UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re

CUSTOM SECURITY INC., Case No. 98-37508-L
Chapter 7

Debtor.

OPINION

P. Preston Wilson was appointed interim case trustee in the Chapter 7 bankruptcy case of Custom Security, Inc., on December 21, 1998. On February 1, 1999, Mr. Wilson filed an application seeking to employ Gotten, Wilson & Savory ("GWS"), "an association of attorneys," of which Mr. Wilson is a member, as attorneys for the bankruptcy estate. Mr. Wilson subsequently learned that his associate, Mr. William M. Gotten, previously represented the debtor in a Chapter 11 bankruptcy case. Because Mr. Wilson and Mr. Gotten concluded that this did not present a conflict of interest preventing Mr. Wilson from serving as trustee, Mr. Wilson made no disclosure of the connection between Mr. Gotten and the debtor to the United States Trustee, the Court, or anyone else. Upon learning of the prior representation, the United States Trustee for Region 8 ("U. S. Trustee") filed a "Motion to Remove Panel Trustee From Case And to Disqualify The Law Firm Employed by The Trustee," on November 12, 1999, Document No. 57. After a hearing, the Court granted the motion to remove Mr. Wilson as trustee, but reserved ruling on disqualification of the law firm and any compensation to be awarded to Mr. Wilson or the law firm pending the filing of applications for compensation. *See* "Order Granting United States Trustee's Motion to Remove Panel Trustee From Case And Reserving Ruling on Motion to Disqualify Law Firm Employed by

The Trustee Pending Current Trustee's Application For Trustee Compensation And/or Attorney Fees," January 18, 2000, Document No. 69. The U.S. Trustee appointed George W. Emerson as successor trustee on January 13, 2000. Mr. Wilson filed his application for attorney fees and trustee's commission on March 2, 2000, seeking an award of attorney fees in the amount of $2,252.25 (subsequently amended to $1,952.25), reimbursement of expenses in the amount of $290.90, and a trustee's commission in the amount of $3,075.37. The U.S. Trustee argues that Mr. Wilson's failure to disclose the connection between Mr. Gotten and the debtor renders him ineligible to receive any compensation from the bankruptcy estate. Mr. Wilson argues that he is a disinterested person, and thus was qualified to serve as trustee and attorney in this case, and should be entitled to full compensation. The motion and application came on for trial on April 3, 2000. For the following reasons, the Court holds that Mr. Wilson and GWS are not entitled to compensation from the bankruptcy estate. This is a core proceeding. 28 U.S.C. § 157(b)(2)(A).

I.

On December 18, 1998, the debtor filed a voluntary petition for Chapter 7 bankruptcy. On December 21, 1998, pursuant to 11 U.S.C. § 701(a)(1), Mr. Wilson was appointed interim trustee. Mr. Wilson testified that he reviewed the schedules and statement of financial affairs prepared by the debtor approximately one week prior to the meeting of creditors which was scheduled for January 27, 1999. Due to illness, Mr. Wilson did not conduct this meeting of creditors, but asked another panel trustee, Mr. Richard T. Doughtie, to do so. Mr. Wilson testified that he reviewed the

schedule of creditors filed by the debtor to determine whether he had previously represented any of the debtor's creditors. Mr. Wilson did not, however, provide any information to the other members of his law firm in order to determine whether they had previous contacts with the debtor or any of its creditors. Despite this, on February 1, 1999, Mr. Wilson filed his application on behalf of himself and GWS to serve as attorneys for the estate. Filed with the application was Mr. Wilson's sworn declaration in which the following statements, among others, were said to be true and correct under penalty of perjury:

> 1. I am a Partner of the law firm of GOTTEN, WILSON & SAVORY ("GWS"), and I am the Case Trustee in this matter.
>
> 2. Applicant and other partners and associates of GWS, an association of attorneys, are attorneys at law, duly admitted to practice before this Court and other necessary State and Federal Courts in this jurisdiction.
>
> 3. To the best of my knowledge, information and belief, this law firm and its members are disinterested persons within the meaning of 11 U.S.C. Section 101 and eligible to serve as counsel for the Estate and the Trustee pursuant to the provisions of 11 U.S.C. Section 327(d).
>
> 4. Neither the firm nor any of its members has a prepetition or other claim against the Estate.
>
> 5. Neither the firm nor any of its members has any connection with the debtor or any principal of the debtor. We have not in the past, and I do not plan in the future, to represent any related debtors or principals.
>
> 6. We have not received a retainer from the debtor, the estate, a principal of the debtor or a third party.

> 7. We do not have any interests adverse to the Trustee, the Estate or the debtor.

Declaration of Trustee and Law Firm, February 1, 1999, Document No. 13. The statement was signed by Mr. Wilson as Chapter 7 Trustee and as "Attorney" for GWS. Mr. Wilson acknowledges that he made no inquiry to determine whether statements made on behalf of GWS were true. Mr. Wilson further asserts that references to himself as "partner" and references to other "partners and associates of GWS" were false, because GWS is an association of attorneys, not a partnership. The Court finds that other statements made in the declaration were also false. It is not true that "[n]either the law firm or any of its members has any connection with the debtor or any principal of the debtor." Mr. Gotten clearly had a connection with the debtor, having served as its counsel in a prior Chapter 11 case. For reasons discussed below, the Court further concludes that GWS was not a disinterested person within the meaning of 11 U.S.C. § 101(14), rendering that statement false as well. It is clear, however, that Mr. Wilson did not know that these statements were false at the time he made them.

Mr. Wilson testified that some time subsequent to the meeting of creditors, but before March 4, 1999 (the date that the debtor's assets were sold at auction), Mr. Wilson visited the offices of the debtor and discovered a copy of the confirmed plan from the debtor's previous Chapter 11 case. From this point in time, Mr. Wilson knew of Mr. Gotten's prior representation of Custom Security. Mr. Wilson testified, and Mr. Gotten confirmed, that they had a brief conversation concerning the prior representation, but concluded that it did not raise a conflict of interest.

Consequently, Mr. Wilson took no steps to inform the Court or the U.S. Trustee of Mr. Gotten's prior representation of the debtor. Specifically, Mr. Wilson did not amend his prior sworn declaration.

The U.S. Trustee asserts that on or about July 12, 1999, Cynthia G. Bennett, counsel for the U.S. Trustee, had a conversation with a creditor in which the creditor mentioned that the debtor had previously filed a Chapter 11 petition. Upon investigation, Ms. Bennett determined that the debtor filed a Chapter 11 petition on or about December 8, 1992, under docket number 92-33428, and that the debtor was represented by Mr. Gotten. *See* United States Trustee's Motion to Remove Panel Trustee and to Disqualify the Law Firm Employed by the Trustee, November 12, 1999, Document No. 57, ¶ 2. Ms. Bennett did not testify at the hearing on the motion to disqualify and application for compensation. Mr. Wilson acknowledges, however, that at some point prior to October 7, 1999, the U.S. Trustee asserted that he did not qualify as a disinterested person, was not entitled to serve as trustee and attorney for the trustee, and was not entitled to compensation from the estate. *See* Motion for Instructions, October 7, 1999, Document No. 53, ¶ 7. It was not until October 7, 1999, that Mr. Wilson made the Court aware of the prior representation of Custom Security by Mr. Gotten, when he filed his "Motion For Instructions." The motion was served only upon the U.S. Trustee, and was subsequently withdrawn in the face of the U.S. Trustee's motion to remove Mr. Wilson as trustee, filed November 12, 1999. Mr. Wilson offers no explanation for why he waited until October to file his motion for instructions. The Court finds that Mr. Wilson did so only as a result of the issue being raised by the U.S. Trustee.

The Court conducted a hearing on January 10, 2000, to consider the U. S. Trustee's motion, and ruled that the motion should be granted pursuant to 11 U.S.C. § 324(a), for cause. The Court did not rule on the questions of the law firm's qualification to serve as attorneys for the trustee or compensation to be awarded to the trustee or the law firm because no application for compensation had as yet been filed. Mr. Wilson subsequently filed an application on behalf of himself and GWS. *See* Original Trustee's Final Application to Pay Compensation to Trustee's Attorney and for Trustee's Commission, March 2, 2000, Document No. 81.

Mr. Wilson offers three arguments in support of his application: (1) neither he nor GWS was an interested person, and therefore both he and GWS were eligible to serve the estate as trustee and attorney respectively; (2) even if Mr. Gotten's prior representation of the debtor raises a conflict of interest, Mr. Wilson and Mr. Gotten engaged in no discussions concerning the substance of the prior representation, and Mr. Wilson did not have access to Mr. Gotten's files concerning Custom Security; and (3) because the trustee for a bankruptcy debtor has the ability to waive the attorney/ client privilege, Mr. Gotten is in effect the trustee's counsel, and therefore there can be no conflict.

The U.S. Trustee argues that Mr. Wilson's failure to disclose the connection between Mr. Gotten and the debtor in and of itself should result in disqualification of Mr. Wilson and GWS to serve the estate, and further should result in no compensation being paid to Mr. Wilson. The U.S. Trustee further argues that Mr. Wilson was an interested person, and thus was never qualified for appointment as trustee or retention as counsel. Therefore, Mr. Wilson is prohibited from receiving compensation from the estate.

II.

Under 11 U.S.C. § 701(a)(1), the U.S. Trustee is authorized to appoint "one disinterested person that is a member of the panel of private trustees established under section 586(a)(1) of title 28 . . . to serve as interim trustee in the case." If another trustee is not elected at the meeting of creditors, the interim trustee serves as trustee in the case. *See* 11 U.S.C. § 702(d). No trustee was elected by the creditors in the case of Custom Security. Mr. Wilson was appointed to the panel of private trustees for this judicial district pursuant to an application that he submitted to the U.S. Trustee in December of 1990. That application contains the following relevant limitations:

> BY SIGNING THIS APPLICATION, YOU ARE:
>
> 1) representing that, as to any case in which you accept appointment, you have no biases or prejudices which would impede your ability to administer the case fairly;
>
> 2) agreeing to comply with such policies, guidelines, and directives as the Executive Office for U.S. Trustees and the United States Trustee for the district in which you seek appointment has issued or may issue.

Trial Exhibit 2. The application was signed by Mr. Wilson on December 12, 1990, under penalty of perjury. At trial, the U.S. Trustee introduced a portion of the *Handbook for Chapter 7 Trustees* promulgated by the Executive Office of the United States Trustees related to conflicts of interest. It provides:

> C. CONFLICTS OF INTEREST
>
> A trustee must be knowledgeable of § 701(a)(1), § 101(14), and § 101(31), and must decline any appointment in which

> the trustee has a conflict of interest or lacks disinterestedness. If a trustee discovers a conflict of interest or lack of disinterestedness after accepting the appointment, the trustee should immediately file a notice of resignation in the case.
>
> In order to address conflicts of interest, the trustee must:
>
> 1. Review each case assigned as soon as possible after appointment, but in any event prior to the § 341(a) meeting, for actual or potential conflicts, including prior representations of either the debtor or any creditors;
>
> 2. Advise the United States Trustee in writing of any such actual or potential conflicts upon becoming aware of them;
>
> 3. Disclose any potential conflicts on the court record or at the § 341(a) meeting, or both on the court record and at the § 341(a) meeting; and
>
> 4. Decline any appointment or immediately resign if there is an actual conflict or lack of disinterestedness.

Trial Exhibit 3.

A.

The U.S. Trustee asserts that Mr. Wilson failed to comply with the U.S. Trustee's guidelines by failing to conduct an adequate conflicts check and failing to notify the U.S. Trustee immediately upon learning of a potential conflict of interest. In response, Mr. Wilson asserts that the United States Trustee handbook does not have the force of law, but merely contains the interpretations of

the United States Trustees. Thus, Mr. Wilson apparently asserts he was not bound by the Handbook for Chapter 7 Trustees. In the alternative, Mr. Wilson asserts that he complied with the guidelines in the case of Custom Security when he reviewed the debtor's schedules and statement of financial affairs prior to the § 341(a) meeting. The Court is not persuaded by either argument.

