UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

In re:	)	Chapter 11
PEGASUS SATELLITE TELEVISION, INC., et al.,	)	Case No. 04-20878
Debtors.	)	(Jointly Administered)

RESPONSE OF AKIN GUMP STRAUSS HAUER & FELD LLP TO UNITED STATES TRUSTEE'S OBJECTION TO THIRD AND FINAL FEE APPLICATION FILED BY AKIN GUMP STRAUSS HAUER & FELD, CO-COUNSEL TO THE OFFICIAL UNSECURED CREDITORS' COMMITTEE

TO: THE HONORABLE W. JAMES B. HAINES, JR.,
CHIEF UNITED STATES BANKRUPTCY JUDGE:

Akin Gump Strauss Hauer & Feld LLP ("Akin Gump" or "Applicant"), co-counsel to the Official Committee of Unsecured Creditors (the "Committee") of Pegasus Satellite Television, Inc., et al. (collectively, the "Debtors"), hereby responds (the "Response") to the United States Trustee's (the "U.S. Trustee") Objection (the "Objection") to the Third and Final Fee Application of Akin Gump Strauss Hauer & Feld LLP, Co-Counsel to the Official Committee of Unsecured Creditors, for Allowance of Compensation and Reimbursement of Expenses (the "Fee Application"). In support of this Response, Akin Gump respectfully represents as follows:

PRELIMINARY STATEMENT

1. The U.S. Trustee's Objection is limited in nature and does not relate to the quality of services performed by Akin Gump in connection with its representation of the Committee, the results achieved or the amount of fees requested. Rather, the Objection relates solely to Akin Gump's unintentional failure to disclose a prior relationship it had with Silver Point Capital ("Silver Point"), a member of the Committee, in a matter wholly unrelated to the Debtors' chapter 11 cases in accordance with Rule 2014 of the Federal Rules of Bankruptcy Procedure

(the "Bankruptcy Rules"), which relationship did not result in an actual or potential conflict with the interests of the Committee or the Debtors or make Akin Gump adverse to these estates or their creditors.

2. Akin Gump is fully aware that a professional's compliance with Bankruptcy Rule 2014 is required to provide a Court with the information necessary to its determination as to whether a professional's retention is in the best interests of the estate and that the self-policing by a professional of its obligations under Bankruptcy Rule 2014 is of paramount importance to the integrity of the bankruptcy system. Akin Gump does not take this obligations, nor its failure (though unintentional) to comply with its obligations under Bankruptcy Rule 2014, lightly and is aware that inadvertent violations of Bankruptcy Rule 2014 may result in the imposition of penalties on a professional.

3. However, Akin Gump's failure to disclose its prior connections to Silver Point was inadvertent and resulted not from an intent to withhold information from this Court but, rather, from an internal error associated with the conflict check conducted by Akin Gump in connection with the filing of the Akin Gump Retention Application (as defined below).

4. David Botter, the partner at Akin Gump principally responsible for Akin Gump's representation of the Committee, did not become aware of Akin Gump's prior undisclosed connections to Silver Point until July 8, 2005, subsequent to filing the Fee Application. On that date, Mr. Botter was contacted by Eric Bradford from the U.S. Trustee's office with an inquiry regarding Akin Gump's potential prior representation of Silver Point and the absence of disclosure with respect thereto in the declaration submitted in connection with the Akin Gump

Retention Application. See Affidavit of David H. Botter at ¶3 (hereinafter the "Botter Affidavit").[1]

5. Upon receiving the U.S. Trustee's inquiry, Akin Gump immediately commenced an internal investigation to ascertain whether Silver Point was a firm client at any time prior to or during the pendency of the Debtors' chapter 11 cases and, if so, why Akin Gump's prior connections to Silver Point were not disclosed in connection with the filing of the Akin Gump Retention Application or thereafter. See Botter Affidavit at ¶4.

6. The results of this investigation revealed that, in conducting the conflict check for the Akin Gump Retention Application, the names of a limited number of parties (including Committee members) were mistakenly checked against Akin Gump's accounting system (the "Accounting System") as opposed to Akin Gump's formal computer conflict check database and adverse party index (the "Conflict Check System"). See Botter Affidavit at ¶¶ 7-8. While the Conflict Check System contains sufficient data to reveal, among other things, every matter on which Akin Gump has been engaged and the identity of related and adverse parties, the Accounting System only contains the names of certain firm clients and fees incurred in connection with client engagements. See Botter Affidavit at ¶¶ 6, 8.

