THE STATE BAR OF CALIFORNIA

COMPLAINT FORM
Read instructions before filling in this form.

Date 12-28-05

(1) Your name and address David P. O'Donnell, 72 Van Reipen Avenue, Suite 37
Jersey City, NJ 07306

(2) Telephone number: Residence 917-553-7899 (cell) Work 201-659-0209

(3) The name, address and telephone number of the attorney being complained about. (See note below.)
Joshua M. Mester, Sidney P. Levinson, Steve Mitchell, James O. Johnston, Linda A. Kontos, Joshua D. Morse, Karen L. Kupetz, Michael A. Morris, all of whom are present or former attorneys with the firm Hennigan, Bennett & Dorman LLP, 601 South Figueroa Street, Suite 3300, Los Angeles, CA 90017, phone # 213-625-390

(4) Have you or a member of your family complained about this attorney previously?
Yes ____, No X___. If yes, please state to whom the previous complaint was made, its approximate date and disposition.
I have not previoulsy complained about H&B to the CA Bar. I have alleged misconduct on the part of H&B in court filings (5/3/03); the court determined the allegations of misconduct on the part of H&B were not relevant to the issue before it.

(5) Did you employ the attorney? Answer yes or no and, if "yes," give the approximate date you employed him or them and the amount, if any, paid to him.
No.

(6) If your answer to 5 above is "no," what is your connection with the attorney? Explain briefly.
I am President of Next Factors, Inc., a creditor in Aureal, Inc.'s Chapter 11 bakruptcy case.
The named attorneys in this complaint served as reorganization counsel for Aureal, Inc.

(7) Write out on a separate piece of paper and send-with this form a statement of what the attorney did or did not do that you are complaining about. Please state the facts as you understand them. Do not include opinions or arguments. If you employed the attorney, state what you employed him to do. Sign and date such separate piece of paper. Further information may be requested. (Attach copies of pertaining documents.)

(8) If your complaint is about a law suit, answer the following, if known:
a. Name of court (For example, Superior Court or Municipal - in what county)
United States Bankruptcy Court, Northern District of California
b. Title of the suit (For example, Smith against Jones).
In re Aureal, Inc. ("Aureal") [a Chapter 11 bankruptcy case]
c. Number of the suit No. 00-42104 T
d. Approximate date the suit was filed April 5, 2000
e. If you are not a party to this suit, what is your connection with it? Explain briefly.
I am President of Next Factors, Inc., a creditor in this bankruptcy case.

(9) Size of law firm complained about (*) 1 Attorney ___ 2 - 10Attorneys ___ 11 + Attorneys X___ Don't know ___

NOTE: If you are complaining about more than one attorney, write out the information about each in answer to questions 3 through 8 above on separate sheets if necessary. Answers to questions 3-8 apply to each named attorney.

Mail to:
Office of the Chief Trial Counsel/Intake
State Bar of California
1149 South Hill Street
Los Angeles, California 90015-2299

(*) **Section 6095.1 of the Business and Professions Code mandates that the State Bar compile statistics concerning the size of the attorney's law firm – solo practitioner, small law firm (2-10 attorneys) and large law firm (11+ attorneys).**

Signature _____

December 28, 2005

Office of the Chief Trial Counsel/Intake
State Bar of California
1149 South Hill Street
Los Angeles, California 90015-2299

RE: California Bar Complaint Against Members of Hennigan, Bennett & Dorman LLP as Reorganization Counsel for Aureal, Inc. and Adverse Counsel for Oaktree.

Dear Chief Trial Counsel, California Bar:

This is my answer to question #7 on the accompanying California Bar ("Bar") Compliant Form against the named California-licensed attorneys ("CA Attorneys"), all of whom are present or former attorneys with the firm Hennigan, Bennett & Dorman LLP ("H&B"), in your state.

1.0 Nature of Complaint

The sole concern of this complaint is the CA Attorney's apparent failure to adhere to the California Bar Rule 3-310 which requires attorneys to obtain written informed consent of each client in circumstances where the interests of those clients are adverse to each other, in order to avoid the representation of adverse interests of those clients. The apparent failure to act in accordance with CRPC 3-310 is evidenced by specific events surrounding the initial retention of H&B by Aureal. It further apparently resulted in the impairment to Next Factors ("Next") and other unsecured creditors in the Aureal case, as discussed in section *2.9 Apparent Harm to Next and Other Unsecured Creditors*.

I complain that while the circumstances requiring attorneys to obtain written informed consent were present in the Aureal case, it appears that H&B neither obtained the required written informed consent nor obtained a blanket waiver that the conflicted parties could knowingly and intelligently enter into. I further complain that any consent obtained by H&B must follow a written disclosure of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client[1], in accordance with CRPC 3-310(A).

[1]This complaint is in regards to the apparent failure of H&B to obtain a written informed consent from their concurrent adverse clients: Aureal, the debtor-in-possession; Oaktree and the Oaktree Funds, the largest creditor in the Aureal case, as detailed in section *2.3 Adverse Representation (CRPC 3-310)* of this complaint; and the Creditors Committee as detailed in section *2.4 Relevance of CRPC 3-310 to CA Attorneys as Creditors Committee Fiduciary*, with respect to the initial retention of H&B by Aureal.

First I will set out what I believe to be the relevant portion of the California Rules of Professional Conduct ("CRPC"), followed by a brief note on ethics opinions, laws, rules, opinions of California courts, and standards regarding disclosure requirements of any actual or potential conflict under bankruptcy law that I ask to be considered when evaluating the conduct that forms the basis of this complaint; the apparent failure to obtain written informed consent at the outset of the Aureal case as required by CRPC 3-310. I do not know whether any other CRPC requirements may also be connected with the particular facts I set out below.

1.1 CRPC 3-310

The CA Attorneys apparently violated California Bar Rule 3-310 by failing to obtain written informed consent of each client, and other parties entitled to such related disclosure. This apparent failure would have occurred on the initial retention of H&B in the Aureal case, and in every subsequent instance when new potential or actual adverse issues arose between clients, as discussed in sections *2.3 Adverse Representation* and *2.8 Failure to Seek Renewed Consent*.

Rule 3-310. Avoiding the Representation of Adverse Interests.

(A) For purposes of this rule:

(1) "Disclosure" means informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client;

(2) "Informed written consent" means the client's or former client's written agreement to the representation following written disclosure;

(B) A member shall not accept or continue representation of a client without providing written disclosure to the client where:

(1) The member has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; or

(3) The member has or had a legal, business, financial, professional, or personal relationship with another person or entity the member knows or reasonably should know would be affected substantially by the resolution of the matter; or

(C) A member shall not, without the informed written consent of each client:

(3) Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.

1.2 Bankruptcy Proceedings

The need for full disclosure, as a prerequisite to valid consent among conflicted parties, is an integral element of CRPC 3-310 and the prime concern of this complaint. It is a necessary element of federal bankruptcy practice as well; and central to the context in which the conduct complained of takes place.

Full disclosure is of paramount import because it enables creditors and the US Trustee to be informed of the facts necessary to determine whether they should object to the employment of a debtor's attorney. Such possible objection to debtor's retention of an attorney by creditors or the US Trustee is provided for within 11 U.S.C. 327(a) and (c):

11 USC § 327. Employment of professional persons

(a) Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

(c) In a case under chapter 7, 12, or 11 of this title, a person is not disqualified for employment under this section solely because of such person's employment by or representation of a creditor, unless there is objection by another creditor or the United States trustee, in which case the court shall disapprove such employment if there is an actual conflict of interest.

The statute does not automatically cause a conflicted attorney to be disqualified as debtor's counsel, but rather requires disapproval of such employment if an actual conflict exists, after there has been an "*objection by another creditor or the United States trustee*". This begs the question: <u>How will another creditor or the United States trustee know that an objection should be made?</u>

The answer to this question lies in part with the CA Attorneys requirements of CRPC 3-310: the full disclosure required by this rule provides another creditor or the United States trustee with the information needed to determine if an objection should be made. This determination would be based on knowledge of an actual or apparent lack of

disinterestedness[2] or holding of any interest, or representing any interest adverse to the bankruptcy estate. Such a determination is dependent upon the disclosure provided to the court by the appointed lawyer or firm.

