FILED
U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
November 25, 2014
Blaine F. Bates
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE SCHUPBACH INVESTMENTS, LLC, Debtor.	BAP No. KS-13-077
ROSE HILL BANK, Appellant, v. MARK J. LAZZO, P.A., Appellee.	Bankr. No. 11-11425 Chapter 11 OPINION*

IN RE SCHUPBACH INVESTMENTS, LLC, Debtor.	BAP No. KS-13-078
CARL B. DAVIS, Trustee of the Schupbach Investments Liquidation Trust, Appellant, v. SCHUPBACH INVESTMENTS, LLC, ROSE HILL BANK, BANK OF COMMERCE & TRUST COMPANY, CENTRAL NATIONAL BANK, COMMUNITY BANK OF WICHITA, INC., FIRST NATIONAL BANK OF	Bankr. No. 11-11425 Chapter 11

* This unpublished opinion may be cited for its persuasive value, but is not precedential, except under the doctrines of law of the case, claim preclusion, and issue preclusion. 10th Cir. BAP L.R. 8018-6.

HUTCHINSON, formerly known as Bank Haven, KANSAS STATE BANK OF MANHATTAN, KANSAS, LEGACY BANK, MERITRUST CREDIT UNION, and MARK J. LAZZO, P.A.,

Appellees.

Appeal from the United States Bankruptcy Court
for the District of Kansas

Before MICHAEL, ROMERO, and JACOBVITZ, Bankruptcy Judges.

PER CURIAM.[**]

In bankruptcy court, as in most areas of life, if you want to get paid, you have to get hired, and you must perform work your boss (or whoever is paying you) deems valuable. These appeals involve the *post facto* approval of the employment of debtor's counsel and the allowance of attorney's fees for certain services.[1] Specifically, the appellants argue the bankruptcy court erred by: 1) applying the wrong standard in granting employment of counsel *post facto* under 11 U.S.C. § 327[2] and allowing fees for services rendered prior to filing of the employment application; 2) allowing fees for services that did not benefit the estate; and 3) allowing fees for services rendered postconfirmation. After

[**] Judge Michael dissents as to Part IV, C.

[1] Referring to a professional's belatedly filed request as an "application for employment *nunc pro tunc*," though common nomenclature, is technically incorrect. What is sought is more properly described as an order authorizing employment *post facto*. *See In re Albrecht*, 233 F.3d 1258, 1260 n.4 (10th Cir. 2000); *In re Music Store, Inc.*, 241 B.R. 752, 754 n.3 (Bankr. N.D. Okla. 1999).

[2] Unless otherwise indicated, all future references to "Code," "Section," and "§" are to the Bankruptcy Code, Title 11 of the United States Code.

carefully considering the record, we REVERSE in part and AFFIRM in part.[3]

I. FACTUAL BACKGROUND

Schupbach Investments, L.L.C. ("SILLC") was engaged in the purchase, renovation, rental, and sale of residential real properties in low income areas of Wichita, Kansas. Jonathan Schupbach owned 50 percent of SILLC and was its manager. His wife, Amy Schupbach, owned the other 50 percent and was active in the business. SILLC's assets included 165 rental properties valued at $ 4,616,900, which had been mortgaged to eleven different creditors, with the underlying debts personally guaranteed by the Schupbachs. Appellant Rose Hill Bank ("RHB") was SILLC's largest creditor.

In March 2011, SILLC retained Mark J. Lazzo, P.A. as bankruptcy counsel ("Appellee" or "Lazzo").[4] In April 2011, SILLC paid Lazzo a $10,000 retainer. Between March 17 and May 11, 2011, SILLC accrued $9,760 in attorney's fees. Lazzo billed SILLC for that amount on May 12, 2011, and applied the retainer to that bill. SILLC filed a Chapter 11 petition on May 16, 2011,[5] followed by the Schupbachs' filing for personal bankruptcy protection shortly thereafter.

A. Employment Applications

SILLC did not submit an application to employ Lazzo as its attorney with its Chapter 11 petition. A month later, after the United States Trustee's Office advised Lazzo that an employment application had not been filed, SILLC filed

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[3] The parties did not request oral argument, and after examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. Fed. R. Bankr. P. 8012. The case is therefore ordered submitted without oral argument.

[4] Although Appellee is technically "Mark Lazzo, P.A.," a corporate entity, instead of Mark Lazzo personally, we will use the pronoun "he" rather than the impersonal "it" to refer to Appellee.

[5] *Voluntary Petition*, *in* Appellant's Appendix ("App.") at 100-32.

one on June 17, 2011 ("Initial Employment Application").[6] Although an employment application was prepared along with the petition, Lazzo explained it was not filed at that time because:

> . . . there was a whole bunch of first day motions that I had to prepare and file regarding rents involving eight different creditors and . . . it got lost in that work. I had it prepared and why it wasn't filed, I don't have a reason other than . . . it just didn't get done. It should have been done.[7]

The Initial Employment Application failed to address the issue of legal services Lazzo provided to SILLC prior to its filing.

On July 8, 2011, creditor Central National Bank ("CNB") objected to the Initial Employment Application to the extent it sought retroactive approval of employment or any fees incurred prior to June 17, 2011. CNB argued that the Initial Employment Application did not comply with Kansas Local Bankruptcy Rule 2014.1 because it was not timely filed with the petition and it did not include the required Disclosure of Compensation of Attorney for Debtor, Official Form B203.[8] Lazzo did not file a supplemental employment application to clarify that he was seeking approval of his employment *post facto* to the petition date ("Supplemental Employment Application")[9] until September 1, 2011, when he also filed SILLC's first application for allowance of attorney's fees and expenses. CNB and RHB objected to the Supplemental Employment Application, arguing that it was untimely and that *post facto* approval of Lazzo's employment should be denied because the case presented no extraordinary circumstances

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6 *Initial Employment Application*, *in* App. at 144-46.

7 *Transcript of Proceedings held on August 30, 2011* at 9-10, *ll.* 24-25, 1-5, *in* App. at 223-24.

8 *Objection of CNB to Initial Employment Application* at 2, ¶ 7, *in* App. at 172.

9 *Supplemental Employment Application*, *in* App. at 231-35.

warranting retroactive approval.[10]

Objections to the Initial and Supplemental Employment Applications were heard by the bankruptcy court on November 8, 2011.[11] The bankruptcy court granted both Employment Applications and overruled the objections to retroactive approval of employment, stating:

> [Lazzo] substantially complied with all of the requirements in terms of the disclosures that he needed to file . . . which is probably more important than actually filing the actual application. And there was a great many things going on at that time which I think were handled promptly and timely . . . I think he substantially complied with the requirements and so I am going to grant the application to employ Mr. Lazzo as of the date this case was filed.[12]
>
> . . .
>
> [B]asically my finding is he was in substantial compliance with all of the requirements. He filed the necessary disclosures and, in essence, . . . I think the . . . timing of the filing of the disclosures are as important as the actual application itself and I think he's in substantial compliance.
>
> All the facts and circumstances surrounding the filing of this case and everything that was going on are sufficient justification for not filing the application.[13]
>
> I also . . . give weight to the U.S. Trustee's [sic] not objecting to this. They have an internal policy that if it's not filed[,] they contact the lawyer and suggest to the lawyer that they file it within a certain period of time . . . the U.S. Trustee's Office contacted Mr. Lazzo and he immediately filed his application. And, therefore, I think the failure to file it has been adequately explained and that he substantially complied with the requirements.[14]

On November 15, 2011, the bankruptcy court entered a written order granting the

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[10] *Objection of CNB to Supplemental Employment Application, in* App. at 253-55; *Objection of RHB to Supplemental Employment Application, in* App. at 256-58.

