Dated: December 05, 2017
The following is SO ORDERED:

David S. Kennedy
UNITED STATES CHIEF BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re

William H. Thomas, Jr., **Case No. 16-27850-K**

Debtor. **Chapter 11**

SSN: xxx-xx-8251

MEMORANDUM AND ORDER ON AMENDED APPLICATION TO EMPLOY JONATHAN MILEY ESQ. AS SPECIAL COUNSEL FOR DEBTOR IN POSSESSION

On October 24, 2017, the debtor in possession, William H. Thomas, Jr., filed an amended application to employ Jonathan Miley as special counsel for the debtor in possession ("Application"). (Dkt. # 320.) On October 27, 2017, creditor Clear Channel Outdoor, Inc.

("CCO") filed an objection to this Application. (Dkt. # 323.) A hearing on the objection was held on November 21, 2017, at which time counsel for both parties made thoughtful statements and arguments in support of their respective positions. This matter was later taken under submission for future consideration. The following shall constitute the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052.

Jurisdiction

This is a core proceeding under 28 U.S.C. § 157(b)(1). The Court has statutory and constitutional authority to hear and determine this particular proceeding. All the parties have consented to the Court's jurisdiction.

Background Facts

On June 2, 2016, Mr. Thomas, a non-bankruptcy attorney, sought personal relief under Chapter 11 of the Bankruptcy Code. Mr. Thomas is acting as a debtor in possession. 11 U.S.C. § 1101(1). This Chapter 11 case was originally filed in the Northern District of Florida and was subsequently transferred to this Judicial District on August 29, 2016.

Prior to the transfer of this Chapter 11 case under 28 U.S.C. § 1412 and Fed. R. Bankr. P. 1014(a)(1), Mr. Thomas filed an § 327(e) application in the Florida Bankruptcy Court to employ Jonathan Miley Esq. as special counsel to represent the § 541(a) estate regarding pending civil litigation brought in the United States District Court for the Western District of Tennessee against John Schroer, the Tennessee Department of Transportation, and others[1] ("*Schroer*"). (Dkt. # 29.) That employment application was granted. (Dkt. # 57.) It is noted that this was not the only piece of litigation for which Mr. Miley was providing legal services to Mr. Thomas and

[1] William H. Thomas v. John Schroer, et al., U.S. District Court for the Western District of Tennessee Case No. 2:13-cv-02987-JPM-cgc.

the estate. Mr. Thomas was involved in four additional lawsuits[2] ("*State Court Ligitation*") at the time the § 327(e)/Fed. R. Bankr. P. 2014(a) application was filed, but Mr. Thomas only sought approval for the *Schroer* matter.

During the course of the *Schroer* litigation, it was determined by Mr. Thomas that a lawsuit also should to be filed against Richard Copeland and others[3]. As a result, a civil action lawsuit was filed on August 12, 2016 ("*Copeland*"). Mr. Miley aided in the filing of this action and also has provided legal services to the estate for all of the above-mentioned actions for the past year.

Mr. Thomas believed that his prior bankruptcy counsel in Florida had taken the appropriate actions on behalf of the estate to employ Mr. Miley as special counsel on all of these matters. When Mr. Thomas learned that the original § 327(e) application to employ Mr. Miley was not broad enough in scope, he filed the instant amended application in this Bankruptcy Court.

Discussion

A trustee or debtor in possession may not employ special counsel without court approval. 11 U.S.C. § 327(e). Federal Rule of Bankruptcy Procedure 2014 outlines the process for obtaining such approval. There does not appear to be any disagreement that Fed. R. Bankr. P. 2014 has been followed here except that the instant amended application to employ was filed more than a year after the special counsel began representing the estate.

[2] Clear Channel Outdoors, Inc. and Tennison Brothers, Inc. v. William H. Thomas, Jr., et al., Chancery Court of Shelby County, Tennessee, Case No. 08-1310; State of Tennessee v. William H. Thomas, Jr., Chancery Court of Shelby County, Tennessee, Case No. 07-0454; Shroer, Commissioner of TDOT v. William H. Thomas, Jr. Chancery Court of Davidson County, Tennessee, Case No. 14-0306-I; and Thomas v. Tennessee Dept. of Transportation, Chancery Court of Davidson County, Tennessee, Case No. 15-210-III.
[3] Thomas v. Copeland, Docket No. 2:16-cv-02660.

