

United States Bankruptcy Court
District of South Carolina

In re) Case No. 12-01220-W
The Cliffs Club & Hospitality) Chapter 11
Group, Inc., et al, d/b/a)
The Cliffs Golf & Country Club) Application to Employ John B Butler III
) P.A. As Local Counsel for Committee of
Debtor(s)) Unsecured Creditors **Nunc Pro Tunc**

Now comes John B Butler III, P.A. ("Applicant") in the above-captioned case, and asks this court to enter an order appointing him **Nunc Pro Tunc** as Local Counsel for Counsel to the Unsecured Creditors Committee ("Committee") and alleges as follows:

1. This Court has jurisdiction over this matter pursuant to 11 U.S.C. §§327(a) and 1103 and Fed. R. Bankr. P. 2014.

2. The Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code on February 28, 2012.

3. The Committee was appointed by the United States Trustee on March 7, 2012. The Committee met on March 7, 2012, and chose Jonathan B. Alter of Bingham McCutchen ("Lead Counsel") to be Lead Counsel. In light of Movant's qualifications, the Committee and Lead Counsel requested that Applicant serve as Local Counsel.

4. The professional services contemplated to be rendered by Applicant as requested by Lead Counsel and Committee include:

- (a) Rendering of legal advice to the Committee with respect to its duty and powers in this case, and especially assisting Lead Counsel and Committee with applicable Local Rules, Procedure and case law;
- (b) Assisting the Committee's investigation of the acts, conduct, assets, liabilities and financial condition of the Debtor, the operation of the Debtor's business and the desirability of the continuance of such business, and any other such matter relevant to the case or to the formulation of the Plan;
- (c) Assisting in formulation of a Plan, if necessary;
- (d) Assisting in requesting the appointment of a trustee or examiner under section 1104 of this title if advisable;

- (e) Performing any other such legal services as may be required and be in the best interest of the creditors.

5. Section 1103(b) addresses the requirement for counsel or accountant for an unsecured creditors committee stating:

An attorney or accountant employed to represent a committee appointed under section 1102 of this title may not, while employed by such committee, represent any other entity having an adverse interest in connection with the case. Representation of one or more creditors of the same class as represented by the committee shall not per se constitute the representation of an adverse interest.

With respect to the requirement of §1103 one Court stated:

This provision is different from section 327(a) because (unlike counsel for the debtor) it does not require that counsel to a committee be disinterested.

Section 1103(b) does, however, require that counsel for the committee not hold or represent an adverse interest in connection with the case. An adverse interest is "any economic interest that would tend to lessen the value of the bankruptcy estate or that would create either an actual or potential dispute in which the estate is a rival claimant."

In re eToys, Inc., 331 B.R. 176, 197 (Bankr. D. Del. 2005) quoting TWI Int'l, Inc. v. Vanguard Oil & Serv. Co., 162 B.R. 672, 674 (S.D.N.Y. 1994). Compare, In re Caldor, 193 B.R. 165, 170-171 (Bankr.S.D.N.Y. 1996)(Disinterestedness requirement of §327(a) did apply to unsecured creditors committee counsel.).

The 1984 Amendment to §1103 was specifically drafted to permit the professionals for the Official Unsecured Creditors Committee to **simultaneously represent** other creditors in the case if there is no actual conflict of interest. See, In re Rusty Jones, Inc., 107 B.R. 161, 163 (Bankr. N.D. Ill. 1989)(*"The amendment of 1103(b) permits a committee to employ an attorney or accountant, notwithstanding that attorney's representation of members of the committee in connection with the case, 'so long as any other party represented by such attorney or accountant in connection with the case does not have an adverse interest to the interest represented by the committee.'* Vol. 5 *Collier on Bankruptcy*, ¶ 1103.03 at 1103-8 (15th Ed.)). Although Section 1103(b) of the Bankruptcy Code no longer contains a per se prohibition against dual representation by an attorney for both individual creditors and a creditors committee, it does prohibit dual representation when there is an actual conflict of interest or where there is a likelihood of a conflict of interest.... A conflict of interest is defined as the representation by an attorney of two or more parties holding or claiming adverse interests."); Matter of Oliver's Stores, Inc., 79 B.R. 588, 594 (Bankr. D.N.J. 1987)(*"The effect of the 1984 Amendments was to weaken the absolute prohibition of simultaneous representation by counsel (1) for a*

creditors' committee and (2) for creditors in a matter adverse to the interest of other creditors in the case. However, the amendments did not alter the prohibition of counsel representing an individual creditor and a creditors' committee if the individual creditor hired such counsel to litigate issues potentially adverse to other committee members.").

