UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

RANDY W. JOHNSON
d/b/a Johnson Lumber

CASE NO. 96-62916
Chapter 13

Debtor

APPEARANCES:

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The Court considers herein two motions filed in the within bankruptcy case. The first motion was filed on January 15, 1998, by the Debtor's current counsel, Steven J. Blumenkrantz, Esq. ("Blumenkrantz"), and seeks disgorgement of fees paid to Debtor's former counsel, Michael D. Jacobs, Esq. of Jacobs & Jacobs ("Jacobs") ("disgorgement motion"). The second motion was filed February 25, 1998, by James E. Collins, Esq. ("Collins") as attorney for the Chapter 7 Trustee ("Trustee"), seeking fees for services rendered to the Trustee between January 15, 1998 and February 16, 1998[1] ("fee motion").

The disgorgement motion was heard by this Court on February 10, 1998, at Binghamton, New York, and was adjourned to the Court's motion calendar in Binghamton on March 10, 1998. The fee motion was heard also in Binghamton on March 10, 1998. The disgorgement motion was submitted for decision as of March 17, 1998, while the fee motion was submitted as of March 10, 1998.

JURISDICTIONAL STATEMENT

[1] Debtor initially filed a petition pursuant to chapter 11 of the Bankruptcy Code (11 U.S.C. §§ 101-1330)("Code") on June 18 1996, the case was thereafter converted to a case under chapter 7 of the Code by Order dated November 12, 1997 and finally converted to a case pursuant to chapter 13 of the Code by Order dated February 24, 1998.

The Court has core jurisdiction over these contested matters pursuant to 28 U.S.C. §§ 1334(b) and 157(a), (b)(1) and (b)(2)(A).

FACTS

On June 18, 1996, the Debtor filed a petition pursuant to chapter 11 of the Code. Debtor was represented in the chapter 11 case by Jacobs who acknowledged receipt of fees in the sum of $8,500 for services rendered in connection with the chapter 11 case.[2] At no time during the chapter 11 case did Jacobs seek appointment pursuant to Code § 327(a), nor did he seek interim or final compensation pursuant to Code §§ 330 or 331.

On November 12, 1997, after failing to obtain confirmation of a plan of reorganization or liquidation, the chapter 11 case was converted, on motion of the United States Trustee, to a case pursuant to chapter 7. Following conversion, Collins was appointed Trustee and subsequently attorney for the Trustee. On January 15, 1998, Debtor, now represented by Blumenkrantz, moved before this Court for an order converting the chapter 7 case to one pursuant to chapter 13. Over the objections of the Internal Revenue Service and the Trustee, the Court granted Debtor's motion by Order dated February 24, 1998.

ARGUMENTS

[2] Included in the bankruptcy petition was an Attorney Statement Pursuant to Federal Rule of Bankruptcy Procedure ("Fed.R.Bankr.P.") 2016(d) in which Jacobs acknowledges the Debtor's agreement to pay him $8,500.

Debtor now seeks disgorgement of the entire $8,500 paid to Jacobs on the ground that Jacobs was never appointed pursuant to an order of this Court, and Debtor needs to utilize the $8,500 to assist him in his negotiations with the Internal Revenue Service in the context of the chapter 13 case.[3]

Jacobs opposes the Debtor's motion by setting out a chronology of his lengthy and rather distinguished legal career to include his having "handled various bankruptcy matters since approximately 1974." (*See* Affidavit in Opposition of Michael A. Jacobs, sworn to February 4, 1998, ¶ 4). Included within Jacobs' Affidavit are time records detailing services he rendered to the chapter 11 Debtor between August 7, 1996 and January 2, 1998. Those time records reflect a total fee of $15,381.25.

Jacobs asserts, somewhat disingenuously, that he encountered difficulty in obtaining accounting records of the Debtor from his accountant, and also experienced a general lack of cooperation from the accountant. Additionally, he argues that while Debtor's plan was never confirmed, Jacobs' efforts "did in effect get over an additional year to start to work out his financial problems." (*See* Jacobs' Affidavit at ¶ 12).

Finally, Jacobs seeks approval of his fees "nunc pro tunc", suggesting that someone is guilty of laches in seeking disgorgement presumably so long after he received the $8,500 fee.

