

FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

In re:)	
)	Case No. 07-25104
SHEPARD JOHNSON and MONTE)	
JOHNSON)	DC Nos. DNL-5
)	MHK-22
Debtors.)	

OPINION
ON APPLICATIONS FOR EMPLOYMENT AND COMPENSATION

Anthony Asebedo, Meegan, Hanschu & Kassenbrock, Gold River, California, for Meegan, Hanschu & Kassenbrock

Allen C. Massey, United States Department of Justice, Office of the United States Trustee, for Sara L. Kistler, Acting United States Trustee

Thomas A. Aceituno, Folsom, California, Trustee

J. Russell Cunningham, Desmond, Nolan, Livaich & Cunningham, Sacramento, California, for Trustee

1 KLEIN, Bankruptcy Judge:
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3 The problem is how, in the wake of the Supreme Court
4 decision in Lamie v. United States Trustee, 540 U.S. 526 (2004),
5 to pay counsel to former debtors in possession under 11 U.S.C.
6 § 330(a) for services needed to effect smooth transition to a
7 chapter 11 trustee. The answer is for the trustee to employ the
8 debtors' counsel pursuant to 11 U.S.C. § 327(e) for the specified
9 special purpose of performing transition services requested by
10 the trustee.

11 A chapter 11 trustee was appointed when this contentious
12 cross-border real estate development case became dead in the
13 water. Debtors' counsel made a final fee request under § 330(a)
14 for work done before and after the trustee took over. The United
15 States trustee objected that some of the fees were unauthorized
16 under § 330(a) because counsel's § 327(a) employment expired when
17 the debtors lost debtor-in-possession status. The case trustee,
18 who had requested the services, then applied to employ debtors'
19 counsel under § 327(e) for the specified special purpose of
20 performing the transition services that he had requested.

21 As suggested in Lamie, § 327(e) permits the counsel for a
22 former debtor in possession to become qualified for compensation
23 under § 330(a) after appointment of a chapter 11 trustee or
24 conversion to another chapter. The trustee is the main
25 gatekeeper, and the key to the gate's lock is § 327(e). Here,
26 § 327(e) employment is approved, and the requested fees awarded.

1 case.

2 On September 9, 2008, debtors' counsel made a final fee
3 application seeking compensation for services rendered before and
4 after the appointment of the chapter 11 trustee.

5 The United States trustee filed a limited opposition to the
6 fee application. Based on Lamie, the opposition contended that
7 debtors' counsel could not, with the exception of the expense of
8 presenting a fee application for services rendered before the
9 trustee was appointed, receive payment under § 330(a)(1) for
10 services rendered after the chapter 11 trustee was appointed and
11 their § 327(a) employment ended.

12 Siding with debtors' counsel, the chapter 11 trustee then
13 applied under § 327(e) to employ debtors' counsel for the
14 specified special purpose of performing transition services that
15 he had requested. Counsel logged 15.3 hours in performing
16 services requested by the trustee during the period from May 23
17 to August 12, 2008, for which it requests \$3,857 and asks to be
18 paid retroactively based on the requested § 327(e) employment.
19 The case trustee supports the overall final fee request,
20 including the \$3,857.00 for the services he requested.

21 As finally adjusted, the § 330(a)(1) fee request seeks a
22 total of \$179,894.24, including the \$3,857.00 incurred at the
23 request of the chapter 11 trustee after counsel's § 327(a)
24 employment ended and \$1,625.00 for preparation and prosecution of
25 the final fee application.

26 The latest developments are that the trustee, in his new
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1 capacity as successor chapter 7 trustee to himself as chapter 11
2 trustee,¹ has in open court ratified his § 327(e) application and
3 his support for the fee application for transition services
4 rendered at his request, and that the United States trustee has
5 clarified on the record that it does not oppose the proposed
6 § 327(e) employment and compensation on that basis.

7
8 Jurisdiction

9 Federal jurisdiction is founded upon 28 U.S.C. § 1334(a) and
10 (e)(2). This is a core proceeding. 28 U.S.C. § 157(b)(2)(A).
11

12 Issues

- 13 1. Whether counsel for a former debtor in possession may
14 be employed under 11 U.S.C. § 327(e) by a successor
15 trustee to provide transition services for compensation
16 under 11 U.S.C. § 330(a)(1).
17
- 18 2. Whether the circumstances of this case qualify for
19 retroactive compensation.
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21

22 ¹The conversion to chapter 7, without prejudice to
23 reconverting to chapter 11 to confirm a plan, occurred on the
24 trustee's motion with consent by the debtors for reasons
25 associated with tactics and financing of the case. The debtors
26 contend that the case will turn out to be a "surplus" case in
27 which the assets exceed liabilities. The trustee, carefully
emphasizing the importance of favorable outcomes of disputes and
excellent cooperation by the debtors, does not disagree that this
could turn out to be a surplus case and that it may yet be
possible to negotiate a confirmable chapter 11 plan.

1 Discussion

2 The analysis of the compensability of services rendered
3 after the trustee was appointed subdivides into two parts.²
4 First, there is the problem of the puzzle lying in the wake of
5 the Lamie holding that the act of Congress deleting debtors'
6 counsel from § 330(a)(1)'s list of those generally entitled to
7 compensation from the estate could not be disregarded as a
8 scrivener's error. Solving the puzzle after the services were
9 rendered leads to the second question: whether the circumstances
10 of this situation qualify for retroactive compensation under the
11 controlling Ninth Circuit standard established in Okamoto v. THC
12 Fin. Corp. (In re THC Fin. Corp.), 837 F.2d 389 (9th Cir. 1988).

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14 I

15 The United States trustee initially objected that debtors'
16 counsel was ineligible for compensation under § 330(a)(1) because
17 its § 327(a) authorization expired at the time the debtor ceased
18 to perform the duties of the trustee as debtor in possession.

19 While the objection was correct in light of Lamie, it
20 exposes an important practical problem for the efficient
21 functioning of reorganization cases when a trustee replaces a
22

23 ²The court is persuaded that the balance of the fee request
24 for services rendered to the debtor in possession, as finally
25 adjusted by the applicant law firm, constitutes reasonable
26 compensation for actual, necessary services and reimbursement for
27 actual, necessary expenses. 11 U.S.C. § 330(a)(1). It is
28 further noted that the case trustee supports the entire fee award
and that the United States trustee has clarified that it has no
opposition.

1 debtor in possession: since the choice to appoint a chapter 11
2 trustee is premised on the view that the debtor is still a viable
3 candidate for reorganization, it is vital that there be as rapid
4 and as smooth a transition as possible from debtor in possession
5 to trustee.

6 Refusal to pay counsel for a displaced debtor in possession
7 for services that are necessary to facilitate the transition
8 stands as an economic disincentive to the assistance that often
9 is essential to an expeditious transition to a chapter 11
10 trustee.

11 This problem, as illustrated by the paucity of authority to
12 which debtors' counsel and the United States trustee were able to
13 cite in this case, apparently has perplexed the bar since Lamie
14 was handed down. The § 327(e) solution to the puzzle, however,
15 is suggested by Lamie itself.

16 Lamie presented the basic compensation question of the
17 effect of the deletion by Congress in 1994 of the phrase "or to
18 the debtor's attorney" from the list at § 330(a)(1) of those
19 eligible for compensation by the estate.³

21 ³The pertinent portion of § 330(a)(1) now provides:

22 After notice to the parties in interest and the United
23 States Trustee and a hearing, and subject to sections 326,
24 328, and 329, the court may award to a trustee, a consumer
25 privacy ombudsman appointed under section 332, an examiner,
26 an ombudsman appointed under section 333, or a professional
27 person employed under section 327 or 1103 -

28 (A) reasonable compensation for actual, necessary
services rendered by the trustee, examiner, ombudsman,
professional person, or attorney and by any paraprofessional
person employed by such person; and

1 attorney" in the amended version of § 330(a)(1) was not so
2 dysfunctional as to warrant construing the statute as meaning
3 something other than what it says, confirms that § 327(e) is
4 available as a tool that may be used to enable the compensation
5 of debtors' counsel in appropriate circumstances.

6 The appropriate circumstances necessary to § 327(e)
7 employment are derived from the face of that section:⁴ (1) the
8 trustee must be persuaded to request the employment of debtors'
9 counsel; (2) the purpose must be a specified special purpose that
10 does not include representing the trustee in conducting the case;
11 (3) the employment must be in the best interest of the estate;
12 (4) the attorney must not represent or hold any interest adverse
13 to the debtor or to the estate with respect to the services to be
14 rendered; and (5) the court must approve the employment. 11
15 U.S.C. § 327(e).

16 The fourth element ordinarily will be the most problematic
17 in the context of whether to authorize § 327(e) employment of an
18 attorney for a debtor in possession following appointment of a
19 chapter 11 trustee (and of a debtor's attorney in a case
20

21 ⁴The actual language of § 327(e) is:

22
23 (e) The trustee, with the court's approval, may employ, for
24 a specified special purpose, other than to represent the
25 trustee in conducting the case, an attorney that has
26 represented the debtor, if in the best interest of the
estate, and if such attorney does not represent or hold any
interest adverse to the debtor or to the estate with respect
to the matter on which such attorney is to be employed.

27 11 U.S.C. § 327(e).

1 converted from chapter 11 to chapter 7). As the § 327(e)
2 attorney also represents the debtor, navigating what is best
3 termed the Strait of Conflicts between the Scylla of not
4 representing or holding an interest adverse to the debtor and the
5 Charybdis of not representing or holding an interest adverse to
6 the estate with respect to the proposed services is fraught with
7 perils that permit only a narrow range of services.

8 At the stage of authorizing § 327(e) employment, neither the
9 trustee nor the court can do anything more than predict whether
10 the Strait of Conflicts will be successfully navigated when the
11 services are ultimately performed. Hence, that aspect of a
12 § 327(e) employment is necessarily preliminary and contingent
13 upon the course of performance.

14 Two mechanisms counterbalance the risk of an incorrect
15 prediction regarding the course of performance by § 327(e)
16 counsel in the Strait of Conflicts. First, the case trustee can
17 decline to support compensation. Second, the court is
18 specifically authorized to deny compensation if, at any time
19 during the § 327(e) employment, counsel "represents or holds an
20 interest adverse to the interest of the estate with respect to
21 the matter on which such professional person is employed." 11
22 U.S.C. § 328(c).⁵ This language mirrors the provision in

23
24 ⁵The relevant language of § 328(c) is:

25 Except as provided in ... [§] 327(e), ..., the court may
26 deny allowance of compensation ... if, at any time during
27 such professional person's employment under section 327 ...,
such professional person ... represents or holds an interest
adverse to the interest of the estate with respect to the

1 § 327(e) that the attorney "not represent or hold any interest
2 adverse to ... the estate with respect to the matter on which
3 such attorney is to be employed." 11 U.S.C. § 327(e).

4 In this case, the first four requirements of § 327(e) have
5 been satisfied. The trustee has been persuaded to request
6 § 327(e) employment of debtors' counsel. The specified special
7 purpose is performance of services requested by the trustee to
8 help familiarize himself with what is unquestionably a complex
9 case. The employment is plainly in the best interest of the
10 estate. Counsel does not represent any interest adverse to the
11 debtor or to the estate with respect to the transition services,
12 a determination that ironically is rendered less tentative by the
13 fact that this employment determination is being made ex post
14 rather than ex ante. Nor has the United States trustee or any
15 party in interest raised a contest as to these points.

16 The final element, court approval, is supplied by this
17 decision and the order implementing it.

18
19 II

20 As the § 327(e) employment request encompasses services that
21 were rendered before the application was filed, one must also
22 consider whether the circumstances satisfy governing standards
23 for retroactive compensation.

