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For the United States Trustee

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FT WORTH DIVISION

IN RE	§	
	§	
	§	
PILGRIMS PRIDE CORP.	§	**CASE NO. 08-45664 (DML) (Chapter 11)**
	§	**Jointly Administered**
	§	**HEARING: August 25, 2009, 9:30 a.m.**
DEBTOR	§	**Before the Hon. Russell F. Nelms**

UNITED STATES TRUSTEE'S BRIEF SUPPORTING OBJECTION TO EQUITY COMMITTEE'S APPLICATION TO EMPLOY BROWN RUDNICK, LLP

The United States Trustee for Region 6 files this brief supporting his Objection to the Equity Committee's Application to Employ Brown Rudnick, LLP and respectfully states:

Factual Statement

1. On December 1, 2008, Pilgrim's Pride Corporation and related entities (PPC or the Debtors) filed voluntary petitions under chapter 11 of the Bankruptcy Code.

2. Before the bankruptcy filing, PPC employed William Snyder (Snyder) as its Chief Restructuring Officer.

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Willingham Offers Litigation Consulting Services to Debtor and Unsecured Creditors' Committee:

3. Michael Willingham is a licensed certified public accountant, but he does not have a permit to practice. *Willingham Deposition, 22:5-10*. He has a litigation consulting business. *Willingham Deposition, 13:20-21; Willingham Resume, UST B.*

4. He also served as an equity committee representative in the Mirant and Calpine bankruptcy cases.

Brown Rudnick and Willingham Meet in the Mirant Case:

5. Brown Rudnick represented the equity committee in Mirant. *Willingham Deposition, 16:15-17.*

6. After the Court approved a plan in Mirant, Willingham was appointed as the equity committee's representative on the board of Mirant Corporation Asset Recovery, LLC (MCAR). For serving on the board, the MCAR pays him:

a. $25,000 per annum;

b. $1,500 a board meeting;

c. $20,000 a month; and

d. Up to one percent of litigation proceeds.

Willingham Deposition, 19:11-21. The MCAR provided between one quarter and one third of Willingham's 2008 income. *Willingham Deposition, 20:9-15*.

7. When asked whether Brown Rudnick had a role in his employment on the MCAR, Willingham responded that Brown Rudnick "recommended a couple of people to work as a board member – that they brought to me to – to interview and to talk about it. So I don't know if they had a role in me being selected, but they had a role in bringing people to be selected." Willingham Deposition, 17:5-13.

Willingham Seeks a Role in the PPC Cases:

8. Willingham contacted Snyder, the Debtor's CRO, and Andrews & Kurth, the creditors committee's counsel, to remind them of his availability for forensic accounting work in the PPC cases. Willingham Deposition, 27:18-28:7; 32:15-33:2.

9. He was not retained by PPC or the official unsecured creditors' committee.

Brown Rudnick Reaches Out to Willingham:

10. Howard Siegel (Siegel) is a partner with Brown Rudnick, LLP; his state bar licensure is in Connecticut; and he has worked in the Northern District of Texas on the Mirant case.

11. On December 14, 2008, Siegel emailed Willingham: "I wanted to check in to see if you have any information about the Pilgrims Pride Chapter 11 . . . . We are exploring the prospect of having an equity committee formed and wondered if you may have some contacts with shareholders." *Siegel Email 12/14/08, 10:51 a.m. Brown Rudnick (BR) Ex. 4, AHG 815.*

12. A few hours later Willingham responded, "Hey Howard! Long time no hear . . . .I actually live very near Pittsburg, Texas. . . home of Pilgrims . . . . I don't know any major shareholders, but I know Bo Pilgrim and/or his relatives own a substantial portion. Locally, I have met a lot of people who hold small amounts." *Willingham Email, 12/14/08, 2:33 p.m., BR Ex. 4, AHG 815.*

13. Within an hour, Siegel quipped back, "Small world! Also interesting to see that there is a Yahoo message board for Pilgrims SHs – not like the glory days of the Mirant board – but perhaps a path to organize smaller holders to push for equity committee. Will plan to call tomorrow to discuss." *Siegel Email 12/14/08, 2:52 p.m, BR Ex. 4, AHG 814*

The Month of Recruiting PPC Shareholders for an Equity Committee:

14. As arranged, Willingham and Siegel spoke on December 15, 2009.

15. Also on December 15, 2009, Willingham, using "hammr6" -- the same user name that he employed in Mirant -- added the following posting to the PPC Yahoo chatroom:

> I have never posted on this board before. I resolved to give up message boards after the last bankruptcy situation I was involved in. However, since I know so many people affected by Pilgrim's bankruptcy, I thought I would provide you with some simple advice that will serve you well in the coming months. I recommend you diligently attempt to pursue the formation of a shareholder's committee that can represent your interests in the bankruptcy proceedings. . . [Y]ou will not receive any value generated absent excellent representation in the bankruptcy . . . .
>
> I know you don't know me from Adam, but I am willing to assist anyone in understandingwhat is about to transpire, as well as hel p you understand who I am and what kind of situation you are facing.