7. As a result of conducting a limited part of the conflict check through the Accounting System and not learning of this mistake until Mr. Botter was contacted by Mr. Bradford, it was not discovered that Silver Point, acting together with two other parties, had, prior to the commencement of the Debtors' cases, retained Akin Gump to assist them in connection with the potential purchase of an airline, which was a debtor in a Canadian

[1] A copy of the Botter Affidavit is attached hereto as Exhibit A.

bankruptcy proceeding. See Botter Affidavit at ¶10. The total fees received from Silver Point in connection with this engagement were approximately $20,000. See Botter Affidavit at ¶11.

8. Upon determining the cause of Akin Gump's disclosure deficiency, Akin Gump performed a further supplemental conflict check through the Conflict Check System for the parties that were checked against the Accounting System. See Botter Affidavit at ¶12. The results of this supplemental conflict check revealed that Akin Gump had connections with certain other members of the Committee in matters wholly unrelated to the Debtors' chapter 11 cases. See Botter Affidavit at ¶¶12-16. The results of this conflict check were then set forth in the Botter Affidavit as required by Bankruptcy Rule 2014.

9. Akin Gump's supplemental conflict check and the disclosures contained in the Botter Affidavit do not reveal any actual or potential conflict or adverse interest to the Debtors or their creditors and did not result in any harm, whether tangible or intangible, befalling these estates or their creditors. Indeed, Akin Gump did not, at any time during the pendency of the Debtors' chapter 11 cases, have any possible actual or potential dispute or conflict with the Committee, the Debtors or the Debtors' estates. It is undisputed that Akin Gump vigorously and effectively acquitted its services on behalf of the Committee, which resulted in substantial benefit to these estates and significant recoveries for unsecured creditors.

10. Based on the foregoing and as further elaborated upon herein, Akin Gump respectfully submits that since (a) Akin Gump's disclosure errors were unintentional and did not reveal any actual or potential conflict or adverse interest; (b) Akin Gump proactively investigated the issues raised by the U.S. Trustee and stayed in communication with the U.S. Trustee in connection therewith; (c) upon the completion of a supplemental conflict check and prior to the hearing on the Fee Application, Akin Gump fully disclosed its connections to Silver Point and

other parties in interest in the Debtors' chapter 11 cases; and (d) no party in interest objected to Akin Gump's fees based on a failure to acquit vigorously and effectively its services on behalf of the Committee, the equities of the case militate against a reduction in the fees requested by Akin Gump.

BACKGROUND

11. On June 2, 2004 (the "Petition Date"), each of the Debtors filed with this Court a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"). The Debtors continued in possession of their properties and operated their businesses as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code until May 5, 2005 (the "Effective Date"), when their confirmed First Amended and Restated Joint Chapter 11 Plan (the "Plan") became effective. No trustee or examiner was appointed in these cases.

12. On June 10, 2004 (the "Committee Formation Date"), pursuant to section 1102 of the Bankruptcy Code, the U.S. Trustee appointed the Committee. The Committee initially was comprised of the following entities: Wachovia Bank, as Indenture Trustee, JP Morgan Bank, as Indenture Trustee; HSBC Bank USA, as Successor Indenture Trustee; D.E. Shaw Laminar Portfolios; LLC; Singer Childrens Management Trust and affiliates; and LC Capital Master Fund. On June 14, 2004, Silver Point was added to the Committee. On November 4, 2004, following the resignations of D.E. Shaw Laminar Portfolios, LLC, Singer Childrens Management Trust and affiliates and LC Capital Master Fund, Ltd., Sandell Asset Management Corp. ("Sandell") was added to the Committee.[2]

[2] As noted in the Botter Affidavit, due to oversight during the pendency of the Debtors' cases, Akin Gump failed to file a supplemental disclosure regarding its prior connections to Sandell when Sandell was added as a member of the Committee in November 2004. At the time Sandell was appointed to the Committee and since such time, Akin

13. On June 14, 2004, the Committee selected Akin Gump as its lead counsel and Pierce Atwood LLP to serve as co-counsel to the Committee.

14. On June 25, 2004, the Committee filed its Application to Employ Akin Gump as co-counsel to the Committee *Nunc Pro Tunc* to June 2, 2004 (the "Akin Gump Retention Application").[3] In connection with the Akin Gump Retention Application, Akin Gump submitted the Declaration of Daniel H. Golden (the "Golden Declaration").[4] On July 13, 2004, this Court entered an order approving the Akin Gump Retention Application.