A full written disclosure and informed consent required by CRPC 3-310 thereby helps protect the members of the public who are creditors in bankruptcy proceedings in California, while further engendering confidence in the legal system by ensuring that bankruptcy lawyers provide the broad[3], full[4], and candid disclosure of all facts and connections which may be relevant in determining their eligibility for employment under § 327. Who then must come forward with the information concerning the conflict?

It is the duty of the attorney to make full disclosure of the conflict in a meaningful manner[5]. This is so regardless of the legal arena within which a conflict arises, whether it is bankruptcy or other law. An effective consent to waive a conflict must be in writing, and must fully inform the client[6] about the nature and extent of the conflict.

2.0 Facts to My Understanding

2.1 About Next Factors

Next is a claims trader. Claims trading has become "big business" and has attracted a wide variety of players. However, as the scope of the claims trading activity has increased, so too has the potential for corrupt practices and actions involving the professionals retained in those related proceedings. Despite the rampant claims trading

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[2] In re Sullivan, 1992 U.S. Dist. LEXIS 3954, at *14 (E.D. Pa. 1992) ("It is not sufficient that the trustee and his counsel actually be disinterested; the appearance of interestedness must also be avoided").

[3] *See* Diamond Lumber v. Unsec'd Creditors' Comm., 88 B.R. 773, 777 (N.D. Tex. 1988) (noting that the disclosure duty is so broad because the court, rather than the attorney, must decide whether the facts constitute an impermissible conflict).

[4] *See* In re Bolton-Emerson, 200 B.R. 725, 731 (D. Mass. 1996); In re Blinder, Robinson & Co., 131 B.R. 872 (cautioning that, in bankruptcy cases, full disclosure of all potential adverse interests should be a principle of first magnitude).

[5] In re California Canners and Growers (Bkrtcy.N.D.Cal. 1987) 74 B.R. 336. *See also* Image Technical Services, Inc. v. Eastman Kodak Company (N.D. Cal. 1993) 820 F. Supp. 1212, 1217. *See also* Schmitz v. Zilveti (9th Cir. 1994) 20 F.3d 1043, 1048-1049 (a lawyer has a duty to investigate for his own potential conflicts of interest).

[6] *See* Image Technical Services, Inc. v. Eastman Kodak Company (N.D. Cal. 1993) 820 F. Supp. 1212, 1216-1217 (Consent to waive a conflict under CRPC 3-310 was not effective where it was not in writing and where the client was not informed (i) how the proposed representation would be adverse to the client's interest, (ii) that the law firm was actually going to appear on a brief against the client or (iii) of the potential exposure to the client.).

involved in large bankruptcy cases, there are few precautions in place to avoid corrupt practices and actions involving bankruptcy professionals.

Next is engaging itself in the national debate for federal bankruptcy reformation as a result of the harm that Next and similarly situated creditors have as a result of a number of such practices. Our first area of focus relates to state bar ethical requirements of bankruptcy lawyers in connection to their disclosure requirements under federal bankruptcy practice.

2.2 About H&B

A substantial portion of H&B's business involves the representation of large corporate 11 debtors. The CA Attorneys named in this complaint served as reorganization counsel for Aureal, Inc.

2.3 Adverse Representation (CRPC 3-310)

H&B engaged in concurrent representation of the debtor and an entity which was both the secured creditor and majority shareholder in the Aureal case. The CA Attorneys apparently did so without adhering to the requirements of CRPC 3-310. The employment began with Aureal, Inc, filing their "Application Of Debtor And Debtor In Possession For Authority To Employ Hennigan & Bennett As Reorganization Counsel" on April 5, 2000 with the US Bankruptcy Court for the Northern District of California attached as Exhibit A (the "Application"), and the CA Attorney James O. Johnston Declaration in support of that Application on April 5, 2000, attached as Exhibit E (the "First Declaration").

The First Declaration disclosed that H&B was representing an affiliate of the largest secured creditor and shareholder. The First Disclosure further informed the Court about an unrelated court case in which H&B was serving as counsel for Oaktree Capital Management, LLC ("Oaktree"). The CA Attorney's were thereby concurrently serving as adverse counsel for a firm that was affiliated with the largest creditor and equity holder in the case, the Oaktree Funds. The information in this declaration clearly required the CA Attorneys to seek written informed consent of each client. A subsequent declaration by CA Attorney Johnston provided new disclosure.

On April 13, 2000, a Supplemental Declaration of CA Attorney James O. Johnston was filed with the court. This declaration provided additional information about

H&B's representation of Oaktree attached as Exhibit B (the "Oaktree Disclosure"). The information in this declaration, omitted from the First Declaration, clearly required the CA Attorneys to seek, for the second time, written informed consent of each client.

The Oaktree Disclosure informed the court that Oaktree was an affiliate of, related to, or manager of various funds (the "Oaktree Funds") that asserted secured claims against Aureal, Inc. in the amount of approximately $18,151,739.00. This amount constituted the majority of the liabilities of the Aureal. An enumeration of the entities constituting the Oaktree Funds was also disclosed.

The Oaktree Funds represented 8 separate entities: 1) OCM Opportunities Fund II, L.P., 2) PCW Special Credits Funds IIIb, 3) TCW Special Credits Trust, 4) TCW Special Credits Trust IIIb, 5) The Board of Trustees of the Delaware State Employees' Retirement Fund, 6) Weyerhauser Company Master Retirement Trust, 7) Columbia/HCA Master Retirement Trust, and 8) OCM Administrative Services II, LLC. The Oaktree Disclosure represented that one or more of the Oaktree Funds were affiliates of, related to, or managed by Oaktree. The conflicts that did or could arise between Aureal and Oaktree required that the CA Attorneys obtain the informed written consent required in CRPC 3-310 for each of their clients affected by this actual or potential adversity: Aureal, Oaktree, and each of the Oaktree Funds.

2.4 Relevance of CRPC 3-310 to CA Attorneys as Creditors Committee Fiduciary

Aureal was the debtor-in-possession ("DIP") in their bankruptcy case, a fact which impacts their attorney's requirements under CRPC 3-310[9]. This impact stems from the special trustee powers that a DIP enjoys under the bankruptcy code, and the attached responsibility the DIP inherits to act as a fiduciary for creditors. A lawyer who undertakes to fulfill instructions of the client in cases where the client is a fiduciary may actually assume a relationship not only with the client but also with the client's intended beneficiaries[10]. In this way, the CA Attorneys owe a duty to third-party creditor beneficiaries when representing a debtor-in-possession with fiduciary duties. Therefore, the CA Attorneys should have provided a written disclosure to the Creditors Committee.

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[9] A debtor-in-possession in Chapter 11 bankruptcy cases acts as the bankruptcy trustee in the case, with all of the attendant duties of a fiduciary toward each creditor in the case. In re Kelton Motors Inc., 109 B.R. 641, 645 (Bankr. D. Vt. 1989). *Cf*. In re Grabill Corp., 113 B.R. at 970.

[10] *See* Lucas v. Hamm (1961) 56 Cal.2d 583, 15 Cal.Rptr. 821, 364 P.2d 685 (when a lawyer is retained to draft a will, the document's very purpose is to create a benefit for a legatee, and hence a duty is owed to the legatee even though the legatee and the lawyer are not in privity of contract); Morales v. Field, DeGoff, Huppert & MacGowan (1st Dist. 1979) 99 Cal.App.3d 307, 160 Cal.Rptr. 239 (a lawyer representing a trustee assumes a relationship with the beneficiary akin to that between trustee and beneficiary and thus assumes a duty of care toward the beneficiary).

2.5 Facts Illustrating Egregious Nature of Conflict[11]

To the extent that H&B may have failed to adhere to CRPC 3-310 with respect to Aureal, Oaktree, Oaktree Funds, and the Creditors Committee, it is a potential willful breach made more egregious by the surrounding facts and circumstances. I understand that an overview of the factual context in which the possible unethical conduct complained of occurred is not a prerequisite to the applicability of CRPC 3-310. However, this context does illuminate the need to obtain the clients informed written consent in this case[12].

