No.

IN THE

Supreme Court of the United States

KEVIN KERVENG TUNG, P.C., PETITIONER

v.

CHARLES M. FORMAN, CHAPTER 7 TRUSTEE AND ANDREW R. VARA, U.S. TRUSTEE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

KEVIN K. TUNG, ESQ.,
Counsel of Record

Queens Crossing Business Center
136-20 38th Avenue,
Suite 3D
Flushing, NY 11354
ktung@kktlawfirm.com
(718) 939-4633

CURRY & TAYLOR ♦ (202) 350-9073

QUESTIONS PRESENTED

This appeal addresses a subtle yet important constitutional issue concerning the judicial power of a non-Article III bankruptcy court Judge. This important constitutional question should have been resolved in the landmark case of *Stern v. Marshall*, 564 U.S. 462, 481, 131 S.Ct. 2594, 180 L.Ed.2d 475 (2011). However, the Third Circuit's decision did not follow the ruling in *Stern* in the instant case. While subtle, the importance of this constitutional issue was strongly emphasized by Chief Justice Roberts, when he cautioned all of us in *Stern* that

> "[a] statute may no more lawfully chip away at the authority of the Judicial Branch than it may eliminate it entirely. 'Slight encroachments create new boundaries from which legions of power can seek new territory to capture' (Citation Omitted) … we cannot overlook the intrusion: 'illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure.' (Citation Omitted) We cannot compromise the integrity of the system of separation powers and the role of the Judiciary in that system, even with respect to challenges that may seem innocuous at first blush." See, Id.

Two questions are presented:

1. Whether or not a non-Article III Bankruptcy Court Judge can exercise judicial power to

determine a noncore proceeding where the final determination affects non-parties (the single sole member of the Debtor LLC and the non-party attorneys' contractual rights) to the Debtor LLC's bankruptcy proceedings without their consent by ordering the non-party attorney to disgorge the legal fees paid by the single sole member of the Debtor LLC, not paid by the estate, to the estate of the Debtor.

2. Whether or not Congress can enact Bankruptcy Code as the Third Circuit interpreted in the instant case that the bankruptcy court may order disgorgement of any payment made to an attorney representing the debtor in connection with a bankruptcy proceeding, regardless of the payment source, which is in conflict with Article III, §I, of the Constitution when Article III, §I, of the Constitution does not permit or allow a non-Article III Bankruptcy Court Judge to determine issues of non-core bankruptcy matters that encroach into the boundaries of the judiciary systems and invade the principal of separation of powers.

PARTIES TO THE PROCEEDING

All the parties in this proceeding are listed in the caption.

STATEMENT OF RELATED CASES

None

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, KEVIN KERVENG TUNG, P.C., respectfully petitions for a writ of certiorari to review the opinion of the United States Court of Appeals for the Third Circuit in this case.

OPINION BELOW

The United States Bankruptcy Court for the District of New Jersey's Order (per Meisel, Bankruptcy Judge) denying fee application and disgorging attorney's fees (Appendix ("Pet. App." 67a-69a) is not otherwise published. The United States Bankruptcy Court for the District of New Jersey's Opinion (per Meisel, Bankruptcy Judge) denying fee application and disgorging attorney's fees (Appendix ("Pet. App." 26a-66a) is not otherwise published. The United States District Court for the District of New Jersey's Letter Order (per Arleo, District Judge) affirming Bankruptcy Judge Meisel's order to deny fee application and disgorge attorney's fees (Appendix ("Pet. App.") 14a-25a) is not otherwise published. The Opinion of the United States Court of Appeals for the Third Circuit (per Ambro, Jordan, and Scirica, Circuit Judges) affirming the District Court's letter order (Pet. App. 1a-12a) is not otherwise published. The Judgment of the Third Circuit (per Ambro, Jordan, and Scirica, Circuit Judges) affirming the District Court's letter order (Pet. App. 13a) is not otherwise published.

JURISDICTION

The Third Circuit entered its judgment on April 19, 2022. (Pet. App. 13a) Petitioner invokes this Court's jurisdiction under 28 U.S.C.§1254(1).

RELEVANT PROVISIONS INVOLVED

Article III, §I, of the Constitution mandates in pertinent part, that "[t]he judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

STATEMENT

Debtor, 38-36 Greenville Avenue, LLC, is a Single-Member LLC ("Debtor LLC") formed in March 2008 for the sole purpose of owning the real property located at 38-36 Greenville Avenue, Jersey City, New Jersey 07305 (hereinafter the "Real Property"). Lingyan Quan ("Single Member") is an individual who conveyed the Real Property to the Debtor in February 2009 and who remained as the Single-Member for the Debtor LLC. Single Member Lingyan Quan was disclosed as the 100% Equity Holder of the Debtor LLC in the Bankruptcy Petition.

In November 2015, Superior Court of New Jersey granted a judgment in the amount of $1,260,936.13 against Robert Browning and 38-36 Greenville Avenue, LLC. ("Judgment") On or about March 24, 2016, the Debtor 38-36 Greenville Ave, LLC filed the Chapter 11 Petition for the purpose of staying the enforcement of the state court Judgment against

the Debtor. KEVIN KERVENG TUNG, P.C. ("Counsel") were the attorneys representing only the Debtor LLC in the state court action for the Debtor in Flores v. 38-36 Greenville Avenue, LLC ("State Court Action"). In the Petition, Debtor LLC clearly disclosed to the Court that it is a Single Asset Real Estate business. The Single Member Lingyan Quan clearly disclosed to the Court she is an authorized agent of the Debtor LLC. The fees in the amount of $3,000 received for services by the Counsel before filing the Petition was also clearly disclosed. Additionally, the scope of the services rendered for the initial $3,000 was clearly disclosed in the Petition. Subsequent to the filing of the Petition, services such as motion practice, court hearings, adversary proceedings, reorganization plans, among others, which were provided after 341 meetings were not included.

On or about April 6, 2016, Counsel filed the Application for Retention of Professional Service as counsel for Debtor. ("Application") In the Application, Counsel disclosed to the Bankruptcy Court ("Court") that Counsel received a retainer in the amount of $3,000 from the Debtor LLC. Counsel also disclosed that no other agreement was made by the debtor with anyone else at the time of retention. To Counsel's knowledge, there was no Loan Agreement of any kind between the Single Member and Debtor LLC that was formed or even discussed at the time the Application was prepared. Counsel also represented to the Court that they were the attorneys in the State Court Action for the Debtor in the Application. In fact, Counsel had always been paid legal fees in the State Court Action by the Debtor's Single Member Lingyan Quan on behalf of the Debtor LLC before the filing of the Bankruptcy

proceeding, because the Debtor LLC did not have funds to pay its Counsel. The initial $3,000 received from the Debtor was clearly and unequivocally disclosed in the Statement of Operation for the period between January 1, 2016 through March 24, 2016.

On or about April 18, 2016, the Court granted the Application to employ KEVIN KERVENG TUNG, P.C. as Counsel to the Debtor-in-Possession. On or about May 3, 2016, the Debtor LLC filed a motion for an Order to be relieved from the stay to pursue its State Court appeal of the State Court Judgment against the Debtor LLC. On or about December 6, 2016, the Court denied the motion of the Debtor LLC for an Order lifting the Stay to pursue its State Court appeal. On or about January 18, 2017, the Debtor LLC filed a motion for reconsideration of the Order dated December 6, 2016 for Relief from Stay.

On or about April 10, 2017, the Court denied the Debtor LLC's motion for reconsideration. The Court then issued an Order to Show Cause by the Court for Dismissal or Conversion from Chapter 11 to Chapter 7. On or about May 17, 2017, the Court denied Debtor's request to dismiss the Chapter 11 Petition but issued an Order converting the Chapter 11 case to a Chapter 7 case. On or about September 20, 2017, the Court issued a Final Order authoring Public Sale of the Real Property of the Debtor.

On or about October 10, 2017, Counsel for Debtor filed the Motion for Payment of Administrative Expenses, which Counsel indicated that was the First and Final Application for Professional Services Rendered and Reimbursement of Expenses Incurred

and Posted during the representation of the Debtor's bankruptcy proceeding from February 9, 2016 through October 10, 2017. Counsel also disclosed to the Court that the total amount of the administrative expense sought was $31,819.00, of which Counsel had been compensated on behalf of the Debtor by the Single Member Lingyan Quan for an amount of $19,400, which included the $3,000 initial retainer. Counsel did not intentionally mislead the Court with regards to any of the facts or events that occurred during the Counsel's representation of the Debtor. Nothing in the record indicates that Counsel, at any point, had knowledge that they were required to disclose, within 14 days of receipt, that they had received any fee payments from a third party. There is additionally nothing contained in the record which indicates that Counsel intentionally ignored these requirements by failing to disclose. Nothing in the record indicates that Counsel was representing the Single Member's interest in a manner that was adverse to the interest of the Debtor LLC's interest in the State Court Action as well as in the Bankruptcy proceeding, even though such an interest may be united when the issues involve Single Member LLCs.

At no point in time did the Debtor or Counsel make a false representation to the Court in the Monthly Operating Statement filed with the Court. The payment of legal fees by the Single Member of the Debtor were not the funds disbursed from the Debtor LLC's funds, which should not be part of the accounting contained in the Monthly Operating Statements. Nothing in the record indicates that Counsel was aware that the fees received from a third party should be part of the monthly operating statement of the Debtor LLC

and the record further fails to indicate that Counsel intentionally chose not to disclose this information on the monthly operating statements. The monthly operating statements were prepared by the Debtor LLC. Nothing in the record shows that the payment of the legal fees by the Single Member were loans to the Debtor LLC.

In October of 2018, the Bankruptcy Court Judge issued, sua sponte, two Orders to Show Cause, as to Why the Court shall Not Issue Sanctions Against Kevin Kerveng Tung, P.C. and Kevin K. Tung, Esq., in His Individual Capacity, for Potential Violations of the New Jersey Rules of Professional Conduct, the United States Code, and the Federal Rules of Bankruptcy Procedure. On March 31, 2020, the Bankruptcy Court issued an Order denying Counsel's fee application and disgorging attorney's fees. (67a-69a) On April 2, 2020, the Law firm of Kevin Kerveng Tung, P.C. field the Notice of Appeal. On April 6, 2020, the Bankruptcy Court issued an Opinion. (26a-66a) Most surprisingly, the Bankruptcy Judge did not find there was a conflict of interest existing between Counsel and Debtor LLC in her Opinion, but the Bankruptcy Judge chose to punish Counsel with an extremely harsh determination by denying all fees requested in the application and disgorging all fees that were received by the Counsel from a third party and all costs incurred by Counsel during the representation to the estate. In addition, the Bankruptcy Judge ordered that Counsel shall disgorge said fees within 30 days of the date of the Order to avoid further sanctions, especially during this corona virus pandemic when the small law firm was not in operation and was not generating significant income.

THE DISTRICT COURT LETTER ORDER BY HON. ARLEO

The District Court's Letter Order to affirm the Order of the Bankruptcy Court was based on a mistake of a material fact that the professional fees received by the attorneys for the Debtor and disgorged by the Court to the estate were from the estate as the Court below specifically stated in the Letter Order. The undisputed fact in the record, however, was that the professional fees received and disgorged were Not received from the estate, but from a third party, the single member of the Debtor LLC. Specifically, the District Court Judge stated in her Letter Order that the "Appellant argues the Bankruptcy Judge lacked jurisdiction to disgorge the fees it received from the estate." Because of the mistake on the material fact that the fees ordered to be disgorged were considered to be part of the estate even though they were never a part of the estate in the instant case, the legal analysis that followed was entirely invalid. Based on the foregoing reason alone, the Order of disgorging attorney fees received from a third party, not from the estate, to the estate must be vacated as a matter of law.

In addition, the District Court's Order to affirm the Order of the Bankruptcy Court was based on a mistake of a material fact that the failure to disclose was an intentional "total failure to disclose" the fees received by the attorneys for the Debtor. In fact, the fees received from a third party, a single member in the Debtor LLC, were voluntarily disclosed by the attorneys for the Debtor in the First and Final Professional Fees Application.

Said mistake of material facts rendered the analysis and conclusion of the law on all issues before the District Court below invalid. In *Stern v. Marshall*, the Supreme Court ruled that even if the Bankruptcy Court had the statutory authority to enter judgment on a counterclaim, it lacked the constitutional authority to do so. See, *Stern v. Marshall*, 564 U.S. 462, 481, 131 S.Ct. 2594, 180 L.Ed.2d 475 (2011) This is exactly the same situation in the instant case. For example, even if the Bankruptcy Court had the statutory authority to allow or disallow the professional fees application when fees are taken from the estate, it lacked the constitutional authority to disgorge the fees received by Counsel from a third party. This is due to the fact that disgorging the fees received by Counsel from a third-party amounts to (i) interference with the contractual right to receive fees earned from rendering professional services and (ii) would deprive the property right of Counsel for the fees received, especially when there is no fee dispute between the Counsel and the third-party that has been submitted to the Bankruptcy Court for adjudication. The constitution of the United States does not allow a non-Article III judge to make those adjudications.

In addition, the District Court's analysis was based on a mistake of a material fact when it determined that it was an intentional "total failure to disclose" the fees received by the attorneys for the Debtor. In fact, the fees received from the third party (the Single Member of the Debtor LLC) were voluntarily disclosed by the attorneys for the Debtor. The only issue was it was not "timely" disclosed. The timely disclosure was required to determine if receiving fees from a third party would create conflict of interest

on the part of the attorneys for the Debtor. No conflict of interest was found by the Court below. To hold that an alleged failure to "timely" disclose the fees received by Counsel from a third-party is the same as an intentional total failure to disclose would ultimately render the distinction between an intentional failure to disclose and a non-intentional failure to disclose to be totally meaningless. A technical and harmless failure to disclose should not be punished indistinguishably from an intentional total failure to disclose as it has in the instant matter at hand.

THE THIRD CIRCUIT DECISION

Petitioner appealed the Letter Order of Judge Arleo to the Third Circuit. On April 14, 2022, the Court of Appeals for the Third Circuit affirmed the District Court's Letter Order on the grounds (1) that Petitioner's reliance on *Stern v. Marshall*, 564 U.S. 462 (2011) was misplaced, because payment of legal fees is based on a federal bankruptcy law provision with no common law analogue, and (2) that the bankruptcy court may order disgorgement of any payment made to an attorney representing the debtor in connection with a bankruptcy proceeding, irrespective of the payment source.

This petition for a writ of certiorari now follows.

REASONS FOR GRANTING THE PETITION

The petition for writ of certiorari should be granted for the following reasons:

The Third Circuit's opinion to affirm the decisions of the courts below was mainly based on its narrow and broad interpretations of the Supreme Court's holding in the landmark case *Stern v. Marshall*, 564 U.S. 462 (2011) that (1) Stern only narrowly restricts a bankruptcy court from determining or adjudicating state-law tort claims that were "in no way derived from or dependent upon bankruptcy law" because they "exist[] without regard to any bankruptcy proceeding" and (2) Stern does not restrict a bankruptcy court to order the disgorgement of any payment made to an attorney representing the debtor in connection with a bankruptcy proceeding, irrespective of the payment's source, because the Congress has enacted the Bankruptcy Code, which has broadly interpreted that disgorgement was within the Bankruptcy Court's jurisdiction as these proceedings were core and flowed directly from bankruptcy scheme.

This purview of the holdings in *Stern v. Marshall*, 564 U.S. 462 (2011) is not entirely accurate. To some degree, this purview of the holdings in Stern will actually cause misinterpretations of Stern and will lead to wrong conclusions by many courts in the future. The real effect of this Third Circuit decision will actually negate the holdings of Stern. Therefore, this Court's review of the instant Third Circuit's opinion is necessary and will clarify the misunderstandings and confusions for the legal community at large regarding the correct understanding of the holdings in Stern.

I. The Ruling in *Stern v. Marshall*, Is Applicable Because the Professional Fees and Costs Received and Disgorged Were Never Part of the Estate

A. Bankruptcy Judge Lacked the Judicial Power to Disgorge Fees Not Paid by the Estate to the Estate

"Bankruptcy judges may hear and enter final judgments in 'all core proceedings arising under title 11, or arising in a case under title 11.' §157(b)(1)" *Stern v. Marshall*, 564 U.S. 462, 474. 131 S.Ct. 2594, 180 L.Ed.2d 475 (2011) Core proceedings are listed in §157(b)(2). Subsections of §157(b)(2) only gives bankruptcy judges the judicial power to determine "allowance or disallowance of claims against the estate" §157(b)(2)(B) or to issue "orders to turn over property of the estate." §157(b)(2)(E). None of the core proceedings allows the bankruptcy judges to determine and issue orders affecting the property of non-parties, which was never the property of the estate, to the bankruptcy proceedings.