12/14/08 Yahoo PPC Posting 6:06 pm, Brown Rudnick (BR) Ex. 6, p. 1.

16. Several Yahoo posters then responded that the Pilgrims has the majority stockholding and therefore the Pilgrims would insulate the stock value. 12/14/08 Yahoo Postings, BR 6, p. 1.

17. Monitoring the Yahoo chatroom, the next morning Siegel commented, "I was interested to see the infamous 'hammr6' weigh in on the Pilgrim message board – altho the reception from other board members seems a bit murky." Siegel Email 12/16/08, 8:58 a.m., BR 4, AHG 814.

18. Willingham noted that it was late to become involved on the chat board, so he was going to focus on shareholders in Pittsburgh. Willingham Email 12/17/08, 2:18 pm, BR 4, AHG 813.

19. "We're working on the institutional front – will keep you posted," Siegel responded. Siegel Email 12/17/08, AHG

20. The next day, December 17, 2008, Willingham updated Siegel that he was "making some progress. I hope by the end of the week to have a local network established to gather shareholders."

21. On December 18, 2009, Siegel again indicated that he was monitoring the PPC Yahoo postings "with great interest." BR 2, AHG 814.

22. Between December 17, 2008, and December 21, 2009, Willingham expressly encouraged shareholders to organize and request an equity committee in six different Yahoo PPC postings. Wilingham Yahoo Postings, BR 6, pp, 10-11, 15, 26, 27, 28, 38.

23. Sometimes Willingham's factual representations were imprecise.

24. Willingham posted, "Bo [Pilgrim] did not create the new CEO's pay package, the creditors did." Willingham 12/21/08 12:39 a.m. PPC Yahoo Posting, BR 6, p. 38.

25. During his deposition, he represented that he based this statement on his experience in prior bankruptcy cases. Willingham Deposition, 101:2-12. He testified that he was not aware that the agreement with the new chief executive officer was reached without input from the creditors' committee. Willingham Deposition, 102:19-24.

26. Yet three months prior to the deposition – on January 14, 2009 – his Yahoo posting noted that he had attended a bankruptcy court hearing, that Don Jackson was not approved as chief executive officer because there was a dispute with the creditors' committee, and that a mediator would be appointed. *Willingham 01/14/09 PPC Yahoo Posting, BR 6, p. 52.*

Willingham Recommends Brown Rudnick:

27. Two of Willingham's PPC Yahoo chat room postings referenced legal services. Explaining the need to write the United States Trustee, Willingham commented, "[m]y lawyer would even write the letter for you . . . for free." Willingham Yahoo 12/18/09 Posting, 12:01 pm, BR 6, p. 28.

28. Although Willingham said he was referencing "[n]obody in particular," and that an attorney had prepared such a letter for free in the past, he and Siegel continued emailing during this time period. *Willingham Deposition, 97:14-98:3*

29. Only three days after posting that an attorney would write a letter for shareholders for free, Willingham posted the following: "The best way to get as many shareholders on the same page as possible is to have one focal point. That focal point should be Brown, Rudnick, Berlack, Israel (BRBI) and the person to contact is Howard Siegal. His link is below . . . I've worked with him and his team before on a bankruptcy case ten times this size. BRBI is your best shot. You have nothing to lose, no cost for a committee." *BR 6, p. 38.*

Question: "This was a pretty good advertisement for Howard, wasn't it?"

Willingham: "You bet."

Willingham Deposition, 98:20-22.

30. Willingham testified that Brown Rudnick had commenced representing him individually at some point in January of 2009 but he was not sure of the date, and that he did not have a formal agreement. The Brown Rudnick attorney attending the deposition did not disagree or otherwise clarify the scope of representation. *Willingham Deposition, 47:18-48:8; 55:17-56:24;114:21-25.*

31. Siegel acknowledged that he himself would not have viewed posting in the Yahoo PPC chat room as improper conduct for himself as a lawyer.

