NO. 23-1856

In The
United **S**tates **C**ourt of **A**ppeals
For The Fourth Circuit

BYRON F. DAVID,

Plaintiff – Appellant

v.

DONALD F. KING,

Defendant – Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA AT ALEXANDRIA

BRIEF OF APPELLEE

DONALD F. KING

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PRELIMINARY STATEMENT

This is the second appeal pursued by the Appellant, Brian F. David ("Mr. David") related to the employment of counsel to the trustee and compensation of that professional. The only issue before this Court in this appeal is whether the District Court's affirmance of the bankruptcy court's rulings on remand that properly narrowed the scope of the bankruptcy court's prior order authorizing the employment of chapter 11 counsel by the chapter 11 trustee, the Appellee, Donald F. King should be affirmed. Because the District Court found that the bankruptcy court faithfully implemented the instructions on remand while properly exercising its discretion to approve professional employment and compensation, this Court should affirm as well.

STATEMENT OF APPELLATE JURISDICTION

Mr. David's appeal of the final order of the U. S. District Court for the Eastern District of Virginia entered on August 4, 2023 that affirmed the final order of the U. S. Bankruptcy Court for the Eastern District of Virginia entered on September 2, 2023. Mr. Davis filed his timely notice of appeal on August 15, 2024. This Court's appellate jurisdiction arises pursuant to 28 U.S.C. §§ 41,1291 and 1924, and Fed R. App. P 4 and 6(b).

The District Court's August 4, 2023 order affirming the bankruptcy court's September 2, 2022 Order Reconsidering and Amending Employment and Fee Order

("Amended Employment and Fee Order") was a final order. *Smythe v. Master Auto Serv. Corp.*, 986 F.2d 1415 (4th Cir. 1993) (considering appeal of final order denying a motion to alter or amend judgment).

This Court has jurisdiction to hear an appeal of the Amended Employment and Fee Order under 28 U.S.C. § 158(a)(1) which provides jurisdiction to the District Court to hear appeals from final orders and judgments of bankruptcy courts. A notice of appeal of the District Court's Final Order entered on August 4, 2023 affirming the bankruptcy court's Employment and Fee Order (JA 286-300) was timely filed on September 9, 2022 (JA 258-260). *See* 28 U.S.C. § 158(c)(2); Fed. R. Bankr. P. 8002(a)(1).

STATEMENT OF ISSUES

1. Did the District Court err in affirming the bankruptcy court's the Amened Employment and Fee Order following remand?

STANDARD OF REVIEW

The order on appeal is the District Court's final order affirming the bankruptcy court's Amended Employment and Fee Order, which involved a matter of the employment of professionals on behalf of a bankruptcy estate.

"Because we review the judgment of the district court sitting in review of a bankruptcy court, we apply the same standard of review that the district court applied. That is, we review the bankruptcy court's legal conclusions de novo, its

factual findings for clear error, and any discretions for abuse of discretion." *Copley v. United States*, 959 F.3d 118,121 (4th Cir. 2020).

Bankruptcy courts have broad discretion in approving the employment of professionals in bankruptcy cases. *Harold & Williams Dev. Co. v. United States Trustee (In re Harold & Williams Dev. Co.)*, 977 F.2d 906, 909–910 (4th Cir. 1992). Determining the reasonableness of professional fees in bankruptcies is also a matter that lies within the bankruptcy court's discretion. *Fine v. Weinberg*, 384 F.2d 471, 473 (4th Cir. 1967). Under the abuse of discretion standard, the bankruptcy court's decisions will not be reversed unless its conclusion was "guided by erroneous legal principles," or "rests upon a clearly erroneous factual finding." *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 261 (4th Cir. 1999) (citations omitted).

STATEMENT OF THE CASE

I. Statutory Framework

The Bankruptcy Code contemplates and requires that professionals representing or assisting a bankruptcy trustee be employed in bankruptcy cases. 11 U.S.C. § 327(a). Professionals provide services that are necessary for and beneficial to the administration of bankruptcy estates. 11 U.S.C. § 327–330. This enables estate assets to be monetized to pay the claims of creditors. In exchange for their services, professionals receive an administrative claim, which is paid by the bankruptcy estate as a priority before payments are made to most other creditors. 11 U.S.C. §§ 330(a),

503(b)(2). Payment of professional fees occurs after an application for compensation is filed and the compensation is reviewed and approved by the bankruptcy court as reasonable and necessary 11 U.S.C. § 330(a)(1)(A)–(B).

Approval of a proposed professional fee occurs after the filing of an application. 11 U.S.C. § 327(a); Fed. R. Bankr. P. 2014. Court approval of professional employment provides review by the bankruptcy court of the terms and conditions of employment and ensures that professionals do not hold or represent an interest adverse to the estate and are otherwise disinterested. 11 U.S.C. §§ 327(a), 328(a). After an employment application is approved, a professional's on-going duty to disclose any additional conflicts or connections continues throughout the case, requiring "spontaneous, timely, and complete disclosure." *In re The Harris Agency*, 462 B.R. 514, 524 (E.D. Pa. 2011) (citation omitted).

II. Statement of Facts

This bankruptcy case was commenced by the filing of a voluntary petition under chapter 7 by Mr. David on July 10, 2018. Shortly after the filing, the United States Trustee[1] appointed Donald F. King ("Mr. King") to serve as chapter 7 trustee for the bankruptcy estate of Byron F. David ("Bankruptcy Estate"). Mr. King

[1] The United States Trustee is an official of the United States Department of Justice appointed by the Attorney General to supervise the administration of bankruptcy cases. 28 U.S.C. §§ 581–589.

selected Odin Feldman Pittleman, P.C. ("OFP") as his counsel with the firm filing an application for court approval as counsel for Mr. King and the bankruptcy estate. The application was properly served, no objections were filed, and the bankruptcy court entered an order approving OFP's employment in the chapter 7 phase of this bankruptcy case. (JA 001-003).