In addition, the Bankruptcy judge can deny the fees application, but cannot disgorge the fees to the estate that were not paid by the estate. By doing so, the bankruptcy court is engaged in a determination of claims that seek to "augment the estate", which can only be determined by an Article III judge, as opposed to those that seek a "pro rata share of the bankruptcy res." See, *Butler v. Anderson* (*In re C.R. Stone Concrete Contrs. Inc.*), 2013 Bankr.LEXIS 5692, *Meoli v. Huntington Nat'l Bank* (*In re Teleservices Group, Inc.*), 456 B.R. 318 (Bankr. W.D. Mich. 2011) *In re Felice*, 480 B.R. 401, 415 (Bankr. E.D. Nass. 2012) (The

proceedings seeking to "augment the estate" might be beyond a bankruptcy judge's authority to decide.), *In re Tolomco*, 537 B.R. 869, 872-73 (Bankr. N.D. Ill. 2015), (Turnover action, which is predicated upon alter ego and veil-piercing theories of liability under Illinois law, are not issues that stem from bankruptcy itself or would necessarily be resolved in the claims allowance process), *Sitka Enters. v. Segarra-Miranda*, 2011 U.S.Dist.LEXIS 90243 (D.C. Puerto Rico 2011) (Fraudulent conveyance action could not be adjudicated by the Bankruptcy Court for lack of constitutional authority to do so.)

In the instant case, an Order disgorging attorneys' fees and costs paid to the attorney by a third party is equivalent to an action to turn over non-estate property to the estate, which can only be determined by a district court upon reviewing de novo the proposed findings of fact and conclusions of law submitted by the bankruptcy judge. See, *Stern v. Marshall*, 564 U.S. 462, 475. 131 S.Ct. 2594, 180 L.Ed.2d 475 (2011) (When a bankruptcy judge determines that a referred 'proceeding … is not a core proceeding but … is otherwise related to a case under title 11,' the judge may only 'submit proposed findings of fact and conclusions of law to the district court.' §157(c)(1). It is the district court that enters the final judgment in such cases after reviewing de novo any matter to which a party objects. This principle may not even apply in this case, because the bankruptcy judge acted on the court's own order to show cause, which is not authorized by any statute in existence, as opposed to a situation where a bankruptcy judge might more appropriately be asked to determine a motion for recovering the legal

fees paid by the estate or by any party, creditor or trustee.

The argument that a Bankruptcy Judge is prohibited from adjudicating a contract dispute between non-parties is supported by the argument outlined in the Trustee Forman's brief. "It is important to note that Judge Meisel did not enter a dispositive order regarding the ultimate disposition of the funds to be disgorged by Appellant. She merely found that Appellant was not entitled to retain those funds as compensation for acting as the Debtor's attorney in the bankruptcy case. In her opinion, Judge Meisel specifically wrote that,

> "[u]nder appropriate circumstances, the Bankruptcy Court: would entertain a motion to permit the portion of the undisclosed payments that was not part of the retainer to be transferred back to the Debtor's principal either as a repayment, administrative expense or some other mechanism suggested by the Chapter 7 Trustee. Any such motion should be supported by a certification by the Debtor's principal with facts that support the relief sought. See, foot note 191 at pages 31-32 (65a)"

What the Bankruptcy judge decided to adjudicate here is exactly what is prohibited by *Stern v. Marshall*, 564 U.S. 462, 131 S.Ct. 2594, 180 L.Ed.2d 475 (2011), regardless of whether it was a decision to disgorge or to determine the distribution of the non-estate funds turned over to the estate.

The Supreme Court of the United States ruled clearly on the point that even if the Bankruptcy Code may permit the Bankruptcy Court to enter final judgment on certain claims, Article III of the Constitution does not. See, *Stern v. Marshall*, 564 U.S. 462, 481, 131 S.Ct. 2594, 180 L.Ed.2d 475 (2011) Article III, §I, of the Constitution mandates that "[t]he judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Article III protects liberty not only through its role in implementing the separation of powers, but also by specifying the defining characteristics of Article III Judges. Article III could neither serve its purpose in the system of checks and balances nor preserve the integrity of judicial decision-making if the other branches of the Federal Government could confer the Government's "judicial Power" on entities outside the scope of Article III. Congress may not withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty. See, *Stern v. Marshall*, 564 U.S. 462, 484. 131 S.Ct. 2594, 180 L.Ed.2d 475 (2011)

This is exactly the argument raised by the petitioner's Counsel below. A non-Article III Bankruptcy judge is not constitutionally authorized to determine the legal fees paid or funds that are not part of the estate. The bankruptcy judge can only grant or deny the application for professional fees to be drawn from the estate, not the funds that were never part of the estate; especially when the Order being appealed from is requesting fees that were not paid from the estate to be turned over to the estate. The Bankruptcy judge in the instant case made a decision interfering

with the contractual relationship between the non-party Counsel and the principal of the Debtor LLC by requesting Counsel to refund the legal fees paid by the third party back to the estate even if there was no dispute for the fees between the non-party Counsel and the third-party principal of the Debtor LLC. By making a determination of non-core bankruptcy matters, the Bankruptcy judge encroached into the boundaries of the judiciary systems and invaded the principal of separation of powers.

Furthermore, in *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982), the Supreme Court of the United States concluded that bankruptcy court judges were not constitutionally vested with jurisdiction to decide state law contract claims. Assignment of such state law claims for resolution by bankruptcy judges violates Art. III of the United States Constitution, unless the cases involve "public rights." *Id* at 52. After *Northern Pipeline*, Congress revised the statutes governing bankruptcy jurisdiction and bankruptcy judges in the 1984 Act. In *Stern v. Marshall*, 564 U.S. 462, 502, 131 S.Ct. 2594, 180 L.Ed.2d 475 (2011), the Supreme Court of the United States again concluded "that Congress, in one isolated respect, exceeded that limitation in the Bankruptcy Act of 1984. The Bankruptcy Court below lacked the constitutional authority to enter a final judgment on a state law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim.

In *Northern Pipeline*, the Supreme Court of the United States concluded that the "public right" exception applies only to matters arising between

individuals and the Government in connection with the performance of the constitutional functions of the executive or legislative departments that historically could have been determined exclusively by those branches. See, *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 67-68, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982) In *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989), the Supreme Court of the United States rejected a bankruptcy trustee's argument that a fraudulent conveyance action filed on behalf of a bankruptcy estate against a non-creditor in a bankruptcy proceeding fell within the "public rights" exception, because fraudulent conveyance actions were more accurately characterized as a private right rather than a public right as the Supreme Court has used those terms in other Article III decisions. See, Id at 55.

The decisions rendered by Supreme Court of the United States in *Katchen v. Landy*, 382 U.S. 323, 86 S.Ct. 467, 15 L.Ed.2d 391 (1966) and *Langenkamp v. Culp*, 498 U.S. 42, 111 S.Ct. 330, 112 L.Ed.2d 343 (1990) are not applicable here.

> "*Katchen* permitted a bankruptcy referee acting under the Bankruptcy Acts of 1898 and 1938 (akin to a bankruptcy court today) to exercise what was known as "summary jurisdiction" over a voidable preference claim bought by the bankruptcy trustee against a creditor who had filed a proof of claim in the bankruptcy proceeding. A voidable preference claim asserts that a debtor made a payment to a particular creditor in anticipation of bankruptcy, to in effect increase that creditor's proportionate

> share of the estate. The preferred creditor's claim in bankruptcy can be disallowed as a result of the preference, and the amounts paid to that creditor can be recovered by the trustee."

Stern v. Marshall, 564 U.S. 462, 496, 131 S.Ct. 2594, 180 L.Ed.2d 475 (2011) *Katchen* is obviously distinguishable from the instant case, where the Trustee did not initiate the Order to Show Cause to disgorge legal fees paid by the Debtor LLC. Most importantly, the Debtor LLC in possession never paid the legal fees from the estate to be disgorged. In *Katchen*, one of those consequences involved a resolution of the preference issue as part of the process of allowing or disallowing claims. Therefore, it is within the core bankruptcy proceeding. In comparison, disgorging fees to an estate when the fees are outside of the estate's assets is not within the scope of core bankruptcy proceedings that allow or disallow claims against the estate. Legal fees paid by a third party to Counsel is a private contractual matter between the non-parties to the bankruptcy proceeding.

In *Langenkamp*, the trustee instituted adversarial proceedings to recover, as avoidable preferences, payments that respondents received from the debtor before the bankruptcy filings occurred. Therefore, it is also within the core bankruptcy proceeding as in *Katchen*. In the instant case, the bankruptcy judge issued an order, disgorging legal fees to the estate even though said fees were paid by a third-party. Therefore, the non-Article III bankruptcy Judge lacked the judicial power to determine a noncore proceeding where the final determination affects the non-parties (the single sole member of the Debtor LLC

and the non-party attorneys' contract rights) to the instant bankruptcy proceeding without their consent. For the reasons stated above, the bankruptcy judge can only deny or allow the application for professional fees to be paid from the estate, not to disgorge fees to the estate that were paid by a third-party.

Why is this distinction so important? Chief Justice Roberts cautioned all of us when he stated that

> "[a] statute may no more lawfully chip away at the authority of the Judicial Branch than it may eliminate it entirely. 'Slight encroachments create new boundaries from which legions of power can seek new territory to capture' (Citation Omitted) … we cannot overlook the intrusion: 'illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure.' (Citation Omitted) We cannot compromise the integrity of the system of separation powers and the role of the Judiciary in that system, even with respect to challenges that may seem innocuous at first blush."

Stern v. Marshall, 564 U.S. 462, 503. 131 S.Ct. 2594, 180 L.Ed.2d 475 (2011)

II. Based On A Mistake of Fact, the District Court Erred In Affirming the Bankruptcy Judge's Order Denying the Application for Professional Fees and Disgorging Fees Not Paid by the Estate to the Estate

A. Counsel's Receiving Fees from A Third Party, Not From the Estate, No Mandatory Disclosure Is Required in Monthly Statements of the Estate

Based on the mistake of a material fact whereby the fees in the instant case were considered to be a part of the estate even though they were never a part of the estate, the District Court continued to draw erroneous conclusions in its legal analysis. The Court stated that "it is undisputed that Appellant failed to disclose the post-petition payments Appellant received from Debtor, in the monthly statements it filed or elsewhere. These disclosure requirements are "mandatory, not permissive."

If the ordered disgorgement of the fees was derived from the Debtor LLC or estate, the District Court's legal analysis would be correct. However, the undisputed fact is that the fees ordered to be disgorged were never a part of the estate or Debtor LLC. The fees were paid directly by the Debtor's principal in her personal capacity to the Debtor's attorney. The District Court failed to point to any statute or case law that requires the monthly operating statement of the Debtor LLC to reflect the transactions between other non-parties unrelated to the transactions of the estate or the Debtor LLC.

The District Court cited *Wasserman v. Bressman* (*In re Bressman*), 327 F.3d 229, 240 (3rd Cir. 2003) to support its finding that a bankruptcy court may order the disgorgement of fees received by an attorney when he or she has ignored reporting and court approval duties imposed by the Bankruptcy Code. The teaching in *Wasserman v. Bressman* is actually that the law firm of Cole, Schotz, Meisel, Forman & Leonard, P.A., Counsel for the Debtor, could receive legal fees from non-estate assets. The Court did not order the law firm to disgorge any legal fees received from non-estate assets, because the trustee seeking disgorgement of legal fees received by the law firm failed to prove that the fees received by the law firm were part of the estate. Therefore, the case cited by the District Court actually supports Appellant's argument. The fact is that it remains undisputed that the fees received in the instant case were from a third-party and not from the estate as in the case in *Wasserman v. Bressman*, 327 F.3d 229, 240 (3rd Cir. 2003)

The District Court also cited *Jensen v. U.S. Trustee (In re Smitty's Truck Stop, Inc.*, 210 B.R. 844, 848 (10th Cir. 1997) to support its finding that a bankruptcy court may order the disgorgement of fees received by an attorney when he or she has ignored reporting and court approval duties imposed by the Bankruptcy Code, even if the failures to disclose are the result of negligence or inadvertence. Once again, the mistaken facts in the instant case by the District Court renders the wrong conclusion. In *Jensen v. U.S. Trustee*, the Court found that the attorney provided incorrect and inconsistent information in his applications to employ and in his fees' application. In

the instant case, the Counsel voluntarily disclosed all the fees received on its application for retention and application for First and Final Professional Fees. Most importantly, the Court found that the source of his retainer was not from the sole shareholders of the corporation, but from the sale of a piece of equipment owned by the corporation, immediately prior to filing, which in fact were the corporate property. See *Id* at 850. Therefore, the Court concluded that the retainer funds were cash collateral of the estate. Again, this case supports the Petitioner's argument that the fees received in the instant case were undisputed not from the estate but from a third party; therefore, the Bankruptcy Judge abused her discretion to order the disgorgement of fees not paid from the estate to the estate.

B. Because No Conflict of Interest Was Created By Receiving Funds From A Third Party In the Instant Case, A Failure to Timely Disclose Is A Harmless Error

The District Court correctly ruled that "the Court need not re-litigate whether an actual conflict existed since the Fee Order did not rest on that question." The Bankruptcy Judge did not find conflict of interest in her Opinion either. To hold that a failure to "timely" disclose that fees were received from a third party, rather than from an estate, when no conflict of interest is found, is the same as an intentional total failure to disclose the funds received from an estate where a conflict of interest exists, would render the distinction between an intentional and non-intentional violation of the disclosure requirement meaningless. Such a determination is a clear abuse of discretion by

the Bankruptcy Judge in her Fee Order. A technical and harmless failure to disclose should not be punished indistinguishably from an intentional total failure to disclose.

The law is well settled that "Disgorgement" is an equitable remedy, not a cause of action. See, *Kaye v. Rosefielde*, 223 N.J. 218, 231 (2015), *Cuidado Casero Home Health of El Paso, Inc. v. Ayuda Home Health Care Servs., LLC*, 404 S.W.3d 737, 744 (Tex. App. 2013) (explaining that "disgorgement is not a cause of action, but an equitable remedy applied to breaches of fiduciary duty.") The Third Circuit has explained that "[d]isgorgement is an equitable remedy designed to deprive a wrongdoer of his unjust enrichment and to deter others from violating securities laws." *SEC v. Hughes Cap. Corp.*, 124 F.3d 449, 455 (3rd Cir. 1997)

In Federal law, the courts recognize a distinction between restitution and disgorgement. The Third Circuit has explained that

> "[i]n contrast [to disgorgement], a claim for restitution seeks to compensate a plaintiff for a loss, so a financial loss is required to bring such a claim. As the Court of Appeals for the Fifth Circuit has explained, 'disgorgement is not precisely restitution. Disgorgement wrests ill-gotten gains from the hands of a wrongdoer. It is an equitable remedy meant to prevent the wrongdoer from enriching himself by his wrongs. Disgorgement does not aim to compensate the victims of the wrongful acts, as restitution does.'"

Edmonson v. Lincoln Nat' Life, Ins. Co., 725 F.3d 406, 415 n.3 (3rd Cir. 2013) (quoting *SEC v. Huffman*, 996 F.2d 800, 802 (5th Cir. 1993)).

In the instant case, the Bankruptcy Judge, in her opinion, specifically wrote that,

> "[u]nder appropriate circumstances, the Bankruptcy Court: would entertain a motion to permit the portion of the undisclosed payments that was not part of the retainer to be transferred back to the Debtor's principal either as a repayment, administrative expense or some other mechanism suggested by the Chapter 7 Trustee. Any such motion should be supported by a certification by the Debtor's principal with facts that support the relief sought. (See, April 6, 2020 Opinion at Pages 31-32, n.191)"

(65-66a) Clearly, the Bankruptcy Judge abused her discretion to disgorge legal fees paid by a third party to Counsel as compensation to a so called "victim" the third-party Debtor principal as return the legal fees paid by the Debtor principal even the Debtor principal never submitted such a claim to the Bankruptcy Judge for adjudication.

C. No Statute Requires that the Payment of Legal Fees From A Third Party Has to Be Paid to the Estate First Before Being Released To The Debtor's Attorney

The District Court erred in finding that Counsel's conduct was willful in violation of Rule 3.3 of the New Jersey Rules of Professional Conduct, when

Counsel was alleged to have intentionally failed to disclose its receipt of payments from Ms. Quan on monthly operating reports to show that the Debtor could fund a Chapter 11 plan.

