UNPUBLISHED OPINION

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IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

In re:	
NAKA INDUSTRIES, INC.,	Bankruptcy Number 86B-03175 [Chapter 7]
Debtor.	(Joint Administration)
In re:	
FRANK H. NAKASHIMA,	Bankruptcy Number 86B-03178 [Chapter 7]
Debtor.	

MEMORANDUM DECISION

Richard F. Bojanowski, Esq., of Salt Lake City, Utah, appeared.

Richard H. Casper, Esq., of Ray, Quinney & Nebeker, Salt Lake City, Utah, appeared on behalf of First Security Bank of Utah, N.A.

Laurie A. Crandall, Esq., of Salt Lake City, Utah, appeared on behalf of the United States Trustee.

Theodore E. Kanell, Esq., of Hansen, Epperson & Smith, Salt Lake City, Utah, appeared on behalf of CNA Insurance Companies.

Nick Newbold, Esq., of Salt Lake City, Utah, appeared as staff attorney on behalf of the Small Business Administration.

This matter came before the court upon the amended motion for *nunc pro tunc* appointment of Richard F. Bojanowski, Esq., as attorney for Naka Industries, Inc., one of the debtors in this jointly administered, converted chapter 7 case. The motion was contested by the United States trustee and by First Security Bank of Utah, N.A., a major creditor in the case.

BACKGROUND

Helen and Frank Nakashima (the Nakashimas) and their family are the shareholders, officers and directors of Naka Industries, Inc., a Utah corporation (Naka). Naka was a general contractor providing services to the United States (Government) for the renovation of ninety residences at Dugway Proving Ground near Tooele, Utah. Naka tried unsuccessfully to complete the project and borrowed over $300,000 from First Security Bank of Utah, N.A. (FSB) during its endeavor.

The Government eventually defaulted Naka and requested Naka's bonding company, CNA Insurance Companies (CNA), to perform on the contract. CNA refused[1] and the Government completed the project using other contractors. Naka filed an appeal (Appeal) before the Armed Services Board of Contract Appeals for improper termination asserting a claim for damages of $500,000. That cause of action was the primary asset of

[1] CNA ultimately paid certain subcontractors. The payment resulted in CNA filing a claim for $80,932.30 in each of the estates of Naka, Frank Nakashima and Helen Nakashima.

Naka when it filed for protection under chapter 11 on July 28, 1986. Naka had ceased doing business and hoped to fund a plan from the proceeds of the Appeal.

Naka owed FSB and the Small Business Administration (SBA) funds which were secured by First and Second Trust Deeds, respectively, on a commercial building titled to Frank Nakashima. Naka claimed no interest in the real property, though it had been a tenant occupying the premises for free. Of the $435,000 in unsecured debt listed in Naka's schedules, FSB was owed approximately $313,000. Frank Nakashima was a co-obligor on the debt owed to FSB and FSB alleges the Nakashima's children are guarantors. SBA's loan was also secured by equipment in which Naka had an interest. Naka's obligation to SBA was personally guaranteed by the Nakashimas. The Nakashimas transferred their interest in their residence, having an equity of approximately $83,000, to a trust allegedly within one year of July 28, 1986. The Nakashimas were also personally liable to CNA for claims paid on behalf of Naka. The Nakashimas filed a chapter 11 petition on July 28, 1986, the same day as Naka's filing.

Naka and the Nakashimas acknowledged that one attorney could not be appointed to represent both the corporate chapter 11 debtor and the principals of the corporation in a concurrent chapter 11. Therefore, on September 20, 1986, Daniel R. Boone, Esq., (Boone) was appointed as the attorney for Naka. Richard F. Bojanowski, Esq., (Bojanowski) was appointed as the attorney for the Nakashimas. Shortly after filing the two chapter 11 petitions, a joint ex-parte motion was filed to consolidate the two cases.

The court, after notice and a hearing, entered an order which provided for the two cases to be consolidated for procedural purposes only[2].

Both before and after the chapter 11 filing, Naka was represented in its Appeal by nonbankruptcy counsel.[3] In September of 1986, that attorney, who was never appointed by this court to represent Naka, withdrew. Bojanowski then began representing Naka in the Appeal.

