Docket #1261 Date Filed: 06/10/2025

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

In re:	§	**Chapter 11**
RHODIUM ENCORE LLC, *et al.*	§	**Case No. 24-90448 (ARP)**
Debtors.	§	**(Jointly Administered)**

DEBTORS' AND LKC'S POST-HEARING MEMORANDUM IN SUPPORT OF APPLICATION FOR UPDATED ORDER AUTHORIZING RETENTION OF LKC
(Relates to Docket Nos. 173, 263, 835, 891, 1111, & 1230)

The Court should exercise its discretion to grant Debtors' application. The AHG's argument to the contrary is wrong on the law and fundamentally unfair and inequitable.

The hearing confirmed that the key facts are essentially undisputed:

- In the original LKC application, Debtors repeatedly disclosed that LKC's compensation included a contingency fee based on the outcome of the Whinstone litigation.
- LKC proposed disclosing the specific details of that fee, but those details were deleted due to Debtors' concern that disclosure would disadvantage them in the Whinstone litigation.
- No one objected to the retention or sought clarification of the contingency fee. Six months later, after LKC successfully enriched the estate, the AHG belatedly raised a concern, and Debtors promptly disclosed the details and sought an updated order.
- The revised March 2025 engagement letter makes no substantive change to the success fee agreed upon in May 2023 and re-affirmed in the September 2024 engagement letter. *See* ECF Nos. 1222-3, 1222-2, 1121-5. It clarifies that the contingency fee is subject to bankruptcy court approval. As Mr. Topping testified, the parties' intent remained the same. *Cf. Anglo-Dutch Petroleum International, Inc. v. Greenberg Peden, P.C.,* 352 S.W. 3d 445, 451 (Tex. 2011, reh'g denied) (under Texas law, construing "contract between client and lawyer as a reasonable person in the circumstances of the client would have construed it").

Even if the original application or order did not adequately address the contingency, this Court has, and should exercise, its broad discretion to amend it retroactively. At a minimum, the Court can and should clarify that its original order permits the contingency fee.

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I. B.R. 2014 permits retroactive authorization of employment.[1]

Both the Fifth Circuit and Bankruptcy Local Rule 2014-1 recognize this Court's authority to enter retroactively effective employment applications.[2] *See In re Triangle Chems., Inc.*, 697 F.2d 1280, 1289 (5th Cir. 1983). A bankruptcy court "retains equitable power in the exercise of its sound discretion, under exceptional circumstances ... [and] upon a proper showing" to retroactively approve an application for employment. *Id.*; *In re Ramirez*, 633 B.R. 297, 305–09 (Bankr. W.D. Tex. 2021). The Fifth Circuit has not imposed limits or mandatory tests, and courts in this and other jurisdictions emphasize the equitable nature of this relief. *See, e.g.*, *In re Office Products of Am., Inc*., 136 B.R. 675, 682–84 (Bankr. W.D. Tex. 1992) (summarizing various approaches); *In re Hill*, 2011 WL 6936357, at *11 (Bankr. S.D. Tex. Dec. 30, 2011). Further, the fact that courts retroactively approve retentions where there was *no* timely disclosure confirms that the Court has ample authority to do so here, where there was significant disclosure and no objection.

The pertinent factors uniformly favor approval. *See, e.g.*, *Ramirez*, 633 B.R. at 308; *In re Inter Urban Broad. of St. Louis, Inc*., 174 B.R. 441, 447 (E.D. La. 1994) (granting nunc pro tunc

[1] The AHG incorrectly assumes the original order must be replaced by an entirely new retention order for which retroactive relief would be required. Because an order authorizing employment is interlocutory, *see In re Smyth*, 207 F.3d 758, 763 (5th Cir. 2000), a bankruptcy court may revise it "for any reason it deems sufficient, even in the absence of new evidence or an intervening change in or clarification of the substantive law." *In re Fieldwood Energy LLC*, 637 B.R. 712, 715–16 (Bankr. S.D. Tex. 2022) (cleaned up). Indeed, section 330 is inherently retroactive since it tasks courts with assessing fees for services previously rendered.

