

JUN 25 2015

NOT FOR PUBLICATION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-14-1351-DTaKu
	)	
WILLIAM MICHAEL WATSON,	)	Bk. No. 2:12-bk-34557
	)	
Debtor.	)	
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WILLIAM MICHAEL WATSON	)	
	)	
Appellant,	)	
	)	
v.	)	<b>MEMORANDUM<sup>1</sup></b>
	)	
DAVID ALAN GILL, Chapter 7	)	
Trustee,	)	
	)	
Appellee.	)	
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Argued and Submitted on June 18, 2015  
at Pasadena, California

Filed - June 25, 2015

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

Honorable Thomas B. Donovan, Bankruptcy Judge, Presiding

Appearances: Michael Gordon York argued for Appellant; Kevin D. Meek of Danning, Gill, Diamond & Kollitz, LLP argued for Appellee.

Before: DUNN, TAYLOR AND KURTZ, Bankruptcy Judges.

<sup>1</sup>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 8024-1.

1 Chapter 7<sup>2</sup> debtor William Michael Watson ("Debtor") appeals  
2 from the bankruptcy court's Order Allowing Administrative Claims,  
3 Professional Fees and Expenses, [and] Trustee's Fees and  
4 Expenses. We AFFIRM.

5 I. FACTS

6 The Debtor filed his chapter 7 petition on July 17, 2012.  
7 Appellee David A. Gill ("Trustee") was appointed the chapter 7  
8 trustee. On the Debtor's Schedule A, he listed a one-half  
9 interest in "21 undeveloped acres in Louisiana" (the  
10 "Properties") which the Debtor valued at \$10,000.00. The Debtor  
11 claimed an exemption in the Properties in the amount of  
12 \$10,000.00, pursuant to California Code of Civil Procedure  
13 § 703.140(b)(1).

14 The Properties, which comprised two parcels, were co-owned  
15 with the Debtor's brother, Gary Sherman. The Debtor told the  
16 Trustee that, pursuant to an oral agreement between Mr. Sherman  
17 and the Debtor, Mr. Sherman was to receive one parcel, and the  
18 Debtor was to retain the other. However, the title had not been  
19 changed to reflect such an agreement. When the Trustee expressed  
20 his belief that the Properties might be worth more than their  
21 scheduled value, the Debtor obtained an appraisal, which valued  
22 the Properties at \$59,000.00. The Trustee concluded that the  
23 value of the Debtor's pre-petition interest in the Properties,  
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25  
26 <sup>2</sup>Unless specified otherwise, all chapter, section and rule  
27 references are to the federal Bankruptcy Code, 11 U.S.C. §§ 101-  
28 1532, and to the Federal Rules of Bankruptcy Procedure, Rules  
1001-9037. The Federal Rules of Civil Procedure are referred to  
as "Civil Rules."

1 net of his exemption, was \$24,500.00.

2 The Trustee decided to pursue the estate's interest in the  
3 Properties. To facilitate this, the Trustee hired Danning, Gill,  
4 Diamond & Kollitz, LLP ("Danning Gill") as his general counsel.  
5 Danning Gill began its work for the Trustee on January 23, 2013,  
6 but did not file an employment application at that time.

7 At some point, the Debtor offered to buy the estate's  
8 interest in the Properties. Negotiations followed between the  
9 Debtor's counsel and Danning Gill. On June 27, 2013,  
10 approximately five months after Danning Gill's employment began,  
11 the Trustee filed a motion for authority to settle the matter.  
12 Under the settlement, the Debtor was to pay \$16,550.00 to the  
13 Trustee in exchange for the estate's interest in the Properties.  
14 The bankruptcy court approved the settlement on July 24, 2013.  
15 Seven days later, the Debtor paid the Trustee as agreed. That  
16 \$16,550.00 payment constituted the entirety of the estate's  
17 receipts.

18 In November 2013, Danning Gill discovered during the  
19 preparation of its final fee application that it never had  
20 requested bankruptcy court approval of its employment. To remedy  
21 this oversight, on November 27, 2013, the Trustee filed an  
22 application to employ Danning Gill nunc pro tunc as of  
23 January 23, 2013 ("Nunc Pro Tunc Application"). In an attached  
24 declaration, Danning Gill attorney Eric P. Israel attributed the  
25 failure to make a timely application to "inadvertence or  
26 oversight." Mr. Israel further explained that, due to the  
27 protracted nature of the settlement negotiations, he had not  
28 followed his usual procedure for filing employment applications.

1           The Debtor opposed the Nunc Pro Tunc Application. In his  
2 accompanying Memorandum of Points and Authorities, the Debtor did  
3 not challenge Danning Gill's disinterestedness or any other  
4 criterion for eligibility to serve as general counsel for the  
5 estate. Rather, the Debtor argued that inadvertence or oversight  
6 was insufficient to establish extraordinary circumstances  
7 justifying nunc pro tunc approval of employment.

8           The Trustee filed a reply memorandum, arguing that the  
9 application should be approved, because Danning Gill had offered  
10 a satisfactory explanation for its delay in submitting an  
11 application, and because Danning Gill's work had provided a  
12 significant benefit to the estate.

13           The bankruptcy court set the matter for hearing and entered  
14 a tentative ruling ("Tentative Ruling"). In the Tentative  
15 Ruling, the bankruptcy court proposed to grant the Nunc Pro Tunc  
16 Application over the Debtor's opposition and stated as follows:

17           [The Nunc Pro Tunc Application] should be granted  
18 because:

- 19           (1) The delay was adequately explained,
- 20           (2) The delay was inadvertent,
- 21           (3) The delay amounts to harmless error,
- 22           (4) The services performed resulted in a significant  
benefit to the estate,
- 23           (5) Indeed, the services resulted in the only recovery  
to the estate,
- 24           (6) The fees requested are very reasonable in relation  
25 to the \$16,550.00 cash recovery to the estate,
- 26           (7) All requirements of 11 U.S.C. § 327 are met by  
attorneys, and
- 27           (8) But for these services performed at risk to the  
28 attorneys, the estate would have recovered nothing.

1 In its Tentative Ruling, the bankruptcy court waived appearances  
2 at the January 9 hearing.

3 On January 23, 2014, the bankruptcy court entered an order  
4 approving the Nunc Pro Tunc Application ("Nunc Pro Tunc Order").  
5 The bankruptcy court noted in the Nunc Pro Tunc Order that it  
6 appeared:

7 that it is necessary that the Trustee employ Danning,  
8 Gill, Diamond & Kollitz, LLP, and [that] its partners  
9 and employees do not hold or represent any interest  
10 adverse to the Debtor, the creditors, or the estate,  
11 and are disinterested persons as that term is defined  
12 in 11 U.S.C. § 101(14) and used in 11 U.S.C. § 327(a),  
13 and that Danning, Gill, Diamond & Kollitz, LLP's  
14 employment nunc pro tunc is justified in this case[.]

15 On March 5, 2014, Danning Gill submitted its first and final  
16 fee application ("Fee Application"). Attached to the Fee  
17 Application, Danning Gill provided a narrative of its services,  
18 along with detailed billing records beginning on January 23,  
19 2013. Danning Gill requested total fees of \$9,157.00 and expense  
20 reimbursement in the amount of \$1,053.47.<sup>3</sup>

21 The Trustee submitted his final report and applications for  
22 compensation ("Final Report") on May 15, 2014. The Final Report  
23 revealed that the balance of funds on hand in the estate amounted  
24 to \$15,616.27, all of which were derived from the settlement  
25 between the Debtor and the Trustee.<sup>4</sup> The Final Report proposed  
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27 <sup>3</sup>Danning Gill did not charge any fees for the time it spent  
28 responding to the Debtor's opposition to the Nunc Pro Tunc  
Application.

<sup>4</sup>This figure represents the balance after payment of bank  
service fees and fees of Swicker & Associates Accountancy Corp.,  
whose compensation had been approved in a prior order.

1 payment to the Trustee in the total amount of \$2,683.55 for fees  
2 and expenses, and to Danning Gill in the amount requested in the  
3 Fee Application. The remaining \$2,722.25 was to be paid to  
4 priority creditors with claims totaling \$28,169.41.