Creditors eventually moved for the dismissal or conversion of Naka's case because of delay. Deadlines were set for filing a disclosure statement and plan in lieu of dismissal or conversion of the case. Naka filed a disclosure statement and plan, as did the Nakashimas. The plans were "consolidated" plans mutually contingent upon each other. They provided for prosecution of the Appeal and for liquidation of certain of the Nakashima's assets to pay both estates' debts. FSB consistently objected to the form and substance of the plans although it did not object to the continued prosecution of the Appeal if that produced a source of revenue to Naka's estate. Throughout the bankruptcy

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[2] The order drafted by counsel used "consolidated" to describe what was clearly intended by the court, and which is conceded by counsel, to be an order allowing joint administration of the debtor and an affiliate as provided in Bankruptcy Rule 1015(b).

> The purpose of a joint administration is to allow pleadings which would likely be filed in duplicate, one in each case, to be filed under one number . . . A joint administration is not, however, the same thing as a substantive consolidation. Whether or not a case is jointly administered has nothing to do with the rights creditors have against each estate, nor the rights and liabilities of one estate to the other. A substantive consolidation means that the assets of the two estates are combined and the liabilities are combined creating, in effect, one debtor.

In re N.S. Garrott & Sons, 63 B.R. 189, 191 (Bankr. E.D. Ark. 1986).

[3] Frank M. Nakamura, Esq.

proceeding, Bojanowski represented both Naka and the Nakashimas at all hearings as well as in drafting the disclosure statements and plans.

During the course of both cases, Bojanowski represented to the court and creditors that his fees in relation to the Appeal would be paid on a contingent basis from the proceeds of any recovery if Naka's Appeal was successful. Eventually it appeared that the prospects of recovery from Naka's Appeal were slim. Indeed, the Appeal proved unsuccessful and did not produce revenue to pay either prepetition creditors or Bojanowski.[4] However, the commercial property owned by the Nakashimas was liquidated through their estate. The liquidation produced cash to the Nakashima's estate after debt service of approximately $97,000.

Bojanowski eventually filed a fee application in the Nakashima case for $54,365.32. The application contained numerous entries for services performed in prosecution of Naka's Appeal. Bojanowski gave the following explanation for filing the application for fees incurred in Naka's estate in the Nakashima case

> The obligations of Frank and Helen Nakashima are, for the most part, inseparable from those owed by Naka Industries, Inc. in the following respects.
>
> 1) The $300,000 unsecured obligation to Naka [sic] was guaranteed by Nakashima.

[4] On September 13, 1989, the court approved a stipulated settlement agreement in the Appeal which provided for reinstatement of Naka in the Government's 8a (disadvantaged) program in return for dismissal of the Appeal. The stipulation was premised upon the potential merit of the claim filed by the Government against Naka and CNA in the amount of $551,441, representing the cost of completion of the Dugway project by another contractor.

2) The commercial building owned by Frank and Helen Nakashima was used by Naka Industries, Inc., rent free, in conducting their construction business.

3) The operational and performance bond issued to Naka was personally guaranteed by Frank and Helen Nakashima.

The assets of Frank and Helen Nakashima are indistinguishable from the assets of Naka Corporation and are so intertwined that the proceeds available from such assets shall reduce the liabilities of both Naka and Frank and Helen Nakashima. For example:

1) The outcome of the appeal filed by Naka shall reduce the liabilities of Naka and thus reduce the contingent liabilities of Frank and Helen Nakashima arising from the guarantee of Naka's bond.

2) The sale of the commercial building titled in Frank and Helen Nakashima's names shall satisfy the secured obligations of Frank and Helen Nakashima, said obligations being incurred to finance Naka Industries, Inc.

