MICHAEL J. MANDELBROT (State Bar No. 148009)
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MICHAEL J. MANDELBROT, IN PRO PER

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

In Re Subpoenas to Michael J. Mandelbrot, Mandelbrot Law Firm, and Asbestos Legal Center, William H. Durham, Plaintiff(s), vs. Ankura Consulting Group, LLC, Defendant(s).	Misc. Case No.: **MICHAEL J. MANDELBROT'S [1] OPPOSITION TO MOTION TO COMPEL AND MEMORANDUM AND [2] SUPPORTING DECLARATION OF MICHAEL J. MANDELBROT IN SUPPORT OF OPPOSITION** **DATE: February 16, 2022** **TIME: 2:00 p.m.** **DEPT: Zoom videoconference** Judge: William H. Orrick Dept: (department number)

MEMORANDUM

I. INTRODUCTION

This Motion to Compel exemplifies a "Big Law" misappropriation of Asbestos Trust Funds *solely designed* to harass Mandelbrot which results in a colossal waste of Judicial resources. In addition, the continued pursuit of the Motion, given full and complete compliance by Mandelbrot, rises to the level of sanctionable unethical conduct by Ankura's counsel Rebecca Sciarrino and Stuart Senator.

II. BACKGROUND

A. The Underlying Action

The underlying action involves a sham audit of esteemed Dr. William Durham conducted, performed, and directed by Ankura Consulting Group, LLC ("Ankura") which destroyed the reputation and consulting career of Dr. Durham. Michael J. Mandelbrot, the Mandelbrot Law Firm, and the Asbestos Legal Center (collectively "Mandelbrot") are not parties to the underlying action and have no financial interest in the underlying action. Since 2018, Mandelbrot has acted as a "shadow Counsel" for Dr. Durham providing legal consultation for Dr. William Durham. *See* Mandelbrot Decl. ¶1.

B. The Subpoenas

Mandelbrot has *fully complied* with the Subpoena at issue. Mandelbrot has provided Ankura Consulting LLC with all correspondence (e-mails) in his possession with Dr. Durham dated prior to June 22, 2020. Mandelbrot has no other documents responsive to the Subpoena. *See* Mandelbrot Decl. ¶6.

III. CONCLUSION

For the foregoing reasons, Ankura's motion to compel should be denied.

DATED: January 10, 2022

MICHAEL J. MANDELBROT
In Pro Per

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In Re Subpoenas to Michael J. Mandelbrot, Mandelbrot Law Firm, and Asbestos Legal Center, William H. Durham, Plaintiff(s), vs. Ankura Consulting Group, LLC, Defendant(s).	Misc. Case No.: **DECLARATION OF MICHAEL J. MANDELBROT'S IN SUPPORT OF OPPOSITION TO MOTION TO COMPEL** **DATE: February 16, 2022** **TIME: 2:00 p.m.** **DEPT: Zoom videoconference** Judge: William H. Orrick Dept: (department number)

I, Michael Mandelbrot, declare:

1. I am an attorney licensed to practice law in the States of California and Oregon. I am representing myself "Pro Se" in this matter. I am not a party in the Underlying Action **Durham v. Ankura Consulting Group, LLC ("Ankura")** *Case No. 2:20-CV-112-KS-MTPU.S. district Court (S.D. Miss.)* nor do I have any financial interest in the outcome of that litigation. I have consulted with and acted as "shadow" counsel to Dr. William Durham, the Plaintiff in the underlying litigation, since 2018. I have personal knowledge of the facts stated herein and, if called as a witness, would competently testify thereto.

2. In November 2021, I received a subpoena from Munger Tolles & Olson on behalf of their client Ankura Consulting Group, LLC ("Ankura") in *Case No. 2:20-CV-112-KS-MTPU.S. district Court (S.D. Miss.).*

3. On November 15, 2021, I timely responded to counsel for Ankura Munger, Tolles & Olson's Rebecca Sciarrino with an Objection by e-mail. Attached hereto as Exhibit A is a true and correct copy of my e-mail response to Rebecca Sciarrino. Various cases were cited for the proposition that "there is simply no reason to burden nonparties when the documents sought are in the possession of the party" *Nidec Corp. v. Victor Co. of Japan, 249 F.R.D. 575, 577 (N.D. Cal. 2007).*

4. After responding to various Meet and Confer letters from Rebecca Sciarrino, we agreed to speak on December 8, 2021. In those discussion of December 8, 2021, Ms. Sciarrino indicated to me that Dr. Durham *had already produced* correspondence from my office. At that time on December 8, 2021, I indicated to Ms. Sciarrino that I would produce *all documents* in my possession relating to correspondence with Dr. William Durham after determining the accuracy of Ms. Sciarrino's representation through discussions with Dr. Durham. I agreed to follow up with Rebecca Sciarrino on December 10, 2021.