15. On June 20, 2005, Akin Gump filed the Fee Application

16. On July 12, 2005, the U.S. Trustee filed the Objection.

17. On August 16, 2005, Akin Gump filed the Botter Affidavit.

THE CONFLICT CHECK

18. Set forth below is a full account of the process undertaken by Akin Gump in conducting its conflict check for this engagement. The recitation of the facts is not intended to place blame on any individual for Akin Gump's disclosure deficiencies. Rather, Akin Gump believes it is necessary for the Court to have a full understanding of the facts and circumstances associated with the preparation of the Akin Gump Retention Application and the supporting Golden Declaration.

19. Upon its formation, the Committee selected Akin Gump and Pierce Atwood as co-counsel to the Committee and, shortly thereafter, filed applications to retain both firms. In

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Gump has represented and currently represents Sandell in matters wholly unrelated to the Debtors' chapter 11 proceedings. Akin Gump collected fees from Sandell in 2004 in respect of such engagements totaling $1,259,715.25, which represented approximately .2% of Akin Gump's revenues for 2004. For the first six months of 2005, Akin Gump has collected approximately $299,000 in fees from Sandell which accounts for approximately .1% of Akin Gump's revenue for fiscal year 2005 to date. See Botter Affidavit at ¶¶16-17.

[3] A copy of the Akin Gump Retention Application is attached hereto as Exhibit B.

[4] A copy of the Golden Declaration is attached as Exhibit A to the Akin Gump Retention Application (Exhibit B hereto).

support of the Akin Gump Retention Application, Akin Gump submitted the Golden Declaration. The intended purpose of the Golden Declaration was to disclose to this Court and all parties in interest the connections, if any, which Akin Gump had to the Debtors, their creditors and other parties in interest in the Debtors' chapter 11 cases as is required under Bankruptcy Rule 2014.

20. In preparing the Golden Declaration, as is its customary practice, Akin Gump submitted to its Conflict Check System the names of the parties set forth in the Debtors' application to retain counsel (the "Initial Conflict Check List").[5] See Botter Affidavit at ¶7. The Conflict Check System is designed to include every matter on which the firm has been engaged, by which entity the firm has been engaged and, in each instance, the identity of related and adverse parties.[6] See Botter Affidavit at ¶6. The results of this conflict check are set forth in the Golden Declaration.

21. In addition to reviewing the parties on the Initial Conflict Check List for potential connections, Akin Gump undertook to check for potential connections with certain other parties in interest not listed on the Initial Conflict Check List, including the members of the Committee and the Debtors' bankruptcy professionals (the "Supplemental Conflict Check List").[7] Botter Affidavit at ¶7.

[5] The Initial Conflict Check List is attached as Exhibit A to each of the Golden Declaration and the Botter Affidavit.

[6] It is the policy of Akin Gump that no new matter may be accepted or opened within the firm without completing and submitting to those charged with maintaining the Conflict Check System the information necessary to check each such matter for conflicts, including the identity of the prospective client, the matter and related and adverse parties. Akin Gump maintains and systematically updates the Conflict Check System in the regular course of business of the firm, and it is the regular practice of the firm to make and maintain these records. See Botter Affidavit at ¶6.

[7] The Supplemental Conflict Check List is attached as Exhibit B to the Golden Declaration and the Botter Affidavit.

22. Specifically, in connection with the preparation of the Akin Gump Retention Application, on or about June 3, 2004, Peter J. Sprofera, a bankruptcy analyst with Akin Gump,[8] submitted to the Conflict Check System the list of names set forth in the Initial Conflict Check List. However, the list of names in the Initial Conflict Check List (which contained over 350 parties) did not contain the names of the parties listed on the Supplemental Conflict Check List, as the Committee had not been formed at the time the Debtors' filed their application to retain counsel nor had any of the Debtors' bankruptcy professionals been officially retained. Accordingly, the conflict check with respect to Committee members and the Debtors' bankruptcy professionals occurred separately from the conflict check for the parties listed on the Initial Conflict Check List. See Botter Affidavit at ¶7.

23. In order to expedite the review of potential conflicts with respect to the parties listed on Supplemental Conflict Check List (consisting of the Committee members and the Debtors' bankruptcy professionals) and ensure the timely filing of the Akin Gump Retention Application, Mr. Sprofera personally checked each of these parties against Akin Gump's Accounting System. Mr. Sprofera was under the mistaken belief that, by checking the names of the parties listed on the Supplemental Conflict Check List against the Accounting System, he would be able to discern potential conflicts between Akin Gump and such parties. The Accounting System, however, only sets forth the name of clients of the firm and the fees incurred in connection with engagements for such clients. The Accounting System does not include every entity that has engaged the firm or the identity of related parties and adverse parties. See Botter Affidavit at ¶8.