Second Application of Attorney for Debtor for Allowance of Fee Pursuant to 11 U.S.C. § 329 at p. 2. It was then brought to the court's attention that Bojanowski had never been appointed as Naka's counsel. On June 22, 1989, Boone filed a pleading in the Naka case entitled Withdrawal and Substitution of Counsel. Bojanowski then filed the within Motion for Order Approving Counsel for Debtor-in-Possession on June 22, 1989, requesting *nunc pro tunc* appointment to July 28, 1986. No disclosure was made of his representation of the Nakashimas as contingent creditors and co-obligors of Naka's estate. Naka's case was ultimately converted to a chapter 7 on July 11, 1989.[5] The matter now

[5] Frank Nakashima's case was converted to a chapter 7. Helen Nakashima's case was converted to a chapter 13 and subsequently dismissed.

comes before the court to determine whether Bojanowski is eligible for appointment and the propriety of his appointment *nunc pro tunc* to the original filing date.[6]

DISCUSSION

The issue before the court is whether Bojanowski's representation of Naka while simultaneously representing the Nakashimas, and the subsequent conduct of the case, constitutes an actual conflict of interest which precludes Bojanowski from being a disinterested person under 11 U.S.C. § 327(a).[7] If the appointment is authorized, the issue of the propriety of his appointment *nunc pro tunc* arises.

A. Jurisdiction

This matter represents issues which are core to the administration of these estates. 28 U.S.C. § 157(b)(2)(A).

B. 11 U.S.C. § 327

The appointment process required by 11 U.S.C. § 327 and Bankruptcy Rule 2014 is designed to bring to the court's attention at the inception of the case any

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[6] Bojanowski applied for authority to represent Naka in its chapter 7 proceeding, as well as to represent Frank Nakashima in his chapter 7 and Helen Nakashima in her chapter 13. The court previously denied the application to represent Naka in its chapter 7, granted the application to represent Helen Nakashima in her chapter 13, and took the application to represent Frank Nakashima in his chapter 7 and the within application under advisement.

[7] 11 U.S.C. § 327(a) provides:

> **§ 327. Employment of professional persons.**
>
> (a) Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

relationship of counsel which would preclude giving the estate less than the benefit of full, independent legal advice. When that procedure is not followed, or less than full disclosure is provided, the potential harm to the estate cannot be calculated because of the possibility that all legal advice may be tainted with the specter of less than disinterested advice.

11 U.S.C. § 327(a) requires that the professional person not hold or represent an interest adverse to the estate and that such person is disinterested. "Disinterested" is defined by 11 U.S.C. § 101(13).[8]

In *In re Roberts, Inc.*, 46 B.R. 815, 826-27 (Bankr. D. Utah 1985) the court stated:

> To "hold an adverse interest" means for two or more entities (1) to possess or assert mutually exclusive claims to the same economic interest, thus creating either an actual or potential dispute between the rival claimants as to which, if any, of them the disputed right or title to the interest in

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[8] 11 U.S.C. § 101(13) defines "disinterested" as:

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

question attaches under valid and applicable law; or (2) to possess a predisposition or interest under circumstances that render such a bias in favor of or against one of the entities.

To "hold an interest adverse to the estate" means (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.

To "represent an adverse interest" means to serve as agent or attorney for any individual or entity holding such an adverse interest. In the case of *In re Harry Fondiller*, the court stated:

> We interpret that part of § 327(a) which reads that attorneys for the trustee may "not hold or represent an interest adverse to the estate" to mean that the attorney must not represent an adverse interest relating to the services which are to be performed by that attorney.

With this qualifying language, this Court concurs.

A "conflict of interests," as usually applied to an attorney, refers to the representation by a given attorney or law firm of two or more entities holding or claiming adverse interests or of an entity holding an interest adverse to that of its attorney, its attorney's firm or the firm's associates.

In this case, the Nakashimas and their family own Naka. Frank Nakashima is president and, since he holds over 20% of its stock, is an affiliate of Naka. Frank Nakashima is a co-obligor on the $313,000 unsecured debt owed by Naka to FSB and allegedly Helen Nakashima and their children are also guarantors. Frank and Helen Nakashima are guarantors on the SBA debt. They are both guarantors on the performance bond issued by CNA. They are contingent creditors of Naka. The Nakashimas have pledged their property as additional collateral for Naka's debt. No disclosure has ever been made as to any causes of action either estate may have against

the other, either for unpaid rent, the avoidance of fraudulent transfers, equitable subordination, or asserting Naka's right to charge its co-obligor with payment of its debt. Further, FSB alleges that Frank Nakashima's transfer of his equity interest in his home prior to filing was an attempt to place the asset outside the reach of creditors. The same argument would be available to Naka if it chose to assert it. It is impossible to ascertain whether Naka may have other claims against its affiliates or insiders because of the lack of disclosure.

