UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-1856

BYRON F. DAVID,

Appellant,

v.

DONALD F. KING,

Appellee.

Appeal from an Order of the United States District Court, Eastern District of Virginia Case No. 1:22-cv-01053-PTG

BRIEF OF APPELLANT

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I. STATEMENT OF APPELLATE JURISICTION

This Bankruptcy Appeal is filed by the Appellant, Byron F. David ("Mr. David" or the "Appellant"), and arises from a final order of the U.S. District Court of the Eastern District of Virginia (the "District Court") entered on August 4, 2023, which affirmed a final order entered by the U.S. Bankruptcy Court for the Eastern District of Virginia (the "Bankruptcy Court") on September 2, 2022. The Appellant filed his timely Notice of Appeal in the District Court on August 15, 2023. This Court's appellate jurisdiction is proper pursuant to 28 U.S.C. §§ 41, 1291 and 1294, and Fed. R. App. P. 4 and 6(b).

II. STATEMENT OF ISSUE PRESENTED

Whether a Former Trustee may file a Motion to approve a professional retention application under 11 U.S.C. § 327(a) when the Former Chapter 11 Trustee did not do so at any point in time during the Chapter 11 phase of the bankruptcy case, and filed such a motion after conversion to Chapter 13 when the Former Chapter 11 Trustee's fiduciary office had terminated pursuant to 11 U.S.C. § 348(e).

III. STATEMENT OF THE CASE

This bankruptcy case first began in Chapter 7 of the U.S. Bankruptcy Code. *See* 11 U.S.C. §§ 701 *et seq.* The Appellant, Donald King, was appointed as the Chapter 7 Trustee. While the case was pending in Chapter 7, Mr. King sought the Bankruptcy Court's approval under 11 U.S.C. § 327(a) to retain his law firm, Odin, Feldman & Pittleman, P.C.

("OFP"), as counsel for himself as the Chapter 7 Trustee. The Bankruptcy Court granted that approval.

The case remained in Chapter 7 for nine months thereafter, but was converted to Chapter 11. *See* 11 U.S.C. §§ 1101 *et seq.* The Bankruptcy Court, however, conditioned conversion upon the appointment of a Chapter 11 Trustee. Mr. King was then appointed as the Chapter 11 Trustee. The case remained in Chapter 11 for approximately one year and one month. On May 13, 2020, the case was converted from Chapter 11 to Chapter 13. *See* 11 U.S.C. §§ 1301 *et seq.*

During the pendency of the Chapter 11 case, Mr. King did not seek the Bankruptcy Court's approval, pursuant to 11 U.S.C. § 327(a) or Fed. R. Bankr. P. 2014(a), to retain OFP as his counsel. Instead, following conversion, on June 22, 2020, and after his status as Chapter 11 Trustee was terminated pursuant to 11 U.S.C. § 348(e), Mr. King moved the Bankruptcy Court to approve the professional fees of OFP in the Chapter 11 phase of the case in the amount of $43,668.00, and $70.00 in costs. Mr. David objected to that request because Mr. King had never moved the Bankruptcy Court to approve his retention of OFP while he still served as Chapter 11 Trustee.

On September 30, 2020, the Bankruptcy Court entered an Order denying Mr. King's application to compensate OFP for the Chapter 11 Phase

of the case because Mr. King had never sought and obtained the Bankruptcy Court's approval to retain OFP and that, "[u]pon conversion of the case from chapter 7 to chapter 11, the Chapter 7 Trustee's services were terminated." The Bankruptcy Court held further that "OFP's retention, as special counsel to the Chapter 7 Trustee, was also terminated" upon conversion. Bankruptcy Court Order at p. 3 (Sept. 30, 2020) (JA 048-053) (citing 11 U.S.C. § 348(e) and *In re Fontainebleau Las Vegas Holdings, LLC*, 574 B.R. 895, 901 (Bankr. S.D. Fla. 2017). In that Order, the Bankruptcy Court granted Mr. King leave to file a retention application *nunc pro tunc*.

Mr. King first filed an application to retain OFP on October 13, 2020—four months and 22 days after his fiduciary office as Chapter 11 Trustee had terminated. His Application to Retain counsel was filed pursuant to 11 U.S.C. § 327(a). The Debtor, Mr. David, filed an opposition to that retention application on the grounds that 11 U.S.C. § 327(a) permits a trustee to move the Court to approve the retention of a professional, and that by the operation of 11 U.S.C. § 348(e), conversion of the case from Chapter 11 to Chapter 13 terminated Mr. King's fiduciary office as trustee. Mr. David contended further that the termination of Mr. King's fiduciary office rendered him ineligible to file a retention application under 11 U.S.C. § 327(a). Finally, Mr. David asserted that the Supreme Court of the United

States' decision in *Roman Cath. Archdiocese of San Juan v. Acevedo Feliciano*, 140 S. Ct. 696 (2020) (per curiam) precluded Mr. King and the Court from seeking this approval *nunc pro tunc* because Mr. King had not sought the Bankruptcy Court's approval to retain counsel during the Chapter 11 phase of the case.

On November 24, 2020, the Bankruptcy Court overruled Mr. David's opposition, granted Mr. King's Motion to Reconsider its September 30th Order, and authorized employment of counsel for the Chapter 11 Trustee under 11 U.S.C. § 327(a); and approved and awarded OFP fees in the amount of $43,590.00 and costs in the amount of $70.00. Mr. David then timely filed a Motion to Alter or Amend pursuant to Fed. R. Civ. P. 59(e) and Fed. R. Bankr. P. 9023. On February 1, 2021 the Bankruptcy Court denied Mr. David's Motion to Alter or Amend the Reconsideration Order (JA 208-211) Thereafter, Mr. David timely appealed to the U.S. District Court for the Eastern District of Virginia.

On appeal, the District Court entered an Order reversing the Bankruptcy Court and remanded the case for further proceedings based on its conclusion that it was "clear error" of law for the Bankruptcy Court to "permit King to act on behalf of the bankruptcy estate despite his status as

former trustee." *David v. King*, 638 B.R. 561, 568, 570 (E.D. Va. 2022) (JA 241-255).

Following remand from the District Court, on September 2, 2022, the Bankruptcy Court entered an Order Reconsidering and Amending Employment and Fee Order, which Order failed to correct the errors identified by the District Court, and which continued to approve the motion filed by Mr. King to retain counsel under 11 U.S.C. § 327(a) when Mr. King filed that motion "despite his status as a former trustee." *Id.* at 568.

The Debtor timely appealed the Bankruptcy Court's September 2, 2022 Order (JA 256-257) In a second appeal, the U.S. District Court for the Eastern District of Virginia entered an Order on August 4, 2023, which affirmed the Bankruptcy Court's September 2, 2022, Order. Mr. David timely filed a Notice of Appeal on August 15, 2023.

IV. SUMMARY OF THE ARGUMENT

A bankruptcy trustee's employment of a law firm that will be paid with bankruptcy assets requires the bankruptcy court's approval. Such a motion may be filed by a trustee possessing the requisite office and capacity to act on behalf of a bankruptcy estate. *See* 11 U.S.C. § 327(a), 330; *see also* Fed. R. Bankr. P. 2014(a) (stating that "[a]n order approving the employment of attorneys . . . pursuant to § 327 . . . shall be made only on

application of the trustee or committee"). Here, Mr. King never moved the Bankruptcy Court to approve his retention of OFP at any time when he served as Chapter 11 Trustee. Instead, he filed that Motion 4 months and 22 days after his fiduciary office as Chapter 11 Trustee had terminated (i.e. when he was no longer a trustee). *See* 11 U.S.C. § 348(e). Because Mr. King lacked the fiduciary office and capacity to move for approval of his retention of OFP, he could not properly bring that request before the Bankruptcy Court. The Bankruptcy Court, therefore, erred in approving a Motion filed by a non-trustee, and the District Court erred when affirming that error.

The Bankruptcy Court's approval of a ***former*** Chapter 11 Trustee's professional retention application under 11 U.S.C. § 327(a) is unprecedented, and counter to the plain text of the Bankruptcy Code and Fed. R. Bankr. P. 2014(a). This unprecedented approval, and the District Court's affirmance of it, were errors that must be corrected on appeal.

V. STANDARD OF REVIEW

The issue presented on appeal presents a pure question of law and is reviewable *de novo*. *See In Re Johnson*, 960 F2d. 396, 399 4th. Cir. (1992); *Fairchild Dornier GmbH v. Official Comm. of Unsecured Creditors (In Re Dornier Aviation (N. Am.), Inc.* 453 F.3d 225 (2006).

VI. ARGUMENT

Mr. King first filed sought Bankruptcy Court approval of his retention of OFP on October 13, 2020 -- four months and 22 days after his fiduciary office as Chapter 11 Trustee had terminated. At the time Mr. King filed that Motion, he was not a trustee, he was a ***former*** trustee. Because his fiduciary office had terminated, he lacked the fiduciary office or capacity to move the Court to approval his retention of counsel for the Bankruptcy Estate. The Bankruptcy Court, therefore, erred in approving the his motion to approve the retention of counsel for the Bankruptcy Estate.