[8] Mr. Sprofera's duties as a bankruptcy analyst for Akin Gump include, among other things, running conflicts checks as the necessary predicate for the preparation of retention applications and supporting affidavits or declarations in connection with Akin Gump's retention as counsel to an official committee of creditors appointed in a given chapter 11 case. See Botter Affidavit at ¶5.

24. As a result of Mr. Sprofera's error in using the Accounting System instead of the Conflict System, it was not discovered that Silver Point, acting together with two other parties, had, in April 2004, prior to the commencement of the Debtors' chapter 11 cases, retained Akin Gump to assist them in connection with the potential purchase of an airline, which was a debtor in a Canadian bankruptcy proceeding. See Botter Affidavit at ¶10. When using the Accounting System, where one party is acting with one or more other parties, and such group retains Akin Gump, only one party's name will appear as the client in the Accounting System. When names are checked in the Conflict Check System, however, all clients, affected parties and adverse parties known to the firm are revealed. See Botter Affidavit at ¶10.

25. While performing a supplemental conflict check in connection with Akin Gump's retention as counsel to an official committee of unsecured creditors in another chapter 11 proceeding, Mr. Sprofera discovered that Akin Gump had been retained by Silver Point and other parties to assist them in the purchase of the Canadian airline. The time records for that matter revealed that all of the substantive work performed by Akin Gump, on behalf of Silver Point and the other parties, was performed between April 6, 2004 and April 16, 2004, almost two months prior to the commencement of the Debtors' chapter 11 cases. The total fees received from Silver Point in connection with that matter were approximately $20,000.00. No work was performed on behalf of Silver Point following the commencement of the Debtors' cases. See Botter Affidavit at ¶11.

26. Until the U.S. Trustee contacted Mr. Botter on July 8, 2005, Mr. Botter had no actual knowledge of the firm's prior retention by Silver Point. See Botter Affidavit at ¶11.

RESPONSE

27. The issues presented by the U.S. Trustee's Objection are (i) did Akin Gump hold an interest adverse to the estate through its prior representation of Silver Point in matters wholly unrelated to the Debtors and their creditors which would warrant a denial of fees and (ii) to the extent there was no adverse interest, should Akin Gump be penalized for its inadvertent failure to disclose its connections to Silver Point in matters wholly unrelated to the Debtors as mandated by Bankruptcy Rule 2014. See Fed. R. Bankr. P. 2014(a).

28. Akin Gump is fully aware of the mandatory disclosure obligations of Bankruptcy Rule 2014 and acknowledges its failure (though unintentional) to comply with such rule. However, Akin Gump believes that the equities of this case militate against a reduction in the fees requested by Akin Gump.

I. Akin Gump Did Not Represent an Interest Adverse to the Debtors' Estates

29. Upon the appointment of an official committee pursuant to section 1102 of the Bankruptcy Code, the committee may select one or more attorneys, accountants or other agents to represent or perform services for such committee. See 11 U.S.C. § 1103(a). A professional retained by an official committee "may not, while employed by such committee, represent any other entity having an *adverse interest* in connection with the case." 11 U.S.C. § 1103(b) (emphasis added).

30. The Bankruptcy Code does not define "adverse interest"; yet, courts have found it to mean possessing a competing economic interest that would tend to lessen the value of the bankruptcy estate or that would create either a potential or actual dispute in which the estate is a rival claimant. See, e.g., In re Caldor, Inc., 193 B.R. 165, 171 (Bankr. S.D.N.Y. 1996); In re National Liquidators, Inc., 182 B.R. 186, 192 (S.D. Ohio 1995). Thus, attorneys are deemed to

have an interest adverse to the estate and its creditors if they have "either a meaningful incentive to act contrary to the best interests of the estate and its sundry creditors -- an incentive sufficient to place those parties at more than acceptable risk -- or the reasonable perception of one." In re Granite Partners, L.P., 219 B.R. 22 (Bankr. S.D.N.Y. 1998) (citing In re Martin, 817 F.2d 175, 180 (1st Cir 1987)).

