

Dated: October 30, 2025
The following is ORDERED:



M. Ruthie Hagan
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re
Source Mortgage & Funding, Inc.
Debtor

Case No. 25-23647
Chapter 11
Subchapter V

**OPINION AND ORDER APPROVING APPLICATION TO EMPLOY AND DENYING
NUNC PRO TUNC RELIEF**

This matter came before the Court upon the Application to Employ Attorneys and Disclosure of Compensation (the “Application”) filed by Source Mortgage & Funding, Inc. (“Source Mortgage”) [DE 36] on September 30, 2025.

The Bankruptcy Code is chock-full of deadlines and bright-line rules which protect the integrity of the bankruptcy system and ensure that Title 11 works to achieve the overarching goal of the Code. Disregard of such deadlines and rules has consequences. Ignoring the Code, which creates clarity and fosters predictability in the application of the law, can also lead to harsh results. In this case, the Court is presented with the unfortunate situation where Debtor's counsel failed to file an employment application in a timely manner and now seeks to have the late-filed application approved *nunc pro tunc* to the petition date for purposes of qualifying for compensation.

I. JURISDICTION

The court has jurisdiction to consider the Application under 28 U.S.C. § 1334(a) and (e)(2). Resolving disputes regarding the retention of bankruptcy professionals lies at the core of the bankruptcy court's authority under 28 U.S.C. § 157(b)(2)(A).

II. DISCUSSION

Employment of Professional Persons under 11 U.S.C. § 327

“A trustee or debtor-in-possession may not employ an attorney, accountant, or other professional person without the court's express approval.” *Farinash v. Vergos (In re Aultman Enters.)*, 264 B.R. 485, 489 (E.D. Tenn. 2001) (citing 11 U.S.C. § 327(a)). The debtor-in-possession must obtain court approval to employ a professional person to represent the bankruptcy estate. 11 U.S.C. § 327; FED. R. BANKR. P. 2014(a). The procedure for obtaining approval of employment of a professional is governed by Bankruptcy Rule 2014, which requires that the application set forth certain facts regarding the need for and the terms of the employment, and establish that the applicant is disinterested. Section 327(a) of the Bankruptcy Code states as follows:

- (a) Except as otherwise provided in this section, the [debtor-in-possession], with the court's approval, may employ one or more 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 [debtor-in-possession] in carrying out the [debtor-in-possession's] duties under this title.

11 U.S.C. § 327(a).

The purpose of 11 U.S.C. § 327 is to provide notice to all creditors and parties in interest that the debtor-in-possession is hiring a professional and is proposing to pay the professional from estate funds. *In re McKenzie*, 449 B.R. 306, 318 (Bankr. E.D. Tenn. 2011). “Section 327 also gives the Court the ability to perform a screening process, verify the necessity of employment, ensure the neutrality of the person employed, and control and limit estate expenses, thereby promoting efficient administration of the bankruptcy estate.” *Id.* (citations omitted).

Until the bankruptcy court approves the employment application, counsel is risking not being compensated for work performed. *See e.g. Interwest Bus. Equip., Inc. v. U.S. Tr. (In re Interwest Bus. Equip., Inc.)*, 23 F.3d 311, 318 (10th Cir. 1994); *see also Connolly v. U.S. Tr. (In re Morreale)*, 595 B.R. 409, 418 (B.A.P. 10th Cir. 2019) (“The Tenth Circuit’s case law in this regard is as unforgiving as it is crystal clear: Absent court approval of an individual’s employment as a professional ..., the individual is a volunteer and is entitled to no compensation from the estate for any services rendered.” (citing *In re Schupbach Invs., LLC*, 808 F.3d 121, 1219 (10th Cir. 2015))).

Debtor filed this bankruptcy case on July 23, 2025. At that time, the Debtor only filed a skeleton petition and failed to upload a matrix or to complete schedules. Because the matrix was not filed initially, the Court set a deadline for the matrix to be filed by July 31, 2025. The matrix was not filed until August 1, 2025. Since the matrix was filed late, the Court was unable to upload its “Order and Notice of Deadlines and Date Set for § 1188(a) Status Conference” (“Order and Notice of Deadlines”) [DE 11] until August 5, 2025. The delay and the need for proper notice to all parties required the Court to set the § 1188 conference on October 1, 2025 (70 days after the

commencement of the case). The Order and Notice of Deadlines provided that “the following deadlines are established, and duties are imposed...Counsel for the Debtor *must* file an Application to be Employed, together with an Affidavit of Disinterestedness, within thirty (30) days of the Chapter 11 filing or the commencement of service, whichever occurs later. *See* FED. R. BANKR. P. 2014.” [DE 11, ¶1 (emphasis added)]

Therefore, the Application must have been filed by August 22, 2025 (based on the petition date — i.e. July 23, 2025). However, the Application was not filed until September 30, 2025 — 39 days late (and almost 70 days after the petition date).

Deadlines and rules help create clarity, remove ambiguity, and establish predictability in the application of the law and this Court’s own orders. Debtor’s counsel in this case failed to file a timely employment application, and now seeks, *ore tenus*, *nunc pro tunc* relief as of the petition date for purposes of qualifying for compensation. When the Court questioned the U.S. Trustee’s trial attorney, Jamaal M. Walker, whether he had any opposition to the request, he, to the Court’s astonishment, responded that the U.S. Trustee will consent to the *nunc pro tunc* relief requested.¹

Nunc pro tunc (or *ex post facto*) approval is retroactive approval that is only appropriate in the most extraordinary circumstances. *In re Arkansas Co., Inc.*, 798 F.2d 645, 649 (3d Cir. 1986); *see also In re Martin*, 102 B.R. 653, 655 (Bankr. W.D.Tenn. 1989) (counsel failed to show satisfactory explanation for failure to seek timely approval of application for employment of counsel); *In re Twinton Props. P’ship*, 27 B.R. 817, 819 (Bankr. M.D. Tenn. 1983) (“*Nunc pro tunc*

¹ Despite being the “watchdog” with statutory standing to challenge debtor’s applications to employ counsel, the U.S. Trustee appears to turn a blind eye to statutory requirements and guidance from the U.S. Supreme Court and this Court’s Scheduling Order. *See Morgenstern v. Revco D.S., Inc. (In re Revco D.S., Inc.)*, 898 F.2d 498, 500 (6th Cir. 1990) (United States Trustee acts as “watchdog”); 11 U.S.C. § 307; *see also Roman Catholic Archdiocese of San Juan, Puerto Rico v. Acevedo Feliciano*, 589 U.S. 57, 65 (2020) (a court cannot use *nunc pro tunc* order to “make the record what it is not”) (citation omitted).

applications must be the extraordinary exception rather than an accepted practice.”). Therefore, without extraordinary circumstances, counsel cannot be compensated for services rendered before the filing of the application to employ and its subsequent approval by the court. The requirement “allows the bankruptcy court to review any conflicts of interest and to assess the competency, experience, and integrity of debtor's counsel and other professionals.” *In re Golexis*, 659 B.R. 767, 774 (Bankr. D. Utah 2024) (citation and internal quotations omitted). It likewise “promot[es] 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.” *In re Wellington*, 628 B.R. 19, 29 (Bankr. M.D.N.C. 2021) (citations omitted); *see also In re Young*, 646 B.R. 779, 783 (Bankr. W.D. Pa. 2022) (“[A] timely employment application promotes transparency by ensuring that no professionals are working surreptitiously on the debtor's behalf, only to emerge from the shadows after court oversight has ended.”).

Counsel does not dispute that he failed to file the Application by the required deadline or that *nunc pro tunc* approval requires extraordinary circumstances. Instead, Counsel argues that as this is his first filing as lead counsel of a Subchapter V bankruptcy case, he asks leniency for his late Application. This Court takes judicial notice that Counsel has associated on a number of Subchapter V and conventional Chapter 11 bankruptcy cases for a number of years (at least three (3) years from this Court’s observation). Therefore, the question presented to the Court is whether the circumstances asserted by Counsel rise to the level of being extraordinary such that Counsel can be compensated for services rendered during the gap period between the petition date and the filing of the Application.

In order to determine whether the circumstances presented are sufficiently “extraordinary,” this Court finds persuasive the two-part analysis set forth in *In re Arkansas* cited herein. “The first part of the *Arkansas* Test serves a gatekeeping function and asks whether ‘the applicant satisfies the disinterestedness requirements of section 327(a) and would therefore have been appointed initially.’” *In re Golexis*, 659 B.R. at 778, quoting *F/S Airlease II, Inc. v. Simon*, 844 F.2d 99, 105 (3d Cir. 1988) (citing *Arkansas*, 798 F.2d at 650). If a court would not have granted a timely application in the first instance, it does not make sense to grant it retroactively. *Id.* The Application at issue satisfies the disinterestedness requirement. The competence, experience, and integrity of Counsel is without question, and had the Application been timely filed, the Court would have approved it.

The second part of the *Arkansas* Test involves consideration of non-exclusive factors to determine if the circumstances surrounding the delay in filing the application are extraordinary. Those factors include:

(1) whether the applicant or some other person bore responsibility for applying for approval; (2) whether the applicant was under time pressure to begin service without approval; (3) the amount of delay after the applicant learned that initial approval had not been granted; and (4) the extent to which compensation to the applicant will prejudice innocent third parties.

Id. (citation omitted); *see also In re Arkansas Co.*, 798 F.2d at 650; *Mitan v. Duval (In re Mitán)*, 573 F.3d 237, 245 (6th Cir. 2009) (“*nunc pro tunc* orders have been denied when they are not ‘appropriate,’ as when they are sought to validate an action arrived at by a process not in accordance with the Code.”) (citing 2-105 *Collier on Bankruptcy* § 105.04(a) (quoting *Schwartz v. Aquatic Dev. Grp., Inc. (In re Aquatic Dev. Grp., Inc.)*, 352 F.3d 671 (2d Cir. 2003)); *Cushman & Wakefield of Connecticut, Inc. v. Keren Ltd. P’ship (In re Keren Ltd. P’ship)*, 189 F.3d 86, 87-88

(2nd Cir. 1999); *In re Jarvis*, 53 F.3d 416, 420–21 (1st Cir.1995) (quoting *Arkansas*, 798 F.2d at 650). The Court next considers the *Arkansas* factors set forth above.

a) Whether Counsel or Another Person Bore Responsibility for Filing the Application

In cases involving non-attorney professionals ,where the process for filing an application is outside of the professionals’ control, they may receive more leeway in the extraordinary circumstances analysis (examples would be experts, realtors and appraisers that rely on the debtor’s attorney to file the required application). However, that leeway is nonexistent when the professional bears the responsibility to file the application himself. Under these circumstances, this factor will weigh against the applicant. In this case, filing the Application rested solely with Debtor’s Counsel; therefore, this factor weighs against granting the *nunc pro tunc* relief.

b) Whether Counsel Was Under Time Pressure to Begin Providing Services Before the Application Could Be Filed

There are circumstances where a bankruptcy professional can come under pressure to jump midstream into a case to provide immediate and zealous representation to a client who might otherwise be prejudiced by a delay. However, this Court’s standard Order and Notice of Deadlines gives counsel a very generous thirty (30) days to file an application to employ (something not all courts grant). In many cases across the country, courts expect applications to employ debtor’s counsel to be filed on the petition date (which would be good practice, so that if there is an employment dispute, it is revealed early in the case).

Regardless of the type of estate professional, the asserted time pressure that prevents the timely completion of an employment application cannot stem from work that is common and anticipated in Chapter 11 cases. In this case, there appears to be little to no emergency matters that would have caused any delay in filing the Application. For example, there were no first-day motions, no evidence of negotiating and documenting post-petition financing, no change in

leadership or any other exigent matters. In fact, in this Court's opinion, this is a fairly simple Chapter 11 case. In this case, Counsel appears to be the sole reason for the delay in filing the Application; therefore, the Court concludes that this factor weighs against granting *nunc pro tunc* relief.

c) Whether Counsel Was Diligent in Attempting to Timely File the Applications to Employ

Counsel essentially argues that the Court should grant him leniency for his late application because this is his first effort as lead counsel in a Subchapter V case. Counsel has associated on a number of large Subchapter V and conventional Chapter 11 cases for a number of years (at least three (3) years from this Court's observation), and this argument misses the mark of applying all scheduling orders and deadlines set forth in the Code and Rules with consistency across all cases. Consistency helps establish predictability of the Court for the benefit of its litigants, which is a paramount interest to this Judge. There is nothing that prevented Counsel from filing a timely application to employ, so this Court finds this factor to weigh against granting *nunc pro tunc* relief.

d) Other Circumstances Bearing on Whether to Grant Retroactive Employment

This Court cannot arbitrarily grant the relief in this case as it potentially will have a domino effect and open the proverbial floodgates on other cases that come before it. Instead, this Court must deter attorneys and other professionals from a general nonobservance of Bankruptcy Code § 327 and this Court's scheduling orders.

III. CONCLUSION

Counsel's Application is granted as of the date of the filing of the Application, September 30, 2025. Debtor's Counsel failed to establish any extraordinary circumstances sufficient to justify the Court in granting *nunc pro tunc* relief to July 23, 2025 (the Petition Date). There was no evidence presented to support a finding that the failure to timely file the Application was caused

by extraordinary circumstances. The Court acknowledges that between the petition date and the filing of the Application, Counsel performed some amount of bankruptcy-related work for the Debtor's benefit. The Court is also aware of the impact a denial of fees for such services will have on Counsel. Nevertheless, given the reasons stated herein, Counsel will not be compensated for work performed and fees incurred in this case between July 23, 2025 and September 29, 2025.

IT IS SO ORDERED.

The Bankruptcy Court Clerk shall serve a copy of this Opinion and Order on the following interested parties:

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