IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

In re CAM-PLEK OF VIRGINIA IQ CONVERTING DIVISION, INC., d/b/a IQ PAPER, EIN #54-1023994, Debtor.	No. 96-21367 Chapter 11 [affirmed E.D. Tenn. 2:99-CV-116; 07/28/1999]

M E M O R A N D U M

APPEARANCES:

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MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE

This chapter 11 case is before the court upon a motion for interim compensation by Dean Greer, debtor's former counsel, and the amended objection thereto by Coronet Paper Products, Inc. ("Coronet"), along with a motion by Coronet for disgorgement of all fees and expenses paid to date to Mr. Greer, based on the allegation that Mr. Greer has not been disinterested and has represented interests adverse to the estate throughout his employment by the debtor. The objection and disgorgement motion are supported by the United States trustee. For the following reasons, the court does not find that Mr. Greer was interested or has represented interests adverse to the estate. However, based upon the failure of Mr. Greer to meet the disclosure requirements of Fed. R. Bankr. P. 2014, the court finds that a sanction disallowing 40% of the combined total of fees previously awarded and presently requested by Mr. Greer is appropriate. Accordingly, the motion for interim compensation will be denied, except to the extent of expense reimbursement, and fees previously awarded but remaining unpaid in the amount of $4,501.80 will be disallowed. Coronet's motion for disgorgement will also be denied. This is a core proceeding. *See* 28 U.S.C. § 157(b)(2)(A).

I. PROCEDURAL HISTORY

In a memorandum opinion and order entered May 13, 1998, this court denied confirmation of the debtor's proposed plan, concluding that it was not feasible as required by 11 U.S.C. § 1129(a)(11), and approved for confirmation the competing plan filed by Coronet, an unsecured creditor. Coronet's plan provides that the debtor's assets will be transferred to a corporation formed by Coronet, Coronet Paper Products of Tennessee, Inc. ("Coronet Tennessee"), in exchange for the assumption of certain of the debtor's liabilities. Coronet Tennessee will operate from the debtor's current business location and will engage in the same type of business as debtor and Coronet, paper conversion and waste recycling. In accordance with Coronet's plan, the debtor's assets were transferred to Coronet Tennessee on May 27, 1998.[1]

As discussed in this court's memorandum on confirmation of the competing plans, the debtor, Cam-Plek of Virginia IQ Converting Division, Inc., d/b/a IQ Paper ("Cam-Plek"), is a small closely-held corporation with 50% of the stock being owned by Charles P. Quillen III ("Skip Quillen"), the president of the debtor, and the other 50% owned by Skip Quillen's father,

[1]Inexplicably, the assignment indicates that the assets were transferred not only to Coronet Tennessee, but jointly to Coronet Tennessee and Coronet.

Charles Pat Quillen II ("Pat Quillen"), who formed the corporation in 1976. Lisa Q. Loggans, the daughter of Pat Quillen and sister to Skip Quillen, is the secretary of the debtor and was employed as its office manager. Andrew J. Quillen, the son of Pat Quillen and brother of Skip Quillen and Lisa Loggans, was director of sales and at one time a member of the board of directors.

On June 10, 1998, subsequent to confirmation of Coronet's plan and the transfer of the debtor's assets, Dean Greer, counsel of record for the debtor at that time, filed a proof of claim on behalf of Andrew J. Quillen, d/b/a Mid-Atlantic Paper, in the amount of $38,032.08 for sales of inventory to the debtor in April and May of 1998. On June 11, 1998, Mr. Greer also filed proofs of claims on behalf of Skip Quillen, Andrew Quillen, and Lisa Loggans for unpaid wages in the amounts of $1,500.00, $1,300.00, and $1,300.00 respectively for pay periods ending May 8 and May 15, 1998. Each proof of claim was signed by Mr. Greer as the attorney for the respective claimant.

Pending before the court at the time the proofs of claims were filed was an application for compensation filed by Mr. Greer on May 20, 1998, for services rendered by him as attorney for Cam-Plek as debtor in possession from January 15 to May 18, 1998, in the amount of $6,741.00 and for expense reimbursement

of $968.96, along with an objection to this application filed by Coronet on June 10, 1998, in which it asserted that all services performed after the confirmation hearing held on February 10 and 11, 1998, were not necessary or beneficial to the bankruptcy estate. On June 18, 1998, shortly after he filed the proofs of claims on behalf of the principals of the debtor, Mr. Greer filed on behalf of the debtor a motion to dismiss this chapter 11 case or alternatively to dismiss the debtor from the case.[2]

The filing of the proofs of claims prompted Coronet to file on June 22, 1998, an amendment to its objection to Mr. Greer's interim fee application in which it asserted that compensation should be denied not only for the reasons previously stated but also because Mr. Greer was not disinterested and represented interests adverse to the bankruptcy estate due to his concurrent representation of the debtor's insiders. Coronet also argued in the amended objection that the application should be denied as a sanction for Mr. Greer's failure to disclose his relationship as counsel for these individuals. Along with the filing of the amended objection, Coronet filed a motion to disqualify Mr. Greer as counsel for the debtor and its principals and requested that Mr. Greer be required to disgorge all fees and expenses

[2]After notice and hearing, this motion was denied by the court pursuant to order entered August 3, 1998.

paid to him to date. On June 24, 1998, the U.S. trustee filed a response in support of the motion to disqualify and disgorgement.

A preliminary hearing was held on the fee application, the amended objection, and the disgorgement motion on June 25, 1998. In response to questioning from the court as to the extent of his representation of the debtor's principals, Mr. Greer acknowledged that prior to the filing of this chapter 11 case and during the case he had performed certain work on behalf of members of the Quillen family which had not been previously disclosed, either in the initial application for employment or in any subsequent amendment. He asserted, however, that there was no conflict of interests and attributed his failure to disclose these representations to inadvertence and chapter 11 inexperience. Mr. Greer then disclosed in open court the nature and extent of his representation of the debtor's related parties. Based on these disclosures and the fact that Mr. Greer had entered an appearance in this bankruptcy case on behalf of Skip and Andrew Quillen and Lisa Loggans, the court suggested to Mr. Greer that he withdraw as counsel for the debtor. Subsequently, by order entered July 2, 1998, Mr. Greer was allowed to withdraw as counsel for the debtor. All issues raised in the fee application, the amended objection and the

disgorgement motion were set over for final hearing on October 20, 1998, to allow Mr. Greer the opportunity to obtain personal counsel and to permit interested parties to conduct discovery. After obtaining counsel, Mr. Greer filed a response to Coronet's amended objection to the interim fee application and its motion for disgorgement on September 28, 1998. The final hearing was held as scheduled on October 20, 1998, with Mr. Greer being the only witness.

II. FACTUAL FINDINGS

Mr. Greer testified that he has been licensed as an attorney since 1982, that 60% of his practice is bankruptcy related with the balance in the area of Social Security disability, and that the majority of his bankruptcy work has been as counsel for chapter 7 debtors. In December 1995, Mr. Greer was certified as a specialist in consumer bankruptcy law by the American Board of Certification. Cam-Plek's bankruptcy case is the first chapter 11 filed by Mr. Greer.[3]

Mr. Greer testified that his representation of Cam-Plek commenced in March 1996 after he was contacted by Lisa Loggans to give advice regarding the financial and legal difficulties

[3]Mr. Greer has since been approved as counsel for other chapter 11 debtors.

that Cam-Plek was experiencing. Mr. Greer stated that prior to this contact he had never met any of the principals of Cam-Plek, although he had heard of Andrew Quillen, as the two had mutual friends. Mr. Greer filed a chapter 11 petition for Cam-Plek on June 24, 1996, thus initiating the present case after attempts to resolve Cam-Plek's financial crisis outside bankruptcy were unsuccessful.

Cherokee Oil Company, Inc.

One of the legal matters presented to Dean Greer by Cam-Plek involved Cherokee Oil Company, Inc. In late March 1996, Andrew Quillen and Matthew Quillen, a brother to Skip, Andrew and Lisa, and also an employee of the debtor, were sued individually and d/b/a "Quest Paper a/k/a Quest Paper Converting" by Cherokee Oil Company to recover payment for petroleum and related products purchased by the debtor on an open account. Dean Greer testified that Skip Quillen requested on behalf of Cam-Plek that Mr. Greer defend Andrew and Matthew Quillen in this lawsuit because they were being sued on the corporation's debt.

