UNITED STATES BANKRUPTCY COURT SOUTHERN DISTRICT OF NEW YORK		HEARING DATE: To be announced
In re:	:	
	:	Chapter 11
GENERAL GROWTH PROPERTIES, INC., *et al.*,	:	Case No. 09-11977 (ALG)
Debtors.	:	(Jointly administered)

THE UNITED STATES TRUSTEE'S: (A) OBJECTION TO THE DEBTORS' APPLICATION TO EMPLOY KIRKLAND & ELLIS LLP AS CO-COUNSEL FOR THE DEBTORS AND (B) RESPONSE TO THE DEBTORS' APPLICATION TO RETAIN WEIL, GOTSHAL & MANGES LLP AS COUNSEL FOR THE DEBTORS

**TO: THE HONORABLE ALLAN L. GROPPER,
UNITED STATES BANKRUPTCY JUDGE:**

Diana G. Adams, as the United States Trustee for Region 2 (the "United States Trustee"), (a) objects to the application of South Street Seaport Limited Partnership, its ultimate parent, General Growth Properties, Inc. ("GGP"), and their debtor affiliates, as debtors and debtors in possession (collectively, "General Growth" or the "Debtors") for the entry of an Order Authorizing the Employment and Retention of Kirkland & Ellis LLP ("K&E") as Co-Counsel for the Debtors (the "K&E Application") and (b) responds to the application of the Debtors to retain Weil, Gotshal & Manges ("WG&M," with WG&M and K&E, collectively the "Firms") as Counsel for the Debtors (the "WG&M Application").

I. INTRODUCTION

The United States Trustee objects to the proposed retention of K&E as co-counsel to represent all but six of the Debtors in these cases. Although the retention of co-counsel is not precluded by the Bankruptcy Code, this arrangement is generally disfavored in the Southern District of New York. Simply put, the risk of excessive and duplicative services that necessarily

follow in the wake of a co-counsel retention exponentially increases the costs of administering bankruptcy estates. While the United States Trustee does not doubt the good faith of both counsel in allocating duties in order to minimize the additional costs to the estate, a complete division of duties is simply not practical. Despite best efforts, there will necessarily be attorneys from both firms reading the same exact documents and attending the same hearings and meetings in order to perform their "separate" duties.

This does not appear to be the extraordinary case in which the increased costs of administering the bankruptcy estate can be justified. Absent any disqualifying conflicts, each firm appears to be equally capable with the skill, expertise, and staffing to handle the issues that will arise, and neither firm appears to have a very specialized substantive knowledge of an area of the law that the other firm lacks for the purposes of these cases. Accordingly, while the retention of co-counsel may be permissible under section 327(a) of the Bankruptcy Code, the facts here do not appear to warrant such dual retention.

To the extent that the Court finds that co-counsel may be appropriate in this case, K&E may not be retained by the Debtors under section 327(a), as it has two disqualifying conflicts. First, K&E is currently representing the plaintiffs in an action where four of the Debtors are being sued. As a result, even K&E acknowledges that it cannot be retained by those four debtors as well as two additional debtors. Second, an attorney who is of counsel to K&E represents an entity involved in an appeal against two adversaries that include two of the Debtor entities. K&E holds an interest adverse to the Debtors and is not disinterested, and, therefore, cannot be retained under section 327(a).

II. FACTS

A. Background

1. On April 16, 2009 (the "Petition Date"), General Growth and approximately 359 of its affiliates filed voluntary cases under Chapter 11 of the Bankruptcy Code. Since the Petition Date, approximately 28 other affiliates of General Growth have filed for relief under Chapter 11 of the Bankruptcy Code. By order signed on April 16, 2009, the Court authorized the joint administration of the Debtors' cases. *See* ECF Doc. No. 35.

2. The Debtors continue to operate and manage their businesses and properties as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

3. The Debtors "comprise one of the largest shopping center REITs in the United States, measured by the number of shopping centers" the Debtors manage. *See* WG&M Application at ¶ 2; K&E Application at ¶ 2. The Debtors also own and develop "large-scale, long-term master planned communities" in the United States, and own "non-controlling interests in two international joint ventures that own shopping centers in Brazil and Turkey." *See id.*, at ¶¶ 5, 7; *see also* K&E Application at ¶ 4.