24 The employment order cannot be entered "nunc pro tunc" to

25 _____
26 matter on which such professional person is employed.
27 11 U.S.C. § 328(c).

1 the time of the trustee's appointment because the "nunc pro tunc"
2 (now for then) concept is limited to correcting clerical and
3 ministerial errors of the court by making the record reflect what
4 the court "actually intended to do at an earlier date, but which
5 it did not accomplish due to some error or inadvertence" and
6 cannot be used to alter the substance of "what actually
7 transpired or to backdate events to serve some other purpose."
8 Singh v. Mukasey, 533 F.3d 1103, 1110 (9th Cir. 2008), quoting
9 United States v. Sumner, 226 F.3d 1005, 1009-10 (9th Cir. 2000);
10 accord, e.g., In re Jarvis, 53 F.3d 416, 418-19 n.2 (1st Cir.
11 1995); Transamerica Ins. Co. v. South, 975 F.2d 321, 325 (7th
12 Cir. 1992); W.F. Sebel Co. v. Hessee, 214 F.2d 459, 462 (10th
13 Cir. 1954). It is a facet of a court's inherent power to make
14 its records "speak the truth." E.g., Singh, 533 F.3d at 1110.

15 Notwithstanding that the employment order cannot be entered
16 retroactively, a bankruptcy court has discretion in exceptional
17 circumstances to award professional fees that were not authorized
18 in advance, provided that the professional satisfactorily
19 explains the failure to obtain approval in advance and
20 demonstrates that the services provided a significant benefit to
21 the estate. Law Offices of Ivan W. Halperin v. Occidental Fin.
22 Group, Inc. (In re Occidental Fin. Group, Inc.), 40 F.3d 1059,
23 1062 (9th Cir. 1994); THC Fin. Corp., 837 F.2d 389, 392 (9th Cir.
24 1988); Mehdipour v. Marcus & Millichap (In re Mehdi-pour), 202
25 B.R. 474, 479-80 (9th Cir. BAP 1996); In re B.E.S. Concrete
26 Prods., Inc., 93 B.R. 228, 231 (Bankr. E.D. Cal. 1988).

1 The exceptional circumstances requirement for retroactive
2 compensation has been satisfied in this case. First, the
3 satisfactory explanation for not having persuaded the trustee to
4 apply for § 327(e) employment immediately upon his appointment is
5 that this solution to the Lamie puzzle – however apparent it may
6 be from a close reading of Lamie – has not been generally
7 recognized by bench and bar, as reflected by the paucity of
8 authority located by counsel for the debtors and for the United
9 States trustee. While, henceforth, the question of § 327(e)
10 authorization ought to be a routine consideration for trustees,
11 counsel for debtors, and judges considering whether to displace a
12 debtor in possession, the fact of the matter is that it has been
13 sufficiently obscure as to supply a satisfactory explanation for
14 not having pursued the procedure.

15 Second, it is apparent that the assistance of debtors'
16 counsel materially contributed to the ability of the chapter 11
17 trustee to familiarize himself with the intricacies of the
18 complex situation.

19 It follows that the requisite exceptional circumstances have
20 been demonstrated. Moreover, both the case trustee and the
21 United States trustee support a determination of exceptional
22 circumstances.
23

24 Conclusion

25 Counsel for the former debtors in possession provided
26 material assistance to, and at the request of, the newly-
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1 appointed chapter 11 trustee. The case trustee is persuaded that
2 counsel is worthy of employment under § 327(e), to which
3 employment there is no opposition by the United States trustee.
4 The exceptional circumstances required to qualify on an equitable
5 basis for retroactive compensation in this circuit have been
6 established. The § 327(e) employment application is approved.
7 The appropriate award for such services for the counsel who is,
8 by virtue of this employment, now qualified under § 330(a)(1) is
9 \$3,837.00 (to which the United States trustee no longer objects),
10 which sum will be included in a total final award of \$179,894.24.

11 Orders implementing this decision will issue in separate
12 documents.

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15 UNITED STATES BANKRUPTCY JUDGE
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