UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

NORTHEAST FOOD MANAGEMENT	CASE NO. 93-61100
Debtor	Chapter 11

IN RE:

METT MANAGEMENT	CASE NO. 93-61099
Debtor	Chapter 11

APPEARANCES:

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The Court considers herein Fee Applications filed by David Shockey, Esq. ("Shockey") in both of these Chapter 11 cases. Because the issues raised by these Fee Applications are common to both Chapter 11 cases, the Court will issue a joint decision and order.

Motions for approval of the Fee Applications were both

filed with this Court on December 30, 1994 and initially appeared on the Court's calendar at Syracuse, New York on February 7, 1995. The motions were thereafter consensually adjourned and finally heard at a motion term of the Court held on March 21, 1995.

The Fee Application filed in the Northeast Food Management Inc. case ("Northeast Application") covers the period March 31, 1993 through June 15, 1994 and seeks a fee of $5,204.25, plus reimbursement of expenses in the sum of $638.00 for Pelland & Shockey ("P&S") as well as a fee of $2,227.50, plus reimbursement of expenses of $231.80 for David Shockey ("DS"). [1] The Fee Application filed in the Mett Management Inc. case ("Mett") covers the period generally from March 31, 1993 through December 21, 1994 and seeks a fee of $4,394.25, plus reimbursement of expenses in the sum of $629.39 for P&S, as well as a fee of $1,120.50 plus reimbursement of expenses in the sum of $189.64 for DS.[2] Both Fee Applications have been objected to by the United States Trustee ("UST") and the Trustee in the bankruptcy estate of a creditor, Paul Curtis, M.D. ("Curtis Trustee")

JURISDICTIONAL STATEMENT

The Court has core jurisdictions of these contested

[1] P&S was appointed as counsel to Northeast by Order dated May 11, 1993, said appointment being effective on April 9, 1993. Thereafter, DS was appointed as substitute counsel for P&S pursuant to an Order dated September 16, 1994, effective August 29, 1994.

[2] P&S was appointed counsel to Mett by Order dated May 11, 1993, said appointment being effective April 9, 1993. Thereafter, DS was appointed as substitute counsel for P&S pursuant to an Order dated September 16, 1994, effective August 29, 1994.

matters pursuant to 28 U.S.C. §§1334(a) and 157(a), (b)(1), (b)(2)(A) and (B).

FACTS

Northeast filed a voluntary petition pursuant to Chapter 11 of the Bankruptcy Code (11 U.S.C. §§101-1330) ("Code") on April 8, 1993, while Mett filed a similar petition on the same date. P&S received a pre-petition retainer in both cases of $2,000. (See Affidavits of David Pelland ("Pelland") filed in both cases sworn to April 7, 1993.) It appears that at some point, post-petition, P&S apparently received the additional fee of $2,300 in each case "toward legal services" (See Applications of DS filed in each case and dated December 21, 1994).

There is no record of any fee applications having been filed by P&S or DS in these cases other than those presently before the Court and, therefore, it would appear that any sums received by P&S or DS subsequent to April 8, 1993 in connection with these cases were received in the absence of an order of this Court.[3]

Both Debtors operate fast food outlets in the Upstate New York area and a plan of reorganization filed by Northeast was confirmed by an Order of this Court dated January 4, 1995. To date Mett has been unable to confirm a Chapter 11 plan. The Fee Applications appear to divide the billable hours of P&S and DS

[3] DS asserts, in the Applications dated December 21, 1994, that all prior fees paid to DS or P&S, in connection with these cases, were paid by Jack Hasselwander, Thomas Swartz and Jreck Subs, Inc., not by the Debtors.

equally between the Chapter 11 cases.

In the respective applications for appointment of P&S and DS, in each case, there was no disclosure that the applicants simultaneously represented a creditor of either Chapter 11 Debtor or any other party in interest. Prior to May 17, 1994, P&S also represented Lox, Stocks & Bagels of Liverpool, Inc. ("Lox") which corporation also filed a voluntary petition pursuant to Chapter 11 in this Court on October 7, 1993. Subsequently, P&S was replaced in that case by other counsel and Lox's plan of reorganization, was confirmed by Order dated February 10, 1995.

ARGUMENTS

The UST objects to the Fee Applications in their entirety on the ground P&S's initial applications for appointment as counsel to both Debtors failed to disclose that it was simultaneously representing creditors of that Debtor. Specifically, the UST contends that in seeking appointment as counsel to Northeast, P&S did not disclose the fact that Mett, for which it sought appointment simultaneously, held a pre-petition claim of $48,000.00 against Northeast. Additionally, the UST alleges that Northeast held a pre-petition claim of $148,000.00 against Lox and that it is apparent that P&S did not assert or pursue either of these claims in the respective Chapter 11 cases of Northeast and Lox, thus, allowing both cases to proceed to confirmation without properly treating those claims.

The Curtis Trustee has filed similar objections to the

Fee Applications also contending that P&S, and presumably DS, suffer "from hopelessly intertwined conflicts of interest with related corporations and the principals of the debtor". (See Objections of David P. Antonucci, Esq. dated January 11, 1995.)

DS responds to the Objections of the UST and the Curtis Trustee contending somewhat disingenuosly that P&S was never actually appointed as counsel to Lox, though acknowledging that it did perform certain services for Lox in connection with its bankruptcy case. Further, DS argues that he has been informed by Pelland, a former member of P&S, who was "initially involved" with these three Debtors' estates that at the meeting of creditors held in each of these cases, a representative of the UST was well aware of the potential conflicts inherent in P&S's representation of all three Debtors and, in fact, provided Pelland with guidance as to how P&S might obtain an order of appointment as counsel to Lox. DS asserts that upon information and belief the issue of potential conflicts also arose at the time of the hearing on the disclosure statements and plans in these cases.

With regard to the criticism that neither P&S or DS has filed proofs of claim for Mett in the Northeast case nor for Northeast in the Lox case, allegedly due to their simultaneous representation of all three Chapter 11 Debtors, DS argues that neither he nor P&S were ever expressly directed to file claims, and that if need be such proofs of claim could be still be filed pursuant to Federal Rules of Bankruptcy Procedure ("Fed.R.Bankr.P.") 8003(c)(3).

Finally, DS opines that even if Northeast filed a claim

in the Lox case, any additional monies recovered now, post-confirmation, "would not necessarily benefit the unsecured creditors". (See Affidavit of DS sworn to February 14, 1995, ¶ 3).

DISCUSSION

The UST argues consistently that a failure to disclose in violation of Code §327(a) and Fed.R.Bankr.P. 2014 in and of itself justifies a sanction or fee denial. It relies primarily upon the cases of In re Tinley Plaza Assocs. L.P., 142 B.R. 272, 278 (Bankr. N.D.Ill. 1992), and In re EWC Inc., 138 B.R. 276 (Bankr. W.D.Okla. 1992). See also Rome v. Braunstein, 19 F.3d 54 (1st Cir 1994). Additionally, the UST points to an actual conflict of interest here, in that if P&S and DS properly represented Mett, they should have aggressively pursued its claim of $48,000.00 against Northeast. Conversely, in representing Northeast they would be charged with the duty of objecting to the Mett claim. Carrying the web of conflict a step further, the UST contends that if Northeast pursued its alleged claim versus Lox and recovered thereon, it would directly inure to the benefit of Northeast creditors, one of which was Mett.

Examining the failure to disclose argument of the UST, the Court notes that it recently discussed the identical issue in an unpublished decision, In re Eagle Rock Dairys Inc. (In re William Michael Bargabos and Christine D. Bargabos) (Case No. 92-63813, May 9, 1995). In that decision, the Court concluded that it "is not of the opinion that the failure to disclose standing alone

mandates fee denial and fee disgorgement". To the contrary, "This Court believes that non-disclosure brings upon the non-complying professional a full and complete inquiry by a bankruptcy court aimed at determining why full disclosure was not made and whether or not the professional had a conflict of interest which would have otherwise been obvious had full disclosure been made." Id at pages 10-11. See also In re Leslie Fay Companies, Inc., 175 B.R. 525 (Bankr. S.D.N.Y. 1994).

The Court concludes that an actual conflict of interest emanates from P&S's dual representation of these two Chapter 11 Debtors and carries over to P&S's prior representation of Lox, even though it was never actually appointed as that Debtor's counsel by an order of this Court.

The Court further finds unpersuasive the explanations provided in the Supplemental Affidavits of DS, even assuming that those explanations insofar as they assert full knowledge by and concurrence of the UST, are accurate. Conflicts of interest which result in real harm to the creditors of a particular bankruptcy estate are not waivable nor are they cured by the simple passage of time. See In re Global Marine Inc., 108 B.R. 998, 1004 (Bankr. S.D.Tex 1987). Further, it is the Court to whom potential conflicts must be revealed, since it is the Court which must rule upon the professional eligibility for appointment. See In re B.E.T. Genetics, Inc., B.R. 269, 273 (Bankr. E.D.Cal. 1983)

The Court does express one concern, and that is what knowledge can be charged DS when he was substituted for P&S some sixteen months into the cases; however, DS has provided no

explanation to this Court which would suggest any conclusion other than that he was fully aware of facts giving rise to the conflict, at the time of P&S's initial appointments.

Having considered all of the facts and circumstances presented by these contested matters, the Court concludes that the present Fee Applications should be denied in their entirety. The Court will not, however, require the disgorgement of the initial pre-petition retainers of $2,000.00 paid to P&S in each case. Any additional fees paid to P&S or DS in either of these cases for legal services or disbursements shall, however, be disgorged and paid over to the UST within forty-five days of the date of this order, unless within that time the Court is presented with proof that the source of those additional fees and disbursements was not property of the Debtors' estates.

IT IS SO ORDERED.

Dated at Utica, New York
this day of 1995

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STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge