

1 FOR PUBLICATION

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3 UNITED STATES BANKRUPTCY COURT  
4 EASTERN DISTRICT OF CALIFORNIA

5 In re: ) Case No. 17-23606-B-7  
6 )  
7 JOAN ARLENE MILLER, ) DC No. DNL-3  
8 )  
9 Debtor(s). )  
\_\_\_\_\_ )

10 OPINION REGARDING RETROACTIVE EMPLOYMENT AND COMPENSATION

11 J. Russell Cunningham, Desmond, Nolan, Livaich & Cunningham,  
12 Sacramento, California, for Chapter 7 Trustee.

13  
14 JAIME, Bankruptcy Judge:

15 The matter before the court is a request by the chapter 7  
16 trustee to retroactively employ attorneys as special counsel  
17 under 11 U.S.C. § 327 pursuant to a *nunc pro tunc* order and an  
18 exercise by the bankruptcy court of its equitable discretion to  
19 compensate the professionals under 11 U.S.C. § 330 for pre-  
20 employment services. Although Roman Catholic Archdiocese of San  
21 Juan, Puerto Rico v. Acevedo Feliciano, \_\_\_ U.S. \_\_\_, 140 S. Ct.  
22 696, 206 L. Ed. 2d 1 (2020), prohibits the court from approving  
23 the professionals' employment *nunc pro tunc*, or effective on the  
24 date before employment is actually approved, it does not prohibit  
25 the court from exercising its equitable discretion to compensate  
26 the professionals for pre-employment services. The court's  
27 conclusion is consistent with long-standing Ninth Circuit  
28 precedent which remains unchanged by Acevedo.



1 On the motion of the United States trustee, the chapter 7  
2 case was ordered reopened on August 1, 2019, to administer the  
3 asset. The chapter 7 trustee was re-appointed on August 5, 2019.  
4 And the chapter 7 trustee's motion to employ general bankruptcy  
5 counsel was granted in an order filed on August 13, 2019.

6 The chapter 7 trustee identified Special Counsel and Special  
7 Counsel's contingency fee agreement with the debtor in a  
8 September 24, 2019, motion to approve a stipulation that allowed  
9 the debtor a \$30,000.00 exemption in the settlement proceeds of  
10 the medical device claim without litigating the fact-intensive  
11 basis for the claimed exemption under state law. The court  
12 approved the stipulation as a fair and equitable compromise by  
13 order entered on October 30, 2019.

14 Timely proofs of claim filed by the December 9, 2019, bar  
15 date totaled \$32,270.66. No tardy claims have been filed.

16 Although the debtor's bankruptcy case was reopened on August  
17 1, 2019, and the chapter 7 trustee disclosed Special Counsel and  
18 the contingency fee agreement shortly thereafter, the chapter 7  
19 trustee did not file an application to employ and compensate  
20 Special Counsel until July 14, 2020. The application requests  
21 the employment of and compensation for Special Counsel  
22 "retroactively to March 3, 2013." The application was filed with  
23 a motion to approve the \$165,000.00 settlement of the debtor's  
24 medical device claim and the chapter 7 trustee's attorneys'  
25 application for compensation.

26 The settlement terms and Special Counsel's role in settling  
27 the debtor's medical device claim are not at issue. If Special  
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1 Counsel is employed under the contingency fee agreement with the  
2 debtor, it would receive \$62,700.00 in attorney's fees, and  
3 \$1,151.54 in expenses, for a total of \$63,851.54. The debtor  
4 would also be allowed a \$30,000.00 exemption. And after  
5 mandatory litigation deductions, the estate would recover  
6 approximately \$54,001.06. That amount is sufficient to pay  
7 administrative expenses consisting of compensation for the  
8 chapter 7 trustee and his attorneys of approximately \$15,500.00,  
9 pay 100% of unsecured claims in the approximate amount of  
10 \$32,270.66, and provide the debtor with a surplus.

11 The issues concern the chapter 7 trustee's request for a  
12 *nunc pro tunc* order that approves Special Counsel's appointment  
13 retroactive to a March 3, 2013, effective date and compensates  
14 Special Counsel for services they provided from the retroactive  
15 date forward. In the absence of *nunc pro tunc* employment, the  
16 court must also address the issue of Special Counsel's  
17 compensation for its pre-employment services.

#### 18 Jurisdiction

19 Jurisdiction is founded on 28 U.S.C. § 1334(a). Employment  
20 of professional persons under 11 U.S.C. § 327(e) is a matter of  
21 exclusive jurisdiction. 28 U.S.C. § 1334(e)(1). Employment and  
22 compensation of professionals is a core proceeding concerning the  
23 administration of the estate that a bankruptcy judge may hear and  
24 determine. 28 U.S.C. § 157(b)(2)(A).

#### 25 Analysis

##### 26 I

27 As a general matter, authority for federal courts to make  
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1 retroactive orders derives either from inherent authority,  
2 statute, or rule.

3 A

4 The "*nunc pro tunc*" or "now for then" order is the paradigm  
5 example of a retroactive order issued under the court's inherent  
6 authority. Acevedo effectively ends federal courts use of *nunc*  
7 *pro tunc* orders to the extent such orders rewrite history to  
8 retroactively make the record reflect something that never  
9 occurred in the first instance.

10 Acevedo arose in a jurisdictional context. Acevedo, 140 S.  
11 Ct. at 699-700. In March 2018, and thus after the Archdiocese  
12 removed the case against it from the Puerto Rico Court of First  
13 Instance to the United States District Court for the District of  
14 Puerto Rico in February 2018 and before the district court  
15 remanded by *nunc pro tunc* order in August 2018, the Court of  
16 First Instance issued certain payment and seizure orders against  
17 the Archdiocese. Id. Concluding that the payment and seizure  
18 orders were void because the Court of First Instance lacked  
19 jurisdiction to enter the orders after removal and before remand,  
20 the Supreme Court explained:

21 The Court of First Instance issued its payment and  
22 seizure orders after the proceeding was removed to  
23 federal district court, but before the federal court  
24 remanded the proceeding back to the Puerto Rico court.  
At that time, the Court of First Instance had no  
jurisdiction over the proceeding. The orders are  
therefore void.

25 Id. at 700.

26 The Supreme Court also rejected the idea that the district  
27 court's *nunc pro tunc* remand order, made effective to a few days

1 before the payment and seizure orders were entered, created the  
2 non-federal jurisdiction necessary to validate the orders. Id.  
3 at 700. Noting that the applicable remand statute prohibited the  
4 local court from exercising jurisdiction "unless and until" there  
5 was an actual remand, id. at 700, and further noting that nothing  
6 occurred in the district court on the purported effective date of  
7 the *nunc pro tunc* remand order, id. at 701, the Supreme Court  
8 stated:

9 Federal courts may issue *nunc pro tunc* orders, or 'now  
10 for then' orders, to 'reflect the reality' of what has  
11 already occurred[.] 'Such a decree presupposes a decree  
12 allowed, or ordered, but not entered, through  
13 inadvertence of the court.' Put colorfully, '*nunc pro*  
*tunc* orders are not some Orwellian vehicle for  
revisionist history - creating 'facts' that never  
occurred in fact.' Put plainly, 'the court cannot make  
the record what it is not.'

14 Id. at 700-01 (emphasis in original, internal citations  
15 omitted).<sup>1</sup>

16 Acevedo's significant limit on the use by federal courts of  
17 *nunc pro tunc* orders has necessitated a change in bankruptcy  
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19 <sup>1</sup>In this respect, Acevedo is consistent with what has been  
20 the Ninth Circuit position regarding *nunc pro tunc* orders for  
effectively 50 years. See Wirum v. Warren (In re Warren), 568  
21 F.3d 1113, 1116 n.1 (9th Cir. 2009) (inherent limited power to be  
used only to correct the record to reflect actual events);  
22 Sherman v. Harbin (In re Harbin), 486 F.3d 510, 515 n.4 (9th Cir.  
2007) (used to correct errors in the record, are extremely  
23 limited in scope, and refer to situations where the court, after  
discovering the record does not accurately reflect its actions,  
24 corrects the record to accurately show what happened); United  
States v. Sumner, 226 F.3d 1005, 1009-10 (9th Cir. 2000) (limited  
25 to making the record reflect what the trial court actually  
intended to do at an earlier date, but which it did not  
26 sufficiently express or did not accomplish due to some error or  
inadvertence); Martin v. Henley, 452 F.2d 295, 299 (9th Cir.  
27 1971) (Bankruptcy Act § 17 - *nunc pro tunc* power may be used only  
28 where necessary to correct clear mistake and prevent injustice).

1 practice. *Nunc pro tunc* orders have been common, particularly  
2 with respect to employment under § 327. Bankruptcy courts have  
3 recognized that practice must now stop. In re Roberts, 618 B.R.  
4 213, 217 (Bankr. S.D. Ohio 2020); In re Benitez, 2020 WL 1272258,  
5 \*2 (Bankr. E.D.N.Y. March 13, 2020).

6 Acevedo is, however, not a *per se* prohibition of all  
7 retroactive relief in all instances. Acevedo curtails only the  
8 inherent authority of federal courts to grant retroactive relief  
9 by *nunc pro tunc* orders which purport to create facts or rewrite  
10 history to support the retroactive relief granted. There is a  
11 distinct difference between retroactive relief granted by *nunc*  
12 *pro tunc* orders which purport to create facts and rewrite  
13 history, as with the remand order in Acevedo, and discretionary  
14 grants of retroactive compensation in orders that do neither—as  
15 explained below.

16 B

17 Statutes may also serve as a basis, express or implied, for  
18 orders that have retroactive effect without need for inherent  
19 power *nunc pro tunc* orders.

20 Express retroactive authority is exemplified by the power  
21 within the bankruptcy court's discretion to "annul" the automatic  
22 stay under 11 U.S.C. § 362(d). Merriman v. Fattorini (In re  
23 Merriman), 616 B.R. 381, 391-93 (9th Cir BAP 2020). Annuling  
24 the automatic stay typically operates retroactively to validate  
25 acts that violated the stay.

26 Implied retroactive authority reposes in Bankruptcy Code  
27 provisions that require court approval but that do not mandate  
28

1 that such approval actually precede the statutory activity. Two  
2 Ninth Circuit opinions illustrate this point.

3 In Harbin, the Ninth Circuit contrasted *nunc pro tunc* orders  
4 with the equitable discretion that remains with bankruptcy courts  
5 to grant retroactive approval under provisions of the Bankruptcy  
6 Code which do not expressly require approval to precede the  
7 approved act. Harbin, 486 F.3d at 515 n.4, 521-22. As an  
8 example of this distinction in the context of the case before it,  
9 the Ninth Circuit stated that “[s]ection 364(c)(2) does not, by  
10 its express terms, require the bankruptcy court to authorize the  
11 financing transaction before the debt is incurred.” Id. at 522.  
12 The salient point is that retroactive approval of the  
13 postpetition debt did not depend on the fact of prior  
14 authorization by the bankruptcy court to enter into the financing  
15 transaction. In other words, there was no need to create facts  
16 or rewrite history with a *nunc pro tunc* order in order support  
17 the retroactive relief granted.

18 The same distinction exists in the specific context of  
19 employment under § 327 and compensation under § 330. In Atkins  
20 v. Wain, Samuel & Co., 69 F.3d 970 (9th Cir. 1995), the Ninth  
21 Circuit reaffirmed the long-recognized principle that “[t]he  
22 bankruptcy courts in this circuit possess the equitable power to  
23 approve retroactively a professional’s valuable but unauthorized  
24 services.” Id. at 973.<sup>2</sup> Harbin described Atkins as an example

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26 <sup>2</sup>See also Law Offices of Ivan W. Halperin v. Occidental  
27 Fin. Group, Inc. (In re Occidental Fin. Group), 40 F.3d 1059,  
28 1062 (9th Cir. 1994) (“A bankruptcy court may sometimes exercise  
discretion to make an award for attorneys fees not authorized in



1 under § 327 of "circumstances that warrant an equitable exception  
2 to the prior authorization requirement." Harbin, 486 F.3d at 522  
3 (citing Atkins, 69 F.3d at 973).

4 Harbin amplifies Atkins' conclusion that although an order  
5 authorizing employment under § 327 is a prerequisite to awarding  
6 compensation under § 330, there is no requirement that  
7 compensated services must have been performed only after the  
8 effective date of an employment order. These circumstances  
9 distinguish Acevedo from circuit precedent, which means circuit  
10 precedent that recognizes the power to award pre-employment  
11 compensation remains unchanged by Acevedo.

12 C

13 Retroactive authority to compensate estate professionals  
14 under § 330 for services provided before employment is formally  
15 approved under § 327 also derives from federal rules of procedure  
16 without need for inherent power *nunc pro tunc* orders.

17 The concept of retroactive compensation is incorporated into  
18 the Federal Rules of Bankruptcy Procedure, as prescribed by the  
19 Supreme Court. Under Bankruptcy Rule 6003(a) an application for  
20 employment may not be approved within the first 21 days of a  
21 bankruptcy case, absent a need to avoid immediate and irreparable  
22 harm. Fed. R. Bankr. P. 6003(a).

23 The first 21 days of a chapter 11 case usually require  
24 significant postpetition professional services that will be

25 \_\_\_\_\_  
26 advance[.]"); Jerrel v. Martinson (In re Jerrel), 24 F.3d 247,  
27 1994 WL 171166 at \*4 (9th Cir. May 5, 1994) ("Jerrel is correct  
28 that this circuit allows a bankruptcy court to award retroactive  
fees for services rendered without court approval.") (Table).

1 eligible for compensation under § 330 after employment is  
2 approved. This necessarily entails retroactive compensation for  
3 pre-employment services to avoid the absurdity of the need to  
4 find immediate and irreparable harm regarding employment in  
5 virtually every chapter 11 case. Bankruptcy Rule 6003(a) thus  
6 contemplates employment orders that provide for an effective  
7 retroactive date of compensation. See Fed. R. Bankr. P. 6003,  
8 Advisory Committee Note to 2011 Amendment.<sup>3</sup> Nothing in Acevedo  
9 suggests the Supreme Court intended to undermine the vitality of  
10 Bankruptcy Rule 6003(a).

11 II

12 The Ninth Circuit standard for an award of compensation  
13 under § 330 for pre-employment services is found in Okamoto v.

14  
15 <sup>3</sup>The Judicial Conference Advisory Committee on Bankruptcy  
16 Rules has clarified that a degree of retroactivity is implicit in  
Bankruptcy Rule 6003:

17 The rule is amended to clarify that it limits the  
18 timing of the entry of certain orders, but does  
19 not prevent the court from providing an effective  
20 date for such an order that may relate back to the  
21 time of the filing of the application or motion,  
22 or to some other date. For example, while the  
23 rule prohibits, absent immediate and irreparable  
24 harm, the court from authorizing the employment of  
25 counsel during the first 21 days of a case, it  
26 does not prevent the court from providing in an  
27 order entered after expiration of the 21-day  
28 period that the relief requested in the motion or  
application is effective as of a date earlier than  
the issuance of the order. Nor does it prohibit  
the filing of an application or motion for relief  
prior to expiration of the 21-day period. Nothing  
in the rule prevents a professional from  
representing the trustee or a debtor in possession  
pending the approval of an application for the  
approval of the employment under Rule 2014.