Even now the facts as set forth above are gleaned from the pleadings on file and the fee application, not from counsel's verified statement.[9] Bojanowski was under a duty to disclose any "actual or potential conflicts which bear upon whether [he] 'holds or represents an interest adverse to the estate' or whether [he] is a 'disinterested person'". *In re Roberts*, 75 B.R. 402, 410 (D. Utah 1987). In spite of this oft quoted admonition, the motion for appointment is devoid of any disclosure.

Procedurally the motion is defective. It does not comply with Bankruptcy Rule 2014(a). It is not submitted by the trustee or debtor, but instead is signed by Bojanowski. It does not set forth Bojanowski's connection with the debtor, creditors or any other party in interest, their attorneys or accountants. The Affidavit of Counsel is an eight line document which merely states that he has no interest adverse to the estate and is disinterested within the meaning of 11 U.S.C. § 101(3) [sic]. This is in stark contrast

[9] The failure to adequately inform the court of the interrelationship of Naka and the Nakashimas makes it impossible now to determine whether the settlement negotiated by Bojanowski in the Appeal was intended for the benefit of Naka and its creditors, or intended for the benefit of the Nakashimas as personal guarantors.

to the affirmative duty owed by counsel to provide detailed disclosure to the court and creditors. *In re Petro Serve Ltd.*, 97 B.R. 856, 863 (Bankr. S.D. Miss. 1989).

It has long been the intent of Congress to ensure disinterested representation of estates. *In re Kendavis Indus. Int'l, Inc.*, 91 B.R. 742, 754-755 (Bankr. N.D. Tex. 1988). Courts cannot measure an applicant's interest in the estate absent full disclosure, and mere conclusory statements are insufficient. "In order for the rule to work, professionals must voluntarily and in good faith comply by making factual disclosures that are prerequisite to employment and compensation under the Bankruptcy Code." *United States v. Azevedo (In re Azevedo)*, 92 B.R. 910, 911 (Bankr. E.D. Cal. 1988).

Professor Elizabeth Warren of the University of Pennsylvania School of Law has proposed that debtors' counsel supply an exhaustive analysis of potential conflicts prior to court appointment.[10] While such extensive disclosure may not be appropriate in all

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[10] This material was prepared for the Federal Judicial Center, Workshop for Bankruptcy Judges of the 8th, 9th and 10th Judicial Circuits, December 4, 1989. Professor Warren asserts that a schedule similar to the one below should accompany all applications for appointment of counsel for chapter 11 corporate, partnership and joint-venture debtors.

1. Does the debtor have any affiliates, defined under 11 U.S.C. § 101(2)? If yes, list the affiliate(s) and explain the ownership or control relationship between the debtor and the affiliate(s). If no, do not answer the remainder of this schedule. [Note that "affiliate" includes any entity or individual who directly or indirectly owns, controls, or holds with power to vote 20 percent or more of the outstanding voting securities of the debtor.]

2. Has any affiliate ever filed for bankruptcy? If yes, list the affiliate(s) and the date and court of the bankruptcy filing. If any affiliate files after this schedule is filed, debtor's counsel must amend this schedule and notice all creditors.

3. Has any affiliate guaranteed any debt of the debtor or has the debtor guaranteed any debt of any affiliate? If yes, list the name of the affiliate, the amount of the guarantee, the date the guarantee was made, the identity of the creditor receiving the guarantee, and whether any security interest was given by the debtor or the affiliate to secure the guarantee. Give this information for every guarantee outstanding at the time of the debtor's bankruptcy filing, and every guarantee outstanding within 18 months before filing.

(continued...)

circumstances, it illustrates the disparity between a thorough analysis of potential conflicts and a conclusory statement of disinterestedness.

It is impossible at this point to find Bojanowski to be disinterested. Even if full disclosure had shown no actual conflict to exist between the estate of Naka and the Nakashimas at the inception of the case, Bojanowski has now created an actual conflict between the two estates and himself. He now seeks what is, in effect, substantive consolidation of the two estates in order to assure payment of his fees. He holds an interest adverse to the estate of the Nakashimas by attempting to use its assets to pay the

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[10](...continued)

4. Has any affiliate extended credit, received credit, or otherwise established a debtor-creditor relationship with the debtor corporation? If yes, list the name of the affiliate, the amount of the loan, when the loan was made, what repayments have been made on the loan, and whether any security interest was involved in the loan. Give this information for all loans that have been made and fully paid off within 18 months preceding this filing and to any loans outstanding at the time of the bankruptcy filing.

5. Has the debtor granted any security interest in any property to secure any debts of any affiliate other than provided in Questions 3 and 4? Has any affiliate granted any security interest in any property to secure any debts of the debtor other than provided in Questions 3 and 4? If yes, list the affiliate, the collateral, the date of the security interest, the creditor to whom it was granted, and the loan balance for the underlying loan.

6. Has any affiliate engaged in any other transaction with the debtor corporation during the past 18 months? If yes, briefly describe the transaction(s).

7. List any affiliate who is potentially a "responsible party" for any unpaid taxes of the debtor. Give the estimated amount of such taxes owed at the time of filing.

8. List the employment of any affiliate by the debtor. List the employment of any relative or partner of any equity security holder by the debtor.

9. List all circumstances under which proposed counsel or proposed counsel's law firm has represented any affiliate during the past 18 months. List any position other than legal counsel which proposed counsel holds in either the debtor or affiliate corporation, including corporate officer, board of directors, or employee. List any amount owed by the debtor or the affiliate to proposed counsel or counsel's law firm at the time of filing or paid within 18 months before filing.

legal fees of the Naka estate, thereby depleting the Nakashima estate of funds which would otherwise be available for its creditors.[11]

C. *Nunc Pro Tunc* Appointment

Court approval is required for the employment of any professional pursuant to 11 U.S.C. § 327(a). This is further emphasized by Bankruptcy Rule 2014. Failure to obtain approval for employment will result in a forfeiture of any compensation earned, even though valuable services may have been provided to the estate in good faith. *In re Hydrocarbon Chemicals, Inc.*, 411 F.2d 203 (3rd Cir. 1969), *cert. denied*, 396 U.S. 923 (1969). Bojanowski has requested the court to appoint him as counsel *nunc pro tunc* to avoid that result.

The Tenth Circuit has specifically addressed the issue of the appropriateness of granting a *nunc pro tunc* order. In *Eaton v. Weaver Mfg. Co.*, 582 F.2d 1250, 1254 n. 6 (10th Cir. 1978), the court stated:

> The true function of a nunc pro tunc order is to make the record speak the truth relative to the judgment or order intended by the court at the time the original judgment or order was entered. If the clerk makes a mistake or incorrectly enters a judgment or order, the same may be corrected by an order nunc pro tunc. If the court itself by inadvertence uses language in the journal entry which does not reflect the true judgment or order intended, an order may be made nunc pro tunc correcting same. (citation omitted). The amendment or nunc pro tunc entry may not be made to supply a judicial omission or correct an error of the court, or to show what the court might have or should have decided, or intended to decide, as distinguished from what it actually did decide.

[11] For example, FSB holds approximately 70% of the listed unsecured debt in the Naka case, but holds approximately 99% of the listed unsecured debt in the Nakashima case. It is clearly in FSB's self interest to retain the maximum funds in the Nakashima case so that a larger share of its debt is paid.

The District Court in Utah has also confronted the issue of when an order *nunc pro tunc* is appropriate in a bankruptcy context. The case of *Wildflower, Inc. v. Executive Air Serv. Inc. (In re Executive Air Serv.)*, 62 B.R. 474, 477 (D. Utah 1986), stated:

> This court notes at the outset that a *nunc pro tunc* order requires that entry should be made now of acts *actually previously done*, which entry creates the same effect as if the acts had been regularly docketed. Executive Air correctly states that "[w]hile a court has inherent power to amend or correct its records, to make them conform to the actual facts, it is without power to change a record so as to make it show that which did not occur or to cure the errors or omissions of counsel." *Slade v. United States*, 85 F.2d 786, 787 (10th Cir. 1936) (footnotes omitted); *see also W.F. Sebel Co. v. Hessee*, 214 F.2d 459, 462 (10th Cir. 1954). [Emphasis in original].

Other courts have followed a similar analysis.

> These courts state that the purpose of a *nunc pro tunc* order is to record a prior but unrecorded act of the court, one unrecorded due to inadvertence or mistake. The function of a *nunc pro tunc* order is not, by a fiction, to antedate the actual performance of an act which never occurred, but is to make the record conform to that which was actually done at the time it was done.

