

**In the Supreme Court of the State of California**

**DAVID P. O'DONNELL,  
President of Next Factors, Inc.,**

Petitioner,

v.

**THE STATE BAR OF  
CALIFORNIA,**

Respondent.

CA Bar Complaint #06-0-15523 et  
al.

**Petition for Review**

After State Bar of California Decisions in Complaint #06-0-15523 et al.  
Dated March 6, 2006 and August 8, 2007

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**In the Supreme Court of the State of California**

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## Table of Exhibits

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|----|--|-----------|
| 1. | December 28, 2005 Complaint Form and Statement.  | Exhibit A |
| 2. | March 6, 2006 Decision to close complaint due to lack of standing and/or jurisdiction.                           | Exhibit B |
| 3. | June 5, 2006 Request for review of decision and Revised Complaint.   | Exhibit C |
| 4. | December 20, 2006 Decision to Reopen Complaint.  | Exhibit D |
| 5. | December 28, 2006 Decision to forward to the Enforcement Unit.   | Exhibit E |
| 6. | July 23, 2002 Memorandum of Decision In re AUREAL, INC., etc., No. 00-42104 T.                                   | Exhibit F |
| 7. | July 31, 2007 Narrative provided with documents requested by the California Bar pursuant to their investigation. | Exhibit G |
| 8. | August 8, 2007 Decision to close complaint due to lack of standing and/or jurisdiction.                          | Exhibit H |
| 9. | August 15, 2007 CA Bar Closing letter.   | Exhibit I |

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## **Petition for Review**

To: The Chief Justice, and to the Associate Justices of the California  
Supreme Court:

Complainant respectfully petitions this Court to review the March 6,  
2006 and August 8, 2007 decisions of the State Bar of California to close  
my Complaint. (Exhibit B and Exhibit H, hereinafter "Decisions").

\* \* \* \*

## Questions Presented

1. Whether the State Bar of California has standing and/or jurisdiction to investigate a complaint of attorney misconduct where said complaint is filed by a non-client beneficiary and consumer of legal services in California who is harmed by said misconduct.
2. Whether the State Bar of California has standing and/or jurisdiction to investigate a complaint of attorney misconduct where said misconduct occurs within a complicated specialty practice such as federal bankruptcy law.
3. Whether the State Bar of California requires a Court Order finding that attorney misconduct has taken place as a prerequisite to exercising jurisdiction over a complaint of attorney misconduct.
4. Whether the State Bar of California requires a Court Order finding attorney misconduct has taken place as a prerequisite to exercising jurisdiction over a complaint of attorney misconduct where the complainant has produced a Court Order which finds one party has engaged in misconduct and the complainant provides additional documentary evidence illustrating how the conduct of the complained-of attorney is inextricably intertwined with the misconduct of said party.

5. Whether the State Bar of California is required to interview witnesses as part of its mandate to investigate claims of attorney misconduct.
6. Whether California attorneys practicing federal bankruptcy law are required to comply with the disclosure requirements as defined in CRPC 3-310(A).
7. Whether under California law, the conflict of an attorney, who is a member of a law firm, is a conflict for all members of the law firm?

## Procedural Background

On December 28, 2005, Petitioner, President of Next Factors, Inc, an unsecured creditor in the Chapter 11 Bankruptcy case of *Aureal Inc.*, filed a complaint (“Complaint”) against attorneys representing the debtor in that case. Exhibit A. The focus of the Complaint was on the apparent failure of the attorneys in the Aureal case to obtain written informed consent of each client, and other parties entitled to such related disclosure. The State Bar of California informed Petitioner on March 6, 2006 of their decision to close the Complaint for lack of evidence, standing, and/or jurisdiction. Exhibit B. Included in the Bar’s closing letter was an invitation to request a review of this decision with additional or new evidence and copies of documentation that Petitioner believed should be considered.

Petitioner responded on June 5, 2006 with a formal request for review and included additional and new evidence supporting the allegations of attorney misconduct found in the Complaint and demonstrated further grave and related misconduct (“Revised Complaint”). Exhibit C. On December 20, 2006, Petitioner received a letter from the Bar indicating that the Audit and Review Unit completed its review of the Revised Complaint and made a determination to reopen the case and forward it for further investigation. Exhibit D. On December 28, 2006, Plaintiff received a letter

from the Bar indicating that the Revised Complaint has been forwarded to the Enforcement Unit. Exhibit E.

On August 8, 2007, Petitioner received notice that the State Bar of California reviewed all court documents and “has decided that we do not have standing and/or jurisdiction over this matter to move forward with your complaint and our investigation”. Exhibit H. The closing letter from the Bar reasserts that Petitioner was not a client of the attorneys who were subjects of the Complaint. Exhibit I.