Aureal may have had a cause of action with one or more of Oaktree and the Oaktree Funds, or Aureal may have wanted to subordinate Oaktree or the Oaktree Funds claims behind that of the other creditors in the case, either of which would certainly place the CA Attorney client's interests adverse to those of the debtor. Such a cause of action may be found within the facts surrounding Aureal's entry into bankruptcy. According to the Aureal ex-CEO, Kenneth Kokinakis, as reported by Ziff Davis Media and attached here as Exhibit C (the "Aureal Power Struggle"):

> *"Management hoped to sell to avoid bankruptcy, while the shareholders thought we should hold out for a better deal. So we left"*

According to the Aureal Power Struggle article, there was a management walkout at Aureal involving all eight corporate officers listed in Aureal's annual report. Moreover, four out of the five members of the board of directors also left the company. The sole remaining board member was a principal at Oaktree. At the time, Oaktree held the majority interest in Aureal.

By way of review, we ask the following rhetorical questions: Who was the shareholder holding out for a better deal? Oaktree; Who funded Aureal? Oaktree; Who was left running Aureal prior to filing for bankruptcy? Oaktree; Who became a secured party at the 11th hour? Oaktree; Who made the decision to file for bankruptcy? Oaktree[13].

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[11] "Integrity is the very breath of justice. Confidence in our law, our courts, and in the administration of justice is our supreme interest. No practice must be permitted to prevail which invites towards the administration of justice a doubt or distrust of its integrity." Erwin M. Jennings Co. v DiGenova, 107 Conn. 491, 499, 141 A. 866, 868 (1928).

[12] The text of CRPC 3-310 contains no "material adverse effect" requirement as a prerequisite to the rule's applicability in a case of concurrent adverse representation. Similarly, the rule applies regardless of the CA Attorney's reasonable belief about the lack of adverse effect on the representation of their clients.

[13] Indeed, it would appear to me that Aureal acts as the mere "Alter Ego" of its largest shareholder, sole secured creditor, and sole board member.

Among the potential claims or against Oaktree and the Oaktree Funds, or the defenses to their claims, at the time the CA Attorney's undertook concurrent representation would have been all those based on theories of aiding and abetting, equitable subordination, validity of the security interest, deepening insolvency and fraudulent conveyance ("Lender Issues"). These facts underscore the importance of full disclosure and informed consent of the parties prior to such representation[14]. They also are instructive to the CA Attorneys: any written disclosure of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client would have to include, without limitation, a full disclosure of these Lender Issues, as required by and in accordance with CRPC 3-310(A).

2.6 Blanket Waiver

Any blanket waiver which H&B may have received from Aureal could not serve to contractually circumvent the CA Attorney's obligations to obtain an informed written consent under CRPC 3-310 during the initial retention of H&B by Aureal. The disclosure required must further have conformed to the definition in CRPC 3-310(A). Each of the CA Attorneys has the duty to make a full disclosure of the actual or potential conflicts to their clients, in a meaningful manner[20]. Such disclosure should, at a minimum, include the information as discussed in section *2.5 Facts Illustrating Egregious Nature of Possible CRPC 3-310 Violation*, including, without limitation, the Lender Issues. In this case, the CA Attorneys did obtain from Aureal advance consent to conflicts of interest that presently existed or that might arise in the future. It appears that the CA Attorney's did not, however, obtain the informed written consent prior to obtaining this blanket waiver.

The advanced consent H&B did obtain appears in their Retainer Agreement with Aureal in the form of a "Blanket Waiver" on pages 3 and 4 of the attached Exhibit D (the "Blanket Waiver"). The CA Attorneys knew or should have known that Oaktree/Oaktree Funds were creditors in the Aureal bankruptcy case as they were listed on the proof of service list attached to the Application. Similarly, they would also have been informed as to the Lender Issues. These facts highlight the need for the CA Attorney's to have obtained an informed written consent. However, in accordance with

[14] "A lawyer for the debtor in possession represents the estate and owes duties to the entire creditor body. Because the bankruptcy process involves a competition among all of the creditors and shareholders for a share of a limited pie, all of the creditors' interests are potentially adverse to one another." Christopher W. Frost, *Are you really disinterested? Chapter 11 presents real problems in ethics*, ABA Section of Business Law Today, November/December (1998).

[20] In re California Canners and Growers (Bkrtcy.N.D.Cal. 1987) 74 B.R. 336.

CRPC 3-310, such consent was required *even in the absence of these additional facts* which reflect the egregious circumstances surrounding the apparent failure of the CA Attorney to obtain the informed written consent.

2.7 Apparent Failure to Obtain Informed Written Consent

On April 4, 2000, Aureal executed the H&B retainer agreement and became their client. Exhibit D. Oaktree was on the attached Service List. Exhibit B. H&B was required to obtain a written informed consent before April 4, 2000 between these concurrent adverse clients as required under CRPC 3-310. The only indication available from the bankruptcy court that these clients had consented to the concurrent and adverse representation of Aureal and Oaktree is from the statement of Attorney Johnston: "I am informed by other members of H&B that each of the Debtor, the Oaktree Funds, and Oaktree have consented to H&B's concurrent representation of the Debtor and Oaktree Funds." Exhibit B. In this case, the omitted information is more telling than the proffered hearsay.

Attorney Johnston does not state that he has either fully disclosed the true nature of the adversarial conflicts, including the Lender Issues, or has received written consent to the conflicted representation[23]. No conflict waiver letter or written consent from Aureal, Oaktree, Oaktree Funds, or the Creditors Committee which mentions the Lender Issues was submitted into court, and we have reason to believe that none exists[24]. Indeed, Next made requests for such written waivers with respect to the Oaktree Affiliates to the CA Attorneys and the Liquidating Trustee in this case; Next has yet to receive a response.

A separate violation of CRPC 3-310 may be associated with Attorney Johnston's subsequent statement: "The representation of large corporate chapter 11 debtors, who typically have sizable corporate and institutional creditors, constitutes a substantial portion of H&B's business. In fact, other members of H&B have informed me that H&B currently represents a chapter 11 debtor against which an Oaktree Affiliate also asserts significant secured claims. To the best of my knowledge, no person has asserted that H&B is not disinterested in that case."

Attorney Johnston does not indicate whether or not informed written consent was received in this instance. If such informed written consent was not obtained, then it would appear that this CA Attorney believes the burden of CRPC 3-310 rests not with

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[23] *See, e.g.*, In re Jaeger, 213 B.R. 578, 585-586 (Bankr. C.D. Cal. 1997).

[24] If any such waiver was received from Aureal, it should have been filed with the court.

himself but rather on CA Attorney's clients or opposing parties. This would not be the first instance where a CA Attorney misconstrued CRPC 3-310.

Page four of the Retainer Agreement (Exhibit D) discusses "Relationship Conflicts" involving H&B attorney spouses and other relatives who work at other law firms and companies. The blanket waiver that H&B obtained from Aureal was subject to the disclosure by H&B in the event that "[H&B] determines than any of the relationships likely would lead to a conflict situation." By this language, it appears that H&B again misconstrues CRPC 3-310 as applying to their clients only where the CA Attorney has a reasonable belief that the conflict may have an adverse effect on the representation of a client. On the contrary, CRPC 3-310 applies regardless of the CA Attorney's reasonable belief about the lack of adverse effect a conflict of interest will have on the representation of a client. Next has no knowledge of any H&B Relationship Conflicts, but we assert that if any exist, H&B must obtain the informed written consent required by CRPC 3-310.

2.8 Failure to Seek Renewed Consent

On April 13, 2000, the Oaktree Disclosure was filed with the Court. This supplemental declaration (Exhibit B) was submitted not at the CA Attorney's initiative, but rather in response to concerns raised by the Court at the initial hearing on the Application. In this supplemental declaration, Attorney Johnston discloses the following facts: 1) Oaktree asserts claims against Aureal in the amount of approximately $18M, and 2) the CA Attorneys represent Oaktree in an unrelated action pending in the California Superior Court.

