

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re:
Charles K. Breland, Jr.,
Debtor.

Case No.: 16-2272-JCO
Chapter 11

In re:
Osprey Utah, LLC,
Debtor.

Case No.: 16-2270-JCO
Chapter 11

STANDING ORDER ON APPLICATIONS FOR
NUNC PRO TUNC OR POST FACTO EMPLOYMENT OF PROFESSIONALS

The issue of *nunc pro tunc* requests for relief have come before this Court on numerous occasions in this case and such relief has once again been requested by the Chapter 11 Trustee to Approve the Employment of an Accountant *Nunc Pro Tunc*. (Doc. 943). Having considered the law in this Circuit on *nunc pro tunc* requests for relief, this Court enters the following Standing Order applicable in the above styled cases. Failure of the parties to follow the procedures set out herein may result in the denial of the relief requested without a hearing.

Generally, bankruptcy courts require that court approval of the retention of a professional must be made before the professional has been employed. *See In re Jarvis*, 53 F.3d 416 (1st Cir. 1995). There is a circuit split on whether employment should be permitted on a *nunc pro tunc* basis. *See Matter of Concrete Products, Inc.*, 208 B.R. 1000, 1008 (Bankr. S.D. Ga. 1996) (*citing* 3 Collier on Bankruptcy ¶ 327.02, n. 5 (16th 2018)). Some courts have recognized a "*per se*" rule against retroactive approval of a professional's employment, *see Matter of Futuronics Corp.*, 655 F.2d 463 (2d Cir. 1981), and some courts have concluded that such approval is permissible. *See Matter of Concrete Products*, 208 B.R. at 1008 (collecting cases). The undersigned adopts the ruling of the court in *Matter of Concrete Products, Inc.*, and follows the more lenient line of cases holding that a movant seeking retroactive approval of a professional's

employment must demonstrate that the professional would have been qualified for employment at the onset, and throughout the period of time for which the services are to be compensated; and, that the movant's failure to obtain prior approval at an earlier time is excusable. *Id.* at 1008.

This inquiry requires a movant to demonstrate both the professional person's suitability for an appointment and the existence of excusable neglect sufficient to justify the failure to file a timely application. *Id.* To determine whether excusable neglect is present, the analysis is twofold. *Pioneer Inv. Servs. v. Brunswick Assocs.*, 507 U.S. 380, 392-394 (1993). First, whether there is neglect, be it either actual negligence or a mere omission to act. *Matter of Concrete Products* at 1008. Second, whether the neglect is excusable. "To answer this question, a court necessarily considers all of the circumstances surrounding the parties' omission or negligence." *Id.* Those circumstances include "the danger of prejudice to the debtor, the length of the delay and the potential impact on the judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." *Id.* (citing *Pioneer Inv. Servs.* at 394-95).

From the date of this Order forward, all applications for *nunc pro tunc* or *post facto* relief shall include a statement by the movant:

- 1) demonstrating that the professional was qualified for employment at the onset, and throughout the period of time, for which the services are to be compensated; and,
- 2) describing the neglect that occurred by the movant, and why the neglect should be found to be excusable.

In addition to the requirements noted above, the movant shall specifically address each of the following circumstances:

- 1) the danger of prejudice to the debtor,
- 2) the length of the delay and the potential impact on the judicial proceedings,
- 3) the reason for the delay,
- 4) whether delay was within the reasonable control of the movant,
- 5) and whether the movant acted in good faith.

Movant should include in the statement any other reason the Court should consider in its determination. Failure to submit this statement may result in a denial of the request without a hearing. A determination of excusable neglect will be made by the Court at the hearing on the request.

Dated: March 27, 2018



JERRY C. OLDSHUE, JR.
U.S. BANKRUPTCY JUDGE