



THIS ORDER IS SIGNED AND ENTERED.

Dated: May 17, 2024

Rachel Blise

**Hon. Rachel M. Blise
United States Bankruptcy Judge**

**UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF WISCONSIN**

In re:

Farwell Ventures Inc.,

Debtor.

Case No. 23-11125-rmb

Chapter 7

DECISION AND ORDER ON MOTION TO EXAMINE FEES OF ACCOUNTANT

Debtor Farwell Ventures Inc. filed a voluntary chapter 11 petition on June 30, 2023 and elected to proceed under subchapter V. ECF No. 1. On April 23, 2024, the Court converted the case to one under chapter 7 on the debtor's motion. ECF No. 215. While the debtor was in chapter 11, the debtor operated its business as a debtor-in-possession pursuant to 11 U.S.C. § 1184. Before the case was converted, the United States Trustee filed a motion to examine the fees of True Tax & Accounting II, LLC, an accounting firm retained by the debtor-in-possession to prepare and file 2022 state and federal tax returns. For the reasons explained below, the Court holds that the debtor was required to seek and obtain Court approval before employing and paying True Tax.

BACKGROUND

The relevant facts are not in dispute. On November 30, 2023, the debtor provided the U.S. Trustee with a copy of the debtor's 2022 federal and state income tax returns. The federal

tax return included the preparer tax identification number for Kimberly Ruef, an employee of True Tax, and True Tax's employer identification number. The state tax return included Ruef's signature and the employer identification number for True Tax. This information included on the tax returns suggested that the tax returns had been prepared by Ruef and True Tax.

The U.S. Trustee then sought and received information from the debtor indicating that the debtor paid \$500 to True Tax for tax preparation services related to the debtor's 2022 federal and state tax returns. On January 2, 2024, the U.S. Trustee filed a motion for an order to show cause why the debtor had not filed an application to employ True Tax under 11 U.S.C. § 327(a). On January 8, 2024, the Court entered an order requiring the debtor to respond to the U.S. Trustee's motion.

In its response, the debtor stated that True Tax had prepared the debtor's 2021 federal and state tax returns before the petition date. The debtor paid \$300 per month for this and other accounting services, but there was no pre-petition engagement agreement between the debtor and True Tax. The debtor further stated that it paid True Tax a flat fee of \$500 for preparation of the 2022 federal and state tax returns, and that there was no written engagement or other agreement related to True Tax's preparation of those services. The only writing was an invoice from True Tax dated November 30, 2023 for \$500, which the debtor paid the same day. The debtor argued that it was not required to obtain a court order authorizing employment of True Tax under § 327(a) before it could pay True Tax.

The Court received further briefing from the parties and took the matter under advisement.

DISCUSSION

Section 327(a) of the Bankruptcy Code provides in relevant part, "[e]xcept as otherwise provided in this section, the trustee, with the court's approval, may employ one or more

attorneys, accountants, appraisers, auctioneers, or other professional persons . . . to represent or assist the trustee in carrying out the trustee’s duties under this title.” 11 U.S.C. § 327(a). In this case, as a debtor-in-possession the debtor was the functional equivalent of a trustee for purposes of employing professionals under § 327(a). 11 U.S.C. § 1184 (“a debtor in possession shall have all the rights, [except the right to compensation], and powers, and shall perform all functions and duties, [with limited exceptions], of a trustee serving in a case under this chapter”); *see also, e.g., In re NIR W. Coast, Inc.*, 638 B.R. 441, 453 (Bankr. E.D. Cal. 2022) (a subchapter V debtor in possession is the “functional equivalent of a trustee” and has “authority to employ [professionals] under § 327”).

Section 330(a) authorizes a bankruptcy court to award compensation to “a professional person employed under section 327.” 11 U.S.C. § 330(a). That language makes employment under § 327(a) “a condition precedent” to payment under § 330(a). *In re Grabill Corp.*, 983 F.2d 773, 776 (7th Cir. 1993). That is, a court must approve employment under § 327(a) and the court must authorize the payment under § 330(a) before a professional performing work for a trustee or debtor-in-possession can be paid.

This scheme requiring court approval for retention and payment of professionals serves an important purpose. A professional may be retained by a trustee or debtor-in-possession only if the professional is disinterested and does not hold or represent an interest adverse to the estate. *See* 11 U.S.C. § 327(a). “Together, the statutory requirements of disinterestedness and no interest adverse to the estate ‘serve the important policy of ensuring that all professionals appointed pursuant to section 327(a) tender undivided loyalty and provide untainted advice and assistance in furtherance of their fiduciary responsibilities.’” *In re Crivello*, 134 F.3d 831, 836 (7th Cir. 1998) (quoting *Rome v. Braunstein*, 19 F.3d 54, 58 (1st Cir. 1994)); *see also* 11 U.S.C.