Even if the CA Attorneys had obtained the informed written consent from Oaktree, Oaktree Funds, and the Creditors Committee as required by CRPC 3-310 when first engaging the client, they were required to receive renewed informed written consent as a result of the new facts in the supplemental declaration.[25]

2.9 Apparent Harm to Next and Other Unsecured Creditors

The unsecured creditors in this case were impaired as a result of H&B's apparent breach of their promise made to their concurrent and adverse clients that they "zealously pursue the interests of each of our clients, including in those circumstances in which we represent the adversary of an existing client in an unrelated case." Exhibit D. This harm occurred in at least two separate respects.

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[25] *See, e.g.*, Klemm v. Superior Court, 75 Cal. App. 3d 893, 142 Cal. Rptr. 509, 513 (1977) opining that, once an actual conflict develops, a previous waiver of potential conflicts becomes ineffective). *Cf.* Cal. State Bar Standing Comm. On Prof'l Responsibility & Conduct, Formal Op. 1989-115 (1989) (approving blanket prospective waivers, but requiring a new waiver once a potential conflict ripens into an actual one).

First, the unsecured creditors, Next, and the US Trustee ("Harmed Parties") were harmed by the absence of a disclosure of information relevant and necessary to them in determining whether or not they should object to the employment of H&B by the debtor in this case. Such a right is specifically provided for and fundamental to the bankruptcy code. 11 U.S.C. 327(A). Had H&B obtained the written informed consent of each client after first making a full disclosure of all issues relating to CRPC 3-310, which disclosure would include, at a minimum, the Lender Issues, either in their First Declaration, the Oaktree Disclosure, or to each client, then one or more of the Harmed Parties could have made an objection to the employment of the conflicted CA Attorneys. However, apparently such information was not disclosed and the case was managed in a fashion that resulted in speedy liquidation of debtor assets. The CA Attorneys appear to have either failed to address the Lender Issues or simply resolved all such issues in favor of the wealthier non-liquidating client[26]. In either event, this first harm has resulted in additional harm.

Second, H&B did not retain outside counsel to review Lender Issues. As a result of the management of the case, the unsecured creditors, and Next, were left impaired while the only secured creditor, Oaktree, was paid in full. Had H&B retained outside counsel to review issues where Aureal and Oaktree's interests were adverse, such as involving the Lender Issues discussed above, then an action may have been filed against one or more parties, such as Oaktree, that could have left Next and other creditors unimpaired while the conflicted client, Oaktree, would possibly have been paid less.

A written informed consent in compliance with CRPC 3-310(A), wherein all of the relevant circumstances, such as the Lender Issues, and of the actual and reasonably foreseeable adverse consequences was first disclosed and obtained by H&B, then Next and the other creditors may have been left unimpaired. This consent was required under CRPC 3-310 before April 4, 2000, when H&B retained a concurrent adverse client, and subsequently on April 13, 2000, when the Oaktree Disclosure was made.

[26] The Lender Issues discussed are common in fact situations similar to the one presented in this complaint. However, an attorney may not determine alone whether or not such potential issues may have an adverse effect on the representation of a client. Such an incredulous position would render CRPC 3-310 moot whenever a CA attorney holds a "reasonable belief" about the adverse affect an issue may have for a client.

3.0 Request

Given that H&B's conduct appears to violate the California Rules of Professional Conduct, 3-310, I respectfully request that the Office of the Chief Trial Counsel investigate this matter to see if the CA Attorneys should be subject to sanctions for their actions.

In order to ensure transparency in the Bar investigatory process, and to aid members of the Bar in determining what constitutes a disclosure in conformity with the definition in CRPC 3-310(A) in bankruptcy practice, I would ask that any purported written waiver produced by H&B be made available for public inspection. Further, I ask that H&B provide a complete statement of Relationship Conflicts, available for public inspection.

The simple facts giving rise to the complaint regarding the concurrent adverse representation of H&B and Oaktree appear straight-forward. Significant effort was expended in focusing this complaint solely on that topic in hopes that your investigation could proceed quickly. I look forward to learning about the outcome of your investigation in the near future. Meanwhile, I am available to answer any questions you may have.

Sincerely,

David P. O'Donnell, President

Date: _____

EXHIBIT A

BRUCE BENNETT (SBN 105430)
JAMES O. JOHNSTON (SBN 167330)
JOSHUA M. MESTER (SBN 194783)
HENNIGAN & BENNETT
601 South Figueroa Street, Suite 3300
Los Angeles, California 90017
Telephone: (213) 694-1200
Facsimile: (213) 694-1234

Proposed Reorganization Counsel for
Debtor and Debtor in Possession

UNITED STATES BANKRUPTCY COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

In re AUREAL, INC., d/b/a SILO.COM, f/k/a AUREAL SEMICONDUCTOR, INC., f/k/a MEDIA VISION TECHNOLOGY, INC., a Delaware corporation; Debtor.	Case No. 00 42104 (Chapter 11) **APPLICATION OF DEBTOR AND DEBTOR IN POSSESSION TO EMPLOY HENNIGAN & BENNETT AS REORGANIZATION COUNSEL; DECLARATION OF JAMES O. JOHNSTON IN SUPPORT** [No Hearing Required]

Aureal, Inc., the debtor and debtor in possession herein (the "Debtor"), hereby applies to this Court for the entry of an order, in substantially the form of the proposed order attached hereto as Exhibit A, authorizing it to employ the law firm of Hennigan & Bennett ("H&B") as its reorganization counsel. In support of this Application, the Debtor submits the accompanying Declaration of James O. Johnston (the "Johnston Declaration") and respectfully represents as follows:

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1. On April 3, 2000 (the "Petition Date"), the Debtor commenced its reorganization case by filing a voluntary petition for relief under chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 101-1330 (the "Bankruptcy Code").

2. The Debtor is continuing in possession of its assets and is operating and managing its business as debtor in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

3. The Debtor's business is in the field of digital audio imaging, which is the process of creating a highly realistic audio experience by closely simulating the real world physics of audio. The Debtor has developed a series of audio products based upon its A3D technologies. One of the leading markets for the Debtor's audio products is the personal computer gaming market. As of the Petition Date, the Debtor was integrating its A3D technologies with internet based applications to increase its customer base.

4. On the Petition Date, the Debtor employed approximately 56 employees in offices located in Freemont, California and Austin, Texas. At these offices, the Debtor conducts sales, shipping, production, and research and development efforts.

Services to be Provided by H&B as Reorganization Counsel

5. The Debtor desires to employ H&B as its reorganization counsel in connection with this case on substantially the terms and conditions set forth in the retention agreement attached hereto as Exhibit B (the "Retention Agreement").

6. All attorneys comprising or associated with H&B who will render services in this case are or will be duly admitted to practice law in the Courts of the State of California and in the United States District Court for the Northern District of California. A summary of the experience and qualifications of these attorneys and paraprofessionals of H&B expected to render substantial services to the Debtor is attached hereto as Exhibit C.

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7. Among other things, as indicated in the Retention Agreement, the Debtor requires H&B to render the following types of professional services:

- To advise the Debtor regarding matters of bankruptcy law;
- To represent the Debtor in proceedings or hearings before this Court involving matters of bankruptcy law;
- To assist the Debtor in the preparation of reports, accounts, applications, and orders;
- To advise the Debtor concerning the requirements of the Bankruptcy Code, Bankruptcy Rules, and United States Trustee Guidelines and Requirements relating to the administration of this case and the operation of the Debtor's business; and
- To assist the Debtor in the negotiation, preparation, confirmation, and implementation of a plan of reorganization.

8. As indicated in the Retention Agreement, however, except as set forth in paragraphs 9, 10, and 11 below, the Debtor does not intend for H&B to be responsible for appearances before any court or agency, other than before this Court and the office of the United States Trustee; litigation before this Court with respect to matters which are, in essence, disputes involving issues of nonbankruptcy law; or the provision of substantive legal advice outside of the insolvency area, such as in areas implicating patent, trademarks, intellectual property, corporations, taxation, securities, torts, environmental, labor, criminal, or real estate law. Further, the Debtor does not intend for H&B to be required to devote attention to, form professional opinions as to, or advise the Debtor with respect to their disclosure obligations under nonbankruptcy laws or agreements.