27 Fed. R. Bankr. P. 6003, Advisory Committee Note to 2011  
28 Amendment.

1 THC Fin. Corp. (In re THC Fin. Corp.), 837 F.2d 389 (9th Cir.  
2 1988), and Atkins, 69 F.3d at 973-74. Notably, both are  
3 retroactive compensation and not *nunc pro tunc* employment cases.

4 In THC, Bankruptcy Rule 215, § 327's predecessor, required  
5 the court to approve a professional's employment in order for the  
6 professional to be compensated by the estate. THC, 837 F.2d at  
7 391. At the request of the bankruptcy trustee, an attorney  
8 provided services to the estate over a four-year period without  
9 prior court approval of her employment. Id. at 390. The  
10 attorney then filed a fee application with the district court  
11 which the bankruptcy trustee opposed because the attorney had not  
12 sought prior approval of her employment. Id. Although the Ninth  
13 Circuit noted that the attorney's employment should have been  
14 approved before services were provided, it also concluded that  
15 the absence of prior approval did not necessarily preclude  
16 compensation, stating: "In this circuit, a retroactive award of  
17 fees for services rendered without court approval is not  
18 necessarily barred." Id. at 392. The court further noted that a  
19 court may exercise its discretion to compensate for valuable pre-  
20 employment services and it set the standard for such an award as  
21 follows: "[S]uch awards should be limited to exceptional  
22 circumstances where an applicant can show both a satisfactory  
23 explanation for the failure to receive prior judicial approval  
24 and that he or she has benefitted the bankrupt estate in some  
25 significant manner." Id.

26 Professionals who request retroactive compensation must also  
27 satisfy the criteria for employment pursuant to § 327, other than  
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1 the usual requirement of pre-employment approval. Atkins, 69  
2 F.3d at 976.

3 Fee applicants bear the burden of proof in all such  
4 instances, and the ultimate decision is within the discretion of  
5 the court. See Neben & Starret v. Chartwell Fin. Corp. (In re  
6 Park-Helena Corp.), 63 F.3d 877, 880-81 (9th Cir. 1995).

7 And of course, the length of the delay in seeking judicial  
8 approval of employment affects the analysis of extraordinary  
9 circumstances—the longer the delay, the more difficult to  
10 explain. Emergency services early in a case followed by prompt  
11 application for employment are better explanations than neglect  
12 and inattention. In re B.E.S. Concrete Products, Inc., 93 B.R.  
13 228, 232 n.5 (Bankr. E.D. Cal. 1988).

14 III

15 Turning now to the chapter 7 trustee's application to employ  
16 Special Counsel in this case, the application references the THC  
17 standard to some degree. That reference permits the court to  
18 address whether the standard for awarding pre-employment  
19 compensation is satisfied in this case.

20 The court will grant the chapter 7 trustee's application to  
21 employ Special Counsel under § 327(e). However, the request for  
22 *nunc pro tunc* approval of employment effective March 3, 2013,  
23 will be denied. Special Counsel's employment under § 327(e) will  
24 be effective September 29, 2020, which is the application  
25 approval date.

26 The court will also allow the chapter 7 trustee to  
27 compensate Special Counsel under § 330 for the reasonable,  
28

1 necessary, and beneficial services that Special Counsel provided  
2 to the trustee and the estate prior to approval of their  
3 employment. However, compensation is subject to the conditions  
4 explained below.

5 Special Counsel qualifies for employment under § 327(e) in  
6 that it is well-qualified to serve the estate in the capacity of  
7 the debtor's litigation counsel.

8 There also has been a plausible representation that the  
9 debtor "forgot" about her medical device claim when she filed  
10 bankruptcy. The debtor is an octogenarian. And communications  
11 from counsel in mass tort cases are oftentimes sparse. All of  
12 this is consistent with good faith.