[11] *Transcript of Proceedings held on Nov. 8, 2011 ("Nov. 8, 2011 Hr'g Tr."),* in *App.* at 343-62.

[12] *Id.* at 6, *ll.* 3-11, *in* App. at 348.

[13] *Id.* at 16, *ll.* 13-25, *in* App. at 358.

[14] *Id.* at 17, *ll.* 1-10, *in* App. at 359.

application to employ Lazzo *post facto* for the reasons stated on the record ("Employment Order").[15]

B. Motion to Consolidate and Competing Plans

On October 3, 2011, SILLC and the Schupbachs filed a motion to consolidate and/or to jointly administer their respective bankruptcy cases ("Motion to Consolidate").[16] SILLC then submitted a Chapter 11 plan ("Debtor's Plan"), accompanied by a Disclosure Statement.[17] Debtor's Plan provided for: 1) the consolidation of SILLC's and the Schupbachs' bankruptcy cases; 2) vesting of the retained assets of the combined estates at confirmation in the Schupbachs; 3) full payment by the Schupbachs of all allowed administrative, secured and priority claims; and 4) partial payment for general unsecured claims.[18] The Schupbachs wanted to retain their ownership and control of SILLC. RHB and CNB objected to the Motion to Consolidate;[19] RHB and CNB plus an additional five creditors objected to the Disclosure Statement.[20] At a November 8, 2011, hearing, the bankruptcy court deferred ruling on the Motion to Consolidate pending its ruling on a motion to convert the Schupbachs' Chapter 13 case to a Chapter 11.[21]

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[15] *Employment Order*, *in* App. at 368-70.

[16] *Motion to Consolidate*, *in* App. at 263-66.

[17] *Debtor's Plan dated October 11, 2011*, *in* App. at 267-307; *Debtor SILLC's Chapter 11 Disclosure Statement dated October 11, 2011 ("Disclosure Statement")*, *in* App. at 308-32.

[18] *Debtor's Plan* at 2-3, *in* App. at 268-69.

[19] *Objection of RHB to Motion to Consolidate*, *in* App. at 333-41; *Objection of CNB to Motion to Consolidate*, *in* App. at 342.

[20] *See Objections to Disclosure Statement dated October 11, 2011*, *in* App. at 365-67 and 374-82.

[21] *Nov. 8, 2011 Hr'g Tr.* at 5, *ll.* 6-11, 19-23, *in* App. at 347. On November 14, 2011, the Schupbachs' motion to convert their Chapter 13 case to a Chapter

(continued...)

On July 24, 2012, a group of secured creditors filed a competing plan providing for liquidation of SILLC ("Creditors' Plan").[22] The Creditors' Plan called for transfer of the secured collateral to the respective creditors and all other assets to a liquidating trust ("Liquidating Trust").[23] The secured creditors would fund the Liquidating Trust and pay all allowed administrative expenses. Carl B. Davis was named as the trustee of the Liquidating Trust ("Liquidating Trustee").[24]

On August 17, 2012, the bankruptcy court issued its order on the Motion to Consolidate, denying consolidation, but granting the request for joint administration ("Joint Administration Order").[25] Thereafter, SILLC filed an amended Chapter 11 Plan and corresponding disclosures ("Amended Plan").[26] The Amended Plan abandoned consolidation, but continued to seek cramdown on the secured creditors. It provided for limited payments over seven years to unsecured creditors and an auction of the Schupbachs' ownership interest in SILLC. Several creditors filed objections to the Amended Plan. After a hearing, the Bankruptcy Court confirmed the Creditors' Plan, as amended, by written order

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[21] (...continued)
11 was granted. They filed an application to employ David Eron as counsel on November 17, 2011. *Application by Debtors for the Engagement of Counsel, Case No. 11-13633, in* App. at 383-86. The Bankruptcy Court granted the application on January 13, 2012. *Order Granting Application for Authority to Employ Eron Law Office, P.A. as Counsel, Case No. 11-13633, in* App. at 454-55. The Schupbachs later filed an application to employ Lazzo to conduct their Chapter 11 case on December 20, 2011. *Debtor-in-Possession's Application to Employ Attorney to Conduct Chapter 11 Case, Case No. 11-13633, in* App. at 419-22. The record shows the latter application has not been ruled on. It was taken off the docket pending rulings on matters that were under advisement. *See Bankruptcy Docket, Case No. 11-13633, Docket Entry 189 entered on August 9, 2012, in* App. at 208.

[22] *Creditors' Plan, in* App. at 458-93.

[23] *Id.* at 13, *in* App. at 470.

[24] *Id.* at 14, *in* App. at 471.

[25] *Joint Administration Order, in* App. at 527-44.

[26] *Amended Plan, in* App. at 548-74.

on November 21, 2012 ("Confirmation Order").[27]

C. Fee Applications

SILLC's filed its first fee application on September 1, 2011 ("First Fee Application"),[28] requesting $27,980 for fees and $1,039 for expenses, which covered the period May 13, 2011, through July 20, 2011. CNB and RHB objected to the First Fee Application to the extent it sought $14,960 in fees incurred from the petition date to the date the Initial Employment Application was filed (hereafter "Gap Fees" or "Gap Period").[29] CNB and RHB also argued the $ 10,000 retainer Lazzo secured from SILLC prior to filing of the petition, which had not been properly disclosed, was property of the estate and could not be applied to disallowed fees.

After a hearing, the bankruptcy court entered an order on November 15, 2011, granting SILLC's First Fee Application in its entirety ("First Fee Order").[30] SILLC subsequently filed a second fee application on December 23, 2011 ("Second Fee Application"), and a third fee application on July 26, 2012 ("Third Fee Application").[31] A substantial portion of the fees were for services rendered in connection with the Motion to Consolidate. In absence of objection, the bankruptcy court allowed the fees and expenses requested in the Second and Third Fee Applications in their entirety.[32]

SILLC filed a fourth application for fees and expenses, seeking $14,100 for

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27 *Confirmation Order, in* App. at 613-21.

28 *First Fee Application, in* App. at 236-52.

29 *Limited Objection of RHB to First Fee Application, in* App. at 259-60; *Objection of CNB to First Fee Application, in* App. at 261-62.

30 *First Fee Order, in* App. at 371-73.

31 *Second Fee Application, in* App. at 423-41; *Third Fee Application, in* App. at 517-25.

32 *Second Fee Order, in* App. at 456-57; *Third Fee Order, in* App. at 545-46.

the period June 7, 2012 through October 24, 2012 ("Fourth Fee Application").[33] RHB objected to the fees related to a nondischargeability complaint filed in the Schupbachs' bankruptcy case, which totaled $3,000.[34] On November 29, 2012, the bankruptcy court allowed $11,100 in fees and set the disputed entries for an evidentiary hearing ("Fourth Fee Order").[35]

SILLC filed a fifth application for fees and expenses, seeking $12,443.60 for the period September 20, 2012 through December 6, 2012 ("Fifth Fee Application").[36] RHB and the Liquidating Trustee objected to fees totaling $ 1,180 because they were for services that allegedly benefitted only the Schupbachs as individuals.[37] On January 14, 2013, the bankruptcy court allowed $11,263.60 in fees and set the disputed fee entries for hearing ("Fifth Fee Order").[38]

SILLC subsequently filed its Sixth,[39] Seventh and Final,[40] and Supplemental Seventh and Final[41] Fee Applications for fees and expenses, which together covered the postconfirmation period December 6, 2012 through February 15, 2013. SILLC's Seventh and Final Fee Application also requested that the

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33 *Fourth Fee Application, in* App. at 595-608.

