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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re Case No. 97-56069-JRG
AND, INC., dba Reveille Pet
Care, dba Buglers,
Debtor.

_____ /

**ORDER ON MOTION FOR RECONSIDERATION OF
ORDER GRANTING TRUSTEE'S MOTION FOR RETURN OF
EXCESSIVE ATTORNEY FEE PAYMENTS TO THE ESTATE**

Before the court is attorney Peter Owens' Motions for Reconsideration and For Relief from the Court's Order of December 16, 1998. Owens requests reconsideration and relief from the Order Granting Trustee's Motion for Return of Excessive Attorney Fee Payments to the Estate. For the reasons hereafter stated, the court denies the motion.

I. BACKGROUND

On July 21, 1997, AND, INC. filed a voluntary Chapter 11 petition and continued to operate its business as a debtor-in-possession. The debtor-in-possession employed Peter Owens as its attorney. On August 21, 1997, Owens filed a Disclosure of Compensation by Attorney,

1 stating that \$2,500 was paid to him in connection with the filing the
2 bankruptcy petition. This was the only disclosure of attorney's fees
3 made by Owens to the court.

4 Owens filed an application for his appointment along with a
5 verified statement indicating that he had represented the debtor for
6 approximately two years on general business and litigation matters.
7 He stated that all fees owed to him by the debtor for such
8 representation had been paid or forgiven. The order approving Owens'
9 employment was signed on August 28, 1997.

10 Other than initiating the Chapter 11 case and having himself
11 appointed as counsel, the court's file provides no evidence of any
12 work performed by Owens. In fact, the court file shows no
13 reorganization activity of any kind for over six months. Not
14 surprisingly, on December 30, 1997, the United States Trustee filed
15 a motion to convert, dismiss or fix deadline by which a plan must be
16 confirmed. On February 9, 1998, the court granted the U.S. Trustee's
17 motion and the case was converted to one under Chapter 7.¹ The
18 Chapter 11 case had lasted only seven months.

19 John Richardson was appointed the Chapter 7 trustee following
20 conversion. In May 1998, the trustee received information that Owens
21 had been paid \$23,500 by the debtor's principals in addition to the
22 \$2,500 which had been disclosed. The trustee's counsel then sent
23 Owens two letters, dated June 26, 1998 and July 17, 1998, requesting
24 turn over of the undisclosed funds to the estate. Owens did not
25 bother to respond to either of the letters.

26 On August 27, 1998, the Chapter 7 trustee filed a Motion for
27

28 ¹ Other than the subsequent hearings regarding Owens' fees, this was the only
hearing in the case.

1 Order Requiring Return of Excessive Attorney Fee Payments to the
2 Estate. The trustee now sought the turn over of \$30,000, consisting
3 of \$17,000 given to Owens by William Albanese, the Chief Executive
4 Officer of the debtor, \$6,500 given by William Nordvik, an officer and
5 director of the debtor and another \$6,500 the trustee believed the
6 debtor had given Owens during the course of the case.

7 On October 13, 1998, a hearing was held on the trustee's motion.
8 Prior to the commencement of the hearing, the court had not received
9 an opposition or other response to the trustee's motion. Michelle
10 Rubin, attorney for the Chapter 7 trustee, and Nanette Dumas, attorney
11 for the United States Trustee, appeared at the hearing. Owens also
12 appeared at the hearing indicating that he had filed an opposition
13 that day and had served it by facsimile on Rubin. He had not bothered
14 to serve the opposition on the U.S. Trustee.

15 Owens requested time to file additional pleadings regarding the
16 motion. Given the severity of the matter, the court granted his
17 request. The court set a briefing schedule and continued the hearing
18 to December 10, 1998 at 2:00 p.m.² Owens' pattern of practice
19 continued. He failed to comply with the scheduling order by filing
20 his response late.³ The U.S. Trustee and Chapter 7 trustee timely
21 filed their reply to Owens' new papers. The court had given Owens the
22 opportunity for a final reply which he filed, but again four days
23

24 ² Upon Rubin's request, the court imposed sanctions of \$1,000 against Owens
25 to be paid to Rubin for fees incurred in attending and preparing for the hearing.
26 The sanctions were ordered to be paid by November 13, 1998. As of November 23, 1998, Rubin
had not received the funds as required by the court's order and the court has not been advised
of the current status.