In re Carolina Sales Corp., 45 B.R. 750, 753 (Bankr. E.D. N.C. 1985), citing *In re Call*, 36 B.R. 374 (Bankr. S.D. Ohio 1984) and *In re Mork*, 19 B.R. 947, 949 (Bankr. D. Minn. 1982).

In spite of a consistent line of authority that *nunc pro tunc* orders are unavailable to give retroactive application to orders subsequently entered, bankruptcy courts have sometimes used the mechanism to validate employment orders retroactively. Perhaps because this is a court of equity, perhaps because the courts wish to prevent an estate's unjust enrichment at the expense of professionals, or perhaps because of the

unique relationship bankruptcy courts have in regulating attorney conduct and compensation, a considerable line of cases have developed relating to *nunc pro tunc* appointments. Whether based on authority inherent in 11 U.S.C. § 105, or merely an aberration of usual federal decisions, the opinions are relevant to an analysis of this issue.

Jurisdictions outside of the Tenth Circuit have adopted an "exceptional circumstances" requirement before granting such an order. *Matter of Triangle Chemicals, Inc.*, 697 F.2d 1280 (5th Cir. 1983). "Mere oversight in filing a timely application for approval of employment is not an extraordinary circumstance which warrants *nunc pro tunc* approval." *In re Aladdin Petroleum Co.*, 85 B.R. 738, 739 (Bankr. W.D. Texas 1988). "A *nunc pro tunc* order should be limited to extraordinary circumstances to deter attorneys from general non-observance of section 327." *In re McKinney Ranch Assoc.*, 62 B.R. 249, 252 (Bankr. C.D. Cal. 1986). Simple neglect or inadvertence should not be the standard applied by the court. *In re Arkansas Co., Inc.*, 55 B.R. 384 (D. N.J. 1985), *aff'd* 798 F.2d 645 (3rd Cir. 1986). Exceptional circumstances must certainly be present to buttress an argument premised upon mere negligence or inadvertence in order for a court to exercise this extraordinary remedy. *Triangle Chemicals, Inc.*, 697 F.2d at 1289.

Recent cases dealing with the *nunc pro tunc* approval of applications for the employment of counsel have

> developed a set of standards to be examined in considering *nunc pro tunc* applications, which applications "must be the extraordinary exception rather than an accepted practice." . . .[T]he bankruptcy court should "carefully scrutinize all *nunc pro tunc* requests under strictly interpreted criteria", which criteria would require a "clear and convincing evidence" standard of proof from the applicant.

In re Martin, 102 B.R. 653, 655 (Bankr. W.D. Tenn. 1989) quoting *In re Twinton Properties Partnership*, 27 B.R. 817 (Bankr. M.D. Tenn. 1983).[12] This court recognizes the Tenth Circuit has spoken on the issue of the propriety of *nunc pro tunc* orders and, while not expressly adopting the criteria in *Twinton Properties* or of any other jurisdiction where *nunc pro tunc* orders are entered, it does find that even under such standards, this application fails.

In *Matter of Freehold Music Center, Inc.*, 49 B.R. 293 (Bankr. D. N.J. 1985) the court attempted to devise a balancing test weighing several factors in making a

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[12] *Twinton Properties* set forth nine criteria which the applicant must demonstrate before a *nunc pro tunc* order will be issued.

> (1) The debtor, trustee or committee expressly contracted with the professional person to perform the services which were thereafter rendered;
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> (2) The party for whom the work was performed approves the entry of the *nunc pro tunc* order;
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> (3) The applicant has provided notice of the application to creditors and parties in interest and has provided an opportunity for filing objections;
>
> (4) No creditor or party in interest offers reasonable objection to the entry of the *nunc pro tunc* order;
>
> (5) The professional satisfied all the criteria for employment pursuant to 11 U.S.C.A. § 327 (West 1979) and Rule 215 of the Federal Rules of Bankruptcy Procedure at or before the time services were actually commenced and remained qualified during the period for which services were provided;
>
> (6) The work was performed properly, efficiently, and to a high standard of quality;
>
> (7) No actual or potential prejudice will inure to the estate or other parties in interest;
>
> (8) The applicant's failure to seek employment approval is satisfactorily explained; and
>
> (9) The applicant exhibits no pattern of inattention or negligence in soliciting judicial approval for the employment of professionals.