A. The U.S. Bankruptcy Court does not authorize a Bankruptcy Court to hear and grant a Former Trustee's Application to Retain Counsel.

The provisions of 11 U.S.C. § 327(a) are clear: a trustee may employ counsel only with the bankruptcy court's approval. *See* 11 U.S.C. § 327(a) (stating, in pertinent part, that "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"); *see also* Fed. R. Bankr. P. 2014(a) (stating that "[a]n order approving the employment of attorneys . . . pursuant to § 327 . . . shall be made only on application of the trustee or committee"). "Without Court approval, professionals rendering services to debtors generally are considered volunteers and cannot be compensated for

their services unless the statute and Rules are complied with." *In re First Federal Corp.*, 43 B.R. 388 (Bankr. W.D. Va. 1984) (citing 2 Collier on Bankruptcy (15th ed.), 327.02).

11 U.S.C. § 348(e) is similarly clear. Conversion of a bankruptcy case from one chapter to another terminates the service of a trustee that is serving before the conversion. *See* 11 U.S.C. § 348(e) (stating that "[c]onversion of a case under section 706 [Chapter 7], 1112 [Chapter 11], 1208 [Chapter 12], or 1307 [Chapter 13] of this title terminates the service of any trustee or examiner that is serving in the case before such conversion") (alterations in brackets). Because the operation of 11 U.S.C. § 348(e) caused Mr. King's service as the Chapter 11 Trustee to terminate, he has no standing or capacity to proceed as a "Chapter 11 Trustee." *See In re Roberts*, 80 B.R. 565, 566 (1987) (citing *In re Kleber*, 81 Bankr. 726 (Bankr. N.D. Ga. 1987) (recognizing that, following conversion of a case from Chapter 7 to Chapter 13, "the Chapter 7 trustee has no standing in a fiduciary capacity in the converted case")).

The case law addressing the status of a former trustee frequently employs the term "standing." *See*, *e.g.*, *In re DeLash*, 260 B.R. 4, 5 (Bankr. E.D. Cal. 2000) (citing *In re Ayoub*, 72 B.R. 808, 812 (Bankr. M.D. Fla. 1987)). The term "standing" used herein does not refer to constitutional

standing under Article III of the U.S. Constitution, but rather to prudential standing, which looks to who is the real party in interest with the legal right to pursue a claim. See *Martineau v. Wier*, 934 F.3d 385, 391 n.3 (4th Cir. 2019) (citing *Wilson v. Dollar Gen. Corp.*, 717 F.3d 337, 342 (4th Cir. 2013) (noting that the Fourth Circuit analyzes questions of prudential standing under "the real-party-in-interest framework")).

On the question of whether Mr. King, as a former trustee, could file a professional retention application on behalf of the bankruptcy estate 4 months and 22 days after his fiduciary office as Chapter 11 Trustee had terminated, the District Court following remand gave short shrift to the question by declaring that Mr. King "clearly would have standing—both constitutional and prudential—in this matter." *David v. King*, __ B.R. __, 2023 U.S. Dist. LEXIS 136171, at *7 n.2 (E.D. Va. Aug. 4, 2023). As discussed herein, there was no basis under the Bankruptcy Code, or any case law, for the Bankruptcy Court or the District Court to conclude that Mr. King had prudential standing (or that he was the real party in interest with authority) to file a retention application on behalf of the Bankruptcy Estate when he lacked a fiduciary office or capacity to do so.

Only a trustee may seek the Bankruptcy Court's approval under 11 U.S.C. § 327 to employ professionals. *See* 11 U.S.C. § 327(a); *accord In*

re Wiredyne, Inc., 3 F.3d 1125, 1127 (7th Cir. 1993) (recognizing that, "[b]y their terms, however, sections 327 and 328 apply only to professionals employed by a trustee"); *see also* Fed. R. Bankr. P. 2014(a) (stating that "[a]n order approving the employment of attorneys . . . pursuant to § 327 . . . shall be made only on application of the trustee or committee").