31. Courts interpreting this maxim have found adverse interests where, for instance, the professional person (a) had an attorney client relationship with the financial institutions employing members of the debtor's board of directors; (b) represented the debtor corporation's officers in their individual capacities concurrently with their representation of the debtor; (c) served as an officer and director of the debtor; (d) was a prepetition creditor of the debtor's estate; and (e) was actually acting on behalf of a major equity holder of the estates. See e.g. In re Leslie Fay Cos., 175 B.R. 525 (Bankr. S.D.N.Y. 1994); In re Tauber on Broadway, Inc., 271 F.2d 766 (7th Cir. 1959); In re Wells Benrus Corp., 48 B.R. 196 (Bankr. D. Conn. 1985); Sholer v. Bank of Albuquerque (In re Gallegos), 68 B.R. 584 (Bankr. E.D. Mich. 1986); In re Kendavis Indus. Int'l Inc., 91 B.R. 742 (Bankr. N.D. Tex. 1988). Interests do not rise to the level of being adverse for purposes of Bankruptcy Code section 1103, however, merely because "it is possible to conceive a set of circumstances under which they might clash." Caldor, 193 B.R. at 172 (quoting Leslie Fay, 175 B.R. at 532).

32. Where committee counsel represents a creditor or committee member in matters wholly unrelated to the debtor's estate or its creditors, there is no actual or potential conflict giving rise to an adverse interest. See In re Firstmark Corp., 132 F.3d 1179, 1182-1183 (7th Cir. 1997) (holding that law firm representing committee was not in violation of Bankruptcy Code section 1103(b) by concurrent representation of committee and former president of debtor in

matters unrelated to the debtor's bankruptcy case); Daido Steel Co., Ltd. v. Official Committee of Unsecured Creditors, 178 B.R. 129, 131 (N.D. Ohio 1995) (holding that where there is no dispute that committee counsel's representation of a party in interest was in connection with matters not related to the bankruptcy case, Bankruptcy Code section 1103(b) did not bar counsel from representing committee); In re Enron Corp., 2003 WL 223455 (S.D.N.Y. Feb 3, 2003) (holding that committee counsel does not violate Bankruptcy Code section 1103(b) if it represents an entity with an adverse interest to the debtor in a matter unrelated to the debtor's chapter 11 case or in a matter that predates counsel's retention by the committee); see also 7 Collier on Bankruptcy ¶ 1103-04[2][a] at 1103-20 (15th ed rev. 2005) ("The absolute prohibition imposed by section 1103(b) is limited to representation of other entities in connection with the case. Section 1103(b) constitutes a blanket prohibition on representing another entity (except a creditor) in connection with the case at the same time the professional is representing the committee. It does not prohibit simultaneous representation of both the committee and the holder of the adverse interest, so long as the professional represents the holder of the adverse interest in matters unrelated to the case.").

33. While representing the Committee, Akin Gump did not represent any party holding an adverse interest to the estate in connection with the Debtors' chapter 11 cases. As noted in the Golden Declaration, the Botter Affidavit and other supplemental disclosures made by Akin Gump during the pendency of the Debtors' chapter 11 cases, Akin Gump has in the past represented and currently represents certain parties in interest in the Debtors' chapter 11 cases in matters wholly-unrelated to the Debtors.

34. For example, as disclosed in the Botter Affidavit, as of the commencement of the Debtors' chapter 11 cases, in addition to Silver Point, HSBC Bank, N.A. ("HSBC"), as indenture

trustee, or certain affiliates of HSBC, and certain affiliates of Singer Childrens Family Trust were also current or former clients of the firm in matters wholly unrelated to the Debtors' chapter 11 cases.

Silver Point

35. As noted above, Akin Gump's prior representation of Silver Point (a) was in a connection with a single matter, unrelated to the Debtors or these cases; (b) all of the substantive work performed by Akin Gump, on behalf of Silver Point and the other parties in their efforts to acquire a Canadian airline, was performed prior to the commencement of the Debtors' chapter 11 cases; and (c) the total fees received from Silver Point in connection with that matter were approximately $20,000.00.

HSBC

36. While Akin Gump does not currently represent HSBC, Akin Gump has in the past and currently represents certain affiliates of HSBC in corporate matters wholly unrelated to the Debtors' chapter 11 cases. Akin Gump collected fees in 2004 in respect of such engagements totaling $438,150.34, which represented approximately .07% of Akin Gump's revenues for 2004. For the first six months of 2005, Akin Gump has collected approximately $175,000 in fees from affiliates of HSBC, which account for approximately .06% of Akin Gump's revenue for fiscal year 2005 to date. In addition, HSBC is currently a member of an official creditors committee which is represented by Akin Gump in connection with another chapter 11 case in connection with another chapter 11 case. See Botter Affidavit at ¶13.