1. The Bankruptcy Case is Converted to Chapter 11 with No Assertion OFP Was Not Properly Employed.

During the chapter 7 phase of the bankruptcy case Summit Community Bank filed an adversary proceeding against Mr. David seeking a denial of his bankruptcy discharge alleging that Mr. David concealed his assets and made improper transfers. After that adversary proceeding was filed, Mr. David moved to convert his chapter 7 case to chapter 11 to pursue objections to Summit Community Bank's claims.[2] The bankruptcy court granted Mr. David's motion to convert his case but required the appointment of a chapter 11 trustee. (JA 006).

The United States Trustee appointed Donald F. King to serve as the chapter 11 trustee and filed a motion to approve his appointment. With the employment application, Mr. King filed a verified statement disclosing his connections with parties-in-interest in the bankruptcy case, including proposed trustee's affiliation

[2] Chapter 7 debtors do not have standing to bring claim objections unless the bankruptcy case will result in a full distribution to all creditors leaving any surplus for the owners of the Debtor.

with "his law firm," OFP. There were no objections, and the bankruptcy court approved the United States Trustee's selection of Mr. King as chapter 11 trustee. (JA 008).

During the chapter 11 case, Mr. King and Mr. David had a number of disputes which included litigation over Mr. David's obligations to turn over and account for his post-petition earnings which would be property of his chapter 11 bankruptcy estate, timely provide his bank statements to the trustee, and cooperate with the trustee's accountant to enable the filing of necessary tax returns. Mr. David's recalcitrance and refusal to cooperate resulted in Mr. King being forced to file a motion for a rule to show cause against Mr. David.

OFP represented Mr. King in these disputes as counsel to the chapter 11 trustee. Mr. David never contended the firm lacked authority to represent Mr. King, and Mr. David's counsel endorsed at least six orders on where OFP was listed as Mr. King's counsel.

After succeeding in part on his objections to Summit Community Bank's claims, Mr. David then moved to convert his bankruptcy case to chapter 13 to enable him to file a wage earner plan of reorganization. The bankruptcy court granted the motion to convert to a chapter 13 case and entered the conversion order on May 21, 2020 (JA 009-011). The order converting the case to chapter 13 authorized Mr. King to seek bankruptcy court approval of chapter 11 administrative expenses (including

the compensation owed to his professionals), required Mr. King to pay those expenses, and upon doing so, turn over all remaining amounts to the chapter 13 trustee. (JA 010).

2. Mr. David Objects to the Payment of Chapter 11 Professional Fees.

After the case was converted to chapter 13, Thomas P. Gorman was appointed chapter 13 trustee. Mr. King filed applications pursuant to the conversion order for approval of chapter 11 administrative expenses, including compensation owed for the professional services rendered by OFP to the trustee on behalf of the bankruptcy estate.

At the time OFP's compensation request was pending, Mr. King was holding approximately $100,000.00 of bankruptcy estate funds. Pursuant to the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, and the order setting the terms of conversion of the case to chapter 13, Mr. King was responsible for paying the administrative expenses incurred during the chapter 11 case, filing a final report, and then turning over the remaining funds to the chapter 13 trustee. *See also* 11 U.S.C. § 1106(a)(1) (incorporating § 704(a)(9)'s requirement for the trustee to make a final report and accounting). Until the issue of OFP's compensation was determined, Mr. King could not file his final report and account.

Mr. David objected to all of the compensation applications filed by Mr. King. In his objection to the application for OFP's professional compensation, Mr. David

asserted for the first time that the firm was not properly employed following the conversion of the case to chapter 11 because, in his view, another employment application was required to be filed for the firm after conversion of the case from chapter 7 to chapter 11. Prior to this case, the issue of whether professionals employed under 11 U.S.C. § 327(a) are required to file a successive employment application when the bankruptcy case is converted to another chapter where the trustee wishes to continue to use the previously employed professional's services does not appear to have been the subject of a published opinion in any district.[3]

Mr. King opposed the objection, arguing that OFP was properly employed pursuant to the order entered by the bankruptcy court on November 20, 2018 following the application previously filed by the firm.

The bankruptcy court resolved the matter by entering an order requiring OFP to file an additional application for court approval of the firm's employment during the chapter 11 portion of the bankruptcy case.[4] Mr. David did not appeal that memorandum opinion and order, nor did he object to the bankruptcy court allowing

[3] The timing of the filing and approval of the application is the only disputed issue with respect to OFP's application. Mr. David has never identified any information that would have been included in a second employment application that was not included in OFP's initial employment application.

[4] The compensation awarded for the work performed while the case was pending in chapter 7 are not at issue in this appeal.

Mr. King, as chapter 11 trustee, to file a second application to approve his decision to hire his law firm.

OFP filed that application which Mr. David opposed, primarily contending the employment application should not be approved retroactively, that the fees sought were too high, and that the chapter 11 trustee did not have standing to seek employment of his counsel. Mr. King filed a reply to Mr. David's objection.

