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NOT FOR PUBLICATION

SUSAN M. SPRAUL, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re:	)	BAP No.	CC-13-1252-TaDKi
	)		
MALCOLM D. OWENS,	)	Bk. No.	13-14740-WJ
	)		
Debtor.	)		
	)		
MALCOLM D. OWENS,	)		
	)		
Appellant,	)		
	)		
v.	)	<b>MEMORANDUM*</b>	
	)		
UNITED STATES TRUSTEE,	)		
	)		
Appellee.	)		

Argued and Submitted on June 26, 2014  
at Pasadena, California

Filed - August 6, 2014

Appeal from the United States Bankruptcy Court  
for the Central District of California

Honorable Wayne E. Johnson, Bankruptcy Judge, Presiding

Appearances: David Akindede Akintimoye for Appellant Malcolm D. Owens; Noah M. Schottenstein of the Executive Office for U.S. Trustees for Appellee United States Trustee.

Before: TAYLOR, DUNN, and KIRSCHER, Bankruptcy Judges.

\* This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

1 Debtor Malcolm Owens retained David Akintimoye as bankruptcy  
2 counsel in a chapter 11<sup>1</sup> case that culminated in case dismissal.  
3 Debtor filed a second chapter 11 case and again sought court  
4 approval of Akintimoye's employment. The bankruptcy court denied  
5 the employment application without prejudice; Akintimoye,  
6 facially on behalf of Debtor, appealed.

7 We determine that the bankruptcy court did not abuse its  
8 discretion in denying the employment application without  
9 prejudice; we, thus, AFFIRM.

#### 10 **FACTS**

11 The Debtor filed a chapter 11 bankruptcy petition; it was  
12 his second chapter 11 case in approximately eight months.<sup>2</sup> The  
13 Debtor previously retained Akintimoye as counsel in his first  
14 case. In his second case, he again moved for an order approving  
15 Akintimoye's employment. In support of the employment  
16 application, he submitted Akintimoye's declaration and statement  
17 of disinterestedness.

18 The United States Trustee ("UST") objected, arguing that  
19 Akintimoye was not disinterested as he appeared to hold a claim  
20 against the Debtor for unpaid legal fees owing from the first  
21 case. The UST also asserted that the oral retention agreement  
22 between the parties precluded approval of the employment based on  
23 § 528 and § 526 and that notice of the application failed to

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24  
25 <sup>1</sup> Unless otherwise indicated, all chapter and section  
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.

27 <sup>2</sup> We exercised our discretion to take judicial notice of the  
28 Debtor's first chapter 11 case and documents electronically filed  
in that case. See Atwood v. Chase Manhattan Mortg. Co.  
(In re Atwood), 293 B.R. 227, 233 n.9 (9th Cir. BAP 2003).

1 clearly state whether Akintimoye sought compensation under § 328  
2 or § 330.

3 Akintimoye, facially on behalf of the Debtor, contested the  
4 UST's objection. He argued that the UST incorrectly assumed that  
5 he held a prepetition claim for "post-petition services rendered  
6 in the [first] case even though the [employment] application []  
7 state[d] otherwise." ECF No. 34 at 5. Akintimoye pointed out  
8 that both his declaration and statement of disinterestedness  
9 expressly provided that neither he nor his firm held a  
10 prepetition claim against the Debtor or the estate for fees  
11 incurred in the first case. As a result, he argued that it was  
12 reasonable to infer his intent not to seek compensation in  
13 connection with the first case, based on both his declaration and  
14 statement of disinterestedness and the fact that he did not file  
15 a compensation application in the first case.

16 At the hearing on the matter, Akintimoye clarified that the  
17 Debtor sought approval to employ him as chapter 11 general  
18 counsel under § 328. The bankruptcy court then indicated that it  
19 likely would require additional briefing on the § 328 issue and,  
20 accordingly, it was not inclined to rule on the employment  
21 application that day. In response, Akintimoye expressed  
22 reluctance to continue to work on the case if the issue of his  
23 employment was "dicey" and stated that he was not prepared to  
24 continue working "in vain." Hr'g Tr. (May 14, 2013) at 10:17-18,  
25 24-25; 11:1-2. The bankruptcy court then denied the application  
26 without prejudice and expressly allowed Akintimoye to file  
27 another and better supported employment application.

28 The bankruptcy court subsequently entered an order denying

1 the employment application. This appeal followed.

