SO ORDERED.

SIGNED this 9th day of March, 2021.

LENA MANSORI JAMES
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

IN RE:	)	
	)	
Donald F. Wellington	)	Case No. 20-10080
	)	
Debtor.	)	Chapter 11
	)	

ORDER
GRANTING AMENDED APPLICATION FOR COMPENSATION

THIS CASE came before the Court on the Debtor's Amended Application for Compensation to Special Counsel (Docket No. 332, the "Amended Application"), seeking authority to compensate McGuireWoods, LLP ("Special Counsel") in the amount of $17,321.00 in fees and $168.00 in expenses. For the reasons discussed below, the Court finds it has the authority under 11 U.S.C. § 330[1] to award reasonable fees and expenses for services rendered prior to an applicant's effective date of employment, provided the applicant shows a reasonable justification for why services were performed prior to the employment effective date. This additional

[1] All citations to statutory sections refer to Title 11, United States Code, unless otherwise indicated.

criterion for awarding pre-employment[2] compensation is a "relevant factor" the Court will consider in determining the amount of reasonable compensation under § 330(a)(3). Based on the facts of this case, and the reasonable value of the services provided by Special Counsel, the Court finds the Debtor has narrowly met his burden and shown reasonable justification for Special Counsel's pre-employment services. The Court, therefore, will award pre-employment compensation to Special Counsel, albeit with a 10 percent reduction, due to the length of the delay and the Debtor's multiple failures to disclose to the Court and interested parties that Special Counsel was performing, and would seek compensation for, services performed prior the effective date of employment.

FACTUAL AND PROCEDURAL BACKGROUND

The Debtor filed this chapter 11 bankruptcy case on January 24, 2020 amid ongoing state-court litigation resulting from the Debtor's ill-fated real estate investments and personal guarantees. On March 4, 2020, or 40 days after filing his petition, the Debtor filed an application to employ Special Counsel to represent the Debtor in connection with the state-court cases in New York (Docket No. 71, the "Employment Application"). After notice and a hearing, the Court approved the Special Counsel's employment on March 20, 2020 (Docket No. 89, the "Employment Order"). Because neither the Employment Application nor the Employment Order specified the effective date of retention, the date upon which Special Counsel was employed in this case was the filing date of the Application to Employ – March 4, 2020 (the "Effective Date"). *See Order Regarding Employment of Professionals in Chapter 11 Cases*, at ¶ (c)(1) (Bankr. M.D.N.C. June 7, 2012) (the "Standing Order").[3]

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[2] As described in more detail below, the Court adopts the term "pre-employment" to denote the period prior to the filing of a professional's application to employ under § 327(a). *See infra* discussion at note 9. This should not be conflated with a professional's retention date, which is the date on which a debtor first retains the professional. That retention date may not always align with the professional's employment date in a bankruptcy case and, in many instances, the retention of a professional may occur prior to the filing of the respective bankruptcy case.

[3] The 2012 Standing Order provides, in pertinent part, that "[a]ny order of approval of employment entered by the court will relate back to the date of the filing of the application for approval of employment unless the order of approval provides otherwise."

At the hearing on the Debtor's initial application to compensate Special Counsel (Docket No. 286), the Court questioned the inclusion of fees for work performed prior to the Effective Date. The time entries provided by the Debtor document a fee of $18.50 and a charged expense of $18.07 that were both incurred prepetition. Those same time entries also show that approximately $11,876.50 (68.6%) of the $17,302.50 in post-petition fees sought by Special Counsel were incurred prior to the Effective Date. The Debtor had not expressly indicated, in either the application or at the hearing, that Special Counsel was seeking compensation for work performed prior to the Effective Date. The Debtor also failed to provide any rationale for the gap between when Special Counsel commenced work and when the Debtor filed the Employment Application. In response to this prompting, the Debtor agreed to provide more explanation, by way of a supplement or amended application, as to why Special Counsel should be awarded fees incurred prior to the Effective Date.