While it is true that the United States Trustee handbook does not have the force of law, it is nevertheless binding upon panel trustees, such as Mr. Wilson, who voluntarily agree to abide by it. Mr. Wilson agreed to be bound by the guidelines when he submitted his application for appointment to the panel of trustees. Thus Mr. Wilson agreed to perform a conflicts check as soon as possible after receiving an assigned case, and agreed to notify the U.S. Trustee in writing of any actual or potential conflicts upon becoming aware of them. Mr. Wilson argues that he fulfilled his duties to perform a conflicts check by reviewing the debtor's schedules and statement of financial affairs. Mr. Wilson believes that this was adequate. The Court does not agree.

Even if the Court were to agree that Mr. Wilson adequately complied with the requirement of a conflicts check, Mr. Wilson clearly did not comply with the requirement that he notify the U.S. Trustee in writing of any actual or potential conflicts upon becoming aware of them. Mr. Wilson knew at least by March 5, 1999, of Mr. Gotten's prior representation of the debtor. Whether or not this connection is determined to raise an actual conflict of interest in no way obviates the need for its disclosure. Mr. Wilson and Mr. Gotten unilaterally determined that no conflict existed. This was not their determination to make. In response to questions from the Court, Mr. Wilson indicated that he "did not know" whether he would have accepted the appointment had he known from the

beginning of Mr. Gotten's prior representation of the debtor, and that he affirmatively would not have accepted that appointment if he, rather than Mr. Gotten, had represented the debtor. Mr. Wilson's very uncertainty about the potential for conflict raises a requirement of disclosure. It is only through full disclosure of all potential conflicts that the U.S. Trustee, the creditors and ultimately the Court can determine whether or not an individual is eligible to serve as trustee in a particular case. The Court agrees with the U.S. Trustee that, "[t]he conflict check is particularly important in an asset case, such as this one, to ensure the integrity of the system, to avoid any appearance of impropriety and to ensure that all parties to the case are treated fairly and perceive that they have been treated fairly." United States Trustee's Memorandum of Authorities in Support of Motion to Remove Trustee from Case and to Disqualify the Law Firm Employed by the Trustee, December 9, 1999, Document No. 62, pp. 4-5.

Returning now to the question of whether Mr. Wilson's conflict check was adequate, the Court notes first that it is foolhardy to rely only upon one's memory to determine whether a conflict of interest exists. Mr. Wilson did not compare the debtor's schedule of creditors to any list, written or electronic, of his clients and former clients. In this way alone his conflict check clearly was inadequate.

The more interesting question presented in this case is whether Mr. Wilson was also obligated to consult the other members of his law firm regarding any possible interest as well. As a potential trustee, Mr. Wilson would be obligated to do so if a trustee is prevented from serving in a particular case because of an interest held by one of the trustee's associates. The Bankruptcy Code

requires that the trustee be a "disinterested person that is a member of the panel of private trustees." 11 U.S.C. § 701(a). The Bankruptcy Code does not contain a per se rule imputing the disqualifying conflicts from one member of a professional association to another *(see Vergos v. Timber Creek, Inc*., 200 B.R. 624, 627 (W.D. Tenn. 1996); *In re Creative Restaurant Management, Inc*., 139 B.R. 902, 911 (Bankr. W.D. Mo. 1992)), nor does the United States Trustee's handbook contain a per se rule requiring the imputation of conflicts of interest. The Bankruptcy Code does provide that a person is not disinterested who has "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 for any other reason." 11 U.S.C. § 101(14)(E). To have "an interest materially adverse to the interest of the estate of any class of creditors" means "(1) to possess or assert any economic interest that would tend to lessen the value of the bankruptcy estate or that would create an actual or potential dispute in which the estate is a rival claimant; or (2) to possess a predisposition under circumstances that render such a bias against the estate." *In re Roberts*, 46 B.R. 815, 816 (Bankr. D. Utah 1985), *aff'd in part, modified in part, and rev'd in part,* 75 B.R. 402 (D. Utah 1987); *see Roger J. Au & Son v. Aetna Ins. Co.,* 64 B.R. 604 (N.D. Ohio 1986) (quoting *Roberts*); *In re Professional Dev. Corp.,* 140 B.R. 467, 473 (W.D. Tenn. 1992) (same).

Under the *Roberts* definition, it is clear that the relationship between a professional's associate or relative and the debtor or one of the debtor's creditors can result in a disqualifying conflict. For example, a person could not serve as trustee for the estate of a debtor who was represented by the trustee's law firm. A person could not serve as trustee in a case in which his law

firm represented the major secured creditor. A person could not serve as trustee in a case in which his spouse represented the debtor or a creditor of the debtor. In each of these examples, a person cannot serve as trustee because of his relationship to another party who in turn is related in some way to the debtor. The potential trustee's relationship could create a "predisposition under circumstances that render such a bias against the estate." Further, these relationships could create an economic interest adverse to the interest of the estate. Each of these examples illustrates the fact that while there is no per se rule requiring the imputation of all conflicts of interest to every member of a professional association, there are circumstances under which a person would be disqualified from serving as trustee because of some relationship of his firm, associate, or relative to the case. These circumstances must be evaluated on a case by case basis, and can only be evaluated if the relationships are fully and completely disclosed. A potential trustee cannot be expected to know all of the relationships between his relatives or professional associates and a debtor. Thus implicit in the requirement that a potential trustee perform a conflicts check as soon as possible after receiving an assignment from the U.S. Trustee is a requirement that the conflicts check be designed to discover all relationships and connections that could potentially disqualify that person from serving as trustee. Mr. Wilson's simple review of the schedules and statement of financial affairs was not adequate to disclose all potential conflicts of interest; thus Mr. Wilson did not comply with the United States Trustee's guidelines. Had he done so, he would have discovered Mr. Gotten's prior representation of the debtor before the meeting of creditors. He then would have been under a duty to disclose this relationship to the U.S. Trustee and would have declined the appointment, or asked for a

determination by the Court of his eligibility to serve as trustee before he had invested substantial time in the administration of the debtor's estate.

B.

The Court next turns to the question of whether Mr. Wilson was ever qualified to serve as trustee in this Chapter 7 case. In doing so, the Court necessarily will consider the qualification of GWS to serve as attorneys for the trustee. The Bankruptcy Code requires that the trustee be disinterested. Mr. Wilson correctly asserts that if he is not disinterested, it can only be by virtue of section 101(14)(e) because he does not fit within any of the other categories of interested persons within that definition.[1] The U.S. Trustee asserts that Mr. Gotten is an interested person, and that the interest of Mr. Gotten should be imputed to Mr. Wilson.

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[1] 11 U.S.C. § 101(14) provides in its entirety:

(14) "disinterested person" means person that –

(A) is not a creditor, an equity security holder, or an insider;

(B) is not and was not an investment banker for any outstanding security of the debtor;

(C) has not been, within three years before the date of the filing of the petition, an investment banker for a security of the debtor, or an attorney for such an investment banker in connection with the offer, sale, or issuance of a security of the debtor;

(D) is not and was not, within two years before the date of the filing of the petition, a director, officer, or employee of the debtor or of an investment banker specified in subparagraph (B) or (C) of this paragraph; and

(E) does not have 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 an investment banker specified in subparagraph (B) or (C) of this paragraph, or for any other reason.

Section 323 of the Bankruptcy Code provides that the trustee in a bankruptcy case is a "representative of the estate." As such, the trustee is a fiduciary of the estate for the benefit of the creditors and other parties in interest. *See In re Jack Greenberg, Inc.*, 189 B.R. 906, 910 (Bankr. E.D. Penn. 1995) (the trustee is a fiduciary and intended to be independent). The fiduciary duty of the trustee runs to shareholders as well as to creditors. *Commodity Futures Trading Commission v. Weintraub*, 471 U.S. 343, 354, 105 S. Ct. 1986, 1994, 85 L.Ed.2d 372 (1985). The trustee does not represent the debtor and does not owe the debtor a fiduciary duty. 3 LAWRENCE P. KING, COLLIER ON BANKRUPTCY ¶ 323.02[1], p. 323-4 (15th rev. ed. 1999) (citing *In re Bashour*, 124 B.R. 52 (Bankr. N.D. Ohio 1991)). The trustee in a chapter 7 bankruptcy case "must adhere to the strictest letter of the law in all his dealings with respect to the estate." *In re I.D. Craig Service Corp.*, 138 B.R. 490, 501 (Bankr. W.D. Pa. 1992). A chapter 7 trustee cannot serve with a disabling conflict of interest. *Jack Greenberg*, 189 B.R. at 911.

Mr. Gotten represented the debtor in possession in the prior Chapter 11 case. The debtor in possession has substantially all the rights, powers and duties of a trustee serving in a chapter 11 case. *See* 11 U.S.C. § 1107(a). Even though the debtor in possession is a fiduciary for creditors, counsel for the debtor in possession owes a duty of loyalty to and takes instruction from management of the debtor. If a court ordered the appointment of a trustee in a Chapter 11 case, it seems readily apparent that counsel for the debtor in possession would be prohibited from serving as trustee. The Bankruptcy Code specifically provides that a trustee may not employ an attorney who has represented a debtor to represent the trustee in conducting the case. *See* 11 U.S.C. § 327(e). The

drafters of the Bankruptcy Code apparently felt it unnecessary to add that an attorney who had represented the debtor could not himself serve as trustee. There are no time limitations set forth in section 327(e). Thus if an attorney represented a debtor at any time, he is prohibited from serving as trustee and from generally representing a trustee for that debtor's estate. The Court concludes that Mr. Gotten would have been ineligible to serve as trustee for Custom Security and was ineligible to serve as attorney for the trustee.

The U.S. Trustee asserts that if Mr. Gotten is ineligible to serve as trustee for Custom Security, Mr. Wilson is also ineligible to serve because of his association with Mr. Gotten. Mr. Wilson strongly disagrees, asserting that he was not associated with Mr. Gotten during Custom Security's Chapter 11 case, there were no substantive conversations between himself and Mr. Gotten concerning Custom Security, and he had no opportunity to have access to Mr. Gotten's files. Mr. Wilson argues further that, as trustee he controls the attorney-client privilege for Custom Security and thus could compel Mr. Gotten to provide privileged information to him.

The U.S. Trustee asserts that Mr. Gotten's conflict of interest should be imputed to Mr. Wilson pursuant to Disciplinary Rule 5-105(D) of the Tennessee Code of Professional Responsibility which provides that "if a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, associate, or any other lawyer affiliated with that lawyer or that lawyer's firm, may accept or continue such employment." The U.S. Trustee's memorandum presents a very thorough discussion of the application of this rule and effectiveness of a screening mechanism to cure the conflict of interest. The Court does not here decide whether

the Rules of Conduct apply to trustees in bankruptcy who may be, but need not be, attorneys because the Court believes that the nature of the conflict of interest in this case compels disqualification of Mr. Wilson based upon § 101(14)(E).

The nature of the conflict of interest in this case is not amenable to being resolved through a screening mechanism. The Court is not concerned with protecting the confidences of the debtor, but rather with preserving the impartiality and the appearance of impartiality of the trustee. The trustee is the representative of the estate, and is charged with liquidating all assets of the estate, including any claims against insiders. The creditors should not be concerned that the trustee will be influenced not to take action against insiders as the result of Mr. Gotten's prior association with the debtor and its owners. No screening mechanism will protect against this conflict. It arises from the relationship between Mr. Wilson and Mr. Gotten, and Mr. Gotten's prior relationship with the debtor. Mr. Wilson takes pains to explain that, despite the statements to the contrary in his affidavit, he and Mr. Gotten are not in fact partners. The Court does not doubt that Mr. Wilson has testified truthfully about the financial relationships between Mr. Gotten and himself. Nevertheless, Mr. Wilson and Mr. Gotten hold themselves out to the world, and indeed to the Court in Mr. Wilson's affidavit, as a "law firm." Further GWS is not a large law firm where one member might have no idea of what another is doing. Rather, GWS is a firm of three attorneys who share a relatively small office suite. The creditors are entitled to an independent trustee.

There is no question here of choice of counsel or election of a particular trustee. *Cf. Timber Creek*, 200 B.R. at 627 ("The debtor's right to choose qualified counsel should be disturbed only in

the rarest cases."); *Jack Greenberg*, 189 B.R. at 913 (elected trustee would not be removed for failing to disclose relatively immaterial conflict of interest where there was evidence of creditor's continued support for trustee and trustee's removal could imperil liquidation). Mr. Wilson was but one member of a panel of trustees from which the U.S. Trustee could make her appointment in this case. Mr. Wilson has no special qualification or expertise to serve as trustee in this case.

Mr. Wilson argues that no creditor has in fact objected to his service in this case. This does not change the Court's analysis for the integrity of the bankruptcy system requires strict adherence to the requirement of disinterestedness.

Mr. Wilson was not eligible to serve as trustee for Custom Security, and Mr. Gotten and the law firm of GWS were not eligible to serve as attorneys for the trustee.

C.

The court now turns to the question of compensation to be paid to Mr. Wilson and GWS. Mr. Wilson has requested a trustee's commission in the amount of $3,075.37, attorney fees in the amount of $1,952.25, and reimbursement of expenses in the amount of $290.90. The Court has concluded that Mr. Wilson (1) failed to perform an adequate conflicts check; (2) failed to disclose Mr. Gotten's prior representation of the debtor when he learned about it; (3) filed a false affidavit in connection with the application to employ GWS; (4) failed to correct the affidavit when he learned that it was false; and (5) was never qualified to serve as trustee for Custom Security. Under these circumstances the Court is without discretion to award Mr. Wilson any compensation or reimburse him for any expenses from the debtor's estate.

11 U.S.C. § 326(a) provides:

> In a case under chapter 7 or 11, the court may allow reasonable compensation under section 330 of this title for the trustee's services, payable after the trustee renders such services....

Subsection (d) of section 326 provides:

> The court may deny allowance of compensation for services or reimbursement of expenses of the trustee if the trustee failed to make diligent inquiry into facts that would permit denial of allowance under section 328(c)[2] of this title or, with knowledge of such facts, employed a professional person under section 327 of this title.

Mr. Wilson was never qualified to serve as trustee in this case. The facts that prevent him from serving as trustee should have been discovered by him prior to the meeting of creditors, and were in fact discovered by him within three months after the case was filed. In an analogous situation, the Sixth Circuit has held that the bankruptcy court is without discretion to approve compensation to a professional who was not disinterested at the time of his appointment. *See In re Federated Dept. Stores*, *Inc.,* 44 F. 3d 1310, 1319 (6th Cir. 1995). If it is possible that there are degrees of disinterestedness, then the case trustee should be held to a higher standard of disinterestedness than a professional employed by the trustee. It would be illogical and imprudent

[2] 11 U.S.C. § 328(c) provides:

(c) Except as provided in section 327(c), 327(e), or 1107(b) of this title, the court may deny allowance of compensation for services and reimbursement of expenses of a professional person employed under section 327 or 1103 of this title, such professional person is not a disinterested person, or represents or holds an interest adverse to the interest of the estate with respect to the matter on which such professional person is employed.

to award compensation to an individual trustee who should never have been appointed trustee. Even if the Court had discretion to award trustee compensation to an individual who was never qualified to serve as trustee, it would not do so in this case where the conflict could easily have been discovered prior to the trustee performing any administrative services. Likewise, GWS was never qualified to serve as attorneys for the trustee. Thus the court is without authority to award attorney fees to GWS from this estate. *Id.* Further, although the U.S. Trustee has not objected to Mr. Wilson's being permitted to recover his out of pocket expenses from the estate, the Court must unfortunately conclude that for the same reasons that a commission and attorney fees must be denied to Mr. Wilson, he is not entitled to recover his out of pocket expenses. *See* 11 U.S.C. §§ 326(d); 328(c); and 330(a)(1)(B).

IV.

For the foregoing reasons, the Court will enter its order denying the application of P. Preston Wilson and Gotten, Wilson & Savory for trustee commission, attorney fees, and expenses. The Court feels it important to state that the Court does not attribute any intent to harm the estate or deceive the Court to Mr. Wilson. Rather, the Court knows Mr. Wilson to be an attorney of good character and an important member of the panel of trustees in this district. The Court believes that Mr. Wilson used poor judgment when he decided not to bring Mr. Gotten's prior representation of

the debtor to the Court's attention. The Court does not intend that its ruling be viewed as a sanction of Mr. Wilson, but rather as the unfortunate result of this error in judgment.

BY THE COURT

____
JENNIE D. LATTA
United States Bankruptcy Judge

Date: _______________________

cc: Cynthia G. Bennett
P. Preston Wilson
George W. Emerson, Trustee
Martin B. Daniel