4. James Mesterharm, a managing director of AlixPartners LLP, prepared the Debtors' Affidavit Under Local Rule 1007-2 (the "Local Rule Affidavit"). *See* ECF Doc. 13. As of December 31, 2008, the GGP Group as a whole reported approximately $29.6 billion in total assets and approximately $27.3 billion in total liabilities (including the GGP Group's proportionate share of joint venture indebtedness). Of the $27.3 billion in total liabilities, $24.85 billion represents the aggregate consolidated outstanding indebtedness of consolidated entities, which includes $6.58 billion in unsecured, recourse indebtedness and $18.27 billion in debt

secured by properties. For 2008, the GGP Group reported consolidated revenues of approximately $3.4 billion. *See* Local Rule Affidavit at ¶ 14.

5. On April 24, 2009, the United States Trustee appointed an Official Committee of Unsecured Creditors (the "Committee") in these cases. *See* ECF Doc. No. 136. On May 6, 2009, the United States Trustee amended the Committee appointment to add two members. *See* ECF Doc. No. 390.

B. The K&E Application

6. On the Petition Date, the Debtors filed an Application seeking to retain K&E as co-bankruptcy counsel, accompanied by the Declaration of James H.M. Sprayregen, P.C., in Support of the Application (the "Sprayregen Decl.") and an engagement letter between the Debtors and K&E dated December 28, 2008 (the "Engagement Letter"). *See* ECF Doc. No. 22, Exhibit C.

1) Scope of Services

7. Pursuant to the K&E Application, the Debtors seek to retain K&E to provide legal services, including advice concerning (a) filing and corporate governance issues with respect to certain subsidiaries; (b) matters related to the Debtors' international affiliates; (c) transactional work related to project level assets, including the potential sale thereof; (d) restructuring matters for certain mortgage level debt; and (e) the plan of reorganization relating to project level issues and mortgage level indebtedness. *See* K&E Application at ¶ 19.

8. In furtherance of the services set forth above, K&E seeks to be authorized to (a) advise the Debtors with respect to their powers and duties as debtors in possession in the continued management and operation of their businesses and properties; (b) prepare pleadings beneficial to the administration of the Debtors' estates; (c) appear before the Court and any

appellate courts in connection with the services rendered; and (d) perform all other legal services reasonably necessary or otherwise beneficial for the Debtors in connection with the prosecution of these Chapter 11 cases. *See id*. at ¶ 20.

2) Conflicts

9. The K&E Application reveals that four of the Debtors, including the lead Debtor in these cases, General Growth Properties, Inc., are defendants in a civil lawsuit in a Cook County, Illinois state court, captioned *Ctr. Partners, Ltd., et. al v. Urban Shopping Ctrs., L.P. et. al.*, Case No. 04 L 012194 (Il. Cir. Ct.) (the "State Court Litigation"), in which K&E represents the plaintiffs. K&E admits that it is "adverse" to certain of the Debtors (the four Debtors involved in the State Court Litigation shall hereinafter be referred to as the "Debtor Defendants").[1] *See* K&E Application, at ¶ 22. Two additional Debtors (the "Specified Debtors") are direct or indirect owners or subsidiaries of the Debtor Defendants.[2] *Id.* at ¶ 23, n.5.

10. K&E states that it does not and will not represent, as bankruptcy counsel, the Specified Debtors or the Debtor Defendants in these cases. *Id.* at ¶ 23. As described more fully below, WG&M seeks to be sole bankruptcy counsel for these six Debtors.

11. The Sprayregen Declaration states that the Debtors have consented to K&E's continued representation of the plaintiffs in the State Court Litigation on the terms set forth in the Engagement Letter. *Id*. at ¶ 31. The Sprayregen Declaration also states that the four Debtor Defendants and the two Specified Debtor subsidiaries have not hired K&E in these cases, and

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[1] The Debtor Defendants are Rouse LLC, The Rouse Company, L.P., GGP LP, and General Growth Properties, Inc. *See* K&E Application at ¶ 22.

[2] The Specified Debtors are Rouse Company Operating Partnership, LP and The Rouse Company BT, LLC. *Id*. at ¶ 23, n. 5.

that WG&M will serve as exclusive bankruptcy counsel to those six Debtors. *Id*.

12. In the Engagement Letter, K&E acknowledged that K&E's client in the State Court Litigation "is directly adverse to" the Debtor Defendants and the Specified Debtors. *See* Engagement Letter at 4. A copy of the Engagement Letter is attached as Exhibit A.

13. In addition, K&E explained that "Kenneth Starr, who is Of Counsel" to K&E, is providing an entity known as Caruso Affiliated Holdings ("Caruso") advice in connection with an ongoing appeal in which GGP and GGP/Homart II L.L.C. are adverse to Caruso (the "Caruso Matter"). *Id.*

3) Professional Compensation

14. The Sprayregen Declaration states that K&E will apply for compensation in accordance with the Bankruptcy Code, Bankruptcy Rules, Local Bankruptcy Rules and United States Trustee Guidelines. *See* Sprayregen Decl., at ¶ 12.

15. According to the Sprayregen Declaration, K&E's top billing rate for partners and counsel is $965 per hour. *Id*. at ¶ 15.

16. There is no disclosure in the Sprayregan Declaration that K&E will notify the Court, this Office and any official committees appointed in this case, in writing, of any change in the hourly rates charged by K&E for services rendered during this engagement.

4) K&E's Retainer

17. The Sprayregen Declaration discloses that on January 13, 2009, K&E received a classic retainer from the Debtors in the amount of $500,000. *Id*. at ¶¶ 9, 10. That classic retainer was "replenished" seven times prior to the Petition Date and increased five times prior to the Petition Date. *Id*. at ¶ 10. In total, K&E received in excess of $5 million for pre-petition

services to the Debtors. *Id*.

18. The Sprayregen Declaration discloses that the Debtors do not owe K&E any amounts for legal services rendered before the Petition Date. *Id*. at ¶ 11.

C. The WG&M Application

19. On the Petition Date, the Debtors also filed an Application seeking to retain WG&M as co-bankruptcy counsel, accompanied by the Affidavit of Gary T. Holtzer in Support of the WG&M Application (the "Holtzer Aff."). *See* ECF Doc. No. 21. WG&M was retained by the Debtors in late December 2008. *See* WG&M Application at ¶ 12.

1) Scope of Services

20. Pursuant to the Application, the Debtors seek to retain WG&M to provide legal services, including advice concerning (1) obtaining "first day" relief, (2) negotiating with the Debtors' debt and equity holders, (3) "various project level restructuring matters," and (4) developing the Debtors' plan of reorganization, "including confirmation matters and related litigation" *See* WG&M Application at ¶ 17. The WG&M Application notes, however, that the Debtors reserve the right to amend WG&M's duties in this case. *Id.* at ¶ 16, n.4. WG&M also seeks approval to provide these services to the two Specified Debtors and the four Debtor Defendants. *Id.* at ¶ 17.

21. According to the WG&M Application, the Debtors, the Specified Debtors and the Debtor Defendants have entered into a common interest agreement (the "Common Interest Agreement") which allows both K&E and WG&M to perform their respective duties in these cases, "without compromising client confidentiality or privilege." *See* WG&M Application, at ¶

16, n.3. [3]

2) WG&M Disclosures

22. According to the Holtzer Affidavit, WG&M's internal conflicts check has indicated that "no WG&M personnel or member of the household of any WG&M personnel holds any claims against, stock of, or other interests in any of the Debtors and that no such individuals were ever employed by any of the Debtors." *See* Holtzer Aff. at ¶ 6.

23. The Holtzer Affidavit discloses that WG&M currently represents a number of the Debtors' secured creditors, unsecured creditors, and tenants, in "matters unrelated to the Debtors" (collectively, the "Current Clients"). *Id*. at ¶ 9, Ex. 2. According to the Holtzer Affidavit, over the past twelve months, WG&M's representation of four of the Current Clients accounted for greater than 1% of WG&M's annual revenues (the "Four Clients"). *Id.* at ¶ 10. The Four Clients are: (a) Lehman Brothers, Inc., an underwriting investment banker for the Debtors' Bonds, (b) General Electric, a pre-petition agent and lender for the Debtors' 2006 loan agreement, (c) Microsoft, an affiliate of which is listed on the Debtors' consolidated list of top 100 unsecured creditors, and (d) Citigroup, a pre-petition secured lender, an indenture trustee for certain bonds, as well as an underwriting investment banker for certain bonds. *Id*. at ¶ 10, Ex. 2.

24. The Holtzer Affidavit does not disclose the exact percentage of revenue WG&M derived from representing the Four Clients over the last twelve months, nor does it indicate whether WG&M attorneys working on matters related to the Four Clients have been screened from matters related to the Debtors' cases, and, what, if any, screening procedures were

[3]The United States Trustee was provided with a copy of the Common Interest Agreement during discussions with WG&M and K&E. A copy of the Common Interest Agreement is attached as Exhibit B.

implemented. *Id*. The Holtzer Affidavit is also silent as to whether any conflicts counsel will handle matters involving the Four Clients that WG&M is unable to undertake.

25. The Holtzer Affidavit does state, however, that WG&M will not represent any Current Clients in "matters directly related to the Debtors or the Chapter 11 Cases." *Id*. at ¶ 9.

26. Finally, the Holtzer Affidavit does not list the names of any specific WG&M attorneys or staff who may be conflicted from participating in these cases because of their past or present representations or affiliations. *Id*. at ¶¶ 6-14.

3) Compensation and Reimbursement of Expenses

27. According to the Holtzer Affidavit, WG&M wants the "rates, terms, and conditions" that are charged to the Debtors to be approved under 11 U.S.C. § 328(a), so that its rates in these cases are consistent with WG&M's practice outside of bankruptcy, "namely, prompt payment of WG&M's hourly rates . . . and reimbursement of out-of-pocket expenses." *Id*. at ¶19. WG&M does state, however, that it "intends to apply pursuant to section 330 of the Bankruptcy Code" for the Court's approval of its fees and expenses. *Id.*

28. According to WG&M, the firm's top billing rate for members and counsel is $950 per hour. *Id*. at ¶ 16. WG&M states that it will notify the Debtors and the United States Trustee "of any change in the hourly rates charged by WG&M for services rendered." WG&M Application, at ¶ 24. WG&M does not state whether it will also notify the Court or any official committees appointed in this case.

4) WG&M's Retainer

29. The Holtzer Affidavit discloses that WG&M earned fees and expenses aggregating in excess of $14.22 million for pre-petition services to the Debtors. *Id*. at ¶ 15.

According to Exhibit 4 to the Holtzer Affidavit, WG&M received thirteen pre-petition advances from the Debtors between December 31, 2008 and the Petition Date. *See* Holtzer Aff., Ex. 4. The Holtzer Affidavit describes these as "periodic fee advances." *Id.* at ¶ 15. These advances aggregated in excess of $15 million. ***Id.,*** Ex. 4**.** WG&M states that it currently has a "credit balance in favor of the Debtors" of approximately $873,000 with regard to future professional services. *Id.*

III. ARGUMENT

A. Retention of Dual Bankruptcy Counsel is Not Warranted In These Cases

The United States Trustee objects to the proposed retention by all but six of the Debtors of two sets of bankruptcy counsel in these cases.[4] Both the K&E and WG&M Applications respectively provide that the firms will provide legal services and advice to the Debtors with regard to (a) filing and corporate governance issues, (b) advising the Debtors with respect to their powers and duties as debtors in possession in the continued management and operation of their businesses and properties; and (c) performing other legal services reasonably necessary or other beneficial for the Debtors in connection with the prosecution of these Chapter 11 cases. *See* K&E Application at ¶¶ 19, 20 and WG&M Application at ¶ 17.

While the K&E Application states that K&E will provide advice concerning (a) transactional work related to project level assets; (b) restructuring matters for certain mortgage level debt; and (c) the plan of reorganization relating to project level issues and mortgage level indebtedness, the WG&M Application also states that WG&M will also be concerned with

[4] K&E does not propose to be retained in any capacity whatsoever with respect to six of the Debtors, including the lead Debtor, due to a conflict of interest. *See* infra.

"various project level restructuring matters." *See* K&E Application at ¶¶ 19, 20; WG&M Application at ¶ 16. Therefore, WG&M has the ability to prosecute all aspects of the cases and this co-counsel retention scheme is not driven by, for example, specialized expertise by one firm or the other.

While section 327(a) does not specifically preclude the proposed co-counsel retention arrangement in Chapter 11 cases, such arrangements should be viewed very critically before approval is granted. As stated above, both firms were retained almost simultaneously around December 2008, with neither firm evidencing any prior deep or extended relationship with the Debtors. Furthermore, at the time of the employment of both firms, K&E's conflict was unequivocally known as evidenced by the Common Interest Agreement executed on January 27, 2009, which specifically referenced K&E's conflict. *See* Ex. B, p. 1. Moreover, the applications do not appear to indicate that the specialized knowledge of each firm to a specific area of the law and specific subset of debtors is crucial in these cases. In fact, neither of the two retention applications set forth in any comprehensive detail the division of duties and delegation of authority between the two law firms, other than with respect to the two Specified Debtors and the four Debtor Defendants. Additionally, beyond *pro forma* pledges to avoid duplication, neither WG&M nor K&E have described with any specificity what procedures they explicitly intend to undertake to avoid duplication. They must promptly provide this information should the Court permit their dual retentions.

Indeed, both firms have successfully handled large and complicated cases without the assistance of co-counsel of the type proposed here. Most notably, WG&M represents and has represented the debtors in *Lehman Brothers Holdings, Inc.*, 08-13555 (JMP), *Enron Creditors*

Recovery Corp., 01-16034 (AJG); *WorldCom, Inc.* 02-13533 (AJG); and *BearingPoint, Inc.*, 09-10691 (REG). K&E represents and has represented the debtors in *Charter Communications, Inc.*, 09-11435 (JMP); *Chemtura Corp.*, 09-11233 (REG); and *Solutia, Inc.* 03-17949 (PCB). While some or all of those cases may have required the retention of specialized counsel to handle discrete tasks (under 11 U.S.C. § 327(e)), there was no need for two firms to be retained as co-counsel in any of those relatively large cases.

A co-counsel arrangement is fraught with dangers and thus should be permitted in only the most extraordinary of circumstances. One immediate reason why the retention of co-counsel, even with the consent of the client, is disfavored is that a clear cut chain of command will be lacking -- that is, which partner at which law firm will be responsible for giving legal advice to the client, which firm will determine what path to follow in terms of the Debtors' exit strategy, which litigations to pursue, and what steps to take to achieve the ultimate goal of reorganization.

A second important factor militating against the use of a co-counsel is that the danger of overbilling and duplication of billings is great. Although with the best intentions the duties of both firms may be identified and separated, nonetheless, two sets of eyes will be looking at the same documents and appearing in Court. For example, at a hearing on May 13, 2009, WG&M represented the Debtors on a debtor-in-possession financing motion and other relief, but at least two K&E attorneys were also present to monitor the proceedings.

Notably, K&E reports that one of its tasks will be to provide advice concerning issues such as plan of reorganization and transactional work relating to project level issues, WG&M also states that it will be concerned with project level restructuring matters. On the face of the retentions, there already appears to be a grave danger of duplicative billing, as some of these

tasks will be the same or require the same documents to be reviewed. Again, a complete division of duties does not seem practical. *See In re The Bible Speaks*, 67 B.R. 426, 427 (Bankr. D. Mass. 1986) (denying request for co-counsel to be retained as counsel to the unsecured creditors committee and noting that despite any lack of bad faith concerning allocation of duties, each counsel would read and analyze the Debtor's plan of reorganization because of the "compelling desire that each will likely have to master the reorganization process as well as other aspects" of the case).[5]

B. K&E Holds Interests Adverse to the Debtors and Is Not Disinterested

Even if the court were inclined to permit the section 327(a) retention of two firms as the Debtors' counsels in these cases, K&E may not be retained as K&E cannot meet the applicable standards under section 327(a). Section 327(a) of the Bankruptcy Code provides, in part, that

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

11 U.S.C. § 327(a) (emphasis added). Thus, a professional

> 1) must not hold an interest adverse to the bankruptcy estate; 2) must not represent an interest adverse to the estate; and 3) must be disinterested.

In re Worldcom, 311 B.R. 151, 163 (Bankr. S.D.N.Y. 2004). The Bankruptcy Code includes as a "disinterested person," someone who "does not have an interest materially adverse

[5] Should the Court grant the retention applications of K&E and WG&M, the United States Trustee reserves her right to object to any fees sought that she finds to be excessive or duplicative by reason of the co-counsel arrangement.

to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor ..., or for any other reason." 11 U.S.C. § 101(14)(E).

"The 'materially adverse' standard incorporated in the disinterestedness test and the 'interest adverse to the estate' language in section 327(a) overlap . . . and form a single test to judge conflicts of interest." *In re Granite Partners, L.P.*, 219 B.R. 22, 33 (Bankr. S.D.N.Y. 1998) (citations omitted).

The term adverse interest is not defined in the Bankruptcy Code. However, the Second Circuit has defined adverse interest as:

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

Worldcom, 311 B.R. at 163 (quoting *Bank Brussels Lambert v. Coan (In re AroChem Corp.*), 176 F.3d 610, 623 (2d Cir. 1999)). "The decision whether an adverse interest exists is determined by the court on a case by case basis." *Id.*

A disabling adverse interest arises where a professional "had a meaningful incentive, **or the perception of one**, to act contrary to the interests of the estates." *Granite Partners*, 219 B.R. at 36 (emphasis added). *See also In re Leslie Fay Cos.*, 175 B.R. 525, 534 (Bankr. S.D.N.Y. 1994) (debtor's counsel investigating a client "had a perceptible economic incentive not to pursue the possibility of claims . . . with the same vigor and intensity it might have otherwise applied.") The Bankruptcy Code's requirements are sufficiently broad so as to encompass not only conflicts, but any connection with the debtor. *Id.* at 536.

Therefore,

> because section 327(a) is designed to limit even appearances of impropriety to the extent reasonably practicable, doubt as to whether a particular set of facts gives rise to a disqualifying conflict of interest normally should be resolved in favor of disqualification.

In re Angelika Films 57th, Inc., 227 B.R. 29, 39 (Bankr. S.D.N.Y. 1998). "To be disinterested is 'to prevent even the appearance of a conflict irrespective of the integrity of the person or firm under consideration.'" *In re Vebeliunas*, 231 B.R. 181, 191 (Bankr. S.D.N.Y. 1999). For example, counsel who has represented a debtor's equity security holder has an adverse interest and does not meet the disinterestedness requirement of Section 327(a). *In re Zenith Elecs. Corp.*, 241 B.R. 92, 101 (Bankr. D. Del. 1999). Likewise, attorneys who cannot sue or investigate clients who are parties in a bankruptcy case have adverse interests and are, therefore, not disinterested. *See Granite Partners*, 219 B.R. at 40 ("the preconceived refusal to sue a potential defendant at the beginning of an investigation constitutes a disqualifying adverse interest").

Here, K&E has a conflict of interest with respect to the State Court Litigation and the Caruso Matter. The Engagement Letter discloses K&E's relationships in these cases under a "Conflicts of Interest" category and recites that K&E represents parties that are "directly adverse" to certain Debtors.

Nor can the materiality of these representations be in doubt. K&E has not been able to certify to the United States Trustee that the State Court Litigation or the Caruso Matter will not result in a large judgment against the Debtors.[6] Moreover, the prospect of K&E litigating in

[6] The Debtors have advised the United States Trustee that the amount at issue in the State Court Litigation is below the materiality threshold for SEC reporting purposes, but they have not

bankruptcy court against the Debtors' interests, for example in connection with a motion to vacate the automatic stay or in a discovery dispute, at the same time as K&E is representing the Debtors, is not some "horrible imagining," but is entirely foreseeable. *In re Caldor, Inc. NY*, 193 BR 165, 172 (Bankr. S.D.N.Y. 1996) ("[H]orrible imaginings alone cannot be allowed to carry the day. Not every conceivable conflict must result in sending counsel away to lick his wounds.") (quoting *In re Martin*, 817 F.2d 175, 183 (1st Cir. 1987)). It is immaterial that K&E is not representing the Debtor Defendants in the bankruptcy cases. The fact is that on any particular day, K&E attorneys may appear in this bankruptcy proceeding and take positions that are contrary to the Debtors' interests.

C. Further Disclosures Have Been Requested of WG&M and K&E [7]

Disclosure by professionals is governed by Federal Rule of Bankruptcy Procedure 2014 ("Bankruptcy Rule 2014"), which requires professionals, *inter alia*, to disclose "to the best of the applicant's knowledge, all of the [professional's] connections with the debtor, creditors, any party in interest. . . ." FED. R. BANKR. P. 2014(a). A professional's failure to comply with the strict requirements of Bankruptcy Rule 2014 may form the basis for the court to disallow fees. *See Leslie Fay*, 175 B.R. at 533.

Compliance with Bankruptcy Rule 2014 is the responsibility and burden of each retained

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been able to quantify the extent of any potential liability, or certify that the amount will remain below the materiality threshold as discovery progresses.

[7] The United States Trustee has engaged in discussions with both WG&M and K&E and anticipates that prior to the hearing, additional disclosures will be provided by WG&M that may resolve some or all of the disclosure issues raised by the United States Trustee below. K&E has responded to the requests for additional disclosures and is expected to file supplemental disclosure in the near future.

professional. *See In re Keene Corp.*, 205 B.R. 690, 695 (Bankr. S.D.N.Y. 1997). The term "connections" is broad and strictly construed for the purposes of Bankruptcy Rule 2014. *In re Balco Equities Ltd.*, 345 B.R. 87, 112 (Bankr. S.D.N.Y. 2006) ("Failure to disclose direct or indirect relations to, connections with, or interest in the debtor violate . . . [s]ection 327(a) and Bankruptcy Rule 2014."). *Granite Partners*, 219 B.R. at 35 ("The existence of an arguable conflict must be disclosed if only to be explained away . . . ."). The court should not have to "rummage through files or conduct independent factfinding investigations" to determine whether a professional should be disqualified. *Id.* at 45 (quoting *In re Rusty Jones, Inc.*, 134 B.R. 321, 345 (Bankr. N.D. Ill. 1991)).

The K&E Application and the WG&M Application make clear that the Firms are well aware of their duty to provide complete disclosure regarding their connections to parties in these cases. Further disclosure, however, is necessary and the United States Trustee requests the following specific disclosures:

1. WG&M Requested Disclosures

The United States Trustee has requested supplemental information from WG&M. The United States Trustee requests that WG&M disclose the exact percentage of revenue that WG&M derived from representing the Four Clients in unrelated matters over the last twelve months and a statement as to whether WG&M can be adverse to the Four Clients.

The United States Trustee also requests that WG&M disclose which WG&M attorneys worked on matters related to the Four Clients and, if any, have been screened from working on the Debtors' cases and the nature of the screening procedures.

WG&M states in the Holtzer Affidavit that it will not represent any current clients in

"matters directly related to the Debtors or the Chapter 11 Cases." *See* WG&M Application at ¶ 9. WG&M must explain the meaning of "directly related."

2. K&E Requested Disclosures

The United States Trustee has requested supplemental information from K&E. K&E has responded with additional disclosures that the United States Trustee has seen and that K&E expects to file in the near future.

The additional disclosures include the information that K&E will not take positions directly adverse to affiliates of Goldman Sachs Group, Inc., General Motors or General Motors Acceptance Corp. (other than GMAC Commercial Mortgage Corporation) without first securing a waiver. K&E has represented that, if necessary, it would take reasonable steps to seek such a waiver.

IV. CONCLUSION

WHEREFORE, the United States Trustee respectfully requests that this Court grant the relief requested herein and grant such other and further relief as it deems just and proper.

Dated: New York, New York
May 14, 2009

Respectfully submitted,

DIANA G. ADAMS
UNITED STATES TRUSTEE

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