The bankruptcy court granted OFP's application for approval of its employment as counsel for the chapter 11 trustee and the requested compensation. The court found the fees incurred for the chapter 11 phase of the case were reasonable, "particularly in light of the debtor's behavior in this case," and noting the "allegations of asset concealment, the general lack of cooperation from the debtor, and the need to negotiate and settle on procedures with the U.S. Trustee's Office related to cash flow, budgeting, and reporting[.]"

The court rejected Mr. David's standing[5] argument holding that trustees and their professionals do have standing to appear in converted cases to preserve and satisfy their claims for professional compensation. The bankruptcy court, however,

[5] The District Court properly identified that this case is about the Trustee's authority to hire counsel and for what time period: "Although Appellant uses the word standing in his briefing, he conceded at the June 2, 2023 hearing that what he is actually referring to is the trustee's authority. The trustee clearly would have standing—both constitutional and prudential—in this matter." *David v. King*, 653 B.R. 833, 837, n.2 (E.D. Va. 2023).

approved the firm's application to be employed, only effective as of November 12, 2022, a date neither party requested nor discussed in their briefs. The November 12, 2022 date was during the chapter 13 phase of the case and four months after the case had been converted from chapter 11 to chapter 13 on May 21, 2020.

A written order memorializing this ruling (JA 168-171), was entered by the bankruptcy court on November 24, 2020 ("November 24, 2020 Order"). Following the entry of this order, the Trustee paid the fees in accordance with the order,[6] filed his final report in the chapter 11 proceeding and turned over the remaining funds of $58,203.63 to the chapter 13 trustee.

Mr. David then moved for reconsideration of the November 24, 2020 Order. The motion for reconsideration repeated Mr. David's prior arguments, but also added an argument that the bankruptcy court erred in its November 24, 2020 Order by approving OFP's application effective through November 24, 2020—a date after the conversion of the case to a case under chapter 13 on May 21, 2020—contending that because the case was pending in chapter 13, the chapter 11 trustee did not have standing or authority to act for the bankruptcy estate. The bankruptcy court held a hearing and issued a bench ruling in favor of the trustee. A written order denying

[6] Mr. David did not obtain a stay pending appeal.

reconsideration was entered by the bankruptcy court on February 1, 2021 ("February 1, 2021 Order") (JA 208-211).

Mr. David appealed the February 1, 2021 order to the District Court (JA 212-214). This District Court reviewed the November 24, 2020 Order and February 1, 2021 Order. The District Court did not vacate or provide Mr. David with any relief he sought in that appeal related to the November 24, 2020 Order. (JA 241 fn.1).

In considering the bankruptcy court's February 1, 2021 Order denying Mr. David's motion to reconsider, this District Court identified an error, finding that "when the bankruptcy court granted King's Section 327(a) application "effective . . . November 12th, 2020," [] it "made a decision outside the adversarial issues presented to [it] by the parties." (JA 250).

The District Court found it was error for the bankruptcy court to authorize OFP's employment effective to a date during the chapter 13 case—"four months after [Mr. King's] service as trustee for the estate terminated." (JA 255 fn.4). That ruling was a limited one, and the District Court made clear "that the only error" the District Court identified with the bankruptcy court's February 1 Order was the failure to correct November 12, 2020 as the effective date of counsel's employment. (JA 255 fn.4).

The District Court did not reach any other issues raised with respect to the November 12, 2020 hearing or the November 24, 2020 Order and noted that Mr.

David "did not present those issues as new arguments in support of his Motion to Reconsider." (JA 255 fn.4).

The matter was remanded by the District Court to the bankruptcy court. On remand, the bankruptcy court entered an Amended Employment and Fee Order on September 2, 2022. This amended order noted that OFP had been hired by the chapter 11 trustee during the chapter 11 phase of the case. The bankruptcy court stated it was its intention to merely approve the past actions taken by Mr. King on behalf of the bankruptcy estate during the time of his service as chapter 11 trustee and during the chapter 11 phase of the case. The Amended Employment and Fee Order corrected the error identified by the District Court, and approved OFP's employment limited to "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." Mr. David then filed his appeal.

SUMMARY OF THE ARGUMENT

The bankruptcy court faithfully applied the District Court's instructions on remand and corrected the "only error" identified by the District Court in the first appeal. The bankruptcy court's initial error of approving OFP's employment as the chapter 11 trustee's counsel to an effective date during the chapter 13 phase of the case was corrected by the Amended Employment and Fee Order. Any further error was harmless.

The chapter 11 trustee had the authority to obtain retroactive approval by the bankruptcy court of his decision to hire the law firm as his counsel during the chapter 11 phase of the case and effective only for the chapter 11 phase of the bankruptcy case.

The trustee's decision to hire counsel, his interest in obtaining after-the-fact court authorization of that decision, and desire to ensure that actions taken by his counsel during the chapter 11 case were authorized are each matters that are relevant to the administration of the bankruptcy case during the time period in which Mr. King served as trustee. This satisfies the requirements of constitutional and prudential standing.

The conversion of the case from chapter 11 to chapter 13 did not vitiate the chapter 11 trustee's authority because Mr. King had continuing duties under the bankruptcy code as chapter 11 trustee during the time period in which he served the bankruptcy estate as trustee. Post-conversion to chapter 13, Mr. King also had an ongoing duties to make an appropriate turnover of assets to the chapter 13 trustee. His fiduciary duties to the bankruptcy estate did not end until all estate property he held in his capacity as trustee had been appropriately distributed, in this instance, to the chapter 13 trustee.

