

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF SOUTH CAROLINA**

In re,  Grinding Specialists, LLC,  Debtor(s).	C/A No. 18-05225-HB
In re,  Grinding Specialists of the Carolinas, LLC,  Debtor(s).	C/A No. 18-05223-HB (Substantively Consolidated)
In re,  Callahan Grading LLC,  Debtor(s).	C/A No. 18-05220-HB  <b>ORDER APPROVING TRUSTEES' EMPLOYMENT OF JAMES, McELROY &amp; DIEHL, P.A. PURSUANT TO 11 U.S.C. § 327(e)</b>

**THIS MATTER** involves the above-captioned bankruptcy cases and litigation pending in the United States District Court for the Western District of North Carolina before the Honorable Graham C. Mullen, captioned *Keith Hawthorne, KLH Acquisition Company, LLC, Rivercross Capital, LLC, Rufus Road Partners, LLC, Janet B. Haigler in her Capacity as Chapter 7 Trustee for Callahan Grading, LLC, and Robert F. Anderson in his Capacity as Chapter 7 Trustee for Grinding Specialists of the Carolinas, LLC and Grinding Specialists, LLC v. Callahan Grading, LLC, Grinding Specialists of the Carolinas, LLC, Grinding Specialists, LLC, High Tension Ranch, LLC, Anthony Jarrett Callahan, The Howey Co., Inc., Camden Land Co., LLC, STGE Investments, LLC, Deepe, LLC, FM Capital, LLC, and David S. Howey*, C/A No. 3:20-cv-564 (“NC Litigation”). Before the Court is a Motion filed by Robert F. Anderson as Chapter 7 Trustee for the substantively consolidated bankruptcy estates of Grinding Specialists, LLC and Grinding

Specialists of the Carolinas, LLC, and Janet B. Haigler as Chapter 7 Trustee for the bankruptcy estate of Callahan Grading LLC (collectively, “Trustees”) on January 15, 2021, seeking approval to employ the Law Firm of James, McElroy & Diehl, P.A. (“NC Counsel”) and requesting other relief.<sup>1</sup> The Howey Co., Inc., Camden Land Co., LLC, STGE Investments, LLC, DEEPE, LLC, FM Capital, LLC, and David S. Howey (the “Howey Entities”) opposed the Motion.<sup>2</sup> The Court considered the exhibits,<sup>3</sup> the Declaration of attorney John R. Buric, the testimonies of Trustee Anderson, Trustee Haigler, and Buric, the recording of a hearing held in this Court on April 14, 2020,<sup>4</sup> and the case dockets and various pleadings.

### **PROCEDURAL HISTORY AND FINDINGS OF FACT**

#### **I. THE BANKRUPTCY CASE**

The above-captioned Debtors filed voluntary petitions for Chapter 11 relief on October 15, 2018. The cases were converted to Chapter 7 in March 2019 and the Trustees were appointed. In May 2019, Trustee Haigler’s employment of the Gleissner Law Firm LLC was approved pursuant to 11 U.S.C. § 327(a).<sup>5</sup> In June 2019, Trustee Anderson’s employment of Nelson Mullins Riley & Scarborough, LLP (“NMRS”) was approved pursuant to § 327(a). A review of the relevant bankruptcy case dockets indicates the Trustees have since utilized these attorneys to represent them in various matters, including those related to the NC Litigation.

In March 2020, the Trustees’ attorneys requested approval of a settlement in each

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<sup>1</sup> ECF No. 144, filed Jan. 15, 2021 (C/A No. 18-05225-hb); ECF No. 322, filed Jan. 15, 2021 (C/A No. 18-05220-hb).

<sup>2</sup> ECF No. 151, filed Jan. 20, 2021 (C/A No. 18-05225-hb); ECF No. 329, filed Jan. 20, 2021 (C/A No. 18-05220-hb).