In the Amended Application filed on December 23, 2020, the Debtor asserts that the pre-employment fees were unanticipated and stemmed from a creditor's state-court filings as well as the subsequent request from the presiding judge for briefing and a hearing on the applicability of the automatic stay (Docket No. 332, p. 2). This Court held a telephonic hearing on the Amended Application on January 14, 2021, at which Charles M. Ivey, III, appeared on behalf of the Debtor and William P. Miller appeared in his capacity as United States Bankruptcy Administrator (the "BA"). At the hearing, the Debtor further explained the basis for Special Counsel's incurring of fees before the Effective Date, adding that, given the terms of the Confirmed Plan (Docket No. 275), the Debtor's payment to Special Counsel would have no impact on any creditor in this case. The BA did not oppose the relief requested in the Amended Application and agreed that Special Counsel's pre-employment charges were of an emergency nature, but reiterated the BA's policy that applications to employ should be filed, to the greatest extent possible, contemporaneously with the onset of an applicant's services. The BA advises applicants that they risk denial of compensation for work performed before an

application to employ is filed. At the conclusion of the hearing, the Court took the matter under advisement.

DISCUSSION

I. The Code and Federal Bankruptcy Rules do not Preclude Awarding Compensation for Services Rendered Prior to Court Approval of a Professional's Employment

The central question presented within the Amended Application is whether professionals such as Special Counsel can be compensated for services rendered prior to the professional's effective date of employment. This is hardly the first instance in which an application was belatedly filed after the professional had begun rendering services, but after the Supreme Court's decision in *Roman Catholic Archdiocese of San Juan v. Acevedo Feliciano*, 140 S. Ct. 696 (2020), the longstanding procedural mechanism bankruptcy courts had utilized to consider pre-employment compensation — *nunc pro tunc* employment orders[4] — no longer appears to be a permissible exercise of a bankruptcy court's inherent powers or authority under § 105(a).[5] Rather than retroactively changing the effective date of

[4] After enactment of the Bankruptcy Code, courts were faced with two paths forward to awarding pre-employment compensation. Rather than awarding compensation for services performed prior to a professional's effective employment date, the broad consensus of circuits on how to address the dilemma of pre-employment fees and expenses was through the use of *nun pro tunc* retention orders to backdate the effective date of employment to align with the start of services. *See In re Jarvis*, 53 F.3d 416, 419–20 (1st Cir.1995); *In re Singson*, 41 F.3d 316, 319–20 (7th Cir. 1996); *In re Land*, 943 F.2d 1265, 1267–68 (10th Cir. 1991); *In re F/S Airlease II, Inc.*, 844 F.2d 99, 105 (3d Cir. 1988); *In re THC Fin. Corp.*, 837 F.2d 389, 392 (9th Cir. 1988); *In re Triangle Chems., Inc.*, 697 F.2d 1280, 1289 (5th Cir. 1983).

[5] In *Roman Catholic Archdiocese of San Juan v. Acevedo Feliciano*, 140 S. Ct. 696 (2020), the Supreme Court clarified the limits and proper use of *nunc pro tunc* orders. The Court held that "[f]ederal courts may issue *nunc pro tunc* orders … to 'reflect the reality' of what has already occurred." *Id.* at 700–01 (internal citation omitted). An order granting relief *nunc pro tunc* "'presupposes a decree allowed, or ordered, but not entered, through inadvertence of the court." *Id.* As reemphasized in *Acevedo*, a court cannot "create[] 'facts' that never occurred in fact" or "make the record what it is not." *Id.* at 701; s*ee also Gagnon v. United States*, 193 U.S. 451, 457–58 (1904) (finding the weight of authority decidedly against the existence of the "power to recreate a record, no evidence of which exists"); *Glynne v. Wilmed Healthcare*, 699 F.3d 380, 384 (4th Cir. 2012) (finding *nunc pro tunc* orders "may not be used to retroactively record an event that never occurred or have the record reflect a fact that never existed."). While the question is not before the Court in this instant application, several bankruptcy courts have persuasively determined that the longstanding bankruptcy practice of utilizing *nunc pro tunc* orders to backdate a professional's employment date, by invoking the court's inherent powers, must be discontinued in the wake of *Acevedo*. *See, e.g.*, *In re Miller*, 620 B.R. 637, 638 (Bankr. E.D. Cal. 2020) (finding *Acevedo* "prohibits the court from approving the professionals' employment *nunc pro tunc*…"); *In re Roberts*, 618 B.R. 213, 217 (Bankr. S.D. Ohio 2020) ("Based on the Supreme Court's ruling [in *Acevedo*], the use of *nunc pro tunc* orders

Special Counsel's employment, relief which the Debtor has not requested and which is arguably no longer within a bankruptcy court's power to grant, the Court is left to consider whether the Bankruptcy Code and Federal Bankruptcy Rules allow for any compensation to Special Counsel for services performed prior to the Effective Date.