Turning to the fee motion, Collins asserts that he expended at least 14 hours rendering services to the Trustee while the Debtor's case was proceeding pursuant to chapter 7 for which he should be compensated. He attaches time records to his motion, allegedly supporting a fee

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[3] At the argument of the motion the Trustee filed opposing papers contending that should the Court order disgorgement, any sum disgorged should be turned over to him. Conversion of the case to chapter 13 renders the Trustee's argument moot.

of $1,750.

Blumenkrantz opposes the fee motion on certain procedural grounds and also contends that the fees sought by Collins are excessive.

DISCUSSION

Code § 327(a) authorizes a trustee to employ one or more professionals, including attorneys and accountants, with the bankruptcy court's approval. Pursuant to Code § 1107(a), a debtor in possession has generally all of the rights and duties of a trustee. Authority for compensating such professionals is found in Code §§ 330 and 331 which permit the Court to award reasonable compensation to a professional employed under Code § 327. Prior to any award of interim or final compensation, however, a professsional's employment must be approved formally by the bankruptcy court. Thus, approval generally must occur before any compensable services are rendered to the estate. *See In re Rainbow Press of Fredonia*, 197 B.R. 428, 429 (Bankr. W.D.N.Y. 1996); *In re 245 Assocs. LLC*, 188 B.R. 743, 749 (Bankr. S.D.N.Y. 1995); *In re Sapolin Paints, Inc.*, 38 B.R. 807, 817 (Bankr. E.D.N.Y. 1984). This is true regardless of whether any pre-approval services were rendered in good faith and were beneficial to the estate.

In the Second Circuit, this "*per se*" rule prohibiting payment to professionals for services rendered to the estate prior to appointment by the court has been applied strictly. *See, e.g., Futuronics Corp. v. Arutt, Nachamie & Benjamin (In re Futuronics Corp.)*, 655 F.2d 463, 469 (2d Cir. 1981), *cert. denied*, 455 U.S. 941, 102 S.Ct. 1435, 71 L.Ed.2d 653 (1982); *Smith v.*

Winthrop, Stimson, Putnam & Roberts (In re Sapphire Steamship Lines, Inc.), 509 F.2d 1242, 1245-46 (2d Cir. 1975); *General Motors Acceptance Corp. v. Updike (In re H.L. Stratton, Inc.),* 51 F.2d 984, 988 (2d Cir. 1931), *cert. denied,* 284 U.S. 682, 52 S.Ct. 199, 76 L.Ed. 576 (1932); *In re Robotics Resources R2, Inc*., 117 B.R. 61, 62 (Bankr. D.Conn. 1990); *In re French*, 111 B.R. 391, 394 (Bankr. N.D.N.Y. 1989); *In re Ochoa*, 74 B.R. 191, 195-96 (Bankr. N.D.N.Y. 1987); *In re Cuisine Magazine, Inc.,* 61 B.R. 210, 216-17 (Bankr. S.D.N.Y. 1986); *Hucknall Agency, Inc. v. Nanni (In re Hucknall Agency, Inc.)*, 1 B.R. 125, 126-27 (Bankr. W.D.N.Y. 1979). Strict enforcement of the rule enables the court to examine any potential conflicts of interest that a professional may have prior to the rendering of services, *see Futuronics*, 655 F.2d at 469, thereby avoiding the emotional pressure to award fees which can arise if services have already been rendered. *See In re Rogers-Pyatt Shellac Co.*, 51 F.2d 988, 992 (2d Cir. 1931). It also discourages volunteer services and maintains control of costs to the estate by avoiding payment for services which may not otherwise have been authorized. *See In re Eureka Upholstering Co*., 48 F.2d 95, 96 (2d Cir. 1931); *245 Assocs*., 188 B.R. at 749; *Sapolin Paints*, 38 B.R. at 817.