34 *Objection of RHB to Fourth Fee Application, in* App. at 609-10.

35 *Fourth Fee Order, in* App. at 622-24.

36 *Fifth Fee Application, in* App. at 628-44. The Fifth Fee Application also requested copying and postage expenses incurred in September but not included in the Fourth Fee Application.

37 *Objection of RHB to Fifth Fee Application, in* App. at 645-46; *Liquidating Trustee's Partial Objection to Fifth Fee Application, in* App. at 647-48.

38 *Fifth Fee Order, in* App. at 658-60.

39 *Sixth Fee Application, in* App. at 649-57.

40 *Seventh and Final Fee Application, in* App. at 673-80.

41 *Supplemental Seventh Fee Application, in* App. at 681-83.

bankruptcy court authorize and approve on a final basis all of its previous interim Fee Orders. These applications drew objections from numerous creditors, including RHB,[42] as well as the Liquidating Trustee.[43] Among other things, the objectors argued: 1) the applications violated § 331 and Kansas Local Bankruptcy Rule 2016.1 because they had been filed more frequently than every 120 days without court approval; 2) the services rendered were unnecessary; 3) the billing for the work performed was excessive; and 4) fees for services rendered postconfirmation are noncompensable because the services did not benefit the estate.

On March 14, 2013, the bankruptcy court held an evidentiary hearing on the unresolved fee issues. The bankruptcy court entered a final written order on October 3, 2013 ("Final Fee Order") allowing: 1) the portion of fees requested in the Fourth and Fifth Fee Applications that were disputed on the basis that the services did not benefit the estate, and 2) all of the postconfirmation fees and expenses requested in the Fifth, Sixth, Seventh and Final, and Supplemental Seventh and Final Fee Applications.[44] On October 16, 2013, both RHB and the Liquidating Trustee (collectively "Appellants") timely filed their notices appealing the bankruptcy court's Employment Order and Final Fee Order and their appeals have been companioned.

II. APPELLATE JURISDICTION

This Court has jurisdiction to hear timely filed appeals from "final judgments, orders, and decrees" of bankruptcy courts within the Tenth Circuit,

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[42] *See, inter alia, Objection of RHB to Sixth Fee Application, in* App. at 661-666; *Objection of RHB to Seventh Fee Application, in* App. at 686-92.

[43] *Liquidating Trustee's Objection to Seventh Fee Application, in* App. at 684-85.

[44] *Final Fee Order, in* App. at 874-905.

unless one of the parties elects to have the district court hear the appeal.[45] None of the parties elected to have this appeal heard by the United States District Court for the District of Kansas. The parties have therefore consented to appellate review by this Court.

A decision is considered final "if it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'"[46] Here, the bankruptcy court's Final Fee Order "conclusively determines how much compensation [Lazzo] is ultimately awarded," and is final for purposes of review.[47] The bankruptcy court's Employment Order and its First Fee Order retroactively allowing compensation for services rendered prior to filing of the Initial Employment Application, though interlocutory when entered,[48] became appealable when the bankruptcy court entered its Final Fee Order. The Final Fee Order approved and authorized the previous interim Fee Orders on a final basis, concluding its consideration of Lazzo's employment and compensation and disposing of the matter.[49]

III. STANDARDS OF REVIEW

For purposes of standard of review, decisions by trial courts are traditionally divided into three categories, denominated: 1) questions of law, which are reviewable *de novo*; 2) questions of fact, which are reviewable for clear

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[45] 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8002; 10th Cir. BAP L.R. 8001-3.

[46] *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)).

[47] *In re Union Home and Indus., Inc.*, 376 B.R. 298, 302 (10th Cir. BAP 2007); *In re Dewey*, 237 B.R. 783, 787 n.3 (10th Cir. BAP 1999).

[48] *In re Callister*, 673 F.2d 305, 307 (10th Cir. 1982).

[49] *Spears v. U.S. Trustee*, 26 F.3d 1023, 1024 (10th Cir. 1994); *In re Union Home and Indus., Inc.*, 376 B.R. 298, 302 (10th Cir. BAP 2007).

error; and, 3) matters of discretion, which are reviewable for abuse of discretion.[50] *De novo* review requires an independent determination of the issues, giving no special weight to the bankruptcy court's decision.[51] A factual finding is "clearly erroneous" when "'it is without factual support in the record, or if the appellate court, after reviewing all the evidence, is left with the definite and firm conviction that a mistake has been made.'"[52] "Under the abuse of discretion standard: 'a trial court's decision will not be disturbed unless the appellate court has a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances.'"[53] A trial court abuses its discretion when it makes an "arbitrary, capricious, or whimsical," or "manifestly unreasonable judgment."[54]

We review an order granting employment of a professional *post facto* for abuse of discretion.[55] However, we review *de novo* the issue of whether the bankruptcy court applied the appropriate legal standard for *post facto* approval of employment under § 327.[56] We review a bankruptcy court's allowance of

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[50] *Pierce v. Underwood*, 487 U.S. 552, 558 (1988); *see* Fed. R. Bankr. P. 8013; *Fowler Bros. v. Young (In re Young)*, 91 F.3d 1367, 1370 (10th Cir. 1996).

[51] *Salve Regina Coll. v. Russell*, 499 U.S. 225, 238 (1991).

[52] *Las Vegas Ice & Cold Storage Co. v. Far W. Bank*, 893 F.2d 1182, 1185 (10th Cir. 1990) (quoting *LeMaire ex rel. LeMaire v. United States*, 826 F.2d 949, 953 (10th Cir. 1987)).

[53] *Moothart v. Bell*, 21 F.3d 1499, 1504 (10th Cir. 1994) (quoting *McEwen v. City of Norman*, 926 F.2d 1539, 1553-54 (10th Cir. 1991)).

[54] *Id.* at 1504-05 (internal quotation marks omitted).

[55] *In re Land*, 943 F.2d 1265 (10th Cir. 1991).

[56] *In re Albrecht*, 245 B.R. 666, 669 (10th Cir. BAP), *aff'd*, 233 F.3d 1258 (10th Cir. 2000) (any statutory interpretation or other legal analysis underlying a bankruptcy court's decision concerning attorney fees is reviewed *de novo*).

attorney's fees for abuse of discretion,[57] and apply a clearly erroneous standard to its factual finding that services rendered benefitted the estate.[58]

IV. DISCUSSION

Before us are the bankruptcy court's Employment Order, First Fee Order, and Final Fee Order. The Employment Order and First Fee Order, finalized by the Final Fee Order, have been appealed to the extent they retroactively approve employment of Lazzo prior to filing of the Initial Employment Application and award fees for services rendered during that Gap Period. The Final Fee Order has been appealed to the extent it awards: 1) fees requested in the Second, Third, Fourth, and Fifth Fee Applications for services that are disputed as having no benefit to the estate; and 2) fees requested in the Sixth, Seventh and Final, and Supplemental Seventh and Final Fee Applications for services that were rendered postconfirmation and did not benefit the estate. We address each issue in turn below.

A. Employment Order and Gap Fees

Sections 327, 328, 329, and 330 govern the employment and compensation of professional persons. Section 327 permits a trustee or debtor-in-possession to employ professional persons to assist them only with the bankruptcy court's approval.[59] Section 330(a)(1) permits a bankruptcy court to award compensation only to professional persons assisting the trustee or debtor-in-possession who are "***employed under section 327***."[60] "[A]ny professional not obtaining approval is

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[57] *In re Mullendore*, 527 F.2d 1031, 1038 (10th Cir. 1975).