<sup>3</sup> ECF No. 156, filed Jan. 21, 2021 (C/A No. 18-5225-hb); ECF No. 334, filed Jan. 21, 2021 (C/A No. 18-5220-hb). The exhibits were admitted into evidence without objection.

<sup>4</sup> See ECF No. 92, entered Apr. 14, 2020 (C/A No. 18-05225-hb); ECF No. 289, entered Apr. 14, 2020 (C/A No. 18-05220-hb).

<sup>5</sup> This provision allows the trustee, with the Court’s approval, to employ “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.” 11 U.S.C. § 327(a).

bankruptcy case whereby they sought to resolve disputes involving competing proofs of claim filed by the Trustees, and to resolve and establish the claims of KLH Acquisition Company, LLC, Rivercross Capital, LLC, The Village at Sherrills Ford, LLC, and Rufus Road Partners, LLC (collectively, “Claimants”).<sup>6</sup> The settlement agreement stated the Trustees and Claimants also executed a Joint Defense and Prosecution Agreement (“JPA”) to facilitate the settlement, which memorialized the parties’ agreement to work jointly to pursue the recovery of alleged fraudulent transfers and other claims against multiple defendants. The settlement agreement provided that any proceeds from this joint litigation, after payment of the Claimants’ attorney’s fees and costs, would be distributed 50% to the Claimants and 25% each to Trustee Anderson and Trustee Haigler.

The JPA provides its parties and their counsels will cooperate, communicate, and work together in the joint prosecution to coordinate strategy and address issues they deem to be of common interest in connection with the litigation brought by them, and information shared and communications among the JPA parties and their counsel are to be confidential and protected by the applicable privilege. However, the JPA expressly states it does not create an attorney-client relationship between one party and counsel for another, and any such relationship shall be determined by separate independent agreements. The JPA is signed by Trustee Anderson, Trustee Haigler, and Keith Hawthorne both individually and on behalf of the other parties to the agreement. Page 8 of the JPA is titled “Exhibit A” and lists the following as the JPA parties’ counsel: Richard R. Gleissner and Luke R. Gleissner of the Gleissner Law Firm for Trustee Haigler; Brandon Keith Poston of NMRS for Trustee Anderson; Will Esser of Parker Poe, LLC for KLH Acquisition Company, LLC, the Village at Sherrills Ford, LLC, KLH Real Property Holdings, LLC, and Rivercross Capital, LLC; and John R. Buric of NC Counsel for Keith Hawthorne, Campground

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<sup>6</sup> ECF No. 84, filed Mar. 9, 2020 (C/A No. 18-05225-hb); ECF No. 273, filed Mar. 14, 2020 (C/A No. 18-05220-hb).

64, LLC, and Rufus Road Partners, LLC.<sup>7</sup>

At the April 14, 2020, telephonic hearing to consider the proposed settlement, the Trustees provided evidence and arguments that its terms were favorable and in the best interests of their estates, which otherwise do not have sufficient funds to pursue this contemplated litigation. All objections were resolved and the Consent Order Approving Settlement Agreement (“Consent Order”) was entered on April 16, 2020.<sup>8</sup> The Consent Order authorized the parties to enter the proposed settlement, granted Claimants an allowed claim in both bankruptcy cases in the amount of \$5,369,402.52, and set forth the procedure for the distribution of any Net Litigation Proceeds (as that term is defined in the settlement agreement) recovered in litigation the parties jointly prosecute (defined in the Consent Order as the “Jointly Prosecuted Litigation”). It also incorporated language the United States Trustee requested requiring that prior to the disbursement of any Net Litigation Proceeds, the Trustees file a notice in their respective estates under Fed. R. Bankr. P. 9019 specifying how the Net Litigation Proceeds are calculated in order to review the reasonableness of fees and expenses incurred by Claimants in the Jointly Prosecuted Litigation. The Consent Order specifically provided “the parties may enter into other agreements to govern the terms of the Jointly Prosecuted Litigation, but any such agreements have not been approved by this Court.” A review of the recording of that hearing and the docket clearly indicate the JPA itself was discussed, but no employment of new counsel was requested, and no attorney-client relationship was formed between its parties at execution of the JPA. Much of the JPA dealt with provisions regarding discovery and attorney-client privilege that would only involve this Court if the litigation was ultimately pursued here. Thus, approval of many terms of the JPA by this Court