Id. at 819-820.

determination regarding the applicability of the *nunc pro tunc* remedy. Among the considerations were the good faith of the professionals in proceeding without an order, the need for the services rendered, whether or not the debtor could have functioned without the services, whose responsibility it was to obtain authorization, the applicant's relationship with the debtor and the applicant's own sophistication in the field. *Id.* at 296.

As those standards apply to this case it is apparent from the argument of counsel and the record that the applicant holds a substantial allegiance to Naka and the Nakashimas and was willing, for whatever reasons, to pursue the Appeal. Although representation of Naka in that proceeding was certainly in keeping with the pursuit of assets of the estate, it has been the contention of creditors throughout that the Appeal would not prove fruitful. This is not a case where compensation is requested by a professional whose services enabled the debtor to conduct its day-to-day business affairs. The applicant was not, for example, an accountant who provided daily accounting services which were necessary for the debtor's effective rehabilitation. Nor did Bojanowski perform services such as negotiating cash collateral or adequate protection agreements. Bojanowski had been involved in the representation of Naka for a lengthy period of time in the Appeal when he drifted into representation of Naka in the preparation of a disclosure statement and plan mandated by the court imposed deadlines. Finally, "It is impossible to find any. . .urgency or frantic activity in this case which would have diverted [Bojanowski's] attention from his responsibility to cause an application for his retention to

be brought before the court." *Matter of Platinum Power Co.*, 105 B.R. 381, 383 (Bankr. N.D. Ohio 1989).

FSB has raised objections to the representation of both Naka and the Nakashimas by Bojanowski as well as to the *nunc pro tunc* nature of this application. The United States trustee has now joined in the objection. No argument has been made that there is an undue hardship to this applicant, though the court acknowledges that substantial services may have been rendered on behalf of Naka. Perhaps most telling, Bojanowski has failed to satisfactorily explain his failure to seek pre-employment approval. This is significant inasmuch as Bojanowski recognized the inherent conflicts of dual representation at the inception of the debtor's case.

The court also acknowledges that Bojanowski has practiced in this court for a substantial period of time and is familiar with the basic requirements of 11 U.S.C. § 327. "Especially when a debtor is represented by experienced bankruptcy counsel, an entitlement to a *nunc pro tunc* appointment is even more questionable." *Martin*, 102 B.R. at 656. Even assuming Bojanowski was ignorant of the requirements of the Code, a question would exist whether or not that ignorance excuses noncompliance. Notwithstanding this analysis, assuming arguendo the ability of this court to issue a *nunc pro tunc* order, Counsel has not proven his case. *In re Vlachos*, 61 B.R. 473 (Bankr. S.D. Ohio 1986) and *In re Williamette Timbers Systems, Inc.*, 54 B.R. 485 (Bankr. D. Or. 1985).

In the final analysis the Tenth Circuit has ruled and a *nunc pro tunc* remedy is simply not available to Bojanowski on this set of facts. Bojanowski seeks not to make

the record "conform to the actual facts" rather, he seeks to make the record "show that which did not occur" and to cure his omission for whatever reason. *Executive Air*, 62 B.R. at 477.

CONCLUSION

The statute specifically sets forth the requirement for pre-services appointment of counsel based upon full and thorough disclosure. Any exception to that statutory intent should be narrowly construed. The Tenth Circuit has indicated that orders should not attempt to create something that has not in fact occurred. Even if this court were inclined to ignore that clear instruction and to grant relief under 11 U.S.C. § 105 or some other equitable provision of the statute, the court must be able to find exceptional circumstances which generated the failure to obtain appointment as well as exceptional circumstances which require the appointment to be made *nunc pro tunc*.

The improper form of the application, the failure to disclose conflicts and the actual conflict which now exists between counsel seeking to be paid from one estate for services performed for another, require that the application be disapproved. Were that decision otherwise, the court finds no compelling reason for granting the *nunc pro tunc* appointment under the circumstances of this case and the controlling case law.

DATED this 2nd day of January, 1990.

JUDITH A. BOULDEN
United States Bankruptcy Judge