9. The Debtor anticipates that in addition to employing H&B as reorganization counsel, the Debtor will require the services of litigation, corporate, trademark and patent counsel. However, the Debtor does not expect that there will be duplication in the services to be rendered to the Debtor by the separate counsel.

10. The Debtor may, from time to time, request that H&B undertake specific matters beyond the limited scope of the responsibilities set forth above. Should H&B agree in its discretion to undertake any such specific matters, the Debtor seeks authority by this Application to employ H&B for such matters, in addition to those set forth above, without further order of this Court.

11. H&B also has agreed to serve as counsel to the Debtor with respect to certain nonbankruptcy litigation to be commenced on behalf of the Debtor. The terms and conditions of that engagement are set forth in a separate engagement letter, which will be submitted to the Court for approval with the appropriate notice.

H&B's Compensation as Reorganization Counsel

12. H&B has received a retainer of $300,000 for services to be rendered to the Debtor in connection with this chapter 11 case. H&B has deposited the unearned portion of that retainer into a trust account in the name of the Debtor, as a trust fund/security retainer, to secure the payment of H&B's allowed fees and expenses in this case. During the one year period prior to the filing date of the chapter 11 petition, H&B did not receive from the Debtor any other payments for services rendered to the Debtor in connection with this case and the reorganization of its business.

13. H&B has agreed to accept as compensation for its services its retainer and such additional reasonable sums as may be allowed by this Court in accordance with law, based upon the time spent and services rendered, the results achieved, the difficulties encountered, the complexities involved, and other appropriate factors, as set forth in the Retention Agreement. A list of the guideline hourly rates for H&B and of those members of H&B expected to render services to the Debtor is attached hereto as Exhibit "D".

14. No additional compensation will be paid by the Debtor to H&B except upon application to and approval by the Bankruptcy Court after notice and a hearing.

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Disinterestedness

15. To the best of the Debtor's knowledge, based upon the Johnston Declaration, except as they are or have been the attorneys for the Debtor, H&B and all of the attorneys comprising or employed by it are disinterested persons who do not hold or represent an interest adverse to the estates and who do not have any connection with the Debtor, their creditors, or any other party in interest in these cases, or their respective attorneys or accountants, except as stated in the Johnston Declaration.

16. Moreover, to the best of the Debtor's knowledge, based upon the Johnston Declaration, H&B and all of the attorneys comprising or employed by H&B:

(a) are not and have not been an equity security holder or an insider of the Debtor.

(b) are not and have not been an investment banker for any outstanding security of the Debtor.

(c) are not and have not been 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 any security of the Debtor.

(d) are not and have not been a director, officer or employee of the Debtor or of any investment banker for any security of the Debtor.

(e) subject to the disclosures contained in the Johnston Declaration, have no interest materially adverse to the interest of the estate or 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 for any security of the Debtor, or for any other reason.

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18. The name, address and phone number of the person signing this Application on behalf of H&B and the relationship of such person to H&B is:

James O. Johnston, Partner
Hennigan & Bennett
601 S. Figueroa Street, Suite 3300
Los Angeles, California 90017
Telephone: (213) 694-1200

Summary

19. The employment of H&B as the Debtor's reorganization counsel is in the best interest of the estate.

20. The Debtor has served copies of the Application and certain related pleadings and documents on the Office of the United States Trustee, the creditors identified on the lists of creditors holding the twenty largest unsecured claims against the Debtor, and counsel to the Debtor's primary secured lender, Oaktree Capital Management, LLC.

WHEREFORE, the Debtor requests that it be authorized to employ H&B as its reorganization counsel with compensation to be at the expense of the estate in such amount as the Court may hereafter allow in accordance with law.

DATED: April 5, 2000

AUREAL, INC.

By: _____
Steve Mitchell,
Chief Operating Officer

Submitted By:

By: _____
James O. Johnston
Hennigan & Bennett
Proposed Reorganization Counsel for Debtor
And Debtor in Possession

EXHIBIT B

BRUCE BENNETT (SBN 105430)
JAMES O. JOHNSTON (SBN 167330)
JOSHUA M. MESTER (SBN 194783)
HENNIGAN & BENNETT
601 South Figueroa Street, Suite 3300
Los Angeles, California 90017
Telephone: (213) 694-1200
Facsimile: (213) 694-1234

Proposed Reorganization Counsel for
Debtor and Debtor in Possession

UNITED STATES BANKRUPTCY COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

In re AUREAL, INC., d/b/a SILO.COM, f/k/a AUREAL SEMICONDUCTOR, INC., f/k/a MEDIA VISION TECHNOLOGY, INC., a Delaware corporation; Debtor.	**Case No. 00-42104-T11** (Chapter 11) **SUPPLEMENTAL DECLARATION OF JAMES O. JOHNSTON IN SUPPORT OF APPLICATION OF DEBTOR AND DEBTOR IN POSSESSION TO EMPLOY HENNIGAN & BENNETT AS REORGANIZATION COUNSEL** Date: April 17, 2000 Time: 3:30 p.m. Place: Courtroom 201 1300 Clay Street Oakland, CA 94612

I, James O. Johnston, declare:

1. I am a member in good standing of the Bar of the State of California, and I am admitted to practice before, among other courts, the United States District Court for the Northern District of California. I am a partner in Hennigan & Bennett ("H&B"), proposed reorganization counsel for Aureal, Inc., the debtor and debtor in possession (the "Debtor") in the above-captioned bankruptcy case. I make this Supplemental Declaration in further support of the "Application Of Debtor And Debtor In Possession

For Authority To Employ Hennigan & Bennett As Reorganization Counsel" (the "Application") and in response to concerns that I understand to have been raised by the Court at the initial hearing on the Application. Except where otherwise indicated, I have personal knowledge of the matters set forth below and, if called to testify, I would and could competently testify thereto.

2. Based upon my review of the Debtor's books and records, it appears that OCM Opportunities Fund II, L.P., TCW Special Credits Fund IIIb, TCW Special Credits Trust, TCW Special Credits Trust IIIb, The Board of Trustees of the Delaware State Employees' Retirement Fund, Weyerhaeuser Company Master Retirement Trust, Columbia/HCA Master Retirement Trust, and OCM Administrative Services II, LLC (collectively, the "Oaktree Funds") assert secured claims against the Debtor in the amount of approximately $18,151,739 and also that the Oaktree Funds own a majority of the shares of the Debtor. H&B has been informed by the Oaktree Funds that one or more of the Oaktree Funds are affiliates of, related to, or managed by Oaktree Capital Management LLC ("Oaktree").

3. H&B represents Oaktree, on a contingent-fee basis, in an unrelated action entitled Farallon Capital Partners, L.P., et. al. v. Gleacher & Co., Inc. et. al, which action currently is pending in the California Superior Court in Los Angeles as Case Number BC 215260 (the "Farallon Litigation"). The Farallon Litigation involves alleged fraud by the underwriters for a Thai steel company in connection with the issuance of bonds by that Thai steel company. In the Farallon Litigation, Oaktree, as plaintiff, alleges that it was damaged through the purchase of the Thai steel company's bonds, and Oaktree is pursuing remedies against the underwriters.

4. To the best of my knowledge, none of the parties to the Farallon Litigation, other than Oaktree, are parties in interest, or are affiliated with parties in interest, in the above-captioned case in which H&B seeks employment. Also, to the best of my knowledge, the controversies for which H&B represents Oaktree in the Farallon

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Litigation are entirely unrelated to any of the transactions conducted by any of the Oaktree Funds with the Debtor.

5. I believe that H&B is "disinterested" with respect to the Debtor, within the meaning of sections 101(14) and 327 of the Bankruptcy Code, notwithstanding its ongoing representation of Oaktree on the Farallon Litigation.