The District Court's finding is erroneous for a number of reasons. First, the monthly operating reports were not prepared by Counsel. Instead, they were prepared by the Debtor. Second, Counsel is currently not aware of any statute in existence that requires that payments of legal fees from a non-interested third-party must be paid to the estate first before they are released to the Debtor's Counsel. Third, even if Counsel advised the third party, who was the sole member of the Debtor's LLC, to pay legal fees to Counsel directly so as to avoid showing the payments from the monthly operating reports to demonstrate that the Debtor could fund a Chapter 11 plan, Counsel cannot be held to have violated Rule 3.3 for failure to be candid with the Court because Counsel's advice would have been in line with the holdings in *In re Lotus Props. LP*. See, *In re Lotus Props. LP*, 200 B.R. 388 1996 Bankr. LEXIS 1425.

In *In re Lotus Props. LP*., the Court ruled that the interest of Lotus and it's the sole general partner was united. "This Court believes that, although Mr. Tsai's (general partner) and Lotus' (Debtor) interests are united, they are not absolute identical. Lotus' interests are united and best served by Mr. Tsai's funding of the legal fees and costs, including the retainer, so that it's scarce cash reserve were not completely depleted before the start of the case or during the proceedings. As a result, Lotus would be able to focus upon improving it's own financial condition.

That improvement would then benefit Mr. and Mrs. Tsai and the Tsai Family Trust as they reap whatever profit is earned from the operation of the motel, and reduce the debt owed to Cathy Bank." *See In re Lotus Props. LP*, 200 B.R. 388, 392, 1996 Bankr. LEXIS 1425.

The situation in Lotus is very similar to that in the instant case, the Debtor LLC is a single member of a limited liability company. The sole purpose to form the limited liability company was to shield the personal liability of the individual member. The Debtor LLC has never filed for its income tax returns. The single member of the Debtor reports the Debtor LLC's incomes and expenses through her personal tax returns. Counsel could not identify any conflict of interest between the Single Member and the Debtor LLC in connection with Counsel's representation in the State Court Action and in the Bankruptcy Proceeding. The interest of the Debtor and its sole or Single Member is united. If the instant case were not converted from Chapter 11 to Chapter 7, no application for professional fees would be made, because Counsel would not request fees from the same source, the Single Member's own fund. In addition, making payments for legal fees by the Single Member would preserve more funds for the Debtor to come up with a reorganization plan. In *Lotus*, the Court specifically rejected the trustee's argument that paying legal fees by a third party directly to counsel is a capital contribution to Lotus. See Id at 395. Obviously, Counsel was following the holdings from *In re Lotus Props. LP.* to give the advice to the Sole Member of the Debtor LLC. Therefore, the Bankruptcy Judge abused her discretion in finding that Counsel acted in violation of Rule 3.3 of the New Jersey Rules of Professional Conduct. By the same token, the

District Court erred in affirming the Bankruptcy Judge's finding that Counsel violated Rule 3.3.

The erroneous determination by the courts below stemmed from their failure to distinguish that any funds received from a third party are never a part of the estate's funds. The failure to appreciate the difference between third party funds and funds that are a part of the estate was demonstrated by the questions interposed by the Bankruptcy Judge in the hearing in April 2019 and the finding by the District Court. "In response to the Bankruptcy Judge's questions asking him to explain the nature of these undisclosed payments, Appellant described the payments inconsistently as a "gift", A331, "not a loan", A332, "it could be a loan," A321, and an "investment," A322. (See 15a) Clearly, the Appellant could not give an answer to these questions, which presumed that the funds paid to Counsel were a part of the funds of the estate even though the payments of legal fees from the non-interested third party were never part of the estate's funds or became the funds of the estate. Therefore, they were not a gift, not a loan, nor were they an investment (or capital contribution) to the estate. This is exactly the finding in *Wasserman v. Bressman, cited by the District Court in her Letter Order* that the law firm of Cole, Schotz, Meisel, Forman & Leonard, P.A., Counsel for the Debtor, could receive legal fees from non-estate assets. The Court did not order the law firm to disgorge any legal fees received from non-estate assets, because the trustee seeking disgorgement of legal fees received by the law firm failed to prove that the fees received by the law firm were part of the estate.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

KEVIN KERVENG TUNG, P.C.
Kevin K. Tung, Esq.
Queens Crossing Business Center
136-20 38th Avenue, Suite 3D
Flushing, NY 11354
(718) 939-4633
ktung@kktlawfirm.com

United States Court of Appeals, Third Circuit.

IN RE: 38-36 GREENVILLE AVE LLC, Debtor
Kevin Kerveng Tung, P.C., Appellant

No. 21-2164

Submitted Under Third Circuit L.A.R. 34.1(a) April 14, 2022(Filed: April 19, 2022)

On Appeal from the United States District Court For the District of New Jersey (D.C. No. 2-20-cv-03563), District Judge: Honorable Madeline C. Arleo

Attorneys and Law Firms

Kevin K. Tung, Esq., for Appellant.

Michael J. Connolly, Esq., Michael Holt, Esq., Erin J. Kennedy, Esq., Forman Holt, Rochelle Park, NJ, for Charles M. Forman, Chapter 7 Trustee.

Wendy Cox, Esq., Executive Office for United States Trustee Office of General Counsel, Beth A. Levene, Esq., United States Department of Justice Executive Office for United States Trustees, Washington, DC, Robert J. Schneider, Jr., Esq., Office of United States Trustee, Newark, NJ, for Andrew R. Vara, U.S. Trustee.

Before: AMBRO, JORDAN and SCIRICA, Circuit Judges

OPINION[*]

JORDAN, Circuit Judge.

This case highlights the famous first law of holes: when you're in one, stop digging. The appellant here, a law firm representing a small, limited liability company in a bankruptcy matter, ignored that law, and a few others, to its shame. The U.S. Bankruptcy Court for the District of New Jersey ordered the disgorgement of fees paid to the firm, denied its request for further payment from the bankrupt debtor's estate, and referred the firm's principal to the District Court for possible disciplinary action. The District Court upheld the Bankruptcy Court's order, and so do we.

I. BACKGROUND

In March 2016, 38-36 Greenville Ave LLC (the "Debtor") filed a petition for relief under Chapter 11 of the Bankruptcy Code (the "Code") in the U.S. Bankruptcy Court for the District of New Jersey. It did so with the aid of its counsel, Kevin Kerveng Tung, and his law firm, Kevin Kerveng Tung, P.C. ("KKT"). The Debtor is a single-member limited liability company wholly owned by Lingyan Quan. Aside from a few thousand dollars in cash and accounts receivable, its only asset is a multi-family dwelling in New Jersey, and its sole creditors are Armando and Melinda Flores, who hold approximately $1.85 million in judgment liens arising out of a state-court judgment.[1] Simultaneous with the Debtor's petition, KKT filed a statement of compensation, pursuant to § 329(a) of the Code and Rule 2016(b) of the Federal Rules of Bankruptcy Procedure, disclosing receipt of a $3,000 retainer payment by the Debtor.

The Debtor then filed an application under § 327(a) of the Code (the "Retention Application"), seeking permission to retain KKT as counsel in the

Chapter 11 proceedings. The Retention Application stated that KKT's services were necessary because the Debtor had previously had KKT as its defense counsel in the state-court action brought by the Floreses, so KKT was "fully knowledgeable" of "the debtor's situation." (App. at 121.) It further represented that KKT had "rich experience in bankruptcy[.]" (App. at 121.)

Additionally, the Retention Application disclosed the parties' compensation arrangement and declared that, other than the $3,000 retainer, no other agreement had been made between KKT and the Debtor, or anyone acting on either party's behalf. It also certified that KKT would comply with applicable bankruptcy laws and court procedures when applying for compensation. Lastly, it stated that KKT was disinterested and neither held nor represented an interest adverse to the Debtor or the Debtor's estate under § 327(e) of the Code. The Bankruptcy Court approved the Retention Application and ordered that KKT be paid "in such amounts as may be allowed by the Court upon proper application(s) therefor." (App. at 129.)

Not long after, the Debtor asked the Bankruptcy Court to lift the automatic stay on its appeal of the state-court judgment and, in the meantime, to hold the bankruptcy proceeding in abeyance. The Court denied that request, concluding that the Debtor "was using the bankruptcy case as a substitute for posting a *supersedeas* bond ..., as required under state law[,]" without first "attempt[ing] to pay or obtain a waiver of the bond requirement." (App. at 988-89.)

A year into the proceeding, the Debtor had yet to file a Chapter 11 disclosure statement and plan, so the Bankruptcy Court *sua sponte* ordered the parties to

show cause why the proceeding should not be dismissed or converted into a Chapter 7 liquidation. The United States Trustee then became involved. The Trustee argued that the proceeding lacked a valid reorganizational purpose and should be dismissed entirely as a bad faith bankruptcy filing. [App. at 381-82 (citing 11 U.S.C. §§ 349, 1112(b)(1)).] The Floreses argued for conversion into a Chapter 7 liquidation so that they could enforce their judgment liens. The Debtor admitted that "the only reason [it] filed the instant bankruptcy [was] to secure a stay so that [it could] pursue its appeal in State Court without losing the property at issue." (App. at 393.) Because it had not been successful in securing that relief, it sought dismissal of its Chapter 11 case.

At the hearing on the order to show cause, Tung, appearing on behalf of both the Debtor and his firm, KKT, "conceded that the Debtor failed to file a plan and disclosure statement and ... that it would be futile for the Debtor to do so." (App. at 990.) The Bankruptcy Court refused to dismiss the case because it believed it was in the best interest of the creditors and the estate to instead convert the case to a Chapter 7 liquidation and appoint a trustee to manage the estate. The Court proceeded to take those steps, and soon the Chapter 7 Trustee moved to sell the Debtor's only known asset, the multi-family house. The Court approved the property's public sale for $725,000 two months later.

It was not until after the Chapter 7 conversion, and over a year and half after the Debtor declared bankruptcy, that KKT filed its first and only fee application (the "Fee Application"). In the Fee Application, KKT sought payment of $31,819 in fees and expenses from the Debtor. Notably, the Fee Application also disclosed that KKT, without

Bankruptcy Court approval, had already received payments totaling $19,400 from the "personal bank account" of Quan – the Debtor's sole shareholder – as "pre-payment for the legal services rendered" to the Debtor. (App. at 481.) KKT thus requested that the Court approve its fees so that it could pay Quan back. Both the Chapter 7 Trustee and the Floreses objected to the Fee Application, arguing, among other things, that the previously undisclosed payments violated the Code and the Bankruptcy Rules.

At the Fee Application hearing, Tung repeatedly evaded the Bankruptcy Court's questions regarding Quan's undisclosed payments. At first, he attempted to characterize the payments as something other than an unauthorized loan incurred by the Debtor. When pressed, he admitted that the payments were indeed a loan, only to reverse course after the Bankruptcy Court reminded him that any debt incurred by the Debtor had to be pre-approved by the Court. He also conceded that KKT intentionally omitted the payments from the Debtor's Monthly Operating Reports, in violation of §§ 704(a)(8) and 1106(a)(1) of the Code, because, if the Debtor had owed post-petition money for legal fees, then "the monthly operati[ng] report[s] most likely [would have] go[ne] negative[,] [a]nd at the time [they] were talking about reorganization[.]" (App. at 651.) In other words, KKT intentionally withheld required information and did so to mislead the Court and avoid either the conversion or the dismissal of the case.

Rightly concerned, the Bankruptcy Court issued a second order for KKT and Tung, in his individual capacity, to show cause why the Court should not sanction them for violations of the New Jersey Rules of Professional Conduct, the Code, and the Bankruptcy Rules. It also asked, among other things, why it should

not deny KKT's fee application in its entirety, require KKT to disgorge attorney's fees previously paid, and find that KKT was not disinterested in its representation. KKT and Tung responded that their conduct had not violated any legal or ethical obligations. KKT also contended, among other things, that acceptance of legal fees from Quan was not a per se violation of § 327(a) of the Code, that it made the appropriate disclosures in its Fee Application under Bankruptcy Rule 2016, and that there was no conflict of interest because the interests of Quan and the Debtor are united.

At the hearing on the second order to show cause, Tung, again speaking on behalf of both KKT and himself, first argued that the failure to timely disclose the payments was merely a "technical failure to disclose, ... [which] shouldn't warrant any sanctions." (App. 874.) He then changed his tune, saying he did not believe KKT needed to disclose anything about the payments until it filed the Fee Application. Even after he finally agreed that earlier disclosure was required, he gave a series of contradictory responses on how the undisclosed payments should be characterized.[2] The Bankruptcy Court said that Tung "really, really [did not] understand the laws that govern a bankruptcy proceeding," and, rather than show contrition for his mistakes, was "very defensive, flip flopping in [his] statements, ... and ... unhelpful[.]" (App. at 932-33.)

The Court denied with prejudice the Fee Application and ordered the payments to KKT to be disgorged to the estate (the "Fee Order"). It determined that KKT and Tung failed to make timely and adequate disclosures under Rules 2014 and 2016, and had "purposefully and strategically decided to omit pertinent information from the [Monthly Operating

Reports.]" (App. at 1010.) The Court thus concluded they had violated their duty of candor under New Jersey Rule of Professional Conduct 3.3. In light of those violations, the Court found it unnecessary to decide whether an actual conflict of interest arose. Lastly, because of the egregiousness of counsel's conduct, the Court referred the case to the Chief Judge of the District Court for potential disciplinary action.

KKT appealed to the District Court, arguing that the Bankruptcy Court, as a non-Article III court, lacked jurisdiction to order disgorgement of KKT's fees and, even if it had the authority to do so, that it abused its discretion in issuing the Fee Order. The District Court rejected both arguments. It held that disgorgement was within the Bankruptcy Court's jurisdiction under *Stern v. Marshall*, 564 U.S. 462 (2011), as "these proceedings were core and flowed directly from the bankruptcy scheme[.]" (App. at 16.) And because KKT breached its disclosure obligations, the District Court said that the Bankruptcy Court was well within its discretion to order disgorgement and deny the Fee Application.[3] Finally, the District Court struck from the record, as irrelevant and meritless, a supplemental letter filed by KKT alleging that the Bankruptcy Judge was improperly biased in the Debtor's bankruptcy. The basis of the allegation was a photograph taken of the Judge with the Chapter 7 Trustee at a New Jersey Bankruptcy Lawyers Foundation event.

II. DISCUSSION[4]

KKT raises the same arguments before us that have already been rejected. It says that the Bankruptcy Court lacked constitutional authority to

order the disgorgement to the estate of fees paid by Quan, that the Bankruptcy Court abused its discretion in issuing the Fee Order, and that the District Court should not have struck KKT's post-briefing filing accusing the Bankruptcy Judge of bias. None of that has the slightest merit.

KKT argued for the first time in the District Court that, under *Stern*, the Bankruptcy Court lacked authority to order disgorgement of the post-petition, unauthorized fee payments, because it is not an Article III court. It stated that the payments underlying the disgorgement were "non-core" because they were made by a third party and are not part of the estate. (Opening Br. at 17-18.) KKT's reliance on *Stern* is misplaced.

In *Stern*, the Supreme Court determined that a bankruptcy court could not adjudicate state-law tort claims that were "in no way derived from or dependent upon bankruptcy law" because they "exist[ ] without regard to any bankruptcy proceeding." 564 U.S. at 499. As we have since explained, "*Stern* made clear that non-Article III bankruptcy judges do not have the constitutional authority to adjudicate a claim that is exclusively based upon a legal right grounded in state law[.]" *In re One2One Commc'ns, LLC*, 805 F.3d 428, 433 (3d Cir. 2015). Unlike the tort claims at issue in *Stern*, the payment of legal fees is "based on a federal bankruptcy law provision with no common law analogue, so the *Stern* line of cases is plainly inapposite." *In re Lazy Days' RV Ctr. Inc.*, 724 F.3d 418, 423 (3d Cir. 2013); *see also In re Frazin*, 732 F.3d 313, 321 (5th Cir. 2013) (treating the award of fees as constitutionally within bankruptcy court's jurisdiction). Violations thereof are thus appropriately policed through equitable remedies fashioned by the Bankruptcy Court. *See In re Lewis*, 113 F.3d 1040, 1046 (9th Cir. 1997)

("The bankruptcy court may order the disgorgement of any payment made to an attorney representing the debtor in connection with a bankruptcy proceeding, irrespective of the payment's source."); *In re Walters*, 868 F.2d 665, 668 (4th Cir. 1989) ("[A]ny payment made to an attorney for representing a debtor in connection with a bankruptcy proceeding is reviewable by the bankruptcy court notwithstanding the source of payment."). The fees paid by Quan were to the benefit of the estate and thus were core matters within the Bankruptcy Court's purview. *See* 11 U.S.C. § 541(a)(7) (Property of the estate includes "[a]ny interest in property that the estate acquires after the commencement of the case.").

KKT next asserts that, even if the Bankruptcy Court possessed authority to order disgorgement, it abused its discretion by entering the Fee Order, which ordered disgorgement and denied KKT's Fee Application. The word "chutzpah" comes to mind. KKT's repeated violations of the Bankruptcy Rules and the Code, along with counsel's lack of candor, more than justified entry of the Fee Order. *See In re Bressman*, 327 F.3d 229, 240 (3d Cir. 2003) (indicating that "a bankruptcy court may order the disgorgement of fees received by an attorney when he or she has ignored reporting and court approval duties imposed by the Code"); *In re Downs*, 103 F.3d 472, 479 (6th Cir. 1996) (holding that the bankruptcy court has inherent authority to "deny all compensation to an attorney who exhibits a willful disregard of his fiduciary obligations to fully disclose the nature and circumstances of his fee arrangement").

We reiterate that the Code and associated Rules impose a rigorous structure of oversight on a debtor, its professionals, and the estate. At the heart of that

structure is a baseline presumption – and an expectation – of disclosure and candor. *See, e.g.*, Fed. R. Bankr. P. 2014(a) (requiring counsel to disclose "any proposed arrangement for compensation"); Fed. R. Bankr. P. 2016(b) (requiring that compensation be disclosed "within 14 days after any payment or agreement not previously disclosed"); 11 U.S.C. § 329(a) (requiring comprehensive disclosure of payments in connection with bankruptcy); *id.* § 330(a) (requiring counsel to file fee applications when seeking payment for services rendered). KKT flouted those obligations, and we will not disturb the Bankruptcy Court's well-justified response.

Lastly, though it is hardly worthy of response, we dispose of KKT's argument that a photograph of the Bankruptcy Judge and the Chapter 7 Trustee, taken at a New Jersey Bankruptcy Lawyers Foundation event, somehow evidences judicial bias. It does not, and the District Court did not abuse its discretion by striking KKT's supplemental letter as "wholly irrelevant and without merit." (App. at 19.) *See Meditz v. City of Newark*, 658 F.3d 364, 367 n.1 (3d Cir. 2011) ("We review the District Court's decision denying the motion to strike for an abuse of discretion.").

III. CONCLUSION

Because there is no reason to question the Bankruptcy Court's handling of the sad situation created by KKT and its principal, Mr. Tung, we will affirm the order of the District Court, thus affirming the underlying Fee Order.

Footnotes

*This disposition is not an opinion of the full court and, pursuant to I.O.P. 5.7, does not constitute binding precedent.

1Prior to the Debtor's bankruptcy, the Floreses brought tort claims against the Debtor and its employee, a non-party to this matter, in the Superior Court of New Jersey. In November 2015, the jury found the Debtor jointly and severally liable for the employee's tortious conduct and awarded the Floreses approximately $1.85 million in compensatory damages. The Debtor appealed in December 2015 but was unable to post the bond necessary to stay enforcement of the judgment pending appeal. *See* N.J. R. Ct. 2:9-6. Instead, the Debtor "came to the bankruptcy court for help as its last hope and resort." (Opening Br. at 3.) The Debtor's petition "automatically stay[ed], among other things, 'any act to create, perfect, or enforce any lien against property of the estate[.]' " *In re Linear Elec. Co.*, 852 F.3d 313, 317 (3d Cir. 2017) (quoting 11 U.S.C. § 362(a)(4)).

2Each time the negative implications of his proposed characterization became apparent, Tung would change his response: The undisclosed payments were "definitely not a loan" (App. at 879); they "could be characterized" as an infusion of capital (App. at 879); "the assumption should be [that they were] not [an] infusion of capital" (App at 928); they were an "investment" (App. at 880); they "w[ere]n't treated as [an] investment" (App. at 890); they "could be" a gift to the debtor (App. at 889-90); "[n]obody said to me it was a gift" (App. at 890); "[i]t's a gift" (App. at 928); "I'm not saying it's a gift" (App. at 929); "I withdraw that statement [that it was a gift]" (App. at 929); "[i]t was

money paid on behalf of the debtor ..., legally speaking, by a third party" (App. at 890); and "[a]nything could have happened" (App. at 892).

3The District Court also affirmed the Bankruptcy Court's holding that KKT violated New Jersey Rule of Professional Conduct 3.3 and, like the Bankruptcy Court, found it unnecessary to address whether there was an actual conflict of interest between KKT and the Debtor.

4The Bankruptcy Court had jurisdiction under 28 U.S.C. §§ 157(a) and (b) and 1334(a). The District Court had jurisdiction to review the appeal under 28 U.S.C. § 158(a), and we have jurisdiction to review that final decision pursuant to 28 U.S.C. § 158(d)(1). In doing so, we " 'stand in the shoes' of the District Court and ... review the Bankruptcy Court's legal conclusions de novo and its factual findings for clear error." *In re Glob. Indus. Techs., Inc.*, 645 F.3d 201, 209 (3d Cir. 2011) (en banc) (citations omitted).

United States Court of Appeals, Third Circuit.

IN RE: 38-36 GREENVILLE AVE LLC, Debtor
Kevin Kerveng Tung, P.C., Appellant

No. 21-2164

Submitted Under Third Circuit L.A.R. 34.1(a) April 14, 2022(Filed: April 19, 2022)

On Appeal from the United States District Court For the District of New Jersey (D.C. No. 2-20-cv-03563), District Judge: Honorable Madeline C. Arleo

Before: AMBRO, JORDAN and SCIRICA, Circuit Judges

JUDGMENT

This cause came to be considered from the United States District Court for the District of New Jersey and was submitted pursuant to Third Circuit L.A.R. 34.1(a) on April 14, 2022.

On consideration whereof, it is now hereby ORDERED and ADJUDGED that the order of the District Court entered on June 9, 2021 is hereby AFFIRMED. Costs to be taxed against the Appellant. All of the above in accordance with the opinion of this Court.

ATTEST: s/ Patricia S. Dodszuweit Clerk

Dated: April 19, 2022

United States District Court, D. New Jersey.

38-36 GREENVILLE LLC

v.

FORMAN

Civil Action No. 20-3563

Filed 06/09/2021

Attorneys and Law Firms

Kevin Kerveng Tung, Flushing, NY, for 38-36 Greenville LLC.

Michael J. Connolly, Forman Holt Eliades Ravin & Youngman LLC, Paramus, NJ, Michael E. Holt, Forman Holt, Rochelle Park, NJ, for Forman.

LETTER ORDER

MADELINE COX ARLEO, United States District Judge

Dear Litigants:

Before the Court is Appellant Kevin Kerveng Tung, P.C.'s, the Counsel for the Debtor and Debtor in Possession, ("Appellant" or "KKT") appeal under 28 U.S.C. § 158(a) or (b) from the Order of the Bankruptcy Judge, the Honorable Stacey L. Meisel (the "Bankruptcy Judge"), denying fee application and disgorging attorney's fees in this proceeding entered on March 31, 2020. For the reasons set forth herein, the bankruptcy court's order is **AFFIRMED**.

I. BACKGROUND[1]

On March 24, 2016, 38-36 Greenville LLC ("the Debtor") initiated the underlying bankruptcy action by filing a chapter 11 petition. A2; A25-65. The Debtor is a single-member limited liability company, and Lingyan Quan ("Quan") is its sole member. A61; A66. The only creditors identified in Debtor's bankruptcy schedules were Armando and Melinda Flores, who hold judgment liens totaling over $1.8 million from a separate litigation. A38; A44; A65. Appellant represented the Debtor in the Flores litigation and filed the chapter 11 petition for the Debtor. A28; A68; A7. Eventually, on May 17, 2017, the bankruptcy court converted the Debtor's reorganization case to a chapter 7 liquidation case. A11.

Debtor and Appellant filed an application seeking permission to employ KKT under 11 U.S.C. § 327(a). A67. The application represented that, "[o]ther than [KKT's] acceptance of the $3,000 retainer, no agreement of any type was made between [KKT and Debtor] in connection with [KKT's] retention." A69. The bankruptcy court subsequently approved Appellant's employment (the "Retention Order"). The Retention Order stated: "Compensation shall be paid in such amounts as may be allowed by the Court upon proper application(s) therefor." A74-A76.

While the Debtor's case was still in chapter 11 proceedings, Appellant filed thirteen monthly operating reports. A77-A202. The May 2016 report disclosed a $100 payment from Debtor to Appellant. However, none of the other reports disclosed any payment of attorney fees nor the accrual of any unpaid attorney fees. Id. Additionally, they did not disclose any loans, capital infusions, or gifts from Quan. Id.

On October 10, 2017, Appellant filed a "First and Final Fee Application" seeking $29,720 from the bankruptcy estate for services rendered and $2,099 in reimbursement for expenses incurred between March 23, 2016 and October 10, 2017. A203-235. This was the first time Appellant disclosed it had taken $19,400 "from Ms. Lingyan Quan, Principal of [the Debtor], from her personal bank account as prepayment for the legal services rendered." A218. Appellant asked that the full amount of the $29,720 in requested fees be disbursed to it and stated that it was requesting "$19,400 as compensation to Lingyan Quan individually for prepayment for [KKT]." A219.

On November 17, 2017, the bankruptcy court held a fee application hearing. At that hearing, Appellant stated that Quan verbally agreed to make additional payments to Appellant. A256-A257. The Bankruptcy Judge stated that the Debtor's monthly reports did not disclose any unpaid post-petition expenses. A261. Appellant conceded that they had never disclosed the payment of these legal expenses and offered the explanation that they were not disclosed because that would have made the reports "go negative." A331.

On October 10, 2018, the bankruptcy court entered an Order to Show Cause why Appellant should not be held accountable for their violations of the United State Code, the Bankruptcy Rules, and the Rules of Professional Conduct (the "Order to Show Cause"), which it slightly amended on October 12, 2018. A266-A269. The Order to Show Cause, as amended, cited concerns raised at the fee application hearing regarding the unauthorized transactions and the failure to disclose them in the Debtor's monthly reports. A267.

In April 2019, the bankruptcy court held a hearing on the Order to Show Cause. A310-A376. Therein, Appellant stated it "was not familiar with" the Rule 2016(b) requirement to disclose post-petition payments within 14 days after receipt. A316. In response to the Bankruptcy Judge's questions asking him to explain the nature of these undisclosed payments, Appellant described the payments inconsistently as "a gift," A331, "not a loan," A332, "it could be a loan," A321, and an "investment," A322.

On March 31, 2020, the bankruptcy court entered an order (1) denying Appellant's fee application; (2) ordering Appellant to return "all fees and costs received in connection with the Debtor's bankruptcy case;" (3) instructing Appellant to turn the improperly obtained fees over "to the Chapter 7 Trustee on behalf of the Debtor's estate;" and (4) noting that failure to turn the funds over within 30 days "shall result in further sanctions" (the "Fee Order"). A377-A379. The Fee Order also stated that, pursuant to the attorney disciplinary procedures established by Local Civil Rule 104.1(e)(2), the matter would be referred to the Chief Judge of this Court for review. A379.

On April 6, 2020, the bankruptcy court entered an opinion further explaining the basis for the Fee Order. A385-A416 ("Fee Opinion"). The Bankruptcy Judge found that Appellant's responses to her questions at the Order to Show Cause hearing evinced Appellant's "blatant disregard of the Retention Order, the Bankruptcy Code, Bankruptcy Rules, and RPC." A404. The court found that the unauthorized payments had to be disclosed under Section 329(a) and Bankruptcy Rule 2016(b) and included in the Debtor's monthly operating reports. Moreover, the court found that Appellant's non-disclosure was intentional, but

noted that even a negligent or inadvertent failure to comply with the disclosure requirements could result in denial of all fees. A414-A415.

Appellant filed a notice of appeal on April 2, 2020. ECF No. 1. On April 13, 2021, this Appeal was reassigned to the undersigned. ECF No. 23.

II. LEGAL STANDARD

The Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 158(a)(1), which grants district courts jurisdiction over final orders from a bankruptcy court. The Bankruptcy Judge's Order denying the fee application and ordering the disgorging of fees is a final order. See Ferrara & Hantman v. Alvarez (In re Engel), 124 F.3d 567, 571 (3d Cir. 1997); In re Law Offices of Nicholas A. Franke v. Tiffany (In re Lewis), 113 F.3d 1040, 1043-44 (9th Cir. 1997). The bankruptcy court's legal determinations are reviewed de novo, factual findings for clear error, and exercises of discretion for abuse. In re United Healthcare Sys., Inc., 396 F.3d 247, 249 (3d Cir. 2005); see, e.g., In re Vertientes, Ltd., 845 F.2d 57, 59 (3d Cir. 1988).

III. ANALYSIS

On appeal, Appellant makes two primary arguments. First, Appellant argues the Bankruptcy Judge lacked jurisdiction to disgorge the fees it received from the estate. Second, Appellant argues the Bankruptcy Judge abused her discretion in issuing the Fee Order. The Court disagrees on both points.

The Bankruptcy Judge had the power to issue the Fee Order. Appellant cites Stern v. Marshall, 564 U.S. 462 (2011), for his argument that that the

bankruptcy court, as a non-Article III court, lacked the "judicial power" to order Appellant to return the post-petition, unauthorized fee payments over to the bankruptcy estate. See Appellant's Br. at 7-10. In support, Appellant asserts that the proceedings leading to the Fee Order were "noncore" because they involved a state law contract matter and thus the bankruptcy court lacked jurisdiction over the issue. Id. This is incorrect.

In Stern, the Supreme Court held that a bankruptcy court could not adjudicate a state-law contract claim that was "in no way derived from or dependent upon bankruptcy law" and "exist[ed] without regard to any bankruptcy proceeding." 564 U.S. at 499. Here, however, the Fee Order followed an attorney compensation request brought under the Bankruptcy Code and Rules and involved the turnover of funds received in contravention of bankruptcy laws. See A212. Thus, unlike the contract claims at issue in Stern, the fees here "flow from a federal statutory scheme" and are "dependent upon adjudication of a claim created by federal law." Stern, 564 U.S at 493. Moreover, contrary to Appellant's premise, the proceedings leading up to the Fee Order were "core proceedings" because they involved the compensation of bankruptcy counsel. See, e.g., In re Redington, No. 16-18407, 2018 WL 6444387, at *1; Shubert v. Law Offices of Paul J. Winterhalter, 531 B.R. 546, 552 (E.D. Pa. 2015); McCollum Interests, 551 B.R. 292, 299-300 (Bankr. S.D. Tex. 2016). Because these proceedings were core and flowed directly from the bankruptcy scheme, the Bankruptcy Judge had authority to issue the Fee Order. See 28 U.S.C. § 157(b)(1) (explaining bankruptcy judges have authority over "core" bankruptcy proceedings).

The Bankruptcy Judge also did not abuse her discretion in issuing the Fee Order. Orders pertaining to fees "are reviewed for an abuse of discretion, which can occur if the judge fails to apply the proper legal standard or to follow proper procedures in making the determination or bases an award upon findings of fact that are clearly erroneous." Zolfo, Cooper & Co. v. Sunbeam-Oster Co., 50 F.3d 253, 257 (3d Cir. 1995). Here, the Bankruptcy Judge committed no error of law nor fact.

Section 329 of the United States Bankruptcy Code and Federal Rule of Bankruptcy Procedure 2016 obligated Appellant to disclose all compensation paid or to be paid in connection with its representation of Debtor, including the source of the compensation paid. Specifically, Section 329(a) of the Bankruptcy Code provides:

> Any attorney representing a debtor in a case under this title, or in connection with such a case, whether or not such attorney applies for compensation under this title, shall file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation or in connection with the case by such attorney, and the source of such compensation.

11 U.S.C. § 329(a). Additionally, Federal Rule of Bankruptcy Procedure 2016(b) provides:

> Every attorney for a debtor whether or not the attorney applies for compensation, shall file and

> transmit to the United States trustee within 14 days after the order for relief, or at another time as the court may direct, the statement required by § 329 of the Code including whether the attorney has shared or agreed to share the compensation with any other entity.... A supplemental statement shall be filed and transmitted to the United States trustee within 15 days after any payment or agreement not previously disclosed.

Fed. R. Bankr. P. 2016(b).

Here, it is undisputed that Appellant failed to disclose the post-petition payments Appellant received from Debtor, in the monthly statements it filed or elsewhere. These disclosure requirements are "mandatory, not permissive." Jensen v. U.S. Trustee (In re Smitty's Truck Stop, Inc., 210 B.R. 844, 848 (10th Cir. 1997) (internal quotation marks omitted). "Accordingly, an attorney who fails to comply with the disclosure requirements of Section 329 and Rule 2016(b) forfeits any right to receive compensation for services rendered on behalf of the debtor and may be ordered to return fees already received." Id.; see also Wasserman v. Bressman (In re Bressman), 327 F.3d 229, 240 (3d Cir. 2003) ("[A] bankruptcy court may order the disgorgement of fees received by an attorney when he or she has ignored reporting and court approval duties imposed by the [Bankruptcy] Code."). Therefore, the Bankruptcy Judge applied the proper legal standard and acted with proper discretion in denying Appellant's request for fees and ordering disgorgement of those already received.