The focus on the adverse interest inquiry is **the time during which the professional is employed by the committee**. See, In re Buran, 363 B.R. 358, 360 (Bankr. W.D.N.Y. 2007) ("Instead, section 1103(b) speaks only to adverse representation during the period of employment by a committee. Specifically, the statute directs that an attorney 'may not, **while employed by such committee**, represent any other entity having an adverse interest in connection with the case.' 11 U.S.C. § 1103(b)(emphasis added). By its language, therefore, section 1103(b) aims not to restrict the employment of committee counsel, but to limit the separate and prospective representation of individual creditors. Even in that context, the section advises that representation of specific unsecured creditors 'shall not per se constitute the representation of an adverse interest.'"); In re Nat. Century Fin. Enterprises, Inc., 298 B.R. 118, 123 (Bankr. S.D. Ohio 2003) ("In reviewing the facts of this case, 11 U.S.C. § 1103(b) is violated if Carlile represents both the Committee and another party, with an interest adverse to the committee, in matters related to the bankruptcy proceeding.... Section 1103(b) is not violated if Carlile represents an entity with an adverse interest in a matter unrelated to the National Century bankruptcy case or in a matter that predates its representation of the committee.... Based upon the facts presented, the Court finds that Section 1103(b) is not violated.").

Representation of individual unsecured creditors for a short period of time before moving to be retained as counsel for the unsecured creditors committee did not necessarily bar employment by the committee where the attorney intended to terminate representation of the individual creditors. In re Nat. Century Fin. Enterprises, Inc., *supra*.

Representation of an unofficial committee of creditors does not necessarily bar an attorney from later representing the Official Committee for that group of creditors. See, In re Lion Capital Group, 44 B.R. 684, 689 (Bankr. S.D.N.Y. 1984) ("It thus appears from the legislative history, from prior authority in this Court and from the amendment to § 1103(b), that Congress intended substance to prevail over form. Where the representation does not entail an actual or potential conflict of interests or present an appearance of impropriety, § 1103(b) is not to be interpreted to preclude a committee from engaging counsel of its choice and one in whom it has confidence will best serve the interests of the creditors represented by the

Committee.").

Even though §1103 does not require disinterestedness, Applicant is a "disinterested party" under 11 U.S.C. §101(14) and §1103(b). Furthermore Applicant represents or holds no interest adverse to the interest of the Committee with respect to the matters in this case in which he is to be employed. To the best of Applicant's knowledge any possible issues with regard to adverse interests or connections to related parties are disclosed in the Affidavit filed simultaneously herewith.

6. To the best of the Applicant's knowledge all the Applicant's connections with the Debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States Trustee, or any other person employed in the office of the United States Trustee are set forth herein and in the Affidavit filed simultaneously herein.

7. Applicant is informed and believes that it is in the best interest of the estate to employ Applicant as Local Counsel for the Committee.

8. Applicant has agreed to represent the Committee for compensation to be subsequently allowed and approved by the Court in accordance with 11 U.S.C. §328(a) and other applicable provisions of the Bankruptcy Code and applicable Local Rules, Operating Orders or procedure. No Committee Member has agreed to pay Applicant for any fees or expenses not awarded by this Court.

9. Applicant filed this Application as quickly as possible after Committee sought to hire him but due to the press and urgency of events, and the need to wait on Lead Counsel's Conflict Check, Applicant had to render services to the Committee before his appointment. Applicant has not made a habit of seeking retention *nunc pro tunc*. In this District the following factors have been used to determine if *nunc pro tunc* employment of a professional is warranted.