6. Specifically, as indicated in that Declaration, H&B does not fall within the criteria set forth in subsections (A) through (D) of section 101(14). Moreover, I do not believe that H&B has an interest materially adverse to the interest of the Debtor's estate, or to any class of creditors or equity security holders, for at least the following reasons:

a. As noted above, to the best of my knowledge, none of the parties to the Farallon Litigation, other than Oaktree, are parties in interest, or are affiliated with parties in interest, in the above-captioned case. Moreover, I believe that the controversies for which H&B represents Oaktree in the Farallon Litigation are entirely unrelated to any of the transactions conducted by any of the Oaktree Funds with the Debtor.

b. The Farallon Litigation does not constitute a material percentage of H&B's revenues or overall client base. Specifically, based upon information provided to me from H&B personnel who regularly monitor and administer our books and records, I believe that H&B devoted to the Farallon Litigation only approximately 1.14% of the total hours billed by H&B professionals and employees from March 1, 1999 through February 29, 2000. Thus, I believe that H&B's representation of Oaktree in the Farallon Litigation does not constitute a material portion of H&B's business. The overwhelming majority of H&B's business relates to litigation and bankruptcy matters that do not involve Oaktree or any of its affiliates.

c. I am informed by other members of H&B that each of the Debtor, the Oaktree Funds, and Oaktree have consented to H&B's concurrent representation of the Debtor and the Oaktree Funds.

d. The representation of large corporate chapter 11 debtors, who typically have sizable corporate and institutional creditors, constitutes a substantial portion of H&B's business. In fact, other members of H&B have informed me that H&B currently represents a chapter 11 debtor against which an Oaktree affiliate also asserts significant secured claims. To the best of my knowledge, no person has asserted that H&B is not disinterested in that case.

7. In summary, I believe that H&B is disinterested notwithstanding H&B's representation of Oaktree in the unrelated Farallon Litigation, and I believe that the employment of H&B as requested in the Application is reasonable and appropriate under the circumstances.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 12th day of April, 2000, at Los Angeles, California.

By: _____
James O. Johnston
Proposed Reorganization Counsel for Debtor
And Debtor in Possession

DECLARATION OF SERVICE

I am over the age of eighteen years and not a party to the within action. My business address is Hennigan, Mercer & Bennett, 601 South Figueroa Street, Suite 3300, Los Angeles, California 90017.

On April 13, 2000, I served the following pleading:

SUPPLEMENTAL DECLARATION OF JAMES O. JOHNSTON IN SUPPORT OF APPLICATION OF DEBTOR AND DEBTOR IN POSSESSION TO EMPLOY HENNIGAN & BENNETT AS REORGANIZATION COUNSEL

on the interested parties in this action by placing true copies thereof, enclosed in sealed envelopes, with first-class postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as follows:

See attached Service List

The above-described pleading also was transmitted to the indicated parties set forth above in the manner described below:

By air courier service, for next business-day delivery by

_____

By messenger service, for same-day delivery by hand by

_____

By telecopy, for immediate receipt to those creditors marked with an asterisk.

I declare that I am employed in an office of a member of the bar of this Court, at whose direction the within service was made.

EXECUTED on April 13, 2000, at Los Angeles, California.

Kathryn S. Bowman

Kathryn S. Bowman, Declarant

Debtor:
AUREAL, INC.
Attn: Steve Mitchell
7 Northport Loop West
[illegible]ont, CA 94538

Secured Creditor as Agent:
Oaktree Capital Management LLC
Attn: Richard Masson
333 S. Grand Avenue, 28th Floor
Los Angeles, CA 90071

20 Largest Unsecured Creditor:
UMC Group (USA)
Attn: Tam Kalvin
488 Deguigne Drive
Sunnyvale, CA 94086

20 Largest Unsecured Creditor:
Cadence Design Systems, Inc.
Attn: Steve Mih
555 River Oaks Parkway
San Jose, CA 95134

20 Largest Unsecured Creditor:
Ziff-Davis, Inc.
Attn: Customer Service
File #2082
Los Angeles, CA 90074-2082

[illegible]rgest Unsecured Creditor:
[illegible]orld Communications
Attn: Kevin Greene
PO Box 3700-67
Boston, MA 02241-0767

20 Largest Unsecured Creditor:
Integra-Dyne Corp.
Attn: Ren Condotta
145 King Street, West, Suite 1000
Toronto, ON M5H 1J8
Canada

20 Largest Unsecured Creditor:
Highsoft, Inc.
Attn: Steve Campos
1965 Latham Street
Mountain View, CA 94040-2107

20 Largest Unsecured Creditor:
Orrick, Herrington & Sutcliffe
Attn: Terrence P. McMahon
1020 March Road
Menlo Park, CA 94025

Debtor's Counsel:
Bruce Bennett/Joshua Mester
Hennigan & Bennett
601 S Figueroa St., Suite 3300
Los Angeles, CA 90017

Counsel to Oaktree Capital Mgmt.:
Eric Reimer, Esq.
McDermott, Will & Emory
2049 Century Park East, 34th Floor
Los Angeles, CA 90067

20 Largest Unsecured Creditor:
Flatland Online, Inc.
Attn: Michael K. Powers
2325 Third Street, Suite 215
San Francisco, CA 94107

20 Largest Unsecured Creditor:
KPMG, LLP
Attn: Juan Gonzales
Dept. 0922
PO Box 120001
Dallas, TX 75312-0922

20 Largest Unsecured Creditor:
Houlihan Lokey Howard & Zukin
Attn: Glenn R. Daniel, Managing Director
49 Stevenson Street, 14th Floor
San Francisco, CA 94105

20 Largest Unsecured Creditor:
VIFA-Speak A/S
Stationsvej 5
6920 Videbaek
Danmark

20 Largest Unsecured Creditor:
3DSL
Attn: John Byrne
Blissworth Base Hill
Stoke Road, Busworth
Northants, UK NN73DB

20 Largest Unsecured Creditor:
Hruska Productions Audio, Inc.
Attn: Jennifer Hruska
66 Rear Dudley Street
Arlington, MA 02476

Request For Special Notice:
Orrick, Herrington & Sutcliffe
Attn: Thomas C. Mitchell, Esq.
400 Sansome Street
San Francisco, CA 94111-3143

Office of the U.S.Trustee:
U.S. Trustee
1301 Clay Street, Suite 690N
Oakland, CA 94612

20 Largest Unsecured Creditor:
Ocean Data Products
5th Floor Kader Industrial Bldg.
22 Kai Cheung Road
Kowloon Bay
Kowloon, Hong Kong

20 Largest Unsecured Creditor:
Caesar International, Inc.
Attn: JoJo Estavillo
2860 Zanker Road, Suite 210
San Jose, CA 95134

20 Largest Unsecured Creditor:
Avnet Electronics Marketing
Attn: Judy O'Brien
2105 Lundy Avenue
San Jose, CA 95131

20 Largest Unsecured Creditor:
Finova Technology Finance, Inc.
Attn: Lori P. Sullivan
115 West Century Road, 3rd Floor
Paramus, NJ 07652

20 Largest Unsecured Creditor:
GE Capital
Attn: Brian Haber
Dept. 3123
Pasadena, CA 91051-3123

20 Largest Unsecured Creditor:
Activision, Inc.
Attn: Andrea Tedeschi
3100 Ocean Park Boulevard
Santa Monica, CA 90405

20 Largest Unsecured Creditor:
PC Gamer
Attn: Robin Rosales
150 North Hill Drive
Brisbane, CA 94005

EXHIBIT C

EXTREMETECH® BUILD IT, TWEAK IT, KNOW IT

Power Struggle Forced Aureal Walkout

March 6, 2003

By Mark Hachman

The mysterious last days of Aureal Semiconductor were marred by a power struggle that culminated in a management walkout, according to the ex-chief executive of the company.

Kenneth "Kip" Kokinakis, who led Aureal—the company that popularized the concept of virtualized HRTF sound on the PC—joined similarly named startup Aura Communications in January, in yet another bid to turn a struggling company around.

Kokinakis joked about the similarity between his two companies' monikers. "Yeah, I thought Aura—Aureal—here we go again," Kokinakis said in an interview. "At least this time, maybe we won't get sued."

Aureal was founded on the principle that the experience of interacting with devices like a PC or a television set could be made more interactive through the use of "virtual" sound, which uses audio coding algorithms to fool the ear into thinking sounds were actually coming from behind, over, or under the listener. Aura Communications, meanwhile, has designed a personal-area-networking technology that rivals Bluetooth.

Aureal's work prompted a number of competing technologies, the most recent being Dolby's Virtual Speaker algorithm.