The retroactive approval of professional employment in bankruptcy cases is governed by certain factors identified in *In re Tidewaters Mem'l. Hosp., Inc.* 110

B.R. 221 (Bankr. E.D. Va.1989), which focus on whether the professional seeking approval has provided a satisfactory explanation for the delay in filing an application and whether the professional is disinterested and made appropriate disclosures.

Mr. David argues that the Supreme Court's decision in *Acevedo,* which prohibited the issuance of retroactive orders to cure jurisdictional bars, prevents courts from issuing after-the-fact orders in any context. But the argument that *Ascevedo* changed the applicable standards for the approval of professional applications in bankruptcy has been broadly rejected by district and bankruptcy courts nationwide. Mr. David's arguments fail, and the District Court's Final Order confirming the bankruptcy court's Amended Employment and Fee Order should be affirmed.

This Court may also affirm by holding that successive employment applications are not required under the Bankruptcy Code. Section 348(e) of the Bankruptcy Code only terminates the services of an "examiner" or "trustee," and not other bankruptcy professionals such as attorneys. OFP properly obtained an order approving the firm's employment on behalf of the bankruptcy estate during the chapter 7 phase of the case. As a result, any requirement for a second, duplicative employment application in the same bankruptcy case should not be necessary.

ARGUMENT

The error identified by the District Court in Mr. David's first appeal was corrected by the bankruptcy Court and subsequently affirmed by the District Court with the bankruptcy court's approval of the employment of OFP as the chapter 11 as trustee's counsel to a date when the case was pending in chapter 13 (November 12, 2020). On remand, the bankruptcy court corrected this error, limiting the employment of the chapter 11 trustee's counsel to the chapter 11 phase of the case. The bankruptcy court's order was consistent with the District Court's remand instructions and cured the "only error" identified by the District Court on its initial review. *See* (JA 255 fn.4).

Mr. David's argument conflates two distinct concepts that the District Court carefully disaggregated in its initial review: (1) who has standing to file an employment application; and (2) for what time periods can the bankruptcy court approve the employment of professionals who are hired to assist the trustee. The chapter 11 trustee has standing to take actions on behalf of the bankruptcy estate that relate to his administration of the bankruptcy estate and the duties and responsibilities he held as trustee, including the hiring of counsel. The bankruptcy court had the discretion to consider employment applications filed after services are rendered, including entering an order approving the employment of counsel after that hiring occurred and setting the effective date

of counsel's employment approval during the time period in which the chapter 11 trustee served. The District Court found that the bankruptcy court properly implemented the District Court's instructions on remand and applied its discretion in reviewing the employment and compensation of professionals, limiting the employment to the chapter 11 phase of the case and approving the requested compensation. The District Court's order following Mr. David's second appeal should be affirmed.

I. The District Court Found That The Bankruptcy Court Properly Executed its Remand Instructions.

In the initial appeal, he District Court found that the bankruptcy court had failed to consider an argument that Mr. David raised in his motion to reconsider: whether the bankruptcy court erred in authorizing the employment of the chapter 11 trustee's counsel to an effective date that was after the conversion of the bankruptcy case to chapter 13. This was the "only error" the District Court identified with respect to the bankruptcy court's order denying reconsideration. In response to this District Court's ruling and instructions, the bankruptcy court entered the Amended Employment and Fee Order. That order limited the employment of the chapter 11 trustee's counsel to only the time periods the bankruptcy case was pending in chapter 11. That order made clear that counsel's employment was not authorized for any time periods during the chapter 13 phase of the case. Because the bankruptcy court faithfully implemented the District Court's directions on remand, the District

Court's August 4, 2023 Final Order affirming the bankruptcy court's September 20, 2022 Amended Employment and Fee Order should be affirmed.

1. The Chapter 11 Trustee Had The Authority To Secure The Employment of Chapter 11 Counsel Limited to the Chapter 11 Phase of the Case.

The Bankruptcy Code authorizes trustees to employ professionals "to represent or assist the trustee in carrying out the trustee's duties under this title." 11 U.S.C. § 327(a). A bankruptcy trustee thus has standing to seek the employment of counsel where that application relates to his "duties under this title."

In resolving the first appeal, the District Court recognized this principle, finding that Mr. King had standing on "matters relevant to the administration of the case during the period in which the trustee was serving." (JA 253). The District Court's analysis was correct and the bankruptcy court properly implemented it. On remand, the bankruptcy court limited OFP's employment to only the chapter 11 phase of the case, which is the time period Mr. King served as the chapter 11 trustee and was a period during which he had "duties under this title."

Mr. King was acting within the zone of interests contemplated by 11 U.S.C. § 327(a) because the statute authorizes the trustee to seek the employment of professionals "to assist the trustee in carrying out the trustee's duties." The chapter 11 trustee had duties related to the chapter 11 portion of the case and

securing counsel for this portion of the case is consistent with the scope of § 327(a).

2. Conversion Did Not Alter the Trustee's Authority Within the Scope of the Amended Employment and Fee Order.

The conversion of the case to chapter 13 does not change the analysis of the Trustee's authority to employ counsel. In resolving the first appeal, the District Court's recognize and analyzed that the ability to act "on behalf of the bankruptcy estate" and having "standing to argue the issue or seek retroactive approval for the period during which [Mr. King] served as trustee" as two, distinct issues. Under issue one, Mr. King had standing to take actions which were relevant to the administration of the case for the time period the chapter 11 served.

Mr. King had "duties under this title" under the second issue identified by the District Court related to the administration of the chapter 11 phase from April 10, 2019 to May 21, 2020 because he served as chapter 11 trustee during that time period. Nothing in the District Court's order precluded the ability of the bankruptcy court to apply its considerable discretion and approve the chapter 11 trustee's hiring of a law firm effective to May 21, 2020. This date was during the phase of the case in which the chapter 11 trustee served and a date on which Mr. King could act on behalf of himself "*and the estate*." (JA 250) (emphasis in original).

This is consistent with the District Court's ruling leaving in place the November 24, 2020 Order, which approved employment of counsel for the chapter 11 trustee, but reversing the February 1, 2021 order for the bankruptcy court's failure to correct the error of "grant[ing] King authority to act on behalf of the bankruptcy estate effective as of November 12, 2020—a date arising four months after his service as trustee for the estate terminated." (JA 255 fn.4).

Moreover, the chapter 11 trustee also had an ongoing duty—related to his service as trustee and on behalf of the bankruptcy estate—to determine claims, make a report, and make the appropriate turnover of assets to the chapter 13 trustee.

This duty existed for two separate and independent reasons: (1) Bankruptcy Code section 704 placed a duty on the chapter 11 trustee to account for property he received, file a report, and deliver property to the chapter 13 trustee as required under Section 542(a); and (2) in ordering conversion of the case to chapter 13, the bankruptcy court specifically ordered the trustee to obtain court approval of chapter 11 administrative claims, pay those approved claims, and turnover the remaining property to the new chapter 13 trustee.

In addressing whether a former trustee for a terminated trust satisfies a standing requirement, the Fifth Circuit recognized that even when a trustee's responsibility has been terminated, the "former trustee . . . has a duty to return

the trust property to the beneficiaries of the trust." *In re Cleveland Imaging & Surgical Hosp., L.L.C.*, 26 F.4th 285, 295 (5th Cir. 2022). As a result, a former trustee's fiduciary duties do not end until property has been appropriately distributed. *Id.* (citing RESTATEMENT (THIRD) OF TRUSTS § 76 for the principle that the trustee is accountable for trust property). Thus, even though a former trustee does not have wind-up powers and lacks a legal ownership of the trust res, the former trustee still has standing to provide for a proper disposition of property he is holding, which "give[s] him a meaningful interest in [a] case." *Cleveland Imaging*, 26 F.4th at 295.

Here, as in *Cleveland Imaging*, at the time the chapter 11 trustee sought the bankruptcy court's approval for the employment and compensation of his counsel, he was holding approximately $100,000 in bankruptcy estate funds. *See* (A306). The Bankruptcy Code imposed a duty to be accountable for all the property he had received. 11 U.S.C. § 704(a)(2).[7] Consistent with this duty, Mr. King had the responsibility to have the bankruptcy court determine the allowed chapter 11 administrative expenses, pay those expenses, and turnover the remaining funds to the chapter 13 trustee. He thus had standing to seek the employment of counsel to assist with those purposes.

[7] This duty is made applicable to chapter 11 trustees pursuant to 11 U.S.C. § 1106(a)(1).

There is also no reasonable dispute that the chapter 11 trustee had standing to file the application seeking the employment of his counsel at the time the application to employ chapter 11 counsel was filed. This Court found that *In re Harold & Williams Dev. Co.*, 977 F.2d 906 (4th Cir. 1992*)* does not provide support for hiring a professional effective to a date on which the trustee who filed the application is no longer serving as trustee. But reliance on "*Williams* would have been appropriate if the issue [] was one of 'standing' as it related to . . . matters relevant to the administration of the case during the period in which the trustee was serving." (JA 253). Applying that logic, the District Court found support for the proposition that Mr. King had "the ability to file and litigate a Section 327(a) application post-conversion." (JA 252) (citing *In re DeLash*, 260 B.R. 4 (Bankr. E.D. Cal. 2000)). But the District Court differentiated the distinct issue regarding the date the professional was hired, which could not be during the chapter 13 phase of the case. (JA 252).

It was well within the bankruptcy court's discretion to select an effective approval date for the employment of the law firm at any time during the chapter 11 phase of the case. Counsel for the chapter 11 trustee was providing services to the chapter 11 trustee for the entirety of this time period. Those facts were clear to the Court and all parties–in–interest: The bankruptcy court had already entered an order approving counsel's employment "as attorneys for the Trustee *and the estate*" during

the chapter 7 phase of the case on November 19, 2018. (emphasis added). In his disclosure of connections, the chapter 11 trustee referenced "*his law firm*, Odin, Feldman & Pittleman, P.C." (emphasis added). The firm appeared at hearings and endorsed at least six orders as the chapter 11 trustee's counsel, with no party contending the firm lacked authority to take these actions. Given this backdrop, there is ample support in the record for the bankruptcy court's conclusion that OFP's "employment and hiring had already taken place during the chapter 11 phase of the case."

The bankruptcy court did not abuse its discretion in memorializing these facts in a written order that made clear that the law firm's employment was approved but only for the chapter 11 phase of the case and its employment ended upon conversion of the case to chapter 13.

The District Court remanded to the bankruptcy court with instructions to correct "the only error" that was identified with the February 1 Order, which was the decision "grant King authority to act on behalf of the bankruptcy estate effective as of November 12, 2020—a date arising four months after his service as trustee for the estate terminated." (JA 255 fn.4). The District Court did not reach any other issues "because David did not present those issues as new arguments in support of his Motion to Reconsider." (JA 255 fn.4).