The employment of attorneys in bankruptcy is generally governed by 11 U.S.C. § 327(a), which provides that a trustee or debtor-in-possession may, with the court's approval, employ one more or more attorneys, accountants, appraisers, auctioneers, or other professional persons. *In re Harold & Williams Dev. Co.*, 977 F.2d 906, 909 (4th Cir. 1992) (describing the bankruptcy court's "broad discretion over the appointment of professionals."). Attorneys such as Special Counsel, who do not manage the day-to-day aspects of the case as a debtor's bankruptcy counsel but are instead hired for discrete or specialized assignments, are governed by the narrower parameters of subparagraph (e), which provides:

> (e) 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); *see In re Etheridge*, No. 18-11303, 2019 WL 6735753, at *4 (Bankr. M.D.N.C. Dec. 10, 2019).

Federal Bankruptcy Rule 2014 is the procedural means by which a professional may obtain the court-approved employment referenced in § 327(a) and

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to retroactively seek employment of professionals is an improper use of the mechanism and this Court will no longer enter such orders."); *In re Benitez*, No. 8-19-70230, 2020 WL 1272258, at *1 (Bankr. E.D.N.Y. Mar. 13, 2020) ("This Court's reading of *Acevedo* is that utilizing *nunc pro tunc* orders to approve the retention of estate professionals retroactive to some date prior to the actual date of court approval is inappropriate."). While *Acevedo* appears to foreclose a court's invocation of its inherent powers to create an earlier record of employment approval where none exists, the Supreme Court does not foreclose retroactive relief in all circumstances. Where a statute provides for such relief, either expressly or impliedly, courts may award relief with retroactive effect but without resorting to *nunc pro tunc* orders. *Miller*, 620 B.R. at 641. For instance, bankruptcy courts possess express authority to retroactively annul the automatic stay under § 362(d). *See Merriman v. Fattorini (In re Merriman)*, 616 B.R. 381, 391–93 (9th Cir. B.A.P. 2020); *see also* Keith M. Lundin, LUNDIN ON CHAPTER 13, § 64.4, at ¶ 1, LundinOnChapter13.com (last visited on Jan. 13, 2021) ("Annulling means that the stay is eliminated as of some moment in the past, sometimes as of the filing of the case itself.").

(e). The trustee, debtor-in-possession, or committee desiring to employ the professional must submit an application that sets forth the specific facts showing the necessity for the employment, the reasons for the selection, the professional services to be rendered, any proposed arrangement for compensation, and any connections between the professional and the debtor, creditors, or other parties in interest. Fed. R. Bankr. P. 2014(a).

Under § 330(a), professionals who are employed under § 327 may be awarded "reasonable compensation for actual, necessary services rendered" and "reimbursement for actual, necessary expenses." 11 U.S.C. § 330(a)(1)(A)-(B); *see In re Ameritex Yarn, LLC*, 378 B.R. 107, 114–16 (Bankr. M.D.N.C. 2007). While *Acevedo* may have eliminated *nunc pro tunc* retention orders, which effectively required a court to "create" antecedent findings supporting employment where no record previously existed, courts are not prohibited from compensating professionals under § 330 for work performed prior to an effective date of employment. *In re Miller*, 620 B.R. 637, 641–42 (Bankr. E.D. Cal. 2020); *In re Roberts*, 618 B.R. 213, 217 (Bankr. S.D. Ohio 2020); *In re Benitez*, No. 8-19-70230, 2020 WL 1272258, at *2 (Bankr. E.D.N.Y. Mar. 13, 2020). The language of § 330 and Federal Bankruptcy Rule 2014 does not explicitly preclude compensation prior to the effective employment date, and the "single temporal limitation" appears to be that a professional must have been successfully employed pursuant to § 327 before obtaining a court award of compensation. *In re Benitez*, 2020 WL 1272258, at *3. There is nothing in the Code or the Federal Bankruptcy Rules that requires the entirety of an applicant's compensable work be performed subsequent to a court's approval of employment. *Id.*; *see also In re Roberts*, 618 B.R. at 218.[6]