- a. Debtor has expressly contracted for professional services;
- b. Party for whom work was done must approve *nunc pro tunc* order;
- c. Applicant must provide notice to creditors and parties in interest;
- d. No creditor or party in interest offers reasonable objection;
- e. Professional must satisfy all criteria of §327 and B.R. 2014;
- f. Work was performed properly and efficiently;
- g. No actual or potential prejudice to estate;
- h. Applicant's failure to seek pre-employment approval is satisfactorily explained;

I. No pattern of inattention or negligence in soliciting judicial approval.

See, In re Anderson Place Associates, C. A. 8:91-1889-20 (D.S.C. 1/31/91) aff'd 92-1288 (4th Cir. 5/24/93)(unpub.); In re Overstreet, 07-05397-W (Bankr. D.S.C. 3/8/10)(JW).

Applicant is informed and believes he meets the above requirements for *nunc pro tunc* appointment.

WHEREFORE, the Committee respectfully requests that the Court allow its Application to Employ John B Butler III, P.A. as ***Nunc Pro Tunc*** Local Counsel to represent it in this case under Chapter 11 of the Bankruptcy Code and such other and further relief as the Court deems just and proper.

March 16, 2012

/s/ John B Butler III

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ID # 1632
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United States Bankruptcy Court
District of South Carolina

In re) Case No. 12-01220-W
The Cliffs Club &) Chapter 11
Hospitality Group, Inc., et)
al, d/b/a)
The Cliffs Golf & Country) **Affidavit of Disinterestedness**
Club
Debtor(s))

I, John B Butler III, do hereby state and certify as follows:

1. That I am an attorney with the law firm of John B Butler III, P.A., of Columbia, South Carolina.
2. That I am a duly admitted Member of the Bar of this State and am duly admitted to practice in this Court as an attorney for the Committee.
3. That I am experienced in matters of this character, am duly qualified to represent the Committee in this proceeding, am familiar with the case and the facts and circumstances surrounding the filing of the.
4. That, neither I nor the law firm of John B Butler III, P.A. have any adverse interest herein and the firm is a disinterested party within the meaning of 11 U.S.C. §101(14).
5. Except as stated below, John B Butler III, P.A. currently represents no party in this action and has no connections with the Debtor, creditors, any other party in interest, the respective attorneys and accountants, the Office of the United States Trustee, nor any person employed by the Office of the United States Trustee.
 - John B Butler served as a Law Clerk to the Honorable J. Bratton Davis, United States Bankruptcy Judge, from 1981-1984.
 - John B Butler III served as a Standing Chapter 13 Trustee from 1984-1999.
 - In 2001, John B Butler III served as Local Counsel for Wachovia Bank (predecessor in interest to Well Fargo) in several small consumer cases but that John B Butler III does not represent Wells Fargo in any matter at the present time.
 - On September 29, 2011, at the request of a local non-bankruptcy attorney, John B Butler III did converse on the telephone for approximately ten minute with David Robertson, an employee of the Debtor, though in what capacity I am not sure regarding Chapter 11 procedure in general and wage claims.
 - On February 24, 2012, I was contacted by Jonathan B. Alter about serving as Local Counsel for the Ad Hoc Members Committee and did in fact serve in that capacity from February 24, 2012, until March 7, 2012, when I was

approached about serving as Local Counsel for the Unsecured Creditors Committee.

- I submitted for payment a bill in the amount of \$5,699.20 for services rendered to the Ad Hoc Members Committee.
- I am proposing to bill at the hourly rate of \$400.00 subject to court approval

6. John B Butler III, P.A., will provide the following professional services to the Committee:

- (a) Rendering of legal advice to the Committee with respect to its duty and powers in this case and especially assisting Lead Counsel and Committee with applicable Local Rules, Procedure and case law;
- (b) Assisting the Committee's investigation of the acts, conduct, assets, liabilities and financial condition of the Debtor, the operation of the Debtor's business and the desirability of the continuance of such business, and any other such matter relevant to the case or to the formulation of the Plan;
- (c) Assisting in formulation of a Plan, if necessary;
- (d) Assist in requesting the appointment of a trustee or examiner under section 1104 of this title if advisable;
- (e) Performing any other such legal services as may be required and be in the best interest of the creditors.