Singer Childrens Family Trust

37. Akin Gump does not currently represent any affiliates of Singer Childrens Family Trust. An affiliate of Singer Childrens Family Trust retained Akin Gump on two separate

occasions on matters wholly unrelated to the Debtors' chapter 11 cases. One engagement lasted from August 11, 1999 to February 24, 2004. For this engagement, Akin Gump incurred fees of approximately $4,000. The other engagement was opened on January 28, 2002 and closed on November 18, 2004, with the last time entry being recorded on July 21, 2004. The total fees incurred for this second engagement were $8,458.50. See Botter Affidavit at ¶14.

38. As none of the foregoing engagements nor any other engagements, as disclosed in the Golden Declaration, Botter Affidavit or other supplemental disclosures, were related to the Debtors, their creditors or these chapter 11 cases in any manner, Akin Gump respectfully submits that it did not have an interest materially adverse to the interests of the estates 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 Debtors or an investment banker as specified in subparagraph (B) or (C) of 11 U.S.C. § 101(14), or for any other reason.

II. The Equities Militate in Favor of Approving Akin Gump's Fees

39. As Akin Gump did not have an interest adverse to the estates or their creditors, the Court's analysis turns to the sanctions to be imposed, if any, on Akin Gump for its inadvertent failure to disclose its connections to certain parties in interest in the Debtors' cases in accordance with the provisions of Bankruptcy Rule 2014.

40. Authorization for a committee to retain a given professional pursuant to Bankruptcy Code section 1103(b) is obtained from the bankruptcy court after the filing of retention application, notice and, if applicable, a hearing. The retention application must be "accompanied by a verified statement setting forth the [professional's] *connections* with the debtor, creditors, or any other party in interest, their respective attorneys or accountants, the

United States trustee, or any person employed in the office of the United States trustee." Fed. R. Bankr. P. 2014(a) (emphasis added).

41. What constitutes a "connection" for purposes of Bankruptcy Rule 2014 is not defined in the Bankruptcy Code or the Bankruptcy Rules. Courts interpret this term broadly holding that professionals "cannot pick and choose which connections are irrelevant or trivial . . . no matter how old the connection, no matter how trivial it appears, the professional seeking employment must disclose it." In re Park-Helena, 63 F. 3d 877, 881 (9th Cir. 1995). Professionals "must disclose all facts that bear on . . . disinterestedness and cannot usurp the court's function by choosing, *ipse dixit*, which connections impact disinterestedness and which do not. The existence of an arguable conflict must be disclosed if only to be explained away." Granite Partners, 219 B.R. at 35. A professional's disclosure permits a court to determine, in an informed manner, whether a professional's retention should be approved or denied. Id. As such, courts generally hold that professionals must disclose what they know when they know it, frowning on boilerplate language as a substitute for disclosing known and significant connections. See Leslie Fay, 175 B.R. at 537.

42. Substantial legal precedent, including case law cited by the U.S. Trustee, provides that it is within the discretion of a court as to whether the imposition a penalty on a professional for failing to adequately disclose potential conflicts is necessary or appropriate. See Rome v Braunstein, 19 F.3d 54, 59 (1st Cir. 1994) (court has discretion on whether to deny any fees upon counsel's failure to disclose potential conflicts); National Liquidators, 182 B.R. at 197 (holding that absent a disqualifying conflict, the court retains jurisdiction to determine whether to deny fees as a sanction for failures to disclose potential conflicts).

43. In exercising its discretion, several courts have found that, where there is non disclosure of potential conflicts, as opposed to actual conflicts, there is a need for flexibility and "where the equities outweigh the need for attorney discipline for failure to disclose potential conflicts, the law does not require the denial of fees."[9] See In re Roberts, 75 B.R. 402, 412 (D. Utah 1987); see also In re Bolton-Emerson, Inc., 200 B.R. 725, 731 (D. Mass. 1996) (same) (citing Roberts); In re The Lighting Center, Inc., 178 B.R. 320 (Bankr. D.R.I. 1995) (finding the general rule that compensation be denied because of improper disclosure to be "too severe in the present circumstances" and only denying compensation with respect to a limited number of time entries where an apparent conflict was present.); In re National Liquidators, Inc., 182 B.R. 186 (S.D. Ohio 1995) (finding that fees should not be denied *in toto*, even though law firm failed to satisfy the disclosure requirements, because no adverse interest was found to exist, and it was undisputed that legal counsel had provided "an abundance of valuable legal services".).