Appellant argues that the violations were not in bad faith and merely technical errors. However, this is of no consequence. "Negligent or inadvertent omissions do not vitiate the failure to disclose." Jensen, 210 B.R. at 848 (internal citations omitted). "Accordingly, an attorney who fails to comply with the disclosure requirements of Section 329 and Rule 2016(b) forfeits any right to receive compensation for services rendered on behalf of the debtor and may be ordered to return fees already received." Id.; see also In re Busillo, No. 15-15627, 2018 WL 6131767, at *3 (Bankr. D.N.J. Oct. 29, 2018) (explaining "[b]ankruptcy courts have discretion to determine whether a fee is allowed" even if they "are the result of negligence or inadvertence").

Additionally, Appellant argues the at-issue post-petition payment of fees by the Debtor's principal was not a conflict of interests because the Debtor is a single member limited liability company. However, this argument too is of no consequence. An actual conflict of interest need not exist to justify the Fee Order. Failure to disclose information that has even just "the potential for creating a conflict warrants a denial of all compensation to debtor's counsel." In re Smitty's Truck Stop, Inc., 210 B.R. at 850. Indeed, the Bankruptcy Judge expressly stated in her Opinion that it was "unnecessary for [her] to decide whether an actual conflict of interest exists in this case or to decide any other open issues" given the complete failure to disclose the payments. Fee Opinion at 31-32. Therefore, the Court need not re-litigate whether an actual conflict existed since the Fee Order did not rest on that question. Appellant's total failure to disclose the fees was sufficient grounds for denial and disgorgement.

Finally, Appellant argues the Bankruptcy Judge's finding that Appellant violated Rule 3.3 of the

New Jersey Rules of Professional Conduct because his conduct was willful is not supported by the facts. The Court disagrees. There is sufficient evidence in the record on which the Bankruptcy Judge could reasonably conclude Appellant's conduct was willful. Specifically, Appellant admitted that it chose not to disclose its receipt of payments from Ms. Quan based on its determination that these payments did not give rise to a conflict of interest. A323-A324. Appellant also admitted the payments from Ms. Quan were intentionally kept off the monthly operating reports to show the Debtor could fund a chapter 11 plan. A261-A262. This conclusion is supported by the record and, therefore, the bankruptcy court was within its power to deny fees on this basis. See In re Grasso, 586 B.R. 110, 162-63 (Bankr. E.D. Pa. 2018) (denying fee application, ordering return of unauthorized post-petition payments, and referring to district court for, among other things, violating RPC 3.3).[2]

IV. CONCLUSION

For the reasons stated above, Appellant's Appeal is **DENIED** and the bankruptcy court's order is **AFFIRMED.** Additionally, Appellee's Motion to Strike, ECF No. 19, is **GRANTED.** The Clerk of Court shall strike the Response, ECF No. 17, and remove it from the record.

Footnotes

1These facts are drawn from the Appendix filed by Appellee Andrew R. Vara, United States Trustee for Region 3, pursuant to Federal Rule of Bankruptcy

Procedure 8018(b)(2). ECF Nos 11.1-11.6. References to the Appendix are cited as "A[page]."

2Also pending before the Court in this matter is Charles M. Forman's ("Appellee" or "Forman") Motion to Strike Kevin K. Tung, Esq.'s ("Tung"), attorney for Appellant, August 23, 2020 Response, ECF No. 17, pursuant to Federal Rule of Civil Procedure 12(f), ECF No. 19.

On August 20, 2020, Appellee filed a Notice of Supplemental Authority, bringing a recent, potentially relevant Tenth Circuit Case to the Court's attention in relation to the instant Appeal. ECF Nos. 15-16. Three days later, Appellant filed a Response to the Notice (the "Response"). ECF No. 17. In the Response, Appellant refuted the Tenth Circuit case's relevance to the instant action, but also raised new information received by Appellant alleging that Appellee and the Bankruptcy Judge had a personal relationship. Specifically, as evidence of this alleged relationship, Appellant attached a photo showing Forman with the Bankruptcy Judge in a group photo captioned to be from a "New Jersey Bankruptcy Lawyers Foundation" event. Id. Ex. A, ECF No. 17.1. On August 24, 2020, Hon. Katharine S. Hayden ordered the Response to be sealed and thus not accessible to the public. ECF No. 18. Appellee now moves to strike the Response, arguing that the Response violates the Federal Rules of Bankruptcy Procedure and is reckless and vindictive. ECF No. 19. Appellant opposes the Motion. ECF No. 21.

Federal Rule of Civil Procedure 12(f) gives the court discretion to "strike from a pleading ... any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). Although motions to strike are "disfavored and usually will be denied," they

are appropriate when "the allegations have no possible relation to the controversy and may cause prejudice to one of the parties, or if the allegations confuse the issues in the case." Jones v. United States, 2012 WL 2340096, at *3 (D.N.J. June 18, 2012) (quotation marks and citation omitted). Here, as an initial matter, these new allegations of bias are unrelated to the appeal at hand because it was not noted in Appellant's designation of issues on appeal. See ECF No. 3.2. Moreover, the Court finds that the arguments and the photograph attached to the Response are wholly irrelevant and without merit. That a lawyer and a judge attended the same professional event does not warrant a finding that the latter is improperly biased. Therefore, the Motion to Strike is granted.

NOT FOR PUBLICATION

United States Bankruptcy Court, D. New Jersey.

IN RE: 38-36 GREENVILLE AVE L.L.C., Debtor.

Case No.: 16-15598 (SLM)

Signed April 6, 2020

Attorneys and Law Firms

Kevin Kerveng Tung, Esq., Kevin Kerveng Tung, P.C., 136-20 38th Avenue, Suite 3D, Flushing, NY 11354, Attorney for 38-36 Greenville Ave L.L.C.

Michael E. Holt, Esq., Forman Holt, LLC, 66 Route 17 North, Paramus, NJ 07652, Attorneys for the Chapter 7 Trustee, Charles M. Forman.

Mitchell Hausman, Esq., United States Department of Justice, Office of the United States Trustee, One Newark Center, Suite 2100, Newark, NJ 07102, Attorneys for Andrew R. Vara, Acting United States Trustee, Region 3.

OPINION

STACEY L. MEISEL, UNITED STATES BANKRUPTCY JUDGE

INTRODUCTION

The Court is presented with the undesirable circumstance of being asked to approve the fees of an attorney who put his personal pecuniary interests ahead of his fiduciary duties and professional obligations, which resulted in a breach of those duties

and obligations. Before the Court is the Court's *Amended Order to Show Cause as to Why This Court Should Not Issue Sanctions Against Kevin Kerveng Tung, P.C. and Kevin K. Tung, Esq., in His Individual Capacity, for Potential Violations of the New Jersey Rules of Professional Conduct, the United States Code, and the Federal Rules of Bankruptcy Procedure* (the "**Second OSC**")[1] that the Court issued because of questions arising from the *First and Final Fee Application of Kevin Kerveng Tung, P.C. for Professional [sic] Services Rendered and Reimbursement of Expenses Incurred and Posted as Counsel for 38-36 Greenville Ave LLC. [sic] During the Period from February 9, 2016 to October 10, 2017* (the "**Fee Application**") submitted by Kevin Kerveng Tung, P.C. ("**KKT**"), the law firm of record for debtor 38-36 Greenville Ave L.L.C. (the "**Debtor**").[2] Importantly, the Court's questions stem from the Fee Application's indication that KKT intends to pay $19,400 of its fees to the Debtor's principal, Lingyan Quan (the "**Debtor's Principal**") on account of compensation the Debtor's Principal paid to KKT post-petition (the "**Undisclosed Payments**").[3] The Fee Application provides no further information about the payments nor why $19,400 is due to the Debtor's Principal. The Court held a hearing to resolve these questions. The answers provided were wholly unsatisfactory leaving the Court with only one choice—complete denial of KKT's fees and disgorgement of any fees received in this case on behalf of the Debtor and a referral of this matter to the Chief Judge of the District Court.

JURISDICTION AND VENUE

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334, 28 U.S.C. § 157(b)(1), and the Standing Order of Reference from the United States District Court for the District of New Jersey dated July 23, 1984 and amended September 18, 2012. This matter constitutes a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) because it concerns the administration of the bankruptcy estate. Venue is proper under 28 U.S.C. § 1408. Pursuant to Federal Rule of Bankruptcy Procedure 7052, the Court issues the following findings of fact and conclusions of law.

BACKGROUND AND PROCEDURAL HISTORY

On March 24, 2016, the Debtor filed a voluntary Chapter 11 petition for relief under Title 11 of the United States Code (the "**Bankruptcy Code**").[4] The Debtor is a single-member limited liability company, who at the time of filing, owned a six-family house located at 38-36 Greenville Avenue, Jersey City, New Jersey (the "**Property**"). The Debtor's Principal is the Debtor's 100% equity security holder.[5] Armando Flores and Melinda Flores (the "**Flores Creditors**") are the only creditors listed in the Debtor's schedules in the amounts of $1,265,893.16 and $583,244.44, respectively. On April 6, 2016, the Debtor filed an *Application for Retention of Professional* (the "**Retention Application**"), signed by the Debtor's Principal, seeking to retain KKT as its counsel in the bankruptcy case.[6] The Debtor previously retained KKT as legal counsel in a New Jersey Superior Court state court action that involved the Flores Creditors (the "**State Court Action**").[7] On April 18, 2016, the Court entered

an *Order Authorizing Retention of KKT as Debtor's Counsel* (the "**Retention Order**").[8] Throughout the Debtor's Chapter 11 case, the Debtor filed thirteen monthly operating reports ("**MORs**") that covered the period from April 2016 through April 2017.[9] The MORs were signed under penalty of perjury by the Debtor's Principal.[10] KKT filed the MORs electronically on behalf of the Debtor using Mr. Kevin K. Tung, Esq.'s electronic filing credentials.[11] None of the MORs reflected the Undisclosed Payments.

The Retention Order provided that KKT's retention was effective on the date that the Retention Application was filed with the Court.[12] The Retention Order further provided that "[c]ompensation shall be paid in such amounts as may be allowed by the Court upon proper application(s) therefor."[13] The Retention Application disclosed that, on February 9, 2016, the Debtor retained KKT as bankruptcy counsel and paid KKT a $3,000 retainer (the "**Retainer**").[14] The Retention Application also provided that, other than the Retainer, "no agreement of any type was made between [KKT] or anyone acting on its behalf and [Debtor] or anyone acting on its behalf in connection with [KKT's] retention."[15] The Retention Application provided that KKT would seek compensation "in accordance with the applicable provisions of the Bankruptcy Code, the Bankruptcy Rules, the United States Trustee Guidelines ... for reviewing motions for compensation and reimbursement expenses filed under 11 U.S.C. § 330, the Local Bankruptcy Rules, and further orders of this Court."[16]

The Retention Application utilized the local form for the Bankruptcy Court for the District of New Jersey, which contained a standard section for the Debtor to disclose KKT's potential conflicts.[17] The

Debtor indicated that KKT: (1) did not hold an interest adverse to the estate; (2) did not represent an adverse interest to the estate; (3) is a disinterested person under 11 U.S.C. § 101(14); and (4) does not represent or hold any interest adverse to the Debtor or the estate with respect to the matter for which it was retained under 11 U.S.C. § 327(e) of the Bankruptcy Code.[18] In his certification in support of the Retention Application, Mr. Tung checked all of the same boxes including the box that indicates KKT does not hold an interest adverse to the Debtor or the estate under § 327(e).[19] The Retention Application also indicated that KKT was selected because the firm "devotes a substantial percentage of its professional time and effort to the practice of bankruptcy law and insolvency law" and KKT "has rich experience in bankruptcy practices including chapter 11 cases."[20]

The Pre-Petition State Court Action

On November 16, 2015, the Flores Creditors initiated the State Court Action against the Debtor and Robert Browning ("**Mr. Browning**"), a non-party to the instant matter. KKT represented the Debtor in the State Court Action.[21] Following that trial, the jury found that: (1) Mr. Browning, a principal, officer, employee or agent of the Debtor, committed an assault and battery against Armando Flores in the scope of Mr. Browning's employment with the Debtor;[22] and (2) the Debtor negligently hired, supervised, or retained Mr. Browning.[23] Based on the jury verdict and award, the state court entered judgment against Mr. Browning and the Debtor, jointly and severally, for $1,260,936.13 plus $4,957 in pre-judgment interest in favor of Armando Flores, and $580,000.00 plus $3,244.44 in pre-

judgment interest (the "**State Court Judgment**").[24] The Debtor (and Mr. Browning) appealed the State Court Judgment on December 25, 2015.

The Chapter 11 Case

The Debtor filed bankruptcy on March 24, 2016 because of the State Court Judgment.[25] On May 3, 2016, the Debtor filed a *Motion for Relief from Stay* (the "**Stay Relief Motion**"), seeking permission to proceed with its appeal of the State Court Judgment and requesting the bankruptcy case be held in abeyance during the pendency of the appeal.[26] The Flores Creditors opposed the Stay Relief Motion[27] and filed a *Cross-Motion for Relief from Stay* (the "**Cross-Motion**"), seeking permission to collect on the State Court Judgment.[28] On May 31, 2016, the Court held oral argument on the Stay Relief Motion and the Cross-Motion. The Debtor asked the Court to send the parties to mediation and the Court granted the Debtor's request. Mediation ultimately proved unsuccessful.[29]

On November 29, 2016, the parties appeared again for oral argument regarding the Stay Relief Motion and the Cross-Motion. At the conclusion of argument, the Court issued an oral opinion. The Court found that the Debtor was using the bankruptcy case as a substitute for posting a *supersedeas* bond to appeal the State Court Judgment, as required under state law. The Court observed that under certain circumstances this could be a potential basis for stay relief. However, in this case stay relief was inappropriate without posting the bond because the Debtor failed to attempt to pay or obtain a waiver of the bond requirement. Furthermore, the Court denied the Stay Relief Motion because the bankruptcy case (at that time) reflected a two-party dispute. Next, noting that the Flores

Creditors objected to the Debtor's request for stay relief but did not seek dismissal of the bankruptcy case, the Court denied the Cross-Motion without prejudice.

On January 18, 2017, well over a month after the Court denied the Stay Relief Motion, the Debtor filed an untimely *Motion for Reconsideration* (the "**Reconsideration Motion**").[30] Among other things, the Debtor argued that after the Court issued the Order denying the Stay Relief Motion, the Debtor's Principal applied for a *supersedeas* bond, but was denied because the value of the real property to be posted as collateral for the bond was insufficient.[31] On April 4, 2017, the Court held a hearing on the Reconsideration Motion. At the end of that hearing, the Court issued an oral opinion finding that the Debtor's inability to obtain a *supersedeas* bond was not new evidence because the Debtor implicitly, if not explicitly, asserted in support of the Stay Relief Motion that it filed a bankruptcy petition because it could not obtain a *supersedeas* bond. The Court denied the Reconsideration Motion with prejudice.[32]

On April 10, 2017, the Court *sua sponte* issued an *Order to Show Cause* (the "**First OSC**") as to why the case should not be dismissed or converted because (1) the case is comprised of a two-party dispute and (2) the Debtor failed to file a plan and disclosure statement.[33] The United States Trustee's Office (the "**UST**"), the Flores Creditors, and the Debtor responded.[34] On May 16, 2017, the Court heard oral argument on the First OSC. Mr. Tung, appearing on behalf of the Debtor, conceded that the Debtor failed to file a plan and disclosure statement and indicated that it would be futile for the Debtor to do so.[35] Clearly, had the Court not issued the First OSC, KKT would have further

delayed in informing the Court that the Chapter 11 case was unable to confirm.

The Flores Creditors sought conversion, arguing a Chapter 7 proceeding is the most expeditious way to resolve the matter. At the end of that hearing, the Court issued an oral opinion. The Court noted that, because a second creditor filed a proof of claim, the bankruptcy case was no longer a two-party dispute between the Debtor and the Flores Creditors. Therefore, because of the Flores Creditors' request and the additional creditor, it was in the best interest of the creditors and the estate to appoint a Chapter 7 trustee (the "**Chapter 7 Trustee**"). On May 17, 2017, the Court entered an *Order Converting Chapter 11 Case to Chapter 7*.[36] A Chapter 7 Trustee was appointed to the case.[37] As of the date of conversion, KKT had not filed a fee application in the Chapter 11 case. The Chapter 7 Trustee moved to sell the Debtor's only known asset—the Property. On September 20, 2017, the Court issued a *Final Order Authorizing Public Sale of the Real Property of the Debtor*.[38]

The Fee Application

On October 10, 2017, KKT filed the Fee Application, which KKT indicated was the first and final application for professional services rendered and reimbursement of expenses incurred.[39] The Fee Application further indicated that KKT was retained pursuant to § 327(a).[40] In the Fee Application, KKT seeks $29,720 in fees and $2,099 in expenses incurred during the period of February 9, 2016 through October 10, 2017, for a total of $31,819.[41] Notably, the Fee Application seeks fees for both before and after the May 17, 2017 conversion of the case to Chapter 7. As

news to the Court and all interested parties, KKT disclosed for the very first time that it received $19,400 from the Debtor's Principal's "personal bank account as pre-payment for legal services rendered."[42] However, the Fee Application failed to provide any other information about the Undisclosed Payments.