5. On December 8, 2021, I phoned Dr. William Durham to inquire regarding the extent of his production in the underlying litigation. Dr. William Durham indicated to me that he had produced all correspondence with me and my office up until the filing of the Complaint (June 22,2020) in the

underlying litigation. As a result, I intended to produce all correspondence with Dr. William Durham in my possession to Rebecca Sciarrino and Ankura Consulting Group LLC on December 10, 2021 (our next scheduled meet and confer discussion) and avoid any wasteful and unnecessary Motion practice.

6. Contrary to Ms. Sciarrino's Declaration, meet and confer efforts had not broken down but were ongoing as of December 9, 2021. Of the 7 categories of documents sought by Ankura and its lawyers (*see* Ankura Motion to Compel pages 3,4), I indicated to Ms. Sciarrino that the only documents which (ever) existed in response to Ankura's Subpoena request related to category #7 – Correspondence with Durham. I have never had an agreement for services with Dr. Durham; I have never had any written agreement with Dr. Durham; I never paid Dr. Durham any monies; Consequently, I do not owe him monies; and I do not have communications reflecting bills or payments with Dr. Durham.

7. Nonetheless, Ankura filed Motion to Compel on December 9, 2021 in an effort to *waste and misappropriate Asbestos Trust funds* (who pays Ankura's billing, and to *harass* me and my office. The Motion filed by Sciarrino scheduled for hearing on February 16, 2021. At the time of the filing of the Motion, discovery in the underlying litigation in *Case No. 2:20-CV-112-KS-MTPU.S. district Court (S.D. Miss.) closed* on January 14, 2022 rendering Ankura's Motion moot.

8. On December 10, 2021, in an effort to avoid any further Motion practice, I fully and completely complied with the subpoena at issue by providing *all correspondence* (multiple e-mails) between Dr. William Durham, me, and my office from July 7, 2018 to June 22, 2020. I sent 3 e-mails to Rebecca Sciarrino and her co-counsel Stuart Senator containing a *complete set* of my correspondence with Dr. Durham. I also requested this moot and wasteful Motion to Compel be taken off Calendar. I also indicated to immediately advise if any there were any attachments to the produced e-mail with which they did not have, to please let me know and I would provide them immediately. Attached hereto as Exhibit B is a true and correct copy of my e-mail response to Rebecca Sciarrino.

9. On December 14, 2021 I received an e-mail from Rebecca Sciarrino clearly trying to mislead me, and the record, and to continue to harass me and my office. Sciarrino indicated she did a "limited analysis" (a complete lie) and that attachments were not produced. Sciarrino also indicated that that they were seeking all e-mails between myself and Dr. Durham *to the present date* despite Ankura having produced no documents dated after the underlying Complaint filing of June 22, 2020. Attached hereto as Exhibit C is a true and correct copy of my e-mail response to Rebecca Sciarrino. On December 14, 2021, I immediately provided the attachments Sciarrino referenced and again requested Sciarrino take this moot and wasteful Motion off calendar.

10. At all times, Dr. Durham and his Counsel Norm Pauli have informed me that both parties (Ankura and Dr. Durham) have agreed that no documents will be produced in the underlying litigation (by either party) dated after June 22, 2020. Attached hereto as Exhibit D is a true and correct copy of an e-mail from Norm Pauli to me, dated January 4, 2022, confirming the above.

11. Having fully and completely complied with the Subpoena at issue, I have repeatedly requested that Rebecca Sciarrino take this wasteful, unethical, moot, and harassing Motion off Calendar. Sciarrino has refused to take this Motion off Calendar.