## Factual Background

Petitioner is the President of Next Factors, Inc., a claims trader in the *Aureal* case. Claims trading has increased significantly in large bankruptcy cases, and Next has observed a commensurate increase in practices and actions of bankruptcy professionals that is, at best, unethical. While there is no “bankruptcy police” whose responsibility it is to ensure the honesty and integrity of the bankruptcy system, the professionals entrenched in the system should certainly be held to account for their ethical lapses under the disciplinary rubric of their self-policing professional organization. The Complaint and Revised Complaint allege systemic failure of attorney’s to obtain waivers of conflicts in accord with the California Rules of Professional Conduct. The Revised Complaint provides additional evidence for this claim as well as for related failures to adhere to other California Bar Rules, failure to comport their conduct in accordance with opinions of California courts, ethics opinions, rules, statutes, and standards promulgated by other jurisdictions and bar associations (“Guiding Authority”). One instance of additional misconduct was related to the representation of a conflicted client in the *Aureal* case known as Argo Partners, Inc.

The law firm and attorneys subject to the Complaint and Revised Complaint represented the debtor Areal, and are referenced alternatively as “H&B” or the “CA Attorneys”.

Argo Partners, Inc. (“Argo”) is also a claims trader. At all times during the pendent *Areal* bankruptcy case, Argo was a direct competitor of Next Factors, Inc. Argo purchased a number of claims held by various debtors in the Areal bankruptcy case and was the claims trader with the largest number of claims in the case. Argo was also a client of H&B during various periods during the pendent Areal bankruptcy case.

Petitioner informed the California State Bar that the liquidating trustee in the *Areal* case, a holder of attorney-client privilege, informed him that he would fully cooperate with any investigation into misconduct by the CA Attorneys and disclose any information they required.

There are three charts in the accompanying Exhibits which distill the various allegations and evidence of CA Attorney misconduct in chronological form, which may prove useful in summarizing some complexities in these facts. “Chronology of Conflicted Representation”. Exhibit C, at Exhibit J. “Chronology of Attorney Misconduct”. Exhibit C, at Exhibit P. “Delays Advised or Engaged by CA Attorneys”. Exhibit C, at Exhibit X.

## **Necessity for Review**

### **I.**

#### **The State Bar of California Erred in Closing Petitioners Complaint for Lack of Jurisdiction and/or Standing.**

##### **Harm to Petitioner and Other Unsecured Creditors**

The Complaint and Revised Complaint is seeking an investigation into CA Attorney Misconduct which caused harm to all creditors in the *Aureal* case, including to Petitioner. The allegations of attorney misconduct share a common theme: failure to fully disclose conflicted interests. 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: How will another creditor or the United States trustee know that an objection should be made?

The first 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 or holding of any interest, or representing any interest

adverse bankruptcy estate. Such a determination is dependent upon the disclosure provided to the court by the appointed lawyer or firm.

The full written disclosure and informed consent required by CRPC 3-310 and CRPC requirements to be truthful thereby help 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, full, 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<sup>1</sup>. 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 about the nature and extent of the conflict. A pattern of numerous CA Attorney representations of clients in the *Aureal* case with concurrent potential and actual adverse interests is illustrated in the table in Exhibit C, at 45.

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<sup>1</sup> In re California Cannery 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

The second answer to this question lies in the proscriptions against misleading the Court as described in Sections 5.6, 5.8, and 5.9 of the Revised Complaint. Exhibit C, at 20, 33, 41. The State Bar Act § 6068(d) requires that attorneys comply with a general duty to be truthful, and this section mirrors CRPC 5-200(B), which proscribes practices which "mislead or tend to mislead." The State Bar of California has consistently imposed sanctions on attorneys for violating the rules set forth in § 6068(d). See, e.g., *Davis v. State Bar* (1983) 33 Cal.3d 231, 188 Cal.Rptr. 441, 655 P.2d 1276 (holding that "the filing of false or misleading pleadings or documents is ground for discipline"). See also, *Pickering v. State Bar* (1944) 24 Cal.2d 141, 148 P.2d 1 (holding that "[t]he presentation to a court of a statement of fact known to be false presumes an intent to secure a determination based upon it and is a clear violation of [§ 6068(d)]."). Further details and specific of such instances of misconduct may be found in the Revised Complaint.

In any event, when debtors' attorneys do not so act to make full disclosure or to be truthful, they defraud both creditors and the Court in a bankruptcy case from their right to object to the employment of debtor's

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Cir. 1994) 20 F.3d 1043, 1048-1049 (a lawyer has a duty to investigate for his own potential conflicts of interest).

attorney in the case. Petitioner, as creditor in this case, has been similarly harmed.