44. In National Liquidators, a case heavily relied upon by the U.S. Trustee in its Objection, the bankruptcy court found that counsel for the creditors' committee held an adverse interest to the estate based on its *concurrent* representation of the committee and a committee member in connection with the case and its failure to disclose such representation. The bankruptcy court also based its holding that counsel had an adverse interest, in part, on the lack of progress in the case. On appeal, the district court found that (a) notwithstanding committee

[9] Indeed, even if a conflict was present, which it is not in this case, the court retains wide discretion in determining whether to deny fees incurred for services rendered by a professional. See, e.g., Diamond Mortgage, 135 B.R. 78, 96 (Bankr. N.D. Ill. 1990) ("[i]n exercising that discretion, the court needs to balance the draconian impact of the loss of fees for services actually rendered by a professional ... against the actual injury or prejudice to the estate from his failure to live up to the requirements of [section] 328(c)."); In re Watson Seafood & Poultry Co., Inc., 40 B.R. 436, 440 (Bankr. E.D.N.Y. 1984) (noting that, "because the bankruptcy court is a court of equity ... the general rule should be that ... when a conflict is present ...the court should have the ability to deviate from [the rule that all fees be denied] where the need for attorney discipline is outweighed by the equities of the case. This flexibility is supported by 11 U.S.C. [section] 328(c), which says that the court 'may' (rather than 'shall') deny compensation when counsel represents an interest adverse to the interest of the estate.").

counsel's dual representation, it did not have an interest adverse to the estate nor was there even an appearance of impropriety and (b) the record (i) sharply contradicted a finding of lack of progress and (ii) fail[ed] to suggest even the remotest possibility of the existence of any actual dispute, strife, discord or difference between [the individual client] and the Committee." 182 B.R. at 194. The district court reasoned that "it simply exceeds rational bounds to rule than an adverse interest exists merely because a committee member's or a creditor's transactions with the debtor will be investigated, or because a remote, speculative, hypothetical possibility exists that, in the future, the estate or the Committee may dispute the creditor's claim or bring a cause of action against the creditor." 182 B.R. at 192. The court went on to note that "such a broad definition would create an injustice in cases . . . where courts are called on to evaluate concurrent representation after completion of such representations. In such cases, attorneys would be punished simply because the committee routinely investigates the creditor's transactions or because, at the beginning of the representation, it was hypothetically possible that the estate possessed a cause of action against the creditor or could dispute the creditor's claim." Id.

45. The district court did, however, take issue with counsel's failure to disclose its concurrent representation of the committee and a creditor of the estate but ruled that the bankruptcy court abused its discretion when it denied counsel's fees "*in toto*." Id. at 196. Based on its prior findings that that there was no adverse interest, the district court determined that it was not required to deny all fees for the attorney's failure to meet the disclosure requirements of Bankruptcy Rule 2014. In reaching this conclusion, the court noted that "no bankruptcy section speaks directly to circumstances, such as these, where no disqualifying interest exists but an attorney knew of information he was required to disclose but failed to do so." Id. at 197. The

court found that absent an actual disqualifying interest, justice required the court to retain discretion whether to deny fees as a sanction for the failure to disclose. Id.

46. The district court ultimately concluded that a total denial of fees was "inequitable and draconian" but that some sanction was appropriate because the failure to comply with disclosure requirements cannot be tolerated. Id. As a result, the district court remanded the case to the bankruptcy court to rule upon an appropriate penalty in the event the United States trustee, which was the sole objecting party, and the law firm could not reach agreement on a suitable penalty for the law firm's failure to comply with Bankruptcy Rule 2014. As a guidepost, the district court stated that the most equitable solution for the attorney's violation of the disclosure rules would be to deny "only those fees for services performed after the performing person, or the person directing such performance, acquired actual knowledge of the representation of [the creditor in connection with the case]." Id.

47. Other courts have followed National Liquidators in holding that in the absence of actual injury to the estate, a complete denial of fees based on a failure to disclose connections might be "draconian and inherently unfair." Granite Partners, 219 B.R. at 31. (citations omitted). As such, courts generally subject the penalty decision to a test based on, among other things, (i) the deficiencies of disclosure, (ii) whether the conflict is actual or potential, (iii) harm to the estate and (iv) the quality of the services provided. See generally In re Granite Partners, L.P., 219 B.R. 22 (Bankr. S.D.N.Y. 1998); In re Leslie Fay Companies, Inc., 175 B.R. 525 (Bankr. S.D.N.Y. 1994); In re Film Ventures Int'l, Inc., 75 B.R. 250, 253 (9th Cir. BAP 1987); In re National Liquidators, Inc., 182 B.R. 186 (S.D. Ohio 1995).

48. In this case, Akin Gump took immediate action to remedy its disclosure deficiencies. As soon as David Botter, the Akin Gump financial restructuring partner principally

responsible for Akin Gump's representation of the Committee, became aware of the potential disclosure issues, he spearheaded Akin Gump's efforts to unearth any inadvertently undisclosed connections to ensure complete disclosure was made in accordance with Bankruptcy Rule 2014.