Mr. King was not a Chapter 11 Trustee when he filed a Motion on October 13, 2020, for the Bankruptcy Court to approve his retention of OFP. He was a ***former*** Chapter 11 Trustee. Courts have recognized that the provisions of 11 U.S.C. § 327 "should be strictly construed in order to maintain the integrity of the bankruptcy process." *In re Temp-Way Corp.*, 95 B.R. 343, 345 (Bankr. E.D. Pa. 1989) (citing *Matter of Cons. Bancshares, Inc.*, 785 F.2d 1249, 1256, n.6 (5th Cir. 1986); *In re Philadelphia Athletic Club, Inc.*, 20 B.R. 328, 333 (Bankr. E.D. Pa. 1982)). There is no provision under the Bankruptcy Code authorizing a ***former*** trustee to file an application to employ professionals under 11 U.S.C. § 327.

When Mr. David first appealed this case to the District Court, the District Court held that "whether a trustee 'act[s] for the bankruptcy estate' when he hires a law firm for that estate under 11 U.S.C. § 327(a)" is a question of law, and that the Bankruptcy Court committed clear error when it "permitted King to act on behalf of the bankruptcy estate despite his status

as former trustee." *David v. King*, 638 B.R. 561, 569 (E.D. Va. 2022) (JA 246). The District Court further held that "the Bankruptcy Code is clear—only a trustee may employ professional persons on behalf of an estate; and a Chapter 11 trustee automatically loses his office post-conversion." *Id.* (citing 11 U.S.C. §§ 327(a), 348(e)).

Following remand from the District Court, the Bankruptcy Court altered its November 24, 2020, Order (approving Mr. King's retention of OFP) by deleting a single sentence stating that Mr. King "is authorized to employ the law firm of Odin, Feldman & Pittleman, PC, generally, as attorneys for the Trustee and the estate, effective as of November 12, 2020," and replacing that sentence with the following:

> The Court hereby approves the prior employment of the law firm Odin Feldman & Pittleman, P.C., by the Chapter 11 Trustee during the Chapter 11 phase of this case only, with such representation ending on May 21, 2020, the date this case was converted to chapter 13.

Bankruptcy Court Order at p. 2. (Sept. 2, 2022) (JA 257).

Mr. David timely appealed that decision to the District Court on the grounds that the Bankruptcy Court's September 2, 2022, Order repeated the clear error first identified by the District Court in the earlier appeal by approving a retention application filed by a person that lacked the fiduciary office, standing, and capacity to do so.

In affirming the Bankruptcy Court following remand, the District Court (through Judge Giles), acknowledged the prior decision Judge Nachmanoff that the Bankruptcy Court erred when allowing "'King to act on behalf of the bankruptcy estate despite his status as former trustee.'" *David v. King*, __ B.R. __, 2023 U.S. Dist. LEXIS 136171, at *4 (E.D. Va. Aug. 4, 2023) (Giles, J.) (quoting *David v. King*, 638 B.R. 561, 569 (E.D. Va. 2022) (Nachmanoff, J.) (JA 252)).

Despite this, the District Court affirmed the Bankruptcy Court because the Bankruptcy Court approved Mr. King's retention of OFP only through May 21, 2021, the date when the case was converted from Chapter 11 to Chapter 13. According to the District Court, by approving OFP's representation only through May 21, 2020, the Bankruptcy Court "allowed the former Chapter 11 trustee to act on behalf of the bankruptcy estate only for the period he was the acting Chapter 11 trustee." *David*, 2023 U.S. Dist. LEXIS 136171, at *8 (JA 293). The District Court further reasoned that "the Bankruptcy Court's September 2, 2022 Order limited King's ability to act on behalf of the bankruptcy estate to the time period when King was the Chapter 11 trustee." *Id.* at *10 (JA 293).

These observations by the District Court, however, do not address the fact that when Mr. King moved the Bankruptcy Corut to retain counsel on

October 13, 2020, he was acting on behalf of the bankruptcy estate despite his status as former trustee. Changing the date of approval of his retention to a date when Mr. King was still Chapter 11 Trustee does not change the fact that Mr. King filed his motion to do so on October 13, 2020-- 4 months and 22 days after his fiduciary office as Chapter 11 Trustee terminated. The issue overlooked by the Bankruptcy Court on remand, and the District Court in the second appeal following remand, was that Mr. King lacked office to act for the Bankruptcy Estate after his status as trustee was terminated by the operation of 11 U.S.C. § 348(e). Without question, filing an Application to approve the retention of counsel for OFP was an act taken by Mr. King on behalf of the Bankruptcy Estate.

Neither the Bankruptcy Code nor any of the cases cited by the District Court permitted the Bankruptcy Court to entertain a retention application filed by a former trustee.

