by the use of privileged information of the other side"—to "'be quite hesitant to disqualify an attorney'" (quoting *Koller v. Richardson-Merrell Inc.*, 737 F.2d 1038, 1056 (D.C. Cir. 1984))).[14]

Indeed, that is precisely what is happening here. As the bankruptcy court observed, the agreement governing the relationship between Sidley and Century provides that if the parties are unable to resolve a dispute related to a matter handled by Sidley "the sole means for redressing that dispute shall be an

[14] *See also* Ronald D. Rotunda & John S. Dzienkowski, Legal Ethics: The Lawyer's Deskbook on Professional Responsibility § 1.7-1(f) (2018-2019 ed.) ("[I]f the alleged ethical violation does not affect the fact finding process or the fairness of the trial, then the court should leave any enforcement of the alleged violation to the other fora for remedying conflicts of interest.").

arbitration." Ruling at 2 (emphasis in original). And "Century is pursuing this remedy." *Id.* Accordingly, the bankruptcy court concluded that "[v]iolations of the professional rules of conduct will be addressed in that forum, which was Chubb's chosen forum." *Id.* at 14.

B. Century Has Failed To Establish That Sidley Violated The ABA Model Rules Of Professional Conduct.

Like the bankruptcy court, this Court need not reach the question of whether Sidley's representation of BSA in fact violated Sidley's ethical obligations to Century under Rules 1.7 and 1.9. For the reasons stated above, this Court can affirm the retention of Sidley without concluding whether any ethical violation occurred. Nonetheless, the record and law are clear: Sidley did not violate any professional obligation.

1. Sidley's Representation Of BSA Does Not Violate Rule 1.9 Regarding Duties To Former Clients.

a. Century Should Be Treated As A Former Client For Purposes Of The Model Rules.

It is undisputed that well before Century filed its objection to Sidley's retention, and indeed well before Century even appeared in BSA's bankruptcy, Sidley no longer represented Century in any ongoing matter and the attorney-client relationship had terminated. Due to a breakdown in the attorney-client relationship, Sidley notified Century on January 16, 2020—more than a month before BSA filed for bankruptcy—that it was withdrawing from all matters in which it represented

Century and its affiliates. Ruling at 2; *see also* APP000848, APP000850-52. After doing so, Sidley promptly began the process of completing its withdrawal, and completed the process of communicating that withdrawal to the relevant courts and arbitrators just a few days after BSA filed the petition. APP000786-87, Sneed Decl. ¶ 37; APP000870 (2/20/20 email); APP000878 (2/20/20 email).

Century nevertheless argues, relying on the so-called "hot potato" doctrine, that the current-client standard of Rule 1.7 applies. This doctrine—which the Third Circuit has never adopted, *see Sonos, Inc. v. D & M Holdings Inc.*, 2015 WL 5277194, at *3 n.1 (D. Del. Sept. 9, 2015)—prevents a law firm from dropping a client in order to avoid a conflict with another, more lucrative client. That is not what happened here.

To begin with, there was no conflict to be avoided, especially given that Sidley's engagement letter expressly carved out the provision of advice on "insurance coverage issues," which were the province of BSA's longtime coverage counsel Haynes and Boone. *See* p. 3, *supra*. Sidley withdrew from representing Century in its reinsurance disputes, but not because it *could not* continue to represent Century in those reinsurance disputes and represent BSA as restructuring counsel. It withdrew because its relationship with Century broke down when Century decided it *did not want* Sidley to represent BSA, and relied on an erroneous assertion of a conflict to attempt to try to force that result. Sidley sought

to resolve Century's concerns, but when it became clear that the relationship had broken down, Sidley withdrew, as it was entitled to do. *See* ABA Model Rule 1.16(b)(1), (6)-(7) (listing independent reasons "a lawyer may withdraw from representing a client," including that the representation "has been rendered unreasonably difficult by the client," "withdrawal can be accomplished without material adverse effect on the interests of the client," or "other good cause for withdrawal exists"); *City of Joliet v. Mid-City Nat'l Bank of Chi.*, 998 F. Supp. 2d 689, 693 (N.D. Ill. 2014) ("withdrawal for good cause includes a withdrawal based on a breakdown in the attorney-client relationship" (quotation omitted)).