Despite the apparent rigidity and harsh consequences of the *per se* rule, certain exceptions have been recognized. In situations where a professional seeks payment for services performed prior to the order of appointment, courts have considered *nunc pro tunc*[4] appointment as a vehicle to authorize payment for such services. *See, e.g., Fanelli v. Hensley (In re Triangle Chemicals, Inc.)*, 697 F.2d 1280, 1289 (5th Cir. 1983); *Cohen v. United States (In re Laurent*

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[4] As observed by some courts, use of the term "*nunc pro tunc*" in relation to applications by professionals seeking appointment prior to the date on record is not exactly proper. *See In re Jarvis*, 53 F.3d 416, 418 n.2 (1st Cir. 1995); *In re Singson,* 41 F.3d 316, 318-19 (7th Cir. 1994). For the purpose of this Decision, however, the Court will adhere to the practiced usage in this Circuit of the Latin phrase "*nunc pro tunc*" to refer to such applications.

Watch Co., Inc.), 539 F.2d 1231, 1232 (9th Cir. 1976); *In re King Elec. Co., Inc.*, 19 B.R. 660, 663 (E.D.Va. 1982). *Nunc pro tunc* orders effectively subvert the *per se* rule, however, and, therefore, they are generally disfavored in this Circuit. *See Futuronics*, 655 F.2d at 469; *245 Assocs.,* 188 B.R. at 750 (citing *In re Corbi*, 149 B.R. 325, 333 (Bankr. E.D.N.Y. 1993) and *In re Rundlett*, 137 B.R. 144, 146 (Bankr. S.D.N.Y. 1992)); *In re Northeast Dairy Co-Op Federation, Inc*., 74 B.R. 149, 154 (Bankr. N.D.N.Y. 1987).

There are, however, other limited exceptions to this rule. This Court has recognized the "excusable neglect" or "unavoidable hardship" exception to the *per se* rule. *See Ochoa*, 74 B.R. at 195 ("The only recognized exception to the Second Circuit's 'per se' rule is the concept of 'excusable neglect'"); *See Northeast Dairy,* 74 B.R. at 155. ("It appears the only recognized exception to the harsh result occasioned by application of the 'per se' rule is 'excusable neglect' or 'unavoidable hardship'"); *see also In re Amherst Mister Anthony's Ltd.*, 63 B.R. 292, 294 (W.D.N.Y. 1986) (recognizing exception).

Excusable neglect has generally been defined as "the failure to timely perform a duty due to circumstances which were beyond the reasonable control of the person whose duty it was to perform," *see Beneficial Fin. Co. v. Manning (In re Manning)*, 4 BCD 304, 305 (Bankr. D.Conn. 1978), such as when a party fails to meet an obligation due to unique or extraordinary circumstances. *See Northeast Dairy*, 74 B.R. at 155; In *re Waterman Steamship Corp*., 59 B.R. 724, 727 (Bankr. S.D.N.Y. 1986); *see also Robotics Resources R2*, 117 B.R. at 62; *In re Brown*, 40 B.R. 728, 731-32 (Bankr. D.Conn. 1984).

As noted by the court in *245 Associates, LLC*, at 751, however, the United States Supreme Court had occasion to interpret the term "excusable neglect" in *Pioneer Investment Services Co.*

v. Brunswick Associates Ltd. Partnership, 507 U.S. 380, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993), as that term is used in Fed.R.Bankr.P. 9006(b)(1) regarding late claims. In *Pioneer*, the Supreme Court expanded the definition of "excusable neglect" to include "inadvertence, mistake, or carelessness." *Pioneer*, 507 U.S. at 388; 113 S.Ct. at 1495. While acknowledging that the extension of the *Pioneer* definition of excusable neglect regarding late claims to *nunc pro tunc* employment applications does not necessarily follow, Bankruptcy Judge Stuart M. Bernstein nonetheless held that the *Pioneer* standard should be applied to employment applications.[5] *See 245 Assocs*., 188 B.R. at 751; *see also In re Singson*, 41 F.3d 316, 319-20 (7th Cir. 1994) (applying *Pioneer* standard to *nunc pro tunc* employment applications). The court found that authorization of a *nunc pro tunc* application would be allowable in cases where the applicant does not have a conflict of interest and demonstrates excusable neglect under the more liberal *Pioneer* test. *See 245 Assocs*., 188 B.R. at 752.