Next, the District Court relied on *In re Spence*, for the proposition that "a former trustee could pursue 'unpaid expenses or fees arising from the rendition of pre-conversion services to the estate.'" *Id.* at * 15 (quoting 497 B.R. 99, 111 (Bankr. D. Colo. 2013) (JA 295). *Spence*, however, did not so hold. Instead, *Spence* was distinguishable because the Bankruptcy Court entered an order under 11 U.S.C. § 327(a) approving a Chapter 7 Trustee's

application to retain counsel when the Chapter 7 Trustee held office. 497 B.R. at 102. Following this, the case converted to Chapter 13 and the question was whether the attorneys whose retention had been approved prior to conversion could recover their fees as administrative expenses. *Id.* at 104. The issue in *Spence*, therefore, was far different from the issues presented here. *Spence* does not stand for the proposition that a former trustee, such as Mr. King, can move a bankruptcy court to approve the retention of counsel after the termination of the trustee's fiduciary office upon conversion.

The District Court following remand also relied on *In re DeLash* for the proposition that "a former trustee has inherent authority to close out the affairs of an estate post conversion." 2023 U.S. Dist. LEXIS 136171, at *15 (citing 260 B.R. 4, 8 (Bankr. E.D. Cal. 2000)). *DeLash*, however, offers little support for this statement. Prior to the first remand, the District Court examined *DeLash* and held that the bankruptcy court in *DeLash* held that "a former trustee 'has no standing to . . . act for the bankruptcy estate.'" *David v. King*, 638 B.R. 561, 569 (E.D. Va. 2022) (quoting *Delash*, 260 B.R. at 7). In *DeLash*, a former trustee moved to reopen a case under 11 U.S.C. § 350(b). In considering whether a "former trustee [may] ask the court to invest him with authority to administer assets for the benefit of creditors," the U.S. Bankruptcy Court for the Eastern District of California held that a

former trustee may not do so because "***[a] former trustee***, however, ***is not a trustee*** and there is no rule suggesting the contrary. Absent a right to office and a personal need for relief in a reopened case, ***the former trustee has no standing to ask that the case be reopened***." 260 B.R. at 6 (emphasis added).

DeLash recognized that a former trustee might be able to file a motion in his personal capacity to advance a personal interest such as a right to compensation following the termination of his office. *See id.* at 7 n.4 (citing 11 U.S.C. §§ 326(a) & 330(b)(1)). Because the trustee in *DeLash*, however, was not seeking to advance a personal interest, but rather was seeking relief on behalf of the bankruptcy estate by moving to reopen the case, the California Bankruptcy Court denied his motion based on his lack of standing. *Id.* at 10.

Similar to the former trustee in *DeLash*, Mr. King's application to retain OFP did not involve a personal interest advanced by him. To the contrary, it was an action he sought to undertake on behalf of the Bankruptcy Estate. As a former trustee, his lack of power, office and authority prevented and precluded the Bankruptcy Court from entertaining that application. The holding of *DeLash* establishes the error of the

Bankruptcy Court and should have counseled the District Court in reversing that error.

In further support of its reasoning, the District Court criticized Mr. David for not appealing the Bankruptcy Court's September 30, 2020, Order, which sustained Mr. David's objection to Mr. King's request to approve the payment of fees to OFP, but granted him leave to seek approval of his retention *nunc pro tunc*. 2023 U.S. Dist. LEXIS 136171, at *16.[1] Mr. David should not be criticized for not appealing the Bankruptcy Court's September 30, 2020, however, because that order did not conclusively resolve the relevant proceeding and, therefore, was not a final appealable order. *Ritzen Group, Inc. v. Jackson Masonry, LLC*, 140 S. Ct. 582, 588 (2020) (citing *Bullard v. Blue Hills Bank*, 575 U. S. 496 (2015)). Instead, Mr. David objected to Mr. King's retention application at his earliest opportunity. That objection and opposition were preserved and are the subject of this appeal.

Finally, the District Court reasoned that "nothing within 11 U.S.C. § 327, 11 U.S.C. § 330, or 11 U.S.C. § 348(e) prohibits former trustees from

[1] In this same passage, the District Court stated that the Bankruptcy Court's September 30 2020 Order "occurred as the case was converted from Chapter 11 to Chapter 13." 2023 U.S. Dist. LEXIS 136171, at *16. In fact, the case was not converting from Chapter 11 to Chapter 13 on September 30, 2020, but rather had converted from Chapter 11 to Chapter 13 several months earlier on May 21, 2020.