2 **JURISDICTION**

3 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.  
4 §§ 1334 and 157(b). We have jurisdiction under 28 U.S.C. § 158.<sup>3</sup>

5 **ISSUE**

6 Did the bankruptcy court err in denying the application to  
7 employ Akintimoye as bankruptcy counsel?

8 **STANDARD OF REVIEW**

9 We review a decision regarding an application for the  
10 employment of a professional for an abuse of discretion. Elias  
11 v. Lisowski Law Firm, Chtd. (In re Elias), 215 B.R. 600, 603 (9th  
12 Cir. BAP 1997), aff'd, 188 F.3d 1160 (9th Cir. 1999). A review  
13 of an abuse of discretion determination involves a two-pronged  
14 test; first, we determine de novo whether the bankruptcy court  
15 identified the correct legal rule for application. See United  
16 States v. Hinkson, 585 F.3d 1247, 1261-62 (9th Cir. 2009) (en  
17 banc). If not, then the bankruptcy court necessarily abused its  
18 discretion. See id. at 1262. Otherwise, we next review whether  
19 the bankruptcy court's application of the correct legal rule was  
20 clearly erroneous; we will affirm unless its findings were

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21  
22 <sup>3</sup> The UST moved to dismiss the appeal based on the fact that  
23 the order denying the employment application was interlocutory.  
24 A BAP motions panel denied that motion as the chapter 11 case had  
25 been dismissed; thus, the order became final.

26 Apparently, the case was subsequently reopened in order to  
27 "fully administrate" the case. Other than an order for stay  
28 relief, the case has remained dormant. While it is unclear why  
the case was reopened (and the entry of a stay relief order in a  
dismissed case is slightly mystifying), the order to reopen did  
not vacate the dismissal order. The case, thus, remains  
dismissed and the order denying the employment application  
remains a final order subject to review.

1 illogical, implausible, or without support in inferences that may  
2 be drawn from the facts in the record. See id.

### 3 **DISCUSSION**

4 In an individual chapter 11 case, the employment or  
5 retention of general bankruptcy counsel is governed by § 327.  
6 Section 327(a) provides that, with the bankruptcy court's  
7 approval, a debtor-in-possession (pursuant to § 1107(a)) may  
8 employ, among other professionals, an attorney to represent the  
9 debtor-in-possession in carrying out statutory duties under the  
10 Code. As a condition to approval, the attorney: (1) may not hold  
11 or represent an interest adverse to the bankruptcy estate; and  
12 (2) must be disinterested. Id.; see also Tevis v. Wilke, Fleury,  
13 Hoffelt, Gould & Birney, LLP (In re Tevis), 347 B.R. 679, 687  
14 (9th Cir. BAP 2006).

15 When so employed, an attorney is generally entitled to  
16 compensation for services rendered to a debtor. The Code  
17 addresses attorney compensation in various provisions, including  
18 § 328. Employment under § 327 is, however, a condition precedent  
19 to compensation under § 328(a). See Michel v. Federated Dep't  
20 Stores, Inc. (In re Federated Dep't Stores, Inc.), 44 F.3d 1310,  
21 1319 (6th Cir. 1995).

22 Importantly, § 328(a) permits a professional to seek  
23 pre-approval from the bankruptcy court as to terms and conditions  
24 of employment, including compensation, "such that the bankruptcy  
25 court may alter the agreed-upon compensation only 'if such terms  
26 and conditions prove to have been improvident in light of  
27 developments not capable of being anticipated at the time of the  
28 fixing of such terms and conditions.'" Circle K Corp. v.

1 Houlihan, Lokey, Howard & Zukin, Inc. (In re Circle K Corp.),  
2 279 F.3d 669, 671 (9th Cir. 2002) (quoting 11 U.S.C. § 328(a));  
3 see also Friedman Enters. v. B.U.M. Int'l, Inc. (In re B.U.M.  
4 Int'l, Inc.), 229 F.3d 824, 829 (9th Cir. 2000) ("There is no  
5 question that a bankruptcy court may not conduct a § 330 inquiry  
6 into the reasonableness of the fees and their benefit to the  
7 estate if the court already has approved the professional's  
8 employment under [] § 328."). Pre-approval of an attorney's  
9 compensation, thus, is not lightly permitted.

10 To obtain § 328(a) compensation in the Ninth Circuit, the  
11 employment application must unambiguously specify that  
12 compensation pre-approval is sought under § 328. See  
13 In re Circle K Corp., 279 F.3d at 671. Otherwise, an attorney's  
14 right to payment of fees, by default, is governed by § 330 and  
15 subject to § 330 review. See id.