[2] Collier deems the common description of retroactive retention orders as "nunc pro tunc" orders a "misnomer" based on the Supreme Court's discussion of that term in *Roman Cath. Archdiocese of San Juan, Puerto Rico v. Acevedo Feliciano*, 589 U.S. 57, 65 (2020). *See* Collier ¶ 2014.08 n.2. But the "nunc pro tunc" designation may remain apt in these circumstances, "when the court took some action to authorize the employment." Norton § 30.9. The label is in any event not dispositive; the key point is that bankruptcy courts have discretion to retroactively approve retentions. *See, e.g.*, *In re Ramirez*, 633 B.R. 297, 306-07 (Bankr. W.D. Tex. 2021) (confirming that retroactive relief remains available post-*Acevedo*).

application when broker had acted in good faith and in dependence on debtor's counsel); *Luster v. Thomas*, No. 15-0402, 2016 WL 4521663, at *2 (W.D. La. Aug. 26, 2016).

One factor is whether the retention would have been granted had it been timely requested, or, put differently, whether retroactive approval is prejudicial. *E.g.*, Collier on Bankruptcy ¶ 327.03[3]; Norton Bankr. L. & Prac. § 30.9 & nn. 8, 18. Here, had the original application disclosed all of the specific details of the success fees, there is little doubt it would have been approved. Again, the existence of a contingency was disclosed, and no one objected or raised questions. And the success fees—particularly from an ex ante perspective—are reasonable given the hourly discounts and risk of no recovery at all. The fees were also agreed to 15 months pre-petition, ECF No. 1222-2, and LKC had intimate knowledge of the case and was critical to the Debtors' survival.

Equally important—and undisputed—is that LKC "performed valuable services for the debtor[s'] estate that have increased the common funds available for distribution to the creditors." *Triangle Chemicals*, 697 F.2d at 1289. LKC's and Stris's successful representation led directly to the $185 million settlement with Whinstone. LKC's services indisputably "benefitted the bankrupt estate in a significant manner." *In re Atkins*, 69 F.3d 970, 974 (9th Cir. 1995) (cleaned up).

Courts also give substantial weight to a professional's reasonable reliance on a third-party, including following the debtor's instruction or bankruptcy counsel's advice. Norton § 30:9 (orders generally approved "where the professional was reasonably relying on a third party to present the application"); *see, e.g.*, *Atkins*, 69 F.3d at 974 n.4, 977; *In re Freehold Music Ctr., Inc.*, 49 B.R. 293, 294, 296 (Bankr. D.N.J. 1985); *In re Team Fin., Inc.*, 2010 WL 2836877, at *3 (Bankr. D. Kan. July 16, 2010); *In re Wichita River Oil Corp.*, 214 B.R. 308, 309 (E.D. La. 1997); *In re El Paso Refinery, L.P.*, 155 B.R. 418, 421 (Bankr. W.D. Tex. 1993); *In re Saybrook Mfg. Co., Inc.*, 108 B.R. 366, 369 (Bankr. M.D. Ga. 1989). LKC did not make the decision to omit the specifics

of the success fee, and it would be inequitable and contrary to the strong weight of authority to punish LKC for that decision.

Further, once the AHG belatedly raised a question—six months in—Debtors and LKC promptly made additional disclosure and sought relief. That weighs in favor of approval. *See, e.g.*, *In re Cheeseman*, 2025 WL 777106, at *5 (Bankr. D. Vt. Mar. 10, 2025); *accord Pioneer Inv. Services Co. v. Brunswick Assocs.*, 507 U.S. 380, 388-89 (1993) (interpreting excusable neglect to "flexibl[y]" include, within court's "broad equitable powers," any manner of "inadvertence, mistake, or carelessness" as may be "equitable"); *see also In re Miller*, 620 B.R. 637, 644 (Bankr. E.D. Cal. 2020) (granting application after balancing success of achieving a full pay case against the excusable neglect of a yearlong delay in filing a retention application). It is of no significance that the purported mistake concerns what was permissible under the law (as opposed to, say, as an inadvertent deletion or other oversight). *Triangle Chemicals*, 697 F.2d at 1282 (finding authority for retroactive retention where "no court approval was obtained nor other formality complied with at the time, because of the attorney's *misunderstanding of the law*" (emphasis added)).

Indeed, it would be inequitable and contrary to the caselaw to put the Debtors and LKC in a *worse* position for having tried but, in the belatedly expressed view of certain stakeholders, having allegedly made the disclosure incorrectly. Courts regularly use their discretion to approve retroactive retention orders where *no* disclosure was made; the Debtors' repeated disclosure of the existence of the contingency fee—which indisputably would have allowed stakeholders to make further inquiry if they had any concern—should weigh strongly in favor of granting retroactive approval here. *See In re EWI, Inc.*, 208 B.R. 885, 897 (N.D. Ohio 1997) (that "the court and the parties were put on notice of the [relevant] activities," even just through a prior fee application, counseled in favor of retroactive approval); Norton § 30.9 n.8 (citing *EWI*).