27 ³ The briefing schedule was set forth in the Order For Further Hearing Re
28 Trustee Motion for Return of Excessive Attorney Fee Payments to the Estate filed
October 22, 1998.

1 late.

2 On December 10, 1998, the trustee's motion was called at 3:17
3 p.m.⁴ Rubin appeared on behalf of the Chapter 7 trustee and Dumas
4 appeared on behalf of the U.S. Trustee. Owens did not appear and no
5 one had heard from him.⁵ Based on the court's review of the papers,
6 the court granted the motion at the request of both Rubin and Dumas.
7 The order directing Owens to turn over \$30,000 to the estate was filed
8 on December 16, 1998 and entered on December 21, 1998.

9 Soon thereafter, on December 28, 1998, Owens filed "Motions for
10 Reconsideration and For Relief from the Court's Order of December 16,
11 1998."⁶ The points and authorities filed in support of the motions
12 failed to set forth any legal basis for the motion. His sole reason
13 for the motion seems to be that he was late for the December 10
14 hearing because he was stuck in traffic. Following the hearing on
15 Owens' motion the court took it under submission.

16 **II. THERE IS NO PROCEDURAL BASIS FOR OWENS' PRESENT MOTION**

17 A motion for reconsideration must do two things. First, it must
18 demonstrate some reason why the court should reconsider its prior
19 decision. Second, it must set forth facts or law of a strongly
20 convincing nature such as would induce a court to reverse its prior
21 decision. See In re Greco, 113 B.R. 658, 664 (D. Haw. 1990).

22 _____
23 ⁴ The hearing was originally continued to December 10, 1998 at 2:00 p.m. However, on
24 December 4, 1998, the parties were notified that the hearing was continued to 3:00 p.m. on
December 10, 1998. The matter was actually called at 3:17 p.m. on December 10, 1998.

25 ⁵ In his Declaration filed December 28, 1998, Peter Owens stated that he encountered
26 severe traffic congestion on his way to the hearing. He stated that he arrived at the
courtroom at 3:21 p.m., after the court had already adjourned.

27 ⁶ Papers filed by counsel for both the Chapter 7 trustee and U.S. Trustee
28 raise serious questions about Owens' practice with respect to serving papers. Both
counsel suspect that Owens filed a proof of service but that the papers were not
actually mailed. The court does not find it necessary to reach this issue.

1 Owens did not cite any legal authority in his pleadings
2 indicating the basis for his motion. Under Federal Rule of Civil
3 Procedure 59, there are three grounds upon which such a motion can be
4 brought: (1) an intervening change in the controlling law; (2) the
5 introduction of new evidence not previously available; (3) the need
6 to correct clear error or to prevent manifest injustice. Id. A Rule
7 59 motion cannot assert new legal theories that could just as well
8 have been raised before the initial hearing, present new facts which
9 could have been raised before the initial hearing, or rehash the same
10 arguments made the first time, or simply express an opinion that the
11 court was wrong. See MGIC Indemnity Corp. v. Weisman, 803 F.2d 500,
12 505 (9th Cir. 1986). There is no indication that Rule 59 was intended
13 to provide a basis for Owens' motion.

14 Under Federal Rule of Civil Procedure 60(b), the court may
15 relieve a party or a party's legal representative from a final
16 judgment, order or proceeding for the following reasons: (1) mistake,
17 inadvertence, surprise, or excusable neglect; (2) newly discovered
18 evidence which by due diligence could not have been discovered in time
19 to move for a new trial under Rule 59(b); (3) fraud (whether
20 heretofore denominated intrinsic or extrinsic), misrepresentation, or
21 other misconduct of an adverse party; (4) the judgment is void; (5)
22 the judgment has been satisfied, released, or discharged, or a prior
23 judgment upon which it is based has been reversed or otherwise
24 vacated, or it is no longer equitable that the judgment should have
25 prospective application; or (6) any other reason justifying relief
26 from the operation of the judgment. Nothing in Owens' papers suggest
27 Rule 60 as a basis.