16 Here, Akintimoye's continued reference to approval of  
17 employment pursuant to § 328 is inapt. It may be a term drawn  
18 from the bankruptcy lexicon, but the Code is clear that an  
19 attorney's retention is governed by § 327 while his or her  
20 compensation is subject to either § 328 or § 330. Thus, while  
21 Akintimoye's stated goal was § 328 employment, what he really  
22 sought was retention under § 327 and compensation under § 328, as  
23 opposed to § 330.<sup>4</sup>

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25 <sup>4</sup> The confusion relating to § 328 is exacerbated by a local  
26 Central District of California bankruptcy form. See F2081-1.5  
27 Order RE Motion in Individual Chapter 11 Case For Order Employing  
28 Professional, available at  
[http://www.cacb.uscourts.gov/forms/local\\_bankruptcy\\_rules\\_forms](http://www.cacb.uscourts.gov/forms/local_bankruptcy_rules_forms)

continue...

1 **A. The bankruptcy court did not abuse its discretion in denying**  
2 **the employment application.**

3 Akintimoye argues that the bankruptcy court erred in  
4 determining that: the Debtor could not employ Akintimoye if his  
5 compensation was based on an hourly fee rate; §§ 528 or 526  
6 provided appropriate grounds for denial of employment; and  
7 Akintimoye held a prepetition claim against the Debtor. He also  
8 contends error in the bankruptcy court's judicial notice of  
9 events in his first case.

10 We conclude that the bankruptcy court did not abuse its  
11 discretion in denying retention under § 327 without prejudice  
12 based on questions regarding Akintimoye's lack of  
13 disinterestedness. There was also no error in its discussion of  
14 the first case as it related to prospective compensation under  
15 § 328.

16 **1. Denial of the application was not based on §§ 528 and**  
17 **526 or Akintimoye's request for hourly compensation.**

18 As a preliminary matter, we dispense with Akintimoye's  
19 assertions of error based on §§ 528 and 526 and his request for  
20 hourly compensation. The record belies Akintimoye's arguments.

21 At the hearing, the bankruptcy court expressly stated that  
22 it was not addressing the § 528 issue (and, by extension, the  
23 § 526 issue) unless and until other case status issues were first  
24 resolved. The bankruptcy court's denial of the employment  
25

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26 <sup>4</sup>...continue  
27 (last visited Aug. 6, 2014). In particular, the form provides  
28 for only two options as to a debtor's request to employ a  
professional: § 327 or § 328.

1 application, thus, was not based on the UST's §§ 526 and 528  
2 objections. Nor does the record reflect that the bankruptcy  
3 court made any determination as to Akintimoye's proposed hourly  
4 compensation structure, let alone that it denied the employment  
5 application for that reason. As a result, we disregard these  
6 arguments and do not consider this issue.

7 **2. The bankruptcy court did not err in determining that**  
8 **Akintimoye was not disinterested for § 327(a) purposes.**

9 The Code defines a "disinterested person" as a person that  
10 is not a creditor and "does not have an interest materially  
11 adverse to the interest of the estate . . . by reason of any  
12 direct or indirect relationship to, connection with, or interest  
13 in, the debtor, or for any other reason." 11 U.S.C. § 101(14);  
14 see also First Interstate Bank of Nev., N.A. v. CIC Inv. Corp.  
15 (In re CIC Inv. Corp.), 192 B.R. 549, 553 (9th Cir. BAP 1996).

16 Akintimoye alleges error in the bankruptcy court's  
17 determination that he held a prepetition claim against the Debtor  
18 and, thus, that he was a creditor of the Debtor. He reiterates,  
19 verbatim, his response to the UST's opposition before the  
20 bankruptcy court: that the UST erroneously assumed that he held a  
21 prepetition claim and that, based on his declaration and  
22 statement of disinterestedness, it was reasonable to infer that  
23 he did not intend to claim the unpaid legal fees from the first  
24 case.

25 The bankruptcy court correctly determined that Akintimoye  
26 was a prepetition creditor. Akintimoye does not dispute that  
27 there remained unpaid legal fees from the first case. As a  
28 result, he was a prepetition creditor. See 11 U.S.C.

1 § 101(10) (A) (creditor is an "entity that has a claim against the  
2 debtor that arose at the time of or before the order for relief  
3 concerning the debtor."); § 101(5) (A) (claim is a right to  
4 payment). And, therefore, Akintimoye was not disinterested for  
5 the purposes of § 327(a). See In re Kings River Resorts, Inc.,  
6 342 B.R. 76, 88 (Bankr. E.D. Cal. 2006) ("A professional holding  
7 a potential prepetition claim against a debtor . . . is a  
8 creditor of the estate and therefore not 'disinterested'  
9 . . . ."). On this record, the bankruptcy court's finding was  
10 not clearly erroneous.