§ 328(c) (court may deny compensation if a professional is not disinterested or holds an interest adverse to the estate). In addition, prior authorization ensures that the estate's limited resources are used to retain competent professionals and pursue matters that are in the best interests of the estate. *See, e.g., In re Renaissance Residential of Countryside, LLC*, 423 B.R. 848, 856 (Bankr. N.D. Ill. 2010) (“The purpose of § 327 is to allow the bankruptcy court to control administrative expenses.”).

The parties' central disagreement is whether True Tax is the type of professional person whose employment requires court approval. Accountants are specifically listed in the statute among the professionals that a trustee may employ. 11 U.S.C. § 327(a) (trustee may employ “attorneys, *accountants*, appraisers, auctioneers, or other professional persons”) (emphasis added). Section 101(1) provides that the term “accountant” when used in the Bankruptcy Code “means accountant authorized under applicable law to practice public accounting, and includes professional accounting association, corporation, or partnership, if so authorized.” 11 U.S.C. § 101(1). Ruef is an accountant under the definition in the Bankruptcy Code, and both Ruef and True Tax provided public accounting services. That would seem to end the matter and require the debtor to have sought court approval before employing and paying True Tax.

Despite the plain language of § 327(a), the debtor makes several arguments in opposition. None has any merit.

First, the debtor argues that True Tax is not a professional as contemplated under § 327(a). For this proposition, the debtor relies on case law providing that a professional is “a person whose occupation plays a central role in the administration of the bankruptcy case.” *Renaissance Residential*, 423 B.R. at 856; *see also In re Artra Group, Inc.*, 308 B.R. 858, 860 (Bankr. N.D. Ill. 2003); *In re Madison Mgmt. Grp., Inc.*, 137 B.R. 275, 283 (Bankr. N.D. Ill.

1992). Courts addressing whether a particular person is a professional have instructed that “[f]orm is not determinative”; rather, “[t]he bankruptcy court should consider the substance of the person’s employment over the form in determining whether the person is a professional for purposes of [§ 327].” *Madison Mgmt.*, 137 B.R. at 283. “Those who provide services to the debtor that would have been necessary even if the petition had not been filed are not considered professional persons, even though they may be members of a professional community.” *Artra Group*, 308 B.R. at 860. For example, an accountant retained as an expert witness in collateral intellectual property litigation had a “tangential relationship to the administration of the debtor’s estate” and therefore was not required to be retained under § 327(a). *In re That’s Ent. Mktg. Grp., Inc.*, 168 B.R. 226, 230 (N.D. Cal. 1994).

According to the debtor, even though True Tax provides accounting services and Ruef is a licensed accountant, court approval of their employment was not required because preparation and filing of pre-petition tax returns is something that the debtor would need to do regardless of the bankruptcy. The debtor asserts that True Tax did not play a central role in the administration of the bankruptcy case because True Tax did not “assist[] with plan negotiations, creditor relationships, or the acquisition or disposition of the Debtor’s assets.” ECF No. 146 at 5. Therefore, the debtor argues, True Tax is more akin to the expert witness accountant in *That’s Entertainment*, who provided ancillary services for litigation that would have continued regardless of the bankruptcy filing.

The problem with this argument is that True Tax and Ruef provided core accounting services for the debtor, in contrast to the expert opinion services provided by the accountant in *That’s Entertainment*. Accountants performing public accounting functions under the § 101(1) definition are specifically mentioned throughout the Bankruptcy Code and are treated differently

from other professionals. *See, e.g.*, 11 U.S.C. § 327(d) (permitting a qualified trustee to serve as her own accountant or attorney); 11 U.S.C. § 503(b)(4) (permitting reasonable compensation for professional services rendered by “an attorney or an accountant” under certain circumstances); 11 U.S.C. § 1103(b) (providing specific requirements for attorneys and accountants employed by a committee). Courts routinely hold that a trustee or debtor-in-possession must obtain court approval to retain accountants to prepare tax returns. *E.g., In re Butterfliez Servs., LLC*, 563 B.R. 531, 534 (Bankr. S.D. Ohio 2016) (accountant “assisted Debtor with accounting matters, including preparing tax returns and documents that Debtor was required to file with the various taxing authorities” and “§ 327(a) unambiguously requires a debtor in possession to obtain court approval of the employment of ... an accountant ... to represent or assist the debtor in possession with such matters”); *In re Bicoastal Corp.*, 149 B.R. 216, 218 (Bankr. M.D. Fla. 1993) (“It is undisputed that Clear’s training and previous professional experience was in the field of accounting. As an accountant, she clearly fits within the definition of ‘professional person’ contained in § 327.”); *In re Action Video, Inc.*, Case No. 02-52402, 2003 WL 21350081, *4 (Bankr. M.D.N.C. June 9, 2003) (debtor was required to obtain court approval to employ accountant that prepared tax returns); *In re Seven Counties Servs., Inc.*, Case No. 13-31442, 2014 WL 69880, *3 (Bankr. W.D. Ky. Jan. 9, 2014) (“[P]reparation of income tax returns and reports concerning Debtor’s employees’ benefit plans . . . are clearly the type of services for which employment must be approved pursuant to §327(a).”).

Moreover, a small business debtor-in-possession has an obligation to “timely file tax returns and other required government filings.” 11 U.S.C. § 1116(6)(A); 11 U.S.C. § 1187(b) (requiring subchapter V debtors to comply with the requirements of § 1116(6), among others). *See also Holywell Corp. v. Smith*, 503 U.S. 47, 52 (1992) (a bankruptcy trustee “must pay the tax

due on the income attributable to the corporate debtors' property"); 26 U.S.C. § 6012(b)(3) (bankruptcy trustee "shall make the return of income for such corporation in the same manner and form as corporations are required to make such returns"); 11 U.S.C. § 704(a)(8) (trustee required to provide certain information to taxing authorities). The debtor had a duty under the Bankruptcy Code to file its tax returns, and True Tax assisted the debtor in carrying out that duty. True Tax is therefore a professional whose employment was required to be approved by the Court.

Second, the debtor argues that preparation of tax returns was within the ordinary course of its business, so the fees charged by True Tax could be paid as ordinary course expenses under 11 U.S.C. § 363(c).¹ While the debtor would have (or at least should have) prepared and filed tax returns in the absence of a pending bankruptcy, the statutory scheme makes clear that certain professionals assisting the debtor must be employed under § 327(a), regardless of whether the same professionals were retained to perform the same tasks before the petition date. Allowing professionals to be compensated other than under §§ 327(a) and 330(a) would render the requirements in those sections "nugatory and would contravene Congress' intent in providing for prior approval' for the retention of professionals." *Renaissance Residential*, 423 B.R. at 860 (quoting *F/S Airlease II, Inc. v. Simon*, 844 F.2d 99, 109 (3d Cir. 1988)). For this reason, the specific requirements of § 327(a) take precedence over the more general provisions in § 363(c). See *In re Baker*, 430 F.3d 858, 860 (7th Cir. 2005) ("Canons of statutory construction . . . usually require that a 'specific' statute prevail over a 'general' one."); see also *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) ("The general/specific canon is perhaps

¹ That statute authorizes a trustee or debtor-in-possession operating a business to "enter into transactions . . . in the ordinary course of business, without notice or a hearing." 11 U.S.C. § 363(c)(1).

most frequently applied to statutes in which a general permission or prohibition is contradicted by a specific prohibition or permission. To eliminate the contradiction, the specific provision is construed as an exception to the general one.”² Indeed, several courts have recently rejected attempts to use § 363 to evade the requirements of § 327(a). *See In re McDermott Int’l, Inc.*, 614 B.R. 244, 249 (Bankr. S.D. Tex. 2020) (holding that the language of § 363(b) “deals only with the use of estate property not the conditions under which a professional person may be employed”); *In re Diocese of Buffalo, N.Y.*, 646 B.R. 880, 883 (Bankr. W.D.N.Y. 2022) (“[S]ection 363(b)(1) does not create a path to avoid other requirements of the Bankruptcy Code. Whether or not the proposed employment of a[n] auditor falls outside the ordinary course of business, the Diocese must still address the applicability of 11 U.S.C. § 327(a).”).

Third, the debtor argues that the inclusion of the word “may” in § 327(a) renders court approval optional. The debtor misreads the statute. The relevance of “may” in the text of § 327(a) is that the trustee is not *required* to employ accountants or any other professionals to assist with carrying out the trustee’s duties. It is not authorization for a trustee or debtor-in-possession to forego the requirements of § 327(a) altogether when it suits them. Such a rule would upset the entire compensation scheme for professionals set out in §§ 327, 328, and 330. *See Crivello*, 134 F.3d at 838 (holding the phrasing of § 328(c) is “evidence of the Bankruptcy Code’s intention to require professionals to apply for employment under § 327 before they may receive compensation”). The debtor is correct that § 327 does not explicitly *prohibit* a trustee or debtor-in-possession from hiring an accountant without court approval, but the accountant cannot be compensated for her services in the absence of court approval. *See Grabill Corp.*, 983 F.2d at

² Courts have held that professionals also cannot avoid employment under § 327(a) by seeking compensation under 11 U.S.C. § 503(b)(1), which allows a bankruptcy court to allow administrative expense priority for “the actual, necessary costs and expenses of preserving the estate.” *See, e.g., Renaissance Residential*, 423 B.R. at 860.

776 (noting that approval of employment under § 327(a) is “a condition precedent” to payment under § 330(a)); *see also In re Singson*, 41 F.3d 316, 319 (7th Cir. 1994) (“Prior approval is strongly preferred because it permits close supervision of the administration of an estate, wards off ‘volunteers’ attracted to the kitty, and avoids duplication of effort.”).

Fourth, the debtor points to § 327(b) to bolster its argument that prior court approval is not always necessary. That section provides that “if the debtor has regularly employed attorneys, accountants, or other professional persons on salary, the trustee may retain or replace such professional persons if necessary” to operate the debtor’s business. 11 U.S.C. § 327(b). That is, court approval is not required where the debtor has employed a professional person on salary to do the same tasks before the petition date. *See Park Terrace Townhouses v. Wilds*, 852 F.2d 1019, 1022 (7th Cir. 1988). The key part of the exception is *on salary*. The debtor does not contend that Ruef or True Tax or any other tax preparer was ever employed by the debtor on salary. The debtor cannot rely on § 327(b) to avoid court oversight of True Tax’s employment and compensation.³

Finally, the debtor makes a plea to equity, arguing that the economics and practicalities of a small case should relieve debtors of the obligation to seek court approval for certain professionals. According to the debtor, it would have cost well over \$500 – the amount the debtor paid True Tax – for its attorneys to prepare, file, and serve an application to employ True Tax under § 327(a) and an application to pay True Tax under § 330(a). Even accepting that assertion as true, the debtor provided no case law, statute, or rule supporting an equitable

³ In a similar vein, the debtor argues that it could have employed and paid a tax preparer who is not a licensed accountant to prepare its tax returns, so it should not be required to obtain court approval to employ and pay True Tax and Ruef to perform the same tasks as non-accountant tax preparer. The Court is not convinced that such a tax preparer would not require employment under § 327(a). The Court need not pass on that question here because it is undisputed that Ruef is a licensed accountant.

exception to § 327(a). The Court has not been able to discern any sort of governing principle for the debtor's proposition – if there was such an exception, at what point would a trustee or debtor-in-possession be required to seek court approval for employment of an accountant to prepare its tax returns? If the professional anticipated charges of \$1,000? \$10,000? More than that?

Section 330(a) requires that a professional be employed under § 327(a) before the professional can be paid from estate property. There is no de minimus exception in the Bankruptcy Code, and the Court declines to write one in. Indeed, the Bankruptcy Rules specifically contemplate that a professional must seek court approval for payment of compensation, even when the amount is less than \$1,000. Rule 2002 provides that 21 days' notice to parties in interest is required for the "hearing on any entity's request for compensation or reimbursement of expenses if the request exceeds \$1,000." This suggests that requests will be made for compensation that does not exceed \$1,000, but that such requests need not be noticed to all parties in interest. *See* Fed. R. Bankr. P. 2002(a)(6). It may be burdensome for a trustee or debtor-in-possession to seek approval to employ and pay a professional who will do little work, but that is the scheme set up by Congress. There are good policy reasons for that scheme, as discussed above, and the Court has no authority to ignore the applicable statutes.

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True Tax is a professional person that provided services to the debtor that assisted the debtor in carrying out its duties as a debtor-in-possession. Accordingly, True Tax could not be paid except under § 330(a), which in turn requires that the employment of True Tax be approved under § 327(a). A professional who has been paid without first being employed under § 327(a) must return any payment received. *See, e.g., In re ACandS, Inc.*, 297 B.R. 395, 405 (Bankr. D. Del. 2003) ("Professionals who . . . fail to obtain court approval of their retention are usually required to disgorge fees.").

If the debtor or the chapter 7 trustee wants to pay True Tax for the services it provided, an application for employment under § 327(a) must be filed. The Court notes that the Seventh Circuit has instructed that court approval prior to a professional’s rendition of services “is strongly preferred because it permits close supervision of the administration of an estate, wards off ‘volunteers’ attracted to the kitty, and avoids duplication of effort.” *Singson*, 41 F.3d at 319. Nevertheless, a court can provide retroactive authorization under § 327(a) if the applicant demonstrates “excusable neglect.” *Id.* (“[W]hen the trustee establishes ‘excusable neglect,’ the court may give retroactive authorization under § 327(a) and Rule 2014(a) for the provision of professional services.”).⁴

ORDER

For the foregoing reasons, IT IS HEREBY ORDERED that any fees and costs paid to True Tax & Accounting II, LLC after June 30, 2023 shall be disgorged and paid to the chapter 7 trustee within 14 days after the entry of this Order.

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⁴ The parties devote much space in their briefs to a dispute as to whether True Tax is disinterested as required for employment under § 327(a). That issue is not before the Court, because no application for employment has yet been filed.