28 The court believes the motion to be procedurally defective and

1 will deny it on that ground.

2 **III. THERE WAS A SUBSTANTIVE BASIS FOR THE GRANTING OF THE TRUSTEE'S**
3 **ORIGINAL MOTION**

4 Owens states that he has been paid a total of \$19,500 as payment
5 for his legal fees in connection with the Chapter 11 bankruptcy case.
6 The sum of \$2,500, which was disclosed to the court, was paid at the
7 inception. The Statement of Financial Affairs filed August 25, 1997,
8 indicates that \$2,500 was paid to Owens on July 18, 1997. The
9 Disclosure of Compensation by Attorney, filed August 21, 1997 and
10 signed by Owens, states the fees were paid by funds on hand. However,
11 Owens's September 8, 1998 Declaration states that no funds were paid
12 on July 18th, rather the \$2,500 was paid on July 21, 1998 as a loan
13 from Cathy Manchester, Chief Financial Officer for the debtor.
14 However, Manchester has testified that she never loaned the business
15 any money. Owens' own conflicting statements have led the court to
16 conclude that Owens' statements lack credibility.

17 The balance of the \$19,500 which amounted to \$17,000 came from
18 William Albanese, the Chief Executive Officer of the debtor.
19 Albanese's August 10, 1998 Declaration indicates that he thought Owens
20 was simply holding the money for him and asked for its return on
21 several occasions. Owens refused to return the money saying it was
22 for the Chapter 11 case.

23 On May 27, 1998, William Nordvik testified at a Rule 2004
24 Examination that he made a payment of another \$6,500 to Owens from
25 personal funds on behalf of the debtor. William Nordvik is an
26 officer, director and shareholder of the debtor. Owens now claims
27 that the money was for representation of Nordvik's interests in a
28 variety of litigation and transactional matters which occurred during

1 the course of the Chapter 11 proceedings. Such representation
 2 included representing Nordvik in the formation of a California
 3 corporation which was created to purchase and hold the assets of the
 4 debtor towards the end of the Chapter 11 case and immediately after
 5 conversion to a Chapter 7 case. Owens offers no explanation for the
 6 apparent conflict of interest.

7 The trustee also received information from Cathy Manchester
 8 indicating that additional payments of \$6,500 were made to Owens
 9 during the Chapter 11 proceedings. Owens admits that part of these
 10 payments were for the Chapter 11 case but states that another portion
 11 was attributable to other matters the debtor was involved in, as if
 12 this lessened his duty of disclosure.

13 Owens did not disclose or report the money received from
 14 Albanese, from Nordvik or from the debtor, as required by the
 15 disclosure rules of 11 U.S.C. § 329 and Federal Rule of Bankruptcy
 16 Procedure 2016.

17 Section 329(a) provides in pertinent part:

18 Any attorney representing a debtor in a case under this
 19 title...whether or not such attorney applies for
 20 compensation under this title, shall file with the court
 21 a statement of compensation paid or agreed to be
 22 paid...for services rendered or to be rendered...in
 23 connection with the case by such attorney, and the source
 24 of such compensation.

25 Federal Rule of Bankruptcy Procedure 2016(b) provides in part:

26 Every attorney for a debtor, whether or not the attorney
 27 applies for compensation, shall file and transmit to the
 28 United States Trustee...the statement required by Section
 329 of the Code.... A supplemental statement shall be
 filed and transmitted to the United States Trustee within
 15 days after any payment or agreement not previously
 disclosed.

29 In In re Lewis, 113 F.3d 1040 (9th Cir. 1997), the Ninth Circuit
 Court of Appeals ruled that the Bankruptcy Court has inherent

1 authority over attorney's fees, and thus has broad and inherent
2 authority to deny all compensation, and to order disgorgement of all
3 fees when an attorney has failed to obey the disclosure and reporting
4 requirements of the Code and Rules. See In re Lewis, 113 F.3d at
5 1045. It is not disputed that Owens violated Rule 2016(b) and thus
6 the court has authority to order disgorgement of fees from Owens.