handling administrative tasks for a bankruptcy estate specifically relating to the time period during which they were the active trustee." 2023 U.S. Dist. LEXIS 136171, at *15. This reasoning is notable because while nothing in those statutes "prohibits" a former trustee from so acting, it is more notable that nothing in the Bankruptcy Code positively authorizes a former trustee to move the Bankruptcy Court to approve a trustee's retention of a professional following conversion. Instead, 11 U.S.C. § 327(a) and Fed. R. Bankr. P. 2014(a) commit that power to an actual trustee. Further, this reasoning by the District Court runs counter to the reasoning of its earlier decision prior to remand that the Bankruptcy Court erred when allowing "'King to act on behalf of the bankruptcy estate despite his status as former trustee.'" *David v. King*, __ B.R. __, 2023 U.S. Dist. LEXIS 136171, at *4 (E.D. Va. Aug. 4, 2023) (Giles, J.) (quoting *David v. King*, 638 B.R. 561, 569 (E.D. Va. 2022) (Nachmanoff, J.) (JA 252)).

The case of *In Re Mallinckrodt PLC* cited by the District Court likewise offers little support for its affirmance. In that case, the Bankruptcy Court approved a debtor in possession's motion to retain counsel under 11 U.S.C. § 327(a).[2] Bankr. Case No. 20-12522-JTD (Jointly Administered),

[2] Under 11 U.S.C. § 1107(a), a debtor in possession in a Chapter 11 case generally as all the rights and powers as a trustee. 11 U.S.C. § 1107(a) (stating, in pertinent part that a debtor in possession "shall have all the

2022 U.S. Dist. LEXIS 54786, *1 (D. Del. Mar. 28, 2022) (unpublished). The question in that case was not whether a bankruptcy court could entertain a retention application under 11 U.S.C. § 327(a) filed by a former trustee, but rather whether professional fees could be approved as of a date preceding a retention application when a valid retention approval was in place. *Id.* at *28. That issue is far different from the issue in this case: whether a former trustee may move the Bankruptcy Court to approve his retention of professionals under 11 U.S.C § 327(a) after his fiduciary office has terminated.

B. The Bankruptcy Court's approval of the former Trustee's professional retention application runs afoul of *San Juan v. Acevedo Feliciano*, 140 S. Ct. 696 (2020) (per curiam).

Finally, the District Court concluded that the Bankruptcy Court's September 2, 2022, Order did not violate the Supreme Court of the United States' decision in *San Juan v. Acevedo Feliciano*, 140 S. Ct. 696 (2020) (per curiam). The District Court held that *Acevedo Feliciano* does not apply because that case involved jurisdiction, and this case does not. 2023 U.S. Dist. LEXIS 136171, at *18. According to the District Court, "*Acevedo* does not stand for the proposition Appellant offers—that 'retroactive/*nunc*

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rights, other than the right to compensation under section 330 of this title, and powers, and shall perform all the functions and duties, except the duties specified in sections 1106(a)(2), (3), and (4) of this title, of a trustee serving in a case under this chapter").

pro tunc relief may not be used to approve an application to retain and compensate counsel for a bankruptcy estate retroactively to an earlier date.'" *Id.* at *17. The District Court further found that no cases cited by Mr. David applying *Acevedo* "explicitly held that bankruptcy courts cannot use retroactive/*nunc pro tunc* orders to retroactively approve an application to retain and compensate counsel for a bankruptcy estate." *Id.* Finally, the District Court found that, "[u]nlike *Acevedo*, there is no creation of fiction here—the September 2, 2022 Order does not create facts that did not occur. The Order simply approved an employment application *nunc pro tunc*." *Id.* at *18-*19. Next, the District Court analyzed cases citing *Acevedo* and concluded that, consistent with those cases, *Acevedo* has limited applicability and did not preclude the Bankruptcy Court's approval of a retention application filed by a former trustee. *See id.* at *19-*22 (citing *In re Ramirez*, 633 B.R. 297,306 (Bankr. W.D. Tex. 2021); *In re Oaktree Med. Ctr., LLC*, 634 B.R. 465,471 (Bankr. D.S.C. 2021); *Univ. of Colorado Health at Memorial Hosp. v. Becerra*, Civil Action No.: 14-1220 (RC), 2022 U.S. Dist. LEXIS 108785, **122-24 (D.D.C. June 17, 2022) (unpublished); and *Haigler v. High Tension Ranch*, LLC, Civil Action No. 3:20-CV-00564-GCM, 2021 U.S. Dist. LEXIS 153278 (W.D.N.C. Aug. 16, 2021) (unpublished).