49. As evidenced by the Botter Affidavit, the supplemental disclosures made by Akin Gump, subsequent to learning of the mistake that was made in connection with conducting the conflict check associated with the Akin Gump Retention Application, reveal that none of Akin Gump's connections resulted in an actual or potential conflict with these estates or their creditors. As (a) neither Mr. Botter, nor any other Akin Gump attorney principally involved in this engagement acquired actual knowledge of Akin Gump's failure to disclose its connections to Silver Point until the issue was raised by the U.S. Trustee, (b) Akin Gump took immediate action to investigate and then rectify any and all disclosure deficiencies (which were the result of errors in conducting the conflict check, not an abdication of responsibility to undertake such conflict check) and (c) no subsequent disclosures by Akin Gump revealed actual or potential conflicts or an adverse interest, Akin Gump respectfully submits that the imposition of any sanctions for its alleged violation of Bankruptcy Rule 2014 is unwarranted.

50. Moreover, there is no dispute that Akin Gump actively and effectively advocated on behalf of the Debtors' unsecured creditors resulting in substantial benefit to the estate. Akin Gump was instrumental in settling the myriad disputes among the Debtors, DIRECTV, Inc. ("DIRECTV"), National Rural Telecommunications Cooperative ("NRTC"), and Pegasus Communications Corporation ("PCC"), the Debtors' ultimate parent company, that culminated in the sale of the Debtors' largest assets -- the satellite assets -- to DIRECTV for approximately $1 billion in value that ensured maximum guaranteed recoveries for unsecured creditors when such assets could have been rendered valueless during the pendency of these cases.

51. Indeed, as the Court recalls, the Committee, concerned about the desperate situation facing the Debtors and these estates as a result of recurring litigation defeats, increasing customer defections and the looming August 31, 2004 termination date of the Debtors' right to broadcast DIRECTV programming, in mid-June 2004, through Akin Gump and certain members of the Committee, commenced negotiations with DIRECTV, NRTC and the Debtors' secured lenders (the "Secured Lenders") in an effort to determine if a consensual resolution to the numerous disputes among Pegasus, DIRECTV and NRTC could be achieved.

52. In early July, as the foundation for a consensual transaction began to take hold, the Committee, through Akin Gump, approached the Debtors and encouraged them to abandon their litigation strategy and to immediately engage in global settlement discussions with DIRECTV, NRTC and the Committee. Based, in large part, on Akin Gump's efforts, the Debtors joined the discussions, which quickly evolved into extensive, protracted negotiations over the terms of a global settlement among the Debtors, the Committee, DIRECTV, NRTC and PCC. These negotiations culminated in the execution of a global settlement agreement and related documents, which, collectively, netted these estates in excess of $875 million in exchange for what could only have been characterized as "wasting" assets and the release of uncertain litigation claims.

53. Akin Gump also took the lead in analyzing and resolving intricate tax matters and disputes related to the Debtors' separation from PCC which culminated in a settlement among the Debtors, PCC and the Committee that ensured these estates would retain valuable tax attributes that would inure to the benefit of the Debtors' unsecured creditors. Akin Gump was also the lead negotiator in settling disputes with the Debtors' prepetition secured lenders that

resulted in these estates saving over $3 million in potential pre-payment penalties and default interest.

CONCLUSION

54. As evidenced by the foregoing and the record of these cases, Akin Gump was an influential advocate for the Committee and instrumental in securing substantial value for these estates and their unsecured creditors. Akin Gump's inadvertent failure to disclose certain connections to parties in interest in these cases, which connections did not rise to the level of actual or potential conflicts or create an interest adverse to these estates, was remedied as quickly as possible upon Akin Gump learning of the disclosure deficiencies in accordance with applicable law and after multiple discussions with the U.S. Trustee. Accordingly, Akin Gump respectfully submits that based on the equities of these cases, it should be awarded the full amount of the fees requested in the Fee Application.

WHEREFORE, Akin Gump respectfully requests that this Court enter an order (a) overruling the U.S. Trustee's Objection; (b) approving and awarding Akin Gump, on a final basis, $3,622,856.50 in compensation for professional services rendered on behalf of the Committee, and $168,726.09 for reimbursement of expenses incurred from June 2, 2004 through and including May 5, 2005 in connection with such services; and (c) granting Akin Gump such other and further relief as this Court may deem just, proper and equitable.

Dated: New York, New York
September 16, 2005

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