Moreover, the relief the AHG seeks—depriving LKC of any contingency fee—makes no sense: "It would be inequitable in the extreme to use a principle intended to protect creditors to create a windfall for the very persons who entered into the agreement to pay compensation and who have received the benefit of that agreement." *Office Products*, 136 B.R. at 683–84 (cleaned up); *accord In re Martin*, 102 B.R. 653, 658 (Bankr. W.D. Tenn. 1989) (courts determining retroactive relief should consider whether denial would result in a windfall to the estate).

The Court should reject the AHG's improperly "constricted view of [the Court's] equitable powers," *Wichita River*, 214 B.R. at 310, and exercise its broad discretion to enter a retroactive order updating LKC's retention to expressly include the disclosed success fee.[3]

II. In the alternative, the Court should clarify that its October 4, 2024 order approving LKC's retention allows LKC to seek a contingency fee subject to Court approval.

The Court's October 4, 2024 order authorized Debtors to employ LKC "under a general retainer in accordance with Lehotsky Keller Cohn LLP's normal hourly rates and disbursement policies, *as contemplated by the Application*." ECF No. 263, at 2-3 (emphasis added). That original application disclosed a "contingent fee depending on the outcome of litigation." ECF No. 173, ¶ 26. Accordingly, an alternative path to resolving this dispute is for the Court simply to clarify that its original order should be read as authorizing LKC to seek a contingency fee, consistent with the terms of the parties' engagement letters. It is well-established that the Court has "inherent authority

[3] The Court should approve the March 2025 engagement letter, which made "mere clarifying" changes that conform to the parties' intent. Doing so would make the bankruptcy court approval process express and potentially minimize pointless disputes. For example, the AHG apparently contends that the September 2024 letter does not allow for the $600,000 success fee even though this Court rejected Whinstone's arguments for termination and upheld Debtors' "interpretation" of all the "contractual provisions" at issue in "the Matter." ECF No. 1121-05. If the Court disagrees regarding the March 2025 letter, Debtors ask that the Court enter an order approving LKC's retention based on the September 2024 engagement letter, which is the letter that the AHG claims should have been filed with the original retention application.

to interpret and clarify its prior orders," and thus "to modify" the LKC retention. *In re Nat'l Events Holdings, LLC*, No. 17-11556, 2025 WL 480800, at *6 (Bankr. S.D.N.Y. Feb. 12, 2025) (cleaned up); *see In re Schlomer*, No. 24-10999, 2025 WL 553042, at *6 (Bankr. W.D. Tex. Feb. 19, 2025); *see also supra* note 1.

The AHG and DLT say that the original application was inadequate. *E.g.*, ECF No. 891 at 2-3. The Court should, however, reject these untimely objections, which were not made before the Court approved LKC's retention or within any reasonable time thereafter. The AHG was monitoring this case in September 2024, ECF No. 1113-1, and raised questions about another retention application in early October, ECF No. 1113-3 at 3-6. But the AHG said nothing about LKC's retention or its subsequent fee statements until the eve of mediation, *after* LKC provided discounts and achieved an exceptional result for the Debtors.

The AHG's position is a "gotcha"— waiting months to raise a concern during which the estate and all stakeholders reaped benefits from LKC's work, then claiming that no amendment is possible and no contingency fee can be awarded. The Court should not accept that unfair, unsupported, and inequitable result. Thus, if the Court declines to issue a retroactive order, it should clarify that its original order allows LKC to request a contingency fee consistent with its engagement letters and subject to bankruptcy court approval.

CONCLUSION

Debtors and LKC ask that the Court grant the application and either (1) retroactively amend LKC's retention consistent with the March 2025 engagement letter (or at least the September 2024 engagement letter); or (2) clarify that its October 4, 2024 order authorizes LKC to seek a contingent fee consistent with the parties' engagement letters and subject to court approval.

Dated: June 10, 2025

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Certificate of Service

I, Bridget C. Asay, hereby certify that on the 10th day of June, 2025, a copy of the foregoing document was served by the Electronic Case Filing System for the United States Bankruptcy Court for the Southern District of Texas.

/s/ Bridget C. Asay
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