13 Special Counsel's services have provided a tremendous  
14 benefit to creditors and the estate. Settlement of the debtor's  
15 medical device claim will result in full payment to all  
16 creditors, permit the debtor to realize an exemption, and provide  
17 the debtor with surplus funds. A very rare outcome in a chapter  
18 7 case. Certainly under these circumstances no one can complain  
19 about prejudice from the lack of prior approval of Special  
20 Counsel's employment. Moreover, under these circumstances, the  
21 contingency fee compensation requested is reflective of a  
22 reasonable value of the services that Special Counsel provided to  
23 the estate prior to the approval of their employment. And it is  
24 permissible under § 328(a).

25 The chapter 7 trustee has also provided a satisfactory  
26 explanation for the delay in seeking the approval of Special  
27 Counsel's employment. The debtor did not initially schedule her  
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1 medical device claim so delay is measured from the time the case  
2 was reopened to administer the asset. That delay is  
3 approximately one year. Although not ideal, neglect in seeking  
4 Special Counsel's employment earlier is excusable.

5 The debtor's medical device claim was largely settled before  
6 the case was reopened. Special Counsel and the applicable  
7 contingency fee arrangement were also disclosed very shortly  
8 after the case was reopened. And during the months that followed  
9 the 2019 reopening and disclosure through mid-2020, the chapter 7  
10 trustee worked with the litigation administrator to iron out  
11 details of the settlement and payment of the settlement award.

12 Further, although not relied on by the chapter 7 trustee,  
13 the court takes judicial notice that the COVID-19 pandemic struck  
14 shortly after the debtor's bankruptcy case was reopened and it  
15 continues to persist. The pandemic has resulted in a shutdown of  
16 most of the country with a significant number of individuals out  
17 of the office and subject to stay-at-home orders. As one court  
18 described the situation:

19       Meanwhile, the world is in the midst of a global  
20       pandemic. The President has declared a national  
21       emergency. The Governor has issued a state-wide health  
22       emergency. As things stand, the government has forced  
23       all restaurants and bars [] to shut their doors, and  
24       the schools are closed, too. The government has  
25       encouraged everyone to stay home, to keep infections to  
26       a minimum and help contain the fast-developing public  
27       health emergency.

24 Art Ask Agency v. Individuals, Corporations, et al., 2020 WL  
25 1427085 at \*1 (N.D. Ill. March 18, 2020). The story in  
26 California is similar. See In re Dudley, 617 B.R. 149 (Bankr.  
27 E.D. Cal. 2020).

1 Conclusion

2 For the foregoing reasons, the chapter 7 trustee's  
3 application will be granted in part and denied in part.

4 The relief requested in the application will be granted as  
5 to Special Counsel's employment which shall be effective  
6 September 29, 2020, and as to compensation to Special Counsel in  
7 the amount of the contingency fee requested. Compensation to  
8 Special Counsel is conditioned on the requirement that the  
9 chapter 7 trustee and Special Counsel execute a contingency fee  
10 agreement substantially in the form of the contingency fee  
11 agreement between the debtor and Special Counsel which shall be  
12 signed by all parties and filed with the court. To be clear,  
13 there shall be no payment to Special Counsel (and no distribution  
14 of any settlement funds) unless and until the new contingency fee  
15 agreement is signed and filed.

16 The request for *nunc pro tunc* approval of Special Counsel's  
17 employment retroactive to March 3, 2013, will be denied.

18 A separate order will issue.

19 Dated: October 13, 2020.

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UNITED STATES BANKRUPTCY JUDGE  
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**INSTRUCTIONS TO CLERK OF COURT  
SERVICE LIST**

The Clerk of Court is instructed to send the attached document, via the BNC, to the following parties:

J. Russell Cunningham  
1830 15th St  
Sacramento CA 95811

Jason M. Blumberg  
501 I St #7-500  
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Gabriel E. Liberman  
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