

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

IN RE:

Oaktree Medical Centre, LLC,

Debtor(s).

C/A No. 19-05154-HB

Chapter 7

**ORDER GRANTING APPLICATION
TO EMPLOY *NUNC PRO TUNC***

THIS MATTER came before the Court for hearing on November 16, 2021, to consider the Application filed by John K. Fort, Chapter 7 Trustee, seeking approval to employ the firm of Smith Hudson Law, LLC effective January 13, 2020.¹ An Objection was filed by McGuireWoods LLP.² The United States Trustee did not file an objection to the Application or participate in the hearing.

On September 19, 2019, Debtor Oaktree Medical Centre, LLC (“LLC”) and two related organizations, Oaktree Medical Centre P.C. (“PC”) and Labsource, LLC (collectively, “Debtors”) filed voluntary petitions for Chapter 7 relief in the U.S. Bankruptcy Court for the Western District of North Carolina. Venue was transferred to this Court on September 30, 2019, and Fort was appointed Chapter 7 Trustee in all three cases on October 2, 2019. On November 4, 2019, the Trustee’s employment of the firm Roe Cassidy Coates & Price, PA as general and special counsel was approved pursuant to 11 U.S.C. § 327(a) and (e). That application to employ stated:

1. As General Counsel, due to the complexity of this matter, the healthcare law aspects, and the potential for the need to file actions or defend actions outside of the Bankruptcy Court primarily involving regulatory and administrative matters, RCCP will represent or assist the Trustee in carrying out his duties, including assessing, pursuing, defending and litigating these actions outside of the Bankruptcy Court, and to generally advise the Trustee in the administration of the case . . .

¹ ECF No. 95, filed Oct. 7, 2021.

² ECF No. 101, filed Oct. 20, 2021.

2. As Special Counsel, RCCP will assess, pursue, and litigate recovery of assets pursuant to 11 U.S.C. §§ 544 through 550, including sending demand letters and/or conducting settlement negotiations with potential Adversary Proceeding Defendants, as well as commencing and litigating Adversary Proceedings.³

The application listed seven attorneys of that firm, including Joshua H. Hudson and Joseph O. Smith. Attached to the application was the Affidavit of Hudson, setting forth qualifications for employment under § 101(14).

In January 2020, Smith and Hudson left the employed firm to form Smith Hudson Law. Immediately thereafter, the Trustee approached Hudson to continue representation in this matter. A file was created at Smith Hudson Law and Hudson began performing work on January 13, 2020, and continuing to date. However, no application seeking authority to employ Smith Hudson Law was filed. Later realizing this oversight, in late 2020, the Trustee filed applications to employ Smith Hudson Law as successor general and special *nunc pro tunc* to January 13, 2020 in the PC and Labsource cases. No objections were raised and those requests were granted. However, nothing was requested in this case.

The Trustee filed the instant Application, which includes the same scope of employment and compensation as the prior approved arrangement, but only includes Hudson as an attorney to work on this matter going forward. It requests the same relief granted to the Trustee in the PC and Labsource cases. The Affidavit of Hudson included with the Application states a conflict check was conducted, both Hudson and Smith Hudson Law are disinterested persons in this case as that term is defined in § 101(14), and neither Hudson nor Smith Hudson Law hold or represent an interest adverse to the estate.

³ ECF No. 26.

Hudson has represented the Trustee since November 2019 and has actively worked for the Trustee since that time, including conducting Fed. R. Bankr. P. 2004 examinations⁴ and filing adversary proceedings in this Court. Among the adversary proceedings filed by Hudson on behalf of the Trustee are identical actions in each of the Debtors' cases filed on September 17, 2021, asserting various causes of action against several defendants – including McGuireWoods and two of its partners – alleging they caused damages to the Debtors' estates.⁵ The adversary complaints are signed by Hudson only on behalf of the Trustee and at his direction. McGuireWoods recently filed an answer and motion to dismiss in each adversary proceeding.

Although not specifically alleged in the adversary complaint, an Affidavit filed in support references prepetition *qui tam* actions brought against PC and Labsource, but not Oaktree. Prior to the bankruptcy, McGuireWoods represented PC and Labsource in the *qui tam* actions. The government intervened and after PC and Labsource did not respond, default judgments were entered against them post-petition. The Affidavit explains that, in the affiant's opinion, McGuireWoods and its attorneys were negligent and/or breached their fiduciary duties in their management of the defense of the *qui tam* actions. In its Objection to the Application, McGuireWoods asserts its defense in these adversary proceedings involves allegations the Trustee failed to perform his duties and/or followed inadequate advice of his counsel regarding the *qui tam* actions. McGuireWoods argues Hudson will be a witness in its pursuit of this defense and the Trustee, his client, may have unasserted claims on behalf of the bankruptcy estates against him and/or Smith Hudson Law. Consequently, McGuireWoods claims Hudson and Smith Hudson Law are not disinterested persons qualified for employment under § 101(14).

⁴ See ECF Nos. 63, 73, & 75.

⁵ Adv. Pro. Nos. 21-80057-hb (PC), 21-80058-hb (Oaktree), and 21-80059-hb (Labsource).

This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334 and 157 and this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A). The Bankruptcy Code allows trustees, with the Court’s approval, to employ an attorney that: (1) does not hold or represent an interest adverse to the estate; and (2) is disinterested. 11 U.S.C. § 327(a); *see also In re Harold & Williams Dev. Co.*, 977 F.2d 906, 909 (4th Cir. 1992) (explaining the Code “gives broad discretion to the bankruptcy court over the appointment of professionals to work on behalf of the trustee and the estate . . .”). This provision is intended to ensure “all professionals . . . tender undivided loyalty and provide untainted advice and assistance in furtherance of their fiduciary responsibilities.” *In re Johnson*, 312 B.R. 810, 819 (E.D. Va. 2004) (citing *Rome v. Braunstein*, 19 F.3d 54, 58 (1st Cir. 1994)).

A “disinterested person” is defined by the Code as a person who “does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor, or for any other reason.” 11 U.S.C. § 101(14)(C).

[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) (quoting *In re Air South Airlines, Inc.*, C/A No 97-17229-W, 1998 WL 34020727, at *7 (Bankr. D.S.C. Jan. 16, 1998)). This “‘catch all’ provision is broad enough to exclude a [professional] with some interest or relationship that ‘would even faintly color the independence and impartial attitude

required by the Code.” *In re AFI Holding Inc.*, 530 F.3d 832, 846 (9th Cir. 2008) (quoting *Kravit, Gass & Weber, S.C. v. Michel (In re Crivello)*, 134 F.3d 831, 835 (7th Cir. 1998)).

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).

The Trustee bears “the burden of demonstrating that an applicant for professional employment is qualified under § 327 . . .” *Harold & Williams Dev.*, 977 F.2d at 910. This is typically accomplished through the necessary disclosures and other requirements for an application for approval of employment 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 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). Once the proponent meets its burden of demonstrating the applicant is qualified under § 327, “the discretion of the bankruptcy court must be exercised in a way that it believes best serves the objectives of the bankruptcy system. Among the ultimate considerations for the bankruptcy courts in making these decisions must be the protection of the interests of the bankruptcy estate and its creditors, and the efficient, expeditious, and economical resolution of the

bankruptcy proceeding.” *Harold & Williams Dev.*, 977 F.2d at 910.

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). The Supreme Court recently clarified that *nunc pro tunc* orders are only issued to “‘reflect the reality’ of what has already occurred,” and the court “cannot make the record what it is not.” *Roman Cath. Archdiocese of San Juan v. Acevedo Feliciano*, 140 S. Ct. 696, 700-01 (2020) (quoting *Missouri v. Jenkins*, 495 U.S. 33, 49 (1990)). The Supreme Court’s decision in *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).

In *In re Grinding Specialists, LLC*, Chapter 7 trustees for related debtors sought to employ a North Carolina attorney as special counsel to represent them *nunc pro tunc* in litigation jointly prosecuted with certain claimants before the U.S. District Court for the Western District of North Carolina. 625 B.R. 6 (Bankr. D.S.C. 2021). The complaint in that litigation was signed and filed only by the North Carolina attorney and relied on bankruptcy law and the rights and powers of the trustees to avoid and recover certain transfers. *Id.* at 11. After the defendants filed a motion to dismiss arguing, in part, that the trustees were not properly joined in the lawsuit because the complaint was signed by an attorney whose employment was not approved by the bankruptcy court, the trustees filed an application to employ *nunc pro tunc*. While this Court approved

employment of the North Carolina Attorney as special counsel, it found such approval effective as of the date the request was made. Although many details of the parties' joint intention to pursue the litigation were previously disclosed, the record was clear that there was no prior request to employ the North Carolina attorney or any other professionals. *Id.* at 14-15. Therefore, approval of the attorney's employment to an earlier date was inappropriate because it would not correct any mistakes or omissions in the record of events that actually took place. *Id.* at 15. More importantly, adequate disclosures of the North Carolina attorney's connections under Fed. R. Bankr. P. 2014(a) and other relevant details for approval of his employment were not presented until the request to employ *nunc pro tunc* was filed. Therefore, the Court could not have acted on the request to employ prior to the trustees' submission of those qualifications and disclosures. *Id.*

McGuireWoods' arguments that Hudson and Smith Hudson Law are not qualified for employment under §§ 101(14)(C) and 327 are conjectural and, therefore, do not prevent Smith Hudson Law from qualifying as a disinterested person or render it as holding interests adverse to the estate. The Application otherwise meets the burdens necessary to approve employment of Smith Hudson Law under § 327(a) and (e) and Fed. R. Bankr. P. 2014 as general and special counsel for the Trustee and doing so is in the best interest of the estate.

The Court also finds it appropriate to authorize Smith Hudson Law's employment *nunc pro tunc* to January 13, 2020. Hudson (and Smith) individually was approved for employment in November 2019 while working for the prior firm and disclosures under § 327 and Fed. R. Bankr. P. 2014 were made at that time. The record does not indicate further disclosures to date would vary from the original disclosures that initially supported Hudson and Smith's involvement in this case. Approval of Smith Hudson Law's employment is appropriate to comply with § 327 and to correctly reflect what actually occurred when the two lawyers left the prior firm to create another.


The Court finds the relief requested here does not present a conflict with *Acevedo* or *Grinding* because authorizing the employment as the Trustee's successor general and special counsel as of January 13, 2020 does not create new facts, but rather reflects the reality of what has already occurred – lawyers Smith and Hudson were already approved for employment as the Trustee's general and special counsel in November 2019 and formation Smith Hudson Law did not alter the terms of employment or the connections of counsel to the debtor, creditors, or any other parties in interest that needed to be disclosed under Fed. R. Bankr. P. 2014(a).

IT IS, THEREFORE, ORDERED that pursuant to 11 U.S.C. § 327(a) and (e), the Trustee's request for the Court's approval to employ Smith Hudson Law, LLC as successor general and special counsel *nunc pro tunc* as of January 13, 2020 is approved.

**FILED BY THE COURT
11/18/2021**



Entered: 11/18/2021


Chief US Bankruptcy Judge
District of South Carolina