12. My office, the Mandelbrot Law Firm, does not maintain old e-mails in the ordinary course of business. In order to comply with the Subpoena as issue, I ran a comprehensive search of my e-mail at mandelbrot@asbestoslegalcenter.org for "all" correspondence with Dr. William Durham. I did not delete nor remove any e-mails prior to providing Sciarrino my complete correspondence with Dr. William Durham on December 10, 2021. Sciarrino has refused to provide any "key words" or other identification of documents in her possession which she has indicated I failed to produce. I have no other documents to provide to Rebecca Sciarrino, Stuart Senator or Ankura Consulting LLC. I would happily provide any further documents dated prior to June 22, 2020 responsive to the subpoena and have acted in good faith.

13. I maintain a blog at www.mesothelioma.pro which contains my factual **opinions** regarding matters of misappropriation of Asbestos Trust funds, corruption, fraud, and waste at Asbestos Trusts. I strive

to ensure *everything* posted in my blog regarding my opinions on these public matters is 100% accurate, truthful, and verifiable. I have informed Ms. Sciarrino and Mr. Senator that if there is anything inaccurate in my blog, to please provide me the information and I will remove the inaccurate information immediately. I have also provided Ms. Sciarrino and Mr. Senator with various *criminal* provisions of the Department of Justice Chapter 11 Handbook which they are violating relating to 18 U.S.C. §§ 152-154. Attached hereto as Exhibit F is a true and correct copy of portions of the Department of Justice Trustee Handbook.

14. This Motion at issue is entirely moot. I have fully and completely complied with the Subpoena. The scheduled closure of Discovery in the underlying action (January 14, 2022) is *long before* the scheduled hearing date.

DATED: January 10, 2022

MICHAEL J. MANDELBROT
In Pro Per

Exhibit A

From: Michael Mandelbrot <mandelbrot@asbestoslegalcenter.org>
Sent: Monday, November 15, 2021 8:32 AM
To: Sciarrino, Becca <Rebecca.Sciarrino@mto.com>
Cc: Norman Pauli <npauli@paulilaw.com>
Subject: Case No: 2:20-CV-112-KS-MTP - Response to Subpoena (Objection)

Case No: 2:20-CV-112-KS-MTP - Response to Subpoena (Objection)

Counsel,

I have received a subpoena in Case No: 2:20-CV-112-KS-MTP. Please allow this e-mail to serve as a timely "Response to Subpoena" and "Objection".

We hereby "Object" to the entirety of the Subpoena under Rule 45 based on the following:

1) Unduly Burdensome. *See Rembrandt Patent Innovations v. Apple, Inc., 2015 WL 4393581, at *2 (W.D. Tex. July 15, 2015) (holding subpoena issued to non-party is unduly burdensome "until and unless Plaintiffs can establish they are unable to obtain the requested information from the Defendant"); In re Allergan, 2016 WL 5922717, at *9 (C.D. Cal. Sept. 23, 2016) ("'Courts are particularly reluctant to require a non-party to provide discovery that can be produced by a party'" (citation omitted)); Nidec Corp. v. Victor Co. of Japan, 249 F.R.D. 575, 577 (N.D. Cal. 2007) ("There is simply no reason to burden nonparties when the documents sought are in possession of the party defendant."); Moon v. SCP Pool Corp. 232 F.R.D. 633, 638 (C.D. Cal. 2005) ("[T]hese requests all pertain to defendant, who is a party, and, thus, plaintiffs can more easily and inexpensively obtain the documents from defendant, rather than from [the] nonparty") (citing Dart Indus. Co. v. Westwood Chem. Co., 649 F.2d 646, 649 (9th Cir. 1980))); Haworth, Inc. v. Herman Miller, Inc., 998 F.2d 975, 978 (Fed. Cir. 1993) (affirming denial of motion to compel production from nonparty, holding "the district court could properly require [defendant] to seek discovery from its party opponent before burdening the nonparty [] with [an] ancillary proceeding").*

2) Work Product/Attorney Client Privilege. Requires Disclosure of Protected or Privileged Material and No Exception of Waiver Applies (i.e. Strategy, Confidential Client Information.

Thanks,

Mike

Michael J. Mandelbrot

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EXHIBIT B

Michael Mandelbrot <mandelbrot@asbestoslegalcenter.org>
To:Sciarrino, Becca,Stuart Senator,John G. Smith
Cc:npauli@paulilaw.com
Fri, Dec 10, 2021 at 9:47 AM

Ms. Sciarrino,

Please allow this e-mail (Part 1 of 3). To serve as a full and complete response to your Subpoena.