### **Petitioner as Consumer of Legal Services in California**

The Complaint and Revised Complaint is seeking an investigation into CA Attorney Misconduct under which the Office of the Chief Trial Counsel (the “OCTC”) has jurisdiction. Specifically, Petitioner requested a review of CA Attorney misconduct under the State Bar Act and the Rules of Professional Conduct.

Pursuant to the State Bar Act § 6044, the California State Bar, with the filing of any complaint, “may initiate or conduct investigations of all matters affecting or relating to: [...] (c) the discipline of the members of the State Bar”. According to the State Bars’ own website, the State Bar accepts consumer complaints<sup>2</sup>, and Petitioner, as a creditor in a federal bankruptcy proceeding in CA was a consumer of CA legal services and of the CA court system.

The State Bar provides further that “[e]ach local administrative committee shall: (a) receive and investigate complaints as to the conduct of members.” State Bar Act § 6043. For a willful breach of any of the CRPC,

the State Bar Board of Governors has the power to discipline attorneys by reproof, public or private, or to recommend to the Supreme Court the suspension from practice for an attorney not exceeding three years. State Bar Act § 6077.

An individual consumer must be able to file a complaint with the State Bar in order for the objectives of a self-policed organization to be met. As earlier indicated, the State Bar itself invites and receives complaints from individual consumers of the CA legal system. Neither §6086.7 nor apparently any other provision of the Act prohibits the OCTC from asserting jurisdiction in these matters solely because another court has not yet reported misconduct to the State Bar. Based on the foregoing, Petitioner asserts that the State Bar Act confers jurisdiction in the Complaint and Revised Complaint.

### **Petitioner as Non-Client Beneficiary**

Aureal was the debtor- in-possession (“DIP”) in their bankruptcy case, a fact which impacts their attorney’s requirements under CRPC 3-310<sup>3</sup> as well as other sections requiring truthfulness. This impact stems from the

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<sup>2</sup>The State Bar of California Website, Home > Attorney Resources > Lawyer Discipline & Complaints >FAQs, at URL: [http://calbar.ca.gov/state/calbar/calbar\\_generic.jsp?cid=10136&id=FAQ](http://calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10136&id=FAQ)

<sup>3</sup> 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.



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<sup>4</sup>. In this way, the CA Attorneys owe a duty to third-party creditor beneficiaries when representing a debtor-in-possession with fiduciary duties. Therefore, Petitioner asserts that as a creditor who was owed a duty by the CA Attorneys to fully disclose and be truthful in the Aureal case, the State Bar Act confers jurisdiction to the State Bar of California over the Complaint and Revised Complaint.

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641, 645 (Bankr. D. Vt. 1989). Cf. *In re Grabill Corp.*, 113 B.R. at 970.  
<sup>4</sup> See *Osornio v. Weingarten* (2004) 124 Cal.App.4<sup>th</sup> 304 (an estate-planning attorney owes a duty of care to a non-client beneficiary when there is no ambiguity about the testator's intent to benefit the non-client and imposing a duty would not impair the attorney's duty of loyalty to the testator-client.) See *also* *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).

### **Petitioner Produces Court Order Evidencing Proof of Misconduct**

Even if the State Bar of California was correct to conclude that they lacked jurisdiction and/or that Petitioner lacked standing, the State Bar of California cannot ignore the fact that among the allegations of misconduct complained of in Section 5.9 of the Revised Complaint is a reference to two issued Court Orders wherein the Court identified misconduct. Exhibit C, at 41. Petitioner provided documentary evidence within the Revised Complaint linking acts of the CA Attorneys with the party engaging in misconduct as so identified by the Court. Exhibit C, at 43. Certainly the OCTC has jurisdiction to investigate such actions deemed misconduct by a Court in California.

As part of the Bar's documentation review, Petitioner was requested and Petitioner submitted to the Bar on July 31, 2007, the Memorandum of Decision wherein the Court in the *Aureal* case found "intentional nondisclosure" by a party in that case. Exhibit F at 15. Included with this submission was a narrative by Petitioner which described apparent SEC violations which would exacerbate the allegations of misconduct in the Complaint. Exhibit G. These allegations arise out of the \$40 Billion private equity & hedge fund conglomerate, previously identified in Petitioner's Complaint. Exhibit A. This firm was a conflicted client of the

both the CA Attorneys and the party which the *Areal* Court found engaged in intentional misconduct.

However, the text of the Decisions Petitioner received from the OCTC suggests that the bankruptcy court must first find that the CA Attorney's also engaged in Misconduct, and then issue an order to that effect, as a prerequisite to OCTC asserting jurisdiction over the Complaint and Revised Complaint. While a court decision finding misconduct was identified in the Revised Complaint, such a court decision or order finding misconduct should not serve as prerequisite to investigation by the CA Bar. It is true that the State Bar Act § 6086.7 requires that the State Bar investigate and determine whether disciplinary action against the lawyer is warranted when a court notifies the State Bar of certain misconduct, but it would appear incorrect to suggest that this is the *exclusive* means by which a complaint may be filed and investigated by the State Bar.

If a prior court's finding of misconduct were necessary as a prerequisite for OCTC to assert jurisdiction in every case, then the ability of consumers to recognize and respect the State Bar "as a contributing and accountable leader in improving the administration of justice and ensuring the rule of law in our civil society<sup>5</sup>" would be substantively weakened. If the consumers cannot bring forward complaints against members of the State

Bar, then how can they expect that its' members are ever investigated by the State Bar, let alone held to account for misconduct?

In the same way that the State Bar ensures the integrity of the ruling on attorney discipline cases through the nations only discipline system that employs independent professional judges who are dedicated to ruling on attorney discipline cases, so too does the State Bar ensure the integrity of the review of charges of attorney misconduct through the receipt of complaints by consumers who are independent of the professional judges who may or may not complain of misconduct in every case.

Even where a professional judge may find a conflict does not merit disqualification (and the attendant disruption to the case), that does not mean that it has approved of an attorney's conduct – that question can still be resolved by a disciplinary body.

### **Attorney Misconduct in the Context of Practice Specialties**

The Complaint and Revised Complaint provide Guiding Authority relevant to bankruptcy jurisprudence, but only for the Bar's consideration. Petitioner's intent was to illuminate the context within which the alleged violations of the State Bar Act or the Rules of Professional Conduct took place. To be clear, Petitioner was not requesting the OCTC to make any determination based on any rule or law related to bankruptcy law or rules.

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<sup>5</sup> State Bar of California Long-Range Strategic Plan, Aug. 23, 2002.

The Complaint and Revised Complaint only sought a review of conduct by CA Attorneys under the CA Bar Rules, the OCTC therefore has jurisdiction to determine if misconduct was committed by the CA Attorneys. In exercising its' authority to investigate complaints of misconduct by individual consumers, the California Bar upholds honesty and integrity of the bar while maintaining the public confidence in lawyers. That the California Bar seeks to uphold these virtues is evidenced by its' own goal as stated in the State Bar of California Long-Range Strategic Plan, Aug. 23, 2002: "To assure that the public is protected and served by attorneys and other legal services providers that meet the highest standards of competence and ethics." The alleged misconduct complained of is significant and represents a pattern of abuse that reflects poorly on the integrity of all lawyers who may be judged by the conduct of the CA Attorneys. The fact that the alleged misconduct took place in the context of a bankruptcy proceeding should not deter the State Bar of California from fulfilling its' duties under the State Bar Act.

## II.

### **The State Bar of California Erred in Failing to Interview Witnesses.**

The State Bar of California informs consumers of the California legal system that a California Bar prosecutor from the Enforcement Unit takes over an investigation if it appears that the attorney “may be a repeat offender or have committed a violation where there is a serious likelihood of discipline being imposed<sup>6</sup>”. The California Bar prosecutor did so in this case and informed Petitioner of the decision to refer the matter on December 28, 2006. According the Bar, “[t]he accused attorney is given an opportunity to respond, witnesses are contacted and documents are reviewed.<sup>7</sup>”

Petitioner requested that the Bar interview witnesses to completely investigate the allegations in the Complaint and Revised Complaint. First, Petitioner offered that the California Bar could interview the liquidating trustee and representative of Aural’s bankruptcy estate, Mr. Bradlow. At one time the trustee personally informed the Petitioner that he would waive attorney-client privilege so that an investigatory organization could gather existing facts related to the fraud, misrepresentation, and misconduct, alleged by Petitioner. Second, Petitioner offered to personally appear

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<sup>6</sup> [http://calbar.ca.gov/state/calbar/calbar\\_generic.jsp?cid=10136&id=FAQ](http://calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10136&id=FAQ)

<sup>7</sup> Ibid.

before the investigators and attorneys of the California State Bar to provide any further information that could be helpful in the investigation of the Complaint and Revised Complaint. In response, the Bar stated that “we have sufficient information to evaluate the revised complaint”. However, in contrast to the stated policy, the California Bar did not interview any witnesses, even though Petitioner made recommendations.

## **Conclusion**

Complainant respectfully urges this Court to grant review of the decision of the State Bar of California to close Complaint #06-0-15523 et al.

Dated: \_\_\_\_\_, 2007

Respectfully submitted,

\_\_\_\_\_  
[petitioner name]  
Pro Se Petitioner

## **Certificate of Word Count**

Petitioner hereby certifies that this brief consists of **3711** words (excluding proof of service), according to the word count of the computer word-processing program. (Cal. Rules of Court, rule 28.1.)

\_\_\_\_\_, 2007

\_\_\_\_\_  
[Petitioner Name]



## Verification

## **Proof of Service**