On March 26, 1996, Mr. Greer wrote to the clerk of the Law Court for Sullivan County, Tennessee, where the Cherokee Oil Company action was pending, advising that he had been retained as attorney of record for Andrew and Matthew Quillen and that he

would be filing an answer to the complaint in the near future. A copy of the letter was sent to Cherokee Oil Company's attorney. Under cover of letter dated April 30, 1996, Mr. Greer transmitted to the clerk an answer for filing in which it was asserted that the defendants Andrew and Matthew Quillen were employees and agents of Cam-Plek, a corporation, and that Cherokee Oil Company knew that it was dealing with a corporate entity as indicated in the account summary attached to the complaint. The answer further stated that because Cherokee Oil Company had not produced any writing purporting to be a personal guaranty or creating a legal obligation on behalf of the defendants individually, the defendants were pleading mistake of identity of the proper party as an affirmative defense.

After the commencement of Cam-Plek's chapter 11 case, Mr. Greer filed a notice in the Cherokee Oil Company action advising that Cam-Plek had filed chapter 11 and that he was the attorney for Cam-Plek. Mr. Greer's notes indicate that sometime thereafter he instructed his secretary to check his calender and that of Carl Eilers, attorney for Cherokee Oil Company, in order to set a trial date for the lawsuit. On August 21, 1997, Mr. Greer wrote a letter to Mr. Eilers, reiterating the Quillens' assertion that they had no personal liability to Cherokee Oil Company. Mr. Greer requested that Mr. Eilers dismiss the case

or set it for hearing and indicated that if he did not hear from him before a docket sounding, he would ask that the case be put on the docket for disposition. Mr. Greer testified that he billed and was paid directly by Cam-Plek for this work.

Packaging Services, Inc. of Tennessee

On April 3, 1996, Skip Quillen, d/b/a Quest Recycling, was sued in the General Sessions Court for Greene County, Tennessee by Packaging Services, Inc. of Tennessee for goods purchased by the debtor in the amount of $1,677.75. Mr. Greer testified that when this lawsuit first came to his attention on April 23, 1996, he contacted William Nunnally, attorney for Packaging Services, Inc. in order to work out a repayment schedule for Cam-Plek. No agreement was reached and Mr. Greer subsequently learned on May 7, 1996, that a default judgment had been entered against Skip Quillen on May 2, 1996. In order to prevent the judgment from becoming final, a $500.00 appeal bond executed by Skip Quillen as principal and Dean Greer as surety was submitted to the clerk by Mr. Greer as attorney for the defendant. Mr. Greer testified that the filing fee of $102.50 for the appeal was paid by Cam-Plek. After Cam-Plek sought chapter 11 relief, Mr. Greer filed in the Packaging Services, Inc. action a notice of bankruptcy filing similar to the one he had filed in the

Cherokee Oil Company proceeding, indicating that Cam-Plek had filed chapter 11 and that any future correspondence should be served on Mr. Greer as attorney for the debtor in possession. No further action was taken by Mr. Greer in that lawsuit.

Mr. Greer's representation of the Quillens in the Cherokee Oil Company and Packaging Services, Inc. actions was not disclosed when he sought employment as counsel for the debtor in possession in this bankruptcy case. The application for employment of Dean Greer as counsel for the debtor in possession filed on June 24, 1996, states, *inter alia*:

> The applicant is informed and believes that Dean Greer has no connection with debtor, creditors, or any other party in interest, or their respective attorneys or accountants, except that the said attorney has represented the debtor previously, is acquainted with the debtor's management, and is familiar with the debtor's business operation and financial affairs, and that Dean Greer does not hold or represent an interest adverse to the estate with respect to the matters on which the attorney is employed, and that the employment of the attorney is in the best interest of the estate.

A verified statement filed by Dean Greer in conjunction with his employment application on July 3, 1996, states, *inter alia*:

> 2. To the best of my knowledge, I have no relationship with any of the creditors of Debtor, any other party in interest, their attorneys, accountants, the United States Trustee, or any person employed in the office of the United States Trustee.
>
> ....

5. The only potential conflict of interest the undersigned may have is that I received pre-petition payments for legal services required by Debtor and which may be preferential payments under 11 U.S.C. §547. If necessary, I will refund the fees to my trust account and seek application for fees pursuant to 11 U.S.C. §330.

Attached as Exhibit A to the verified statement was an itemized list of services performed by Mr. Greer on behalf of the debtor prior to the filing of the chapter 11 petition. Included within this time sheet are the following notations:

03/25/96	Review documents re Cherokee Oil v. Quillen	.5 [hours]
04/18/96	Prepare answer re Cherokee Oil, letter to C.Eilers, review file re Tennessee Charter, telephone call from C.Laws	1.3 [hours]
04/23/96	Telephone call from Lisa, to Nunnaly re Packing Services	.5 [hours]
04/24/96	Telephone call from Nunnaly, to Quillens	.6 [hours]
04/25/96	Telephone call from Nunnaly, telephone call to L.Loggins & A.Quillen	.6 [hours]

Mr. Greer acknowledges that he erred in failing to disclose in the application and verified statement his prepetition representation of the Quillens in the Packaging Services, Inc. and Cherokee Oil Company cases. He blames the failure on inadvertence, explaining that he did not see himself as representing the Quillens personally in these actions because the debts were those of the corporation and he had been retained by the corporation to defend its employees. “In my mind I was

always representing the debtor in those two cases." Mr. Greer testified that he obtained the attorney application and verified statement forms from Patricia Foster, the attorney for U.S. trustee, and that he basically copied the forms *verbatim*, treating the filing of the documents as a formality. He stated that he did not carefully review Federal Rule of Bankruptcy Procedure 2014 before completing the forms because a lot was going on with the debtor and financial problems were coming in from every direction. Mr. Greer noted that he did discuss with Ms. Foster the fact that he had handled several cases prepetition for the debtor for which he had been paid from weekly draws on a retainer. It was Ms. Foster's recommendation that he disclose in his verified statement the potential for a conflict of interest if the prepetition payments he received from the debtor were determined to be preferences under 11 U.S.C. § 547.

Educational Activities, Inc.

On July 15, 1994, a judgment in the amount of $50,000.00 was entered in the Common Pleas Court of Franklin County, Ohio against Cam-Plek and Skip Quillen, jointly and severally, in favor of Educational Activities, Inc. The judgment was based on a promissory note dated June 18, 1993, executed by Skip Quillen

individually and as president of Cam-Plek. Apparently, Cam-Plek made irregular monthly payments of $2,000.00 on the judgment until March 1996 when it was notified that counsel for Educational Activities, Inc. was putting the case back on the state court docket and alleging that the judgment balance was $33,587.28. In response to this notification, Mr. Greer transmitted a letter on March 15, 1996, requesting a hearing in order to challenge the alleged balance as it was Cam-Plek's contention that only $19,244.54 remained owing on the note. Included with the letter was a completed "Request For Hearing Attachment" form signed by Skip Quillen as president of Cam-Plek.

It does not appear that anything further happened on this matter in the Ohio state court. However, after Cam-Plek's bankruptcy filing, Educational Activities, Inc. pursued collection efforts against Skip Quillen individually by filing a complaint to enforce a foreign judgment in the Circuit Court for Sullivan County, Tennessee on August 7, 1996. Upon the filing of that complaint, Dean Greer advised the circuit court clerk by letter dated August 21, 1996, that he had been retained as attorney for Skip Quillen. Thereafter, under cover of letter dated September 4, 1996, Mr. Greer transmitted for filing an answer on Skip Quillen's behalf asserting that the Ohio judgment

was not entitled to full faith and credit because it was based upon a confession of judgment which is void under Tennessee law. The answer also denied the alleged judgment balance. Mr. Greer billed Skip Quillen individually for preparation of the answer, charging him $300.00 which consisted of three hours of work at $100.00 per hour. Dean Greer testified that Skip Quillen paid the $300.00 although he does not recall if he was paid with corporate or personal funds.

On October 22, 1996, Mr. Greer wrote a letter to the attorney for Educational Activities, Inc. advising her that he would be unable to attend an upcoming docket sounding on November 4 for the January 1997 term of the court because he had matters in bankruptcy court, and inquiring as to when she wished to schedule the case. Mr. Greer's file reflects that over the next year and a half, the attorney for Educational Activities, Inc. wrote four brief letters to him regarding passing the case at each subsequent docket sounding. In her last letter dated April 8, 1998, she advised Mr. Greer that the action had been voluntarily nonsuited.