5 The Debtor filed an opposition to the Final Report on  
6 June 17, 2014. In an accompanying memorandum, the Debtor made  
7 two arguments. First, the Debtor argued in general terms that  
8 the fees were unreasonably high in proportion to the estate's  
9 assets, but the Debtor did not specify any particular charges  
10 that he deemed unreasonable. However, the Debtor's main reason  
11 for opposing the Final Report was his continuing displeasure with  
12 the bankruptcy court's Nunc Pro Tunc Order. The Debtor argued  
13 that Danning Gill's compensation should be limited to the fees it  
14 charged for work done after the entry of the Nunc Pro Tunc Order.

15 In response to the Debtor's opposition, the Trustee noted  
16 that the bankruptcy court had already overruled the Debtor's  
17 objection to the Nunc Pro Tunc Application.

18 The bankruptcy court scheduled a hearing on the Final Report  
19 for July 2, 2014, and again waived appearances. On July 3, 2014,  
20 the bankruptcy court entered an order allowing the requested fees  
21 ("Compensation Order"). In its Compensation Order, the  
22 bankruptcy court made the following statement regarding the  
23 Debtor's opposition to the Final Report:

24 Debtor's opposition, filed June 17, 2014, to the  
25 Trustee's Final Report and Applications for  
26 Compensation is overruled, for all the reasons set  
27 forth in the Trustee's application and in the Trustee's  
28 reply, filed June 24, 2014, to the Debtor's opposition.  
The court issued a tentative ruling to grant the  
Trustee's application and excused appearances at the  
hearing scheduled on July 2, 2014 at 11:00 a.m. Nobody  
appeared at the hearing.

1 The Debtor filed a timely Notice of Appeal from the  
2 Compensation Order on July 14, 2014. The Trustee filed a motion  
3 with the BAP to dismiss the Debtor's appeal for lack of standing.  
4 The Debtor argued in response that his nondischargeable priority  
5 tax debts constituted a sufficient pecuniary interest to  
6 establish standing. Specifically, the Debtor argued that  
7 reversal of the Compensation Order and reduction of Danning  
8 Gill's approved fees would increase payments to priority  
9 creditors and lessen his post-bankruptcy obligations. Our  
10 motions panel agreed with the Debtor and denied the motion to  
11 dismiss.

## 12 II. JURISDICTION

13 The bankruptcy court had jurisdiction under 28 U.S.C.  
14 §§ 1334 and 157(b) (2) (A). We have jurisdiction under 28 U.S.C.  
15 § 158.

## 16 III. ISSUES

- 17 1. Whether the Debtor has standing to appeal.
- 18 2. Whether the bankruptcy court abused its discretion in  
19 granting the Nunc Pro Tunc Order and the Compensation Order.

## 20 IV. STANDARD OF REVIEW

21 We review the bankruptcy court's award of attorney fees for  
22 an abuse of discretion. Smith v. Edwards & Hale (In re Smith),  
23 317 F.3d 918, 923 (9th Cir. 2002). A bankruptcy court's order  
24 approving the employment of professionals nunc pro tunc is  
25 likewise reviewed for abuse of discretion. Atkins v. Wain  
26 (In re Atkins), 69 F.3d 970, 973 (9th Cir. 1995).

27 A bankruptcy court abuses its discretion if it applies an  
28 incorrect legal standard or misapplies the correct legal

1 standard, or if its factual findings are illogical, implausible  
2 or unsupported by evidence in the record. TrafficSchool.com,  
3 Inc. v. Edriver Inc., 653 F.3d 820, 832 (9th Cir. 2011). Only if  
4 the bankruptcy court did not apply the correct legal standard or  
5 improperly applied it, or if its fact findings were illogical,  
6 implausible, or without support in inferences that can be drawn  
7 from facts in the record, is it proper to conclude that the  
8 bankruptcy court abused its discretion. United States v.  
9 Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc).

10 We may affirm the decision of the bankruptcy court on any  
11 basis supported by the record. See ASARCO, LLC v. Union Pac. R.  
12 Co., 765 F.3d 999, 1004 (9th Cir. 2014); Shanks v. Dressel,  
13 540 F.3d 1082, 1086 (9th Cir. 2008).

#### 14 V. DISCUSSION

##### 15 A. Standing

16 As a threshold matter, the Trustee renews his argument that  
17 the Debtor lacks standing to bring this appeal. Standing is “a  
18 jurisdictional requirement which remains open to review at all  
19 stages of the litigation.” Nat’l Org. for Women, Inc. v.  
20 Scheidler, 510 U.S. 249, 255 (1994). Therefore, we consider the  
21 Trustee’s standing argument here.

22 Standing in bankruptcy appeals exists only for those parties  
23 who are “directly and adversely affected pecuniarily” by the  
24 bankruptcy court’s order. Fondiller v. Robertson  
25 (In re Fondiller), 707 F.2d 441, 442 (9th Cir. 1983); Paine v.  
26 Dickey (In re Paine), 250 B.R. 99, 104 (9th Cir. BAP 2000). A  
27 debtor has standing if the order would “diminish the debtor’s  
28 property, increase his burdens, or detrimentally affect his

1 rights." Paine, 250 B.R. at 99, citing Fondiller, 707 F.2d at  
2 442.

3 The Trustee argues that the Debtor's only interest in the  
4 appeal is "speculative" and "tangential." Appellee Brief at 19.  
5 The Trustee asserts that reversal by this Panel cannot provide  
6 any possible financial benefit to the Debtor.

7 We agree with the motions panel's decision to deny the  
8 motion to dismiss for the reason that the existence of  
9 nondischargeable claims can suffice to confer standing on a  
10 debtor to appeal from orders affecting the size of the estate.  
11 Cukierman v. Uecker (In re Cukierman), 242 B.R. 486, 488 n.2 (9th  
12 Cir. BAP 1999), aff'd in part, rev'd in part, on other grounds,  
13 265 F.3d 846 (9th Cir. 2001). As the Trustee points out, the  
14 primary issue in Cukierman was a landlord's entitlement to an  
15 administrative claim against the estate. In that case, as in  
16 this one, the debtor's interest in the controversy was the amount  
17 of money that would remain in the estate to pay his priority  
18 creditors. Id. at 488. The Panel held that this was a  
19 sufficient pecuniary interest to confer standing to appeal. It  
20 suffices here as well.

21 B. The Orders on Appeal

22 Section 330 provides for compensation of attorneys out of  
23 funds of the bankruptcy estate. Bankruptcy courts may award  
24 "reasonable compensation for actual, necessary services" rendered  
25 by the attorney and "reimbursement for actual, necessary  
26 expenses." In his opposition to the Final Report, the Debtor  
27 argued that Danning Gill's fees were unreasonably high in light  
28 of the amount of benefit to the estate and in proportion to the

1 estate's total assets. However, the Debtor makes no such  
2 argument on appeal, and we do not consider the issue, as it is  
3 waived. See Greenwood v. F.A.A., 28 F.3d 971, 977 (9th Cir.  
4 1994); Miller v. Fairchild Indus., Inc., 797 F.2d 727, 738 (9th  
5 Cir. 1986). Instead, the Debtor argues that the bankruptcy court  
6 never should have granted the Nunc Pro Tunc Application and that  
7 Danning Gill therefore was not entitled to any compensation for  
8 the services it provided before its employment was approved.

9 "Failure to receive court approval for the employment of a  
10 professional in accordance with § 327 and Rule 2014 precludes the  
11 payment of fees." Shirley v. DeRonde (In re Shirley), 134 B.R.  
12 940, 943 (9th Cir. BAP 1992). Therefore, if the bankruptcy court  
13 abused its discretion in granting the Nunc Pro Tunc Order  
14 authorizing Danning Gill's employment as of January 23, 2013, it  
15 follows that Danning Gill was not entitled to payment for legal  
16 services prior to entry of the Nunc Pro Tunc Order.

17 Nunc pro tunc employment is available in "exceptional  
18 circumstances." Atkins, 69 F.3d at 974. To establish such  
19 circumstances, the applicant must (1) give a satisfactory  
20 explanation for the failure to obtain pre-employment approval;  
21 and (2) show that its services conferred a significant benefit on  
22 the bankruptcy estate. Id.; Law Offices of Ivan W. Halperin v.  
23 Occidental Fin. Group, Inc. (In re Occidental Fin. Group, Inc.),  
24 40 F.3d 1059, 1062 (9th Cir. 1994); Okamoto v. THC Fin. Corp.  
25 (In re THC Fin. Corp.), 837 F.2d 389, 392 (9th Cir. 1988). The  
26 bankruptcy court considering such an application may also, in its  
27 discretion, rely on other factors, such as those set forth in  
28 In re Twinton Props. P'ship, 27 B.R. 817, 819-20 (Bankr. M.D.

1 Tenn. 1983) (see infra at pp. 15-16). Atkins, 69 F.3d at 976.  
2 Of course, the applicant also must meet the criteria for  
3 employment under § 327. Id.; Mehdipour v. Marcus & Millichap  
4 (In re Mehdi-pour), 202 B.R. 474, 479 (9th Cir. BAP 1996).

5 1. Satisfactory Explanation

6 In its Tentative Ruling on the Nunc Pro Tunc Application,  
7 the bankruptcy court announced its tentative conclusion that the  
8 "delay [in applying for employment] was adequately explained."  
9 The Debtor takes issue with this conclusion, arguing that Danning  
10 Gill's delay was the result of mere negligence, which the Debtor  
11 asserts cannot be a satisfactory explanation. Although  
12 statements in certain decisions of the Panel appear at first  
13 glance to support this contention, a closer examination of these  
14 decisions reveals flaws in the argument.

15 a. In re Downtown Inv. Club III

16 In Andrew v. Coopersmith (In re Downtown Inv. Club III),  
17 89 B.R. 59 (9th Cir. BAP 1988), in reversing the bankruptcy  
18 court, the panel commented that "a nunc pro tunc order is  
19 improperly sought" when the delay is due to "mere negligence or  
20 inadvertence," and that retroactive employment is inappropriate  
21 "where the lateness in seeking court approval . . . is  
22 accompanied by inexcusable or unexplained negligence." Id. at  
23 63. The panel went on to emphasize that the applicant firm in  
24 that case had not applied for employment under § 327 at all. Id.  
25 In other words, the firm's "lateness" was a total failure to seek  
26 authorization of its employment prior to requesting fees. In  
27 addition, a conflict of interest precluded approval of its  
28 application in any event, even if the firm had filed one

1 properly. Id. at 64. On the nature of the conflict, the panel  
2 noted, “[a] clearer conflict, representation of both the lender  
3 and the borrower, can hardly be imagined.” Id.

4 The panel in Downtown Investment did not cite the Ninth  
5 Circuit’s then-recent decision in THC Fin. Corp., which  
6 established the two-part test for exceptional circumstances. The  
7 panel did not specifically address whether the firm’s explanation  
8 for its delay was satisfactory. It did, however, indirectly  
9 address the second THC Fin. Corp. standard, whether the firm’s  
10 services benefitted the estate. The bankruptcy court had  
11 required the party opposing the application to show that the  
12 firm’s services had not provided a benefit, which the panel noted  
13 was an erroneous allocation of the burden of proof. Downtown  
14 Investment, 89 B.R. at 64. In short, the panel predicated its  
15 finding of an abuse of discretion on far more than the “mere  
16 negligence or inadvertence” of the applicant firm in failing to  
17 seek timely approval of its employment.<sup>5</sup>

18 b. In re Shirley

19 The Shirley panel stated in a footnote: “Mere negligence  
20 does not constitute an exceptional circumstance justifying the  
21 entry of a retroactive order [of employment].” Shirley, 134 B.R.  
22 at 943 n.4, citing Credit Alliance Corp. v. Boies (In re Crook),  
23 79 B.R. 475 (9th Cir. BAP 1987). The cited decision, Crook, was  
24 decided before THC Fin. Corp. and Atkins, and did not apply the  
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26 <sup>5</sup>The panel also discussed other problems with the bankruptcy  
27 court’s orders, including lack of notice of the underlying  
28 motions. See also In re Gutterman, 239 B.R. 828 (N.D. Cal. 1999)  
(describing the facts of Downtown Investment as “egregious”).

1 two-part exceptional circumstances test. Thus, it is of limited  
2 application in analyzing the "satisfactory explanation" element  
3 of that test.