32. Siegel periodically monitored both the PPC stock price and the PPC Yahoo chat room while Willingham was posting. He never asked Willingham to change postings or otherwise take any remedial action.

Willingham Tries to Meet Shareholders in Pittsburgh, Texas:

33. In the context of the emails about free services and no cost counsel, a Yahoo poster joked that Willingham should "run a[n] AD in E. Tx. Looking to sign folks up . . . PRO BONO . . . see what you get." *Wildman PPC Yahoo Posting, 12/18/08, at 12:49 a.m., BR 6, p. 27.*

34. Willingham responded, "As for an ad, I don't think that is necessary. I think there are enough shareholders in the area that I have met that are motivated enough to push for it." *Willingham Yahoo Posting, 12/18/08, 1:18 am.*

35. Despite this confident comment, Brown Rudnick and Willingham continued to have difficulty attracting parties to form an equity committee. *See Seigel email 12/18/08, 8:58 pm, BR 4, AHG 814)* (institutional interest is "slow going"); *Willingham email 01/14/09, 4:05 pm, BR 8, AHG 959)* (Willingham emailing Michael Cooper about interest).

36. On January 22, 2009, Willingham wrote a letter – entitled "Stand up, be counted" -- to the editor of the Pittsburgh Gazette newspaper. *BR 3*. In the editorial, he mentioned that the local shareholders needed to "stand together as a community of shareholders right here in Pittsburgh" or "it's all but guaranteed New York will own [its] own piece of east Texas. The vulture [funds] have already made their intentions known." *BR 3*. He conceded during his deposition that he based the vulture fund comments on his prior experience and did not conduct any independent investigation. He did not know when funds on the committee had acquired their shares. He was unaware that the Pension Benefit Guaranty Corporation and a union had representatives on the committee. *Willingham Deposition, 108:11-113:2-10*.

37. On January 23, 2009, the day after publishing the editorial in the newspaper, Willingham entered a contract with the PPC Employee Stock Ownership. The contract provided that if an equity committee was formed and he obtained a position on it, he received a $12,000 retainer

plus $250 per hour for committee service. He was to endeavor to become chairman of the equity committee. *UST Ex. D.*

38. Willingham recognized that folks in Pittsburgh generally "held small amounts" of PPC stock and that they were chicken growers, employees, or people with a local interest. Willingham Deposition, 75:8-76:11. Willingham 12/14/09 2:33 email, BR 4, AHG 815. Individuals sending proxies included retirees and PPC plant employees. *UST Ex. F.*

Willingham Introduces Himself to Michael Cooper:

39. Michael Cooper, a member of both the ad hoc equity committee and the official equity committee, owns a company that recruits executives for companies, including PPC.

40. Willingham could not recall how he was introduced to Cooper, but Willingham was given his name, and Willingham called him. *Willingham Deposition, 115:25-116:24.* Willingham emailed his resume to Cooper, and Cooper asked him about his ability to practice accounting. *BR 8, AHG 960.* Cooper then provided Willingham with other shareholders' names and attempted to direct other shareholders to him for further coordination of the request for an equity committee. Cooper Email of 04/09/09, 4:23 pm, BR 8, AHG 952 (suggesting name after the 03/20/09 filing of the ad hoc committee members' motion for appointment of an official committee); Willingham Email of 04/09/09, 7:29 pm, BR 8, AHG 952; Cooper Email of 01/31/09, 12:29 pm, BR 8, AHG 957, Willingham Email of 01/31/09, 3:01 pm, BR 8, AHG 957.

The Ad Hoc Committee requests an Official Equity Committee.

41. On February 10, 2009, M&G Investment Management Ltd. ("M&G"), a British holder of the Debtors' common stock asked the United States Trustee to appoint a committee.

42. On March 16, 2009, the United States Trustee declined to appoint an equity committee.

43. On March 20, 2009, Brown Rudnick, representing an ad hoc group of shareholders, moved for the appointment of an equity committee. The ad hoc shareholders were M&G, the PPC Employee Stock Ownership Plan (ESOP), Michael Cooper, and James Schwertner.

44. The Unsecured Creditors Committee and the Bank of Montreal opposed the request for the equity committee. The Yahoo postings and emails were produced in connection with discovery regarding the request to direct appointment of an equity committee.

45. After an April 29, 2009, evidentiary hearing, the Bankruptcy Court entered an opinion and order directing the appointment of an equity committee.

46. The Bankruptcy Court defined a budget for equity professionals' fees. All the equity committee professional fees aggregate up to $425,000 per calendar month, not to exceed $1,150,000 per calendar quarter. *Memorandum Opinion Directing Appointment of an Equity Committee, p. 17, ECF No. 1652.*

The Bankruptcy Court Reserves the Brown Rudnick Solicitation Issues for Retention:

47. The Bankruptcy Court acknowledged that the Unsecured Creditors' Committee "allege[d] (and the UCC Objection support[ed] the allegations through cites to the depositions of Willingham, Snyder, and Pilgrim) that Brown [Rudnick] and Willingham solicited shareholder participation in the AHSH [Ad Hoc Shareholders Group] for their own profit in contravention of laws respecting proxy solicitation and prohibiting barratry." *Memorandum Opinion, p. 6, ECF No. 1652.*

48. The Bankruptcy Court found these solicitation issues were not relevant to the decision to appoint a committee. *Memorandum Opinion*, p. 6, ECF No. 1652.

49. The Bankruptcy Court emphasized, "[t]his is not to say the court is not troubled by the UCC's allegations. Rather, the proper context for consideration . . . of the behavior of Brown

[Rudnick] is . . . any effort to employ Brown Rudnick on behalf of the committee." *Memorandum Opinion*, p. 6. The Bankruptcy Court added that its decision did "not address the issue of whether the conduct of Brown [Rudnick] warrants sanction, whether civil, disciplinary, or even criminal." *Memorandum Opinion, p. 7, ECF No. 1652.*

50. The Unsecured Creditors' Committee appealed to the United States District Court. The United States District Court initially entered an order staying the Bankruptcy Court's decision, but the District Court vacated the stay. *Order Granting Temporary Stay and Expedited Briefing, Case No. 4:09-cv-271-Y. ECF No. 7.* The *Order Vacating the Stay* quotes the Bankruptcy Court's language specifying that the issues about soliciting shareholders should be considered in the context of employment. The District Court reiterated that the United States Trustee should consider the issues when appointing the shareholders. *Order Vacating Temporary Stay, pp. 12; Case No. 4:09-cv-271-Y, ECF No. 34.*

The Equity Committee is Appointed.

51. After twice soliciting interest in the equity committee, the United States Trustee appointed two members to the official equity committee: M&G and Michael Cooper.

52. The Bankruptcy Court already has approved the Equity Committee's retention of Kelly Hart & Hallman, LLP as local counsel. Kelly Hardt & Hallman has experienced bankruptcy practitioners, including a former bankruptcy judge.

Legal Discussion and Argument

Ethical Considerations Are an Objective Standard Which May Result In Denial of Employment or Fees.

53. In accordance with sections 1103, 328(a), and 330 of the Bankruptcy Code, the Equity Committee seeks to employ Brown Rudnick. "Public policy favors permitting parties to retain

professionals of their choice." *In re Caldor*, 193 B.R. 165, 170 (Bankr. S.D.N.Y. 1996). Therefore, subjective preferences have no role when the Court evaluates employment.

54. As the Bankruptcy Court and District Court properly recognized, courts consider objective factors such as conflicts of interest and ethical violations when evaluating retention. *E.g., In re Caldor*, 193 B.R. at 175 (evaluating whether committee representation violated Canons 4, 5, or 9 of Ohio Code of Professional Responsibility and holding that representation was permissible); *In re Sauer*, 191 B.R. 402, 410 (Bankr. D. Neb. 1995) (noting that Debtor's attorney's purchasing property from Debtor-client appeared to violate Nebraska Code of Professional Responsibility); *In re Rivers*, 167 B.R. 288, 302 (Bankr. N.D. Ga. 1994). The self interest in seeking employment evidences an "adverse interest" or conflict when state ethical rules are violated. *Cf.* 11 United StatesC. §§1103(a),(b).

55. Improper conduct by a bankruptcy professional "damages the public's confidence in judicially supervised reorganization whether or not there is actual damage to the estate. Denial of compensation is an appropriate deterrent." *In re Rivers*, 107 B.R. at 302.

Disclosure of Relationships Bears on Court's Analysis:

56. Here, Brown Rudnick failed to disclose its interactions with Willingham in its retention application. Fed. R. Bankr. P. 2014; *In re Atlanta Sporting Club*, 137 B.R. 550, 553 (Bankr. N.D. Ga. 1991) (suggesting that courts evaluating lack of disclosure consider whether the facts suggest oversight, misapprehension of the law, or intent). Its retention application engrafts its Disclosure of Multiple Party Representation under Federal Rule of Bankruptcy Procedure 2019, and the Amended Disclosure of Multiple Party Representation mentions, without elaboration, that Brown Rudnick contacted some parties itself. While the interactions have now become widely known in the bankruptcy case, disclosure is self-effectuating and occurs within the four

corners of the employment application. *E.g. In re Granite Partners, L.P.*, 219 B.R. 22, 35 (Bankr. S.D.N.Y. 1998) (citations omitted) (explaining that courts should not have to rummage through files or conduct independent fact-finding investigations). Disclosure of the facts in this case was happenstance arising from discovery about the request for an order directing the appointment of an equity committee. Under different circumstances, these facts never would have been revealed.

The Federal Ethical Standards Control Actions in Bankruptcy Cases:

57. Here, some of Brown Rudnick's attorneys sought admission pro hac vice in the bankruptcy case after the month of effort to find stockholders interested in a committee. Although Siegel was active in the Mirant case and generated interest in an equity committee, Siegel indicated it was unclear whether he would appear in this case.

58. But Brown Rudnick as a whole seeks retention in this Texas federal bankruptcy court, and several Brown Rudnick attorneys have already been admitted pro hac vice or already are admitted. As noted in the United States Trustee's objection to Brown Rudnick's retention, the Fifth Circuit has held that federal ethical standards govern practice in federal courts. *E.g. In re Dresser Indus., Inc.*, 972 F.2d 540, 543-44 (5th Cir. 1992). Accordingly, it is appropriate to turn to the ABA Model Rules, the Canons, and the American Law Institute's *Restatement of the Law Governing Lawyers*. *In re Dresser Indus.*, 972 F. 2d at 544.

Analysis of the Model Rules of Professional Conduct:

59. The facts of this case involve an interaction of three of the American Bar Association's Model Rules: Rules: 7.3, 7.2(b), 7.1, and 8.4. These rules -- combined with the cases and ethics opinions interpreting them -- hold that a perceived likelihood of work or income supports a finding of improper contact.

60. **Rule 7.3 Direct Contact With Prospective Clients**

(a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

(1) is a lawyer; or

(2) has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

(1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress or harassment.

(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).

(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

http://www.abanet.org/cpr/mrpc/rule_7_3.html.

Rule 7.2 Advertising

* * *

(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority;

(3) pay for a law practice in accordance with Rule 1.17; and

(4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if

(i) the reciprocal referral agreement is not exclusive, and

(ii) the client is informed of the existence and nature of the agreement.

http://www.abanet.org/cpr/mrpc/rule_7_2.html.

Rule 7.1 Communications Concerning A Lawyer's Services

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading

http://www.abanet.org/cpr/mrpc/rule_7_1.html

Rule 8.4: Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

61. These provisions were adopted after the Supreme Court's decisions interpreting lawyers' free speech rights. Lawyer Advertising and Solicitation Chapter from *Lawyer Advertising at the Crossroads,* available at http://www.abanet.org/cpr/professionalism/crossroads.html.

62. After reviewing cases arising under the Model Rules and Model Code, one legal researcher has noted that courts are most likely to enforce the direct contact provisions when Model Rule 7.3 interacts with issues about oversight or giving of "anything of value" in exchange for recommending the lawyer's services. Anita Bernstein, *Sanctioning the Ambulance Chaser*, 41 Loy. L.A. L. Rev. 1545, 1560-61 (2008). "Employing . . . nonlawyers who solicit new clients . . . differs from, and in crucial ways is more dangerous than, solicitation by lawyers themselves. A lay runner by hypothesis cannot answer the prospective client's questions as well as a lawyer . . . ." *Id* at 1560.

The Texas Version of the Model Rules:

63. While cases such as *Dresser Industries* recognize that the state ethical standards do not control in federal court, the Fifth Circuit also recognizes that these standards merit special consideration as they are the ones governing practitioners in Texas where the federal district court is located. *FDIC v. United States Fire Ins. Co.*, 50 F.3d 1304, 1312 & n. 9 (5th Cir. 1995). Here, the Pittsburgh, Texas shareholders were in Texas, and the rules were designed to protect Texas citizens. Further, Texas attorneys seeking employment in PPC would have been governed by the Texas Rules.

64. Texas has adopted and modified the Model Rules of Professional Conduct. *Tex. R. Disciplinary P., reprinted in Tex. Govt Code, tit. 2, subtit G.*

65. The Texas version of Rule 7.03 is:

(a) A lawyer shall not by in-person contact, or by regulated telephone or other electronic contact as defined in paragraph (f), seek professional employment concerning a matter arising out of a particular occurrence or event, or series of occurrences or events, from a prospective client or nonclient who has not sought the lawyer's advice regarding employment or with whom the lawyer has no family or past or present attorney-client relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain.

(f) As used in paragraph (a), "regulated telephone or other electronic contact" means any electronic communication initiated by a lawyer or by any person acting on behalf of a lawyer or law firm that will result in the person contacted communicating in a live, interactive manner with any other person by telephone or other electronic means. For purposes of this Rule a website for a lawyer or law firm is not considered a communication initiated by or on behalf of that lawyer or firm.

http://www.texasbar.com/ContentManagement/ContentDisplay.cfm?ContentID=24258

Comments 1 and 4 to this Rule further clarify these provisions in the context of this case.

"[F]orms of electronic communications are prohibited that pose comparable dangers to face-to-face solicitations, such as soliciting business in 'chat rooms.'" *Comment 1 to Rule 7.03.*

"[P]aying, giving, or offering to pay or give anything of value to persons not licensed to practice

law who solicit prospective clients for lawyers has always been considered to be against the best interest of both the public and the legal profession. Such actions circumvent these Rules by having a non-lawyer do what a lawyer is ethically proscribed from doing. Accordingly, the practice is forbidden by Rule 7.03(b)." *Comment 4 to Rule 7.03.*

66. **Rule 8.04 - Misconduct**

> (a) A lawyer shall not:
>
> (1) violate these rules, knowingly assist or induce another to do so, or do so through the acts of another, whether or not such violation occurred in the course of a client-lawyer relationship.

Tex. Disciplinary R. 8.04(a)(1).

67. **Rule 7.06 Prohibited Employment**

> (a) A lawyer shall not accept or continue employment in a matter when that employment was procured by conduct prohibited by any of Rules 7.01 through 7.05, 8.04(a)(2), or 8.04(a)(9), engaged in by that lawyer personally or by any other person whom the lawyer ordered, encouraged, or knowingly permitted to engage in such conduct.

Tex. Disciplinary R. 7.06(a).

68. In *Crook v. State*, 2005 WL 1539187 (Tex. App – El Paso 2005), writ ref'd, 2006. The El Paso Court of Appeals affirmed a finding that Texas Disciplinary Rule 8.04(a)(1) was violated when an attorney encouraged direct contact phone calls to accident victims, including victims who had indicated they did not want to retain counsel. The El Paso Court found some evidence that the attorney had offered to pay for the referrals, but the El Paso Court also indicated that the mutual referrals from chiropractor to doctor would be sufficient to support the ethical violation. 2005 WL 1539187 at *8.

69. Under a prior, similar version of the Texas Disciplinary Rules, the Texas Commission on Professional Ethics was asked to evaluate the propriety of a lawyer's letter to a foundation repair

company. *Texas Commission on Professional Ethics, Op. 507, 58 Tex. B. J. 863 (1992).* The letter indicated that the lawyer would obtain recoveries sufficient to reimburse the cost of foundation repair work. *Id.* "[T]his communication although benign on its face does inspire careful consideration of several implications of prohibited conduct. Obviously, an attorney is prohibited to ask another person to take some action that the attorney is ethically bound to avoid." *Id.* The letter may not expressly state the ethical issue within its four corners but the issue may be "implied by the transmittal of the letter." The Ethics Opinion concludes that the lawyer's letter improperly implied that the foundation repair company would receive compensation through client referrals from the attorney. *Id.*

The Connecticut Version of the Model Rules:

70. Connecticut's ethical standards expressly govern Siegel's conduct. Like Texas, Connecticut has adopted the Model Rules 7.3, 7.2, and 7.1, but unlike Texas, Connecticut does not have notable modifications. The comments to Connecticut Rule 7.3 explain, "The contents of direct in-person, live telephone, or real-time electronic conversations between a lawyer to a prospective client can be disputed and are not subject to a third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading." *Comment to Connecticut Rule 7.3, http://www.jud.ct.gov/Publications/PracticeBook/PB1.pdf*

71. When evaluating the involvement of third parties in attorney employment, the Connecticut standards require that marketing agencies merely serve as answering services. The third party cannot screen the contacts or make recommendations. *Ct. Ethics Op. 98-8, 1998 WL 993677 (Conn. Bar Ass'n)* (citing *Schulman v. Major Help Center*, 21 Conn. L. Rprtr No. 1, 1 (Feb. 16, 1998); *but see Ankerman v. Mancuso*, 79 Conn. App. 480, 830 A.2d 388 (Conn. App.