On October 19, 2017, the Flores Creditors filed a letter memorandum in opposition to the Fee Application, arguing that KKT failed to serve the Flores Creditors with the Fee Application and KKT is not entitled to compensation from the estate post-conversion because the Chapter 7 Trustee never retained KKT as the Debtor's counsel.[43] The Flores Creditors further argued that KKT seeks fees for services that provided no benefit to the estate and were unnecessary to the estate's administration. Finally, the Flores Creditors alleged that KKT guided the Debtor in filing this case in bad faith, including prosecuting the meritless Stay Relief Motion.[44]

The Chapter 7 Trustee filed an *Objection to First and Final Fee Application of Kevin Kerveng Tung, P.C. as Debtor's Counsel*.[45] The Chapter 7 Trustee asserted: (1) KKT's acceptance of the Undisclosed Payments undercut KKT's representation of the Debtor; (2) KKT failed to disclose the Undisclosed Payments as required under 11 U.S.C. § 329(a) and Federal Rule of Bankruptcy Procedure 2016(a) and (b); (3) the Fee Application provides insufficient information about the Undisclosed Payments for the Court to determine whether KKT's services benefitted the estate or the Debtor's Principal under 11 U.S.C. § 328; and (4) the Fee Application contains excessive time entries for relatively routine tasks.[46]

The night before the hearing on the Fee Application, KKT untimely filed a reply to the Flores

Creditors' Objection and a reply to Chapter 7 Trustee's Objection.[47] KKT argued that even if it is not entitled to post-conversion fees, it can still seek pre-conversion fees for the Chapter 11 case.[48] KKT also argued that the Stay Relief Motion and the Reconsideration Motion would have benefitted the estate, if successful *i.e.*, if the Debtor won.[49] KKT asserted that the Undisclosed Payments were necessary because the Retainer was insufficient to cover KKT's fees. KKT also argued that the Debtor's disclosure of the Undisclosed Payments in the Fee Application satisfied the requirements of 11 U.S.C. § 329(a) and Bankruptcy Rule 2016(a) and (b).[50]

This Court held a hearing on the Fee Application (the "**Fee Application Hearing**").[51] Mr. Tung, on behalf of KKT, argued that the Fee Application was reasonable.[52] Mr. Tung presented two alternative fee arrangements. Mr. Tung asserted that even though the Court approved a $300 hourly rate in the Retention Order, he would voluntarily reduce his hourly rate to $200 in consideration of the Debtor's lack of funds.[53] However, Mr. Tung argued that the Court should revert to the original $300 hourly rate if the Court found any of the time entries excessive pursuant to the Chapter 7 Trustee's or the Flores Creditors' objections.[54] In other words, the reduction only applied if the Court awarded the exact amount of fees requested in the Fee Application. Mr. Tung conceded that KKT did not present this conditional reduction in its pleadings.[55] Mr. Tung also conceded that KKT was not entitled to fees after the case was converted to one under Chapter 7.[56]

The Chapter 7 Trustee argued that KKT's acceptance of the Undisclosed Payments during the Chapter 11 case, without Court authorization or disclosure to the Court, violated the Bankruptcy Code

and the Bankruptcy Rules.[57] The Trustee contended that KKT knew, or should have known, of its obligation under the Bankruptcy Code and the Bankruptcy Rules to disclose compensation from any source to this Court.[58]

The Court then questioned Mr. Tung on KKT's failure to mention any payment to KKT beyond the Retainer on behalf of the Debtor.[59] Mr. Tung was evasive, unclear, and repeatedly tried to characterize the Undisclosed Payments as something other than a loan and instead, returned to his argument that the Fee Application was reasonable.[60] Ultimately, Mr. Tung admitted that the Undisclosed Payments were, in fact, a loan from the Debtor's Principal incurred without Court approval.[61] Mr. Tung also indicated that, although there was no written agreement, the Debtor's Principal issued the Undisclosed Payments in several checks to KKT. Mr. Tung could not remember how many checks Debtor's Principal issued—just that they were over an unknown time period after KKT filed the Retention Application, which was post-petition.[62]

Mr. Tung further admitted that the Undisclosed Payments were never disclosed to the Court or other parties until KKT filed the Fee Application.[63] Mr. Tung specifically said the Debtor never included the Undisclosed Payments in the MORs because if the Debtor owed post-petition money for legal fees, "the monthly operation report most likely will go negative. And at the time we were talking about reorganization, Your Honor."[64] Mr. Tung asserted that "if we d[id] not disclose in the fee application that the debtor has paid us, nobody would know."[65] Mr. Tung ultimately conceded that because none of the Debtor's or KKT's pleadings disclosed it, the Court had no way of knowing

about the Undisclosed Payments until KKT filed the Fee Application.[66]

Considering the panoply of issues raised during the Fee Application Hearing, the Court reserved.

The Court's Second Order to Show Cause

As a result of the Fee Application Hearing, the Court issued the Second OSC to determine: (1) the nature of the Undisclosed Payments, *i.e.* whether the Debtor's Principal paid KKT's fees as a loan to Debtor without Court approval and (2) whether a conflict of interest arose between KKT and the Debtor as a result of an insider paying Debtor's legal fees.[67] The Second OSC ordered KKT and Mr. Tung (collectively "**Counsel**") to show cause as to why this Court should not: (i) find that Counsel breached its fiduciary obligations to the Debtor; (ii) find that Counsel violated the New Jersey Rules of Professional Conduct ("**RPC**"); (iii) find that Counsel is not and was not disinterested in its representation of the Debtor; (iv) terminate Counsel as attorney to the Debtor; (v) deny Counsel's Fee Application in its entirety; (vi) require Counsel to disgorge attorney's fees previously paid by or on behalf of the Debtor; and (vii) sanction Counsel as deemed necessary and appropriate.[68] The Second OSC also provided an opportunity for interested parties with standing to file pleadings in response to the Court's queries.

Counsel filed an opposition to the Second OSC.[69] Counsel argued that (1) there is no conflict of interest as it applies to receiving legal fees from the Debtor's Principal because the Debtor and Debtor's Principal's interests are united, (2) the acceptance of legal fees paid by the Debtor's Principal is not a *per se* violation of the

retention parameters provided by 11 U.S.C. § 327(a), and (3) Counsel made appropriate disclosures regarding the Retainer and the Undisclosed Payments from the Debtor's Principal in the Fee Application.[70]

Counsel argues that the Court should adopt the "analytical approach," an alleged approach used by courts to analyze each case's specific facts when determining whether a conflict of interest exists if a third party funds legal counsel for a debtor-in-possession.[71] Counsel asserts that it would not have requested reimbursement of the Undisclosed Payments if the case remained in a Chapter 11 and did not convert to a Chapter 7 case. Counsel explains that it "would not request fees from the same source, the Single Member's own funds."[72] Counsel, without any detail, states that it never intentionally or negligently made false statements of material fact or law to the Court and therefore there is no violation of RPC 3.3.[73] Counsel further argues that it should not be disqualified for employment under § 327 and should not be ordered to return the funds paid by the Debtor's Principal.[74] Finally, Counsel contends that it made complete and timely disclosures in accordance with Bankruptcy Rule 2016 by listing the Undisclosed Payments from the Debtor's Principal in the Fee Application.[75] Counsel asserts there is a high standard of proof in disqualifying legal counsel even when there is a violation of professional ethics.[76] In the instant case, Counsel argues there is insufficient evidence to support disqualification from the representation of the Debtor.[77]

The UST filed a Memorandum of Law in Support of the Second OSC.[78] The UST argues that Counsel violated the Bankruptcy Code and this Court's Order by failing to provide requisite disclosures for each periodic payment made by the Debtor's Principal to

KKT and failing to file applications for compensation in accordance with the Retention Order.[79] The UST also argues that a failure to comply with § 329 and Bankruptcy Rule 2016(b) is grounds to deny all fees and costs sought by counsel, even if the failure resulted from negligence or inadvertence.[80] The UST asserts that Counsel's disclosure is inadequate because Bankruptcy Rule 2016(b) requires that the attorney file a supplemental statement within fourteen days after receiving any payment.[81] The UST requests that the Court disgorge all fees from Counsel for failure to comply with 11 U.S.C. §§ 327(a) and 329, Bankruptcy Rule 2016(b), and for failure to meet the requirements for compensation under 11 U.S.C. § 330.

The Chapter 7 Trustee filed a response to Counsel's opposition to the Court's Second OSC and also joined the UST in its Memorandum of Law in Support of the Court's Second OSC.[82] The Chapter 7 Trustee argues that the primary issue in this matter is Counsel's failure to disclose as required by § 329 and Bankruptcy Rule 2016(b), regardless of whether that failure was inadvertent or negligent.[83] The Chapter 7 Trustee contends that it does not matter if the Debtor's Principal's interest and the Debtor's interest are united. The Chapter 7 Trustee argues that proper and timely disclosures are required to enable the Court to determine if a possible conflict of interest exists.[84] Ultimately, the Chapter 7 Trustee requests the Court: (1) deny Counsel's Fee Application; (2) require Counsel to disgorge all fees received by Counsel in connection with this case; and (3) issue additional sanctions against Counsel in an amount determined by the Court.[85]

Counsel filed a reply to the UST's Memorandum in Support of the Court's Second OSC and a sur-reply to the Chapter 7 Trustee's response.[86] Counsel asserts

again that there was honest and complete disclosure of the Undisclosed Payments in the Fee Application.[87] Furthermore, Counsel argues that the UST misstates the Fee Application Hearing transcript and that Mr. Tung never described the payments as a loan.[88] Counsel asserts that it "never willfully or intentionally withheld any facts or information from the Court."[89] Counsel seemingly asserts it made a technical breach.[90] Therefore, the Court should not impose the harsh sanction of disgorgement.[91] Specifically, Counsel asserts that it never intended to deceive the Court regarding the fees received in connection with this case.[92] Counsel states that it was unaware of any Bankruptcy Code requirements to disclose or the requirement in Bankruptcy Rule 2016 to file a supplemental statement within fourteen days of receiving legal fees. Counsel argues that this is not sufficient evidence to show willfulness.[93] Finally, Counsel argues that in order for the Court to deny compensation under § 329 it must first determine that the fees requested are excessive.[94]

Counsel's reply provides a breakdown of the $19,400, to be paid to Debtor's Principal, as requested in the Fee Application.[95] The breakdown reflects that $3,000 was requested for the Retainer paid by Debtor pre-petition, and the remaining $16,400 consisted of twelve separate post-petition payments paid by Debtor's Principal to Counsel.[96] Counsel also filed copies of thirteen checks in support of its breakdown of the Undisclosed Payments.[97] Twelve of the checks evidence payments made from Debtor's Principal to KKT post-petition.[98] The thirteenth check is the Retainer check. The Retainer was not paid from the same account and was paid by the Debtor.[99]

The Second OSC Hearing

The Court held a hearing on the Second OSC (the "**Second OSC Hearing**"). The UST, the Chapter 7 Trustee, Mr. Tung, and Mr. Robert Browning (seated in the gallery) were present at the Second OSC Hearing.[100] The Debtor's Principal was not. At the Second OSC Hearing, Mr. Tung reiterated that Counsel's failure to disclose the Undisclosed Payments within fourteen days was simply a technical error.[101] He further argued that Counsel did not believe that it needed to disclose anything about the Undisclosed Payments until it filed the Fee Application.[102] After questioning by the Court, however, Mr. Tung admitted that he understands the need for timely disclosure to provide the opportunity for other parties and the Court to review potential conflicts of interests.[103] Mr. Tung argued that this Court should overlook Counsel's violation of Bankruptcy Rule 2016 and the Retention Order because it was a harmless error since KKT voluntarily disclosed the payments on the Fee Application.[104] Regardless, Mr. Tung admitted to a violation of Bankruptcy Rule 2016(b). He further conceded that Counsel is not entitled to $1,500 of the fees for post-conversion services included in the Fee Application.[105]

Importantly, this Court could not determine from any pleadings how to treat the $19,400 Undisclosed Payments (other than the $3,000 Retainer) because every time the Court requested clarification, Counsel refused to commit to any characterization of the payments. Mr. Tung expressed that the parties never considered how to characterize the payments prior to this case's conversion.[106] Mr. Tung previously explained to this Court that the payments *could* be a

loan. However at the Second OSC Hearing, Mr. Tung backtracked and stated that the Undisclosed Payments were not a loan and instead, could be a cash infusion.[107] To explain the change in his characterization, Mr. Tung stated that "[l]awyers, you know, when they're doing cases, makes [sic] a mistake."[108] The Court asked why the MORs do not reflect the Undisclosed Payments.[109] Mr. Tung explained that because the Debtor had no income, any additional burden on the Debtor would eliminate the chance of the Debtor being successful in its reorganization.[110] He further explained that if he knew how to characterize that money at the time Counsel received it, he would have disclosed it on the MORs.[111] This statement is contrary to Mr. Tung's other statement that he purposefully chose to omit the Undisclosed Payments from the MORs because "... then the monthly operation [sic] report most likely will go negative." The Chapter 7 Trustee argued that both a loan and a cash infusion received by a Chapter 11 debtor need to be disclosed on a monthly operating report. The Chapter 7 Trustee also argued that in addition to disclosure, the Debtor would need the Court's approval to accept a loan or cash infusion.[112]

After realizing the negative implications of characterizing the payments as an investment, Mr. Tung again changed his tune and stated that "[i]t could be a gift."[113] Yet, after the Court asked if a gift would also need to be reported on the MORs, Mr. Tung replied "I'm not saying it's a gift."[114] Mr. Tung could not see how any of the characterizations regarding the Undisclosed Payments created a conflict of interest—whether that conflict be with the Debtor or the Debtor's Principal.[115] Mr. Tung asserted that "if there was never a conversion to Chapter 7, that would never be an issue because we never have to apply for legal

fees."[116] Apparently, Mr. Tung forgot the requirements placed upon Counsel by the Retention Order, the Bankruptcy Code, and Bankruptcy Rules. Mr. Tung further explained that the Debtor would never have to apply for legal fees in a Chapter 11 because it's a single member and the Debtor's Principal never intended to burden the Debtor.[117] Mr. Tung continued to give the Court amorphous and conflicting answers while still dodging the Court's questions. When the Court asked Mr. Tung if the Debtor's Principal asked for the money back, Mr. Tung said "[s]he didn't specifically ask for the money back" yet "she did ask if we can put in the application ...."[118]

At the Second OSC Hearing, the UST asserted that Mr. Tung's argument demonstrated his "lack of understanding of compensation in the bankruptcy system."[119] The UST argued that, pursuant to § 329, the fees should be disgorged and paid back to the Debtor's Principal.[120] Interestingly, the UST addressed that the Debtor's Principal filed a proof of claim in this case.[121] The UST asserted that if the Debtor's Principal's payments were made on behalf of the Debtor post-petition, it would have created a conflict of interest because Debtor's Principal purports to be a creditor in this case.[122] However, the dates for the basis of the alleged payments in the proof of claim are unclear based on the information provided in the Debtor's Principal's proof of claim.[123] The UST clarified, however, that the Court need not find a conflict of interest to disgorge Counsel's fees and deny the Fee Application because plenty of other reasons exist.[124]

As previously stated, Mr. Tung eventually asserted that the $19,400 includes the $3,000 Retainer paid by the Debtor, which was already disclosed to the Court in the Retention Application.[125] Mr. Tung

contended that because the $3,000 was included, the Undisclosed Payments only consist of $16,400, which is the actual amount that the Debtor's Principal paid to Counsel post-petition.[126] When the Court asked Mr. Tung why he included the Retainer in the Fee Application, he responded that "[m]aybe, maybe we thought the money was from single member, it's also in her pocket, so she wants to get everything back for legal fees."[127] This was yet again another nebulous answer to the Court that simply made no sense.

Instead of showing contrition at the Second OSC Hearing, as the Court already specifically stated on the record, Mr. Tung was "very defensive, flip flopping in [his] statements, throwing the issues to the Court to figure out, and ... remaining unhelpful as the Court [broached] the decision of what to do about [KKT's] representation and the fee application and the fees that [KKT] received."[128] The Court reserved at the Second OSC Hearing. The Court entered an Order on March 31, 2020 denying the Fee Application, disgorging all fees and costs received in connection with the Debtor's bankruptcy case, and indicated that a decision would follow and that the Court would refer the matter to the Chief Judge of the District Court of New Jersey (the "**March 31, 2020 Order**").[129] On April 2, 2020, KKT filed a *Notice of Appeal* appealing the March 31, 2020 Order.[130] Since the March 31, 2020 Order indicated that a decision would follow, this decision is not subject to the divestiture rule as it has the Court's findings of fact and conclusions of law in support of that Order.