4 As in Downtown Investment, the Shirley panel does not appear  
5 to have based its decision to any significant extent on the "mere  
6 negligence" issue. Shirley was an appeal in a chapter 11 case in  
7 which the attorney for the debtor in possession made no  
8 application for employment under § 327. Shirley, 134 B.R. at  
9 940. Instead, he filed a "Substitution of Attorney" in the  
10 bankruptcy court, signed by the attorney and the debtor, for  
11 which he neither sought nor received court approval.<sup>6</sup> Id. The  
12 primary issue in Shirley was not whether the bankruptcy court  
13 permissibly could have approved the attorney's employment nunc  
14 pro tunc, which it did not do in any event. Rather, the appeal  
15 concerned the question whether relief from stay was available to  
16 the attorney to pursue his fees in state court. This appears to  
17 have been the panel's reason for confining the "mere negligence"  
18 discussion, arguably as dicta, in a three-sentence footnote.

19 c. The current appeal

20 In his declaration filed in support of the Nunc Pro Tunc  
21 Application, Danning Gill attorney Eric Israel explained that the  
22 firm failed to make a timely application due to "inadvertence or  
23 oversight." Mr. Israel went on to state that the peculiarities  
24 of the case, and in particular the negotiations over a period of  
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26 <sup>6</sup>The Panel noted that the attorney had prepared an ex parte  
27 application for nunc pro tunc employment, but that application  
28 had not been signed by the debtor or approved by the bankruptcy  
court.

1 months between Danning Gill and the Debtor's attorney, had  
2 prevented him from following Danning Gill's usual procedures to  
3 ensure timely filing. Finally, Mr. Israel declared that the  
4 firm's mistake was "an isolated incident." This statement stands  
5 unchallenged in the record on which the bankruptcy court based  
6 its decision.

7 The bankruptcy court, in its Tentative Ruling, deemed  
8 Danning Gill's delay in applying for approval of its employment  
9 "inadvertent" and "harmless." These characterizations find  
10 support in the record, as does the bankruptcy court's statement  
11 that "the delay was adequately explained." The above-discussed  
12 cases, which involved much more serious lapses on the part of the  
13 applicants, do not preclude such a conclusion.

14 This is not to say that the bankruptcy court was required to  
15 find this explanation satisfactory. If, in the exercise of its  
16 discretion, the bankruptcy court had arrived at an opposite  
17 conclusion, we would be disinclined to reverse. However, the  
18 bankruptcy court, by virtue of its proximity to the circumstances  
19 of the litigation and its acquaintance with the quality of  
20 Danning Gill's practice in general, was in the best position to  
21 evaluate Danning Gill's explanation. See Pincay v. Andrews,  
22 389 F.3d 858, 859 (9th Cir. 2004) (en banc) (trial court is in  
23 best position to evaluate law firm's explanation of its mistake).  
24 In these circumstances, the bankruptcy court did not abuse its  
25 discretion when it determined that Danning Gill satisfactorily  
26 explained its failure to make a timely application.

27 2. Significant benefit to the estate

28 There appears to be no dispute that Danning Gill's services

1 to the Trustee resulted in a significant benefit to the  
2 bankruptcy estate. Indeed, the settlement Danning Gill  
3 negotiated with the Debtor was the sole source of funds for the  
4 estate. As the bankruptcy court noted in its Tentative Ruling,  
5 "the services [provided by Danning Gill] resulted in the only  
6 recovery to the estate[.]"

7 3. Other factors

8 The Ninth Circuit has held that a bankruptcy court, in the  
9 exercise of its discretion in deciding whether to grant a nunc  
10 pro tunc employment application, may, but need not, consider  
11 additional factors, including those enumerated in Twinton  
12 Properties. Atkins, 69 F.3d at 976. The Twinton Properties  
13 factors are:

- 14 1. The debtor, trustee or committee [to whom or to  
15 which the services were rendered] expressly contracted  
16 with the professional person to perform the services  
17 which were thereafter rendered;
- 18 2. The party for whom the work was performed approves  
19 the entry of the nunc pro tunc order;
- 20 3. The applicant has provided notice of the  
21 application to creditors and parties in interest and  
22 has provided an opportunity for filing objections;
- 23 4. No creditor or party in interest offers reasonable  
24 objection to the entry of the nunc pro tunc order;
- 25 5. The professional satisfied all the criteria for  
26 employment pursuant to 11 U.S.C. § 327 and [Rule 2014]  
27 of the Federal Rules of Bankruptcy Procedure at or  
28 before the time services were actually commenced and  
remained qualified during the period for which services  
were provided;
6. The work was performed properly, efficiently, and  
to a high standard of quality;
7. No actual or potential prejudice will inure to the  
estate or other parties in interest;
8. The applicant's failure to seek pre-employment

1 approval is satisfactorily explained; and

2 9. The applicant exhibits no pattern of inattention or  
3 negligence in soliciting judicial approval for the  
4 employment of professionals.