But in late March 2000, Aureal issued a statement claiming that the company needed an immediate infusion of cash to remain in business and that it was considering selling off its assets.

It ultimately sold out to Creative Labs; ironically, Aureal had defended itself against Creative Labs in a bitter legal fight involving patents and claims of false advertising. Aureal later estimated it spent $6.4 million in 1999 solely on legal fees, while pulling in just slightly more in product revenue each quarter.

The day after Aureal issued its plea for cash, management walked out en masse. All of the eight corporate officers listed in Aureal's annual report, including the chief executive, chief financial officer,

chief technical officer, general counsel and sales executives, left the company. Four of the five members of the board of directors also left, save for D. Richard Masson, principal at Oaktree Capital Management LLC, Los Angeles, a venture-capital firm that held a majority stake in Aureal.

Kokinakis essentially vanished from the public eye for several years, quietly working as a consultant. Toni Schneider, Aureal's vice president of advanced audio products, now runs Oddpost, a Webmail service paid for by customers, not ads. General counsel Brendan O'Flaherty joined broadband chip company Massana.

Kokinakis said the walkout, which was never explained publicly, simply came down to a fight between shareholders and management. "We had exhausted our funds," he said. "Management hoped to sell to avoid bankruptcy, while the shareholders thought we should hold out for a better deal. So we left."

According to Kokinakis, he's applying some lessons from the Aureal ordeal to his new position at Aura Communications.

Aura now uses a fabless model, while Aureal contracted with foundries to build and sell its audio components to companies such as the now-defunct Diamond Multimedia. That got Aureal into trouble, Kokinakis admitted, when Aureal began building its own add-on cards and shipping them to Diamond to resell. Aureal later took the plunge and started building and selling its cards under its own name.

In retrospect, Kokinakis said that strategy was a mistake.

"Had Diamond not folded, we could have done it," Kokinakis said. "But I think we were too greedy in that transaction. We were trying to build a brand, but I think we might have been better off in revenue sharing."

Still, Kokinakis said, the management team faced an uphill battle from the beginning. Aureal was formed from the ashes of Media Vision, an add-on card manufacturer that underwent a complete management and technology overhaul after its executives were indicted for fraud in 1998. Steven Allan, the ex-CFO of Media Vision, was found guilty of five counts of wire, mail and securities fraud last year following an eight-year investigation.

"It was almost impossible right from the beginning," Kokinakis said. 'We just ran out of gas."

EXHIBIT D

HENNIGAN & BENNETT
LAWYERS
601 SOUTH FIGUEROA STREET
SUITE 3300
LOS ANGELES, CALIFORNIA 90017
TELEPHONE (213) 694-1200
FACSIMILE (213) 694-1234

April 4, 2000

VIA FACSIMILE
AND FEDERAL EXPRESS

Aureal, Inc.
45757 Northport Loop West
Fremont, CA 94538
[facsimile no. 510-252-4554]

Re: Retainer Agreement between Hennigan & Bennett and Aureal, Inc., And Its Subsidiaries, Crystal River Engineering, Inc., and Aureal Limited Regarding Bankruptcy Representation

Gentlemen:

This letter sets forth the terms and conditions upon which Hennigan & Bennett ("H&B") will represent Aureal, Inc., and its wholly-owned subsidiaries Crystal River Engineering, Inc., and Aureal Limited (collectively, "Aureal"), in connection with the filing and prosecution of chapter 11 bankruptcy cases for one or more of them in the United States Bankruptcy Court for the Northern District of California, Oakland Division.

H&B will act as Aureal's special reorganization counsel to render such ordinary and necessary legal services as may be required in connection with the contemplated chapter 11 cases, including:

1. Assisting Aureal in the preparation of its bankruptcy petition(s), schedule(s) of assets and liabilities, statement(s) of financial affairs, and such other documents as are required to be filed with the Bankruptcy Court and the Office of the United States Trustee to commence and proceed with the chapter 11 case(s);

2. Advising Aureal with respect to the sale of some or all of its assets and with respect to the negotiation, preparation, and confirmation of a plan or plans of reorganization;

3. Assisting Aureal in preparing and obtaining approval of a disclosure statement or statements;

4. Appearing at meetings of creditors;

5. Representing Aureal in litigation in the Bankruptcy Court where such litigation involves substantial and material issues of bankruptcy law; and

6. Advising Aureal regarding its legal rights and responsibilities as a debtor in possession under the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, and the United States Trustee Guidelines and Requirements.

Please be advised that H&B's employment as Aureal's special reorganization counsel does not include any of the following: (a) appearances before any court or agency other than the Bankruptcy Court and the Office of the United States Trustee; (b) litigation in the Bankruptcy Court with respect to matters which are, in the main, disputes involving issues of nonbankruptcy law; and (c) the provision of advice outside the insolvency area, including advise with respect to matters such as patent, trademark, corporations, taxation, securities, torts, environmental, labor, criminal, and real estate law. Further, the limited scope of our employment as Aureal's special reorganization counsel does not include giving attention to, forming professional opinions as to, or advising you with respect to, disclosure obligations under federal securities or other nonbankruptcy laws or agreements.

As you are aware, H&B also has agreed to serve as counsel to Aureal with respect to certain nonbankruptcy litigation to be commenced on behalf of Aureal. The terms and conditions of that engagement are set forth in a separate engagement letter, which letter is to be read and interpreted consistently and concurrently with the terms and conditions set forth herein.

With respect to H&B's services as special reorganization counsel pursuant to this engagement letter, Aureal has agreed to pay H&B a reasonable fee for services rendered and to be rendered and to pay H&B for all costs and expenses charged to its account. We have requested and Aureal agreed to pay the sum of $300,000 as a retainer for the professional services that H&B will render and for the expenses that H&B will incur as special reorganization counsel, as well as additional security for Aureal's obligations to H&B. H&B's engagement is contingent on its receipt of that sum prior to the commencement of any bankruptcy proceedings with respect to Aureal. The retainer amount may be allocated by H&B among the entities comprising Aureal in any manner in which H&B deems appropriate.

Following exhaustion of the retainer, H&B will seek additional compensation for services rendered during the course of the chapter 11 cases ("interim compensation") based in part upon our guideline hourly rates. These rates range from $200 to $460 per hour for attorneys, from $90 to $340 per hour for financial consultants, and from $50 to $155 for paralegals and clerks. Our guideline hourly rates are adjusted periodically, typically on January 1 of each year, to reflect the advancing experience, capabilities and seniority of our professionals as well as general economic factors.

Our requests for interim compensation also will include charges for reasonable costs and expenses incurred in connection with the engagement. Such costs and expenses typically include, among others, charges for messenger services, air couriers, word processing services, secretarial overtime, photocopying, postage, long distance telephone service, computerized legal research facilities, process service, investigative searches, and other charges customarily invoiced by law firms in addition to fees for legal services, including court fees and travel expenses. In the event that we incur expenses that we deem to be extraordinary or significant, such as transcript costs or sizable outsourced photocopying expenses, you agree that Aureal will pay those expenses directly.

It is H&B's practice to charge our clients for services rendered based upon not only the total number of hours of services rendered charged at guideline hourly rates, but also upon such other factors as the complexity of the problems presented to us, the amount at issue, the nature, quality and extent of the opposition encountered, the results accomplished, the skill we exercised in accomplishing those results, the extent to which our services were rendered outside the Los Angeles area, after normal business hours or on other than normal business days, delay in our receipt of compensation, and the extent to which we were at risk in being paid. When our representation is ended, the firm will determine the amount of the total fees and will send Aureal a final statement, which may reflect a fee that exceeds the interim compensation previously sought or invoiced by H&B. To the extent that H&B's final fee exceeds the total number of hours of services rendered charged at guideline hourly rates, H&B will consult with Aureal before setting that final fee.