[6] The absence of any language in the Bankruptcy Code or Federal Rules requiring that employment approval under § 327(a) precede all compensable work is hardly a new observation. Numerous courts have noted, based on the plain language of the pertinent sections and rules, that there is no requirement that retention precede court approval of employment, nor is there a per se prohibition on compensation for services performed prior to the filing of an application. *See, e.g.*, *In re Singson*, 41 F.3d 316, 319 (7th Cir. 1994) (finding that neither § 327(a) nor Rule 2014(a) say that court approval of a professional's employment must precede the engagement); *In re First Sec. Mortg. Co. Inc.*, 117 B.R. 1001, 1007 (Bankr. N.D. Okla. 1990) (finding "none of the statutes here involved provide in so many words that compensation is owing only where the Court's approval has been

Moreover, it is "difficult to find or envision a case where no services are rendered prior to entry of such an order," given the delay between the filing of an application, the passing of the applicable objection period, and the eventual entry of the order approving employment. *In re Roberts*, 618 B.R. at 218; *see also In re Miller*, 620 B.R. at 642. In addition to natural delays that accompany the processing of employment applications, the Federal Bankruptcy Rules themselves ensure that at least some professional services will be undertaken prior to court approval of employment.[7] After considering the plain language of the applicable sections and rules, the Court concurs with the reasoning of the *Miller*, *Roberts*, and *Benitez* decisions and finds the Bankruptcy Code and Federal Rules of Bankruptcy Procedure allow for the compensation of professional services rendered prior to entry of an order approving employment.

II. Standard for Awarding Pre-Employment Compensation Under 11 U.S.C. § 330

The Court has discretion to award pre-employment fees and expenses as part of its determination of the amount of a professional's reasonable compensation under § 330. Under § 330, the Court is authorized to award "a professional person employed under section 327 … reasonable compensation for actual, necessary services rendered by the professional[,]" with the "reasonable" amount to be determined by the Court after considering "the nature, the extent, and the value of such services, taking into account all relevant factors[.]" 11 U.S.C. § 330(a)(1),(3). It is through this framework that the Court may consider relevant factors that weigh in favor or against the awarding of pre-employment compensation, such as the reasons for a delayed application filing or what circumstances necessitated an

given *in advance* of employment.") (emphasis original); 3 COLLIER ON BANKRUPTCY ¶ 327.03 (16th ed. 2020) ("Although the statute does not require the approval to precede the retention, some courts have read this requirement into the statute.").

[7] Federal Bankruptcy Rule 6003(a) prohibits approval of an employment order within the first 21 days of a bankruptcy case, except in circumstances where it is necessary to avoid immediate and irreparable harm. Fed. R. Bankr. P. 6003(a). As noted in *Miller*, the nature of chapter 11 cases, which usually require significant services from professionals within the first 21 days, shows the Federal Bankruptcy Rules must provide for retroactive compensation for pre-employment services "to avoid the absurdity of the need to find immediate and irreparable harm regarding employment in virtually every chapter 11 case." *In re Miller*, 620 B.R. at 642.

immediate need for professional services. Through a series of amendments to the bankruptcy system, Congress has refined the analytical framework by which bankruptcy courts compensate professionals. *See In re Ameritex Yarn, LLC*, 378 B.R. 107, 114 (Bankr. M.D.N.C. 2007) (discussing the changes to professional compensation between the 1898 Bankruptcy Act and the enactment of Bankruptcy Code).

The first step simply asks whether the fees and expenses are sought by one of the court-approved professionals enumerated in § 330(a)(1). For an attorney such as Special Counsel, the initial prerequisite to compensation under § 330 is that a professional must seek and obtain court-authorized employment by complying with the notice and disclosure requirements of § 327 and Rule 2014. While the Court has found there is no temporal requirement that court-approved employment must precede all services rendered, the professional must nevertheless obtain court approval at some stage of the bankruptcy case to receive any compensation under § 330(a).

Second, a professional employed under § 327 must demonstrate the fees and expenses sought derive from actual, necessary services rendered by the professional. Section 330(a) provides in relevant part:

> (1) After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, a consumer privacy ombudsman appointed under section 332, an examiner, an ombudsman appointed under section 333, or a professional person employed under section 327 or 1103—
>
> > (A) reasonable compensation *for actual, necessary services* rendered by the trustee, examiner, ombudsman, professional person, or attorney and by any paraprofessional person employed by any such person; and
> > (B) reimbursement *for actual, necessary expenses*.

11 U.S.C. § 330 (emphasis added); *see In re Ameritex Yarn, LLC*, 378 B.R. at 114–16.

Third, the Court must determine the reasonable amount of compensation for the actual, necessary services that were rendered by the professional. While "reasonableness is a classic amorphous standard that is preclusive of bright line

rules[,]" *In re Ameritex Yarn, LLC*, 378 B.R. at 114 (internal citation omitted), the Bankruptcy Code provides guidance in § 330(a)(3), which states:

> (3) In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, *taking into account all relevant factors, including—*
>
> (A) the time spent on such services;
> (B) the rates charged for such services;
> (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
> (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;
> (E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and
> (F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

11 U.S.C. § 330(a)(3) (emphasis added).

The factors enumerated within § 330(a)(3) comprise a "non-exclusive list*," In re Etheridge*, No. 18-11303, 2019 WL 6735753, at *4 (Bankr. M.D.N.C. Dec. 10, 2019), which may encompass other variables unspecified within the section. This finding is supported by the use of the word "including," *see Lochner Techs., LLC v. Vizio, Inc.*, 567 Fed App'x. 931, 939 (Fed. Cir. 2014) (noting that including is generally an open-ended term that does not preclude additional elements), as well as the provision's dictate to consider "*all* relevant factors" regarding the nature, extent, and value of services performed by the professional. In fact, Congress amended § 330(a)(3) in 1994 to provide that enumerated list, attempting to "codify many of the factors previously considered by courts in awarding compensation and reimbursing expenses." 3 COLLIER ON BANKRUPTCY ¶ 330.LH(5) (16th ed. 2020). Courts can and do apply additional factors not specifically stated in § 330(a)(3), such as the 12 *Levin* factors employed by bankruptcy courts within the Fourth Circuit.

See Harman v. Levin, 772 F.2d 1150, 1152 n.1 (4th Cir. 1985) (*citing Barber v. Kimbrell's, Inc.*, 577 F.2d 216, 226 n. 28 (4th Cir. 1978)).[8]

Though the Code and Federal Bankruptcy Rules allow for compensation of professionals prior to entry of an order approving employment, the longstanding requirement of numerous bankruptcy courts that the effective date of employment coincide with the commencement of services resulted from sound policy concerns. 3 COLLIER ON BANKRUPTCY ¶ 327.03 (16th ed. 2020) (discussing courts' intention to retain "control over administrative expenses and an opportunity to review any conflicts, the professional's competency and the necessity for the services to be performed."). While *nunc pro tunc* employment orders are no longer permissible, these policy concerns can still be advanced through the Court's responsibility to ensure all professional compensation is "reasonable" under § 330(a)(3). *In re Benitez*, No. 8-19-70230, 2020 WL 1272258, at *4 (Bankr. E.D.N.Y. Mar. 13, 2020). Pre-employment compensation may very well be unreasonable under § 330(a)(3) where, without good reason, creditors and interested parties were not afforded fair notice of the intention to employ the professional before fees and expenses were incurred. As with all applications under § 330(a), the fee applicant has the burden of proof in asserting that the fees requested are reasonable. *In re Ameritex Yarn, LLC*, 378 B.R. 107, 114 (Bankr. M.D.N.C. 2007).

Accordingly, and as part of the "relevant factors" to be weighed in determining reasonable compensation under § 330(a)(3), the Court will consider the following additional factor: whether all or some of the fees and expenses sought are for work performed prior to a professional's effective date of employment and, if so,

[8] The twelve *Levin* factors the bankruptcy court must consider in determining the reasonableness of attorney fees are: (1) the time and labor expended; (2) the novelty and difficulty of the questions raised; (3) the skill required to properly perform the legal services rendered; (4) the attorney's opportunity costs in pressing the instant litigation; (5) the customary fee for like work; (6) the attorney's expectations at the outset of the litigation; (7) the time limitations imposed by the client or circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between attorney and client; and (12) attorneys' fees awards in similar cases. *See In re Etheridge*, No. 18-11303, 2019 WL 6735753, at *5 (Bankr. M.D.N.C. Dec. 10, 2019).

whether the professional has provided a reasonable justification for why services were performed prior to the employment effective date.[9] In some cases, the justification for pre-employment fees and expenses is apparent from the docket itself, a situation that would largely negate the need for an applicant to provide detailed explanation.[10] In most cases, however, an applicant will need to articulate reasonable justification for why compensation is merited for work performed prior to the filing of an employment application.

In considering whether there was reasonable justification for pre-employment services, the Court will look for guidance from the well-developed caselaw regarding *nunc pro tunc* employment orders. While pre-employment compensation is a matter of first impression for this Court within the context of § 330(a)(3) analysis, the established caselaw regarding *nunc pro tunc* employment orders is highly persuasive authority on the subject. *See Detroit Edison Co. v. Michigan Dep't of Envtl. Quality*, 29 F. Supp. 2d 786, 791 (E.D. Mich. 1998) ("This is the very definition of a question of first impression: no precedent compels an answer by *stare decisis*. Thus I find that I have at hand only the suggestions of persuasive authority ..."). This developed caselaw is instructive because the analytical framework within *nunc pro tunc* employment orders did not spring from, or conform to, specific or limiting language within the Code or Federal Bankruptcy Rules. Instead, the analysis was motivated by specific policy concerns, which include ensuring the disinterestedness of a professional before services are commenced, promoting

[9] In most cases, the date on which the application to employ was filed would serve as the effective date of employment and, as a result, would become the temporal boundary for where the Court would retrospectively apply any additional scrutiny to compensation requests. The Court will not apply this standard to compensation requests for work performed between the filing of the application and entry of an order approving the employment as "[o]rders approving employment are rarely entered on the date employment applications are filed." *In re Kearney*, 581 B.R. 644, 647 (Bankr. D.N.M. 2018). Further, the Court is prohibited by rule from approving applications to employ within the first 21 days of a case. Fed. R. Bankr. P. 6003(a). Compensation sought for all work prior to the application date will, however, be examined closely to determine whether any delay was reasonable.

[10] For example, the appointment of a chapter 11 trustee to steady a troubled case would very likely require the trustee's attorney to undertake efforts immediately, with no prior awareness of the case, such that several weeks might elapse before an opportunity is afforded to submit an application to employ.

transparency in the use of estate assets in the early stages of a case, controlling or limiting expenses that impact the estate, and providing interested parties with notice and an opportunity to object to proposed employment *before* any services are undertaken by professionals. *See, e.g.*, *Farinash v. Vergos (In re Aultman Enters.)*, 264 B.R. 485, 490 (E.D. Tenn. 2001); *In re Vlachos*, 61 B.R. 473, 478 (Bankr. S.D. Ohio 1986); *see also* 3 COLLIER ON BANKRUPTCY ¶ 327.03 (16th ed. 2020). These policy concerns, which informed the heightened burden courts applied to *nunc pro tunc* employment applications, remain an ongoing concern within the context of determining whether a professional's pre-employment fees and expenses are reasonable for purposes of § 330 compensation.

The Court, therefore, will look to the persuasive authority within *nunc pro tunc* employment caselaw for guidance on the determining what constitutes reasonable justification for pre-employment fees and expenses. The Fourth Circuit has not endorsed any of the tests for determining *nunc pro tunc* employment, *see Binswanger Cos. v. Merry-Go-Round Enters. Inc.*, 258 B.R. 608, 612–13 (D. Md., 2001), *aff'd* 24 Fed. Appx. 135 (4th Cir. 2001), but the key determinative questions can be gleaned from the test previously applied within this District. *See, e.g.*, *In re Southeastern Materials, Inc.*, No. 09-52606, 2010 WL 521121 (Bankr. M.D.N.C. Feb. 12, 2010); *In re Hinson*, No. 96-11490C, Docket No. 23 (Bankr. M.D.N.C. Jan. 21, 2000). Specifically, the Court's determination of whether pre-employment compensation is reasonably justified will be guided by the following considerations:

i. the reasons for the delay in filing an application to employ;
ii. whether the applicant or some other person bore responsibility for applying for approval;
iii. whether the applicant was under time pressure to begin service without approval;
iv. the amount of delay after the applicant learned that initial approval had not been granted;
v. the extent to which compensation to the applicant will prejudice innocent third parties; and
vi. other relevant factors.[11]

[11] These factors are largely derived from the "extraordinary circumstances" standard that was used by the majority of courts in determining whether to grant *nunc pro tunc* employment. *In re Keren*

The Court will view with skepticism any explanation that simply amounts to negligence or inadvertence in failing to timely file an application to employ before rendering services. *See* 3 COLLIER ON BANKRUPTCY ¶ 327.03[3] (16th ed. 2020) ("The majority of courts hold that simple neglect or inadvertence on the part of the applicant in failing to file a timely retention application under section 327 is not a sufficient basis for granting retroactive approval of employment.").

If the Court determines, through applying these elements, that an applicant has provided reasonable justification for performing services prior to the effective date of employment, the Court may find all or part of the pre-employment fees and expenses to be "reasonable" compensation under § 330(a)(3). Nevertheless, while pre-employment compensation is an available remedy, the burden that accompanies obtaining that compensation should motivate professionals to timely file all employment applications. Since filing an application to employ "is a relatively simple process," *In re Novinda Corp.*, No. 16-13083, 2017 WL 1284715, at *3 (Bankr. D. Colo. Mar. 17, 2017), applicants should not needlessly delay as doing so risks denial of compensation for any pre-employment work where the applicant can provide no reasonable basis for the delay. This recommendation also comports with the BA's policy of encouraging applicants to file any applications to employ, to the greatest extent possible, contemporaneously with the onset of services.

III. Debtor Has Shown Reasonable Justification for Special Counsel's Pre-Employment Services but with a Reduction to the Pre-Employment Compensation

After considering the context of this case and the nature of the applicant's pre-employment work, the Court finds cause to award most, but not all, of the compensation sought by Special Counsel. Initially, the Court will strike and disallow the $18.50 fee and $18.07 expense that were both incurred prior to the Debtor's bankruptcy filing. The charges do not appear to be in contemplation of, or

Ltd. Pshp., 225 B.R. 303, 306–07 (S.D.N.Y. 1998), *aff'd sub nom. Cushman & Wakefield v. Keren P'ship (In re Keren Pshp.)*, 189 F.3d 86 (2d Cir. 1999); *see also* 9 COLLIER ON BANKRUPTCY ¶ 2014.08 (16th ed. 2020). While the standard facially required a demonstration of "extraordinary circumstances," *nunc pro tunc* appointments were "more common" than other types of retroactive relief. *Mitan v. Duval (In re Mitan)*, 573 F.3d 237, 245 (6th Cir. 2009).

in connection with, the Debtor's bankruptcy case sufficient to fall within the purview of 11 U.S.C. § 329(a), nor are the charges intended to be treated as a general unsecured claim, as evidenced by the affidavit attached to the Employment Application stating that Special Counsel was not a creditor of the Debtor (Docket No. 71, Ex. B). For these reasons, the Court concludes the inclusion of the prepetition charges must be an oversight or error on the part of the Debtor or Special Counsel and will disallow $18.50 fee and the $18.07 expense.

As to those fees that were incurred after the Debtor's bankruptcy filing, but before the Effective Date, the Court finds the Debtor has met his burden of demonstrating a reasonable justification for Special Counsel's pre-employment services. While the Court will compensate Special Counsel for work performed prior to the Effective Date, the Debtor's failure to disclose, on at least two occasions, that Special Counsel was already performing and would be seeking fees and expenses for that pre-employment work merits a 10 percent reduction to the amount.

In reaching this conclusion, the Court first finds the entirety of the services performed by Special Counsel to be actual and necessary for purposes of § 330(a). The work performed by Special Counsel ensured the state court understood the applicability of the automatic stay to the proceedings before it. Special Counsel also assisted the Debtor's bankruptcy counsel with noticing issues regarding the proposed settlement agreement that was to be the centerpiece of the Debtor's confirmed chapter 11 plan. The Court also finds, under the 12 *Barber* factors, that Special Counsel's hourly rates are generally reasonable and are consistent with the terms disclosed in the Employment Application. *See Barber v. Kimbrell's, Inc.*, 577 F.2d 216, 226 n. 28 (4th Cir. 1978).