DISCUSSION

The Fee Application requests a total amount of $31,819 ($29,720 in fees and $2,099 in expenses).[131] Of

the $29,720 in professional fees, Counsel requested that $19,400 be paid to Debtor's Principal "individually for pre-payment for KKT Firm."[132] Mr. Tung asserted at the Second OSC Hearing that the $19,400 received includes the $3,000 Retainer.[133] Counsel concedes that the request for $19,400 was an error,[134] and the amount actually paid to Counsel by Debtor's Principal was $16,400.[135]

The Court takes issue with Mr. Tung's uncertainty as to why he requested certain fees and the source of those fees. In fact, the Court takes issue with just about every statement Mr. Tung made while failing to respond to direct inquiries made by the Court. It is clear to this Court that Mr. Tung was willing to say anything that he thought might resolve the issue regarding the Undisclosed Payments in Counsel's favor. Mr. Tung's willingness to say absolutely anything resulted in him saying nothing that proved helpful to the Court. He simply demonstrated to the Court that his blatant disregard of the Retention Order, the Bankruptcy Code, Bankruptcy Rules, and RPC cannot be rewarded.

Counsel's inability to commit to a characterization of the Undisclosed Payments also troubles the Court. Mr. Tung took three different positions starting at the Fee Application Hearing and ending at the Second OSC Hearing—a loan, cash infusion, or gift. If the Undisclosed Payments were a loan, they needed to be approved by the Court under § 364. If they were a cash infusion or a gift, they needed Court approval under § 363. Any characterization, however, requires Counsel's disclosure of the compensation *and* disclosure in the MORs. No matter what characterization, they all require disclosure under Bankruptcy Rule 2016.

I. Counsel was Retained under § 327

Section 327(a) of the Bankruptcy Code, Bankruptcy Rule 2014, and the RPCs govern the employment of counsel in bankruptcy cases. Attorneys in bankruptcy proceedings must comply with the requirements under 11 U.S.C. § 327 of the Bankruptcy Code, which provides the general parameters for the employment of professional persons by the trustee.[136] Section 327 also applies to a debtor in possession.[137] Proper retention of professional persons under § 327 requires court approval.[138] Section 330 governs compensation of professionals retained under § 327.[139] That section provides:

> After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, a consumer privacy ombudsman appointed under section 332, an examiner, an ombudsman appointed under section 333, or a professional person employed under section 327 or 1103—
>
> > (A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, ombudsman, professional person, or attorney and by any paraprofessional person employed by any such person; and
> > (B) reimbursement for actual, necessary expenses.[140]

The Third Circuit interprets § 330 to provide the courts with discretionary authority in that courts *may*

award reasonable compensation.[141] The party seeking compensation bears the burden to prove that the compensation and expenses sought are reasonable and necessary.[142]

In this case, Counsel sought retention as Debtor's counsel under § 327 of the Bankruptcy Code.[143] Mr. Tung's certification in support of the Retention Application asserted that Counsel: (1) was a disinterested person as defined under the Bankruptcy Code; (2) did not hold any interest adverse to the estate; and (3) did not represent an adverse interest to the estate. This Court accordingly authorized Debtor to retain Counsel under § 327 based upon the representation made to the Court.[144] The Court's inquiry addresses the post-petition compensation Counsel received throughout the Debtor's bankruptcy, which was only disclosed at the end of Counsel's representation in the case when Counsel filed the final Fee Application. Therefore, this Court will first review whether Counsel made timely and adequate disclosures as required by the Bankruptcy Code and the Bankruptcy Rules and then whether Counsel acted with full candor to the Court.

II. Counsel Violated Bankruptcy Rules 2014 and 2016 and the Retention Order

Bankruptcy Rule 2014 sets forth a procedure for debtor's attorney retained under § 327 to make certain disclosures.[145] Specifically, Bankruptcy Rule 2014 requires that the debtor's application to employ counsel shall state, "to the best of the applicant's knowledge," the attorney's "connections with the debtor, creditors, [and] any other party in interest."[146]

"Disclosure 'goes to the heart of the integrity of the bankruptcy system.' Therefore, the duty to disclose under Bankruptcy Rule 2014 is considered sacrosanct."[147] The Bankruptcy Code demands the disclosure of an attorney's transactions with a debtor. Section 329 of the Bankruptcy Code requires a debtor's attorney:

> to file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation.[148]

This means a debtor's attorney must disclose all compensation related to the insolvency incurred one year prior to the filing.[149] Bankruptcy Rule 2016(b) implements § 329 by requiring a debtor's attorney to file a statement within 14 days of the entry of the order for relief disclosing the pre-petition payments.[150] A debtor's attorney is further obligated to file a supplemental statement "within 14 days after any payment or agreement not previously disclosed."[151] The Court is authorized to review all payments made to a debtor's attorney after the entry of the order for relief "for services in any way related to the case."[152] Thus, debtor's attorneys are bound to disclose compensation both one year before the case files and all compensation after case filing.

Counsel's opposition to the Second OSC initially asserts that full disclosure was made in the Retention Application and in the Fee Application.[153] During the

Second OSC Hearing, however, Counsel's position changed and Mr. Tung admitted that Counsel failed to disclose compensation received within fourteen days of its receipt as required by Rule 2016.[154] Even after acknowledging the repeated failures to comply with the disclosure requirements of Bankruptcy Rule 2016(b), Counsel insisted that full disclosure was ultimately made in the Fee Application thereby correcting any prior failures, stating it was only a technical error.[155] Regardless, it is clear to the Court from Counsel's admissions that at least twelve violations of Bankruptcy Rule 2016 occurred. One violation for every payment paid by Debtor's Principal as compensation for legal services to Counsel. The facts show a Rule 2016 violation, but the Court need not further analyze those facts due to the admissions made by Mr. Tung.

Both the UST and the Chapter 7 Trustee argue that Counsel's failure to disclose is sufficient grounds for the Court to deny the Fee Application and disgorge Counsel's fees received in this case. The UST requests that this Court deny the Fee Application for its failure to disclose compensation, disgorge the Retainer and all fees received in connection with the Debtor's case, and require Counsel to provide an accounting to the Court of all fees received in connection with the instant case.[156] The Chapter 7 Trustee argues that a failure to make the mandatory disclosures—disclosures that have the potential to reveal a conflict of interest—warrants a denial of all compensation, disgorgement of the Retainer, and imposition of sanctions.[157]

Counsel focused its arguments on attempting to demonstrate that there was no conflict of interest between Counsel and the Debtor. To support the argument of why Counsel does not have a conflict of interests with the Debtor, Counsel relied on *In re Lotus*

Props. LP and that court's analysis of the parties' united interests.[158] Counsel also requests that this Court adopt the analytical approach in determining whether a conflict of interest exists in this case. The *Lotus* court described how courts developed two separate approaches for addressing issues arising from counsel fees paid by insiders of the debtor-in-possession—the restrictive approach and the analytical approach.[159] The restrictive approach institutes a *per se* presumption of a conflict of interest when an insider pays counsel fees on behalf of a debtor.[160] When courts utilize the restrictive approach they also consider whether debtor and the third party insider have united interests.[161] Courts using the restrictive approach found that conflicts of interest exist when there were inadequate disclosures.[162] Alternatively, some courts like *In re Lotus Props. LP* and *In re Missouri Mining* adopted the analytical approach, which rejects the per se rule and instead performs a factual analysis to form a determination as to whether a conflict exists.[163] Counsel asks this Court to follow the analytical approach in this case to determine that no conflict of interest exists.

The UST asserts that this case differs from *Lotus* and *Missouri* primarily because of Counsel's lack of disclosure. The Court agrees. In *In re Lotus Properties LP*, the debtor's principal paid the debtor's retainer to debtor's attorney and paid all ongoing fees.[164] Ironically, the *Lotus* court reviewed the potential conflict of interest in the context of a contested fee application where the debtor provided full disclosure to the court at the onset of the case.[165] The UST argues that just like in *Lotus*, full disclosure should have happened here.[166] In that case, the facts pertinent to the court's determination of whether a conflict of interest existed were fully disclosed to the

court in the retention application.[167] It is clear that the case at hand is distinguishable from *Lotus*.

Counsel also relies on *In re Missouri Mining* to persuade this Court to perform a factual analysis of this case to find no conflict of interest exists.[168] *Missouri Mining*, however, instructs this Court that before conducting a factual case-by-case analysis, there must be full disclosure.[169] Counsel admits that it failed to disclose post-petition compensation received until October 2017, when it revealed the previously concealed Undisclosed Payments in the Fee Application. Counsel's affirmative decision not to disclose compensation foreclosed this Court, and the other parties in this case, from scrutinizing whether a conflict of interest existed. So, even if the *Missouri Mining* Court is right that payment to counsel by a third party does not disqualify counsel *per se*, that conclusion cannot be reached without timely, adequate, accurate, and full disclosure.[170] Here, Counsel waited until the final Fee Application to disclose multiple payments it received from Debtor's Principal. During the course of Debtor's bankruptcy case, the Debtor's Principal paid Counsel on at least twelve separate occasions.[171] At no point during the case was the Court or any party aware that Debtor's Principal was paying the Debtor's attorney fees.

Counsel admits that it failed to meet the requirement set out by Bankruptcy Rule 2016(b). The UST and the Chapter 7 Trustee both argue that—regardless of the source of payments made to Counsel—Counsel failed to make proper disclosures of compensation to the Court and failed to comply with the Bankruptcy Code and Bankruptcy Rules. This Court agrees and finds that Counsel's disclosure in the Debtor's case was untimely, inadequate, and inaccurate.

Additionally, the Retention Order explicitly sets forth that "compensation shall be paid in such amounts as may be allowed by the Court upon proper application(s) therefor."[172] All of the Undisclosed Payments—consisting of twelve separate payments—comprised of compensation paid to Counsel for legal services. None of the Undisclosed Payments, however, were allowed by an order of this Court or included in an application for compensation until the Fee Application. Counsel violated the Retention Order by failing to seek approval and authorization for the compensation it received. The Bankruptcy Code also requires an application to the court for interim compensation.[173] Section 331 of the Bankruptcy Code permits a debtor's attorney to apply to the court for compensation for services rendered before a final fee application.[174] Generally, that compensation is every 120 days unless the court orders otherwise. Counsel violated § 331 when it received the twelve payments neither applied for nor allowed by this Court.

Counsel's excuse of ignorance of the Bankruptcy Code and Bankruptcy Rules is unacceptable and contrary to the "rich experience" in bankruptcy law that Counsel touted in the Retention Application. The Court wonders how Counsel can even profess ignorance of the requirements of the Retention Order when Counsel initially submitted it to the Court at the time it filed the Retention Application. The Court will next determine whether Counsel's actions and lack of disclosures amount to a violation of the RPCs.

III. Counsel Violated Rule of Professional Conduct 3.3

The Second OSC also questioned whether Counsel violated RPC 3.3. Courts in the Third Circuit incorporate applicable state law on professional conduct "to avoid 'detriment to the public's confidence in the integrity of the bar that might result from courts in the same state enforcing different ethical norms.' "[175] "State precedent as to professional responsibility should be consulted when they are compatible with federal law and policy."[176] Accordingly, pursuant to District of New Jersey Local Bankruptcy Rule 9010-1, attorneys appearing before this Court are bound by the RPCs.[177] RPC 3.3, which governs candor toward the tribunal, provides, among other things, that "[a] lawyer shall not knowingly: (1) make a false statement of material fact or law to a tribunal[.]"[178]

Counsel asserts that it "never intentionally or negligently made a false statement of material fact or law to the Court."[179] This Court disagrees. Counsel electronically filed thirteen MORs on behalf of the Debtor between April 2016 and April 2017. Based on the exhibits filed with the Court, the earliest check written to Counsel by Debtor's Principal was from May 2016.[180] Therefore, each of the eleven MORs filed by Counsel covering the period of May 2016 and April 2017 were false statements. Mr. Tung nonchalantly acknowledged that he omitted the Undisclosed Payments from the MORs just so he could keep the Debtor in a viable Chapter 11. In other words, Mr. Tung purposefully and strategically decided to omit pertinent information from the MORs—which Mr. Tung filed with the Court. Again, regardless of the characterization of the Undisclosed Payments, each

characterization required reporting on the MORs. Counsel again intentionally chose not to do so.

Counsel's Fee Application requests $19,400 to be reimbursed to Debtor's Principal for payments made "from her personal bank account as pre-payment for the legal services rendered."[181] However, both Counsel's opposition to the Second OSC and his statements made on the record at the Second OSC Hearing admit that the 19,400 contains the $3,000 Retainer paid by the Debtor. Counsel made a false statement regarding the source of the Retainer on the Fee Application since it was not from the Debtor's Principal. Under other circumstances, this could have potentially been viewed as a minor mistake but here the Court must consider all of Counsel's concealments and obfuscation.

Mr. Tung's statements made on the record at the Fee Application Hearing and the Second OSC Hearing contradicted one another. The Court asked Mr. Tung multiple times to characterize the nature of the Undisclosed Payments. Mr. Tung repeatedly changed his response. Mr. Tung asserted that the Undisclosed Payments were a loan and in the next breath he stated that the payments were a cash infusion. When the Court asked Mr. Tung to reconcile why the Undisclosed Payments were not reflected on the MORs, Mr. Tung then exclaimed that the payments "could be a gift." Two of the three characterizations must be false, leaving one of the characterizations to be true and accurate. The Court does not know which characterization is true and accurate. The Court does know, however, that at least two of Counsel's characterizations were false statements.

Therefore, this Court finds Counsel in violation of RPC 3.3—Candor Toward the Tribunal. There could be other RPCs at play in this case, but RPC 3.3 is one

Counsel clearly violated. Having reached that conclusion, the Court must next determine whether Counsel is entitled to any compensation despite the inadequate disclosures and violations of the Bankruptcy Rules, the Retention Order, and the RPCs. The Court finds in the negative.

IV. Counsel Failed to Comply with the Court's Order, the Bankruptcy Code, Bankruptcy Rules, and the Professional Rules of Conduct

The UST and the Chapter 7 Trustee argue that this Court should deny the Fee Application in its entirety as a result of Counsel's failure to disclose and violations of the Bankruptcy Code and Rules. Counsel, on the other hand, repeatedly argues that its failure to comply with Bankruptcy Rule 2016(b) is merely a technical error. This Court has no idea what Counsel means. Counsel's repeated lack of candor, intentional concealment, and disregard of the rule of law certainly cannot be likened to a mere "technicality." Failure to disclose as required by the Bankruptcy Code, Bankruptcy Rules, and RPCs is not a mere technical error. Counsel failed to comply with the law.

Mr. Tung asserts that he did not know of any specific disclosure requirements until the Second OSC, which is contrary to the bankruptcy expertise he touts in the Retention Application.[182] Counsel argues that it "***voluntarily***" disclosed the compensation in the Fee Application and, therefore, there was no injury to creditors or the estate.[183] Mr. Tung ignores the fact that § 329 disclosure requirements are not discretionary—they are mandatory.[184] "Failure to comply with § 329 and Bankruptcy Rule 2016(b) is grounds to deny all fees and costs sought by counsel."[185] Even if a failure to

disclose is negligent or inadvertent, a court may still deny all compensation of the attorney.[186] Here, the failure to disclose was neither negligent nor inadvertent—it was intentional.

This Court finds Counsel's characterization of its failure to disclose as a "technical error" to be disingenuous. Mr. Tung acknowledges that he knew that he would need to disclose compensation for the Debtor's legal services if it was from "major creditors" or "multiple shareholders."[187] At the same time, however, Mr. Tung asserted that he didn't think it was necessary in this case because *he* determined that the Debtor's Principal and Debtor had a united interest.[188] Neither descriptor calls for different treatment. Disclosure of compensation is required no matter who makes the payment. Counsel lacked contrition at the Court's Second OSC Hearing. This Court observed that Mr. Tung failed to show the Court that he intends to do better moving forward.[189] Nor did Mr. Tung demonstrate an understanding of bankruptcy laws.[190] In fact, Mr. Tung conveyed the opposite on both fronts. Thus, this Court holds that Counsel's repeated failure to disclose the Undisclosed Payments (the portion comprised of the twelve checks) throughout this case and Counsel's lack of candor to the Court warrant complete denial of the Fee Application and disgorgement of fees related to this case.