My office (in good faith) agreed to speak with you today, 12/10/2021, after determining the extent of Dr. Durham's production relating to my office (which I did).

Nonetheless, totally expected that you would file a Motion to Compel in an effort to misappropriate Trust (victim) Funds. How much did you bill Ankura (which you KNOW is paid by the Asbestos Trusts) to write that Motion to Compel? At least $200,000.00 (no doubt you passed it to multiple lawyers in your office to increase the billing. Did you really have to 'steal' from Asbestos Victim's funds to make your billable hour requirements? Disgraceful. Especially given your representation of Ankura ("The Most Corrupt Company in Washington D.C.) who your Firm is aware is has engaged in mass corruption and fraud (while misappropriating Billions of dollars in Trust funds).

Please confirm you will be taking your (worthless and wasteful) Motion off Calendar as I have now fully and completely complied with your request for documents.

If there are any attachments in any of the e-mails which you do not have, please let me know and I will send them over.

Thanks,

Mike

Michael J. Mandelbrot
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EXHIBIT C

RE: Response to Subpoena (Part 3 of 3)

Asbestos Legal Center/Inbox

Sciarrino, Becca <rebecca.sciarrino@mto.com>

To: Michael Mandelbrot

Cc: Norman Pauli,Senator, Stuart,John G. Smith

Tue, Dec 14, 2021 at 12:49 PM

Dear Mr. Mandelbrot,

Even based on our limited analysis in the past few days since you made your production, significant questions about its completeness have become evident:

- Many of the emails that you have provided refer to attachments or screenshot images, but none of those attachments or images has been produced. For example, on November 1 and 2, 2018, you and Dr. Durham emailed regarding an affidavit from Andrew Yang. The affidavit was attached to those emails, but has not been produced. Similarly, on September 27, 2019, you emailed Dr. Durham referring to an attachment, which also has not been produced. These examples are not an exhaustive list but, rather, are intended to illustrate why your production appears incomplete.
- Dr. Durham has produced correspondence with you, which you have not produced.
- The subpoenas seek documents through the present, but the most recent email that you produced was sent on March 10, 2020. We understand from discussions with Dr. Durham's counsel that you have communicated with Dr. Durham more recently than March 10, 2020.

We certainly hope that we can resolve these issues, but it would be inappropriate to take our motion off calendar at this time.

Sincerely,

Rebecca

Rebecca L. Sciarrino (she, her, hers) | **Munger, Tolles & Olson LLP**
560 Mission Street | San Francisco, CA 94105
Tel: 415.512.4097 | rebecca.sciarrino@mto.com | www.mto.com

EXHIBIT D

npauli@paulilaw.com
To:Michael Mandelbrot
Cc:npauli@paulilaw.com,'rusty durham'
Tue, Jan 4 at 8:43 PM

Hello Michael,

I hope you had good Holidays.

I note that you are in the process of producing documents depicting communications you had with Dr. Durham in response to a subpoena for documents issued in connection with the lawsuit that I filed on June 22, 2020 on behalf of Dr. Durham against the Ankura Consulting Group, LLC in the Southern District of Mississippi, Eastern Division.

Please allow me to share with you my understanding with opposite counsel for Ankura, which our pattern of discovery bears out that we have limited our scope of production to the time line from 01/01/2015 through 06/22/2020, the date of the filing of the original Complaint.

I know that you previously rendered some welcomed legal advice to Dr. Durham after Ankura wrongfully caused his ILO and medical reports to not be accepted by certain asbestos trusts and it sent notification letters to Durham's lawyer client customers, which resulted in catastrophic economic damages to his asbestos related medical business.

Please also note that Plaintiff Durham has heretofore already produced ESI of thousands of pages in this case including what communications Durham had with you during the years 2015 through June 22, 2020.

Best regards,

Norman

Norman W. Pauli, Jr.

Pauli Law Firm

P.O. Box 6

Hattiesburg, MS 39403

601-545-7624 office

601-545-1177 fax

npauli@paulilaw.com

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-
-
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EXHIBIT E

Michael Mandelbrot <mandelbrot@asbestoslegalcenter.org>
To:Sciarrino, Becca
Cc:Norman Pauli,Senator, Stuart,John G. Smith
Fri, Dec 17, 2021 at 1:08 PM

Ms. Sciarrino,

Your e-mail response below further exemplifies your propensity to lie, misstate the record, deceive counsel, harass my office, and excessively bill this file in an effort to make your "Big Law" hours. Disgraceful and unethical to say the least.

As noted and you are fully aware:

1. I am not a party to this action;
2. I have no financial interest in the outcome of this matter;
3. I have provided a comprehensive and complete response to your subpoena of all documents up until the filing of the Complaint - not some arbitrary cutoff as you so state;
4. I have been acting as a (shadow) Attorney to Mr. William Durham since the filing of this Complaint - free of charge (unlike you...);
5. I have immediately and dutifully supplied any and all attachments related to my production. You have failed to identify any further attachments;
6. You lied and indicated "you hadn't reviewed the documents I sent" (no doubt you excessively billed many, many hours for "review"). You did review them and (falsely) represented that Dr. Durham had provided additional documents from the time period;
7. My complete production leaves nothing to compel. Your Motion is a disgraceful waste of resources, misguided, and filed in bad faith

Unlike your representation below, I have never asked you to go document by document (something you no doubt welcome to excessively bill more...). YOU represented that Dr. Durham produced documents that I did not produce. I simply asked you to identify them (to prove you aren't lying).

With regards to your "reservation of rights" below - Thank you for your admission that you are reading my blog. You have now given me additional material to add to it (including all documents which I produced to you, your "lying" e-mails, your Motions misappropriating Asbestos victim's monies to make your billings...). In addition, please note that I absolutely strive for accuracy in my Blog at mesothelioma.pro. ***If there is anything inaccurate, please let me know immediately and I will be happy to cure.***

Likewise Ms. Sciarrino, please cease and desist from your harassment, unethical conduct, gross misappropriation of Asbestos Trust funds (to enable fraud/make your hours), and longstanding pattern of misrepresenting the record (lying). We reserve all rights.

Finally, I will provide a "Privilege Log" no later than December 21, 2021. Please confirm you will be taking your Motion off Calendar once the Log is received. Should you want to depose me, I'm happy to be deposed at anytime (a great opportunity for you to steal more Trust funds...).

Thanks,

Mike

Michael J. Mandelbrot
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Exhibit F

U.S. Department of Justice

CHAPTER 11 TRUSTEE HANDBOOK

May 2004

CHAPTER 3: QUALIFICATIONS AND ACCEPTANCE

A. GENERALLY

A chapter 11 trustee or examiner must be a "disinterested person," successfully complete a background investigation, and, in the case of a trustee, post a bond. In addition, pursuant to § 321(a), the trustee must be competent to perform the statutory duties set out in § 1106, which are discussed in more detail in Chapter 6, *infra*. Additional considerations for the selection will be based on the unique circumstances of the specific case. The unique circumstances of the case frequently dictate the terms of the court order directing the appointment.

Some persons are automatically precluded from serving as a trustee or examiner. For example, an examiner appointed in a case may not serve as a trustee in the same case, 11 U.S.C. § 321(b); and the United States Trustee is precluded from serving as either a chapter 11 trustee, 11 U.S.C. §§ 321(c), 1104(d), or examiner, 11 U.S.C. § 1104(d). Finally, relatives of the United States Trustee in the region where the case is pending, or of the bankruptcy judge approving the appointment, are ineligible to serve. Fed. R. Bankr. P. 5002(a).

The United States Trustee does not select the chapter 11 trustee or examiner in isolation from other parties in the case. Section 1104(d) requires the United States Trustee to consult with the parties in interest prior to the appointment. 11 U.S.C. § 1104(d). The United States Trustee will give full and fair consideration to each candidate. Although the United States Trustee is not required to select one of the candidates nominated by the parties, the qualifications of the person(s) recommended and the views of parties in interest will be given due consideration. Further, unsecured creditors may seek the election of a trustee if they are dissatisfied with the United States Trustee's selection. *See* Chapter 4, *infra*.

B. A TRUSTEE OR EXAMINER MUST BE A "DISINTERESTED PERSON"

The word "person" is defined at § 101(41) and includes partnerships and corporations, as well as individuals. Pursuant to § 321(a)(2), partnerships and corporations that are authorized by their charters or bylaws to act as trustee are eligible to serve as trustees. However, the United States Trustee generally appoints individuals.

The term "disinterested person" is defined at § 101(14). The trustee or examiner must not be one of the following:

- a creditor, equity security holder, or insider (which includes relatives of an individual debtor and persons in control of a debtor that is a corporation or partnership; see § 101(31) for definition of "insider");

- an investment banker for any outstanding security of the debtor, either at present or at any time in the past;
- an investment banker for a security of the debtor within three years before the filing of the petition, or an attorney for such an investment banker in connection with the offer, sale, or issuance of a security of the debtor;
- a present director, officer, or employee of the debtor or of the debtor's investment banker;
- a former director, officer, or employee of the debtor or of the debtor's investment banker within the two years prior to the date of the filing of the petition;
- a person holding an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in the debtor or the debtor's investment banker or attorney for the debtor's investment banker.

See 11 U.S.C. § 101(14).

1. Full Disclosure

When the United States Trustee files an application for court approval of the appointment of a trustee or examiner, the application must be accompanied by an affidavit of the person being appointed. Fed. R. Bankr. P. 2007.1(c). The application and affidavit must describe all of the connections of the proposed trustee or examiner to other persons involved in the case. *Id.* This allows the bankruptcy judge to ensure that the person appointed satisfies all the requirements for appointment, particularly the requirement of disinterestedness. Because the determination of "disinterestedness" can turn on so many variables, it is imperative that the trustee or examiner candidate disclose all connections to the debtor, all other parties, and all professionals in the case prior to selection. Determining these connections early in the process will also facilitate the appointment approval process if the person is selected.

In addition to the United States Trustee's application, Bankruptcy Rule 2007.1 also requires the designated person to submit a verified statement listing all connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States Trustee, and any employee of the United States Trustee. *Id.* Although the term "connections" is not defined in the rules, the Advisory Committee note accompanying Bankruptcy Rule 2007.1 contains the following explanation:

> The requirement that connections with the United States trustee or persons employed in the United States trustee's office be revealed is not intended to enlarge

> the definition of "disinterested person" in § 101(13) [redesignated as § 101(14)] of the Code, to supersede executive regulations or other laws relating to appointments by United States trustees, or to otherwise restrict the United States trustee's discretion in making appointments. This information is required, however, in the interest of full disclosure and confidence in the appointment process and to give the court all information that may be relevant to the exercise of judicial discretion in approving the appointment of a trustee or examiner in a chapter 11 case.

Fed. R. Bankr. P. 2007.1 Advisory Committee Note (1991).

A former employee of the United States Trustee's office responsible for the case, or anyone with a past professional relationship with either the United States Trustee or an employee of the United States Trustee in the region where the case is pending, must disclose that relationship. Other factors may be significant and any reasonable doubts regarding the relevance of a particular set of circumstances should be resolved in favor of full disclosure. *See In re The Leslie Fay Cos., Inc.*, 175 B.R. 525, 533 (Bankr. S.D.N.Y. 1994).

2. Full Disclosure – A Continuing Obligation

The determination of "disinterestedness" does not end with the appointment. Any new connections that the trustee or examiner, or any professional employed by the trustee or examiner, establishes or discovers after appointment should be brought to the attention of the court and the United States Trustee through the filing of a supplemental verified statement. *See e.g., In re Granite Partners*, L.P., 219 B.R. 22, 35 (S.D.N.Y. 1998) (Rule 2014 and § 327 contain implied duty of continuing disclosure). Failure to reveal connections that are later determined to have rendered the trustee or examiner not "disinterested" could result in removal as well as the denial or disgorgement of compensation. *See* 11 U.S.C. §§ 327, 328; *United States v. Schilling* (*In re Big Rivers Elec. Corp.*), 355 F.3d 415 (6th Cir. 2004).

3. Conflicts and Related Estates

In the interest of judicial economy and cost reduction, a single trustee is sometimes appointed to serve in two or more related chapter 11 cases. *See* Fed. R. Bankr. P. 2009(c)(2). Generally, the trustee appointed in multiple cases will employ the same set of professionals to represent each of the related estates. However, both the trustee and the professionals appointed to serve in more than one related case must be extremely sensitive to the independent duty imposed upon them to identify and disclose any actual or potential conflicts among the estates.

Although some courts have determined that multiple representation in related estates creates a rebuttable presumption that the representation is *per se* improper, *see, e.g., In re Lee*, 94 B.R. 172, 180 (Bankr. C.D. Cal. 1988), the greater weight of authority favors a case by case

review of the facts to determine the propriety of the representation. *See In re BH&P, Inc.*, 949 F.2d 1300, 1312 (3d Cir. 1991) (citing *In re Martin,* 817 F.2d 175 (1st Cir. 1987)).

Whenever the interests of separate, related estates diverge, the trustee should immediately consult with the United States Trustee and file such disclosures as are necessary and appropriate to protect each estate and the trustee from charges of a lack of "disinterestedness." Based on the particular facts, a trustee appointed in multiple cases may be required to resign from one or more of the cases. *Accord* Fed. R. Bankr. P. 2009(d) (court shall order separate trustees for jointly administered estates where conflict of interest).

C. BACKGROUND INVESTIGATION

All persons appointed to serve as trustees or examiners in a chapter 11 case must undergo a security background investigation. In addition to the initial application form, the appointee is required to complete an affidavit in a format prescribed by the Executive Office for United States Trustees and provide the information necessary for completion of name, fingerprint, tax, and credit checks. This information will be forwarded by the local Office of the United States Trustee to the Office of Review and Oversight ("ORO"), Executive Office for United States Trustees, within ten working days after an appointment is made. If additional or clarifying information is needed, ORO will contact the United States Trustee who will then notify the appointee. The resolution of questionable information may require an affidavit from the trustee or examiner, and/or additional information or documents.

New security application forms are not required if a background investigation is in progress or has been completed within the preceding five years in connection with another chapter 11, chapter 7, or standing trustee appointment.

D. BOND

To qualify as a chapter 11 trustee, the trustee must post a bond in favor of the United States of America within five days after selection. 11 U.S.C. § 322(a). The initial amount and sufficiency of the bond is determined by the United States Trustee, 11 U.S.C. § 322(b)(2); however, it is the trustee's duty to monitor the bond and ensure that it is maintained in an appropriate amount throughout the pendency of the case. The United States Trustee can assist the trustee in obtaining a bond by providing contact with bonding companies used by other trustees. If the trustee wishes to obtain a bond from a different company, the trustee must ensure that the company appears on Treasury Circular 570, which lists those companies holding certificates of authority as acceptable sureties on federal bonds. Only companies appearing on this list are approved by the United States Trustee as sureties on trustee bonds.

discovers or verifies the existence of fraudulent activity, the trustee should notify the United States Trustee immediately.

1. Duty to Report Criminal Conduct

Unless a judge or receiver has already made such report, 18 U.S.C. § 3057 requires a trustee to report suspected violations of federal criminal law to the appropriate United States Attorney. Section 586 of title 28 imposes a similar duty on the United States Trustee to refer any matter that may constitute a violation of criminal law to the United States Attorney and, upon request, to assist the United States Attorney in prosecuting the matter. 28 U.S.C. § 586(a)(3)(F).

A chapter 11 trustee should coordinate efforts with the United States Trustee in the criminal referral process. As noted above, if the trustee has reasonable grounds to believe that a crime has been committed, the trustee is required to refer the matter to the United States Attorney. 18 U.S.C. § 3057(a). However, depending on local practice, the trustee should either submit the referral through the United States Trustee or provide a copy of the referral to the United States Trustee. The mechanics of the actual referral should be discussed with the United States Trustee, the Assistant United States Trustee, or the Regional Criminal Coordinator for the Criminal Enforcement Unit, as they have developed specific procedures with the local offices of the United States Attorney and the Federal Bureau of Investigation.

In making a criminal referral, it is important to provide specific factual and documentary information. At a minimum, the referral should include:

- the bankruptcy case name, file number, and chapter;
- a chronological summary, including dates and specific facts related to the who, what, where, when, and how of the suspected crime;
- a brief narrative of what occurred in relation to each allegation, referring to copies of relevant documents;
- an estimate of the amount of loss involved;
- names, addresses, phone numbers, titles, and descriptions of likely witnesses;
- copies of all written documents relevant to the allegations; and
- a statement of other related referrals made to law enforcement agencies.

2. Types of Criminal Conduct

The most common bankruptcy crimes are set forth in 18 U.S.C. § 152. Section 152 makes it a crime for any individual to " knowingly and fraudulently" (1) conceal property of the estate; (2) make a false oath or account in relation to a bankruptcy case; (3) make a false declaration, certification, verification, or statement in relation to a bankruptcy case; (4) make a false proof of claim; (5) receive a material amount of property from the debtor with intent to defeat the Bankruptcy Code; (6) give, offer, receive, or attempt to obtain money, property, reward, or

advantage for acting or forbearing to act in a bankruptcy case; (7) transfer or conceal property with the intent to defeat the Bankruptcy Code; (8) conceal, destroy, mutilate, or falsify documents relating to the debtor's property or affairs; or (9) withhold documents related to the debtor's property or financial affairs from a trustee or other officer of the court. 18 U.S.C. § 152.

Persons other than the debtor, the debtor's principals, or the debtor's management may commit bankruptcy crimes. For example, a chapter 11 trustee may discover potential theft or embezzlement by professionals employed by the debtor, or by the debtor's employees.

Sections 153 and 154 of title 18 are specifically directed to trustees and other officers of the court. Section 153 relates to the knowing and fraudulent misappropriation, embezzlement, or transfer of property, or destruction of any estate document, by the trustee or other officer of the court. The Bankruptcy Reform Act of 1994, Pub. L. 103-394, 108 Stat. 4106, 4139 (1994), broadened the scope of those affected by this statute to include an agent, employee, or other person engaged by the trustee or officer of the court.

Section 154 of title 18 prohibits a trustee or other officer of the court from knowingly purchasing, directly or indirectly, any property of the estate of which such person is a trustee or officer; or from knowingly refusing to permit a reasonable opportunity for the inspection of estate documents or accounts when directed by the court to do so. It also specifically identifies the United States Trustee as the only party in interest who does not require a court order directing the trustee or court officer to permit a reasonable opportunity for inspection. 18 U.S.C. § 154(3).

Section 155 of title 18 makes it a crime for any party in interest or its attorney to knowingly and fraudulently enter into an agreement with another party in interest or its attorney, for the purpose of fixing the fee or compensation to be paid them for services rendered in connection therewith, from assets of the estate. 18 U.S.C. § 155.

The Bankruptcy Reform Act of 1994 added 18 U.S.C. § 156, "Knowing Disregard of Bankruptcy Law or Rule," and 18 U.S.C. § 157, "Bankruptcy Fraud." *See* Pub. L. 103-394, 108 Stat. 4106, 4140 (1994). Section 156 makes it a misdemeanor if a bankruptcy case or related proceeding is dismissed because of a knowing attempt by a "bankruptcy petition preparer" in any manner to disregard the requirements of the Bankruptcy Code or the Federal Bankruptcy Rules. 18 U.S.C. § 156. The term "bankruptcy petition preparer" does not include the debtor's attorney or an employee of the debtor's attorney, but applies to a person who prepares for compensation a document for filing by a debtor in bankruptcy court or district court. 11 U.S.C. § 110(a).

Section 157 is similar to the federal mail fraud and wire fraud statutes in that it requires a person to devise or intend to devise a scheme or artifice to defraud. A person, not only a debtor, commits bankruptcy fraud if, for the purpose of executing or concealing this scheme or artifice to defraud, that person:

(1) files a petition under title 11;
(2) files a document in a proceeding under title 11; or
(3) makes a false or fraudulent representation, claim, or promise concerning or in relation to a proceeding under title 11, at any time before or after the filing of the petition, or in relation to a proceeding falsely asserted to be pending under such title.

See 18 U.S.C. § 157.

If a person falsely claims to be in bankruptcy, this is a violation of § 157.

Further, the Sarbanes-Oxley Act of 2002, Pub. L. 107-204, 116 Stat. 745 (2000), added 18 U.S.C. § 1519, making the "destruction, alteration, or falsification of records in federal investigations and bankruptcy" a felony. Under § 1519,

> Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

18 U.S.C. § 1519.

There are several other criminal statutes that may be relevant to bankruptcy crimes including those relating to bank fraud, tax fraud, mail and wire fraud, and money laundering.