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<sup>7</sup> A courtesy copy of the JPA was provided to the Court prior to the April 14, 2020 hearing, but not admitted into evidence at that time. The Court does not recall the Exhibit A or whether the JPA was signed when presented. An executed copy, with Exhibit A, was submitted into evidence at the January 22, 2021 hearing.

<sup>8</sup> ECF No. 94 (C/A No. 18-05525-hb); ECF No. 291 (C/A No. 18-05520-hb).

would have been premature and perhaps inappropriate as, at that time, the parties had not yet decided the proper forum for the Jointly Prosecuted Litigation.

## **II. NC LITIGATION**

October 9, 2020, a complaint was filed initiating the NC Litigation and signed (/s/) only by Buric as “Attorneys for Plaintiffs.” The Debtors were named as defendants but were voluntarily dismissed shortly thereafter. As relevant here, the complaint seeks the avoidance and recovery of transfers exceeding \$16,000,000.00 relying on bankruptcy law and the rights and powers of the Trustees. On November 17, 2020, Poston, Luke Gleissner, and Richard Gleissner requested *pro hac vice* admission in the NC Litigation on behalf of the Trustees. Judge Mullen granted the motions on November 18, 2020, pursuant to Local Rule 83.1(b) (W.D.N.C.), with Buric associated as local counsel. On January 5, 2021, the Howey Entities filed a motion to dismiss the complaint, asserting Buric and NC Counsel did not have this Court’s authority to represent the Trustees and bankruptcy estates when the complaint was filed, and rectifying this issue is futile because the statute of limitations has passed. *See* 11 U.S.C. § 546(a).

## **III. THE TRUSTEES’ MOTION BEFORE THIS COURT**

The Trustees’ returned to this Court with a Motion that requests clarification of the prior Consent Order or, alternatively, approval to employ NC Counsel as special local counsel to the Trustees in the NC Litigation to fulfill all obligations required under Local Rule 83.1 (W.D.N.C.), *nunc pro tunc* to April 16, 2020.<sup>9</sup> A hearing was held on January 21-22, 2021.

The testimony made clear the Trustees and their counsel, together with NC Counsel, have worked together to pursue the NC Litigation. At some point after the Consent Order, an attorney-

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<sup>9</sup> Movants initially gave notice of the Motion only to the UST. Thereafter, the Court required notice of the Motion and emergency hearing also be served on all parties in the NC Litigation. *See* ECF No. 146, entered Jan. 15, 2021 (C/A No. 18-05225-hb); ECF No. 324, entered Jan. 15, 2021 (C/A No. 18-05220-hb). Although notice was provided to the Howey Entities, no evidence was presented to indicate they are creditors in the bankruptcy cases.

client relationship was formed between the Trustees and NC Counsel and the Trustees intended for NC Counsel to serve as their local counsel. Trustees reviewed the substance and authorized the filing of the complaint in the NC Litigation, and prior inclusion of the Debtors in the case caption of the NC Litigation was in error. The *pro hac vice* admissions in the NC Litigation further evidence the Trustees' intent for NC Counsel to act as local counsel.

Although employment terms are best included in a clear, concise document of a certain date, basic terms of engagement can be ascertained here, and the parties agree the terms regarding compensation are those found in the settlement agreement, as conditioned by the Consent Order. Employment of NC Counsel is essential and in the best interests of these estates. Buric's Declaration, included with the Motion, explains that the interests of the Claimants and the Trustees are aligned, NC Counsel researched its client database and determined it does not hold any interests adverse to the estates, and NC Counsel disclosed any relevant connections to the Court. Buric testified in support of the Motion that although Keith Hawthorne – who holds ownership interests in the Claimants – is not a party to the settlement agreement, he is a party to the JPA and intends to be bound, individually, by its terms.<sup>10</sup> Hawthorne also intends and has always intended for any and all proceeds from the NC Litigation to be distributed according to the settlement agreement, including any proceeds recovered from any claim asserted by him individually. Thus, because any recovery will be divided in percentages allocated among the Claimants and Hawthorne, Trustee Anderson, and Trustee Haigler, the parties have equal incentive to maximize any and all recoveries regardless of the alleged injured party or legal theory of recovery. Claimants and Hawthorne will cover the upfront fees and expenses incurred by NC Counsel in pursuing the Jointly Prosecuted Litigation, and pursuant to the Consent Order, the UST, parties in interest, and this Court have the

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<sup>10</sup> KLH Real Property Holdings, LLC and Campground 64, LLC are also parties to the JPA and not the settlement agreement, but are not plaintiffs in the NC Litigation.

ability to review the calculation of the Net Litigation Proceeds and the reasonableness of Claimants' fees and expenses prior any distribution.

#### **APPLICABLE AUTHORITIES**

Section 327(e) provides:

The trustee, with the court's approval, may employ, for a specified special purpose, other than to represent the trustee in conducting the case, an attorney that has represented the debtor, if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed.

11 U.S.C. § 327(e).<sup>11</sup>

"Section 327 does not require notice and hearing procedures to hire professionals, only court approval." Dept. of Justice, Exec. Office for U.S. Trustees, *Handbook for Ch. 7 Trustees*, p. 4-20 (Apr. 2017), *available at* [www.justice.gov/ust/file/Handbook\\_for\\_Chapter\\_7\\_Trustees.pdf](http://www.justice.gov/ust/file/Handbook_for_Chapter_7_Trustees.pdf).

Generally, the Court's approval of an application to employ is administrative and non-controversial in nature, so long as there are adequate disclosures of the professional's connections, services, and compensation, and is usually approved without a hearing.<sup>12</sup> The requisite disclosures and other requirements for a trustee's application for approval of employment are set forth in Fed.

R. Bankr. P. 2014:

An order approving the employment of attorneys, accountants, appraisers, auctioneers, agents, or other professionals pursuant to § 327. . . of the Code shall be made only on application of the trustee or committee. The application shall be filed and . . . a copy of the application shall be transmitted by the applicant to the United States trustee. The application shall state the specific facts showing the necessity for the employment, the name of the person to be employed, the reasons for the selection, the professional services to be rendered, any proposed arrangement for compensation, and, to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person

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<sup>11</sup> Although § 327(e) only mentions the trustee, other parties are granted certain rights and powers of the trustee, including the ability to employ professionals under § 327. *See* 11 U.S.C. §§ 1107 & 1203.

<sup>12</sup> The Court does not trivialize the employment approval process, which is essential to the functions of the bankruptcy courts and can lead to significant litigation if conflicts and other information are not properly disclosed or considered.

employed in the office of the United States trustee. The application shall be accompanied by a verified statement of the person to be employed setting forth the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee.

Fed. R. Bankr. P. 2014(a).

[T]o hold an interest adverse to the estate means (1) to possess or assert any economic interest that would tend to lessen the value of the bankruptcy estate or that would create either an actual or potential dispute in which the estate is a rival or claimant; or (2) to possess a predisposition under circumstances that render such a bias against the estate.

To represent an adverse interest means to serve as an agent or attorney for any individual or entity holding such an adverse interest.

*In re Worldwide Wholesale Lumber, Inc.*, 364 B.R. 197, 201-02 (Bankr. D.S.C. 2006) (discussing § 327(a) (citations omitted)). Additionally, “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.” 11 U.S.C. § 327(c). An actual conflict of interest is not defined by the Code and courts have not established bright line rules as to when an actual conflict exists. *See In re Johnson*, 312 B.R. 810, 822 (E.D. Va. 2004). However, courts have concluded that “an alleged conflict of interest is ‘actual’ and warrants disqualification under § 327(c) if there is ‘active competition between two interests, in which one interest can only be served at the expense of the other.’” *Id.* (quoting *In re BH & P, Inc.*, 103 B.R. 556, 563 (Bankr. D.N.J. 1989), *aff’d* 949 F.2d 1300 (3d Cir. 1991)).

These applicable authorities require trustees and professionals to educate themselves about the engagement, negotiate compensation, conduct conflict checks and disclose results, and perform other timely actions to prepare and file a request for approval of employment. Upon filing, approval does not immediately result because sufficient time must be afforded for review,



resolution of any issues or objections, and entry of an order. For practical purposes, this Court's Local Rules provide "[u]pon entry of an order approving an application for employment, employment is effective from the date of the filing of the application, unless otherwise ordered by the Court." SC LBR 2014-1.

Approval "[n]unc pro tunc literally means 'Now for then[,]'" *Glynne v. Wilmed Healthcare*, 699 F.3d 380, 383 (4th Cir. 2012) (citing *Maksymchuk v. Frank*, 987 F.2d 1072, 1075 n.2 (4th Cir. 1993)), and is appropriate in some instances. The doctrine has been described by the Fourth Circuit as a method by which "a determination previously made, but for some reason improperly entered or expressed, may be corrected and entered as of the original time when it should have been, or when there has been an omission to enter it at all." *Id.* (quoting *Maksymchuk*, 987 F.2d at 1075 n.2). "*Nunc pro tunc* merely describes inherent power of [the] court to make its records speak the truth, *i.e.*, to correct [the] record at later date to reflect what actually occurred at trial." *Maksymchuk*, 987 F.2d at 1075 n.2 (quoting *Black's Law Dictionary* 1069 (6th ed. 1990)). Thus, "the purpose of an order entered *nunc pro tunc* is to correct mistakes or omissions in the record so that the record properly reflects the events that *actually took place*. It may not be used to retroactively record an event that never occurred or have the record reflect a fact that never existed." *Glynne*, 699 F.3d at 383-84 (emphasis in original) (citations omitted).

In *Roman Catholic Archdiocese of San Juan v. Acevedo Feliciano*, 140 S. Ct. 696 (2020), the Supreme Court stated:

Federal courts may issue *nunc pro tunc* orders, or "now for then" orders, to reflect the reality of what has already occurred. Such a decree presupposes a decree allowed, or ordered, but not entered, through inadvertence of the court.

Put colorfully, *nunc pro tunc* orders are not some Orwellian vehicle for revisionist history—creating 'facts' that never occurred in fact. Put plainly, the court cannot make the record what it is not.

*Id.* at 700-01 (internal citations, quotations, and alterations omitted). While *Acevedo* limits *nunc pro tunc* relief, it is “not a *per se* prohibition of all retroactive relief in all instances. *Acevedo* curtails only the inherent authority of federal courts to grant retroactive relief by *nunc pro tunc* orders which purport to create facts or rewrite history to support the retroactive relief granted.” *In re Miller*, 620 B.R. 637, 641 (Bankr. E.D. Cal. 2020).<sup>13</sup>

### **DISCUSSION AND CONCLUSIONS**

The Howey Entities assert potential conflicts of interest of NC Counsel and, therefore, object to the Motion to the extent it seeks approval of employment at any date. Even if the objection is considered, the evidence presented at the hearing and provided in Buric’s Declaration is sufficient to approve the request to employ. Employment of NC Counsel is overwhelmingly in the best interest of the estates and the evidence shows no conflict. There is a sufficient record to find the Trustees met their burdens necessary for this Court to approve employment of NC Counsel pursuant to § 327(c) and (e) and Fed. R. Bankr. P. 2014 to serve as local counsel in the NC Litigation. The relevant terms are found in the settlement agreement and Consent Order, and as supplemented and modified by the testimony provided at the hearing.

The Motion also seeks an order from this Court clarifying that the cumulative effect of the settlement agreement, JPA, and Consent Order was a prior approval or authorization of NC Counsel to act on the Trustees’ behalf. Many details of the joint intention to pursue the NC Litigation were disclosed to the Court and relevant parties on the bankruptcy record in April 2020 and the Trustees and their approved counsel were authorized to move forward in cooperation with

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<sup>13</sup> The *Miller* court discussed provisions of the Bankruptcy Code and Rules that may contemplate inherent retroactive relief. 620 B.R. at 641 (discussing the ability to “annul” the automatic stay under § 362 (citing *Merriman v. Fattorini* (*In re Merriman*), 616 B.R. 381, 391- 93 (9th Cir. B.A.P. 2020))); *id.* at 643 (stating Fed. R. Bankr. P. 6003(a) contemplates employment orders that provide for an effective retroactive date of compensation (citing Fed. R. Bankr. P. 6003, 2011 Advisory Comm. Notes)).

other parties and their respective counsel. However, the Consent Order and the recording of the April 14, 2020, hearing evidence that the Court was not asked for approval to employ NC Counsel, or any professionals, pursuant to § 327, and no attorney-client relationship was formed between NC Counsel and Trustees at that time. A review of Fed. R. Civ. P. 54 or Fed. R. Bankr. P. 7054 cited in support of the Motion indicates no authority for the relief requested, and the Trustees' request to "clarify" is without factual and legal support and must be denied. Further, no relief can be granted effective April 16, 2020, because that result would not "reflect the reality of what has occurred." *Acevedo*, 140 S. Ct. at 700-01.

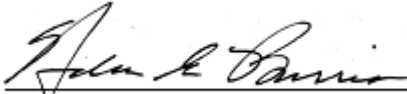
Further, there is no liberty here for the Court to approve employment at an earlier date to "correct mistakes or omissions in the record so that the record properly reflects the events that *actually took place*." *Glynne*, 699 F.3d at 383-84 (emphasis in original) (citations omitted). Although the evidence indicates an attorney-client relationship was formed after entry of the Consent Order but before this Motion, and NC Counsel has filed pleadings on behalf of the Trustees, this information was only presented to the Court with this Motion, along with relevant details for approval of employment, such as adequate disclosures of the professional's connections. *See* Fed. R. Bankr. P. 2014(a). This Court's authority to issue an order *nunc pro tunc* "presupposes a decree allowed, or ordered, but not entered, through inadvertence of the court." *Acevedo*, 140 S. Ct. at 701. The Trustees have failed to show how these facts, consistent with the limits of *Acevedo*, warrant *nunc pro tunc* relief to a time that precedes this Motion. Pursuant to SC LBR 2014-1, and consistent with *Acevedo*, employment of NC Counsel is effective as of the date the request to employ was presented to, and could have been acted on, by the Court. The significance of the effective date awaits determination from the District Court in the NC Litigation as it considers the motion to dismiss.

**IT IS, THEREFORE, ORDERED** that pursuant to 11 U.S.C. § 327(c) and (e), the Trustees' request for the Court's approval to employ the law firm James, McElroy & Diehl, P.A., as associated local counsel for the Trustees to fulfill all obligations required under Local Rule 83.1 (W.D.N.C) in the Civil Action Case No. 3:20-cv-00564, pending in the District Court for the Western District of North Carolina, is granted. SC LBR 2014-1 provides the employment is effective as of January 15, 2021.

**FILED BY THE COURT  
02/03/2021**



Entered: 02/03/2021

  
Chief US Bankruptcy Judge  
District of South Carolina