V. The Court Does Not Need to Decide Whether a Conflict of Interest Arose between Counsel and Debtor

Counsel's complete failure to disclose the Undisclosed Payments paid by Debtor's Principal provides sufficient grounds to deny Counsel's Fee

Application and disgorge all compensation Counsel received in connection with this case to the Chapter 7 Trustee.[191] Therefore, it is unnecessary for the Court to decide whether an actual conflict of interest exists in this case or to decide any other open issues.

CONCLUSION

This Court strongly recommends that Mr. Tung study and learn the Bankruptcy Code and Rules before continuing practice in the insolvency arena. A review of the RPCs is warranted as well. Ignorance of the law by an "experienced" attorney is unacceptable. In bankruptcy a debtor's attorney is a fiduciary of the estate and owes a fiduciary duty. Further, Mr. Tung is reminded that he personally owes a duty of candor to the Court and should not act in a manner designed to conceal and confuse. The Court takes no pleasure in this decision, but took even less pleasure in Mr. Tung's representations and behavior during this case. The conduct in this case was so egregious that the Court shall refer this matter to the Chief Judge of the District Court of New Jersey for review pursuant to D.N.J. L.Civ.R. 104-1(e)(2). Counsel's Fee Application is denied with prejudice. All fees that Counsel received in connection with the case are disgorged to the Chapter 7 Trustee. Based on the foregoing, an *Order Denying the Fee Application and Disgorging Attorney's Fees* was entered on March 31, 2020.

Footnotes

1Docket No. 125. The Second OSC amended the *Order to Show Cause as to Why This Court Should Not Issue Sanctions Against Kevin Kerveng Tung, P.C. and*

Kevin K. Tung, Esq., in His Individual Capacity, for Potential Violations of the New Jersey Rules of Professional Conduct, the United States Code, and the Federal Rules of Bankruptcy Procedure, Docket No. 124.

2Docket No. 100.

3Docket No. 100 at 16–17.

4Docket No. 1.

5Docket No. 12-1.

6Docket No. 13 at 1. Debtor specifically checked the box on the Court's standard form indicating it sought to retain KKT to serve as attorney for debtor-in-possession and not special counsel. *Id.*

7Docket No. 128 at 2.

8Docket No. 15.

9*See* Docket Nos. 23 (April 2016), 31 (May 2016), 33 (June 2016), 36 (July 2016), 37 (August 2016), 39 (September 2016), 41 (October 2016), 46 (November 2016), 49 (December 2016), 52 (January 2017), 55 (February 2017), 61 (March 2017) and 71 (April 2017).

10*Id.*

11*Id.*

12Docket No. 15.

13*Id.*

14Docket No. 15; *See* Docket No. 1 at 29 and 39.

15Docket No. 15.

16*Id.*

17*See* Docket No. 13 at 4.

18*See id.* (number 4 is inconsistent with the narrative portions of the Retention Application, which make clear that Debtor sought to retain KKT as counsel under Section 327 subsection (a), not subsection (e). *Compare* 11 U.S.C. § 327(a) (retention of professional to assist in conducting the case) *with* 11 U.S.C. § 327(e) (retention

of professional for a specified special purpose other than conducting the case)).
19*See* Docket No. 13-1 at 2.
20Docket No. 13 at 2.
21Docket No. 100 at 8.
22Mr. Browning bit off the nose of Armando Flores on the Debtor's premises.
23State Court Order, Docket No. 25-1.
24*Id.* at 8–9. The State Court Judgment also included punitive damages against Mr. Browning only.
25Docket No. 128 at 2.
26Docket No. 18.
27Docket No. 24.
28Docket No. 25.
29Docket No. 28.
30Docket No. 47. The Court recognizes that motions to reconsider are generally viewed as motions to alter or amend judgment under Federal Rule of Civil Procedure 59 incorporated by Federal Rule of Bankruptcy Procedure 9023 since motion to reconsider does not exist under either the Federal Rules of Civil Procedure or the Federal Rules of Bankruptcy Procedure.
31Docket No. 47-1 at 6–7.
32Docket No. 57.
33Docket No. 56.
34Docket Nos. 62, 64, and 65.
35However in argument, Mr. Tung erroneously alleged that the Court previously found the case was not *per se* a bad faith filing in ruling on the Stay Relief Motion. At the time, bad faith filing was not an issue. The Court clarified that while it may have found the Debtor's actions within the bankruptcy case did not appear to be bad faith, it had never ruled on whether the filing of the bankruptcy case itself was bad faith.
36Docket No. 66.

37Docket No. 69.
38Docket No. 97.
39Docket No. 100.
40*Id.* at 9.
41*Id.* at 7 and 17.
42*Id.* at 16.
43Docket No. 101.
44*Id.* at 1–2.
45Docket No. 102.
46*See id.* at 2–4.
47*See* Docket Nos. 103 and 104.
48Docket No. 103 at 2.
49*See id.* at 2–3.
50Docket No. 104 at 1–3.
51Docket No. 106.
52*Id.* at 3:13–4:2.
53*Id.*
54*Id.* at 4:5–4:15.
55*Id.* at 5:2–5:8.
56*Id.* at 7:1–4.
57*Id.* at 8:13–19.
58*Id.* at 9:3–25.
59*Id.* at 19:17–20:11.
60For example, Mr. Tung asserted that the Undisclosed Payments were "a loan, it could be something, right, whatever that is....", then "[w]ell it's not a loan, it's actually the fees that we received. We don't have to return." *Id.* at 21:13–22:14.
61*See id.* at 22:21–23:5.
62*Id.* at 24:9–26:3.
63*Id.* at 26:13–20.
64*Id.* at 26:4–12.
65*Id.* at 20:21–23.
66*Id.* at 26:13–20.
67Docket No. 125.

68*Id.*
69Docket No. 128.
70*Id.*
71*Id.* at 2.
72*Id.* at 6–7.
73*Id.* at 7.
74*Id.* at 11–12.
75*Id.* at 16.
76*Id.* at 17.
77*Id.*
78*Memorandum of Law of the Acting United States Trustee in Support of this Court's Order to Show Cause for Sanctions Against Kevin Kerveng Tung, P.C. and Kevin K. Tung, Esq., in his Individual Capacity, for Potential Violations of the New Jersey Rules of Professional Conduct, the United States Code, and the Federal Rules of Bankruptcy Procedure* (the "**Memorandum in Support of the Court's Second OSC**"), Docket No. 129.
79*See* Docket No. 15.
80Docket No. 129 at 8–9.
81*Id.*
82Docket No. 134.
83*Id.* at 1–2.
84*Id.* at 3.
85*Id.* at 2.
86Docket Nos. 131 and 138.
87Docket No. 131 at 2.
88*Id.* at 2–3.
89*Id.* at 5.
90*Id.* at 6.
91*Id.*; Docket No. 138 at 3.
92Docket No. 138 at 2–3.
93Docket No. 131 at 5.
94*Id.* at 7.

95*Id.* at 1–2.
96*Id.*
97Docket No. 131-1.
98*Id.* at 3–14.
99*Id.* at 2.
100Mr. Robert Browning the co-defendant from the State Court Action, was present in court at the Second OSC Hearing but Debtor's Principal was not. The Court observed Mr. Browning providing information to Mr. Tung during the Second OSC Hearing leading the Court to wonder to whom does Mr. Tung actually report—Debtor's Principal or Mr. Browning (the person responsible for causing the Debtor to file Bankruptcy in the first place).
101Docket No. 142 at 7:1–18.
102*Id.* at 7:19–22.
103*Id.* at 8:8–9:19.
104*Id.* at 18:21–19:13.
105*Id.* at 46:12–24.
106*Id.* at 11:5–17.
107*Id.* at 12:21–13:15.
108*Id.* at 17:10–11.
109*Id.* at 19:18–20:4.
110*Id.* at 22:2–9.
111*Id.* at 23:14–15.
112*Id.* at 60:18–61:7.
113*Id.* at 23:24.
114*Id.* at 62:10.
115*Id.* at 20:12–21:21.
116*Id.* at 25:13–15. It seems Mr. Tung would have continued to have the Debtor's Principal continue to pay KKT similar to the Undisclosed Payments.
117*Id.* at 26:18–27:7.
118*Id.* at 49:1–3.
119*Id.* at 27:19–21.

120*Id.* at 33:5–10.
121*Id.* at 36:21–38:14; *See* Claim No. 5-1.
122*Id.* at 38:10–14.
123*See* Claim No. 5-1.
124Docket No. 142 at 40:19–24.
125*Id.* at 45:4–7. This was previously addressed in Counsel's sur-reply to the Chapter 7 Trustee at Docket No. 131.
126*Id.* at 45:4–7 and 54:6–10.
127*Id.* at 53:14–16.
128Docket No. 142 at 65:9–14.
129Docket No. 149.
130Docket No. 150.
131Docket No. 100.
132Docket No. 100 at 17.
133Docket No. 142 at 45:1–7.
134This was just one of the many errors Counsel made.
135Docket No. 138 at 2.
13611 U.S.C. § 327.
137*In re Congoleum Corp.*, 426 F.3d 675, 689 n.13 (3d Cir. 2005).
138*See* 11 U.S.C. § 327.
13911 U.S.C. § 330.
14011 U.S.C. § 330(a)(1).
141*In re Busy Beaver Bldg. Centers, Inc.*, 19 F.3d 833, 841 (3d Cir. 1994).
142*See Zolfo, Cooper & Co. v. Sunbeam-Oster Co., Inc.*, 50 F.3d 253, 260 (3d Cir. 1995); *In re Engel*, 124 F.3d 567, 573 (3d Cir. 1997) (citing *In re Ark. Co.*, 798 F.2d 645, 650 (3d Cir. 1986) (other citation omitted));
143Docket No. 13.
144Docket No. 15.
145Fed. R. Bankr. P. 2014.
146*In re Radnor Holdings Corp.*, 629 F. Appx. 277, 279 (3d Cir. 2015); Fed. R. Bank. P. 2014(a).

147*In re eToys*, 331 B.R. 176, 189 (Bankr. D. Del. 2005) (quoting *B.E.S. Concrete Products, Inc.*, 93 B.R. 228, 236 (Bankr. E.D. Cal. 1988).
14811 U.S.C. § 329.
149*See Id.*
150Fed. R. Bankr. P. 2016(b).
151*Id.*
152Fed. R. Bankr. P. 2017(b); *See* 11 U.S.C. § 330.
153Docket No. 128 at 5.
154Docket No. 142 at 7:1–18.
155Docket No. 142 at 7:8–8:7.
156Docket No. 129 at 12.
157Docket No. 134 at paragraphs 10-13.
158*See In re Lotus Props. LP*, 200 B.R. 388 (Bankr. C.D. Cal. 1996).
159*Id.* at 391.
160*Id.*; *In re Hathaway Ranch Partnership*, 116 B.R. 208, 219 (Bankr. C.D. Cal. 1990).
161*Lotus*, 200 B.R. at 391–92.
162*Id.* at 392 (citing *Hathaway*, 116 B.R. at 219 and *In re Marine Power & Equipment Co., Inc.*, 67 B.R. 643 (Bankr. W.D. Wash. 1986)).
163*See Lotus*, 200 B.R. at 391–92; *See also In re Missouri Mining, Inc.*, 186 B.R. 946 (Bankr. W.D. Mo. 1995).
164*Lotus*, 200 B.R. at 390–91.
165*Id.*
166*See* Docket No. 129 at paragraph 51.
167*Lotus*, 200 B.R. 391.
168*In re Missouri Mining, Inc.*, 186 B.R. 946 (Bankr. W.D. Mo. 1995).
169*Id.* at 949.
170*Id.*
171*See* Docket No. 131-1, Exhibit K.
172Docket No. 15 at 3.

173*See* 11 U.S.C. § 331.
174*Id.*
175*Congoleum*, 426 F.3d at 687 (quoting *U.S. v. Miller*, 624 F.2d 1198, 1200 (3d Cir. 2000)); *In re Roper and Twardowsky, LLC*, 566 B.R. 734, 746–47 (Bankr. D.N.J. 2017).
176*Congoleum*, 426 F.3d at 687 (citing *Grievance Comm. For S. Dist. of N.Y. v. Simels*, 48 F.3d 640, 645 (2d Cir. 1995)).
177*See* D.N.J. LBR 9010-1(a); *Roper*, 566 B.R. at 746 (Bankr. D.N.J. 2017).
178RPC 3.3(a)(1).
179Docket No. 128 at 8.
180*See* Docket No. 131-1.
181Docket No. 100 at 16.
182Docket No. 138 at 2.
183*Id.*
184*Jensen v. U.S. Trustee (In re Smitty's Truck Stop, Inc.)*, 210 B.R. 844, 848 (10th Cir. BAP 1997).
185*Chatkhan*, 496 B.R. at 695.
186*Smitty's Truck Stop*, 210 B.R. at 848.
187Docket No. 142 at 9:8–15.
188*Id.*
189Docket No. 142 at 65:15–20.
190*See id.* at 65:21–66:4; *Id.* at 27:19–21.
191While the Court does not decide the characterization of the Undisclosed Payments, in all circumstances the fees received by Counsel appear to belong to the estate and therefore are disgorged to the Chapter 7 Trustee. However, if there is any party associated with the Debtor that appears to be harmed, it is the Debtor's Principal. She lost a valuable asset through the wrongdoing of another. She paid money to a law firm, which she did not need to pay nor should she have paid. She may even still be owed money from the

estate (of which this Court is not deciding) based upon her proof of claim filed in this case. If the Chapter 7 Trustee, after further investigation, has reason to believe that the Debtor's Principal made an unauthorized loan to the Debtor instead of a gift or cash infusion, then (without giving an advisory opinion) this Court would entertain a motion to permit the portion of the Undisclosed Payments that was not part of the Retainer to be transferred back to the Debtor's Principal either as a repayment, administrative expense, or some other mechanism suggested by the Chapter 7 Trustee. Any such motion should be supported by a certification by the Debtor's Principal with facts that support the relief sought.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

In re: 38-36 Greenville Ave L.L.C., Debtor.

Chapter 7
Case No.: 16-15598 (SLM)

ORDER DENYING FEE APPLICATION AND DISGORGING ATTORNEY'S FEES

The relief set forth on the following pages, numbered two (2) through three (3) is

ORDERED.

s/
Honorable Stacey L. Meisel
United States Bankruptcy Judge

DATED: March 31, 2020

THIS MATTER having been brought by the Court, sua sponte, on an Amended Order to Show Cause as to Why This Court Should Not Issue Sanctions Against Kevin Kerveng Tung, P.C. and Kevin K. Tung, Esq., in His Individual Capacity, for Potential Violations of the New Jersey Rules of Professional Conduct, the United States Code, and the Federal Rules of Bankruptcy Procedure (the "OSC") (Docket No. 125) ordering Kevin Kerveng Tung, P.C. ("Counsel") and Kevin K. Tung, Esq. ("Mr. Tung") to appear at a hearing (the "OSC Hearing") to show cause as to why this Court should not: (1) find that Counsel and Mr. Tung breached their fiduciary obligations to

the debtor 38-36 Greenville Ave L.L.C. (the "Debtor"); (2) find that Counsel and Mr. Tung violated the New Jersey Rules of Professional Conduct; (3) find that Counsel is not and was not disinterested in its representation of the Debtor; (4) terminate Counsel as attorney to the Debtor; (5) deny Counsel's Application for Compensation, in its entirety; (6) require Counsel to disgorge attorney's fees previously paid by or on behalf of the Debtor; and (7) sanction Counsel and Mr. Tung as deemed necessary and appropriate; and the Court having heard oral argument on the OSC at the OSC Hearing on April 22, 2019;

IT IS HEREBY:

ORDERED that the First and Final Fee Application of Kevin Kerveng Tung, P.C. for Preofessional [sic] Services Rendered and Reimbursement of Expenses Incurred and Posted as Counsel for 38-36 Greenville Ave LLC. During the Period from February 9, 2016 to October 10, 2017 (Docket No. 100) filed by Counsel is DENIED with prejudice; and it is further ORDERED that Counsel shall disgorge all fees and costs received in connection with the Debtor's bankruptcy case within 30 days of the entry of this Order; and it is further

ORDERED that the disgorged funds shall be paid to the Chapter 7 Trustee on behalf of the Debtor's estate; and it is further

ORDERED that the Chapter 7 Trustee shall file a certification with the Court within 10 days of the 30th day of the date of this Order if Counsel fails to disgorge; and it is further

ORDERED that the failure of Counsel to timely disgorge fees and costs shall result in further sanctions; and it is further

ORDERED that this Court shall retain jurisdiction with respect to all matters arising from or related to the implementation or interpretation of this Order. An Opinion regarding this Order will follow. Pursuant to D.N.J. L.Civ.R. 104.1(e)(2), this Court will refer the matter in writing to the Chief Judge of the District Court of New Jersey for review.