Because of the specialized nature of our practice, from time to time H&B may concurrently represent one client in a particular case and the adversary of that client in an unrelated case. Thus, for example, while representing Aureal, H&B also may represent a creditor of Aureal in that creditor's capacity as a debtor or as a creditor of an entity which is not related to Aureal. In addition, while representing Aureal, H&B may represent an account debtor of Aureal as a debtor in a reorganization case or in connection with out-of-court negotiations with such entity's creditors concerning the

entity's ability to pay its debts generally. Please be assured that, despite any such concurrent representation, we strictly preserve all client confidences and zealously pursue the interests of each of our clients, including in those circumstances in which we represent the adversary of an existing client in an unrelated case. Aureal agrees that it does not consider such concurrent representation, in unrelated matters, of Aureal and any adversary to be inappropriate and therefore waives any objections to any such present or future concurrent representation.

Also, several attorneys at H&B have spouses, parents, children, siblings, fiances or fiancees who are attorneys at other law firms and companies. H&B has strict policies against disclosing confidential information to anyone outside the firm, including spouses, parents, children, siblings, fiances and fiancees. You agree that you do not consider our representation of Aureal to be inappropriate in light of any such relationships, and H&B agrees to advise Aureal in the event that it determines that any of the relationships likely would lead to a conflict situation.

H&B maintains a policy that it does not provide opinion letters to its clients or to others who might wish to rely on such letters. We do not alter this policy except under very unusual circumstances and then only upon further written agreement, which provides for compensation to us for the special risks attendant to the furnishing of such opinions. H&B maintains errors and omissions insurance coverage applicable to the services to be rendered hereunder which complies with the requirements imposed by California Business and Professions Code sections 6147(a)(6) and 6148(a)(4).

By this agreement, HMB is being engaged only by Aureal and its subsidiaries, which are corporate entities. Our employment does not include the representation of any individual officer, director, shareholder, employee or any affiliate of Aureal.

Aureal may discharge H&B at any time. H&B may withdraw at any time with Aureal's consent or for good cause without Aureal's consent. Good cause for H&B's withdrawal includes Aureal's breach of this agreement (including Aureal's failure to pay any statement or invoice when due), Aureal's refusal or failure to cooperate with us, or any fact or circumstance that would render our continuing representation unlawful or unethical.

By executing this agreement you acknowledge that you have read carefully and understand all its terms. This letter constitutes the entire understanding between Aureal and H&B regarding our employment as special reorganization counsel, and this agreement cannot be modified except by further written agreement signed by each party. As noted above, the terms and conditions of H&B's engagement by

Aureal with respect to certain nonbankruptcy litigation matters are set forth in a separate engagement letter.

If you have any questions about the foregoing, please call Josh Mester, or me. Moreover, please feel free to obtain independent legal advice regarding this agreement. If you are in agreement with the foregoing, and it accurately represents your understanding of Aureal's retainer agreement with H&B with respect to services as special reorganization counsel, please execute the enclosed copy of this letter and return it to me. If not, please contact us immediately. We look forward to working with you on these cases.

Very truly yours,

HENNIGAN & BENNETT

By _____
James O. Johnston

THE FOREGOING IS APPROVED AND AGREED TO:

DATED: April 4, 2000

AUREAL, INC.

By: _____

Its: Chief Operating Officer

Aureal, Inc.'s Taxpayer I.D. Number: 94-3117385

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EXHIBIT E

BRUCE BENNETT (SBN 105430)
JAMES O. JOHNSTON (SBN 167330)
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HENNIGAN & BENNETT
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Proposed Reorganization Counsel for
Debtor and Debtor in Possession

UNITED STATES BANKRUPTCY COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

In re AUREAL, INC., d/b/a SILO.COM, f/k/a AUREAL SEMICONDUCTOR, INC., f/k/a MEDIA VISION TECHNOLOGY, INC., a Delaware corporation; Debtor.	Case No. 00 42104 (Chapter 11) **DECLARATION OF JAMES O. JOHNSTON IN SUPPORT OF APPLICATION OF DEBTOR AND DEBTOR IN POSSESSION TO EMPLOY HENNIGAN & BENNETT AS REORGANIZATION COUNSEL** [No Hearing Required]

I, James O. Johnston, declare:

1. I am a member in good standing of the Bar of the State of California. I am admitted to practice before, among other courts, the United States District Court for the Northern District of California. I am a partner in Hennigan & Bennett ("H&B"), proposed reorganization counsel for Aureal, Inc., the debtor and debtor in possession (the "Debtor") in the above-captioned bankruptcy case. I make this Declaration in support of the "Application Of Debtor And Debtor In Possession For Authority To

Employ Hennigan & Bennett As Reorganization Counsel (the "Application"). I have personal knowledge of the matters set forth below and, if called to testify, I would and could competently testify thereto.

2. This Declaration is made pursuant to 11 U.S.C. §§ 327, and 329(a) and Rule 2016(b) of the Federal Rules of Bankruptcy Procedure.

3. By the Application, the Debtor has applied to the Court for authority to engage H&B as its reorganization counsel on substantially the terms and conditions set forth in the retention agreement attached as Exhibit B to the Application (the "Retention Agreement").

4. To the best of my knowledge, information, and belief, all attorneys comprising or employed by H&B who will render services in this case are or will be duly admitted to practice law in the courts of the State of California and in the United States District Court for the Northern District of California and are familiar with the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure and the Local Bankruptcy Rules for this District.

5. H&B has received a retainer of $300,000 for services to be rendered to the Debtor in connection with this chapter 11 case. H&B has deposited the unearned portion of the retainer in a trust account in the name of the Debtor, as a trust fund/security retainer, to secure the payment of H&B's allowed fees and expenses in this case. During the one year period prior to the filing date of the chapter 11 petition, H&B did not receive from the Debtor any other payments for services rendered to the Debtor in connection with this case and the reorganization of its business. H&B does not have a prepetition claim against the Debtor's estate.

6. H&B has agreed to accept as compensation for its services its retainer and such additional reasonable sums as may be allowed by this Court in accordance with law, based upon the time spent and services rendered, the results achieved, the difficulties encountered, the complexities involved, and other appropriate factors. As set forth in the Retention Agreement, the Debtor has agreed to pay H&B a reasonable fee.

Such fee may exceed [illegible] fee calculated by reference to H[illegible]'s standard guideline hourly rates.

7. I understand that the provisions of Sections 328, 329 and 330 of the Bankruptcy Code and Federal Rule of Bankruptcy Procedure 2016 require, among other things, Court approval of employment of professionals and Court authorization of any fees and costs that H&B shall receive from the Debtor after appropriate notice and a hearing.

8. H&B has not shared or agreed to share any compensation for its representation of the Debtor with any other person, except as among the members of H&B.

9. H&B represents Oaktree Capital Management, LLC, an affiliate of the Debtor's largest secured creditor and largest equity holder, in an unrelated litigation matter entitled Farallon Capital Partners, L.P., et. al. v. Gleacher & Co., Inc. et. al, which is pending in the California Superior Court in Los Angeles, as case number BC 215260. Despite that concurrent representation which is within the scope of and permitted by retention agreement, I believe that H&B is "disinterested" within the meaning of section 101(14) of the Bankruptcy Code, and does not hold or represent an interest materially adverse to the estates within the meaning of section 327 of the Bankruptcy Code.

10. Except as set forth above, to the best of my knowledge, information, and belief, neither H&B nor any of the attorneys comprising as employed by it has any prior connection to the Debtor or is an insider of the Debtor or any other related entities in which the Debtor may have an interest, its creditors, or any other party in interest in this case or its respective attorneys or accountants. If at any subsequent time during the course of this proceeding, H&B learns of any representation that may give rise to a conflict, an amended Declaration identifying and specifying such potential conflict will be filed promptly with the Court and the Office of the United States Trustee.

11. In the following supplemental disclosures, references to H&B include all members thereof who are expected to render services in this case. To the best of my knowledge, information and belief:

a. H&B is not and has not been a creditor, an equity security holder or an insider of the Debtor.

b. H&B is not and has not been an investment banker for any outstanding security of the Debtor.

c. H&B is not and has not been 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 any security of the Debtor.

d. H&B is not and has not been a director, officer or employee of the Debtor or of any investment banker for any security of the Debtor.

e. H&B has no 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 for any security of the Debtor, or for any other reason.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 4th day of April, 2000, at Los Angeles, California.

By: _____
James O. Johnston
Proposed Reorganization Counsel for Debtor
And Debtor in Possession