[58] *In re Lederman Enters., Inc.*, 997 F.2d 1321, 1323 (10th Cir. 1993); *In re Abraham*, 221 B.R. 782, 785 (10th Cir. BAP 1998).

[59] 11 U.S.C. § 327(a). Although this section specifies only a trustee, it is made applicable to debtors-in-possession by § 1107(a).

[60] 11 U.S.C. § 330(a)(1) (emphasis added).

simply considered a volunteer if it seeks payment from the estate."[61] Section 328 places certain limitations on the compensation of professional persons (such as reasonableness), and § 329 requires attorneys to disclose compensation paid in connection with bankruptcy representation during the year preceding filing of the petition. Together, these sections provide the bankruptcy court with the power and duty to oversee employment and compensation of professionals to protect the estate by: 1) ensuring the trustee or debtor-in-possession is represented by competent, disinterested persons with experience and integrity;[62] and 2) preventing the estate from being drained by unreasonable fees that might otherwise benefit creditors, the debtor, and equity security holders.[63]

Federal Rules of Bankruptcy Procedure 2014 and 2016[64] require that employment and fee applications be made to the court and contain specific information. Rule 2014 requires that an employment application include specific facts that support 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 all of the person's connections with any party in interest.[65] The application must be accompanied by a verified statement of the person to be employed setting forth the person's connections with any party in interest. After employment is approved, Rule 2016 requires an application for compensation to be filed which sets forth the details of the

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[61] *Interwest Bus. Equip., Inc. v. U.S. Trustee (In re Interwest Bus. Equip., Inc.)*, 23 F.3d 311, 318 (10th Cir. 1994) (citing 2 *Collier on Bankruptcy* ¶ 327.02, at 327-10 (15th ed. 1993)).

[62] *In re Ark. Co., Inc.*, 798 F.2d 645, 648-49 (3rd Cir. 1986).

[63] *See In re Busy Beaver Bldg. Ctrs., Inc.*, 19 F.3d 833, 843-44 (3rd Cir. 1994).

[64] Unless otherwise indicated, all future references to "Rule" are to the Federal Rules of Bankruptcy Procedure.

[65] Fed. R. Bankr. P. 2014(a).

services rendered and the amounts requested.

Neither the Code nor the Rules specifically set forth the time for filing an employment application, but courts have held that approval should be sought prior to a professional beginning work.[66] Additionally, in the case of attorneys hired by debtors to conduct a Chapter 11 bankruptcy case, Kansas Local Bankruptcy Rule 2014.1(a) requires the employment application to be filed with the petition:

> (a) **Trustee/Debtor-in-Possession's Application to Employ Attorney to Conduct Chapter 11 Case.** To employ attorneys under § 327 to conduct a Chapter 11 case (as distinguished from attorneys employed other than to conduct the case) the trustee/debtor-in-possession must file *with the petition* an application to employ attorneys to conduct the case in accordance with the limitations on compensation contained in § 328.[67]

Further, Local Rule 2014.1(a)(2) provides that the "application must include the statement of compensation paid or agreed to be paid, required by § 329– Procedural Form 203, Disclosure of Compensation of Attorney for Debtor." Lazzo complied with neither of these requirements.

Moreover, though Lazzo filed his Employment Application on June 17, 2011 immediately after being reminded to do so by the United States Trustee's Office, he neglected to request *post facto* approval so that legal services provided to SILLC prior to its filing could be compensated. Lazzo did not file his Supplemental Employment Application clarifying that he was seeking *post facto* approval of his employment until September 1, 2011, when he also filed SILLC's First Fee Application. Nevertheless, the bankruptcy court granted Lazzo's Employment Application *post facto*, explaining that: 1) Lazzo substantially complied with all of the disclosure requirements, 2) he adequately explained why the application was not filed contemporaneously with the petition, 3) the circumstances substantially justified not filing the application with the petition,

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66 *See e.g., In re Ark. Co., Inc.*, 798 F.2d 645.

67 D. Kan. LBR 2014.1(a).

and 4) the United States Trustee did not object.[68]

On appeal, RHB and the Liquidating Trustee argue the bankruptcy court applied the wrong legal standard in approving Lazzo's employment *post facto*. Citing *In re Land*,[69] a decision of the United States Court of Appeals for the Tenth Circuit ("Tenth Circuit"), they contend that only in "extraordinary circumstances" may employment be approved *post facto*. Lazzo counters that the "extraordinary circumstances" pronouncement in *Land* is dicta and argues the Tenth Circuit has not adopted a standard for *post facto* employment approval. He urges this Court to adopt an "excusable neglect" standard, relying primarily upon *In re Singson*,[70] an opinion of the United States Court of Appeals for the Seventh Circuit ("Seventh Circuit").[71] Lazzo's construction of *Land* is unpersuasive. We agree with RHB and the Liquidating Trustee that the bankruptcy court was required to employ the extraordinary circumstances standard dictated in *Land* in determining whether to grant *post facto* approval of Lazzo's employment.

In *Land*, the bankruptcy court denied *post facto* approval of employment to an attorney who did not file his employment application until almost four years after the Chapter 11 petition was filed. On appeal, the Tenth Circuit affirmed the bankruptcy court's order directing the attorney to return compensation paid to him

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68 *Nov. 8, 2011 Hr'g Tr.* at 6, 16-17, *in* App. at 348, 358-59.

69 943 F.2d 1265 (10th Cir. 1991).

70 41 F.3d 316 (7th Cir. 1994).

71 *Singson* and other cases Lazzo cites in his brief are premised, in part, on Rule 9006(b)(1), which grants bankruptcy courts permission to enlarge time after expiration of a deadline upon showing of excusable neglect. In turn, those cases incorporate the United States Supreme Court's interpretation of excusable neglect as pronounced in *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993)(determination of excusable neglect "is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission," such as prejudice to other parties, length of delay and impact on proceedings, reason for delay and whether it was within reasonable control of party and whether party acted in good faith).

because he failed to obtain court approval of his employment.[72] In so doing, the Tenth Circuit specifically stated that, assuming the bankruptcy court had discretion to retroactively approve employment of a professional, "[*post facto*] approval is only appropriate in the most extraordinary circumstances,"[73] which were not present in *Land*.[74] Further, citing *In re Arkansas Company, Inc.*,[75] an opinion of the United States Court of Appeals for the Third Circuit ("Third Circuit"), the Tenth Circuit stated "[s]imple neglect will not justify [*post facto*] approval of a debtor's application for the employment of a professional."[76] We are not free to disregard the Tenth Circuit's ruling and embrace the excusable neglect standard adopted by the Seventh Circuit.

We realize the facts of *Land* are much more egregious than those presented in this appeal. We are convinced that the Tenth Circuit, in *Land*, adopted the "extraordinary circumstances" test for *post facto* approval of employment. In adopting this standard, the Tenth Circuit was likely persuaded by the Third Circuit's explanation of its ruling in *Arkansas Co.*:

> We thus hold that [*post facto*] approval should be limited to cases where extraordinary circumstances are present. Otherwise the

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72 *Land*, 943 F.2d at 1267.

73 *Id.* at 1267-68. This is the majority position. *See* Rosemary Williams, Annotation, *Approval of Employment of Professional Persons under 11 U.S.C.A. § 327(a) and Bankruptcy Rule 2014 Nunc Pro Tunc*, 133 A.L.R. Fed. 465, § 5[a] (1996); 3-330 *Collier on Bankruptcy* ¶ 330.02[2][b], at 15-17 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2014).