Turning to the question of whether Special Counsel's pre-employment services were reasonably justified, the Court concurs with the BA's assessment that the pre-employment work was of an emergency nature. This conclusion is supported by the state-court docket in *Naber Electric, Inc. v. EMC Builders Metropolitan, et. al.*, No. 64001/2018 (N.Y. Sup. Ct. 2019), of which this Court takes judicial notice. *See Brown v. Ocwen Loan Servicing, LLC*, No. 14-3454, 2015 WL 5008763, at *1 n. 3

(D. Md. Aug. 20, 2015), *aff'd*, 639 Fed. App'x. 200 (4th Cir. 2016) (finding court may take judicial notice of docket entries, pleadings, and papers in other cases). The fees and expenses incurred by Special Counsel arose in direct response to a creditor's actions and the presiding judge's request for briefing on the applicability of the automatic stay to the state-court proceeding. This need for Special Counsel to take immediate, unexpected actions in state court before the filing of the Employment Application serves as a reasonable justification for the performance of pre-employment services for period of time; however, the length of the delay before the Debtor filed the Employment Application—almost six weeks—pushes the boundaries of reasonableness and is cause for concern.

Further supporting the award of pre-employment compensation, however, is the absence of prejudice to any creditors. Pursuant to the terms of the Confirmed Plan (Docket No. 275), the Debtor's payment to Special Counsel will have no impact on any creditor in this case. The unsecured creditors will share pro-rata a dedicated $6.1 million dollar fund generated from the sale of the Debtor's stock holdings. That fund cannot be used to pay administrative expenses such as Special Counsel's compensation. Secured and priority creditors are to be paid on a monthly or quarterly basis and the amount of the Special Counsel's compensation will have no bearing on their claims or payments. The only party that would suffer any detriment in paying the additional fees and expenses to Special Counsel for work performed prior to the Effective Date is the Debtor, who does not oppose the relief sought. This rare lack of prejudice to creditors or other third parties supports awarding pre-employment compensation to Special Counsel.

Weighing against awarding the full amount of pre-employment compensation is the Debtor's failure to disclose to the Court and all interested parties, on at least two occasions, that Special Counsel had provided extensive pre-employment services for the Debtor and intended to seek fees for that work. The Debtor did not indicate in the Employment Application, or at the hearing on the application, that Special Counsel was already performing services and incurring fees. Similarly, in the initial application to compensate Special Counsel (Docket No. 286), the Debtor

neglected to state in the application itself that more than half the requested fees reflected work performed prior to the Effective Date. This concerning lack of candor undercuts the policy concerns discussed above and weighs against awarding the full amount of pre-employment compensation. Applicants must inform the Court, the BA, creditors, and interested parties of any services already performed prior to the filing of an application to employ, the approximate amount billed up to the date of the application, and any future services that are contemplated after the application. *In re Benitez*, No. 8-19-70230, 2020 WL 1272258, at *2 (Bankr. E.D.N.Y. Mar. 13, 2020). Applicants must also include that same information when seeking compensation and provide reasonable justification for awarding pre-employment compensation. The Debtor's failure to adequately disclose Special Counsel's pre-employment services merits a reduction of 10 percent, or $1,187.65, to the pre-employment compensation amount. This modest reduction is an appropriate measure given length of the delay, the multiple disclosure failures, as well as the relative novelty of the governing law at this juncture.

For the reasons stated above, and based on the particular facts and circumstances of this case, the Court finds the Debtor has met his burden of demonstrating reasonable justification for awarding Special Counsel fees and expenses for work performed prior to the Effective Date, but with a 10 percent reduction.

CONCLUSION

For the reasons discussed above, THE COURT FINDS the $18.50 fee and $18.07 expense that Special Counsel incurred prior to the Debtor's bankruptcy filing should be stricken and disallowed.

THE COURT FURTHER FINDS there is reasonable justification for awarding Special Counsel fees and expenses for work performed prior to Special Counsel's effective date of employment.

THE COURT FURTHER FINDS the length of the delay and the Debtor's failures to properly disclose Special Counsel's prior performance of pre-employment

work merit a 10 percent reduction, or $1,187.65, to the pre-employment compensation amount.

Accordingly, IT IS HEREBY ORDERED that the Amended Application for Compensation to Special Counsel is APPROVED in a reduced amount. The Debtor is authorized to pay McGuireWoods, LLP the sum of $16,114.85 in fees and $149.93 in expenses for work performed from January 24, 2020 through June 30, 2020.

END OF DOCUMENT

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20-10080

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