7 Owens continually argues that the \$17,000 paid to him by William
8 Albanese was from non-estate funds. However, the undisclosed fees
9 paid to the attorney in Lewis were from non-estate funds. There the
10 Court pointed out:

11 [The attorney's] attempt to draw a distinction based upon
12 the source of the post-petition payments is unavailing.
13 The bankruptcy court may order the disgorgement of any
14 payment made to an attorney representing the debtor in
15 connection with the bankruptcy proceeding, irrespective of
16 the payment's source. Id. at 1046.

17 In In re Park-Helena Corp., 63 F.3d 877, 882 (9th Cir. 1995), the
18 attorneys for the debtor failed to disclose that they had received a
19 pre-petition retainer from the debtor's principal shareholder rather
20 than the debtor itself. The Court stated that "even a negligent or
21 inadvertent failure to disclose fully relevant information [in a Rule
22 2016 statement] may result in a denial of all requested fees." Thus,
23 although the funds paid by Albanese were non-estate funds, Owens
24 nevertheless had a duty to disclose these payments to the court.

25 In In re Fraga, 210 B.R. 812 (9th Cir. BAP 1997), the Ninth
26 Circuit Bankruptcy Appellate Panel, citing Lewis, held that
27 disgorgement of all attorney's fees was an appropriate sanction for
28 an attorney's failure to file a Rule 2016(b) statement. See In re
Fraga, 210 B.R. at 822. The court stated:

The disclosure rules are applied literally despite the
sometimes harsh results which may occur, and negligent or

1 inadvertent omissions do not obviate the need for
 2 disclosure.... The consequences of an attorney's violation
 3 of the disclosure requirements regarding fees include the
 4 denial of all fees requested...or disgorgement of fees
 5 already received...[The attorney] incorrectly argues that
 6 failure to file a Rule 2016(b) statement is not the test
 7 for disgorgement of fees, and that a non-willful failure
 8 to file the statement is an insufficient basis for
 9 disgorgement.... His violation of Rule 2016(b) was
 10 sufficient to warrant the bankruptcy court's order
 11 requiring disgorgement of the fees. Id. (citations
 12 omitted.)

13 Owens argues that the court should consider mitigating factors
 14 in determining whether disgorgement is an appropriate sanction. Owens
 15 states that his failure to timely amend his financial disclosure
 16 statement was inadvertent and an oversight. When you represent to the
 17 court that your fee is \$2,500 and you receive over \$30,000, it is hard
 18 to believe that such is an oversight.

19 He next claims that his failure to disclose did not amount to
 20 willful or intentional misconduct, and did not cause any harm to any
 21 party. Owens' failure, whether inadvertent or not, requires
 22 disgorgement. His conduct has put the trustee to a great deal of
 23 unnecessary work and his work on behalf of Nordvik appears to have
 24 been in conflict with the best interest of the estate. As pointed out
 25 by the U.S. Trustee, §§ 328© and 329(b) of the Bankruptcy Code
 26 authorize the court to deny compensation and require disgorgement
 27 based on Owens' manifest conflict of interest.

28 Owens also claims that the non-disclosure did not benefit him in
 any way and that he has rendered substantial services in reliance on
 payment of those fees. There is certainly nothing in the court's file
 suggesting substantial services and the case itself does not appear

1 to warrant a substantial fee.⁷ This was a small case. The debtor
2 listed personal property assets of \$42,900 and unsecured debts of
3 \$341,536. If the business could be reorganized, all that was needed
4 was a simple plan.

5 **IV. CONCLUSION**

6 Based on the forgoing, Owens' motion for reconsideration is
7 denied. Owens shall pay \$30,000 to the trustee not later than August
8 1, 1999.

9 DATED: _____

11 _____
12 JAMES R. GRUBE
13 UNITED STATES BANKRUPTCY JUDGE
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26 ⁷ The Chapter 7 trustee also argues that whatever payments were received by
27 Owens for his work on the Chapter 11 bankruptcy case, the attorney fees Owens
28 received are excessive. The trustee has requested numerous records and information
from Owens which were not produced. Owens failed to file the Debtor's List of Debts
Incurred in the Chapter 11 proceedings as requested. Owens also failed to respond
to any of the trustee's numerous letters.