5 Twinton Properties, 69 B.R. at 819-20, quoted in Atkins, 69 F.3d  
6 at 974.<sup>7</sup>

7 Although the bankruptcy court's Tentative Ruling did not  
8 make explicit reference to Twinton Properties, a number of the  
9 court's observations correspond to Twinton Properties factors.

10 The bankruptcy court's remark that "the delay amounts to  
11 harmless error" is consistent with the seventh Twinton Properties  
12 factor, regarding lack of prejudice to the estate or other  
13 parties in interest. The Debtor does not argue that he suffered  
14 any prejudice from Danning Gill's delay in submitting its  
15 application. Although the estate would be left with more money  
16 in the absence of Danning Gill's fees, it does not follow that  
17 the **delay** in the application prejudiced the estate or the Debtor.  
18 If Danning Gill had applied timely, the situation would have been  
19 no different for the Debtor or for the estate. Indeed, Danning  
20 Gill did not charge any fees for its work in responding to the  
21 Debtor's opposition to the Nunc Pro Tunc Application. Thus, even  
22 though the episode resulted in more work for Danning Gill, it did  
23 not diminish the estate's assets.

24 The bankruptcy court also found that Danning Gill's fees

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25 <sup>7</sup>The Twinton Properties court presented these nine items as  
26 required criteria that must be satisfied before nunc pro tunc  
27 approval can be granted. However, under Atkins, they are simply  
28 factors that the bankruptcy court may consider in its discretion,  
although some of the factors overlap with the required elements  
of the two-part THC Financial Corp. test.

1 were "very reasonable in relation to the \$16,550.00 cash recovery  
2 to the estate[.]" This corresponds to the sixth Twinton  
3 Properties factor, which concerns the quality and efficiency of  
4 the professional's work. Similarly, the observation that "but  
5 for [the] services performed at risk to the attorneys, the estate  
6 would have recovered nothing" speaks to the quality and  
7 efficiency of Danning Gill's performance.

8 The ninth Twinton Properties factor, lack of a pattern of  
9 inattention or negligence on the part of the professional, was  
10 not discussed in the bankruptcy court's Tentative Ruling, but it  
11 was mentioned in Mr. Israel's declaration. Mr. Israel referred  
12 to his firm's mistake as "an isolated incident." The need to  
13 deter attorneys from neglecting the requirements of § 327 is less  
14 pressing when there is no reason to fear that the firm will  
15 repeat its mistake in the future. See In re Gutterman, 239 B.R.  
16 at 831.

17 The bankruptcy court was not required to consider any of  
18 these factors in reaching its decision. However, it properly  
19 exercised its discretion by doing so.

20 4. Requirements of § 327

21 "Applying for nunc pro tunc approval does not alleviate the  
22 professional from meeting the requirements of § 327; the  
23 professional still must show that it was disinterested."  
24 Mehdipour, 202 B.R. at 479. After stating in its Tentative  
25 Ruling that Danning Gill met all requirements of § 327, the  
26 bankruptcy court found in its Nunc Pro Tunc Order that Danning  
27 Gill and its partners and employees did "not hold or represent  
28 any interest adverse to the Debtor, the creditors, or the estate,

1 and [were] disinterested persons as that term is defined in  
2 11 U.S.C. § 101(14) and used in 11 U.S.C. § 327(a)[.]” The  
3 Debtor does not dispute this conclusion, and the record supports  
4 it.

5 VI. CONCLUSION

6 Based on the foregoing, we conclude that the Nunc Pro Tunc  
7 Order was not an abuse of the bankruptcy court’s discretion.  
8 Consequently, we conclude that the Compensation Order also was  
9 not an abuse of discretion. We AFFIRM.

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