CCO contends that § 327(e) and Rule 2014 require prior court authorization to employ special counsel. Under a totality of the particular facts and circumstances and applicable law, the Court is not persuaded here by the cases cited to by CCO. Each of CCO's authorities rely on the proposition that the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure require prior court authorization. However, the Court notes that the plain language of neither the Bankruptcy Code nor the Federal Rules of Bankruptcy Procedure state when court approval is to be sought. *In re Singson*, 41 F.3d 316, 319 (7th Cir. 1994).

One of the cases relied upon by CCO is *In re Aultman Enterprises*, which actually does allow for *nunc pro tunc* approval of special counsel if a nine factor test is satisfied. 264 B.R. 485, 492 (E.D. Tenn. 2001). The Court does not believe here that this test is necessary as the Federal Rules of Bankruptcy Procedure already contain an applicable provision addressing this situation. Rule 9006(b)(1) allows for the enlargement of time to do an act "on motion made after the expiration of the specified period" if the "failure to act was the result of excusable neglect." Rule 9006(b)(2) & (3) contain exceptions to this Rule but Rule 2014 is not one of them. While the Court notes that Rule 9006(b)(1) only applies if the act-in-question is required to be done "at or within a specified period," and neither § 327(e) nor Rule 2014 contain such a period. The Court believes this actually strengthens the Court's reasoning. Put simply, if prior court approval is not required, then the Court may simply approve the application to employ special counsel at any time. If prior approval is required, then Rule 9006(b)(1) allows the Court to enlarge the time if the "failure to act was the result of excusable neglect."

As a general matter, it seems obvious that the best practice would be to seek court approval as early as possible, yet the Court is not prepared to state that any special counsel who fails to obtain court approval before beginning to render legal services, ipso facto, forfeits his/her

fees. Such a rule could lead to absurd and inequitable results. Attorneys with little knowledge of bankruptcy could provide valuable non-bankruptcy related services which provide valuable benefits to the estate. If these attorneys meet the criteria for employment under § 327, depriving them of their reasonable fees would be to unjustly enrich the estate to the detriment of the attorneys. Such a rule would also mean that special counsel would not be entitled to any fees earned before the filing of the application seeking employment is made to and approved by the bankruptcy court. In a time sensitive matter, say one where a civil action needs to be filed immediately to beat the statute of limitations, this could prove problematic. Is special counsel supposed to file the complaint but risk his/her fees for doing so, or is he/she supposed to seek approval of the bankruptcy court and risk the statute of limitations running?

The Court concludes that neither 11 U.S.C. § 327(e) nor Fed. R. Bankr. P. 2014 conclusively provide that permission to employ special counsel must always be obtained prior to the special counsel beginning professional legal services. Accordingly, special counsel can be approved *nunc pro tunc* if special counsel satisfies § 327(e).

Alternatively, the Court notes that if such a requirement is read into the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure, then Rule 9006(b)(1) allows for the enlargement of that time for "excusable neglect." Mr. Thomas stated in the amended employment application that he and the special counsel believed the prior approval of the Bankruptcy Court in Florida covered the non-bankruptcy matters at issue here. Mr. Thomas and the special counsel are all lawyers, but none of them practice bankruptcy law. Mr. Thomas did seek approval to employ special counsel near the beginning of the first piece of litigation and the subsequent litigation appears to be related to that first piece. While Mr. Thomas's and special counsel's understanding of the scope of the order approving employment might represent poor comprehension, it is not

inexcusable. Under a totality of the existing facts and circumstances, the Court finds that neglecting to file the § 327(e) application prior to commencing the litigation is excusable. Thus, the Court applies the rule that the issuing of a *nunc pro tunc* order of employment is in the sound discretion of the bankruptcy of the court based on specific facts and circumstances and equitable considerations.

Now that the Court has determined that it can approve the employment of special counsel *nunc pro tunc*, it must determine if the instant amended application satisfies 11 U.S.C. § 327(e). To do so, Mr. Thomas must show that the purpose for which special counsel is being employed is in the best interest of the estate and that special counsel has no interest adverse to Mr. Thomas or the estate. The Court finds, considering a totality of the particular facts and circumstances and applicable law, that Mr. Thomas has indeed met his burden. Special counsel has many years of experience and is working on complex, non-bankruptcy litigation for the estate. Without an extreme showing, the Court will not substitute its own business judgment for that of the Mr. Thomas's. Additionally, there has been no suggestion that special counsel holds an interest adverse to Mr. Thomas or the estate.

The Court also notes that CCO is the only party in interest to object to the amended application to employ special counsel. The Court does not believe CCO has been prejudiced in any way by the delay in the filing of the amended application. CCO can hardly claim to be surprised that special counsel has been working for the estate as it is a party in one of the matters for which special counsel is being employed.

Mr. Thomas has requested permission to employ special counsel for all of the matters already filed and for any future matters that may be filed related to those matters. Section 327(e) of the Bankruptcy Code specifically states that a trustee or debtor in possession may employ

special counsel "for a *specified* special purpose" (emphasis added). Fed. R. Bankr. P. 9001(11). While the Court will grant *nunc pro tunc* approval of special counsel for the matters already filed, Mr. Thomas also requests that approval be granted to employ special counsel on unspecified future matters. Therefore, because Mr. Thomas has not provided a specified special purpose for the future approval, the amended application will be denied in part, as to that specific request. Such denial will be without prejudice, however, to Mr. Thomas making future applications pursuant to § 327(e) to employ special counsel should a specified special purpose arise in the future.

Finally, the Court emphasizes that it is sensitive to the goal of CCO and the cases it cites to "prevent volunteerism and to assist the court in controlling administrative expenses." *See, for example, In re McDaniels*, 86 B.R. 128, 129 (Bankr. S.D. Ohio 1988). The Court believes, however, that the Bankruptcy Code already provides a mechanism for accomplishing this goal without limiting *nunc pro tunc* approval to employ special counsel. Specifically, 11 U.S.C. § 328 allows the Court to determine the appropriate fees for special counsel. It is also of note that while an application for § 331 interim compensation has been filed, this application is only for approval to employ, not to award § 330(a) or § 331 compensation.

It is important to note that the bankruptcy court has the power and authority to determine the propriety of retention and compensation of professionals employed in bankruptcy cases. 11 U.S.C. §§ 327(e), 330(a), and 105(a). Such procedures are to be applied with caution and even suspicion in certain cases. Of course, the Court should temper justice and equity in some matters. Good lawyers and good judges have debated the proper use of *nunc pro tunc* for many years now. The debate continues.

CONCLUSION

Having considered, among others, the cases cited below,[4] the totality of the particular facts and circumstances discussed above, and the applicable law, the Court finds and concludes here as follows:

As noted earlier, Mr. Thomas seeks authorization to employ Jonathan Miley, Esq. as special counsel in the *Schroer*, *Copeland*, and the *State Court Litigation*, and any future litigation which may be brought by or against Mr. Thomas. Such relief, if granted, would be *nunc pro tunc* as of July 22, 2016. Because the requirements of 11 U.S.C. § 327(e) and Federal Rule of Bankruptcy Procedure 2014 have been met, the Court will grant such relief as to the existing litigation. However, because § 327(e) requires a specified purpose, the Court, at this time, will deny without legal prejudice such relief as to future litigation in accordance with the foregoing. Accordingly, IT IS ORDERED AND NOTICE IS HEREBY GIVEN that:

1. Mr. Thomas's amended application to employ Jonathan Miley Esq. is **GRANTED NUNC PRO TUNC AS OF JULY 22, 2016** solely for the *Schroer*, *Copeland*, and *State Court Litigation***.**
2. Mr. Thomas's amended application to employ Jonathan Miley Esq. is **DENIED WITHOUT PREJUDICE** as to future litigation in accordance with the foregoing.
3. The Bankruptcy Court Clerk shall cause a copy of this Memorandum, Order, and Notice of the entry thereof to be sent to the following interested entities:

   Michael P. Coury, Esq.
   Attorney for Mr. Thomas
   Glankler Brown PLLC
   Suite 400

[4]Among other cases, the Court notes it has considered: *In re Georgetown of Kettering, Ltd.*, 750 F.2d 536 (6th Cir. 1984); *In re Twinton Props. P'ship*, 27 B.R. 817 (Bankr. M.D. Tenn. 1983), *approved by In re Twinton Props. P'ship*, 33 B.R. 111 (M.D. Tenn. 1983); *Farinash v. Vergos (in Re Aultman Enters.)*, 264 B.R. 485 (E.D. Tenn. 2001).

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