Far from dropping Century like a "hot potato," after Century first raised its concerns about a potential conflict in October 2019, Sidley and Century had numerous communications regarding Century's concerns. *See*, *e.g.*, SA012, Boelter Decl. ¶ 17 (November 4, 2019 meeting between Sidley's restructuring team and Century); Bankr. Dkt. 500-4 (emails on November 3 & 25, 2019); APP000839-43 (emails on December 3, 11, & 16, 2019); APP000786, Sneed Decl. ¶ 34 (December 18, 2019 conference call). During these exchanges, Sidley consistently maintained that no conflict existed, but also attempted to address Century's concerns—including by putting in place a formal ethical screen. As Mr. Sneed explained, Sidley "wanted this worked out" and "wanted to continue to represent Century in the reinsurance matters" and thus urged Century to schedule a

management-level conference call to resolve the issue. APP000930-31, Tr. 40:21-25, 41:6-9 (Sneed).

Century, however, refused to do so. No management-level discussion occurred before Century's next communication on January 3, 2020—a letter accusing Sidley of "shocking and offensive" behavior. APP000845-46. Yet even then, and after having "consulted with outside ethics counsel," Century's position was merely that it was "*unable to rule out* … a conflict" (*id.* (emphasis added))—not, as it now asserts, that Sidley had "plainly" violated its ethical obligations. Br. at 31. At that point, the relationship between Sidley and Century became irreparably damaged and untenable.

The cases on which Century relies to support its "hot potato" argument are readily distinguishable. *Santacroce v. Neff*, 134 F. Supp. 2d 366 (D.N.J. 2001), which Century discusses extensively (*see* Br. at 36-39 & nn.129-34, 136-37, 139), concerned a law firm immediately dropping a client after she indicated her intent to sue a different client. *Santacroce*, 134 F. Supp. 2d at 367-68. In fact, the law firm in *Santacroce* expressly cited that conflict as the basis for its withdrawal, and the Court concluded that no permissible basis to withdraw existed. *Id.* at 371. Thus the two clients were directly adverse because one was imminently planning to sue the other—which would have placed them on opposite sides of the "v." in active lawsuits, a conflict that cannot be cured by consent. And there was no valid basis

for the law firm to terminate the attorney-client relationship. That is not the case here.[15]

b. Sidley's Representation Of BSA Does Not Violate Rule 1.9.

Century incorrectly states that the bankruptcy court held that Sidley's representation of BSA is "substantially related" to Sidley's prior representation of Century in reinsurance collections disputes. Br. at 25, 43. It did no such thing. Rather, the bankruptcy court observed that the "reinsurance litigation *could* be 'substantially related' to at least some aspects of the Boy Scout's bankruptcy case" before going on to conclude that any issues in that regard would be resolved by the presence of Haynes and Boone as "conflicts counsel." Ruling at 10-12 (emphasis added). The bankruptcy court did not reach the ultimate issue, much less find that *Sidley's representation* of BSA was *in fact* substantially related to the prior reinsurance collections disputes. *See id.* That is underscored by the bankruptcy

[15] Several of Century's other cases (Br. at 37-38 & nn.135, 137) likewise involve counsel simultaneously representing parties on opposite sides of the "v." in existing or imminent litigation. *E.g.*, *Ransburg Corp. v. Champion Spark Plug Co.*, 648 F. Supp. 1040, 1044 (N.D. Ill. 1986); *Int'l Longshoremen's Ass'n, Local Union 1332 v. Int'l Longshoremen's Ass'n*, 909 F. Supp. 287, 293 (E.D. Pa. 1995); *Markham Concepts, Inc. v. Hasbro, Inc.*, 196 F. Supp. 3d 345, 349 (D. R.I. 2016). And while Century relies on cases that suggest that the present-client standard applies even if the concurrent representation ceased prior to the disqualification motion (Br. at 35-36 & nn.127-28), Century's authority explains that this concept and the hot potato doctrine are two sides of the same coin. *See Merck Eprova AG v. ProThera, Inc.*, 2009 WL 10696470, at *6 (S.D.N.Y. Oct. 6, 2019).

court noting that the record showed that Sidley's work on the reinsurance matters involved receipt only of "information *relevant* to the BSA bankruptcy" (*id.* at 10-11 (emphasis added))—which is not the standard under Rule 1.9. Under Rule 1.9, two matters are "substantially related" where confidential information received would "*materially advance* the client's position in the subsequent matter." ABA Model Rule 1.9 cmt. 3 (emphasis added). Again, the bankruptcy court made no such finding.