/s/ John B Butler III
John B Butler III

Sworn to before me this
March 16, 2012

/s/ Allen B. Wise (LS)
Notary Public for South Carolina
My Commission Expires:1/18/16

**U.S. BANKRUPTCY COURT
District of South Carolina**

Case Number:12-01220-W

Order Granting Application for Employment Nunc Pro Tunc

The relief set forth on the following pages, for a total of 3 pages including this page, is hereby
ORDERED.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:) CASE NUMBER: 12-01220-W
The Cliffs Club & Hospitality) CHAPTER 11
Group, Inc., et al, d/b/a)
The Cliffs Golf & Country Club) ORDER GRANTING APPLICATION
Debtor (s)) TO EMPLOY JOHN B BUTLER III
P.A. **NUNC PRO TUNC**

Before the court is the Application ("Application") of John B Butler III, P.A. ("Applicant") to be employed *Nunc Pro Tunc* as Local Counsel for the Unsecured Creditors Committee ("Committee").

It appears that the Unsecured Creditors Committee and its Lead Counsel have requested that Applicant be retained as Local Counsel for the Committee.

It also appears as if *Nunc Pro Tunc* employment of Applicant is warranted under the nine part test set forth in In re Anderson Place Associates, C. A. 8:91-1889-20 (D.S.C. 1/31/91) aff'd 92-1288 (4th Cir. 5/24/93)(unpub.).

Based on Applicant's Application and Affidavit of Disinterestedness, it appears at this time as if Applicant is a disinterested party as defined by under 11 U.S.C. §101(14) and §1103(b) and represents or holds no interest adverse to the interest of the estate with respect to the matters in which he is to be employed.

Applicant has agreed to represent the Committee for the compensation subsequently allowed and approved by this Court and has asserted that no Committee Member has agreed to pay Applicant for any fees or expenses not awarded by this Court.

Applicant shall be compensated in accordance with 11 U.S.C. §§ 330, 331 and such Federal Bankruptcy Rules, Local Rules or Operating Orders as may be applicable. Notwithstanding any term of the Application or Order to the contrary the compensation of Applicant is subject to review by the Court pursuant to 11 U.S.C. §330 and is not authorized pursuant 11 U.S.C. §328.

It is therefore ordered that the Unsecured Creditors Committee be authorized to employ John B Butler III, P.A. *Nunc Pro Tunc* to March 7, 2012, as Local Counsel on the terms set forth above.

**U.S. BANKRUPTCY COURT
District of South Carolina**

Case Number: **07-05397-jw**

ORDER ON APPLICATION FOR APPROVAL OF EMPLOYMENT NUNC PRO TUNC

The relief set forth on the following pages, for a total of 4 pages including this page, is hereby ORDERED.

**FILED BY THE COURT
03/05/2010**



Entered: 03/08/2010

John E. Waite

Chief US Bankruptcy Court Judge
District of South Carolina

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA**

IN RE:

Bryan Paul Overstreet and Jessica Padgett
Overstreet,

Debtor(s).

C/A No. 07-05397-JW

Chapter 13

ORDER

This matter comes before the Court upon the Application for Approval of Employment Nunc Pro Tunc (“Employment Application”) and Application to Approve Settlement Nunc Pro Tunc (“Settlement Application”) filed by Debtors Bryan Paul Overstreet and Jessica Padgett Overstreet (“Mrs. Overstreet”). Although the Trustee filed objections to both Applications, it appears that the objection to the Settlement Application was resolved by a consent order settling a related objection to exemption filed by the Trustee. However, because the issue of nunc pro tunc employment arises frequently, the Court wishes to address the issue for the edification of the bar.

In the Employment Application, Debtors state that Mrs. Overstreet was involved in a motor vehicle accident on September 5, 2007, approximately one month prior to the Debtors’ October 2, 2007 filing of their Chapter 13 petition. According to the Employment Application and attached affidavits, Debtors hired attorneys Gary Ling and Dusty Rhoades on September 18, 2007, to represent them in the personal injury case on a contingency fee basis at the rate of 33% of the proposed settlement agreement. Debtors did not disclose the lawsuit or cause of action in their original schedules and statement of financial affairs nor claim an exemption in any recovery therefrom. Over two years later, Debtors now request authorization, nunc pro tunc, to employ the attorneys, which is an issue raised in connection with the settlement. To explain their failure

to disclose, Debtors state that they did not believe they would receive any recovery from the accident.

11 U.S.C. §327 and Fed. R. Bankr. P. 2014 set forth rules and procedures for the employment of attorneys or other professional persons, and provide that “the trustee, with the court’s approval” may employ such professionals if they “do not hold or represent an interest adverse to the estate” and are “disinterested persons, to represent or assist the trustee in carrying out the trustee’s duties under this title.” § 327(a). Although the U.S. Bankruptcy Code and Federal Rules of Bankruptcy are silent on the issue of nunc pro tunc employment of professionals, it is well recognized, including by this Court, that such employment may be authorized upon a proper showing. See In re TJN, Inc., 194 B.R. 396, 397-99 (Bankr. D.S.C. 1996) (citing In re Twinton Props. P’ship, 27 B.R. 817, 819-20 (Bankr. M.D. Tenn. 1983)). However, the procedure for approving the employment of professionals in a Chapter 13 case is less clear.

Several courts have indicated that § 327 is not applicable to the employment of attorneys or other professionals by a Chapter 13 debtor, reasoning that the statutory language is limited to a trustee or Chapter 11 debtor-in-possession. In re Tirado, 329 B.R. 244, 248-50 (Bankr. E.D. Wis. 2005); see also In re Powell, 314 B.R. 567, 569-70 (Bankr. N.D. Tex. 2004); In re Harris, 298 B.R. 319, 320-21 (Bankr. E.D. Tenn. 2003); In re Dugger, No. 97-30410, 1999 WL 33486706, at *4 (Bankr. D. Idaho Mar. 5, 1999). However, other courts have reached the contrary conclusion on the basis that if the statute was intended to apply only to cases other than Chapter 13, it would have clearly provided for that, and that there would be no requirement for special counsel to be disinterested or not hold an interest adverse to the debtor absent § 327. Price v. Crawford (In re Price), Bankr. No. 05-04807-TOM-13, Adv. No. 07-00017, 2007 WL 1125639, at *3-6 (Bankr. N.D. Ala. Apr. 16, 2007); see also In re Davis, No. 07-51337-NPO,

2009 WL 4856199, at *4 (Bankr. S.D. Miss. Dec. 9, 2009); In re Glover, No. 01-43454, 2003 WL 23811474, at *3 (Bankr. S.D. Ga. June 13, 2003).

In the present case, there is no dispute that Debtors employed the special counsel pre-petition in a customary transaction for representation in an automobile accident. No party objects to the compensation proposed nor to a nunc pro tunc approval of the pre-petition employment.¹ The Court finds that in such cases where a Chapter 13 debtor employs a professional pre-petition, the debtor need not obtain approval from the Court, even if the professional remains employed and continues to work on the matter post-petition. The Court notes, however, that pursuant to § 329 and § 330(a)(4)(B), the Court's approval of compensation to be awarded to the professional may be required. Furthermore, at the outset of representing a Chapter 13 debtor, bankruptcy counsel should inquire specifically about the involvement of special counsel or other professionals, and any lawsuits or other pending legal matters should always be disclosed on the debtor's schedules with any exemption timely claimed.

Accordingly, the Court grants the Applications, but concludes that a Chapter 13 debtor need not seek the Court's approval nunc pro tunc for an employment application under similar circumstances in the future.²

AND IT IS SO ORDERED.

Columbia, South Carolina
March 5, 2010

¹ However, the standards for nunc pro tunc approval require that a hearing be held and proof offered.

² Professionals employed post-petition in a Chapter 13 case may ask for Court approval of employment as means of advising the Court, trustee, and parties of the employment, but any such requests should be timely submitted.