11 The bankruptcy court also found that, insofar as Akintimoye  
12 purported to disavow his prepetition claim, he did not  
13 sufficiently do so. At the hearing, the bankruptcy court stated  
14 to Akintimoye: "I don't see any way that you can get around the  
15 disinterestedness requirement without **unconditionally,**  
16 **irrevocably waiving any claim** that the Debtor or the estate owes  
17 you from the prior case." Hr'g Tr. (May 14, 2013) at 14:9-12  
18 (emphasis added). Again, on this record, the bankruptcy court's  
19 finding was not clearly erroneous.

20 An attorney may rectify disqualifying creditor status by  
21 waiver of his or her prepetition claim prior to court approval of  
22 employment. See generally In re Pillowtex, Inc., 304 F.3d 246,  
23 253 (3d Cir. 2002) (collecting cases). Waiver of the  
24 prepetition claim, however, must be express, unconditional, and  
25 unequivocal. See In re Princeton Med. Mgmt. Inc., 249 B.R. 813,  
26 816 (Bankr. M.D. Fla. 2000); In re E. Charter Tours, Inc.,  
27 167 B.R. 995, 997 (Bankr. M.D. Ga. 1994).

28 The bankruptcy court here was well within its discretion to

1 determine that inferences, all Akintimoye offered, did not  
2 constitute an express, unconditional, and unequivocal waiver of  
3 his prepetition claim. The bankruptcy court also had discretion  
4 to determine that Akintimoye's representations at the hearing  
5 were insufficient and to require additional, formal evidence of  
6 Akintimoye's purported disclaimer. See generally White v. Mintz,  
7 Levin, Cohn, Ferris, Glovsky and Popeo, P.C. (In re CK  
8 Liquidation Corp.), 408 B.R. 1, 7-8 (1st Cir. BAP 2009)  
9 ("Bankruptcy courts are accorded wide discretion in determining  
10 whether a conflict of interest exists . . . and appellate courts  
11 should give appropriate deference to the bankruptcy court's  
12 'front line' position, because the bankruptcy judge is in the  
13 best position to gauge the ongoing interplay of factors and to  
14 make what is often a very fact driven judgment call.") (internal  
15 citation omitted).

16 Based on the foregoing, the bankruptcy court did not clearly  
17 err in finding that Akintimoye held a prepetition claim or that  
18 he failed to clearly and unconditionally waive the claim. It is  
19 significant that the bankruptcy court offered to continue the  
20 matter to allow Akintimoye to supply an unconditional waiver.  
21 Akintimoye, however, declined this opportunity and, indeed,  
22 affirmatively requested denial. Even then, the bankruptcy court  
23 denied the application without prejudice and invited Akintimoye  
24 to file a more complete employment application and express  
25 waiver. Here, the bankruptcy court did not abuse its discretion.

26 **3. On this record, the bankruptcy court's reference to the**  
27 **first case did not constitute error.**

28 Akintimoye finally contends that the bankruptcy court erred

1 in considering the first case (and dismissal therein) when  
2 evaluating the employment application. We disagree.

3 The record shows that the bankruptcy court emphasized  
4 Akintimoye's need to prove that the second chapter 11 case was  
5 not simply a rehash of the first case, which it described as  
6 "fruitless and only served to delay creditors." Hr'g Tr.  
7 (May 14, 2013) at 15:12-14. It stated to Akintimoye:

8 The prior Chapter 11 case [] was not fruitful. Nothing  
9 happened in the case except the Court had to deal with  
10 about a dozen motions for relief from stay. There was  
11 no plan filed. There was no disclosure statement  
12 prepared. There were no motions that I can recall that  
13 were filed at all.

14 It appears that you filed the [first] case just to park  
15 [the Debtor] there for a year and get the benefit of  
16 the automatic stay. That's not what Chapter 11 is for.  
17 And the Court would be -- well, the Court is currently  
18 unconvinced that we won't have a repeat of that this  
19 time.

20 Id. at 10:3-13.

21 As previously discussed, an attorney's employment or  
22 retention is approved by the bankruptcy court pursuant to § 327.  
23 Our review of the record makes clear that the bankruptcy court's  
24 discussion of the first case related to prospective compensation  
25 under § 328, not proposed employment under § 327. It questioned  
26 whether Akintimoye was competent to represent the Debtor in the  
27 second case based on the events in the first case culminating in  
28 case dismissal. In this respect, the bankruptcy court was  
addressing the reasonableness of the terms and conditions of  
Akintimoye's prospective compensation as general bankruptcy  
counsel and, in particular, the appropriateness of limiting its  
ability to review compensation by allowing compensation under  
§ 328, as opposed to § 330.