74 We note many courts originally took the position that employment could not be approved retroactively, but eventually decided to use their equitable powers to prevent technicalities from depriving hard working professionals of a fairly earned dollar. *See* Anthony Collins, Jr., *A Change of Disposition: The Evolving Perception of Pre-Approval Requirements Under 11 U.S.C. § 327*, 28 J. Legal Prof. 133 (2003-04); Stephen R. Grensky, *The Problem Presented by Professionals Who Fail to Obtain Prior Court Approval of Their Employment or Nunc Pro Tunc Est Bunc*, 62 Am. Bankr. L.J. 185 (April 1988).

75 798 F.2d 645 (3rd Cir. 1986).

76 *Land*, 943 F.2d at 1268.

> bankruptcy court may be overly inclined to grant such approval influenced by claims of hardship due to work already performed . . . . [I]nadvertence or oversight of counsel [should not] constitute excusable neglect sufficient to relieve the parties of the consequences of their inaction. . . . While this may seem to be a harsh rule, a more lenient approach would reward laxity by counsel and might encourage circumvention of the statutory requirement."[77]

In other words, a lesser standard would permit the rule requiring pre-approval of employment to be swallowed whole by the exception and effectively write § 327(a) out of the Bankruptcy Code.[78] This underlying rationale supports denial of Lazzo's Supplemental Employment Application asking for *post facto* approval, even though his noncompliance with procedural rules did not rise to the level of the flagrant disrespect of the bankruptcy court's statutorily mandated role in employing and compensating attorneys demonstrated in *Land*.

The "extraordinary circumstances" standard adopted by the Tenth Circuit in *Land* has been followed by bankruptcy courts in this Circuit,[79] including those in Kansas.[80] Moreover, the Kansas bankruptcy court has enacted Local Rule 2014.1, which expressly requires the employment application to be filed with the petition. Lazzo's explanation for failing to do so–having to file numerous first day motions–cannot constitute extraordinary circumstances warranting *post facto* approval. Numerous first day motions are common in large Chapter 11 cases, and Lazzo is a seasoned attorney who practices primarily in the bankruptcy area and

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[77] *In re Ark. Co., Inc.*, 798 F.2d at 649-50.

[78] *In re Music Store, Inc.*, 241 B.R. 752, 754 (Bankr. N.D. Okla. 1999).

[79] *See e.g.*, *In re Rio Valley Motors Co., LLC*, No. 11-06-11866, 2007 WL 4284851 (Bankr. D. N.M. Dec. 3, 2007); *In re Music Store, Inc.*, 241 B.R. 752; *In re Universal Parts & Servs., Inc.*, 151 B.R. 285 (Bankr. W.D. Okla. 1993).

[80] *In re Concha*, No. 10-14186, 2013 WL 153754, at *3 (Bankr. D. Kan. Jan. 15, 2013); *In re Team Fin., Inc.*, No. 09-10925, 2010 WL 2836877 (Bankr. D. Kan. July 16, 2010); *In re Boot Hill Biofuels*, LLC, No. 08-13128, 2009 WL 1766823 (Bankr. D. Kan. June 23, 2009). *See also In re Ibbetson*, 100 B.R. 548, 550-51 (D. Kan. 1989), which predates *Land*.

has handled numerous Chapter 11 cases over the years.

We conclude that the bankruptcy court erred in approving Lazzo's employment *post facto*. Lazzo's inadvertent neglect in failing to timely file his employment application is not an extraordinary circumstance. As stated by the United States Court of Appeals for the First Circuit, "[l]ogic and experience dictate that if the category of extraordinary circumstances were expanded to include mere oversight, the modifying adjective 'extraordinary' would be completely emptied of its meaning. Consequently, the standard itself would be stripped of its efficacy."[81] We reverse the bankruptcy court's Employment Order to the extent it retroactively approves employment of Lazzo prior to filing of the Initial Employment Application. We also reverse the bankruptcy court's First Fee Order to the extent it awards $14,960 in fees for services rendered during that Gap Period.

B. Allowance of Fees Disputed as not Benefitting the Estate

Pursuant to § 330, courts may award an attorney employed under § 327 reasonable compensation only for "***actual, necessary services rendered***."[82] On appeal, RHB and the Liquidating Trustee argue the bankruptcy court erred in granting Lazzo certain fees requested in SILLC's Second, Third, Fourth, and Fifth Fee Applications, alleging the services rendered did not benefit the estate. We disagree.

In determining reasonable compensation, § 330 instructs courts to consider the nature, extent, and value of such services "taking into account all relevant factors, including . . . whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the

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81 *In re Jarvis*, 53 F.3d 416, 421 (1st Cir. 1995).

82 11 U.S.C. § 330(a)(1)(A) (emphasis added).

completion of, a case[.]"[83] Section 330 prohibits courts from allowing compensation for services that were not reasonably likely to benefit the debtor's estate or necessary to the administration of the case.[84]

RHB and the Liquidating Trustee argue that $3,120 in fees requested in the Fourth and Fifth Fee Applications related to evaluation of a nondischargeability action filed in the Schupbachs' bankruptcy case, and therefore did not benefit the estate. The bankruptcy court allowed the fees, explaining:

> At the time of the challenged entries, there were two competing proposed Chapter 11 plans before the Court, one proposed by Debtor and one proposed by creditors. Counsel for Debtor was attempting a global settlement of the competing plans, and evaluation of the dischargeability complaint was required for meaningful settlement discussions. The time spent on the dischargeability complaint benefitted the estate. The fees are therefore properly allowed as an administrative expense.[85]

According to Appellants, the bankruptcy court "went too far in allowing these fees against the Debtor's estate," because "there was nothing in either plan that required the dischargeability action to be resolved for confirmation."[86]

Appellants interpret necessity of the services and benefit to the estate too narrowly. "Benefit" to the estate is measured by considering whether the services were necessary to the administration of, or beneficial toward the completion of a case under this title.[87] The appropriate time for measuring benefit to the estate is as of the time the services are provided, and not at the time the court ultimately

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83 11 U.S.C. § 330(a)(3)(C).

84 11 U.S.C. § 330(a)(4)(A)(ii).

85 *Final Fee Order* at 14-15, *in* App. at 887-88.

86 Appellants' Opening Brief at 25.

87 11 U.S.C. § 330(a)(3)(C).

reviews the fee application.[88] Further, "[b]enefit to the estate for services provided by counsel for a Chapter 11 debtor in possession is not restricted to success measured by confirmation of a plan or the prospect of confirming a plan."[89] Courts may allow compensation where counsel's services promoted the bankruptcy process and contributed to the administration of the estate, but did not otherwise provide an economic benefit to the estate.[90] We reject Appellants' argument because it restricts "benefit to the estate" to confirmation issues, and assumes the services rendered can only have a single purpose. Lazzo's efforts here may have benefitted the Schupbachs, but they also concerned the administration of SILLC's bankruptcy case. The bankruptcy court did not err in allowing these fees.

Appellants also contend that the bankruptcy court erred in allowing $ 8,538.88 in fees requested in the Second and Third Fee Applications that relate to the requested substantive consolidation of SILLC's and the Schupbachs' bankruptcy cases. Like the services discussed above, Lazzo's services relating to possible consolidation of the two bankruptcy cases served multiple purposes. Certainly, consolidation would have benefitted the Schupbachs to the extent it allowed them to retain their ownership interest in SILLC, but it also could have rehabilitated SILLC.[91] As the bankruptcy court noted, many Chapter 11 cases are

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[88] *Id.*; *In re Kitts Dev. LLC*, 474 B.R. 712, 720 (Bankr. D. N.M. 2012) (citing *In re Polishuk*, 258 B.R. 238, 248 (Bankr. N.D. Okla. 2001)).

[89] *In re Kitts Dev. LLC*, 474 B.R. at 721; *In re Universal Factoring Co., Inc.*, 329 B.R. 62, 84 (Bankr. N.D. Okla. 2005).

[90] *In re Kitts Dev. LLC*, 474 B.R. at 721; *In re Kile*, 345 B.R. 182, 189-90 (Bankr. D. Ariz. 2004); *In re Kusler*, 224 B.R. 180, 184 (Bankr. N.D. Okla. 1998).

[91] The bankruptcy court described consolidation of the bankruptcy cases as "a reasonable strategy for achieving rehabilitation of Debtor." *Final Fee Order* at 30, *in* App. at 903.

filed by closely-held businesses where the affairs of the owners and the company are intertwined and successful reorganization is doubtful; nonetheless, the Chapter 11 process remains available to them.[92] We cannot say that the bankruptcy court's finding that "time spent on [consolidation] was calculated to benefit the estate"[93] was clearly erroneous.

Finally, Appellants object to fees for services relating to termination of life insurance policies on the life of Jonathan Schupbach that were owned by SILLC. The life insurance policies became property of the estate and the Creditors' Plan provided for assumption and assignment of the policies, to which SILLC objected.[94] Lazzo's services rendered in connection with the policies involved resolution of the objection to the Creditors' Plan and constitute administration of the estate. Fees for necessary administration of the estate are properly compensable under § 330, and therefore, the bankruptcy court did not err in allowing these fees.

C. Allowance of Postconfirmation Fees

Appellants contend the bankruptcy court erred in allowing most of the professional fees requested in the Fifth Fee Application and all of the fees requested in the Sixth and Seventh/Final Fee Applications because the professional services at issue were rendered postconfirmation. They assert confirmation of the Creditors' Plan terminated SILLC's status as debtor-in-possession, and therefore terminated Lazzo's employment as attorney for the debtor-in-possession. According to the Appellants, the postconfirmation fees cannot be paid using estate funds.

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92 *Id.* at 30-31, *in* App. at 903-04.

93 *Id.* at 30, *in* App. at 903.

94 *Id.* at 16-17, *in* App. at 889-90.

Courts approve a debtor's professional fees only if the debtor employs the professional persons pursuant to § 327.[95] That section provides, in relevant part: "the *trustee*, with the court's approval, may employ one or more attorneys . . . to represent or assist the trustee in carrying out the trustee's duties under this title."[96] Section 330(a)(1) permits a court to award fees to the trustee's counsel in Chapter 7 and Chapter 11 cases whose employment is approved under § 327.[97] The Chapter 11 debtor-in-possession may employ, and courts may award compensation to, professional persons pursuant to these sections only because § 1107 gives the debtor-in-possession the rights, powers, and duties of a trustee. Once a debtor loses its status as debtor-in-possession, however, its ability to employ, and a court's ability to award compensation to, professional persons pursuant to §§ 327 and 330(a)(1) for services provided thereafter is terminated.[98]

It is undisputed that SILLC served as debtor-in-possession until the Creditors' Plan was confirmed and therefore had the power and duty to employ and compensate Lazzo pursuant to §§ 327 and 330(a)(1). A point of contention on appeal is whether SILLC retained that status and ability after confirmation.

The bankruptcy court concluded, and Lazzo now argues, that § 330(a)(1)

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[95] *See Lamie v. U.S. Trustee*, 540 U.S. 526, 538 (2004) (concluding that "[section] 330(a)(1) does not authorize compensation awards to debtors' attorneys from estate funds, unless they are employed as authorized by § 327").

[96] 11 U.S.C. § 327(a) (emphasis added).

[97] Section 330(a)(1) provides, in relevant part: "the court may award to a trustee, . . . or a professional person employed under section 327 or 1103– (A) reasonable compensation for actual, necessary services rendered by the . . . attorney[.]" 11 U.S.C. § 330(a)(1)(A).

[98] *Lamie*, 540 U.S. at 532 (noting that conversion to Chapter 7 "terminated [debtor's] status as debtor-in-possession and so terminated petitioner's service under § 327 as an attorney for the debtor-in-possession"); *In re Princeton Med. Mgmt., Inc.*, 249 B.R. 813, 816-817 (Bankr. M.D. Fla. 2000) (A debtor-out-of-possession may not employ and compensate professionals under § 327.).

still applied to Lazzo's postconfirmation professional fees because SILLC's status as debtor-in-possession was not terminated by confirmation of the Liquidating Plan or by the appointment of the Liquidating Trustee. The bankruptcy court construed § 1101(1) to mean that a Chapter 11 debtor remains a debtor-in-possession unless and until a bankruptcy trustee is appointed. That section defines the term "debtor in possession" as the "debtor except when a person that has qualified under section 322 of this title is serving as trustee in the case." For purposes of § 322, qualified persons include Chapter 7 trustees, which are appointed upon conversion, and Chapter 11 trustees, which are appointed pursuant to court order under § 1104. A liquidating trustee is not a trustee qualified under § 322. The bankruptcy court concluded that because a qualifying trustee was not appointed, SILLC remained a debtor-in-possession postconfirmation, and the bankruptcy could retained the ability to award compensation to Lazzo pursuant to § 330(a)(1).

When read in isolation, the bankruptcy court's construction of § 1101(1) is reasonable; the provision seems to suggest that a debtor remains a debtor-in-possession unless a bankruptcy trustee is appointed. However, when reading Title 11 as a whole,[99] we are not persuaded that the appointment of a bankruptcy trustee is the *only* way to terminate a debtor's status as debtor-in-possession. To remain a debtor-in-possession after confirmation, the debtor must have at least some rights, powers, and duties of a bankruptcy trustee under § 1107.[100] Exercising those rights, powers, and duties is the essential

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[99] *WildEarth Guardians v. Nat'l Park Serv.*, 703 F.3d 1178, 1189 (10th Cir. 2013) (noting that "[s]tatutes must be read as a whole and in relation to one another").

[100] 11 U.S.C. § 1107(a) (the debtor-in-possession has the rights, duties, and powers of a trustee, subject to certain limitations). *See also* 11 U.S.C. § 323(a) (noting that the trustee (or debtor-in-possession under § 1107) is the representative of the estate).

attribute that defines a debtor-in-possession. For example, under certain circumstances a debtor-in-possession, acting like a bankruptcy trustee, must obtain court approval to use, sell, or lease property, to use cash collateral, to borrow money, to reject or assume executory contracts, and to settle controversies.[101] Like employing and compensating counsel pursuant to §§ 327 and 330(a)(1), these activities only require court approval because the debtor-in-possession has the rights, powers, and duties of a bankruptcy trustee. A Chapter 11 debtor who, after confirmation, has none of the rights, powers, or duties of a bankruptcy trustee does not remain under the supervision of the court or the United States Trustee and, therefore, no longer is a debtor-in-possession.

Construing § 1101(1) in isolation to mean that a debtor always remains a debtor-in-possession absent the appointment of a bankruptcy trustee is at odds with what it means to be a reorganized debtor that has emerged from bankruptcy. It would mean that a reorganized Chapter 11 debtor would remain a debtor-in-possession in perpetuity, operating under the supervision of the Court and the United States Trustee even after the bankruptcy case is closed.[102] There is no provision in the Bankruptcy Code expressly providing that, absent the appointment of a bankruptcy trustee, a debtor is no longer a debtor-in-possession after the Chapter 11 case is closed.[103]

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[101] 11 U.S.C. §§ 363(b)(1); 363(c)(2); 364; 365; and 1107(a); Fed. R. Bankr. P. 9019.