In *Acevedo*, the Supreme Court of the United States held as follows:

> Federal courts may issue *nunc pro tunc* orders, or "now for then" orders, *Black's Law Dictionary*, at 1287, to "reflect[ ] the reality" of what has already occurred, *Missouri v. Jenkins*, 495 U. S. 33, 49 (1990). "Such a decree presupposes a decree allowed, or ordered, but not entered, through inadvertence of the court." *Cuebas y Arredondo v. Cuebas y Arredondo*, 223 U. S. 376, 390 (1912).
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> Put colorfully, "*[n]unc pro tunc* orders are not some Orwellian vehicle for revisionist history—creating 'facts' that never occurred in fact." *United States v. Gillespie*, 666 F. Supp. 1137, 1139 (ND Ill. 1987). Put plainly, the court "cannot make the record what it is not." *Jenkins*, 495 U. S., at 49.

140 S. Ct. at 700 (quoting authorities in text above). While *Acevedo* made these observations in the context of a jurisdictional challenge and not in the context of a bankruptcy retention application, it is now clear that a court may not use a *nunc pro tunc* order to "'make the record what it is not.'" *Id.* (quoting *Jenkins*, 495 U. S., at 49). In the second appeal, the District Court reasoned that the Bankruptcy Court's approval of the former trustee's retention application did not "not create facts that did not occur," but rather "simply approved an employment application *nunc pro tunc*." 2023 U.S. Dist. LEXIS 136171, at *18-*19. This observation, however, ignores the fact that Mr. King never moved the Bankruptcy Court to approve his retention of OFP during the Chapter 11 phase of the case; instead, he filed that Motion only after his fiduciary office had terminated pursuant to

11 U.S.C. § 348(e). The Bankruptcy Court's approval, therefore, did in fact impermissibly create facts "that did not occur" because it acted as though Mr. King had filed the Motion when he still held fiduciary office when he did not.

Further, the fee application cases applying *Acevedo* relied on by the District Corut are distinguishable, and do not provide support for the proposition that a Bankruptcy Court may hear and grant a professional retention application filed by a former trustee.

In *Ramirez* and *Oaktree* the trustees had office and capacity to move the bankruptcy courts to approve a professional employment applications (i.e. they were still trustees when they filed them). *See In re Ramirez*, 633 B.R. 297,306 (Bankr. W.D. Tex. 2021); *In re Oaktree Med. Ctr., LLC*, 634 B.R. 465,471 (Bankr. D.S.C. 2021). This case presents a different issue altogether. Unlike the trustees in *Ramirez* and *Oaktree*, Mr. King was not trustee when he moved the Court to employ his employment of OFP during the Chapter 11 Phase of the case.

In *Haigler*, a trustee possessing fiduciary office moved a bankruptcy court to retain a professional *nunc pro tunc* to an earlier date. Despite this, the Bankruptcy Court denied the trustee's request to authorize employment *nunc pro tunc* to an earlier date based on Acevedo. *See Haigler v. High*

Tension Ranch, LLC, Civil Action No. 3:20-CV-00564-GCM, 2021 U.S. Dist. LEXIS 153278, at *10-*12 (W.D.N.C. Aug. 16, 2021) (unpublished) (holding that, "[i]n light of *Acevedo Feliciano*, the bankruptcy court in our case concluded it did not have authority to approve Mr. Buric to act as attorney for the trustees *nunc pro tunc*. Instead, the bankruptcy court approved Mr. Buric effective as of the date the request to employ was presented to the bankruptcy court, which was January 15, 2021."). Again, that case is distinct because the trustee there was still a trustee when it moved the bankruptcy court to approve a retention application.

None of the cases relied on by the District Court following remand involved a retention application filed by a former trustee. Instead, all of those cases have involved retention applications that were filed by trustees possessing fiduciary office to file them. The faithful application of *Acevedo* counsels against the Bankruptcy Court's approval of a professional retention application filed by a former trustee as though it were filed when he still had office to do so.

VII. CONCLUSION

A Chapter 11 Trustee's powers and duties are established by the U.S. Bankruptcy Code. *See* 11 U.S.C. §§ §704; 1107(a). Among those powers is the power to retain counsel to be paid from the bankruptcy estate, but subject

to the court's approval of that retention. *See* 11 U.S.C. § 327(a). When a Chapter 11 Trustee possesses the office, power and authority as trustee, the Bankruptcy Code commits to the trustee power to take certain actions on behalf of the Bankruptcy Estate. As set forth under Fed. R. Bankr. P. 2014(a), "[a]n order approving the employment of attorneys . . . pursuant to § 327 . . . shall be made only on application of the trustee or committee." The termination of a trustee's office terminates a trustee's powers and authority to act for a bankruptcy estate. *See* 11 U.S.C. § 348(e).

The District Court in the first appeal correctly held that the Bankruptcy Court committed "clear error" when it "permitted King to act on behalf of the bankruptcy estate despite his status as former trustee." *David v. King*, 638 B.R. 561, 568, 570 (E.D. Va. 2022) (JA 252). As observed by *In re DeLash*, "a former trustee 'has no standing to . . . act for the bankruptcy estate.'" *In re DeLash*, 260 B.R. 4, 7 (Bankr. E.D. Cal. 2000). When Mr. King filed a professional retention application October 13, 2020, he was attempting to act on behalf of the Bankruptcy Estate. The problem is that Mr. King did so four months and 22 days after his fiduciary office as Chapter 11 Trustee had terminated. Because Mr. King could not properly bring that application before the Bankruptcy Court, the Bankruptcy Court

erred in granting it, and the District Court following remand erred in affirming that decision.

By hearing and granting Mr. King's retention application when he lacked any fiduciary office to do so, the Bankruptcy Court has granted relief without any statutory or common law basis for doing so. It is not enough to say, as the District Court did following remand, that "nothing within 11 U.S.C. § 327, 11 U.S.C. § 330, or 11 U.S.C. § 348(e) prohibits former trustees from handling administrative tasks for a bankruptcy estate specifically relating to the time period during which they were the active trustee." *David v. King*, __ B.R. __, 2023 U.S. Dist. LEXIS 136171, at *15 n.2 (E.D. Va. Aug. 4, 2023). The Bankruptcy Code does not authorize a former trustee to do anything that is not prohibited. Instead, the Bankruptcy Code relies on a system in which persons can only do the actions that they are expressly authorized to do. By way of example, nothing in the Bankruptcy Code prohibits the famous swimmer Michael Phelps from moving any random bankruptcy court to retain counsel on behalf of a random bankruptcy estate, and yet Mr. Phelps could not file such a motion because the bankruptcy code does not expressly grant him the ability to file such a motion. Instead, such a motion is committed to a trustee possessing the office and authority to do so. *See* Fed. R. Bankr. P. 2014(a).

This is no trivial matter. The Bankruptcy Code is based on statute, and courts have recognized that the provisions of 11 U.S.C. § 327 "should be strictly construed in order to maintain the integrity of the bankruptcy process." *In re Temp-Way Corp.*, 95 B.R. 343, 345 (Bankr. E.D. Pa. 1989) (citing *Matter of Cons. Bancshares, Inc.*, 785 F.2d 1249, 1256, n.6 (5th Cir. 1986); *In re Philadelphia Athletic Club, Inc.*, 20 B.R. 328, 333 (Bankr. E.D. Pa. 1982)). Adherence to the process of court approval under 11 U.S.C. § 327(a) is essential to the orderly administration of a bankruptcy because "'services must have been performed pursuant to appropriate authority. . . . Otherwise, the person rendering services may be an officious intermeddler or a gratuitous volunteer. . . .'" *In re Hagan*, 145 B.R. 515, 518-519 (E.D. Va. 1992) (quoting 2 *Collier on Bankruptcy*, P 327.02 at 327-10 (15 ed. 1992). As it stands, the Bankruptcy Court approved a professional retention application filed by a former trustee (i.e. a non-trustee). That action was unauthorized by the well-established process under 11 U.S.C. § 327(a) and Fed. R. Bankr. 2014(A), and was clear error, which must be corrected on appeal.

WHEREFORE, your Appellant, Byron F. David, by counsel, respectfully requests that this Honorable Court enter an Order:

(a) reversing the District Court's Order entered on August 4, 2023, which affirmed the Bankruptcy Court's Order entered on September 2, 2022;

(b) awarding judgment in favor of the Appellant by (i) vacating the Bankruptcy Court's November 24, 2020, Order granting Mr. King's Motion under 11 U.S.C. § 327(a) to retain OFP as his counsel, and (ii) disgorging the fee award to OFP from the Bankruptcy Estate in the amount of $43,590 in legal fees and costs in the amount of $70; and

(c) granting such other and further relief as this Court deems appropriate.

VIII. REQUEST REGARDING ORAL ARGUMENT

Counsel for the Appellant requests oral argument.

Respectfully submitted,

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By Counsel

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CERTIFICATE OF COMPLIANCE

The length of foregoing Opening brief, excluding the cover and tables, is 26 pages.

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CERTIFICATE OF SERVICE

I certify that on the 31st day of October, 2023 the foregoing document was served on all parties or their counsel of record through the CM/ECF system and on Counsel for the Appellee as follows:

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