2003) (disagreeing with *Schulman* voiding of contract based on ethical violation but not involving third party oversight under Rule 7.2).

Analysis of Model Rule Application:

72. Here, Brown Rudnick had no prior contacts with PPC shareholders who were posting on the Yahoo chatroom or in Pittsburgh, Texas. Under Model Rule 7.3(a) and under Texas Rule 7.03(a), the Brown Rudnick attorneys could not contact these individuals in person, on the phone, or by interactive electronic communication such as a chat room. The initial emails to Willingham are analogous to the letter to the foundation repair company in the Texas Ethics Opinion. No financial relationship with Willingham was disclosed to shareholders. *Model Rule 7.2.* Willingham did not provide mere ministerial assistance, and the information he provided was factually imprecise. Model Rule 7.1. What could not occur directly occurred indirectly.

American Bar Association's Model Code

In 1983, the Model Rules replaced the Model Code, but many states maintained the Model Code for years. http://www.abanet.org/cpr/mrpc/preface.html. New York only replaced its version of the Model Code in April of this year. http://www.nycourts.gov/rules/jointappellate/NY%20Rules%20of%20Prof%20Conduct.pdf. Therefore, the cases interpreting the Model Code found the current Model Rules and remain instructive on current legal issues.

73. The Model Code was divided into Disciplinary Rules, which were mandatory provisions that could be enforced through discipline, and Ethical Considerations, which were designed to guide lawyers. The Model Code, including Disciplinary Rules and Ethical Considerations, can be found at http://www.abanet.org/cpr/mrpc/mcpr.pdf.

74. The applicable provisions from Canon 2: "A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available" are Disciplinary Rule 2-103(A) and (E). and from Canon 1: "A Lawyer Should Assist in Maintaining the Integrity and Competence of the Legal Profession" the applicable provision is 1-102(A)(2).

75. Disciplinary Rule 2-103(A) provides: "Recommendation of Professional Employment: A lawyer shall not, except as authorized in DR 2-101(B)[governing media advertising], recommend employment as a private practitioners of himself, his partner, or associate to a layperson who has not sought his advice regarding employment of a lawyer." DR 2-103(A).

76. "A lawyer shall not accept employment when he knows or it is obvious that the person who seeks his services does so as a result of conduct prohibited under this Disciplinary Rule." DR 2-103(E).

77. The Ethical Consideration related to these disciplinary rules provides, "Selection of a lawyer by a layperson should be made on an informed basis. . . . A layperson is best served if the recommendation is disinterested and informed . . . . a lawyer should not seek to influence another to recommend his employment. A lawyer should not compensate another person for recommending him, for influencing a prospective client to employ him, or to encourage future recommendations." EC 2-8.

78. Disciplinary Rule 1-102(a)(2) provides, "A lawyer shall not . . . (2) Circumvent a disciplinary rule through actions of another." DR 1-102(a)(2).

79. In *In re Carroll*, 602 P.2d 461 (1979)(en banc), the Arizona Supreme Court synthesized these provisions. After a destructive explosion, a free lance investigator traveled to the accident site. *Id.* at 462. As a free lance investigator, he had occasionally worked for Attorney Carroll. *Id.* At the accident site, Attorney Carroll's firm was one of three firms that the investigator

recommended to a victim. *Id.* Approximately two hours later Carroll and his law partner arrived at the accident site, and the private investigator introduced the accident victim as his friend. *Id.* at 463. After the victim retained the attorneys, the investigator told the attorneys that he had just met the victim – that he was not a friend. *Id.* The investigator also placed a radio advertisement, and he then praised Carroll and his partner when an accident victim responded to the advertisement. *Id.* This same accident victim referred additional clients to the firm, and the attorneys provided her with a vehicle. *Id.* at 463-65. The investigator contacted the attorneys after the retainer agreements were signed, and he asked for work. *Id.* at 463. The attorneys informed him they were using their staff investigator instead. *Id.* Nevertheless, the Arizona Supreme Court found the attorney's "use and ratification" of the conduct of the investigator and the client violated DR 2-103(A) & (E) and DR 1-102(a)(2). *Carroll*, 602 P.2d at 466.

80. Similarly, in *In re Rapoport*, 588 N.Y.S 2d 436 (3d Dept. 1992), the New York appellate court found that DR 2-103(a) was violated when a law firm retained the leader of a toxic tort victims' support group as a consultant. Both parties understood that the consultant would provide referrals, and the firm obtained fourteen referrals, ten of which resulted in retention agreements. *Rapoport*, 588 N.Y.S. at 437. The New York court held the solicitation issue could be proved by circumstantial evidence and that a party's denial was not dispositive. *Id.*

Analysis of Model Code's Application:

The *Rapoport* and *Carroll* cases properly recognized that these issues may be tried by circumstantial evidence and that a defined compensation need not exist if the evidence supports a financial opportunity for the party referring legal work. Here, the circumstantial evidence supports finding that Willingham believed that an equity committee would probably result in

work for him and that he followed a suggestion to post on the PPC Yahoo website. The concept of using the client referral and ratifying the conduct also apply here. While the situation probably evolved without clear definitions, it was Brown Rudnick's obligation to understand the ethical ramifications, coordinate from the outset, and remedy if the definitions were unclear. If Brown Rudnick might have curtailed Willingham's referrals by asking questions shortly after he posted the email suggesting an attorney would prepare letters for free. Yet Willingham subsequently posted a recommendation for Brown Rudnick which included accolades based on the Mirant experience. After Willingham referred shareholders to Brown Rudnick in the PPC Yahoo chat room, Brown Rudnick still made no effort to evaluate his individual contacts with employees, retirees, and local business owners.

Restatement (Third) of the Law Governing Lawyers:

The *Restatement (Third) of the Law Governing Lawyers* ("*Restatement*") does not contain exact parallels for Model Code or Model Rule provisions. http://www.abanet.org/cpr/jclr/mr_restate.pdf. (chart comparing Model Rules to *Restatement* provisions). Section 10 of the *Restatement* is analogous to Rule 7.2(b)(2). It governs Limitations on Nonlawyer Involvement in a Firm. Generally, "A lawyer or law firm may not share legal fees with a person not admitted to practice as a lawyer." *Restatement*, §10(3). Comment d elaborates on the rationale for the bar:

Referral arrangements. Under the rule of Subsection (3), a lawyer may not pay or agree to pay a nonlawyer for referring a client to the lawyer. Such arrangements would give the nonlawyer an incentive to refer to lawyers who will pay the highest referral fee, rather than to lawyers who can provide the most effective services. They also would give the nonlawyer referring person the power and an incentive to influence the lawyer's representation by an explicit or implicit threat to refer no additional clients or by appealing to the lawyer's sense of gratitude for the referral already made. . . ." Comment (d) to *Restatement* §10.

Analysis of Restatement:

The Restatement provision comports with the Model Rules and Model Code. Potential clients such as the shareholders should know that there may be a financial motivation for referring them to a specific firm. The concerns expressed in Comment d apply indirectly. Obtaining work is analogous to retaining the highest referral fee. The Court should discourage relationships where consultants may refer based on their own interest in employment rather than disinterested analysis of ability.

Synthesis and Conclusion

The circumstantial evidence reflects that Brown Rudnick and Willingham understood that Brown Rudnick would be recommended as counsel for an equity committee and that Willingham believed he would finally obtain a compensated role in the PPC case. Willingham encouraged employees, retirees, and local business owners to participate on the ad hoc shareholders' committee. These individuals do not have the same experience in complex chapter 11 corporate bankruptcies as someone like M&G, an international business with a professionals dedicated to bankruptcy and collection issues.

Despite awareness that Willingham was posting on the Yahoo website and organizing individuals through direct contacts, Brown Rudnick did not take any remedial actions at any time. By failing to do so, it ratified Willingham's actions. As a result, Brown Rudnick, through Willingham's actions, indirectly achieved what could not be achieved directly. Under the facts, Brown Rudnick's retention should be denied. Alternatively, as the bankruptcy judge handling PPC has recused himself from this issue, this Court should not defer sanctions until the fee

hearings. This Court should decrease fees as a sanction or grant other proper relief.

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Respectfully submitted,

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Certificate of Service

I certify that on August 24, 2009, I sent a copy of this document either via ECF to those requesting ECF notice and also by email to the parties listed below.

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