[102] A debtor-in-possession "has fiduciary responsibilities to his creditors[,] is administratively supervised by the United States Trustee[,]" and operates "under court supervision." *Smith v. Rockett*, 522 F.3d 1080, 1085 (10th Cir. 2008).

[103] Section 350, which addresses closing and reopening cases, simply provides: "(a) After an estate is fully administered and the court has discharged the trustee, the court shall close the case. (b) A case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause."

The advisory committee's note accompanying Rule 3022 provides:

(continued...)

Turning to the case at hand, and applying the foregoing principles, we are persuaded that confirmation of the Creditors' Plan terminated SILLC's status as debtor-in-possession. The Creditors' Plan and Confirmation Order provide that, upon confirmation: (1) all encumbered property would be transferred to secured creditors; (2) all unsecured assets of the estate vest in the Liquidating Trust;[104] (3) all rights and powers of a bankruptcy trustee (meaning here, all rights and powers of the debtor-in-possession under 11 U.S.C. § 1107(a)) vest in the Liquidating Trustee; and (4) SILLC will be deemed dissolved. The Creditors' Plan further provides that the Liquidating Trustee will have the power to liquidate assets, administer claims, pursue recovery of fraudulent and preferential transfers, and employ counsel. Here, where SILLC had none of the rights, powers, or duties of a bankruptcy trustee postconfirmation, SILL's status as debtor-in-possession terminated upon confirmation.

In any event, even if SILLC remained a debtor-in-possession postconfirmation, Lazzo was no longer entitled to receive compensation from estate funds as counsel for the debtor-in-possession under §§ 327 and 330(a)(1)

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[103] (...continued)

> The court should not keep the case open only because of the possibility that the court's jurisdiction may be invoked in the future. A final decree closing the case after the estate is fully administered does not deprive the court of jurisdiction to enforce or interpret its own orders and does not prevent the court from reopening the case for cause pursuant to § 350(b) of the Code.

Fed. R. Bankr. P. 3022 advisory committee's note. *See also In re Union Home and Indus., Inc.*, 375 B.R. 912, 916 (10th Cir. BAP 2007) (noting that "entry of a final decree is primarily an administrative decision for the bankruptcy court to determine[,]" and observing that the case may be reopened under Section 350); *Osberg v. Bartels (In re Bartels)*, 449 B.R. 355, 357 (Bankr. W.D. Wis. 2011) ("The closure of a case is essentially an administrative act, as is the reopening of a case for the reasons specified in the statute.").

[104] Any estate assets that did not vest in the Liquidating Trustee vested in the debtor. 11 U.S.C. § 1141(b) ("Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor."). As a result, there was no longer a bankruptcy estate postconfirmation.

because the Creditors' Plan and Confirmation Order explicitly stripped SILLC of all of the rights, powers, and duties of a bankruptcy trustee.[105] This included the right or duty of a trustee to continue to employ professional persons under § 327. As noted above, under § 330(a)(1), the court may award compensation only to professional persons employed under § 327.[106] As a result, by the terms of this particular plan and confirmation order, SILLC's ability to retain and the court's ability to award compensation to professional persons under §§ 327 and 330(a)(1) for postconfirmation services was terminated upon confirmation of the Creditors' Plan.

This is not to say, however, that SILLC (or whatever remained of it, since the entity was deemed dissolved on confirmation) was prohibited from employing and compensating professionals postconfirmation, at least where payment is made from non-estate assets. As a general rule, court approval is not required for the retention or compensation of professionals after confirmation.[107] As one court

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[105] The Creditors' Plan provides that upon confirmation, "all rights and powers of a trustee under the Bankruptcy Code" vest in the Schupbach Investments Liquidation Trust, and presumably the Liquidating Trustee. *Creditors' Plan*, *in* App. at 471. Similarly, the Confirmation Order provides that "the Liquidation Trustee will be created and vested with all unsecured property of the Debtor," and "[t]he Liquidation Trustee [will have] all rights and powers of a trustee under the Bankruptcy Code." *Confirmation Order* at 3, *in* App. at 615.

[106] *See Lamie v. U.S. Trustee*, 540 U.S. 526, 538 (2004).

[107] *In re Colonial BancGroup, Inc.*, No. 09-32303, 2011 WL 2792477, at *3 (Bankr. M.D. Ala. July 15, 2011) (citing 3 *Collier on Bankruptcy* ¶ 327.03 (Lawrence P. King ed., 16th ed. 2011)). *See also In re Mullendore*, 517 B.R. 232, 238 (Bankr. D. Mont. 2014) (noting that after a plan is effective and all assets of the estate have vested in the reorganized debtor, the debtor "no longer has the status and trustee powers of a debtor in possession under § 1107(a), including the trustee's power to employ professionals under § 327(a), or the trustee's power to compensate professionals under § 330(a)(1)"); *Beal Bank, S.S.B. v. Waters Edge Ltd. P'ship*, 248 B.R. 668, 689 (D. Mass. 2000) (observing that the reorganized debtor is free to employ professionals without court approval as long as it can meet its obligations under the confirmed plan); *Kaiser Grp. Holdings, Inc. v. Squire Sanders & Dempsey LLP (In re Kaiser Grp. Int'l, Inc.*, 421 B.R. 1, 13 (Bankr. D. Colo. 2009) ("Normally, a bankruptcy court does not approve fees for post-confirmation conduct nor has an active role in the removal of

(continued...)

explained:

> [U]pon plan confirmation, a debtor is no longer a debtor in possession and the bankruptcy estate ceases to exist. In other words, the reorganized debtor is a new entity not subject to the jurisdiction of the bankruptcy court, except as provided in the plan. Therefore, approval of fees for post-confirmation services is not required.[108]

Unfortunately this provides little consolation in the instant case because SILLC has no assets to pay Lazzo post-confirmation. We are convinced this decision does not produce an inequitable result, though, for two reasons. First, under the Creditors' Plan and Confirmation Order, SILLC's sole duty was to execute quit claim deeds.[109] Any legal work required to assist SILLC with those duties was minimal.[110] The majority of work Lazzo performed was to assist the Schupbachs to perform their individual duties under the plan even though they were not his clients. Lazzo could have insisted that the Schupbachs retain and pay him before doing that work, or negotiated with the Liquidating Trustee to pay his fees for work performed in service of consummating the plan. Second, to the

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[107] (...continued)
post-confirmation counsel."); *In re Dallas Stars, L.P.*, No. 11-12935. 2011 WL 5829885, at *23 (Bankr. D. Del. Nov. 18, 2011) (observing in a confirmation order that "[t]he Post-Effective Date Debtors are authorized to pay compensation for professional services rendered and reimbursement of expenses incurred after the Confirmation Date in the ordinary course and without the need for Court approval.").

[108] *In re Briscoe Enters. Ltd., II*, 138 B.R. 795, 809 (N.D. Tex. 1992) (citation omitted), *rev'd on other grounds*, 994 F.2d 1160 (5th Cir. 1993).

[109] The Confirmation Order provides: "[t]he Debtor will also, through the Schupbachs, execute quit claim deeds to the various properties transferred pursuant to Article 5, to the extent such deeds are provided by the secured creditors." *Confirmation Order, in* App. at 617. Despite the word "also" appearing in that sentence, SILLC was not required to perform any other tasks under the Creditors' Plan and Confirmation Order. All remaining postconfirmation tasks were to be performed by the Schupbachs, individually, or the Liquidating Trustee.

[110] We are not suggesting that the amount awarded for postconfirmation services - which totaled $11,315.95 - is minimal. We only mean that assisting SILLC in executing quit claim deeds prepared by another party would require minimal work. Lazzo's billing statements reflect that he rendered services far beyond those required of him under the plan as SILLC's counsel.

extent the Creditors' Plan required SILLC to perform certain tasks requiring the assistance of counsel, SILLC could have objected to the plan unless it required the Liquidating Trustee to pay those legal fees.

We conclude that the bankruptcy court erred in awarding legal fees to Lazzo for services rendered postconfirmation. Because SILLC had no rights, powers, or duties of a bankruptcy trustee upon confirmation, its ability to employ, along with the bankruptcy court's ability to award compensation to counsel pursuant to §§ 327 and 330(a)(1) for postconfirmation services, also terminated. We reverse the bankruptcy court's Employment Order to the extent it awards $11,315.95[111] in fees to Lazzo for services rendered after November 21, 2012, the date of confirmation.

V. CONCLUSION

Post facto approval of employment is only appropriate in extraordinary circumstances. Lazzo's failure to timely file the employment application was nothing more than inadvertent neglect, which does not rise to the level of extraordinary circumstances. Accordingly, we REVERSE the bankruptcy court's approval of Lazzo's employment *post facto* and its allowance of the fees incurred during the Gap Period. We AFFIRM the bankruptcy court's allowance of fees disputed as not benefitting the estate. The services rendered served multiple purposes and we reject Appellants' narrow interpretation of benefit to the estate. We also REVERSE the bankruptcy court's allowance of postconfirmation fees. Lazzo was not entitled to compensation for services rendered after confirmation because at that time SILLC no longer had the ability to employ, and the bankruptcy court no longer had the ability to award compensation to, professional persons under §§ 327 and 330. We remand the Final Fee Order to the bankruptcy

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[111] We arrived at this number by adding the amount requested in the Fifth Fee Application incurred after the confirmation date (a total of $4,780.95 for November 24, 2012 to December 6, 2012) to the amounts requested in the Sixth ($3,655.75) and Seventh/Final ($2,879.25) Fee Applications.

court to adjust the amount of the fee award consistent with this opinion.

MICHAEL, Bankruptcy Judge, dissenting in part.

In most aspects, the majority opinion is well written, persuasive, and on point. I join in all of its conclusions save one. I believe the bankruptcy court correctly analyzed the operative provisions of the Bankruptcy Code on the issue of allowance of postconfirmation fees. Accordingly, I respectfully dissent from that portion of the majority opinion disallowing postconfirmation fees.

Statutes are to be given their plain meaning and effect.[1] Section 1101 defines debtor-in-possession as the "debtor except when a person that has qualified under section 322 of this title is serving as trustee in the case."[2] Section 322 sets forth a bond requirement for qualification of a person selected under §§ 701, 702, 703, 1104, 1163, 1202, or 1302 to serve as trustee.[3] Read together, these sections provide that the debtor is the debtor-in-possession until a person selected under one of the enumerated sections is appointed to serve as trustee in the case.[4] These statutory provisions are neither ambiguous nor incomplete. The bankruptcy court correctly recognized this fact, and found that the status of SILLC as a debtor-in-possession was not terminated by confirmation of the Creditors' Plan. The majority rejects this analysis, and based upon its reading of

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[1] *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (where statute's language is plain, sole function of court is to enforce it according to its terms); *State Bank of S. Utah v. Gledhill (In re Gledhill)*, 76 F.3d 1070, 1077 (10th Cir. 1996) (In statutory interpretation we look to the plain language of the statute and give effect to its meaning.) (internal quotation marks omitted); *In re Holcomb*, 380 B.R. 813, 816 (10th Cir. BAP 2008) (statutory construction begins with language employed by Congress and assumes ordinary meaning of language accurately expresses the legislative purpose).

[2] 11 U.S.C. § 1101(1).

[3] 11 U.S.C. § 322(a).

[4] *See In re Bresnick*, 406 B.R. 582, 585 (Bankr. E.D.N.Y. 2009), *aff'd*, No. 09-CV-3565, 2010 WL 2653394 (E.D.N.Y. June 24, 2010).

"Title 11 as a whole,"[5] chooses to substitute its definition of what constitutes a debtor-in-possession for the statutory definition. I see no reason to ignore the plain meaning of the statute.

The majority also suggests that its decision "does not produce an inequitable result." I respectfully disagree. Upon confirmation of the Creditors' Plan, SILLC was obligated by § 1142(a) to carry out its implementation. Although the Creditors' Plan does not provide for the continuation of the bankruptcy estate, it clearly contemplates it. The Creditors' Plan requires SILLC to execute quit claim deeds to the various properties and transfer them to the creditors.[6] It also requires SILLC and the Schupbachs to cooperate with all secured creditors by turning over any requested records to them, and to meet with and respond to questions the creditors may have regarding the property.[7] It further provides that "the Liquidating Trust will pay all allowed administrative and priority claims[,]" and that "[t]he Proponents will fund the Trust to the extent needed to pay such claims."[8] Moreover, the Creditors' Plan specifies that the bankruptcy court shall retain jurisdiction "[t]o allow and approve or disapprove the payment of any administrative expense not previously allowed."[9] Each of these mandates contemplate the continued existence of the bankruptcy estate and the incurrence of professional fees in aid of consummating the Creditors' Plan. It is illogical to suggest that fees contemplated to implement the Creditors' Plan should not be compensated as part of the bankruptcy process, and equally illogical to suggest that Lazzo should have objected to the Creditors' Plan or

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5 *Majority Opinion* at 24.

6 *Confirmation Order* at 5, *in* App. at 617.

7 *Id.*

8 *Id.* at 3, *in* App. at 615.

9 *Creditors' Plan* at 16, *in* App. at 473.

negotiated with someone other than the debtor-in-possession to get his fees paid.[10]

As a practical matter, confirmation of a Chapter 11 plan does not complete the bankruptcy process even though in most cases the bankruptcy estate is terminated. The confirmation order must be prepared. Closing documents must be executed. Final fee applications are required. If one carries the majority ruling to its logical conclusion, none of these expenses are subject to court approval or compensable from the entity (according to the majority) formerly known as the debtor-in-possession.

The bankruptcy court found the postconfirmation fees to be both reasonable and necessary, and no one suggests its conclusion was clearly erroneous.[11] The legal services performed by Lazzo postconfirmation were rendered by a "professional person employed under § 327" in relation to effectuating Creditors' Plan, and are compensable under § 330(a) as an administrative expense under § 503(b)(2).[12] The bankruptcy court did not err in allowing fees requested in the Fifth, Sixth, and Seventh and Final Fee Applications for services rendered postconfirmation.

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[10] Under the majority opinion, at least in theory, Lazzo could possibly sue SILLC or some other entity for these fees. Without debating the plausibility of the theory, I note that its implementation would be practically impossible. Fees are incurred as part of the bankruptcy process and experience dictates that the first inquiry a state court being asked to enforce payment of those fees will make is, "where is the order of the bankruptcy court allowing your fees?" Without such an order, the collection process is over before it starts.

[11] The majority states that "[a]ny legal work required to assist SILLC with those [postconfirmation] duties was minimal." *Majority Opinion* at 28. The fees awarded for postconfirmation services totaled $11,315.95. In most cases, and for most people, this is not a minimal amount of money. Nothing in the majority opinion suggests that the bankruptcy court committed clear error in determining the reasonableness and amount of these fees.

[12] *In re Sultan Corp.*, 81 B.R. 599, 602 (9th Cir. BAP 1987); *In re Hays Builders, Inc.*, 99 B.R. 848, 850 (Bankr. W.D. Tenn. 1989); *In re Tri-L Corp.*, 65 B.R. 774, 778-79 (Bankr. D. Utah 1986).