The bankruptcy court did not ignore this instruction on remand. To the contrary, the bankruptcy court implemented the District Court's instructions, entering an order that limited the approval of counsel for the chapter 11 of the case only to the chapter 11 phase of the case, and making clear that counsel's employment was not authorized for any portion of the chapter 13 phase of the case. This corrected the error identified by the District Court.

Mr. David does not articulate how he believes the bankruptcy court failed to respond, except to press his argument that all of the legal fees incurred on behalf of the chapter 11 phase of the case should be disallowed—effectively giving him his chapter 11 case for free. The District Court clearly did not require this result in order for the bankruptcy court to implement its directive, leaving this issue to the bankruptcy court's discretion. *See* (JA 255 fn.4) ("Whether Odin Feldman is entitled to retain those fees and prevent David from recovering a windfall, however, remains a live controversy dependent on the bankruptcy court's decisions on remand.").

The District Court remanded to allow the bankruptcy court to consider the appropriate effective date for employment and the effect, if any, that would have on the amount of the approved chapter 11 compensation. The bankruptcy court's September 2, 2022 Order analyzed these issues in detail. Mr. David presents no argument that, upon limiting chapter 11 counsel's employment to the appropriate

phase of the case, the bankruptcy court committed any abuse of its discretion in reviewing compensation issues. The District Court's order confirming the bankruptcy court's Amended Employment and Fee Order should be affirmed.

II. Mr. David's Arguments Regarding *Acevedo* Have Been Uniformly Rejected By Other Courts Reaching This Issue Since *Acevedo*.

On occasion, trustee's have pressing needs for counsel to take prompt legal action, often times before that counsel has been formerly employed and sometimes even before the first meeting of creditors required under 11 U.S.C. § 341. Bankruptcy professionals routinely perform work prior to the entry of an employment order for which they later receive compensation. In his initial appeal, Mr. David pressed for a sweeping change in bankruptcy law, asking the District Court to adopt a new standard to prohibit the approval of employment applications for bankruptcy professionals after those professionals begin providing professional services.

The resolution of whether employment applications can be considered after a bankruptcy professional provides those services is irrelevant to Mr. David's standing argument and whether the bankruptcy court followed the District Court's instructions on remand. But if this Court should consider Mr. David's argument, it should reject his contention that the bankruptcy court lacked the discretion to review OFP's application as counsel for the chapter 11 trustee because services in the chapter 11 case were rendered before the second employment order was entered.

1. Bankruptcy Courts Have Long Had Discretion to Approve Professional Employment After Services Have Been Performed.

Approving the employment and compensation of bankruptcy professionals is a matter committed to the sound discretion of the bankruptcy court. *In re Boy Scouts of America*, 630 B.R. 122, 128 (D. Del. 2021) (appellate courts generally "review the Bankruptcy Court's decision to approve [a law firm]'s application for employment under § 327(a) for an abuse of discretion").

Bankruptcy courts routinely enter orders authorizing professional employment and compensating work that professionals performed prior to obtaining an order approving employment "and District Courts and courts of appeal routinely affirm such approvals under the abuse of discretion standard." *In re Mallinckrodt PLC*, No. 21-268-LPS, 2022 WL 906462, *7 (D. Del. Mar. 28, 2022); *In re Hunanyan*, 631 B.R. 904, 908 (Bankr C.D. Cal. 2021) ("Every employment application where work must start immediately seeks a form of retroactive approval[.]"). The Federal Rules of Bankruptcy Procedure, which are prescribed by the Supreme Court, recognize this reality. *See* Fed. R. Bankr. P. 6003(a) (generally prohibiting the entry of an order approving the employment of professionals within the first twenty-one days of a case).

Every Court of Appeal that has considered the issue has recognized that bankruptcy courts have authority to approve applications to employ and award professional compensation, even if the application to employ was filed after the

applicant has performed professional services. *In re Jarvis*, 53 F.3d 416 (1st Cir. 1995); *In re Singson*, 41 F.3d 316, 319–20 (7th Cir. 1994); *Land v. First Nat'l Bank of Alamosa (In re Land)*, 943 F.2d 1265, 1267–68 (10th Cir. 1991); *F/S Airlease II, Inc. v. Simon (In re F/S Airlease II, Inc.)*, 844 F.2d 99, 105 (3rd Cir. 1988), *cert. denied*, 488 U.S. 852 (1988); *Okamoto v. THC Financial Corp. (In re THC Financial Corp.)*, 837 F.2d 389, 392 (9th Cir. 1988); *Matter of Arkansas Co., Inc.*, 798 F.2d 645, 648–50 (3rd Cir. 1986); *Matter of Triangle Chemicals, Inc.*, 697 F.2d 1280, 1284 (5th Cir. 1983).

Consistent with this authority, the District Court has also recognized that a bankruptcy court, in fact, abuses its discretion if it fails to approve the employment of counsel who performed work prior to filing of an application, no party has been prejudiced, and there is "no chance of overreaching through unnecessary or improper activity of counsel either before or after formal employment." *In re King Elec. Co., Inc.*, 19 B.R. 660, 663 (E.D. Va. 1982).

In implementing this standard, bankruptcy courts in the Eastern District of Virginia apply *In re Tidewater Mem'l. Hosp., Inc.*, 110 B.R. 221 (Bankr. E.D. Va. 1989), which identified nine factors ("*Tidewater* Factors") to consider in determining whether to approve employment applications filed after the performance of professional services. *Id.* at 226 fn.1. The most important factors pertinent here are: (i) whether a satisfactory explanation was provided for the delay;

and (ii) whether the professional meets the disinterestedness and disclosure requirements of the Bankruptcy Code and Rules. *Id.* at 226 (recognizing that some courts look only to those two factors).

Here, at the hearing on November 12, 2021, and in connection with its November 24, 2021 Order, the bankruptcy court applied the *Tidewater* Factors and concluded that approval of OFP's employment application for the chapter 11 services was appropriate. (JA 168-171).

The firm explained that an application to employ the law firm was not filed after the case was converted to chapter 11 because the firm had already obtained approval of its employment while the case was pending in chapter 7, no prior case law from this jurisdiction required such an application, and the issue of whether a second employment application was required after conversion was a matter of first impression.

The bankruptcy court found that there was no prejudice from the delay in filing the second employment application. The same disclosures required for the chapter 11 application were already before the court and disclosed to parties in interest in OFP's original application; all parties had an adequate opportunity to object to OFP's employment; and the loss of any windfall to Mr. David did not constitute cause to deny the later application.

Mr. David did not contest the bankruptcy court's application of the *Tidewater* Factors in either his first appeal or the second appeal to the District Court. Thus, there is no dispute that the bankruptcy court appropriately exercised its discretion, assuming it had discretion to consider the application. This simplifies this Court's task: The District Court's order should be affirmed unless there is some barrier that, as a matter of law, would have barred the bankruptcy court from even considering OFP's application.

2. *Acevedo* Did Not Change This Case Law.

Mr. David attempts to find a legal error by arguing that the ability for bankruptcy court to consider employment applications changed following the Supreme Court decision in *Roman Catholic Archdiocese of San Juan, Puerto Rico v. Acevedo Feliciano*, 140 S. Ct. 696 (2020). *Acevedo* did not address bankruptcy employment applications or even consider any issues of bankruptcy law. Instead, the case held only that a federal District Court cannot cure a jurisdictional defect, existing on the day a case was filed, by issuing a retroactive order. 140 S.Ct. at 699–700.

Since *Acevedo* was decided, courts throughout country have consistently rejected the argument that it changed the standards for the employment of bankruptcy professionals. *In re Ramirez*, 633 B.R. 297, 306–07 (Bankr. W.D. Tex.

2021) (finding that every court, except one,[8] analyzing requests to grant retroactive approval of an employment application determined that *Acevedo* did not preclude such action); s*ee also In re Hunanyan*, 631 B.R. at 908 ("*Acevedo* does not change the existing authority of the court to approve employment that has commenced before the motion was brought"); *In re Mallinckrodt PL*C, 2022 WL 906462 at *6–*10 (same); *Hagler v. High Tension Ranch, LLC*, No. 3.20-CV-00564-GCM, 2021 WL 3622149, *4 (W.D.N.C. Aug. 16, 2021) (same); *In re Moore*, No. 6:21-bk-70299, 2021 WL 3777538, *5 (Bankr. W.D. Ark. Aug. 25, 2021) (same); *In re Miller*, 620 B.R. 637, 642 (Bankr. E.D. Cal. 2020) (same); *In re Mohiuddin*, 627 B.R. 875, 882 fn.5 (Bankr. S.D. Tex. 2021) (same).

In his initial appeal from the bankruptcy court to the District Court, Mr. David raised this same argument. The District Court, however, left the November 24, 2021 Order, which approved chapter 11 counsel's employment and fees in place in the initial appeal. (JA 245 fn.1). In doing so, the District Court stressed the considerable deference afforded to the bankruptcy court in considering employment applications under 11 U.S.C. § 327(a), except to the extent a legal error is committed.

[8] This single exception involved a failure to make appropriate conflict disclosures. *Ramirez*, 633 B.R. at 307 (citing *In re Grinding Specialists, LLC*, 625 B.R. 6, 15 (Bankr. D.S.C. 2021). Disclosures are not at issue here. (JA 153) ("[T]he same disclosures that would have been made for the Chapter 11 retention were already before the Court[.]").

The District Court did identify a legal error by the bankruptcy court in approving the chapter 11 trustee's counsel effective to a date during the chapter 13 phase of the case. But the District Court reiterated that this was the "only error" it identified and finding that it did not need to reach any of Mr. David's other arguments because his contentions were not "new arguments in support of his Motion to Reconsider." (JA 255 fn.4).

By re-raising the issue again in this appeal, Mr. David has not made any new argument. The District Court determined that the bankruptcy court properly considered those arguments at the November 12, 2021 hearing. But even if the issue were addressed by this Court, the consensus in the caselaw is that *Acevedo* does not present a legal barrier abrogating the standards applicable to employment applications. Bankruptcy court's retain discretion to consider applications to approve the employment of professionals after professional services have been rendered.

III. This Court May Also Affirm Because The Bankruptcy Code Does Not Require Duplicative Employment Applications For Previously Employed Counsel.

This Court may also affirm on the basis that the second application to employ counsel was unnecessary because OFP was properly employed from the entry of the November 20, 2018 order, which originally authorizing the employment of counsel for the trustee *and the bankruptcy estate* during the chapter 7 phase of the case. (JA 001-003).

In reviewing matters on appeal, this Court may affirm on any ground revealed in the record. *Adventure Communications, Inc. v. Kentucky Registry of Election Fin.*, 191 F.3d 429, 439 n. 9 (4th Cir. 1999) (citation omitted); *Okoro v. Wells Fargo Bank, N.A.*, 567 B.R. 267, 271 (D. Md. 2017).

OFP argued before the bankruptcy court that no additional employment applications needed to be filed for the firm because the bankruptcy court entered an order approving the employment of the firm as counsel for Mr. King and the bankruptcy estate while the case was pending in chapter 7. The bankruptcy court disagreed, reasoning that 11 U.S.C. § 348(e) terminates the employment of professionals employed by a trustee, and required the filing of a second employment application to re-employ the firm.[9]

The effect of 11 U.S.C. § 348(e) on professional applications and whether the retention is intended to continue post-conversion appears to be a matter of first impression among the bankruptcy courts. In interpretating a statute, the first rule of statutory construction is to examine the language of the statute itself. As the United States Supreme Court counseled, "[t]he task of resolving the dispute over [statutory interpretation] begins where all such inquiries must begin: with the language of the

[9] The bankruptcy court cited *In re Fontainebleau Las Vegas Holdings, LLC*, 574 B.R. 895 (Bankr. S.D. Fla. 2017). *Fontainebleau* involved an examiner who statutorily could not perform any post-conversion duties due to 11 U.S.C. § 327(f), and unlike Mr. King in this case, was not reappointed upon conversion. 574 B.R. at 901.

statute itself." *U.S. v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). "[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004).

The Bankruptcy Code does not expressly require attorneys, accountants, appraisers, auctioneers, or other professional persons whose employment has been approved by the bankruptcy court to re-apply for employment upon conversion of a bankruptcy case from one chapter to another. Bankruptcy Code §§ 327–333 addresses requirements of officers serving bankruptcy estates. The Bankruptcy Code addresses professional roles with precision, specifically naming the "trustee," "attorneys," "accountants," "appraisers," "auctioneers," "ombudsman" and "other professional persons" throughout these sections. *See* 11 U.S.C. §§ 327–331.

Bankruptcy Code section 348 does, however, address the effect of the conversion of a bankruptcy case to another chapter. This includes a provision addressing certain statutorily identified professionals, providing that conversion "terminates the service of any *trustee or examiner* that is serving in the case before such conversion." 11 U.S.C. § 348(e) (emphasis added). Section 348 does not specifically address the effect of conversion on professionals employed under section 330. The Bankruptcy Code's silence demonstrates that termination of a professional's employment upon conversion is not intended.

The legislation makes objective and rational sense because a trustee is not represented by counsel in his or her individual capacity, but rather in a fiduciary one: While attorneys are employed by a trustee, counsel's professional obligations are owed to the bankruptcy estate and the trustee currently acting for that estate. As a result, if a successor trustee is appointed, the currently employed estate professionals have a responsibility to serve that trustee should that successor trustee to retain them. Previously employed professionals do not need to reapply for employment just because the identity of the bankruptcy trustee changes. *See* The U.S. Dep't of Justice, Executive Office for United States Trustees, *Handbook for Chapter 7 Trustees*, Page 4-20 (Mar. 15, 2022)[10] (recognizing the need for a new retention application only "*in those instances* in which the successor trustee does not continue the employment of current professionals.") (emphasis added).

Congress's choice to designate certain types of professionals, namely trustees and examiners, for termination upon conversion is an intentional choice entitled to respect. Antonin Scalia & Bryan A. Gardner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS, 107-111 (West 2012) (discussing the Negative-Implication Cannon: The expression of one thing implies the exclusion of others). Congress clearly knew how to address bankruptcy professionals with clarity

[10] Available at https://tinyurl.com/yfjpdvh5 (last accessed November 21, 2023).

in drafting the Bankruptcy Code. Had Congress intended the conversion of a bankruptcy case to terminate the services of "attorneys" or all "professional persons," Congress would have used these terms specifically—as it did throughout Chapter 3 of the Bankruptcy Code when discussing officer employment and compensation.[11] *See* 11 U.S.C. §§ 327–331.

This construction of the statute avoids requiring unnecessary and costly applications that serve no purpose. Already employed professionals remain under a continuing duty to supplement their disclosures in the event any previously undisclosed post-employment connection arises. *In re Shelnut*, 577 B.R. 605, 609 (Bankr. S.D. Ga. 2017) (citations omitted). As a result, there is no additional benefit to requiring duplicative applications that increase legal fees at the expense of creditors. Absent clear statutory language, courts should avoid a construction of the bankruptcy code that results in the automatic termination of professional employment, which can have unanticipated consequences—for instance the loss of a realtor employed to complete a beneficial sale or a patient care ombudsman monitoring the quality of health care provided to a debtor's patients.

[11] Chapters 1 through 5 of the Bankruptcy Code are general provisions applicable to cases pending under the most common chapters. 11 U.S.C. § 103(a). Individual debtors receive substantive bankruptcy relief through the filing of a petition under three main chapters of the Bankruptcy Code: Chapter 7 (for liquidations); Chapter 11 (for reorganizations); or Chapter 13 (for payment plans of 3 to 5 years).

While this appeal can be resolved on other grounds, if this Court reaches the statutory issue, it should interpret Section 348(e)'s termination provision in accordance with the text of the statute to apply only to trustees and examiners, and hold that OFP satisfied the employment requirement by obtaining an order authorizing the firm to represent the bankruptcy estate and the trustee in response to the firm's original application.

CONCLUSION

For these reasons, Appellee, Donald F. King, Trustee, respectfully requests that this Court affirm the Final Order entered by the District Court on August 4, 2023.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 8015(a)(7)(B) because it contains 8167 words, excluding the parts of the brief exempted by Rule 8015(a)(7)(B)(iii).

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I HEREBY CERTIFY that on the 30th day of November 2023, a copy of the foregoing was served via electronic mail and first-class mail, postage prepaid, to:

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