Century is likewise incorrect in asserting that Sidley's representation of BSA is "substantially related" to its prior representation of Century in reinsurance collections actions. (Br. at 43-44.) Before this dispute began, Century admitted as much. In the agreement governing the engagement, Century described Sidley's work in the reinsurance collections matters as "*unrelated to the defense of an insurance claim or a related insurance coverage claim*." APP001239. And Sidley's actual work was consistent with this description. As the bankruptcy court found, "Century retained Sidley in connection with Century's efforts to obtain *reinsurance* … for claims Century paid or in the future would pay to BSA under insurance policies Century issued to BSA." Ruling at 1 (emphasis added); *see also id.* at 2. For example, with respect to the Lloyd's Underwriters matter, Century had been defending and indemnifying BSA on individual claims and had paid enough in settlements to reach its reinsurance retentions with Lloyd's Underwriters. As

such, Century's obligations did not arise out of coverage litigation between BSA and Century (like the litigation between BSA and its insurers mentioned in Century's papers (Br. at 8, 47)). In the subsequent reinsurance collections action, the issue was how the *settled claims* would be treated under the pertinent terms of Century's reinsurance treaty with Lloyd's Underwriters—a separate contract from the underlying policies issued to BSA.[16] Only these reinsurance claims fell within the scope of Sidley's engagement with Century.

Century relies on the fact that the reinsurance collections matters involved attempting to recoup amounts paid out under Century's BSA policies from Century's reinsurers. Br. at 43. But that is not sufficient to establish that the matters are substantially related. It is not enough to show that two matters "overlap to some degree." *Talecris Biotherapeutics, Inc. v. Baxter Int'l Inc.*, 491 F. Supp. 2d 510, 515 (D. Del. 2007) (holding no substantial relationship despite overlap and noting "the underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question." (quoting ABA Model Rule 1.9 cmt. 2)). That holds

[16] In the bankruptcy court, Century made much out of the fact that declaratory relief was at issue. *E.g.*, APP000721; APP001042, Tr. 152:6-19 (Russell). That is of no moment. As Mr. Sneed explained, the request for declaratory relief was boilerplate language that simply sought to have the arbitrators declare that the reasons the reinsurance counterparties gave for not paying the reinsurance bills were invalid—as applied to the settled claims and potential future claims. APP001145-46, Tr. 255:8-14, 256:1-24 (Sneed).

true in the reinsurance space. *See Emps. Ins. Co. of Wausau v. Munich Reinsurance Am., Inc.*, 2011 WL 1873123, at *6 (S.D.N.Y. May 16, 2011) (holding that lawyer's prior representation of client in reinsurance arbitration was not substantially related to later reinsurance arbitration against former client despite both involving issues of how to define an "occurrence" for determining if retention was exceeded). Even Century's own authority explains that disqualification is proper under the substantial relationship test only if the "relationship between issues in the prior and present cases is *patently clear*," meaning "*identical or essentially the same*." *Mitchell v. Metro. Life Ins. Co.*, 2002 WL 441194, at *4 (S.D.N.Y. Mar. 21, 2002) (emphasis added) (cleaned up) (cited in Br. at 46 n.159); *see also Chem. Bank v. Affiliated FM Ins. Co.*, 1994 WL 141951, at *12 (S.D.N.Y. Apr. 20, 1994) (same) (cited in Br. at 36 n.128). Century does not even try to meet that standard.

Instead, Century offers a variety of conclusory assertions regarding the nature of the information received by Sidley in the reinsurance matters. *See, e.g.*, Br. at 5-6, 44. The parties disputed the issue before the bankruptcy court, which ultimately found that the record was not sufficiently clear as to how any such information "could be used to Century's detriment in the bankruptcy case." Ruling at 11. That is, the bankruptcy court concluded that even if Sidley had received confidential information (an issue it did not have to decide), whatever Sidley had

received would not "materially advance" BSA's position at the restructuring. ABA Model Rule 1.9 cmt. 3. That conclusion is well supported by the record.[17]

Mr. Sneed testified that the reinsurance disputes did not involve any questions related to the underlying coverage provided by Century to BSA, and that he did not receive any confidential or privileged information related to any insurance coverage disputes between Century and BSA. APP000913-14, Tr. 23:22-24:5; APP000917, Tr. 27:13-21 (Sneed). Century's witnesses were less than clear regarding the sharing of confidential information. While Ms. Russell testified that Century shared information with Mr. Sneed in the reinsurance matters that could be "potentially harmful" to Century if disclosed to BSA (APP001065, Tr. 175:10-14), Mr. Schwartz—the "day-to-day point of contact" on the reinsurance matters (Br. at 18)—expressly disagreed with Ms. Russell about the information shared with Sidley. APP001097, Tr. 207:1-10.

Mr. Schwartz, while indicating that he had shared confidential information with Sidley on certain issues—as one would expect in the course of an attorney-client relationship—did not state that he shared any privileged confidential information with Sidley regarding Century's underlying insurance disputes with

[17] Additionally, Century cannot base its complaints on confidential information already known to BSA either through its being a counterparty to the relevant insurance agreements or prior coverage litigation. ABA Model Rule 1.9 cmt. 3 ("Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying.").

BSA. To the contrary, Mr. Schwartz testified "I don't agree with Ms. Russell that there's privileged information that was exchanged. I can't think of anything privileged, you know, like legal advice from our coverage counsel that we shared." *Id.* Mr. Schwartz went on to confirm that it was his "general understanding" that "none of the documents" provided to Sidley "contained privileged information with respect to the underlying direct insurance claims." APP001097, Tr. 207:11-18. Century entirely ignores this contradictory testimony, which is especially significant because Century bears the burden in seeking disqualification. *See P&L Dev. LLC v. Bionpharma Inc.*, 2019 WL 357351, at *8 (M.D.N.C. Jan. 29, 2019) (declining motion to disqualify where the former client's "speculative" concerns provided "the only path towards the conclusion that there is a substantial risk that confidential information [counsel] normally would have acquired from [former client] would materially advance [current client's] position"); *Talecris*, 491 F. Supp. 2d at 515 & n.2; *Bd. of Regents of Univ. of Neb. v. BASF Corp.*, 2006 WL 2385363, at *8 (D. Neb. Aug. 17, 2006).

Century further points to discovery requests made by BSA to Century in litigation regarding the underlying insurance policies—with which Sidley had no involvement—seeking information regarding the reinsurance coverage disputes. Br. at 8, 47. But Century ignores that, as its own witnesses confirmed, Century itself objected to those very discovery requests on the grounds that information

about the reinsurance matters has *no bearing* on any issues in the insurance litigation. *See* APP001064-65, Tr. 174:25-175:22 (Russell); APP001096, Tr. 206:2-11 (Schwartz); APP001121, Tr. 231:14-25 (Celentano); *see also* Ruling at 10. Century's objection to the discovery is not surprising; courts have recognized that insurance and reinsurance arrangements are governed by separate agreements, with different terms and between different parties that give rise to distinct issues for litigation. *See, e.g.*, *BancInsure, Inc. v. McCaffree*, 2013 WL 5769918, at *6 (D. Kan. Oct. 24, 2013) ("Policy terms, conditions, and exclusions between insurance and reinsurance can be materially different.").

Finally, Century continues to ignore the specific roles of the different law firms representing BSA in the bankruptcy. As the bankruptcy court found, Haynes and Boone—not Sidley—is responsible for insurance-related aspects of the bankruptcy, including any negotiation or adversary proceeding regarding Century's obligations under the policies it issued to BSA. Ruling at 11. So there is no substantial relationship between the reinsurance matters and Sidley's representation of BSA as restructuring, *not* coverage, counsel.

2. Even If Century's Relationship With Sidley Is Evaluated Under The Present Client Standard, Sidley's Representation Of BSA Does Not Violate Rule 1.7.

Sidley likewise did not violate Rule 1.7 because its representation of BSA was never "directly adverse" to Century at any point prior to its withdrawal. ABA

Model Rule 1.7(a)(1). During the period prior to Sidley's withdrawal, the relationship between Century and Sidley bore none of the hallmarks of direct adversity. No lawsuit was filed by Sidley against Century on BSA's behalf,[18] nor did Sidley's role as restructuring counsel result in Sidley conducting a hostile examination of a Century witness or otherwise advocating against Century directly. Indeed, as the bankruptcy court found, Sidley's own engagement letter carved out any advice on insurance coverage issues; Haynes and Boone was responsible for all coverage-related matters, was responsible for analyzing BSA insurance policies and negotiating with insurers, and drafted the portions of BSA's placeholder plan related to insurance neutrality. Ruling at 11. Rather, Century's theory is extremely broad: it posits that any reorganization will necessarily involve contributions from insurers like Century, and thus *any* involvement by Sidley in such a reorganization necessarily creates direct adversity with insurers (or any other party who could conceivably contribute funds). *See* Br. at 33 ("There is inherent adversity between insurers and debtors in a mass tort bankruptcy proceeding[] …."); *id.* ("insurers and debtors" will be "on opposite sides of the ledger, with the debtors advocating a

[18] Century refers to "bankruptcy litigation concerning" Century's BSA policies. Br. at 43. To be clear, no adversary proceeding has been filed against Century in connection with BSA's bankruptcy. And if there was, that would not be handled by Sidley but rather, *e.g.*, by Haynes and Boone.

plan that the insurers oppose"); *id.* at 48 ("insurance is so intrinsic to the structure of this bankruptcy case").

This argument proves too much. BSA's insurance plans are an asset of the estate; that the proposed plan envisions a role for those assets in the restructuring does not suffice to create the sort of direct adversity envisioned by Rule 1.7. There are a myriad of parties in interest, not just insurers, involved in mass tort restructuring cases, and BSA has multiple "assets" that could be at issue in the bankruptcy proceedings. Disputes as to those assets may or may not arise in the course of the bankruptcy. But it simply cannot be the case that a law firm is "directly adverse" to all other parties in a bankruptcy case, including those with interests in the debtor's assets, from the moment it takes on a representation of a debtor. Otherwise, a law firm could not represent a debtor if it represented any other person or entity that possessed any interest that the debtor might conceivably view as an "asset" of the estate. This is not the law.

Century does not cite a single case where a court found direct adversity for purposes of Rule 1.7 based on its novel, expansive theory. Instead, it relies exclusively on *In re Thorpe Insulation Co.*, 677 F.3d 869 (9th Cir. 2012) (cited in Br. at 33 & nn.122-23). But *Thorpe* is not a case about attorney disqualification or Rule 1.7's direct adversity requirement. Instead it is a case about the bankruptcy concept of "insurance neutrality." In *Thorpe*, the court found that a plan "may

economically affect" the appellant-insurance company in "substantial ways," and held that a plan "is not insurance neutral when it may have a substantial economic impact on insurers." *Id.* at 885. And because the plan at issue was not insurance neutral, the debtors' insurer was a party in interest with standing to challenge the plan. *Id.* at 884-88.

If anything, *Thorpe*'s holding about insurance neutrality—and Century's ability to assert its rights in that regard—underscores that mechanisms are in place to prevent a confirmed plan from altering an insurer's legal rights with respect to its policies with the debtor. A plan is insurance neutral if it does not "materially alter the quantum of liability that the insurers would be called to absorb." *In re Glob. Indus. Techs., Inc.*, 645 F.3d 201, 212 (3d Cir. 2011). In order to address any possible objection from Century, the bankruptcy court will need to conclude that a plan meets the insurance neutrality test. And even if Century challenges the plan on these grounds, it would not be adverse to Sidley. As the bankruptcy court found, Haynes and Boone, not Sidley, drafted the insurance neutrality portions of BSA's placeholder plan (Ruling at 11), and will, if needed, address any concerns raised by Century regarding the insurance neutrality provisions.

Moreover, the mere fact that a plan might economically affect an insurer (Br. at 33)—or any other party that might contribute funds to the debtor in connection with a reorganization—does not create direct adversity under Rule 1.7.

Indeed, the Standing Committee on Ethics and Professional Responsibility of the American Bar Association has explained that "economic adversity alone" between a liability insurer and its lawyer's concurrent client "is not … the sort of direct adversity that constitutes a concurrent conflict of interest under the Model Rules." ABA Formal Op. 05-435 (Dec. 8, 2004). That opinion addressed the situation in which a lawyer represented a liability insurer in one action, and simultaneously represented a plaintiff who brought a suit against a defendant to whom a defense was provided under an insurance policy issued by the liability insurer in another action. *Id.* While acknowledging that "a liability insurer has an economic interest in the litigation that ordinarily is aligned with the interests of its insured," the Committee reasoned that the liability insurer was not "directly adverse" to the plaintiff in the second case because it was not a named defendant. *Id.*; *see also Stonebridge Cas. Ins. v. D.W. Van Dyke & Co.*, 2015 WL 8330980, at *3 (S.D. Fla. Oct. 23, 2015) ("[Liability insurer's] alleged economic interest in the litigation does not create direct adversity, thereby creating a conflict of interest.").

Century also asserts that the requisite direct adversity was demonstrated by the fact that it objected to various positions taken by BSA when it moved for the mandatory appointment of a mediator. Br. at 34. But BSA took these positions *after* Sidley withdrew from representing Century. They therefore have little bearing on whether direct adversity existed at the time Sidley began representing

BSA, the relevant inquiry in this context. *See Muma Servs.*, 286 B.R. at 587 ("We conclude that Rule 1.7(a) is not applicable here, because [law firm's] representation of the Committee was not directly adverse to [party seeking disqualification] *from the outset*." (emphasis added)). Having former counsel seek to compel mediation—a process which, of course, cannot alter substantive rights without agreement—is hardly the "definition of adversity." Br. at 34.

Century complains that the bankruptcy court's ruling "impos[ed] no limitation on Sidley's conduct other than to refer to the bankruptcy court's bench ruling." Br. at 47. But the bankruptcy court's ruling is not "vague to the point of being illusory." *Id.* On the contrary, it is quite clear: "Haynes and Boone *must handle all matters adverse to Century* that address the substantive treatment of BSA's insurance policies with Century, claims thereunder, proceeds therefrom or that otherwise implicate insurance coverage." Ruling at 14 (emphasis added). This directive is consistent with Sidley and BSA's engagement letter and the promises Sidley made in its bankruptcy court brief with regards to its role vis-à-vis Haynes and Boone (APP000709), both of which Century ignores.

CONCLUSION

For the foregoing reasons, the bankruptcy court's order approving Sidley's retention and employment as BSA's counsel should be affirmed.

Respectfully Submitted,

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/s/ Derek C. Abbott
Derek C. Abbott (No. 3376)
Andrew R. Remming (No. 5120)
Eric W. Moats (No. 6441)
Morris, Nichols, Arsht & Tunnell LLP
1201 North Market Street, 16th Floor
P.O. Box 1347
Wilmington, DE 19899-1347
Telephone: (302) 658-9200
Email: dabbott@mnat.com
aremming@mnat.com
emoats@mnat.com

Attorneys for the Boy Scouts of America and Delaware BSA, LLC

/s/ Christopher P. Simon
Christopher P. Simon (No. 3697)
CROSS & SIMON LLC
1105 North Market Street, Suite 901
Wilmington, DE 19801
Telephone: (302)777-4200
Email: csimon@crosslaw.com

-and-

James W. Ducayet
Robert N. Hochman
SIDLEY AUSTIN LLP
One South Dearborn Street
Chicago, Illinois 60603
Telephone: (312) 853-7000
Email: jducayet@sidley.com
rhochman@sidley.com

Attorneys for Sidley Austin LLP

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Bankruptcy Procedure 8015(h), the undersigned certifies that the above memorandum complies with the applicable type-volume limitation of Federal Rule of Bankruptcy Procedure 8015(a)(7)(B)(i) because, excluding the parts of the memorandum exempted by Federal Rule of Bankruptcy Procedure 8015(g), this brief contains 12,968 words. The above brief also complies with the typeface requirements of Federal Rule of Bankruptcy Procedure 8015(a)(5) and type-style requirements of Federal Rule of Bankruptcy Procedure 8015(a)(6).

Date: October 7, 2020

/s/Derek C. Abbott
Derek C. Abbott (No. 3376)