In fact, a seemingly more liberal approach to *nunc pro tunc* employment applications than that found in *245 Associates* case is found in *In re Piecuil*, 145 B.R. 777 (Bankr. W.D.N.Y. 1992), which was decided prior to *Pioneer*. In *Piecuil*, Chief Bankruptcy Judge Michael J. Kaplan reviewed Second Circuit case law regarding application of the *per se* rule and concluded that in almost every early Circuit case out of which the rule grew, there were alternate grounds to deny appointment of the professional even if timely application had been made. Judge Kaplan instead formulated the following test: "It is to say that the applicable case law permits the Court, as a court of equity, latitude to grant relief where the failure to file a timely application has been

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[5] *But see In re Franklin Sav. Corp*., 181 B.R. 88, 89 (Bankr. D.Kan. 1995) (finding that *Pioneer* does not apply to *nunc pro tunc* employment applications); *In re Berman*, 167 B.R. 323, 324 (Bankr. D.Mass. 1994) (same).

explained, and the explanation has been found reasonable." *Piecuil*, 145 B.R. at 783 (footnote omitted); *see also In re Rainbow Press of Fredonia*, 197 B.R. at 429 (Bucki, J.) (expressly agreeing with test formulated in *Piecuil*); *In re Corbi*, 149 B.R. 325, 333 (Bankr. E.D.N.Y. 1993) (same).

While this Court does not advocate punctilious application of the *per se* rule, boundaries regarding its use must necessarily be drawn. To the extent, if any, that *Piecuil* and its progeny expand the rule regarding *nunc pro tunc* employment applications beyond the *245 Associates* court's incorporation of the *Pioneer* standard, this Court respectfully declines to follow such test.[6] As noted in this Court's decision in *In re Household Merit, Inc.*, No. 94-62969 (Bankr. N.D.N.Y. Apr. 14, 1995), the excusable neglect exception should not be expanded to the point where the exception swallows the rule itself. *Id.* at 6.

Here Jacobs offers no factual basis upon which this Court could predicate a finding of excusable neglect or unavoidable hardship. Rather, Jacobs devotes the majority of his Affidavit in Opposition to detailing his academic and professional credentials, as well as his many years of experience as a lawyer. While this court takes no issue with Jacobs' credentials, they do not support a *nunc pro tunc* appointment in light of what this Court still believes is an appropriate interpretation of the "*per se*" rule. Thus, with regard to the disgorgement motion, the Court has no choice but to grant it.

Turning to the fee motion, Blumenkrantz has raised a procedural objection grounded upon Rule 9013-4 of the Local Bankruptcy Rules of this Court effective January 1, 1998. While

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[6] The Court notes that it does not expressly pass on the propriety of extending *Pioneer's* expanded definition of "excusable neglect" to *nunc pro tunc* employment applications.

Blumenkrantz is correct that applications for professional compensation may not employ the "default language" set forth in that Local Rule, the Court is unable to discern any prejudice or due process violations that may have occurred here as a result of the Trustee's employment of the "default" language.

Blumenkrantz also asserts that the fees sought by Collins as attorney for the Trustee are excessive though he provides no factual support for that characterization. A review of time records submitted by Collins do not support the conclusion that the fee sought is excessive. While one may argue that the services rendered by Collins upon conversion of the case to chapter 13 provided no tangible benefit to creditors as required by Code § 330(a)(3)(C), that argument presumably fails when one considers that at the time the services were rendered Collins had every expectation that they would benefit the creditors of the chapter 7 case. Thus, the Court will approve an award of fees to Collins in the sum of $1,750 to be paid through the Debtor's chapter 13 plan pursuant to Code § 1322(a)(2).

Based on the foregoing, it is hereby

ORDERED that Jacobs shall disgorge and pay over to Blumenkrantz the sum of $8,500 within forty-five (45) days of the date of this Order, and it is further

ORDERED that the chapter 13 plan orally confirmed by this Court on May 12, 1998 shall be amended by the Debtor to provide for distribution of the additional disposable income of $8,500 through the plan; and it is finally

ORDERED that the Debtor also amend the plan to provide for payment of the sum of $1,750 in attorney's fees to Collins pursuant to Code § 1322(a)(2).

Dated at Utica, New York

this 12th day of June 1998

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STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge