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11 U.S.C. § 327(a)
11 U.S.C. § 328(c)
Rule 2014

In re Hood Lumber Company

Case No. 397-36565-psh11

4/12/99 PSH unpublished

Global Ventures Inc., ("Global") which served as the debtor-in-possession's appointed sales agent, filed an application for compensation based on commissions earned from the sale of the debtor's assets. The Official Creditor's Committee (the "Committee") and the United States Trustee (the "Trustee") both filed objections to the application arguing that certain nondisclosure and conflicts of interest proscribed allowance of one commission and, in addition, the Committee urged disgorgement of another.

At the time the debtor filed its Chapter 11 petition it filed an application to employ Global as its selling agent pursuant to the terms of an exclusive listing agreement. In connection with that application Global filed an affidavit of disinterestedness in which it stated that it had no connection with the debtor, any creditor or any party in interest or their respective attorneys and held no interest adverse to the estate. Global also filed a Rule 2014 Verified Statement for Proposed Professional which contained these standard assurances followed by the disclosure that it had been paid approximately \$305,000 by the debtor within a year of the bankruptcy filing for "business consulting services." No objections to the application were filed and the application was approved.

Global's exclusive listing agreement with the debtor expired, by its terms, on February 1, 1998. However, the agreement provided that Global would be entitled to a commission on any sale made within a year thereafter to any entity from whom Global had acquired a signed confidentiality agreement prior to the expiration of the agreement.

In March, 1998 Global presented an offer to purchase substantially all of the debtor's assets under a confirmed plan. The offer was made by an entity called Dimeling, Schreiber and Park ("Dimeling") which had signed a confidentiality agreement with Global prior to January 31, 1998. However, the assets would actually be acquired by an entity to be formed by Dimeling called Quality Veneer Lumber. ("QVL") The offer disclosed that two of Global's principals and one of its independent sales agents were to join QVL as officers and stockholders. As initially presented, the offer stated that it was contingent upon payment to Global of the commission earned under the exclusive listing agreement. However, that language was deleted from the final offer.

The debtor presented a proposed plan incorporating the Dimeling offer. The plan also provided for payment of the commission earned by Global. The Trustee objected to confirmation of the plan on the

1 grounds that Global was not "disinterested" and therefore not entitled
2 to payment of its commission. The court approved the plan, subject to
the Trustee's objection.

3 After confirmation of the plan Global filed its application for
4 compensation based on the sale of the assets under the plan. The
5 Committee filed an objection to application raising the same
6 "disinterestedness" argument previously raised by the Trustee. In
7 addition, the Committee contended, based on information discovered
8 after confirmation of the plan, that Global had made material
9 nondisclosure on its application for appointment as selling agent and
10 therefore was not entitled to any compensation from the estate.
11 Specifically the Committee contended that Global had failed to disclose
12 that within a year of the filing it had entered into an agreement with
13 the debtor under which it served as the debtors "chief financial
14 officer", that Global was represented both pre and post petition by the
15 law firm which represented the debtor's principal in the bankruptcy,
16 and that it received a payment of \$90k from the debtor three days
17 before the bankruptcy filing and that the payment was on account of an
18 antecedent debt.

19 Global defended against the objections raised by the Committee and
20 the Trustee arguing that it was not disinterested because 1) although
21 its agents were acquiring an interest in the debtor's assets, it was
22 not and 2) its agents did not decide to acquire an interest in the
23 assets until after the expiration of its listing agreement and,
24 therefore, after its employment by the estate ended. In addition it
25 argued that the nondisclosure issues were not material because 1)
26 Global didn't really act as a chief operating officer of the debtor,
despite the language of the agreement to the contrary ;2) the Committee
was aware that Global had a connection with the law firm representing
the debtor's principal and 3) there was no issue of avoidable
preference arising from the \$90k payment because the debtor was solvent
at the time of the payment.

19 The court found that Global violated Rule 2014 by failing to make
20 full disclosure of all of its connections with the debtor in the
21 initial application and by failing to update its disclosure statement
22 as its connections with the debtor changed. It held that a
23 professional seeking employment under § 327(a) has a duty to disclose
24 all possible conflicts or connections with the debtor to the court and
25 is not permitted to make its own determination as which connections
26 have sufficient weight to merit disclosure. It further held that
failure of a professional to make full disclosure, without more, may
justify denial of all compensation. However, it concluded that it was
not required to deny compensation to a professional who failed to make
full disclosure. Rather, it held, the court has discretion to
determine whether and to what extent to deny compensation. In
exercising its discretion the court should consider 1) the extent of
the non-disclosure; 2) whether the non-disclosures were wilful or
innocent; 3) the number of conflicts not disclosed and 4) the benefit,
if any rendered to the estate by the professional.

1 Based on these factors the court concluded that Global's
2 application for compensation should be denied. However, it did not
3 require disgorgement of compensation previously allowed and paid. In
4 addition, it allowed Global to recover expenses incurred by it in the
5 marketing of the debtor's assets.

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:) Bankruptcy Case No.
HOOD LUMBER COMPANY) 397-36565-psh11
Debtor) MEMORANDUM OPINION
_____)

This matter came before the court on the objections of the reorganized debtor's creditor's committee (the "Committee") and the United States Trustee ("UST") to payment of commissions to Global Ventures, Inc. ("Global"), which had served as the debtor in possession's appointed sales agent. The UST and the Committee both believe that certain nondisclosures and conflicts of interest proscribe allowance of one commission and the Committee urges disgorgement of another.

The controversy requires this court to exercise one of its most difficult, yet important, duties. The task is difficult because the outcome rests on the facts and circumstances of the specific case which the judge must interpret while applying the law, often being required by those facts to make delicate distinctions. The task is important

1 because the applicable law reflects Congress' deep concern that the
2 professionals who work in the bankruptcy system adhere to a high moral
3 code of conduct.

4 This decision being fact sensitive, an understanding of the
5 court's ruling is not possible without a thorough review of the
6 relevant case history.

7 I. CASE BACKGROUND

8 The debtor was one of a number of related companies owned
9 and operated by The Morgan Company. Mr. James Morgan was the
10 principal shareholder and president of The Morgan Company.
11 Prepetition The Morgan Company and four of its wholly owned
12 subsidiaries merged into a single company called The Morgan
13 Company. The name of The Morgan Company thereafter was changed
14 to Hood Lumber Company ("Hood"). Hood filed its bankruptcy
15 petition on August 11, 1997. It was anticipated that the newly
16 formed entity would sell most or all of its assets while in
17 chapter 11. At the same time a sister corporation, Bugaboo
18 Timber Company, ("Bugaboo") also filed a Chapter 11 petition.
19 Bugaboo was a company formed by the merger, shortly before the
20 filing, of several other of The Morgan Company's wholly owned
21 subsidiaries. According to the schedules filed in their
22 respective cases, the value of each debtor's assets at the time
23 of filing exceeded its scheduled liabilities.

24 Simultaneously with the petition filings Hood and Bugaboo
25 filed motions asking the court to jointly administer their cases.
26 The motions were based, in part, on their representations that

1 their "economic interests [were] inextricably intertwined."
2 They jointly owed the sum of \$16,000,000.00 to National Bank of
3 Canada ("National Bank") and \$1,500,000.00 to General Electric
4 Credit Corporation ("GECC"). In addition, both Hood and Bugaboo
5 had executed indemnification agreements relating to
6 \$18,000,000.00 in payment and performance bonds issued by United
7 Pacific Insurance Company ("United Pacific") to insure Bugaboo's
8 performance under certain timber contracts. Mr. Morgan had
9 personally guaranteed a part of the corporate indebtedness.

10 The court allowed joint administration. On December 5,
11 1997, the United States Trustee filed a motion to dismiss or
12 convert the Bugaboo case, alleging that the estate was losing
13 money and there was no reasonable likelihood that Bugaboo could
14 successfully reorganize. On December 12, 1997, the Bugaboo case
15 was severed from the Hood case and converted to one under Chapter
16 7.

17 Shortly thereafter the Committee sought and obtained an
18 order appointing an examiner who was directed to investigate
19 Hood's prepetition transactions with related entities during the
20 year prior to the bankruptcy filing, with particular emphasis on
21 examination of the status of its solvency as of the date of
22 filing. In his preliminary report, filed June 4, 1998 the
23 examiner concluded that the prepetition transactions among all
24 the related Morgan entities, including James Morgan individually,
25 were so intertwined and poorly documented that it was impossible
26

1 to provide the court with any conclusion about the financial
2 condition of the bankrupt entities at the time of filing.¹

3 A few weeks later the Bugaboo trustee filed a motion to
4 substantively consolidate the Bugaboo case with the Hood case,
5 arguing that the two entities had been involved in a common
6 enterprise and that because of the nature of their business
7 operations Hood was liable to Bugaboo for virtually all of
8 Bugaboo's losses on its timber contracts. He filed an
9 accompanying \$24,000,000.00 proof of claim in the Hood case.
10 Hood disputed Bugaboo's contentions but eventually agreed to pay
11 \$2,000,000.00 to the Bugaboo trustee in return for his agreement
12 to withdraw his motion and to abandon any further claims he might
13 have asserted against Hood.

14 After the Bugaboo case was converted to Chapter 7 United
15 Pacific filed a motion for relief from stay to allow it to cancel
16 the performance bonds it had issued prepetition on Bugaboo's
17 behalf and to foreclose on its collateral. It argued in part
18 that the value of its collateral was substantially less than the
19 amount Bugaboo owed to it. A decision on this motion would
20 affect Hood because, prepetition, it had agreed to indemnify
21 United Pacific for any losses it sustained on those payment and
22 performance bonds. The court found that Bugaboo's bonded timber

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24 ¹ He did conclude that when the bankruptcy schedules were
25 prepared "estimates and short cuts were used in some instances [with
26 the net result being] a series of valuations and reports that have
not been completely reliable." The examiner did not file any
further reports.

1 contracts, which constituted the majority in value of United
2 Pacific's collateral, had a negative net value of between
3 \$4,000,000.00 and \$6,900,000.00 and granted its motion.

4 Following its success in Bugaboo, and based in part on the
5 court's findings of contract value in that case, United Pacific
6 asserted a contingent, unliquidated claim in the Hood case of
7 \$9,700,000.00 of which \$1,200,000.00 was identified as secured.
8 Ultimately United Pacific entered into a court approved
9 settlement agreement with Hood and its creditor's committee
10 through which it was granted an allowed unsecured claim of
11 \$5,500,000.00 and an allowed secured claim of \$1,200,000.00.

12 II. GLOBAL'S EMPLOYMENT AND THE SALE OF HOOD'S ASSETS

13 In February, 1997 Global had signed an operating agreement
14 with The Morgan Company and James Morgan which provided, in part,
15 that it would provide supervision and general direction of The
16 Morgan Company business activities and consult as its "chief
17 operating officer" regarding matters such as purchase and sale of
18 assets, including timber, employee compensation, and "retention
19 and recruitment matters". It was to aid in improving The Morgan
20 Company's financial condition and recommend and execute its
21 business plans. It had access to The Morgan Company's books and
22 records and all checks over \$5000 had to be countersigned by one
23 of its representatives.

24 At trial Mr. Gordon Boyd, one of Global's principals and
25 its president, testified that during this period in fact James
26 Morgan remained in charge of the Company's operations. However,

1 prepetition Global was given sweeping power and authority both to
2 access The Morgan Company's business records and to run its
3 business affairs. This agreement was in place when Hood was
4 contemplating bankruptcy and Global took part in those
5 discussions.

6 On the day Hood filed its petition it filed an application to
7 employ Global as Hood's selling agent. Pursuant to the
8 requirements of Bankruptcy Rule 2014(a) Mr. Boyd filed an
9 affidavit in support of the application in which he included the
10 boilerplate language:

11 To the best of my knowledge, neither I nor any one
12 at Global has any connection with the Debtor in
13 this matter, nor with creditors or any party in
14 interest nor their respective attorneys, or
15 accountants except as disclosed in the Rule 2014
16 Verified Statement for Proposed Professional
submitted herewith. We represent no interest
adverse to the Debtor or the bankruptcy estate and
believe that we can undertake representation of
Debtor's interest in this case without any type of
restriction.

17 These standard assurances were followed by the specific
18 disclosures that prepetition Global had been retained by Young
19 and Morgan North, one of Hood's affiliates, to dispose of its 50%
20 ownership interest in a joint venture in Seward Forest Products
21 and that the debtor had paid Global \$305,870.00 within a year
22 prior to the filing for "business consulting services, real
23 estate sales commissions, and business unit sales."

24 The affidavit did not disclose that at the time of Hood's
25 bankruptcy filing Global was represented by the law firm of
26 Davis, Wright Tremaine (DWT). DWT would continue to represent it

1 in matters outside the Hood case, including the Omak Wood
2 Products Chapter 11 case, in which Global was acting as sales
3 agent. It had represented Global in its prepetition dealings
4 with The Morgan Company, including review of the operating
5 agreement. It did not disclose that DWT also represented Mr.
6 Morgan and would continue to represent him during Hood's
7 bankruptcy.

8 It did not disclose that prepetition it had served as
9 "chief operating officer" for The Morgan Company and had
10 continued in that position up to Hood's bankruptcy filing.

11 It did not disclose that within three days of Hood's
12 bankruptcy filing Global had received a payment of \$90,545 for
13 past services.

14 Absent any objections, on October 16, 1997 the court
15 entered an order authorizing Hood to employ Global. Under its
16 exclusive listing agreement, effective through January 31, 1998,
17 it had the right to market all of Hood's assets. The marketing
18 responsibilities included preparing an offering prospectus,
19 contacting prospective buyers, obtaining confidentiality
20 agreements² with buyers, providing them with due diligence
21 information, and assisting the seller with evaluation of offers
22 and with negotiations and consummation of any transaction.

24 ² Global required execution by any potential buyer of a
25 confidentiality agreement as a prerequisite for release of any
26 confidential information about a particular business it was
marketing in which the signator had an interest.

1 Within 30 days after January 31, 1998 it was to provide Hood with
2 a list of all parties which had signed confidentiality agreements
3 with it prior to that date. It would receive a commission on any
4 assets it sold during the listing period and it would continue to
5 be entitled to a commission on any sale made by anyone within a
6 year after January 31, 1998 to any entity that had signed a Hood
7 confidentiality agreement with it prior to January 31, 1998.³ It
8 was to bear its own costs.

9 Global is a closely held corporation whose stock is held
10 by three individuals. Mr. Boyd owns 48.85% of the stock, Mr.
11 Neil Anderson owns 2.3% and a silent partner owns the balance.
12 Mr. Boyd and Mr. Anderson do not have majority control of the
13 company, as its bylaws require a 2/3 vote of the stockholders for
14 any corporate action.

15 Global has no employees. Instead it markets properties
16 through the use of "independent sales agents".⁴ Mr. Boyd and Mr.
17 Anderson were the independent sales agents initially in charge of
18 marketing Hood's assets. On November 12, 1997, Mr. Boyd and Mr.
19 Anderson entered into a Commission Split Agreement with Mr.
20 Stuart Young under which they agreed to split any commission they

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22 ³ This last provision is common in exclusive listing agreements
23 and is generally referred to as a "tail".

24 ⁴ Under their contracts with Global each agent was personally
25 responsible for all expenses incurred as a result of their marketing
26 efforts. On paper Global did not reimburse any expenses under the
Hood sales agency contract although it is unclear from the record
whether Global or the agents actually paid for the undisputed amount
of \$30,000 for a wood basket study.

1 earned from the sale of Hood's assets.

2 At the time he signed the Commission Split Agreement Mr.
3 Young was not formally affiliated with Global and was not a
4 licenced sales agent or broker. Rather, he had arrived at Global
5 in July and was using office space there, with its permission,
6 while he reviewed various business opportunities it was marketing
7 for the purpose of finding a company which he wanted to purchase
8 or to manage.

9 On October 24 Mr. Young had signed Global's standard
10 confidentiality agreement. It authorized him access to
11 confidential information of certain wood products companies
12 Global was marketing, namely Hood, Omak Wood Products, Mayr
13 Brothers Company, Atco Lumber Ltd, and Springfield Forest
14 Products, all listed in an addendum A. It identified Mr. Young
15 as "Acquirer" who had "an interest in acquiring or financing all
16 or a part of the outstanding stock and/or assets of Seller
17 identified and incorporated by reference in addendum A". Mr.
18 Young and Mr. Boyd each testified that, despite the language of
19 the confidentiality agreement, when he signed it Mr. Young had no
20 interest in purchasing Hood's assets. Rather, he was considering
21 joining Global as an independent sales agent and his signature on
22 the agreement allowed him access to financial information that

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1 would demonstrate the amount of commissions he could earn working
2 for Global.⁵

3 Messrs. Boyd, Anderson and Young engaged in extensive
4 efforts to market Hood's assets. It owned a number of mills,
5 plants and other facilities spread over a large geographic area.
6 The agents developed a prospectus for the company which included
7 its history and identified the market segments served by, and the
8 financial histories of, each of the company's facilities. Global
9 also commissioned and paid for a study which identified those
10 geographic areas which would logically provide raw materials to
11 each facility (the wood basket study). It developed a list of
12 potential buyers which it contacted by mail and with follow-up
13 calls. If a potential buyer expressed an interest in the
14 company, after receiving a signed confidentiality agreement,
15 Global sent the entity significant detailed information about
16 Hood.

17 Among the entities which signed a confidentiality
18 agreement with Global covering Hood prior to January 31, 1998 was
19 the company Dimeling, Schrieber & Park. ("Dimeling"). Dimeling
20 is an east coast investment group which specializes in making
21 equity investments in companies, many of which are in Chapter 11.
22 In November 1997, Mr. Gary Franklin, one of Global's independent
23 sales agents, had advised Mr. Boyd that Dimeling, which was

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25 ⁵ No evidence was presented to show whether Mr. Young ever
26 signed confidentiality agreements for any other company Global was
marketing.

1 working with Mr. Franklin on another transaction, might be
2 interested in purchasing a company involved in the wood products
3 industry.

4 On December 5, 1997, Mr. Boyd spoke briefly by telephone
5 with Mr. Dimeling to inquire of Dimeling's interest. One of the
6 wood products companies Global was marketing, Omak Wood Products,
7 had filed a chapter 11 case in Tacoma, Washington. Another,
8 Mayr Brothers, was not in bankruptcy. During the course of the
9 telephone conversation Mr. Dimeling advised Mr. Boyd that
10 Dimeling was not interested in purchasing either Omak or Hood
11 alone because each was too small. During its marketing efforts
12 Global's agents had begun to think that there might be a
13 prospective purchaser for a combined sale of the three
14 companies.⁶ During the phone conversation, at Mr. Boyd's inquiry
15 Mr. Dimeling indicated that he was interested in a possible
16 purchase of these three companies. Mr. Boyd followed up by
17 sending Dimeling a prospectus and confidentiality agreement for
18 each of the three companies, which Dimeling signed on December
19 10, 1997.

20 After January 31, 1998 although its listing agreement with
21 Hood had expired,⁷ Global continued to work the Dimeling lead.⁸

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23 ⁶ In the industry such a combined sale is called a "roll-up".

24 ⁷ Hood gave Global no authority, after January 31, 1998, to
25 continue to represent Hood as its selling agent.

26 ⁸ It also continued some marketing efforts to others. After
(continued...)

1 From December through most of February, 1998, Mr. Young was in
2 charge of preparing a prospectus which combined information on
3 the three wood products companies.⁹ After Mr. Boyd's December
4 call to Dimeling, Global's agents did not again contact Dimeling
5 until a second phone call from Mr. Boyd on February 9. Then
6 Global had Dimeling sign a second confidentiality agreement
7 covering the three companies. They sent the combined prospectus
8 to Dimeling on February 25.

9 On March 11, 1998, Mr. Boyd, Mr. Anderson and Mr. Young
10 met with Mr. Dimeling to tour the facilities of all three
11 companies. On March 12, as Mr. Dimeling was preparing to board an
12 airplane to return to the east coast, for the first time he
13 advised Mr. Boyd, Mr. Anderson, Mr. Young, Mr. Mayr of Mayr
14 Brothers, and Dick Baldwin, a forest products industry
15 specialist, all of whom had accompanied him on part or all of the
16 tour, that he was prepared to go forward with the purchase of the
17 three companies but only on the condition that these men join the

21 ⁸(...continued)
22 January 31, 1998 it obtained 6 additional confidentiality agreements
23 covering Hood. Strangely, one of those signing a confidentiality
24 agreement with Global covering Hood, on February 23, 1998, was Mayr
Brothers, one of the companies which Global was attempting to sell.

25 ⁹ During this period of time and at least up through March 12,
26 1998, Global's listing agreement with Omak Wood Products had not
expired.

1 company to be formed to acquire them, to be known as QVL, as both
2 equity holders and as managers.¹⁰

3 Over the next two or three days Messrs. Boyd, Anderson, and
4 Young made the decision to join QVL. Upon payment of \$500,000
5 for his respective interest each became the owner of 1.724% of
6 its issued shares and obtained an option to buy additional shares
7 in the future.¹¹ Under their employment agreement they each
8 received a generous salary plus the potential for additional
9 significant compensation yearly based on a formula which takes
10 into consideration a "target" corporate income. Each had signed
11 a promissory note for their equity share and hoped that income
12 arising from this incentive pay would fund the annual payments
13 due under the notes.

14 The percentage of commission the three men anticipated
15 receiving from their work on the sale of Hood's assets was very
16 important to the capitalization of QVL as it was to be a source
17 of cash that would be used to contribute to QVL's capital
18 account.

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22 ¹⁰ At trial Mr. Dimeling testified that although he made the
23 offer to these men for the first time on March 12, he would have
discussed his need for a management team with Global prior to his
touring visit.

24 ¹¹ The price for the shares was directly proportional to the
25 capitalization of QVL. The men did not receive any bonuses,
26 setoffs, deductions or credits for services to reduce the amount
each of them had to contribute for their shares. Global did not
become an equity owner in QVL.

1 Meanwhile, after the expiration of Global's exclusive
2 listing agreement on January 31, 1998, but prior to the
3 presentation of the Dimeling offer to the court and because Hood
4 and its primary lender, the National Bank, had seen no progress
5 on a sale and thought they had heard nothing from Global, on
6 February 27 Hood entered into an exclusive agreement to employ
7 Hamstreet & Company ("Hamstreet") as its exclusive sales agent to
8 liquidate its assets. It was to be paid a set amount for sale of
9 the Hanel Mill, one of the Hood facilities, depending on whether
10 that facility was operational at the time of sale. In addition,
11 it was to be paid 5% of any distribution made to unsecured
12 creditors and reimbursed for all reasonable and necessary out of
13 pocket costs, expenses and advances made or incurred by it in
14 performing its services under the agreement.

15 Hamstreet later became the disbursing agent under the
16 terms of the confirmed plan. Its disbursing agent agreement
17 states in part "in lieu of any commission or fees which may be
18 fixed by applicable law...[Hamstreet] shall be entitled to
19 reimbursement of expenses and compensation as provided in Section
20 4.7 of the Sales Agency Agreement executed by and between [Hood
21 and Hamstreet]". The court is unaware of the amount, if any,
22 paid to date to Hamstreet for its services as disbursing agent,
23 as the agreement does not require court approval of any such
24 postconfirmation payments.

25 At trial Mr. Hamstreet did not recall any contacts he had
26 with Global between February 1 and the middle of March. After

1 trial he signed an affidavit in which he stated that he didn't
2 recall the phone call but acknowledged that Global's phone
3 records indicated that Mr. Boyd had called him on February 10 and
4 he thought that more likely than not he had had a discussion with
5 Mr. Boyd about possible purchasers for Hood's assets. But Mr.
6 Boyd admitted that he had not shared information with Mr.
7 Hamstreet about the "roll-up" opportunity with Dimeling. Mr.
8 Dimeling testified that he didn't learn about Hamstreet until
9 March 12.

10 As required by its agency agreement with Hood, on February
11 24 Global sent it a list of those entities which had signed
12 confidentiality agreements with it. Its memo stated "[F]ollowing
13 is a list of companies with whom we have executed Confidentiality
14 Agreements regarding Hood Lumber." The list included some
15 entities which had signed agreements after January 31, 1998 but
16 did not distinguish those which signed before January 31 from
17 those which signed after.

18 On March 16, 1998 Mr. Young and Mr. Anderson met with Mr.
19 Morgan and Mr. Hamstreet and advised them that Global had located
20 a possible purchaser for substantially all of Hood's assets and
21 that it was likely that Mr. Young, Mr. Anderson and Mr. Boyd
22 would be shareholders and managers of the purchaser. DWT was at
23 that meeting representing QVL, although at the time Mr. Hamstreet
24 assumed that DWT was present as Mr. Morgan's counsel, as it had
25 been throughout the case.

1 By letter of March 22 DWT wrote a letter to the UST, which
2 was written on behalf of QVL and billed to it, presenting its
3 argument as to why Global was entitled to receive a commission
4 for the sale from the estate.

5 By a letter of March 23 QVL advised the Committee's
6 attorney of the terms of the Dimeling offer, including the
7 involvement of Messrs. Anderson, Boyd and Young as prospective
8 shareholders and managers of QVL. This letter was signed by,
9 among others, Mr. Young as "President" of QVL and included the
10 statement: "...this offer is subject to Global's receipt at
11 Closing [sic] of the commission provided in its approved contract
12 with Hood."

13 Mr. Anderson testified that between March 12 and the sale
14 closing he worked on behalf of QVL by gathering information for
15 its due diligence review and by accompanying potential insurers
16 and environmental engineers on onsite inspections of the Hood
17 properties.

18 On March 31, 1998, at a court hearing on a different matter,
19 Hood's attorney mentioned that he had just heard that it had
20 received an offer to purchase substantially all of its assets
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1 from Dimeling for the sum of \$20,000,000.¹² No details were
2 provided to the court at that time.

3 Sometime during this period Mr. Anderson and Mr. Young
4 retained the firm of Bogle and Gates to negotiate their
5 employment contracts with QVL. Bogle and Gates earlier had been
6 employed by Hood during its Chapter 11 to continue a claim
7 against the U.S.A. for delay in awarding a timber contract and
8 received payment from the estate for these services.

9 The Dimeling offer was reduced to writing in an Asset Sale
10 and Purchase Agreement dated April 6, 1998 and filed with the
11 court. That agreement contained the following language:

12 Buyer shall pay, in addition to the purchase price,
13 the theretofore unpaid Buyer Commissions due to the
14 Sales Agent and to Global Ventures, Inc. (Global).
15 The Buyer has signed confidentiality agreements
16 with Global, and this offer is subject to Global's
17 receipt at Closing of the commission provided for
18 in its approved contract with Seller. Two of
19 Global's principals (Gordon Boyd and Neil Anderson)
20 and one of its independent contractors (Stuart
21 Young) are or intend to become minority
shareholders and officers of an affiliate of the
Buyer, to whom it is contemplated Buyer will assign
its rights to purchase the Assets hereunder
(Quality Veneer & Lumber, Inc. Hereafter "QVL").
Neither Global nor its other principals intend to
have any interest in QVL. Boyd, Anderson and Young
will each obtain their interest in QVL in
consideration for cash in the same proportion as

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23 ¹² The ultimate sales price was \$21,150,000. Hood paid
24 \$1,500,000 into two escrow accounts. Of that amount \$332,000 was
25 returned after closing to Hood. The balance is being held in escrow
26 for a period of two years to cover any costs or expenses which Hood
committed to pay under the contract for remediation of hazardous
waste and other indemnified activities. Any money not paid for
these purposes after two years is to be refunded to Hood. Thus, to
date, Hood has received \$19,982,000 from the sale.

1 QVL's other shareholders without regard to their
2 ownership interests in Global or participation in
3 the fees paid to it with respect to this sale. The
4 Seller shall cooperate with Global's disclosure to
5 the Court of the fact that two of Global's
6 principals and one of its independent contractors
7 are or intend to become minority shareholders and
8 officers of QVL.

(Underlines added)

6 The sale was conditioned upon its incorporation into a plan of
7 reorganization, to be confirmed by June 1, 1998 with closing by
8 June 15, 1998.

9 On April 24, 1998, the parties filed an amended Asset Sale
10 and Purchase Agreement. The amendments to the above quoted
11 portion of the agreement had deleted the underlined sentence but
12 otherwise remained unaltered.

13 On May 26 Judge Rossmesl, Bankruptcy Judge for the
14 Eastern District of Washington, held a hearing in the Omak Wood
15 Products case to determine whether he would approve the terms of
16 Dimeling's purchase of Omak's assets. Among other matters, he
17 inquired into the good faith and fair dealing of the transaction,
18 given that Global was the sales agent and Messrs. Boyd, Anderson
19 and Young had agreed to become associated with QVL. He approved
20 the sale. However, he was not asked to approve the payment of
21 estate funds for Global's commission. The order approving the
22 commission stated that it was to be paid by the buyer.

1 Hood filed its Third Amended Plan of Reorganization on
2 June 1, 1998.¹³ The amended Dimeling Asset and Purchase Agreement
3 was incorporated and constituted the heart of the plan. If the
4 sale closed it would generate any funds available for creditors'
5 payments. There was no question but that by this point Hood was
6 not solvent. Under the plan terms the general unsecured creditors
7 would not be paid in full. This plan also provided that upon
8 confirmation any avoidance claims held by Hood would be waived.

9
10 III. OBJECTIONS TO PAYMENT OF GLOBAL'S SALES COMMISSION

11 The unsecured creditors voted for the plan. The National
12 Bank, which had been The Morgan Company's primary prepetition
13 lender and which had continued, postpetition, to fund Hood's
14 ordinary and necessary operating expenses, including the purchase
15 of mill inventory while Hood attempted to find a buyer, was
16 anxious for consummation of the Dimeling sale. It refused to
17 provide further funding to Hood after the financing order entered
18 June 12, 1998.

19 At the July 9th confirmation hearing the UST objected to
20 confirmation of the plan because it called for the estate's
21 payment of Global's commission arising from the Dimeling sale.
22 It took the alternative positions that (1) the court should deny
23

24
25 ¹³ The court had held a disclosure statement hearing on a second
26 amended plan on June 1. It was approved by the court, with changes
that same day and Hood filed a Third Amended disclosure statement
and plan, taking into consideration those changes.

1 allowance of any commission pursuant to its authority under
2 11 U.S.C. § 328(c) as Global was no longer disinterested and held
3 an interest adverse to the estate given that two of its
4 principals and one of its agents had become shareholders and
5 managers of QVL or (2) the court should reduce any commission
6 originally promised to Global pursuant to its authority under
7 11 U.S.C. § 328(a) as the terms and conditions of Global's
8 employment had proved improvident in light of developments not
9 capable of being anticipated at the time of fixing such terms and
10 conditions.¹⁴

11 The court confirmed the plan, with amendments, but
12 specifically reserved for later consideration the allowance of
13 Global's commission for the Dimeling sale.

14 The sale of Hood's assets to Dimeling closed shortly
15 thereafter. On August 14, 1998, Global filed an application for
16 compensation which sought a total sales commission of \$423,000.¹⁵
17 Pursuant to their agreements with Global, Mr. Boyd, Mr. Anderson
18 and Mr. Young would, collectively, be entitled to 60% of the
19

20

21 ¹⁴ Because the court is deciding the issue before it under §§
22 327(a) and 328(c), it finds it unnecessary to address the UST's
argument under § 328(a).

23 ¹⁵ Under its sales agency agreement Global is to receive a 2%
24 commission on the amounts received by Hood from the sale. To date,
25 on the amounts Hood has received, Global is seeking an allowance and
26 authorization of payment for \$399,640. It also seeks a conditional
allowance of its commission on the remaining \$1,000,000 holdback,
subject to payment to it only with respect to that portion of the
\$1,000,000 which Hood actually is repaid.

1 commission, or a total of \$253,800.¹⁶ Additionally, as 51%
2 shareholders of Global, Mr. Boyd and Mr. Anderson would receive
3 51% of the 40% (\$169,200) retained by Global, or \$86,292.

4 The Committee filed an objection to Global's application
5 on more than one basis. As with the UST, it urged the court to
6 exercise its authority under 11 U.S.C. § 328(c) to deny Global
7 the Dimeling commission because once Messrs. Anderson, Boyd and
8 Young accepted employment by, and an ownership interest in, QVL
9 Global developed a conflict of interest which precluded it from
10 remaining either disinterested or holding an interest which was
11 not adverse to the estate. Additionally, it requested
12 disgorgement under § 328(c) of the commission of \$31,089.50 the
13 court, on March 31, had approved for Global arising from the
14 separate sale of one facility, the North Santiam plywood mill, to
15 Freres Lumber Co., Inc.

16 It reasons that Global had become intimately familiar
17 with Hood's finances and operations through its prebankruptcy
18 position as chief operating officer and as its sales agent.
19 After they accepted Dimeling's offer Global's agents used all of
20 this information to benefit Dimeling at Hood's expense because
21 they had a financial interest in assuring that the Dimeling offer
22 closed. Through its agents it ceased working for Hood and began
23

24
25 ¹⁶ These dollar amounts assume that Hood receives a refund of
26 the full \$1,000,000 held back for remediation. Messrs Anderson and
Boyd will each receive 37.5% of 60% and Mr. Young will receive 25%
of 60%.

1 working for QVL, including hiring DWT, its attorney and Mr.
2 Morgan's counsel during the Hood bankruptcy proceeding, to
3 represent QVL. Two of the agents also used the services of one
4 of Hood's attorneys, Bogle and Gates, in taking steps to protect
5 their interests in QVL. Under these circumstances it became
6 impossible for Hood, its creditors or the court to know whether
7 the best price was obtained for Hood's assets.

8 The Committee also took the position that Global should be
9 denied any fees because at the time of its appointment it was not
10 either disinterested or without any interest adverse to the
11 estate, contrary to 11 U.S.C. § 327(a). It asserts that Global
12 was never qualified to be appointed as Hood's sales agent as (1)
13 it had been an officer of Hood; (2) it had received a payment of
14 \$90,545 just three days before the filing for past services,
15 which payment was potentially avoidable as a preferential
16 transfer; (3) it had been represented by DWT in a number of
17 matters, including review of its prepetition operating agreement
18 with The Morgan Company and that DWT was counsel for James
19 Morgan, would represent Mr. Morgan during the Hood bankruptcy and
20 would continue to represent Global in the Omak Wood Products
21 case; and (4) it had an agent, Mr. Young, whose primary motivation
22 was not to provide sales services to clients but to find a
23 management or ownership interest for himself in a company.

24 Further, it alleged that denial of all fees was justified
25 as, upon application for appointment, Global violated the
26

1 requirements of Bankruptcy Rule 2014(a) by failing to disclose
2 facts which would have revealed its disqualification.

3 Finally, it argued that although obtaining a buyer for
4 Hood's assets, Global's fees should be denied or reduced because
5 its delay and negligence in addressing the interest shown by
6 Dimeling led to confusion for, and damage to, Hood. Although
7 Global did not have authority after January 31, 1998 to continue
8 to represent Hood, it continued to attempt to obtain a buyer for
9 Hood's assets, sharing confidential information about Hood with
10 several prospective purchasers while providing little, if any,
11 information to Hood about these ongoing attempts, particularly
12 those involving the Dimeling offer. Hood was damaged by Global's
13 paucity of information because, having not received any indication
14 from it that a potential sale of assets was in progress, it
15 obtained the appointment of Hamstreet as sales agent, thus facing
16 the possibility that it would have to pay two commissions for one
17 sale. After Hamstreet was appointed it heard little or nothing
18 from Global until it was informed of the Dimeling offer on March
19 17.

20 IV. APPLICABLE LAW

21 A. JURISDICTION

22 The issue before me arises out of 11 U.S.C. § 330.
23 Consequently, the court has jurisdiction to make the decision
24 pursuant to 28 U.S.C. § 1334. The matter being a core matter
25 under 28 U.S.C. §157(b)(2)(A), the court has jurisdiction to
26 enter a final order.

1 B. 11 U.S.C. §§ 327(a) and 1107

2 Section 327(a) acts prospectively. Before a professional
3 may be appointed to provide service on behalf of the estate he
4 must have (1) demonstrated that he has met the substantive
5 conditions of the statute and (2) been appointed under a court
6 order.¹⁷ It provides that "...the trustee, with the court's
7 approval, may employ one or more attorneys, accountants,
8 appraisers, auctioneers, or other professional persons, that do
9 not hold or represent an interest adverse to the estate, and that
10 are disinterested persons, to represent or assist the trustee in
11 carrying out the trustee's duties under this title".

12 This section also applies to professionals retained by a
13 debtor in possession in Chapter 11 by virtue of § 1107(a), which,
14 with certain limited exceptions, grants it all the rights, and
15 obligates it to perform all the duties, of a trustee.

16 Courts have agreed in theory that, with three exceptions,¹⁸
17 each of which is identified through specific Code provisions, §
18 327(a) establishes two preconditions for court approval of
19

20 ¹⁷ In re Capitol Metals, Co., Inc., 228 B.R. 724 (9th Cir. BAP
21 1998).

22 ¹⁸ The exceptions are: (1) § 327(c), which allows employment if
23 the professional would otherwise have been disqualified for having
24 been employed by or represented a creditor, unless, upon objection,
25 the court finds the professional has an actual conflict; (2) §
26 327(e), which allows employment of an attorney for a special purpose
despite having represented the debtor; and (3) § 1107(b), which
allows employment by a debtor in possession although having been
employed by, or represented the debtor prepetition. See, e.g. In re
Crivello, 134 F.3d 831, 835 (7th Cir. 1998).

1 employment on behalf of the estate.¹⁹ These statutory
2 preconditions are to be rigidly applied and cannot be waived.²⁰
3 First, the professional must be disinterested. Second, the
4 professional may not hold or represent an interest adverse to the
5 estate. Several courts have commented that these two tests
6 appear to overlap within the context of 11 U.S.C. § 101(14)(E).²¹
7 This fact is unremarkable. Of importance is what constitutes the
8 content of each test, as together "they serve the important
9 policy of ensuring that all professionals appointed pursuant to
10 section 327(a) tender undivided loyalty and provide untainted
11 advice and assistance in furtherance of their fiduciary
12 responsibilities."²²

13 In a case decided under the Bankruptcy Act the Ninth Circuit
14 stated: "We start with the well established principle that those
15
16

17
18 ¹⁹ Rome v. Braunstein, 19 F.3d 54, 62 (1st Cir. 1994); In re BH & P Inc., 949 F.2d 1300, 1314 (3rd Cir. 1991); In re Granite Partners, L.P., 219 B.R. 22, 32 (Bankr. S.D.N.Y. 1998); In re Tinley Plaza Associates, L.P., 142 B.R. 272, 277 (Bankr. N.D.Ill. 1992); In re Rusty Jones, Inc., 134 B.R.321, 342 (Bankr. N.D.Ill. 1991).

20
21 ²⁰ In re The Leslie Fay Companies, Inc., 175 B.R. 525, 532 (Bankr. S.D. N.Y. 1994); In re Tinley Plaza Associates, L.P., 142 B.R. 272, 277 (Bankr. N.D.Ill. 1992); In re The Cropper Company, 35 B.R. 625, 629 (Bankr. M.D.Ga. 1983) quoting 3 Collier on Bankruptcy ¶ 327.04[4][e] (15th Ed. 1998) (footnotes omitted).

22
23
24 ²¹ In re BH & P Inc., 949 F.2d 1300, 1314 (3rd Cir. 1991); In re Martin, 817 F.2d 175, 181 (1st Cir. 1987); In re The Leslie Fay Companies, Inc., 175 B.R. 525, 532 (Bankr. S.D.N.Y. 1994).

25
26 ²² In re Crivello, 134 F.3d 831, 835 (7th Cir. 1998) quoting Rome v. Braunstein, 19 F.3d 54, 58 (1st Cir. 1994).

1 performing duties in the administration of a bankrupt's estate
2 are not acting as private persons, but as officers of the court.²³

3 When read together, §§ 327(a) and 328(c) demonstrate that
4 the professional, having been appointed, must meet these
5 conditions on an ongoing basis.²⁴

6 C. 11 U.S.C. §§ 101(10), (14)

7 Section 101(14) defines a "disinterested person" to be one
8 that

- 9 (A) is not a creditor, an equity security holder,
or an insider;
10 (B) is not and was not an investment banker for any
outstanding security of the debtor;
11 (C) has not been, within three years before the
date of the filing of the petition, an investment
12 banker for a security of the debtor, or an attorney
for such an investment banker in connection with
13 the offer, sale, or issuance of a security of the
debtor;
14 (D) is not and was not, within two years before the
date of the filing of the petition, a director,
15 officer, or employee of the debtor or of an
investment banker specified in subparagraph (B) or
16 (C) of this paragraph; and
17 (E) does not have an interest materially adverse to
the interest of the estate or of any class of
18 creditors or equity security holders, by reason of
any direct or indirect relationship to, connection
19 with, or interest in, the debtor or an investment
banker specified in subparagraph (B) or (C) of this
20 paragraph, or for any other reason.

23 ²³ In re York International Building, Inc., 527 F.2d 1061, 1061
(9th Cir. 1975) quoting Callaghan v. R.F.C., 297 U.S. 464 (1936).

24 ²⁴ In re Olsen Industries, Inc., 222 B.R. 49, 58 (Bankr. D.Del.
25 1997); In re Rusty Jones, Inc., 134 B.R. 321, 342 (Bankr. N.D.Ill.
1991); In re Diamond Mortgage Company of Illinois, 135 B.R. 78, 89
26 (Bankr. N.D.Ill. 1990).

1 This section is a "guideline for the court to follow in
2 its sound discretion to insure that persons employed shall have
3 the essential character of independence and disinterestedness
4 which is required." ²⁵

5 Under (A) a professional is not disinterested if a
6 "creditor". "Creditor" is another term of art defined in §
7 101(10) to mean an

8 (A) entity that has a claim against the debtor that
9 arose at the time of or before the order for relief
concerning the debtor;

10 (B) entity that has a claim against the estate of
a kind specified in section 348(d), 502(f), 502(g),
502(h) or 502(i) of this title; or

11 (C) entity that has a community claim.

12 Subsection (E) is the "catch-all" section. This subsection
13 was adopted from old Bankruptcy Rule 10-202(c) (2) (D). "It appears
14 broad enough to include anyone who in the slightest degree might
15 have some interest or relationship that would color the
16 independent and impartial attitude required by the Code."²⁶ "The
17 purpose of the rule is to prevent a conflict without regard to
18 the person's integrity. Conflicting loyalties may arise even
19 from remote or indirect associations. The goal should be not to
20
21

22 ²⁵ In re Rusty Jones, Inc., 134 B.R. 321, 342 (Bankr. N.D.Ill.
23 1991); See also, In re Roberts, 46 B.R. 815, 829 (Bankr. D.Utah
24 1985), aff'd in relevant part and rev'd in part, 75 B.R. 402 (D.Utah
1987).

25 ²⁶ 3 Collier on Bankruptcy ¶ 327.04[4][e] (15th Ed. 1998); See
26 also In re BH & P Inc., 949 F.2d 1300, 1309 (3rd Cir. 1991); In re
Glenn Electric Sales Corp., 99 B.R. 596, 601 (D.N.J. 1988).

1 prevent actual evil in this particular case, but the tendency to
2 evil in all cases."²⁷

3 D. INTERESTS ADVERSE TO THE ESTATE

4 Unlike the term "disinterested", this term is not defined
5 by the Code. Yet there appears to be a consensus among courts
6 throughout the country that Judge Clark's ground breaking
7 definitions merit adoption. To "hold an interest adverse to the
8 estate" means (1) to possess or assert any economic interest that
9 would tend to lessen the value of the bankruptcy estate or that
10 would create either an actual or potential dispute in which the
11 estate is a rival claimant; or (2) to possess a predisposition
12 under circumstances that render such a bias against the estate.
13 To "represent an adverse interest" means to serve as agent or
14 attorney for any individual or entity holding such an adverse
15 interest."²⁸

16 "Even when business transactions are 'mutually beneficial'
17 to both sides such transactions involve adverse interests. In
18 other words, a business transaction need not ripen into an actual
19 dispute to have adverse interests involved."²⁹ On the other hand,

21 ²⁷ In re Roberts, 46 B.R. 815 (Bankr. D.Utah 1985), aff'd in
22 relevant part and rev'd in part, 75 B.R. 402 (D.Utah 1987) quoting
23 In re Sambo's Restaurants, Inc., 20 B.R. 295, 297 (Bankr. C.D.Cal.
1982).

24 ²⁸ In re Roberts, 46 B.R. 815, 827 (Bankr. D.Utah 1985), aff'd in
25 relevant part and rev'd in part, 75 B.R. 402 (D.Utah 1987). See
26 also, In re Fondiller, 15 B.R. 890 (9th Cir. BAP 1981).

²⁹ In re The Cropper Company, 35 B.R. 625, 631 (Bankr. M.D.Ga.
(continued...)

1 interests are not considered 'adverse' merely because it is
2 possible to conceive a set of circumstances under which they
3 might clash.³⁰

4 E. CONFLICTS OF INTEREST

5 Taken together, the requirements of disinterestedness and
6 lack of an interest adverse to the estate constitute the
7 Bankruptcy Code's standard for conflicts of interest. Attorneys
8 are familiar with Codes of Conduct which prohibit conflicts of
9 interest. Realtors also have a Code of Ethics and Standards.
10 The standard to be applied in bankruptcy is stricter than these
11 Codes as bankruptcy conflicts may not be waived by the client
12 upon disclosure.³¹

13 In struggling to apply this standard for conflicts three
14 camps have arisen: those courts which have delineated between
15 "potential" and "actual" conflicts, finding disqualification only
16
17
18

19 ²⁹(...continued)
20 1983).

21 ³⁰ In re TWI International, Inc v. Vanguard Oil and Service
22 Co., 162 B.R. 672, 675 (S.D.N.Y. 1994); In re Olsen Industries,
23 Inc., 222 B.R. 49, 56 (Bankr. D.Del. 1997); In re The Leslie Fay
Companies, 175 B.R. 525, 532 (Bankr. S.D.N.Y. 1994); In re Kelton
Motors, Inc., 109 B.R. 641, 650 (Bankr. D.Vt. 1989).

24 ³¹ The concept of waiver is difficult to apply "when the client,
25 the estate, is a fiduciary for another group, the creditor body; and
26 where the client's decisions with respect to retention of
professionals...are subject to review, notice, and hearing". In re
Diamond Mortgage Corp. of Illinois, 135 B.R. 78, 90 (Bankr. N.D.Ill.
1990).

1 with the latter,³² those courts which recognize the distinction
2 but have concluded that even "potential" conflicts are
3 disqualifying,³³ and those courts which refuse to recognize any
4 such a distinction.³⁴

5 More recently a few courts have recognized that this
6 debate "may be more semantic than substantive"³⁵ with the facts
7 of the particular case being determinative without the necessity
8 of labeling. "Rather than worry about the potential/actual
9 dichotomy it is more productive to ask whether a professional has

11 ³² In re Martin, 817 F.2d 175, 182 (1st Cir. 1987); In re
12 American Printers & Lithographers, Inc., 148 B.R. 862, 866 (Bankr.
13 N.D.Ill. 1992); In re Diamond Mortgage Corp of Illinois, 135 B.R.
14 78, 91 (Bankr. N.D.Ill. 1990); In re Stamford Color Photo, Inc., 98
15 B.R. 135, 137-38 (Bankr. D.Conn.1989); In re Waterfall Village of
16 Atlanta, Inc. 103 B.R. 340, 344 (Bankr. N.D.Ga. 1989). (An "actual"
17 conflict is the representation of "two presently competing and
adverse interests" while a "potential" conflict occurs where the
competition "may become active if certain contingencies arise"); In
re Oliver Stores, Inc., 79 B.R. 588 (Bankr. D.N.J. 1987); In re
Marine Power & Equip. Co., 67 B.R. 643, 653 (Bankr. W.D.Wash. 1986).

18 ³³ In re Bohack, 607 F.2d 258, 263 (2d Cir. 1979); In re
19 Philadelphia Athletic Club, Inc., 20 B.R. 328, 334 (E.D.Pa. 1982);
20 In re Watson, 94 B.R. 111, 116 (Bankr. S.D.Ohio 1988); In re Lee, 94
21 BR 172, 178 (Bankr. C.D.Cal. 1988); In re Parkway Calabasas, Ltd.,
89 BR 832 (Bankr. C.D.Cal. 1988); In re Glenn Elec.Sales Corp., 89
BR 410, 413 (Bankr. D.N.J. 1988), aff'd, 99 B.R. 596 (D.N.J. 1988);
In re Codesco, Inc., 18 B.R. 997, 999 (Bankr. S.D.N.Y. 1982).

22 ³⁴ In re Kendavis Industries, Inc., 91 B.R. 742, 744, 755-56
(Bankr. N.D.Tex. 1988).

23 ³⁵ In re The Leslie Fay Companies, 175 B.R. 525, 532 (Bankr.
24 S.D. N.Y. 1994); See also, In re BH & P Inc., 949 F.2d 1300, 1315
25 (3rd Cir. 1991) (the third circuit emphasizes the importance of taking
26 all the circumstances of a case into consideration); In re Granite
Partners, L.P., 219 B.R. 22 (Bankr. S.D.N.Y. 1998); But see §327(c)
which seems to recognize a distinction between a "potential" and
"actual" conflict.

1 'either a meaningful incentive to act contrary to the best
2 interests of the estate and its sundry creditors—an incentive
3 sufficient to place those parties at more than acceptable risk—or
4 the reasonable perception of one.'"³⁶

5 My review of the cases confirms Judge Brozman's
6 observation. The Martin court's test places the court's focus
7 where it should be: on identifying any "divided loyalties and
8 affected judgments"³⁷ under the particular facts.

9 Finally, Congress has found that within the bankruptcy
10 context one conflict of interest is sufficiently harmful to the
11 estate to criminalize. 18 U.S.C. § 154 states:

12 A person who, being a custodian, trustee, marshall,
13 or other officer of the court -
14 (1) knowingly purchases, directly or indirectly,
15 any property of the estate of which the person is
16 such an officer in a case under title 11;

17 * * *

18 shall be fined under this title and shall forfeit
19 the person's office, which shall thereupon become
20 vacant.

21 F. 11 U.S.C. § 328(c)

22 Unlike Section 327(a), Section 328(c) acts retrospectively
23 by authorizing the court to deny compensation for past services
24 for failing to satisfy the requirements of § 327(a). Appellate
25

26 ³⁶ In re The Leslie Fay Companies, 175 B.R. 525, 533 (Bankr.
S.D.N.Y. 1994) quoting In re Martin, 817 F.2d 175, 180-81 (1st Cir.
1987).

³⁷ In re Granite Partners L.P., 219 B.R. 22, 33 (Bankr. S.D.N.Y.
1998).

1 courts have held that an order allowing interim compensation is
2 not a final, appealable order.³⁸ Consequently, on that basis,
3 upon entry of a final compensation order the court may order
4 disgorgement of some or all of interim fees awarded.
5 Additionally, §328(c) gives the court a statutory basis for
6 exercising its discretion to deny fees already awarded, if
7 appropriate. It provides:

8 Except as provided in section 327(c), 327(e), or
9 1107(b) of this title, the court may deny allowance
10 of compensation for services and reimbursement of
11 expenses of a professional person employed under
12 section 327 or 1103 of this title, if, at any time
13 during such professional person's employment under
14 section 327 or 1103 or this title, such
15 professional person is not a disinterested person,
16 or represents or holds an interest adverse to the
17 interest of the estate with respect to the matter
18 on which such professional person is employed.

19 Courts generally agree that this subsection requires of
20 the professional continual scrutiny during service to assure
21 avoidance of a disqualifying interest. If the professional
22 initially qualifies to serve under § 327(a) but fails to remain
23 qualified, the court may deny fees.

24 How is § 328(c) to be applied where the professional,
25 although appointed, is later found to have been initially
26 unqualified? The two circuits which have directly addressed this
27 issue are split. In In re Federated Department Stores, Inc., the
28 Sixth Circuit held that a valid professional appointment under §

29 ³⁸ Spears v. United States Trustee, 26 F.3d 1023, 1024 (10th Cir.
30 1994); In re Westwood Shake & Shingle, Inc., 971 F.2d 387 (9th Cir.
31 1992).

1 327(a) is a prerequisite for any award of compensation under
2 either § 330 or § 328(c).³⁹

3 The professional fared better in the Seventh Circuit. It
4 had conceded that, although appointed, it was never
5 disinterested. The court interpreted "at any time
6 during...employment" in §328(c) to include the period of onset of
7 employment. Accordingly, "[i]f a bankruptcy court errs in
8 approving a professional person's employment, that person is
9 either 'not a disinterested person' or 'represents or holds an
10 interest adverse to the interest of the estate' for the entire
11 duration of that person's employment. Under the plain language
12 of the provision, §328(c) covers questions about whether this
13 erroneously employed professional merits compensation. Thus, a
14 bankruptcy court has discretion in denying that professional's
15 fees."⁴⁰

16 Believing that the Seventh Circuit's analysis more
17 accurately reflects the language and intent of §§ 327(a) and
18 328(c), this court will exercise its discretion to determine the
19 appropriateness of any sanction to be imposed under the section,
20
21
22

23 ³⁹ In re Federated Department Stores, Inc., 44 F.3d 1310, 1320
24 (6th Cir. 1995). See also, In re Mehdipour, 202 B.R. 474 (9th Cir.
25 BAP 1996); In re EWC, Inc., 138 B.R. 276, 282-83 (Bankr. W.D.Okla.
1992).

26 ⁴⁰ In re Crivello, 134 F.3d 831, 837 (7th Cir. 1998).

1 whether the appointed professional was never qualified or whether
2 it became disqualified after appointment.⁴¹

3 In exercising this discretion, which reflects the
4 permissive language of the section itself, courts generally have
5 rejected a brightline rule.⁴² Rather, the court balances many
6 factors, all of which arise from the circumstances of the
7 individual case. Factors to be considered include the extent of
8 any disclosures made at the time of appointment, whether any
9 failure to disclose was willful or innocent, the number of
10 disqualifying conflicts, and the benefit provided to the estate
11 by the services rendered. The court may not always be able to
12 determine the effect of the conflict on the results achieved or

14
15 ⁴¹ In In re Mehdipour, 202 B.R. 474, 478 (9th Cir. BAP 1996) our
16 circuit's bankruptcy appellate panel, in dicta, states "[T]he
17 bankruptcy court does not have authority to allow the employment of
a professional in violation of § 327, and the employment is void ab
initio". As the statement was dicta, this court respectfully
declines to follow it.

18 ⁴² Rome v. Braunstein, 19 F.3d 54, 62 (1st Cir. 1994); In re
19 Prince, 40 F.3d 356, 360 (11th Cir. 1994); Gray v. English, 30 F.3d
20 1319, 1323-24 (10th Cir. 1994); In re BH & P Inc., 949 F.2d 1300,
21 1315 (3rd Cir. 1991); In re Cook, 223 B.R. 782 (10th Cir. BAP 1998);
22 In re Garnite Partners L.P., 219 B.R. 22, 41 (Bankr. S.D.N.Y. 1998);
23 In re Rusty Jones, Inc., 134 B.R. 321, 346-47 (Bankr. N.D.Ill.
24 1991); In re Diamond Mortgage Corp., 135 B.R. 78, 96 (Bankr N.D.Ill.
25 1990); In re Kendavis Industrial Int'l Inc., 91 B.R. 742, 762
26 (Bankr. N.D.Tx. 1988); In re Roger J. Au & Son, Inc., 71 B.R. 238,
242-43 (Bankr. N.D. Ohio 1986); In re GHR Energy Corp., 60 B.R. 52,
68 (Bankr. S.D.Tex.1985); In re Roberts, 46 B.R. 815, 846-48 (Bankr.
D.Utah 1985), aff'd in relevant part and rev'd in part, 75 B.R. 402
(D.Utah 1987); But cf. In re Unicast, Inc., 214 B.R.979, 988 (Bankr.
N.D.Ohio 1997) (harm to the estate is irrelevant) and In re Chou Chen
Chems., Inc., 31 B.R. 842, 850-51 (Bankr. W.D.Ken.1983) (favoring
denial of all compensation if conflict exists, regardless of benefit
from services rendered).

1 the results which might have been achieved.⁴³ Under these
2 circumstances the court need not speculate as to the result of
3 the conflict.⁴⁴ Additionally, the court must be sensitive to
4 protecting the integrity of the bankruptcy process.

5 Two circuit courts, citing *Colliers on Bankruptcy* with
6 approval, have held that “[i]n the absence of actual injury or
7 prejudice to the debtor’s estate, this sanction [denial of fees]
8 should not be rigidly applied.” They concurred, however, that
9 “[i]n exercising the discretion granted by the statute we think
10 the [bankruptcy] court should lean strongly toward denial of
11 fees, and if the past benefit to the wrongdoer fiduciary can be
12 quantified, to require disgorgement of compensation previously
13 paid that fiduciary even before the conflict arose.⁴⁵

14
15 G. BANKRUPTCY RULE 2014(a)

16 This rule requires that any application to be employed
17 under § 327(a) be accompanied by a verified statement signed by
18 the person seeking employment “setting forth the person’s
19 connections with the debtor, creditors, any other party in
20 interest, their respective attorneys and accountants, the United
21 States trustee or any person employed in the office of the United
22

23 ⁴³ Rome v. Braunstein, 19 F.3d 54, 62 (1st Cir. 1994).

24 ⁴⁴ Id.

25 ⁴⁵ In re Prince, 40 F.3d, 356, 359 (11th Cir. 1994); Gray v.
26 English, 30 F.3d 1319, 1324 (10th Cir. 1994).

1 States trustee". The requirements of this rule are to be strictly
2 construed.⁴⁶

3 The precursor to this rule under the Bankruptcy Act was
4 General Order 44, which contained similar requirements. In
5 interpreting that Order the Ninth Circuit held that the applicant
6 has a duty to reveal all his connections with all parties in
7 interest. He has no right to withhold information because it does
8 not appear to him that there is a conflict.⁴⁷ Without doubt,
9 disclosure is compelled where the applicant had contemplated and
10 discussed a specific situation involving a potentiality for a
11 conflict.⁴⁸

12 Disclosure of relationships is crucial to the proper
13 functioning of the adversarial system. "...the American system is
14 one of adversarial justice, in which courts make clear and
15 comparatively simple choices between conflicting claims. The
16 adversary system requires as a minimum condition a clear
17 identification of the parties to a dispute...the conflict of
18 interest rule defines and protects the boundaries of competing
19 interests within the framework of any given litigation. Proper
20 judicial perspective may be gained only by knowing exactly where

22 ⁴⁶ Rome v. Braustein, 19 F.3d 54, 59 (1st Cir. 1994); In re
23 Arlan's Dep't Stores, Inc., 615 F.2d 925, 933 (2d Cir. 1979)
(decided under General Order 44).

24 ⁴⁷ In re Haldeman Pipe & Supply Company, 417 F.2d 1302 (9th Cir.
25 1969); In re Coastal Equities, Inc., 39 B.R. 304, 308 (Bankr.
S.D.Cal. 1984).

26 ⁴⁸ In re BH & P, Inc., 949 F.2d 1300, 1317 (3d Cir. 1991).

1 those boundaries lie. The [professional] working under the burden
2 of a conflict of interest does a disservice to his court and runs
3 the risk even of subverting the justice system. If a
4 [professional] holds himself out as representing one party, but
5 in reality represents another, either in addition to or instead
6 of his stated retainer, that [professional] distorts the judicial
7 perspective . . . Judges direct their thinking and frame their
8 decision along the lines presented to them, the only lines they
9 are allowed to know. If a conflict of interest exists a court
10 decision may impact in an unintended way or touch a party not
11 meant to be reached by the judicial hand."⁴⁹

12 In a case decided under the Code the Ninth Circuit
13 Bankruptcy Appellate Panel has held that so important is the duty
14 to disclose that the failure of the applicant to disclose
15 completely his connections is grounds for denial of compensation,
16 wholly apart from the act of representing conflicting interests.⁵⁰

17
18 Reading Bankruptcy Rule 2014(a) together with §§ 327(a)
19 and 328(c) it is evident that any fact in connection with a party

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21 ⁴⁹ In re Chou-Chen Chemicals, Inc., 31 B.R. 842, 851-853 (Bankr.
22 W.D.Ken. 1983).

23 ⁵⁰ In re Film Ventures International, Inc., 75 B.R. 250 (9th Cir.
24 BAP 1987); See also, Rome v. Braunstein, 19 F.3d 54, 59 (1st Cir.
25 1994); In re Futuronics Corp., 655 F.2d 463, 469 (2d. Cir. 1981); In
26 re Arlan's Dep't. Stores, Inc., 615 F.2d 925, 933 (2nd Cir. 1979);
In re the Leslie Fay Companies, Inc., 175 B.R. 525 (Bankr. S.D.N.Y.
1994); In re Granite Sheet Metal Works, Inc., 159 B.R. 840, 847
(Bankr. S.D.Ill. 1993); In re Environdyne Industries, Inc., 150 B.R.
1008, 1021 (Bankr. N.D.Ill. 1993).

1 in interest which would be relevant to the court's determination
2 of whether the professional had a conflict of interest must be
3 disclosed and that the duty to disclose continues beyond the
4 initial stage of application to employ.⁵¹

5 In conjunction with the appointed professional's ongoing
6 responsibility to remain free of conflicts while serving the
7 estate, Local Form 1114 of the United States Bankruptcy Court for
8 the District of Oregon requires that the professional file with
9 the court an amended verified statement at any time during the
10 service that his connections with the parties listed in
11 Bankruptcy Rule 2014(a) change.

12 Professionals acting on behalf of the estate are officers
13 of the court and fiduciaries. Failure to make disclosure of all
14 relationships constitutes a breach of fiduciary duty to the
15 court.⁵² If the professional is a corporation "[i]t is equally
16 apparent that in practice these fiduciary responsibilities fall
17 not upon the inanimate corporation, but upon the officers and
18 managing employees who must conduct the [corporation's] affairs

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20 ⁵¹ Rome v. Braunstein, 19 F.3d 54, 57-58 (1st Cir. 1994); In re
21 Granite Partners, L.P., 219 B.R. 22 (Bankr. S.D.N.Y. 1998); In re
22 Unitcast, Inc., 214 B.R. 979, 986 (Bankr. N.D. Ohio 1997). In re
23 Tinley Plaza Associates, L.P., 142 B.R. 272 (Bankr. N.D. Ill. 1992);
24 In re EWC Inc., 138 B.R. 276, 282 (Bankr. W.D. Okla. 1992); In re
25 Rusty Jones, Inc., 134 B.R. 321 (Bankr. N.D. Ill. 1991); In re
26 Diamond Mortgage Corporation of Illinois, 135 B.R. 78, 97 (Bankr.
N.D. Ill. 1990).

25 ⁵² In re Sunshine Pizza Exchange, Inc., No. 385-05356-S11, page
26 9 (Bankr. Dist. Or. Aug. 26, 1988); In re Roberts, 46 B.R. 815, 839
(Bankr. D. Utah 1985), aff'd in relevant party and rev'd in part, 75
B.R. 402 (D. Utah 1987).

1 under the surveillance of the court.⁵³ The professional remains
2 a fiduciary as long as it seeks compensation from the court.⁵⁴
3 The court has no duty to search the file to determine for itself
4 that a prospective professional is not involved in conflicts of
5 interest.⁵⁵ And it behooves the applicant naught that failure to
6 disclose arose from a good faith belief that a relationship did
7 not cause a conflict.⁵⁶ The "decision [whether to disclose]
8 should not be left to [the professional] whose judgment may be
9 clouded by the benefits of the potential employment."⁵⁷ It is the
10 court's responsibility to determine the nature of the applicant's
11 connections, after full disclosure.

12 As mentioned in the discussion involving § 328(c), a
13 minority of courts have held that if an initial conflict is
14 disclosed after the professional has been employed, the
15 professional's appointment is void and the court must disqualify
16 him and order disgorgement of any compensation granted during the
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20 ⁵³ Wolf v. Weinstein, 372 U.S. 633, 650 (1963).

21 ⁵⁴ In re Coastal Equities, Inc., 39 B.R. 304, 309 (Bankr.
22 S.D.Cal. 1984).

23 ⁵⁵ Wolf v. Weinstein, 372 U.S. 633, 650 (1963); In re Coastal
24 Equities, Inc., 39 B.R. 304, 309 (Bankr. S.D.Cal. 1984).

25 ⁵⁶ In re Glenn Electric Sales Corp., 99 B.R. 596, 600 (D.N.J.
26 1988).

⁵⁷ Rome v. Braunstein, 19 F.3d 54, 59 (1st Cir. 1994).

1 time the conflict existed.⁵⁸ For the reasons stated, this court
2 disagrees with this per se rule and will not apply it.

3 V. ANALYSIS

4 A. PRELIMINARY ISSUES OF AGENCY

5 Global contends, in part, that the UST and Committee's
6 concerns about any conflict of interest it is alleged to have had
7 are misguided as it never sought, nor has it had, any interest in
8 QVL, and its agents entered into their individual contractual
9 relationships with QVL after its agency agreement with Hood had
10 expired.

11 A corporation can act only through its agents. No
12 evidence has been presented to show that Messrs. Boyd, Anderson
13 and Young have not acted as Global's agents at all times before
14 this court. Through the activities of its agents after January
15 31 it held itself out as Hood's authorized representative. It is
16 a logical incongruity for Global now to make the argument that it
17 is not bound by the acts of its agents after January 31 while
18 simultaneously presenting itself to the court for approval, under
19 § 330, of a commission earned by the activities of those very
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25 ⁵⁸ In re Federated Department Stores, Inc., 44 F.3d 1310, 1320
26 (6th Cir. 1995); In re EWC, Inc., 138 B.R. 276, 282 (Bankr. W.D.Okla.
1992); In re Tinley Plaza Associates, L.P., 142 B.R. 272, 278
(Bankr. N.D.Ill. 1992).

1 agents, an important part of which took place after January 31.⁵⁹

2
3 Under Oregon law, a principal who receives the benefit of
4 its agent's acts is held to have ratified those acts.⁶⁰ Under
5 bankruptcy law, once appointed under § 327(a) Global and its
6 agents remained fiduciaries of the estate until allowance and
7 payment of its final fee request. The fee it receives is based
8 on the extent to which it can show that its activities, through
9 its agents, met the fiduciary standards elaborated under §§
10 327(a) and 328(c).

11 B. GLOBAL VIOLATED BANKRUPTCY RULE 2014(a)

12 Global had an initial and continuing duty, through its
13 Rule 2014(a) verified statement, to reveal all its connections
14 with all parties in interest.⁶¹ Although it filed a 2014 verified
15 statement when it applied to be appointed, it did not make all
16 the necessary disclosures, and it filed no further statements

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18
19
20 ⁵⁹ Global's inconsistency is highlighted by another argument it
21 makes in support of receipt of the commission, that but for the
agents' personal arrangements with QVL the sale of Hood's assets to
the Dimeling group would not have closed.

22 ⁶⁰ Bank of Oregon v. Highway Products, Inc., 598 P2d 318, 41 Or.
23 App. 223 (Or.App. 1979). "[Oregon] law applies because the authority
24 of an agent derives from state law"; Acton v. Merle Norman
25 Cosmetics, Inc., 163 F.3d 605, n.3 (9th Cir. 1998) citing Mallot &
26 Peterson v. Director, Office of Worker's Compensation Programs, 98
F.3d 1170, 1173, n.2 (9th Cir. 1996).

26 ⁶¹ In re Haldeman Pipe & Supply Company, 417 F.2d 1302, 1302
(9th Cir. 1969).

1 after its appointment although, as new connections developed,
2 updated statements should have been filed.

3 Initially it failed to disclose that under its operating
4 agreement, in place at the time of Hood's filing, it was Hood's
5 chief operating officer. In explaining this omission Global's
6 president, Mr. Boyd, testified that Global was given the title of
7 chief operating officer to allow it access to the Morgan
8 Company's financial records. He stated that despite the title,
9 Global did not, in fact, function as an officer of the Morgan
10 Company because "it was made very clear to [Global] at the
11 beginning of [the] relationship with Mr. Morgan that there was
12 only going to be one person making decisions [at the Morgan
13 Company] and that was Jim Morgan . . . When it came to the
14 bottom line Jim had the authority and he wasn't going to
15 relinquish it, and he made that real clear to everybody around."

16
17 Mr. Boyd's statement reveals the primary mistake which
18 Global made when it prepared its verified statement. It took
19 upon itself the responsibility of deciding whether an admitted
20 connection to a party in interest was of sufficient weight to
21 merit disclosure. By doing so it overthrew its own required
22 duty, that of full disclosure, and replaced it with one usurped
23 from the court, the responsibility for determining the importance
24 of the disclosed connections. In fact, Mr. Boyd's own testimony
25 revealed that Global was far more than an officer in name only.
26 It was just because of its position as "chief operating officer"

1 that it had access to all of Hood's financial records. In his
2 position as both Global's president and Hood's chief operating
3 officer, Mr. Boyd had day to day knowledge of Hood's operating
4 position. Indeed, Global had to have been actively involved in
5 running the company because its agent had to countersign all
6 Morgan Company/Hood checks over \$5000.

7 It failed to disclose that just three days before the
8 filing it was paid \$90,545 for an antecedent debt. At trial Mr.
9 Boyd explained that he did not include this information in
10 Global's statement because on August 7, 4 days before the filing
11 and a day before Global was paid, he had had a discussion with
12 Mr. Morgan and with Mr. Kennedy, Hood's attorney, during which he
13 was assured that there was no issue of a preferential transfer
14 because Hood was solvent.

15 By not disclosing this transfer Global again ignored its
16 own duty and usurped the court's. This nondisclosure was
17 particularly egregious in light of the fact that at the time it
18 filed its verified statement Global had just had a conversation
19 with Hood's principals which revealed that it was both familiar
20 with the concept of an avoidable transfer and concerned about it.

21 It initially failed to disclose the connections between
22 itself, Mr. Morgan and the law firm of DWT. The rule requires
23 that the applicant disclose all connections with all parties in
24 interest and their respective attorneys. DWT was representing it
25 at the time of filing, it had represented it when Global signed
26 its operating agreement with The Morgan Company, DWT was then

1 representing it in the Omak Wood Products Chapter 11 and in other
2 nonbankruptcy matters, and DWT had been Mr. Morgan's counsel and
3 would continue to represent him during Hood's bankruptcy
4 proceeding.⁶²

5 After Messrs. Anderson, Boyd and Young agreed to join QVL
6 as both shareholders and employees, it immediately should have
7 filed a supplemental 2014(a) statement with the court, providing
8 all the details of this arrangement and disclosing that prior to
9 closing its agents would be working for QVL. At that point,
10 given this development, the disclosure as to Mr. Young should
11 have included the fact that when he first approached Global his
12 interest was not in becoming a sales agent but in finding a
13 company in which he could have either an ownership or management
14 interest and that he had signed a confidentiality agreement with
15 Global indicating his interest as an acquirer of Hood's assets.
16 Global's supplemental statement also should have revealed that
17 during this period DWT would be representing QVL and Bogle and
18 Gates would be representing Anderson and Young individually.

19
20
21 ⁶² The Committee argues that because DWT wrote a letter to the
22 UST on March 22 in which it analyzed why Global should receive its
23 commission, DWT represented Global during the Hood bankruptcy.
24 However, Mr. Waggoner, a member of DWT and counsel for Mr. Morgan,
25 testified that he wrote that letter on behalf of QVL, not Global.
26 The court believes Mr. Waggoner in part because it recognizes that
QVL had economic reasons for wanting court approval of Global's
commission. Messrs Boyd, Anderson and Young intended to use their
share of the commission to contribute to QVL's capital account.
Absent evidence to the contrary the court concludes that DWT did not
represent Global in the Hood bankruptcy.

1 From the revelation as early as March 16 to Mr. Hamstreet
2 and Mr. Morgan that the three agents intended to join QVL it's
3 clear that Global did not intend to conceal this new
4 relationship. But that is not the point. Once its agents
5 decided to join QVL Global had a duty, under Rule 2014(a), to
6 file with the court a full disclosure of all aspects of this new
7 relationship. Executing this duty quickly and completely was
8 particularly crucial in light of Dimeling's condition that the
9 sale be approved through a plan of reorganization by June 1. The
10 complete details of the agents' personal arrangements with QVL
11 became available to the court and creditors in drips and drabs,
12 some being obtained only through discovery by the Committee.
13 Without full disclosure neither the court nor creditors had the
14 knowledge which was necessary to thoroughly analyze all aspects
15 of the proposed asset purchase in a timely manner.

16 It is irrelevant that Global may have failed in good faith
17 to make full disclosure, either upon appointment or subsequently.
18 It is the failure to disclose itself, not the state of mind of
19 the nondisclosing party, which denies the court and all parties
20 in interest the opportunity to review the connections with an eye
21 for conflicts of interest. For this alone the court may deny
22 compensation to Global.⁶³

23
24
25 ⁶³ In re Film Ventures International, Inc., 75 B.R. 250 (9th
26 Cir. BAP 1987).

1 The Committee asserts that when applying for appointment
2 initially Global had a duty under Rule 2014(a) to reveal that Mr.
3 Young contacted Global for the primary purpose of finding a
4 management or ownership position with another company. The court
5 disagrees. Bankruptcy Rule 2014(a) does not require of an
6 applicant a sweeping revelation of all facts about its business
7 affairs. Required disclosure is limited to connections with "the
8 debtor, creditors, any other party in interest, their respective
9 attorneys and accountants, the United States trustee, or any
10 person employed in the office of the United States trustee". The
11 circumstances of Mr. Young's initial business arrangement with
12 Global do not fall within the category of required disclosures at
13 that time.

14 C. GLOBAL WAS NOT DISINTERESTED WHEN APPOINTED UNDER § 327(a)

15 11 U.S.C. § 101(14) (D) states that a disinterested person
16 is one that "is not and was not, within two years before the date
17 of the filing of the petition, ...an officer... of the debtor...".
18 From February, 1997 up to the filing, Global's president, a
19 shareholder and its agent, Mr. Boyd, was Hood's chief operating
20 officer. For this reason alone Global was not disinterested.

21 11 U.S.C. § 101(14) (A) states that a disinterested person
22 is one that is not a creditor. The definition of "creditor" in
23 § 101(10) includes an entity "that has a claim against the estate
24 of a kind specified in section...502(h)" By inclusion of
25 reference to § 502(h), a "creditor" includes one who holds a
26 claim arising from recovery by the estate of property under §

1 550. Section 550(a) anticipates recovery by the estate of
2 properties under a number of Code sections, including § 547.

3 A "creditor" must hold a "claim", which is defined, in
4 part, under 11 U.S.C. § 101(5) as a "right to payment, whether or
5 not such right is reduced to judgment, liquidated, unliquidated,
6 fixed, contingent, matured, unmatured, disputed, undisputed,
7 legal, equitable, secured or unsecured;". A contingent claim is
8 one which the debtor will be called upon to pay only upon the
9 occurrence or happening of an extrinsic event which will trigger
10 the liability of the debtor to the alleged creditor.⁶⁴

11 Global was paid \$90,545 three days before the filing on
12 account of an antecedent debt. It's president, Mr. Boyd, thought
13 that this payment could be vulnerable to avoidance as a
14 preferential transfer under § 547. He was right. With
15 assurances from Hood's attorney of Hood's solvency he may have
16 concluded that any avoidance action brought against Global under
17 § 547 would be unsuccessful. Yet at the time Hood filed
18 bankruptcy Global remained exposed to the possibility of such an
19 action.⁶⁵ This being the case, Hood's payment to Global simply
20 changed its status from a creditor which held an undisputed,
21 liquidated claim to a creditor which held an undisputed,
22

23 ⁶⁴ Siegel v. Federal Home Loan Mortgage Corporation, 143 F.3d
24 525 (9th Cir.1998; In re Sylvester, 19 B.R. 671 (9th Cir. BAP 1982).

25 ⁶⁵ Hood's Chapter 11 history demonstrates that whether it was
26 solvent on filing was questionable and probably unknowable. Further,
11 U.S.C. § 547(f) presumes a debtor insolvent within 90 days of its
filing.

1 joint representation of both Global and Mr. Morgan, without more,
2 created an adverse interest.

3 E. AFTER APPOINTMENT GLOBAL DEVELOPED ADDITIONAL INTERESTS
4 ADVERSE TO THE ESTATE

5 The evidence indicates that during the latter part of 1997
6 Global's agents developed the idea that there was an opportunity
7 to sell more than one of the wood products businesses it was
8 marketing to one purchaser in a roll-up. They have testified
9 that they believed that the market at that time for such a sale
10 was potentially better than the market for selling any one of the
11 businesses. It goes without saying that a roll-up also would
12 generate more than one simultaneous commission.

13 After Dimeling, in early December, 1997, indicated an
14 interest in purchasing three of the companies, Global initiated
15 steps to assure its consummation. Mr. Young was put in charge of
16 preparing a combined company prospectus which Global sent to
17 Dimeling on February 25 after it had obtained a second signed
18 confidentiality agreement from it. Mr. Boyd later admitted that
19 at the time he sought the second signed confidentiality agreement
20 from Dimeling he had forgotten that Dimeling had signed one in
21 December.

22 Global was acting without authority from Hood after
23 January 31 and it did not communicate any information to Hood
24 about any of its continuing activities until one phone call from
25 Mr. Boyd to Mr. Hamstreet on February 10 of which Mr. Hamstreet
26 has no independent recollection. Mr. Boyd testified that during

1 that call, for unknown reasons, he did not tell Mr. Hamstreet
2 about the Dimeling contact although it was only a day after Mr.
3 Boyd had placed an important call to Mr. Dimeling during which
4 the latter indicated his continuing interest in a purchase.

5 Global did not send the required list to Hood of those
6 entities which had signed confidentiality agreements with it
7 until February 24. One of the purposes of the list was to
8 provide Hood with the names of those entities which had signed
9 confidentiality agreements with Global while operating as Hood's
10 agent so that Global would be assured of receiving a commission
11 for any ultimate sale to one of them. The list was inaccurate in
12 that it contained the names of some entities which had not signed
13 confidentiality agreements with Global until after January 31.
14 Another obvious purpose for providing the list to Hood was that
15 it would allow Hood, through another agent, to follow up on the
16 leads generated by Global. Not receiving this list until late
17 February put Hood and Hamstreet at a disadvantage in pursuing
18 leads.

19 All of these facts suggest to the court that after the
20 initial contact with Dimeling Global's agents, with either spoken
21 or unspoken intention, developed and worked toward three goals:
22 (1) to keep control of all aspects of the Dimeling opportunity;⁶⁶
23 (2) to assure, through that control, the ultimate purchase of the
24

25 ⁶⁶ This made sense if only for the reason that it continued in
26 its position as sales agent in the Omak Wood Products Chapter 11.

1 three roll-up companies; and (3) to earn the three commissions
2 related to that purchase. Unfortunately for Hood, because
3 Global had not informed it of any serious developments toward
4 identifying a purchaser and its funding bank was increasingly
5 unwilling to continue that role, on February 27 it obtained court
6 approval of a contract for a second sales agent which committed
7 it to payment of another commission. A little over two weeks
8 later Global's agents met with Mr. Morgan and Mr. Hamstreet and
9 announced that it had a likely purchaser of its assets but with
10 conditions. First, the sale had to be part of a roll-up.
11 Second, it had to be approved by the court through a plan of
12 reorganization by June 1 with closing by June 15. Third, the
13 ultimate purchaser insisted on including Messrs. Boyd, Anderson
14 and Young in its organization and they had accepted.⁶⁷

15 This situation put the estate in a very difficult
16 position. No one, outside Global, had had any time to acquire a
17 sense of the market for Hood's assets, either individually or as
18 part of a roll-up,⁶⁸ and, if Hood were interested in pursuing the
19 Dimeling offer, no one would have time to do so. No one

21 ⁶⁷ Interestingly, unbeknownst to everyone at that time, QVL had
22 already obtained an attorney, Mr. Waggoner of DWT, who attended that
23 meeting on its behalf, not on behalf of Mr. Morgan.

24 ⁶⁸ In his deposition Mr. Anderson later stated that Global had
25 never put a price on the assets but had stated a range in which it
26 thought they could be sold. This range started out at from \$25-30
million in August, 1997. Thereafter Hood incurred ongoing losses.
One plywood mill was separately sold for \$1,554,475. By February,
1998 Global thought the range was from \$18-\$20 million.

1 understood all the ramifications of Global's agents' acceptance
2 of positions with the purchaser and might not prior to the sales'
3 closing.

4 At that point the estate could be assured that its welfare
5 was being fully heeded only if Global had been consistently
6 providing, and would continue to provide, loyal and disinterested
7 service to Hood as long as it was an officer of the court. The
8 evidence later showed that, on the contrary, it was subject to
9 significant conflicting interests. The monetary incentive to
10 close the roll-up, alone, could have created divided loyalties.
11 But there is no question that once the three agents became both
12 owners and managers of QVL, Global could not act without bias
13 against the estate. This bias could evidence itself in a number
14 of ways.

15 With that decision the agents' monetary incentives to see
16 the Dimeling deal closed increased substantially. Besides
17 receiving the commissions, they would obtain lucrative management
18 positions with QVL. They intended to use the commissions to
19 partially fund their equity interests in QVL.

20 Mr. Boyd, having been Hood's chief operating officer, was
21 in a position to share with Dimeling every detail of its
22 operations while not sharing it with any other interested
23 purchasers.

24 The Committee correctly points out that the price for
25 Hood's assets could have been negatively affected by the fact
26 that the agents' annual incentive pay from QVL, which could be

1 considerable and which they planned to use toward their note
2 payments for their equity interests, would decrease QVL's income
3 stream from the purchased assets.

4 Under the Asset Sale and Purchase Agreement QVL's
5 principals must determine how much of the \$1 million holdback
6 from the purchase price it will claim for the costs of
7 remediation. Principals of QVL include Messrs. Boyd, Anderson
8 and Young. It is in Hood's interest that the holdback be minimal
9 while in the interest of QVL that it be maximized.

10 There is other evidence of divided loyalties. Mr. Young
11 testified that shortly after the three agents decided to join QVL
12 he began to assist it in its due diligence. On March 23 he signed
13 a letter sent to the Committee as President of QVL in which he
14 conditioned the Dimeling purchase on receipt of Global's
15 commission from the estate.

16 Hood's first plan of reorganization, filed with the court
17 on January 15, 1998, before Dimeling made its purchase offer,
18 contained no provision in which Hood waived any avoidance claims
19 it held. Its second plan, which contained the Dimeling Asset
20 Sale and Purchase Agreement, contained this provision. The
21 importance of this change surfaced when it was later disclosed
22 that Global had received a \$90,545 payment for past services just
23 three days before Hood's filing.

24 Dimeling's first Asset Sale and Purchase Agreement filed
25 with the court bound it to pay Global's commission. Two weeks
26

1 later the parties amended the agreement to eliminate that
2 commitment.

3 At a minimum, after its appointment Global developed an
4 interest adverse to the estate through the conflicts created when
5 Messrs Boyd, Anderson and Young accepted management and ownership
6 positions in the purchaser of Hood's assets, QVL. F. REMEDY

7 Global argues that the sale to Dimeling would not have
8 closed had its three agents, who had the management skills QVL
9 needed, not accepted the offer of management and ownership in the
10 purchaser. The sale significantly benefited the estate and
11 Global should receive its commission.

12 Dimeling made its management and ownership offer to two
13 other men besides Messrs. Boyd, Anderson and Young. These men
14 were skilled in the wood products business and associated with
15 Mayr and Omak. No one will know whether the roll-up sale would
16 have closed if the three Global agents had not accepted
17 Dimeling's offer.

18 There is no question that the sale benefited the estate,
19 as well as Mr. Morgan individually, who had personally guaranteed
20 a portion of its indebtedness. The sale proceeds paid the
21 secured creditors, all administrative and priority claims and
22 will pay a small portion toward the general unsecured debt.

23 There is also no question that Global failed to provide
24 initial and subsequent full disclosure under Bankruptcy Rule
25 2014(a), was not disinterested and held an interest adverse to
26 the estate when appointed, in violation of § 327(a), and

1 developed further interests adverse to the estate after being
2 appointed, in violation of § 328(c).

3 Despite these Code and rule violations, applying the legal
4 standards which this court has adopted, it has discretion, under
5 all the facts and circumstances, to determine an appropriate
6 allowance under § 330. Whether the fiduciary's activity has
7 provided a benefit to the estate is only one factor which it must
8 weigh in determining the appropriate allowance. Other factors it
9 should consider include the extent of any failure to provide
10 required disclosures and its potential impact on the estate,
11 whether any failure was willful or innocent and the number and
12 seriousness of any disqualifying conflicts.

13 Once a conflict has been identified, neither the court
14 nor the interested parties to the estate need identify the extent
15 of any damage it actually caused the estate.

16 "[T]he incidence of a particular conflict of
17 interest can seldom be measured with any degree of
18 certainty. The bankruptcy court need not speculate
19 as to whether the result of the conflict was to
20 delay action where speed was essential, to close
21 the record of past transactions where publicity and
22 investigation were needed, to compromise claims by
23 inattention where vigilant assertion was necessary,
24 or otherwise to dilute the undivided loyalty owed
25 to those whom the claimant purported to
26 represent."⁶⁹

22 Under all the facts and circumstances the court has
23 determined that it must deny Global's request for allowance of
24

25 ⁶⁹ Woods v. City Nat. Bank & Trust Co. of Chicago, 312 U.S. 262,
26 268 (1941).

1 the commission arising from the sale of Hood's assets to
2 Dimeling. Although there were several Code and rule violations
3 which, when viewed whole, dictate this outcome, two violations
4 cry out for more comment.

5 The conflict which Global developed when its agents
6 accepted QVL's management and ownership offers was grave. It
7 placed the estate and its creditors at an unacceptable risk that
8 their best interests would become of secondary importance. From
9 and after that date Global, through its agents, acted for both
10 the buyer and the seller. The seriousness of this conflict when
11 the estate fiduciary, as here, has purchased an interest in
12 estate assets, is reflected by the content of 18 U.S.C. § 154.⁷⁰

13
14 Global might argue that the broker's commission was
15 approved, under similar facts, in In re Mehdipour.⁷¹ The facts
16 of that case are distinguishable. The court had no issues of
17 nondisclosure before it. There was no question but that the
18 broker was disinterested and held no interest adverse to the
19 estate when its agent found the purchaser. The agent did not
20 obtain either an ownership or employment interest in the asset.
21 The asset sale was shown to have been for fair market value and

22
23
24 ⁷⁰ Under Ninth Circuit case law Global was an officer of the
25 court. 18 U.S.C. § 154 criminalizes the activity of an officer of
the court who knowingly purchases any property of the estate.

26 ⁷¹ 202 B.R 474 (9th Cir. BAP 1996).

1 resulted in payment of either all or almost all of the estate's
2 indebtedness.

3 It is true that the estate has received benefit from the
4 funds off the Dimeling sale. But this court cannot say, given
5 the circumstances, that the estate did not suffer actual injury
6 or prejudice because neither it nor the creditors knows whether,
7 under the circumstances, the estate obtained the maximum value
8 possible in the market for its assets. Further, the estate is
9 paying Mr. Hamstreet under his own sales agency agreement. As he
10 is also providing services as disbursing agent under the same
11 agreement it is impossible for the court to know whether, or to
12 what extent, the estate has incurred additional expense because
13 of Global's failure to keep Hood fully informed of its ongoing
14 negotiations with Dimeling.⁷²

15 Second, it appears that Global might well have received an
16 avoidable payment in the amount of \$90,545. Failure to disclose
17 this transfer, which Global had identified as potentially
18 avoidable before it filed its 2014(a) statement with the court,
19 was egregious. That there may have been an intentional attempt
20 to assure the finality of this transfer through silence is
21 supported by the fact that Hood's plan was changed, after the
22 Dimeling offer was presented to the court, to waive the estate's

23
24 ⁷² Any possibility that Hood may not have incurred additional
25 expense from what appears now to be the unnecessary retention of Mr.
26 Hamstreet as sales agent arises from no act of Global's but from Mr.
Hamstreet's waiver of any fees he might otherwise have been entitled
to as disbursing agent under the confirmed plan.

1 avoidance claims. The court does not believe was a coincidence.⁷³

2
3 Although in our circuit, failure to provide full
4 disclosure under Rule 2014(a) is in itself a basis for denial of
5 requested fees or commissions, this court will not require Global
6 to disgorge the commission it earned from the sale of the North
7 Santiam Plywood Mill to Freres Lumber Company. That sale
8 benefited the estate and Freres signed a confidentiality
9 agreement with Global prior to January 31, 1998. Although, at
10 the time of that sale Global was not disinterested and, being a
11 creditor, held an interest adverse to the estate, Global had no
12 conflict of interest as to that purchaser and had no incentive,
13 as to that property, other than to obtain the highest and best
14 price available for the estate.

15 Finally, because the estate received benefit from the
16 Dimeling purchase and should not obtain a windfall, it should be
17 required to reimburse Global and its agents for the direct
18 marketing expenses incurred during the six month period it was
19 authorized to act on Hood's behalf. Global should prepare and
20 file with the court, with service on Hood, the UST and the

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23
24 ⁷³ The court recognizes that Hood's representatives probably
25 played a role in this concealment as, despite knowing of the
26 presumption of insolvency in § 547, and knowing of its lack of
financial records, they insisted Hood was solvent upon filing and
later agreed to the changed plan language to waive its avoidance
claims.

1 Committee, an itemized statement of those expenses, by date
2 incurred.

3 This memorandum opinion contains the court's findings of
4 fact and conclusions of law and pursuant to Fed. R. Bankr. P.
5 7052, and they will not be separately stated.

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8 Polly S. Higdon
9 Chief Bankruptcy Judge
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