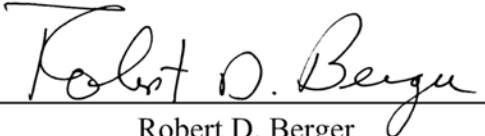


The relief described hereinbelow is **SO ORDERED**.

SIGNED this 14th day of December, 2020.




Robert D. Berger
United States Bankruptcy Judge

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

In re:

KENT LINDEMUTH,

Debtor.

Case No. 12-23060

Chapter 11

**ORDER DENYING APPLICATIONS FOR APPROVAL OF
EMPLOYMENT UNDER § 327 AND COMPENSATION UNDER § 330**

This matter comes before the Court on (1) debtor Kent Lindemuth's application to employ the Skepnek Law Firm and Fagan & Emert, LLC (collectively, "Skepnek"), as attorneys under 11 U.S.C. § 327(e) and (2) Skepnek's application for compensation under 11 U.S.C. § 330(a).¹ Creditors Landmark National Bank and

¹ ECF 403 (application to employ); ECF 405 (application for compensation). All statutory references in this order are to Title 11, United States Code (the "Bankruptcy Code") unless otherwise indicated.

Denison State Bank, interested party Shannon Mesker (as trustee for the Vikki Lindemuth Irrevocable Trust), financial advisor Jim Lloyd, and the United States Trustee all object to the applications.² For the reasons that follow, the applications will be denied.

Kent Lindemuth (“Lindemuth”), along with five of his companies and his wife Vikki Lindemuth (“Vikki”), filed for Chapter 11 bankruptcy in 2012.³ The parties’ joint Chapter 11 plans were confirmed in 2015, and their cases were closed later that year pursuant to [11 U.S.C. § 350\(a\)](#). Under normal circumstances, Lindemuth’s individual bankruptcy case would have remained closed until he completed his plan payments and received a discharge. However, in 2016, Lindemuth was indicted in federal district court on 103 counts of criminal bankruptcy fraud arising out of allegations that he bought 103 firearms with undisclosed assets before confirmation of his Chapter 11 plan. The following year, the United States Trustee (“UST”) moved to reopen Lindemuth’s individual bankruptcy case under § 350(b), citing the need to administer 2,166 previously-undisclosed firearms worth \$1.4 million. This Court granted the UST’s motion and, on July 10, 2017, appointed Bruce Strauss as Chapter 11 trustee for Lindemuth’s post-confirmation bankruptcy estate under § 1104.

In October 2017, Lindemuth moved to employ Skepnek under § 327 to

² ECF 409, 410, 411, 412, 413.

³ The five companies are Lindemuth, Inc. (Case No. 12-23055); K. Douglas, Inc. (Case No. 12-23056); KDL, Inc. (Case No. 12-23057); Bellairre Shopping Center, Inc. (Case No. 12-23058); and Lindy’s, Inc. (Case No. 12-23059). Kent and Vikki Lindemuth filed together as individuals in this case, 12-23060.

represent Lindemuth in his criminal case. This Court denied the motion, reasoning that only the Chapter 11 trustee—Strauss—could employ professionals under § 327.

After Lindemuth moved to reconsider, the Court ruled:

Section 330(a)(1) of the Bankruptcy Code “does not authorize compensation awards to debtors’ attorneys from estate fund, unless they are employed as authorized by § 327.” *Lamie v. U.S. Trustee*, [540 U.S. 526, 538](#) (2004). While § 327 authorizes the trustee to employ an attorney, a debtor who is no longer in possession may not do so. Therefore, this Court simply cannot authorize attorney compensation from estate funds under § 330 unless the attorney is first employed by the trustee pursuant to § 327. *See Lamie*, [540 U.S. at 538-39](#). In asking this Court to authorize attorney compensation from estate funds when those attorneys have not been employed by Mr. Strauss, Mr. Lindemuth asks for that which is specifically prohibited by the Bankruptcy Code—the impossible.