Although Mr. Greer represented Skip Quillen in the Educational Activities, Inc. lawsuit while he was representing the debtor in possession, Mr. Greer did not inform the bankruptcy court or parties in interest of this representation

by amending his verified statement required by Fed. R. Bankr. P. 2014. Mr. Greer has conceded that this failure was an error on his part, but explained that it did not occur to him to disclose the representation to the court because he did not consider it a conflict of interest.

In addition to the matters discussed above where Mr. Greer has admitted representation of certain insiders of the debtor, Coronet and the U.S. trustee allege that Mr. Greer represented persons other than Cam-Plek in the following matters:

D.K. Trading

In February 1996, Skip Quillen was notified that a creditor of Cam-Plek, D.K. Trading, had filed charges against him in Pennsylvania because of an insufficient funds check tendered by Cam-Plek in December 1995. After Cam-Plek retained Dean Greer, he placed a couple of phone calls to Pennsylvania to determine if the action was civil or criminal and thereafter sent a notice of Cam-Plek's bankruptcy filing to D.K. Trading's attorney. No further action was taken on this matter until October 1997 when it was learned that the Pennsylvania district attorney was proceeding with criminal charges against Skip Quillen. Dean Greer testified that at that point he referred Skip Quillen to Nat Thomas, a Kingsport attorney, who began representation of

Mr. Quillen on the matter.

Bobby Griffin

Coronet and the U.S. trustee assert that in connection with the claim of Bobby Griffin, Mr. Greer represented the interests of Skip Quillen personally rather than those of the debtor. The debtor's proposed plan listed the obligation to Mr. Griffin as secured by an Allegheny Model 30-500C paper shredder and provided for payment of $22,000.00 plus 9% interest over 60 months, while unsecured creditors were to receive only 10% of their claims paid over ten years.[4] Skip Quillen was a comaker on the obligation. Coronet and the U.S. trustee argue that Mr. Greer knew, or should have known, that Mr. Griffin did not have a properly perfected security interest in the shredder because he failed to file a financing statement with the Tennessee Secretary of State. As a result, they argue, Mr. Griffin's lien was subject to avoidance under 11 U.S.C. § 544 and the debtor's plan should have provided for payment of the claim as unsecured rather than secured.

[4]The 10% over ten years proposal for unsecured claims was contained in the debtor's first proposed plan of reorganization dated February 25, 1997. The debtor's first amended plan dated August 1, 1997, proposed a debt for equity swap whereby one share of preferred stock in the corporation would be issued for each $1.00 of unsecured debt.

The evidence presented at the trial in this matter indicated that on January 16, 1996, Cam-Plek borrowed $30,000.00 from Bobby Griffin with the loan plus $3,000.00 interest to be repaid in 30 days. The promissory note was executed by Skip Quillen, individually and as president of Cam-Plek. When the debtor failed to repay the loan, Bobby Griffin informed Skip Quillen in a letter dated March 11, 1996, that unless the obligation was paid within four days, he would commence procedures to take possession of the paper shredder. In response, Dean Greer advised A.D. Jones, Jr., the attorney for Bobby Griffin, that the debtor would be unable to make the requested repayment and asked that Mr. Jones provide him with documentation establishing perfection of Mr. Griffin's security interest because he had been informed that the lien on the paper shredder may not have been properly perfected. Mr. Greer noted in the letter that any lien held by Mr. Griffin could be completely "under water" due to the prior perfected blanket liens of NationsBank. It does not appear that Mr. Jones ever responded to the documentation request. Instead, the parties attempted to work out a repayment of the loan. When these negotiations failed, Mr. Griffin filed a warrant for a possessory hearing on the paper shredder, prompting the debtor's bankruptcy filing on June 24, 1996.

After the commencement of the bankruptcy case, Skip Quillen

sent a memorandum to Dean Greer suggesting a settlement of Bobby Griffin's claim by swapping inventory in exchange for the debt, as Mr. Griffin had at one time previously offered. In the memo, Mr. Quillen stated that "[m]y main mission is to get [Griffin] out of the way cleanly and get the equipment freed up that he has a lien on." Mr. Greer conveyed this offer to Mr. Jones in a letter dated November 7, 1996, stating that this was the only way the debtor could pay Mr. Griffin quickly and that if he wanted payment in cash, his claim would have to be included in and paid under the terms of any plan proposed by the debtor. Apparently this offer was not accepted.

In January 1997, Mr. Griffin commenced a collection action on the promissory note against Skip Quillen personally in the Circuit Court of Scott County, Virginia. Upon learning of the lawsuit, Skip Quillen faxed a memo to Dean Greer asking him to telephone him in order to discuss getting Mr. Griffin out of the reorganization picture. In the memo, Skip Quillen stated: "I do owe this debt, I just did not have the means thru [sic] the company last year to repay him at the agreed terms. We now have the cash flow to service this debt and I would like to try and get this matter resolved. Can we propose a repayment?" Skip Quillen suggested that the obligation be repaid in four monthly payments of $5,000.00 each or three payments of $7,000.00 each

with the first payment beginning January 31, 1997.

Upon receiving that correspondence, Mr. Greer set up a new case file indicating that the client was Skip Quillen with the opposing party as Bobby Griffin and the type of case listed as "litigation." The next day he received a letter from Monroe Jamison, the attorney representing Bobby Griffin, in which Mr. Jamison stated that he understood from their telephone conversation that Mr. Greer represented Skip Quillen and thanked Mr. Greer for providing an update on Cam-Plek's bankruptcy reorganization. Mr. Jamison noted in the letter that the lawsuit against Mr. Quillen individually would be resolved if the corporation as comaker paid off the obligation. Thereafter, when Skip Quillen was formally served with notice of the lawsuit, Mr. Greer arranged for Jeffrey Hamilton, a Virginia attorney, to represent Skip Quillen. Mr. Hamilton filed an answer on Skip Quillen's behalf, although subsequently a judgment in the amount of $27,700.00 was entered against Skip Quillen in favor of Bobby Griffin on June 5, 1997.

In a letter dated October 7, 1997, Jeffrey Hamilton advised Monroe Jamison that Skip Quillen and his wife, Lisa H. Quillen, would begin paying $400.00 per month toward the judgment. Mr. Hamilton stated in the letter that:

> Mr. Quillen asked me to remind you that Mr. Griffin should make application through the bankruptcy court

> for a payment to be received from the corporation during the pendency of the bankruptcy proceeding. Mr. Quillen believes that Griffin should receive approximately $450.00 per month through the plan. Of course, there are no plans for the Corporation to object to making this payment.
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> With both of these items being done, Griffin would receive approximately eight hundred fifty ($850.00) dollars per month toward this indebtedness. This would be a yearly payment in excess of ten thousand ($10,000.00) dollars and would allow the matter to be brought to conclusion fairly soon. Please speak to Mr. Griffin about making the application in Bankruptcy Court so that this payment can be started as soon as possible.

In response, Monroe Jamison declined the offer of voluntary payments from Skip Quillen, stating that Mr. Griffin would proceed with his collection efforts and that the matter had been turned over to a Tennessee attorney, Frank Gibson, for the institution of garnishment proceedings against Skip Quillen.

On November 19, 1997, execution was issued directing the garnishment of Skip Quillen's wages from his employment at Cam-Plek. In response to the garnishment, Dean Greer wrote a letter to Frank Gibson advising him that Skip Quillen wished to pay $400.00 per month directly to Bobby Griffin in lieu of being garnished and that if requested, Mr. Greer would supply information concerning Skip Quillen's income. Mr. Greer observed in the letter that he did not know if this amount was

more or less than 25% of Skip Quillen's income,[5] but indicated that he believed this amount to be fair, considering that the additional amount coming from Cam-Plek would exceed 25% combined.