Mr. Lindemuth does not contest this issue in his motion to reconsider. Rather, he argues that certain assets are not property of the estate, and asks the Court for permission to use those assets to pay his attorneys. However, the sole issue currently before the Court is not what *constitutes* property of the estate (see [11 U.S.C. §§ 541, 1115](#)) but whether the Court can authorize the employment of attorneys to be paid *with* property of the estate (see *Lamie* and [11 U.S.C. §§ 327, 330](#)). Because Mr. Lindemuth has provided no reason to disturb the Court’s prior ruling on that issue, and based on the Court’s findings and conclusions at the October 19, 2017 and February 15, 2018 hearings, the motion for reconsideration will be denied. Mr. Lindemuth may hire whomever he wishes, but these professionals will not be employed by the bankruptcy estate and cannot be paid from estate funds unless they are employed by Mr. Strauss pursuant to § 327.

Although not employed by Lindemuth’s bankruptcy estate, Skepnek nevertheless represented Lindemuth at a jury trial in December 2017 and a bench trial in April

2018. Lindemuth was acquitted on all counts. In January 2019, this Court suspended appointment of the Chapter 11 trustee and restored Lindemuth's status to debtor-in-possession on the condition that Lindemuth pay the roughly \$300,000 remaining general unsecured claims in his case, which Lindemuth appears to have done.

On July 1, 2020, Lindemuth filed a new application to employ Skepnek under § 327, this time *post facto*. That same day, Skepnek filed an application for compensation under § 330, seeking fees and expenses totaling \$397,555.60 for the period June 1, 2016 through June 30, 2020. This Court is now faced with two questions: first, whether Lindemuth can appoint criminal attorneys, *post facto*, to be paid by the bankruptcy estate for the time in which Lindemuth was a debtor-in-possession (June 2016-July 2017 and January 2019-June 2020); and second, whether Lindemuth can appoint criminal attorneys, *post facto*, to be paid by the bankruptcy estate for the time in which Strauss served as trustee of his Chapter 11 estate (July 2017-January 2019).

In the Tenth Circuit, “a bankruptcy court may approve an attorney’s employment *post facto*, thereby entitling him to seek fees for work performed prior to approval.” *Schupbach Invs., L.L.C. v. Rose Hill Bank (In re Schupbach)*, [808 F.3d 1215, 1220](#) (10th Cir. 2015). However, “retroactive approval of an attorney’s employment ‘is only appropriate in the most extraordinary circumstances’ . . . [;] ‘simple neglect will not justify nunc pro tunc approval.’” *Id.* (quoting *Land v. First Nat’l Bank of Alamosa (In re Land)*, [233 F.3d 1258, 1267-68](#) (10th Cir. 1991)). Here,

because Lindemuth does not argue that any such “extraordinary circumstances” exist, this Court must deny his *post facto* application to employ Skepnek—both for the time in which Lindemuth was a debtor-in-possession and the time in which Strauss served as trustee of Lindemuth’s Chapter 11 estate.

Lindemuth’s application faces an additional obstacle for the time in which Strauss served as Chapter 11 trustee. As this Court has previously stated, Strauss was the only person with authority to employ an attorney under § 327 during that time. Therefore, Lindemuth cannot now employ Skepnek for that time, *post facto*, without a corresponding *nunc pro tunc* order suspending Strauss’s employment as trustee during that time. However, as a recent Supreme Court decision makes clear, this Court lacks the authority to do so. “[N]unc pro tunc orders are not some Orwellian vehicle for revisionist history—creating ‘facts’ that never occurred in fact. Put plainly, the court cannot make the record what it is not.” *Roman Catholic Archdiocese of San Juan v. Feliciano*, [140 S. Ct. 696, 701](#) (2020) (citations omitted). Because Lindemuth was not a debtor-in-possession during the time Strauss served as trustee of his Chapter 11 estate, and because this Court cannot enter a *nunc pro tunc* order suspending Strauss’s employment during that time, this Court must deny Lindemuth’s *post facto* application to employ Skepnek during that time.

For these reasons, Lindemuth’s *post facto* application to employ Skepnek under § 327 is hereby denied. Skepnek’s application for compensation under § 330 is thus denied as well.

IT IS SO ORDERED.

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