In response to Coronet and the U.S. trustee's allegations, Mr. Greer asserts that at all times in the Bobby Griffin matter he acted on behalf of the debtor rather than Skip Quillen individually. Mr. Greer admitted that he failed to conduct a UCC search to determine if Bobby Griffin's lien was perfected. He stated that in the rush of activities early in the case, he only dealt with the snakes closest to him; and that although there had been a lot of activity from Mr. Griffin prepetition leading up to the writ of possession and the bankruptcy filing, Mr. Griffin had remained quiet in the chapter 11 case, releasing his attorney and never even filing a proof of claim, such that little attention was paid to him. Dean Greer admitted that the debtor's proposed plan provided for Mr. Griffin to be paid as a secured creditor even though it had not been established that he was in fact secured, but explained that any defect in Mr. Griffin's claim would have been revealed if Mr. Griffin had ever filed a proof of claim or had ever sought payment from the

[5]Twenty-five percent of an individual's disposable earnings is the maximum which can be garnished under Tennessee law. *See* TENN. CODE ANN. § 26-2-107.

bankruptcy estate. Mr. Greer observed that Coronet's plan similarly treated Bobby Griffin as secured and that Coronet's counsel had also failed to conduct a UCC search to ascertain if perfection had occurred.[6]

Mr. Greer testified that when suit was commenced against Skip Quillen, he contacted Monroe Jamison to obtain a copy of the complaint and to inform him of the payment proposed for Bobby Griffin's claim in the debtor's plan. He denied that he had ever informed Monroe Jamison that he was representing Skip Quillen and surmised that Mr. Jamison made this assumption based simply on the inquiry. He explained that he opened a new internal file when Skip Quillen was sued in order to keep the information concerning Bobby Griffin separate from other matters. Mr. Greer testified that he did recommend Jeff Hamilton to Skip Quillen and that it was Jeff Hamilton who negotiated a payment schedule on Skip Quillen's behalf. Mr. Greer stated that he corresponded with Frank Gibson regarding the garnishment on behalf of the debtor as opposed to Skip Quillen individually, because Lisa Loggans, the debtor's bookkeeper, did not want the burden of processing the

[6]Coronet's plan that was confirmed on May 13, 1998, provided for the surrender of the shredder to Mr. Griffin. This plan was amended postconfirmation by order entered September 2, 1998, to provide for retention of the shredder by Coronet and payment of Mr. Griffin's claim as unsecured.

garnishment. Mr. Greer denied that he ever recommended to Skip Quillen or Jeff Hamilton that Bobby Griffin file a request for adequate protection in the debtor's bankruptcy case, stating that he had never encouraged any creditor to file such an application.

Andrew Quillen d/b/a Mid-Atlantic Paper

Coronet also alleges that Mr. Greer represented Andrew Quillen d/b/a Mid-Atlantic Paper and in doing so represented interests adverse to the bankruptcy estate. Mid-Atlantic is a paper brokerage company established by Andrew Quillen in June 1996 for the purpose of providing the debtor in possession a source of outside financing for its paper purchases while it was in bankruptcy. Investors in Mid-Atlantic Paper included Andrew Quillen in the amount of $3,700.00, Lisa H. Quillen (the wife of Skip Quillen) in the amount of $10,000.00, and an unrelated third individual, Paul Bellamy, in the amount of $5,000.00.

The evidence offered at trial indicated that during the course of the debtor's chapter 11 case, Mid-Atlantic routinely purchased loads of paper which would otherwise have been purchased by Cam-Plek if it had the money. Mid-Atlantic would then turn around and sell the paper to Cam-Plek on credit at a half-cent to one and a half-cent per pound increase. Cam-Plek

was Mid-Atlantic's only customer, with the exception of one load which was sold on one occasion to an Atlanta company, and Mid-Atlantic was Cam-Plek's principal supplier. Between June 1996 and December 1997, Mid-Atlantic had gross sales of $658,584.07 and gross profit of $94,017.72.[7] In addition to its brokerage activities, Mid-Atlantic also factored accounts receivables on occasion for the debtor in possession at no charge.

All of the debtor in possession's transactions with Mid-Atlantic took place without court approval. In fact, the existence of Mid-Atlantic was not even disclosed until December 1997, after creditors had voted on the debtor's and Coronet's proposed plans. Coronet contends that Dean Greer knew or should have known of the existence of Mid-Atlantic from the outset and even asserts that Mr. Greer acted as counsel for Andrew Quillen and Mid-Atlantic and aided the insiders' use of Mid-Atlantic as a scheme to benefit the insiders of the debtor at the expense of the debtor's creditors.

Mr. Greer denies any representation of Mid-Atlantic other than in connection with the filing of the proof of claim on June

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[7]From this gross profit, the following were paid: wages of $12,550.00 to Andrew Quillen, a sales commission of $6,000.00 to Skip Quillen, sales expenses (travel, gas, and meals) of $3,290.00, office expense (rent, phone, forms, and tax) of $1,832.52, dividends to investors of $7,800.00, reimbursement of the respective investments of $3,700.00 and $5,000.00 to Andrew Quillen and Paul Bellamy, and loans to Cam-Plek of $52,542.66.

10, 1998. He testified that he had no knowledge of Mid-Atlantic and its dealings with the debtor until November 1997 when its existence was revealed by Coronet. Mr. Greer acknowledged that prepetition he had several discussions with the principals of the debtor regarding ways the debtor could raise money and that in these conversations he advised that a debtor in possession can obtain unsecured credit in the ordinary course of business without court approval pursuant to 11 U.S.C. § 364(a). He denied, however, that he knew specifically of the creation of Mid-Atlantic or of any plans to create such an entity. Mr. Greer noted that the debtor's monthly operating reports, which were prepared by the debtor, did not reveal the transactions with Mid-Atlantic and he testified that the debtor's principals had not otherwise advised him of Mid-Atlantic's existence.

As evidence of Dean Greer's representation of Andrew Quillen, Coronet cites Mr. Greer's conduct at the deposition of Andrew Quillen taken by Coronet in January 1998. Coronet notes that at the deposition, Mr. Greer raised objections to some of the questions asked of Andrew Quillen, that Mr. Greer instructed Andrew Quillen to only answer the questions to which he knew the answer, and that in one instance Mr. Greer informed Coronet's counsel that Andrew Quillen refused to provide a personal business plan of his which had been included in the Mid-Atlantic

documents that Andrew Quillen had otherwise produced at the deposition.

In response to this evidence, Mr. Greer observes that the deposition transcript specifically records that his appearance at the deposition was as counsel for the debtor, rather than Andrew Quillen, and that it was in the debtor's interest that he appear at the deposition on its behalf as Andrew Quillen had become a material witness in the chapter 11 case because of allegations raised by Coronet about Mid-Atlantic. Mr. Greer testified that he did not prepare Andrew Quillen for the deposition which he would have done if he had been his client and noted that while he does not interrogate his own client when the client is being deposed, he did question Andrew Quillen during the deposition. Mr. Greer also testified that the instruction he gave Andrew Quillen in the deposition (to only answer questions to which he knew the answers) was the same as he would give any other witness that appeared on his client's behalf and that he otherwise came to the aid of Andrew Quillen in the deposition because he thought Mr. Quillen was being taken advantage of by Coronet's counsel.

With respect to the proofs of claims filed by Mr. Greer on behalf of Skip and Andrew Quillen and Lisa Loggans, Mr. Greer testified that he filed these claims because it was the debtor's

desire to force Coronet to comply with its plan commitment to pay administrative expenses. Mr. Greer stated that he had been advised that Coronet was refusing to pay Messrs Quillen and Mrs. Loggans for the work which they performed on behalf of the debtor in May 1998 and for the inventory sold to Cam-Plek by Mid-Atlantic. Mr. Greer acknowledged that he also represented the debtor when he filed the proofs of claim, but believed that his work at that time was basically over and that the case was essentially defunct because by then all of the assets of the debtor had been transferred to Coronet. It was Mr. Greer's belief that no conflict of interest existed between the interests of the debtor and payment of the insiders' claims by Coronet because the debtor had an obligation to see that its legitimate debts were paid.

Mr. Greer denied that he ever consciously attempted to subvert the interests of the debtor to any other party during the course of representing the debtor. He stated that his intent was to get the debtor rehabilitated, to help the corporation stay on its feet and stay in business, and to help do what Skip Quillen often told him he wanted done which was to repay the debts of the corporation. Mr. Greer noted that his efforts on behalf of the debtor amounted to at least 350 hours of work, but that the time spent on the Cherokee Oil Company,

Packaging Services, Inc. and Educational Activities, Inc. matters together totaled less than nine hours.

As counsel for the debtor in possession, Mr. Greer has been awarded fees of $21,366.00 for services rendered through February 9, 1998, plus expenses of $1,744.92.[8] Mr. Greer has been reimbursed for his expenses but has received only $15,724.00 of the $21,366.00 in approved fees, leaving a balance of $5,642.00 in addition to the amount requested in the application which is presently before the court. Mr. Greer testified that he has never been sanctioned before and that if required to disgorge the fees paid to him to date he would have to borrow the money.

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[8]Mr. Greer's first fee application was filed on December 23, 1996, and requested interim compensation for services performed between June 24 and December 9, 1996, in the amount of $7,335.00, representing 81.5 hours of service at $90.00 per hour, and expenses in the amount of $418.53. This request was approved without objection by order entered January 31, 1997. On June 17, 1997, Mr. Greer filed a second application for interim compensation seeking fees in the amount of $4,579.00 and reimbursement of expenses in the amount of $465.45 which represented 73.10 hours of service rendered between December 10, 1996, and June 11, 1997, at $90.00 per hour. This application was approved without opposition by order entered July 16, 1997. Mr. Greer's third application, wherein he sought fees in the amount of $7,452.00 and reimbursement of expenses in the amount of $860.94 for 82.80 hours of service rendered between June 12, 1997, and January 9, 1998, was filed on January 14, 1998. Again, this application was approved without any objection by order entered February 19, 1998.

III. CONCLUSIONS OF LAW

The Bankruptcy Code prescribes certain standards for the employment of professional persons. 11 U.S.C. § 327(a) states the following:

> Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons to represent or assist the trustee in carrying out the trustee's duties under this title.

Although this section refers to the powers of a trustee, a debtor in possession has the same rights, powers, and duties as a trustee. *See* 11 U.S.C. § 1107(a). Therefore, the attorney for the debtor in possession, like the attorney for a trustee, must meet § 327(a)'s two-prong test for employment: be disinterested and not hold or represent an interest adverse to the estate. *In re Roberts*, 46 B.R. 815, 821-822 (Bankr. D. Utah 1985), *aff'd in part, mod. in part and rev'd in part*, 75 B.R. 402 (D. Utah 1987). These requirements "serve the important policy of ensuring that all professionals ... tender undivided loyalty and provide untainted advice and assistance in furtherance of their fiduciary responsibilities." *Rome v. Braunstein*, 19 F.3d 54, 58 (1st Cir. 1994).

Section 327(a)'s dual requirements apply not only to

appointment in the first instance, but also to a grant of compensation. 11 U.S.C. § 328(c) provides that:

> [T]he court may deny allowance of compensation for services and reimbursement of expenses of a professional person employed under section 327 ... if, at any time during such professional person's employment under section 327 ... such professional person is not a disinterested person, or represents or holds an interest adverse to the interest of the estate with respect to the matter on which such professional person is employed.

As construed by the Sixth Circuit Court of Appeals, § 328(c) is mandatory. Compensation must be denied if a person is either disinterested or has an adverse interest; thus, a valid appointment under § 327(a) is a condition precedent to an award of compensation under § 330(a). *See Michel v. Federated Dep't Stores, Inc. (In re Federated Dep't Stores, Inc.)*, 44 F.3d 1310, 1319 (6th Cir. 1995). Accordingly, if the court determines that Mr. Greer was disinterested or held or represented an interest adverse to the estate at the time of his employment, this court must not only deny his current fee request, but require the disgorgement of any fees that he has been paid thus far in this case. If Mr. Greer was qualified for employment initially, but subsequently became disqualified, § 328(c) dictates that compensation from that time forward be denied.

The first prong of § 327(a), that a professional be a "disinterested person," is defined in the Bankruptcy Code at

section 101(14):

> "disinterested person" means person that—
> (A) is not a creditor, an equity security holder, or an insider;
> (B) is not and was not an investment banker for any outstanding security of the debtor;
> (C) has not been, within three years before the date of the filing of the petition, an investment banker for a security of the debtor, or an attorney for such an investment banker in connection with the offer, sale, or issuance of a security of the debtor;
> (D) is not and was not, within two years before the date of the filing of the petition, a director, officer, or employee of the debtor or of an investment banker specified in subparagraph (B) or (C) of this paragraph; and
> (E) does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor or an investment banker specified in subparagraph (B) or (C) of this paragraph, or for any other reason;

11 U.S.C. § 101(14). Paragraph (E) of this definition, which precludes counsel with "an interest materially adverse to the interest of the estate," overlaps with the second prong of § 327(a), that counsel not hold or represent any interest adverse to the estate. *See In re Angelika Films 57th, Inc.*, 227 B.R. 29 (Bankr. S.D.N.Y. 1998)(citing *In re Martin*, 817 F.2d 175, 179-80 (1st Cir. 1987)("[T]he twin requirements of disinterestedness and a lack of adversity telescope into what amounts to a single hallmark.")).

While not defined in the Bankruptcy Code, "to hold an

interest adverse to the estate" has been generally recognized to mean:

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

In re Roberts, 46 B.R. at 827. *See also In re Granite Partners, L.P.,* 219 B.R. 22, 33 (Bankr. S.D.N.Y. 1998); *In re Envirodyne Indus., Inc.*, 150 B.R. 1008, 1016-17 (Bankr. N.D. Ill. 1993). To "represent an adverse interest" means to serve as agent or attorney for any individual or entity holding such an adverse interest. *Id.* at 1017.

Coronet contends that from the outset of his employment as counsel for the debtor, Mr. Greer represented interests adverse to the bankruptcy estate and was not a disinterested person as required by 11 U.S.C. § 327(a). Coronet asserts that Mr. Greer had a conflict of interest in his concurrent representation of the debtor and the Quillens. Skip Quillen is an officer, shareholder and director of the debtor and was personally obligated on a number of Cam-Plek's debts, including obligations to certain taxing authorities, Premier Bank, Bobby Griffin, and Educational Activities, Inc. Furthermore, Skip Quillen was a creditor of Cam-Plek, since he was owed prepetition wages at the

time of the bankruptcy filing in the amount of $1,090.88.[9] Andrew Quillen was both an officer and director of the debtor and as the brother of Skip Quillen is considered to be an insider under 11 U.S.C. § 101(31)(B). Coronet argues that by asserting in the Cherokee Oil Company and Packaging Services, Inc. lawsuits that the liability in those cases was that of the corporation rather than that of the Quillens individually, Mr. Greer was working to the detriment of the corporation and in the interests of the individuals.

Mr. Greer denies that he was not disinterested or that he had an interest adverse to the estate at any time during this case. Mr. Greer asserts that his representation of the Quillens individually in the Cherokee Oil Company and Packaging Services, Inc. matters presented no conflict of interest with his representation of the debtor. He argues that the positions he took in these cases did not adversely impact the debtor; the debtor, not the individuals, was liable on the obligations and it was the debtor's duty to defend its employees who had been wrongfully sued.

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[9]On July 18, 1996, Mr. Greer filed on behalf of the debtor in possession a motion to pay certain prepetition obligations which included a request to pay $1,090.88 to its president and chief operating officer, Skip Quillen, for wages paid June 21, 1996, but not deposited or received prior to the time the debtor's prepetition bank account was closed. This motion was granted by order entered August 7, 1996.

With respect to the postpetition action by Educational Activities, Inc., Mr. Greer argues that there was not a conflict of interest between his representation of Skip Quillen in that lawsuit and the debtor in its chapter 11 case because Mr. Quillen had not personally benefitted from the transaction even though he was a comaker on the promissory note. Mr. Greer observed that it was clear from the outset that the debtor would only be able to pay a small percentage to unsecured creditors and that Skip Quillen would be personally liable for the balance. Furthermore, in Mr. Greer's view, he was acting in the debtor's best interests by representing Skip Quillen in the Educational Activities, Inc. matter. He noted that the complaint alleged the debt to be much greater than was actually owed and was concerned that if the amount of the debt was not challenged in the lawsuit against Skip Quillen individually, the debtor would be collaterally estopped from disputing the amount owed when Educational Activities, Inc. filed a claim in the debtor's chapter 11 proceeding.

The fact that Mr. Greer represents creditors of the debtor does not automatically disqualify him from representing the debtor in this bankruptcy case. Subsection (c) of § 327 provides that "a person is not disqualified for employment ... because of such person's employment by or representation of a

creditor, unless there is objection by another creditor or the United States trustee, in which case the court shall disapprove such employment if there is an actual conflict of interest." *See also* Steve H. Nickles, *Disgorgement of Fees Paid to a Professional Person in Bankruptcy*, 102 Com. L.J. 380, 395 (Winter 1997)("In theory no per se rule prevents the debtor's general bankruptcy counsel from also representing an existing creditor during the bankruptcy so long as no actual conflict exists."). Thus, only if an actual conflict of interest exists between representation of the debtor and the creditor must employment by the debtor be rejected.

Furthermore, there is no per se rule that prohibits the debtor in possession's employment of an attorney who also represents a principal or controlling shareholder of the debtor.[10] *See In re EWC, Inc.,* 138 B.R. 276, 284 (Bankr. W.D.

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[10]Coronet argues that the Sixth Circuit Court of Appeals in *Hunter Savings Ass'n v. Baggott Law Offices Co., L.P.A. (In re Georgetown of Kettering, Ltd.),* 750 F.2d 536 (6th Cir. 1984), held that an attorney's dual representation of the debtor and its president as an unsecured creditor presents inherently conflicting interests. *Georgetown*, however, does not stand for this proposition; nor did the debtor's attorney in *Georgetown* represent the debtor's president, although the attorney did represent nearly every other interested party and in connection with the debtor's bankruptcy case to boot. The attorney who sought compensation as counsel for the debtor in possession had filed the involuntary chapter 11 petition against the debtor on behalf of the debtor's second largest unsecured creditor and

(continued...)

Okla. 1992)(concurrent representation of debtor in possession and its sole shareholder is not per se a conflict of interest); *In re Maui 14K, Ltd.*, 133 B.R. 657, 659 (Bankr. D. Haw. 1991)(in most circumstances the same attorney may represent both debtor and principal shareholder because parties have common interest); *In re Plaza Hotel Corp.,* 111 B.R. 882, 890 (Bankr. E.D. Cal. 1990), *aff'd*, 123 B.R. 466 (9th Cir. BAP 1990)(simultaneous representation of debtor corporation and controlling shareholders is not a disqualifying conflict per se); *In re Hurst Lincoln Mercury, Inc*., 80 B.R. 894, 895 (Bankr. S.D. Ohio 1987)("It is fundamental that simultaneous representation of a corporation and its sole stockholder is not in and of itself improper."). *See also Parker v. Frazier (In re Freedom Solar Center, Inc.),* 776 F.2d 14, 17 (1st Cir. 1985)("It is true that generally the representation of both a debtor and its sole shareholder may not involve adverse interests ....").

Even though there is no per se rule against dual representation absent an actual conflict of interest, "counsel

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[10](...continued)
thus represented the creditor in the bankruptcy case. The attorney also represented the debtor's largest unsecured creditor, the limited partnership that owned the debtor, and an individual who was a partner in this limited partnership and the president of the petitioning creditor. It is not surprising that the court of appeals found an actual conflict of interest under these circumstances.

is in a delicate posture when representing both a close corporation and its controlling shareholders." *In re Plaza Hotel Corp.,* 111 B.R. at 890. "It is essential that attorneys laboring under the constraints of the Bankruptcy Code requirements never forget that when representing a debtor-in-possession, the interests of the estate must take priority." *In re Bonneville Pacific Corp*., 147 B.R. 803, 805 (Bankr. D. Utah 1992), *aff'd in part and rev'd in part, Hansen, Jones & Leta, P.C. v. Segal*, 220 B.R. 434 (D. Utah 1998). *See also In re Rancourt*, 207 B.R. 338, 360 (Bankr. D.N.H. 1997)(attorney for debtor in possession has duty to look to the interests of estate rather than interests of its principals, shareholders, officers or directors). Great care must be taken to ensure that the attorney's duty and loyalty lies with the debtor rather than the individuals that control the debtor.

Simultaneous representation of a debtor corporation and the controlling shareholders becomes a basis to disqualify counsel when adverse interests either exist or are likely to develop. *See In re Plaza Hotel Corp.,* 111 B.R. at 890. "Generally, the interests of a debtor's estate and a debtor's principal must diverge before a counsel's divided loyalty is evidenced." *In re Angelika Films 57th, Inc.,* 227 B.R. at 39. "Whether such an

actual disqualifying conflict exists must be considered in light of the particular facts of each case." *In re Hoffman*, 53 B.R. 564, 566 (Bankr. W.D. Ark. 1985). *See also In re Angelika Films 57th, Inc.,* 227 B.R. at 39 ("Ultimately, the determination of counsel's disinterestedness is a fact-specific inquiry.").

In this case, Dean Greer's representation of the Quillens in the Cherokee Oil Company and Packaging Services, Inc. matters presented no conflict with his representation of the debtor in possession because there was no divergence of the corporation's and the Quillens' interests. Neither involved situations where two different parties were potentially liable such that each would be attempting to hold the other liable. It was undisputed that the Quillens were sued solely because of their employment by Cam-Plek and there was no evidence that the Quillens had any personal liability on these obligations. In the absence of such evidence, Coronet's assertion that Mr. Greer had a duty to the debtor in these lawsuits to attempt to place liability for the debts on the Quillens individually is without merit. Not only would such an attempt have been unethical, it would also have been contrary to state law which imposes a obligation on the part of a corporation to indemnify its officers and directors who have been required to defend in a lawsuit brought against them solely because of their status. *See* TENN. CODE ANN. §§ 48-18-

503 and 507.

Unlike the facts which are present here, the cases cited by Coronet critical of dual representation of a corporate debtor and its officers present situations where the interests of the two were materially adverse or other egregious facts existed. For instance, in the case of ***EWC***, the court found that the attorney could not act solely in the estate's interest and at the same time protect the interests of the sole shareholder while representing him in a divorce proceeding. As attorney for the debtor in possession, counsel commenced adversary proceedings against the shareholder to recover property of the estate and would have to take positions in the divorce action contrary to those he asserted in the adversary proceedings in order to protect the interests of the shareholder. *In re EWC, Inc.*, 138 B.R. at 284. In the case of *In re TMA Assoc., Ltd.,* 129 B.R. 643, 649 (Bankr. D. Col. 1991), debtor's counsel not only represented the debtor's general partners but had been paid a prepetition retainer by an entity which was both a creditor and controlled by a general partner of the debtor. In *Electro-Wire Products, Inc. v. Sirote & Permutt, P.C. (In re Prince)*, 40 F.3d 356, 360 (11th Cir. 1994), the court concluded that counsel's prepetition representation of a chapter 11 debtor and his wife in estate planning matters wherein the debtor

transferred $600,000.00 in real property to his wife for no consideration rendered counsel not disinterested since counsel would be unable to independently evaluate the property transfer and its effect on the bankruptcy estate.

The question of whether an actual conflict of interest existed in Mr. Greer's simultaneous representation of the debtor in this chapter 11 case and Skip Quillen in the Educational Activities, Inc. lawsuit is more difficult to resolve. Clearly, the potential for conflict was present since Skip Quillen faces individual liability to the extent that any obligation guaranteed by him or on which he a comaker with the debtor is not paid. Furthermore, Skip Quillen is potentially liable to the estate as a preference transferee to the extent the debtor made prepetition payments within the preference period on obligations that Skip Quillen has joint liability based on the theory that he benefitted from the transfers. *See In re Plaza Hotel Corp.*, 111 B.R. at 890. Finally, "there is an ever-present possibility of claims for equitable subordination," which renders Skip Quillen a potential creditor of the estate. *Id.* *See also Sanders Confectionary Products, Inc. v. Heller Financial, Inc.*, 973 F.2d 474, 481 (6th Cir. 1992), *cert. denied* 506 U.S. 1079, S. Ct. 1046 (1993)(guarantor of debtor's loan is a creditor).

Many courts have concluded that the dual representation of a debtor and its principal or shareholder who is a guarantor of an estate obligation presents an inherent conflict of interest requiring disqualification. In *Plaza Hotel* the court disqualified counsel for the debtor corporation who had failed to disclose his simultaneous representation of the debtor's owner-guarantors in a state court civil action based in part upon their loan guaranties. The court reasoned that:

> [T]he persons in control of the debtor are defendants in litigation on their guarantees. They face individual liability for the debtor's unpaid obligation. [Footnote omitted.] They have a powerful incentive to assure that they pay as little as possible by having the debtor pay as much as possible. This entails a correlative incentive to deprive the debtor of flexibility in formulating a plan of reorganization by introducing a strong bias for a particular treatment of a particular creditor, possibly at the expense of other creditors. Similarly, the debtor's reorganization prospects may be sacrificed by the owners-guarantors due to developments in the state court action.

In re Plaza Hotel Corp., 111 B.R. at 890. *See also Colorado Nat'l Bank of Denver v. Ginco, Inc. (In re Ginco, Inc.)*, 105 B.R. 620, 621 (D. Colo. 1988)(holding that law firm's dual representation of bankruptcy estate and principal shareholder, officer and debt guarantor presented sufficient potential conflict to raise "adverse interest" precluding employment of firm as special counsel for debtor); *In re Kuykendahl Place*

Assoc., Ltd., 112 B.R. 847, 849 (Bankr. S.D. Tex. 1989)(calling the question a "close one," court concluded that attorney's dual representation of debtor and an individual who was the general partner of debtor's sole limited partner, which was itself a limited partnership, and a guarantor of one of the debtor's obligations resulted in an actual conflict of interest); *In re B.E.S. Concrete Prod., Inc.*, 93 B.R. 228, 239 (Bankr. E.D. Cal. 1988)("A guarantor on a corporate debt has a natural conflict with the principal and with other guarantors. To be sure, the interests of principal and guarantor coalesce so long as the issue is whether anyone is liable on the claim. They become adverse upon the appearance of a genuine question about who is going to pay. Such an issue, a fortiori, exists whenever a key player is in bankruptcy."); *In re Sixth Avenue Car Care Center*, 81 B.R. 628, 631 (Bankr. D. Colo. 1988)(attorney represented interests adverse to the estate by representing an individual and a corporate entity who were guarantors not only for the debtor's primary secured debt, but also for the fees incurred by the attorney on behalf of the estate).

Other courts, however, have found no inherent conflict but only a potential for conflict and have refused to disqualify counsel unless an actual conflict arises. *See In re Hurst Lincoln Mercury, Inc.,* 80 B.R. 894, 896 (Bankr. S.D. Ohio

1987)(simultaneous representation of both debtor and shareholder guarantor did not warrant disqualification of counsel where, upon development of controversy, counsel withdrew from representation of shareholder); *In re Quakertown Glass Co.,* 73 B.R. 468, 469 (Bankr. E.D. Penn. 1987)(court found no actual conflict of interest by attorney's prior representation of couple who were debtor's sole shareholders and personal sureties on various loan obligations of the debtor as the attorney had only represented the debtor in the bankruptcy proceeding, his representation of the individuals was unrelated to the bankruptcy, and there had been no complaint from those who would presumably be the parties harmed by a conflict).

Coronet asserts that in *Federated Dep't Stores* and *Michel v. Eagle-Picher Indus., Inc. (In re Eagle-Picher Indus., Inc.)*, 999 F.2d 969 (6th Cir. 1993), the Sixth Circuit Court of Appeals rejected the potential/actual conflict of interest distinction, holding that § 327(a) mandates the disqualification of professionals with the appearance of a conflict of interest as well as those who have an actual conflict of interest. Coronet, however, has read these cases too broadly. In both *Federated Dep't Stores* and *Eagle-Picher*, the debtors had conceded that the professionals they sought to employ were "technically" not disinterested persons under § 101(14)(B) since they were

investment bankers for outstanding securities of the debtor, but argued that the existence of an actual conflict of interest was required or that equitable principles warranted a departure from the strict language of the statute. *See In re Federated Dep't Stores, Inc.*, 44 F.3d at 1313; *In re Eagle-Picher Indus., Inc.*, 999 F.2d at 971.

Similarly, in *Childress v. Middleton Arms, L.P. (In re Middleton Arms, L.P.)*, 934 F.2d 723, 725 (6th Cir. 1991), the debtor had been permitted to employ an admittedly interested real estate agent who was an insider of the debtor based on the bankruptcy court's rationale that its equitable powers under § 105(a) of the Bankruptcy Code allowed it to override the literal language of § 327. In all three of these cases, the Sixth Circuit held that § 327(a) posed an absolute bar to the professional's employment by the estate since the professional was not disinterested regardless of the equities or whether an actual conflict of interest existed. As stated by the court in *Middleton Arms*:

> Section 327(a) clearly states ... that the court cannot approve the employment of a person who is not disinterested, even if the person does not have an adverse interest. This Court has held that bankruptcy courts "cannot use equitable principles to disregard unambiguous statutory language." [Citation omitted.] ... By forbidding employment of all interested persons, section 327 prevents individual bankruptcy courts from having to make determinations as to the

> best interest of the debtors in these situations. Section 105(a) cannot be used to circumvent the clear directive of section 327(a).

In re Middleton Arms, L.P., 934 F.2d at 725.

Thus, while the trilogy of *Federated Dep't Stores, Eagle-Picher,* and *Middleton Arms* admonishes us that an actual conflict of interest is irrelevant if a professional is undisputedly disinterested within the literal language of the statute, the cases provide no guidance on the question of whether a potential conflict of interest renders a professional not disinterested under the catchall clause of § 101(14)(E) or whether the professional person represents an interest "adverse to the estate." *See* 3 COLLIER ON BANKRUPTCY ¶ 327.04[4][c][i] (15th ed. rev. 1998)("It is presumed by the statute that a person who is a creditor, equity security holder or insider is incapable of the impartial judgment required of a professional in the conduct of a case under the Code.").

Some insight as to Congress' intent on this issue is provided by § 327(c) which recites that a professional employed by a creditor is disqualified for employment by the estate only if an actual conflict of interest exists. Similarly, under § 1103(b) of the Bankruptcy Code, while a professional employed to represent a committee appointed under § 1102 may not represent any other entity having an adverse interest in connection with

the case, "[r]epresentation of one or more creditors of the same class as represented by the committee shall not per se constitute the representation of an adverse interest." In considering this language, one court has concluded:

> By eliminating the per se bar to dual representation in l984, Congress implicitly determined that the inherent tension between a committee and one of its creditors, standing alone, was immaterial and any conflict too theoretical to warrant being classified as an adverse interest. That is, merely the remote potential for dispute, strife, discord, or difference between a committee and one of its creditors does not give rise to any conflict of interest or appearance of impropriety that would bar an attorney from representing both parties.

In re Nat'l Liquidators, Inc., 182 B.R. 186, 192 (S.D. Ohio 1995).

Another court has expressed reluctance, absent compelling facts, to find that counsel for the debtor had an impermissible conflict of interest as a result of its representation of both the debtor and its officers and director.

> A finding of conflict of interest, while no doubt the responsibility of any judge where the facts so warrant (a responsibility which should not be shirked, no matter how painful its exercise), should nonetheless not be lightly made. There is an inevitable in terrorem effect that accompanies any such ruling, which just as inevitably discourages competent and honest counsel from accepting such representations in the first place, or from diligently discharging their duties for fear of reprisals later in the case. Such a ruling should be reserved for cases where the facts developed at trial establish the conflict of interest with more clarity and more certainty than do the facts

here.

In re Office Prod. of Am., Inc., 136 B.R. 983, 988 (Bankr. W.D. Tex. 1992). *See also In re Hurst Lincoln Mercury, Inc.*, 80 B.R. at 897 (recognizing practical reality that attorney for a closely held corporation looks to the shareholder as the voice of his client).

Under the facts of the present case, this court is unable to conclude that the interests of the estate and Skip Quillen diverged to such a point that Mr. Greer was representing an interest adverse to the estate. The focus of the services provided by Mr. Greer was to fashion a reorganization plan for the debtor in possession which would permit it to repay its obligations. Skip Quillen was united with Cam-Plek in this focus. The possibility that the debtor in possession could at some point in the future object to Skip Quillen's claim or bring a preference action against him is too speculative and remote to warrant disqualification absent evidence that such causes of actions exist or provide a basis for the disallowance of Skip Quillen's claim. No such evidence was presented at the hearing in this matter.[11] *See In re Nat'l Liquidators, Inc.*, 182 B.R. at

[11]At the hearing, Mr. Greer conceded that joint representation of a debtor in possession and an insider who had preference exposure to the debtor in possession would be a conflict of interest. He testified that he was not aware at (continued...)

193 (mere speculation and hypothesizing as to the existence of a possible recovery action or challenge to creditor's claim insufficient to constitute a disqualifying adverse interest).

After careful review of the evidence, this court finds no basis for Coronet's assertion that Mr. Greer represented Andrew Quillen and Mid-Atlantic prior to the filing of the proofs of claims on June 10, 1998. The only evidence offered by Coronet in this regard is Mr. Greer's own testimony that he had discussions with principals of the debtor regarding ways the debtor could raise money and the efforts of Mr. Greer to come to Andrew Quillen's aid during his deposition. Such evidence falls far short of establishing that Mr. Greer represented Andrew Quillen and his company or that Mr. Greer took any steps to further their interests at the expense of the debtor. Coronet's accusation that Mr. Greer participated in a scheme to benefit the debtor's insiders at the expense of creditors was completely unsupported by the evidence. The lack of any evidentiary basis for the pursuit of such a serious and now apparently defamatory allegation against an officer of this court is most troubling.

Furthermore, the filing of the proofs of claims on behalf

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[11](...continued)
that time that payments by Cam-Plek to Bobby Griffin or any other creditor holding a claim guaranteed by Skip Quillen could be recovered from Skip Quillen as insider preferences.

of the principals of the debtor, in and of itself, did not render Mr. Greer unqualified to represent the debtor, although clearly it raised an appearance of impropriety which prompted the court's suggestion to Mr. Greer that he withdraw as counsel for the debtor. Section 327(a)'s two-prong test for employment of a professional plainly applies only to a professional employed by a trustee or debtor in possession. There is no question that Cam-Plek ceased being a debtor in possession upon confirmation of Coronet's plan and the transfer of its assets to Coronet. Accordingly, any assertion that the filing of the proofs of claims provides a basis for the disgorgement of all fees paid to Mr. Greer as attorney for the debtor in possession is without merit.

The court next turns to Mr. Greer's failure to comply with the disclosure requirements of Fed. R. Bank. P. 2014(a). This rule requires applications for the employment of a professional under § 327 of the Bankruptcy Code to set forth, to the best of the applicant's knowledge, all of the professional's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the U.S. trustee or any person employed in the office of the U.S. trustee. Rule 2014(a) also requires that the application be accompanied by a verified statement of the professional setting forth these same

connections. The disclosure requirements of Rule 2014(a) are mandatory. *See, e.g., In re Nat'l Liquidators, Inc.*, 182 B.R. at 196. The duty of professionals is to disclose any and all of such connections and attorneys cannot pick and choose which ones to disclose. *See, e.g., In re EWC, Inc.*, 138 B.R. at 280.

> The purpose of Rule 2014(a) is to ensure that all facts that may be relevant to the determination of attorney qualification are before the Court and "to permit the court and parties in interest to determine whether the connection disqualifies the applicant from the employment sought, or whether further inquiry should be made before deciding whether to approve the employment."

In re Granite Sheetmetal Works, Inc., 159 B.R. 840, 845 (Bankr. S.D. Ill. 1993)(quoting *In re Lee*, 94 B.R. 172, 176 (Bankr. C.D. Cal. 1988)). "It removes the discretion of what information to disclose from the discretion of the attorney 'whose judgment may be clouded by the benefits of the potential employment.'" *Id.*

"Absent the spontaneous, timely and complete disclosure required by section 327(a) and Fed. R. Bankr. P. 2014(a), court-appointed counsel proceed at their own risk." *Rome*, 19 F.3d at 59(citing *In re Roger J. Au & Son, Inc.*, 71 B.R. 238, 242 (Bankr. N.D. Ohio 1986)). Failure to disclose facts material to a potential conflict may provide a totally independent ground for denial of fees, quite apart from the actual representation of competing interests. *See In re Granite*

Sheetmetal Works, Inc., 159 B.R. at 847. Negligent or inadvertent omissions do not vitiate the failure to disclose and a disclosure violation may result in sanctions regardless of actual harm to the estate. *Neben & Starrett, Inc. v. Chartwell Financial Corp. (In re Park-Helena Corp.)*, 63 F.3d 877, 881 (9th Cir. 1995), *cert. denied* 516 U.S. 1049, 116 S. Ct. 712 (1996)(quoting *In re Maui 14K, Ltd.*, 133 B.R. at 660)).

In the present case, Mr. Greer has conceded that he violated his duty of full disclosure by failing to set forth in the application for employment and his verified statement his representation of the debtor's insiders in the Cherokee Oil Company and Packaging Services, Inc. matters. He denies that the omission was intentional and, as evidence of the lack of any effort to hide the representation, points to the reference to the Cherokee Oil Company lawsuit in his itemized statement of services that was attached as Exhibit A to his verified statement. Mr. Greer also acknowledges that he violated his duty of complete and full disclosure by failing postpetition to amend his verified statement to disclose his representation of Skip Quillen in the Educational Activities, Inc. matter.[12] In

[12]Mr. Greer did subsequently amend his Rule 2014 disclosure statement to fully set forth these various representations on the eve of the hearing, October 19, 1998.

his memorandum of law, Mr. Greer observes that sanctions for violating the duty to disclose under Rule 2014 are at the discretion of the court and leaves to the court's discretion the question of whether to impose a sanction.

The Sixth Circuit Court of Appeals has held that a bankruptcy court is vested with the inherent power to sanction attorneys for breaches of fiduciary obligations. *See Mapother & Mapother, P.S.C. v. Cooper (In re Downs)*, 103 F.3d 472, 477 (6th Cir. 1996)(citing *In re Arlan*'s *Dep't Stores, Inc.*, 615 F.2d 925, 943 (2d Cir.1979)). "When a court metes out a sanction, it must exercise such power with restraint and discretion." *Id.* at 478 (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44, 111 S. Ct. 2123, 2132-33 (1991)). The sanction levied must be commensurate with the egregiousness of the conduct, although all compensation should be denied where the attorney has exhibited a callous or willful disregard for the fiduciary obligations imposed on him by statute. *See In re Downs*, 103 F.3d at 479-80.

Mr. Greer is a frequent practitioner before this court, where he has represented his clients in a capable, professional manner. His work on behalf of the debtor clearly benefitted the estate and there is no evidence that his representation of the debtor's insiders resulted in any harm to the estate or its

creditors. Furthermore, the court is not convinced that Mr. Greer's failure to disclose his concurrent representation of the insiders was due to a callous or willful disregard of his statutory obligations. Nonetheless, the court finds that significant sanctions should be imposed. Due to the many hats worn by Skip Quillen, 50% stockholder, director, president, and guarantor on many corporate debts, there was a obvious potential for him to make decisions on behalf of the estate that were in his own personal interests rather than those of the debtor in possession and its creditors. This was especially true with respect to the claim of Bobby Griffin, since Skip Quillen stood to benefit from the nondisclosure of Mr. Griffin's unperfected status. As such, it was vital that the court and all parties in interest be informed of Mr. Greer's representation of Skip Quillen and the other insiders, not only to determine its initial propriety but also to monitor the dual representation as developments in the case which could give rise to an actual conflict of interest occur.

The excuses offered by Mr. Greer, that he treated the disclosure forms as a formality, that he did not think through the disclosure requirements, that this was his first chapter 11 case, and he did not consider his dual representation to present an actual conflict of interest, do not negate the seriousness of

his breach of duty. Considering the equities of the case, the court concludes that a sanction of 40% is appropriate.[13] Because the court has previously awarded fees to Mr. Greer in the amount of $21,366.00 and the current request is for $6,741.00 which results in a total of $28,107.00, 40% of this amount or $11,242.80 of the fees requested is disallowed and 60% or $16,864.20 is allowed. Because Mr. Greer has been awarded the sum of $21,366.00 thus far and has received $15,724.00 in payment from the estate, the motion for interim compensation will be denied to the extent it requests fees and granted as to the reimbursement of expenses in the amount of $968.96,[14] fees previously awarded but remaining unpaid in the amount of $4,501.80 will be disallowed, and Coronet shall pay the remaining balance of $1,140.20 for fees and $968.96 in expense reimbursement to Mr. Greer as an administrative expense. An

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[13]This 40% sanction is applicable only to fees awarded and requested and has no bearing on the expenses awarded and/or requested. *See In re Rusty Jones, Inc.*, 134 B.R. 321, 347 (Bankr. N.D. Ill. 1991)(citing *In re Philadelphia Athletic Club,* 38 B.R. 882 (Bankr. E.D. Pa. 1984)(generally reimbursement of expenses should be allowed not withstanding denial of fees based on the presumption that expenditures have clearly benefitted the estate)).

[14]Although the objection filed by Coronet on June 10, 1998, was based upon the allegation that all services performed after the confirmation hearing on February 10 and 11, 1998, were not necessary or beneficial to the estate, no evidence was offered in this regard at the hearing. Accordingly, Coronet's objection is deemed to have been abandoned.

order to this effect will be entered contemporaneously with the filing of this memorandum opinion.

FILED: January 29, 1999

BY THE COURT

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MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE