SO ORDERED

Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: November 16, 2015

The Order of the Court is set forth below. The docket reflects the date entered.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI

IN RE:

KITCHENS BROTHERS MANUFACTURING COMPANY,	**CASE NO. 13-01710-NPO**
DEBTOR.	**CHAPTER 11**

ORDER ON MOTION TO AUTHORIZE, *NUNC PRO TUNC*, LITIGATION

This matter came before the Court for hearing on October 19, 2015 (the "Hearing") on the Motion to Authorize, *Nunc Pro Tunc*, Litigation (the "Motion to Authorize Litigation") (Dkt. 371) filed by Kitchens Brothers Manufacturing Company ("Kitchens Brothers") and the Objection to Motion to Authorize, *Nunc Pro Tunc*, Litigation (the "Objection") (Dkt. 382) filed by Equity Partners HG, LLC, ("Equity Partners"), Heritage Global, Inc. ("Heritage"), Ken Mann, Matt LoCascio, Robinson Auctions, and Phil Robinson (collectively, the "District Court Defendants")[1] in the above-referenced chapter 11 bankruptcy case (the "Bankruptcy Case").[2] At

[1] *See Kitchens Brothers Manufacturing Co. v. Equity Partners HG, LLC; Heritage Global, Inc.; Ken Mann; Matt LoCascio; Robinson Auctions; and Phil Robinson*, Civil Action No. 3:14-cv-880-HTW-LRA (S.D. Miss. Nov. 12, 2014).

the Hearing, Craig M. Geno represented Kitchens Brothers and Richard E. King represented the District Court Defendants. After considering the matter, the Court finds as follows:[3]

Jurisdiction

This Court has jurisdiction over the parties to and the subject matter of this proceeding pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (O). Notice of the Hearing was proper under the circumstances.

Facts

Kitchens Brothers commenced the Bankruptcy Case on May 30, 2013 (Dkt. 1). As the debtor in possession, Kitchens Brothers retains control of the collection and liquidation of its assets pursuant to 11 U.S.C. § 1107(a).[4]

A. Employment of Heritage

Kitchens Brothers sought approval from this Court to retain professionals to assist it in the sale of certain real and personal property located at its facilities in Hazlehurst, Mississippi and Monroe, Louisiana. To that end, Kitchens Brothers filed the Emergency Application to Employ Heritage Global, Inc.[,] Jacqueline L. Kittrell Appraisers, Inc. and for Expedited Hearing (Dkt. 78) on August 13, 2013. First Tennessee Bank National Association opposed Kitchens

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[2] Although the first sentence of the Objection identifies Phil Robinson as the filer, the second sentence indicates the Objection was filed on behalf of the entities collectively defined in this Order as the District Court Defendants, including Phil Robinson. The same attorney represents all of them.

[3] The Court makes the following findings of fact and conclusions of law in accordance with Rule 7052 of the Federal Rules of Bankruptcy Procedure.

[4] Hereinafter, all references to code sections are to the Bankruptcy Code found at title 11 of the U.S. Code unless otherwise noted.

Brothers' retention of Jacqueline L. Kittrell Appraisers, Inc., but not of Heritage,[5] and filed a Limited Objection to Emergency Application to Employ Heritage Global, LLC, Jacqueline L. Kittrell Appraisers, Inc. and for Expedited Hearing (Dkt. 81). On August 26, 2013, the Court entered the Order Granting Emergency Application to Employ Heritage Global, LLC, Jacqueline L. Kittrell Appraisers, Inc. and for Expedited Hearing [78] & Sustaining Limited Objection to Application Filed by First Tennessee Bank National Association [81] (Dkt. 85). The Court approved the request to employ Heritage, but not Jacqueline L. Kittrell Appraisers, Inc. Thereafter, Kitchens Brothers and Heritage entered into an Exclusive Marketing and Sale Agreement in which Kitchens Brothers retained Heritage and its operating subsidiaries, Heritage Global Partners, Inc. and Equity Partners, to "advertise, market, and sell" certain assets. (Dkt. 85).

B. Public Auction Sale

The public auction sale occurred in Jackson, Mississippi on November 20, 2013. On November 21, 2013, Kitchens Brothers filed a Motion to Confirm Auction and Sale of Assets Free and Clear of Liens, Claims and Interests (the "Motion to Confirm Asset Sale") (Dkt. 147). This Court entered the Order (Dkt. 158) granting the Motion to Confirm Asset Sale on December 4, 2013. Kitchens Brothers filed the Motion to Disburse Sales Proceeds (Dkt. 210) on February 18, 2014. The Court issued the Order (Dkt. 238) granting the Motion to Disburse Sales Proceeds on April 21, 2014.

[5] Heritage is sometimes identified in the documents as Heritage Global, LLC rather than Heritage Global, Inc. Because it makes no difference to the outcome, the Court refers to both entities simply as "Heritage."

C. Employment of Special Counsel

On September 16, 2014, Kitchens Brothers filed the Application to Employ Special Counsel (the "Application") (Dkt. 262) to retain Porter & Malouf, P.A. and Philip W. Thomas, P.A. (collectively, "Porter & Malouf") to act as special counsel with respect to "a potential claim for damages against Heritage[,] Equity Partners, et al., Robinson Auctions and Phil Robinson." (App. ¶ 3). No objection or other response was filed. On October 15, 2014, the Court issued the Order Authorizing Debtor to Employ Special Counsel (the "Order Employing Special Counsel") (Dkt. 271) pursuant to § 327. The Order Employing Special Counsel, as initially submitted by Kitchens Brothers, provided in the fourth paragraph that Porter & Malouf would be entitled to receive reasonable compensation and reimbursement of actual, necessary expenses after notice and a hearing as contemplated by § 330.[6] The Court added the following language to the end of the fourth paragraph:

> Specifically, the Court is not approving the Attorney-Client Contract of Employment and Assignment, attached to the Application as Exhibit B, *at this time*. (NPO).

(Dkt. 271) (emphasis added). Exhibit B to the Application is an unsigned Attorney-Client Contract of Employment and Assignment (the "Attorney-Client Contract") (Dkt. 262) in which Kitchens Brothers had proposed to pay forty percent (40%) of the gross amount of any recovery

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[6] Section 330 provides:

> After notice to the parties in interest and the United States Trustee and a hearing, . . . the court may award to . . . a professional person employed under section 327 . . . reasonable compensation for actual, necessary services rendered by the . . . professional person . . . and . . . reimbursement for actual, necessary expenses.

11 U.S.C. § 330.

to Porter & Malouf.

D. District Court Litigation

On November 12, 2014, Kitchens Brothers filed a Complaint in the District Court against the District Court Defendants in Civil Action No. 3:14-cv-00880-HTW-LRA ("the District Court Litigation"). In the Complaint, Kitchens Brothers alleged that the appraised liquidation value of its assets in March 2012 was $9,044,820.00, but these assets were sold for only $1.1 million at the public auction sale. (DCL Dkt. 1).[7] Kitchens Brothers contended that the District Court Defendants lacked experience in the lumber/saw mill industry and did not have sufficient knowledge or contacts to conduct an auction of its assets. According to Kitchens Brothers, the District Court Defendants sold its assets at unreasonably low prices as a result of their negligence.

In the District Court Litigation, the District Court Defendants filed on August 20, 2015, the Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction, or Alternatively, Motion for Referral (the "Motion to Dismiss") (DCL Dkt. 31), alleging that the District Court lacked subject matter jurisdiction because: (1) "this matter is related to [Kitchens Brothers'] Bankruptcy Case such that the outcome . . . will significantly impact the handling of the Bankruptcy Case" (DCL Dkt. 31) and, therefore, "the Court should have exclusive jurisdiction, diverting subject matter jurisdiction from [the District Court]" and (2) "pursuant to the *Barton* Doctrine . . . Plaintiff failed to seek leave of the Bankruptcy Court prior to filing the instant Complaint." (DCL Dkt. 32). In the alternative, the District Court Defendants asked the District Court to refer the claims to this Court on the ground they constitute "core" bankruptcy matters

[7] Citations to the docket in the District Court Litigation are cited as "(DCL Dkt. ____)".

under 28 U.S.C. § 157. On September 9, 2015, the District Court entered the Order Granting Unopposed Motion to Stay Discovery and Other Deadlines in the Amended Scheduling Order (DCL Dkt. 39) staying all discovery and deadlines in the District Court Litigation until resolution of the Motion to Dismiss.

On September 22, 2015, Kitchens Brothers filed the Plaintiff's Response to Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction, or Alternatively, Motion for Referral (the "Response") (DCL Dkt. 40) in the District Court. Kitchens Brothers asserted in the Response, *inter alia*, that this Court approved the filing of the District Court Litigation for purposes of the *Barton* doctrine when it approved the hiring of Porter & Malouf.[8] On September 29, 2015, the District Court Defendants filed their Rebuttal Memorandum to Plaintiff's Response to Motion to Dismiss for Lack of Subject Matter Jurisdiction, or Alternatively, Motion for Referral. (DCL Dkt. 43). As of the Hearing, the District Court had not yet ruled on the Motion to Dismiss.

E. Motion to Authorize Litigation

Soon after the District Court Defendants filed the Motion to Dismiss in the District Court Litigation, Kitchens Brothers filed the Motion to Authorize Litigation in the Bankruptcy Case asking the Court to approve the District Court Litigation "*nunc pro tunc*" (in Latin, "now for then") in order "to avoid all doubt" that Kitchens Brothers "has the authority to continue to prosecute the District Court Litigation." (Mot. to Auth. Litig. ¶ 8).

Discussion

The issues before this Court are whether Kitchens Brothers was required to obtain

[8] Kitchens Brothers also argued that subject matter jurisdiction is proper in District Court under 28 U.S.C. § 1334 because the action relates to the Bankruptcy Case. (DCL Dkt. 40).

permission to pursue the District Court Litigation and, if so, whether Kitchens Brothers obtained such authority by virtue of the Order Employing Special Counsel. If Kitchens Brothers initiated the District Court Litigation without prior approval but was required to do so, the Court then must determine whether to grant Kitchens Brothers leave, *nunc pro tunc*, to pursue the District Court Litigation. The resolution of these issues requires an analysis of the *Barton* doctrine.

A. *Barton* Doctrine

The *Barton* doctrine arises out of the U.S. Supreme Court's 1881 ruling in *Barton v. Barbour*, 104 U.S. 126 (1881), which generally requires parties seeking to sue a court-appointed receiver (or, in later years, a bankruptcy trustee) to obtain leave of the appointing court before filing the lawsuit. If leave of the appointing court is required but not obtained, then the other forum lacks subject matter jurisdiction. "[T]he Barton doctrine was not dependent on any federal statute, but instead was based on principals of common law." *In re VistaCare Grp., LLC*, 678 F.3d 218, 225 (3d Cir. 2012) (quotation omitted).

1. *Barton v. Barbour*

Barton involved a railroad receivership case. *Barton*, 104 U.S. at 126. A Virginia state court appointed John S. Barbour ("Barbour") as the receiver of the Washington City, Virginia Midland and Great Southern Railroad Company (the "Railroad Company"). Barbour was operating the Railroad Company in his capacity as the receiver when the train car in which Frances H. Barton ("Barton") was a passenger was "thrown from the track and turned over down an embankment." *Barton*, 104 U.S. at 127. Barton sued Barbour in the Supreme Court of the District of Columbia, alleging that a defect in the rails on which the train was traveling caused

the injuries she sustained in the accident. The District of Columbia court dismissed Barton's complaint for lack of jurisdiction because she did not obtain leave from the Virginia state court that had appointed Barbour as the receiver before bringing her suit against him. Barton appealed to the U.S. Supreme Court, arguing that leave was not required or, in the alternative, that the District of Columbia court erred by dismissing her suit for lack of jurisdiction, rather than merely finding her in contempt or awarding injunctive relief.

The U.S. Supreme Court affirmed the dismissal of Barton's suit, reasoning that "[t]he evident purpose of a suitor who brings his action against a receiver without leave is to obtain some advantage over the other claimants upon the assets in the receiver's hands." *Id.* at 128. The *Barton* Court was concerned that problems would arise if litigants otherwise were allowed to sue receivers without leave of the appointing court. The U.S. Supreme Court based its ruling on the need to centralize control over the assets of a receivership estate in one court so as to avoid piecemeal liquidation that receiverships were intended to avoid.

In a dissenting opinion, Justice Miller expressed his concern that depriving a non-appointing court of jurisdiction over suits against receivers would allow receivers to manage businesses without having to comply with state and local laws. *Id*. at 137 (Miller, J., dissenting). Justice Miller agreed, however, that a non-appointing court should be deprived of jurisdiction when the challenged conduct arises out of the sell or other disposition of assets of the business.

Congress addressed Justice Miller's concern by enacting the ancestor of current 28 U.S.C. § 959(a), which creates an exception to the *Barton* doctrine by allowing trustees, receivers, or managers of property, including debtors in possession, to be sued without leave of

the court appointing them "with respect to any of their acts or transactions in carrying on business connected with such property." *Id.* By its plain terms, the exception in 28 U.S.C. § 959(a) does not apply when a receiver acting in his official capacity does not conduct any business connected with the receivership property other than the collection or liquidation of assets.

2. Fifth Circuit

The Fifth Circuit Court of Appeals and other circuit courts have extended the *Barton* doctrine to bankruptcy trustees. *See Anderson v. United States*, 520 F.2d 1027, 1029 (5th Cir. 1975); *see also Muratore v. Darr*, 375 F.3d 140, 143 (1st Cir. 2004); *Lebovits v. Scheffel (In re Lehal Realty Assocs.)*, 101 F.3d 272, 276 (2d Cir. 1996); *Gordon v. Nick*, 162 F.3d 1155 (4th Cir. 1998); *Lowenbraun v. Canary (In re Lowenbraun)*, 453 F.3d 314, 321-22 (6th Cir. 2006); *In re Linton*, 136 F.3d 544 (7th Cir. 1990); *Beck v. Fort James Corp*. (*In re Crown Vantage, Inc.)*, 421 F.3d 963, 970 (9th Cir. 2005); *Carter v. Rodgers*, 220 F.3d 1249, 1252 (11th Cir. 2000); *see also Shavers v. Murray*, No. 2:05-cv-202, 2006 WL 1666693 (N.D. Miss. June 12 2006) (dismissing a *pro se* plaintiff's lawsuit against the bankruptcy trustee and his court-approved counsel based on the *Barton* doctrine). The bankruptcy trustee is the statutory successor to the equity receiver and "[j]ust like an equity receiver, a trustee in bankruptcy is working in effect for the court that appointed or approved him, administering property that has come under the court's control by virtue of the Bankruptcy Code." *In re Linton*, 136 F.3d at 545.

The Fifth Circuit revisited *Barton* twice this year, once in *Villegas v. Schmidt*, 788 F.3d 156 (5th Cir. 2015), and again in *Carroll v. Abide*, 788 F.3d 502 (5th Cir. 2015). In *Villegas*, the Fifth Circuit confirmed that the *Barton* doctrine applies to bankruptcy trustees and that a

plaintiff must obtain permission from the bankruptcy court before commencing a lawsuit against a bankruptcy trustee. The *Villegas* Court also concluded that the *Barton* doctrine applied regardless of whether the claims qualified as *Stern* claims under *Stern v. Marshall*, 131 S. Ct. 2594 (2011). Finally, the *Villegas* Court held that the *Barton* doctrine applied even when the suit against the trustee is filed in the district court that exercises supervisory authority over the bankruptcy court. Weeks after issuing its ruling in *Villegas*, the Fifth Circuit held in *Carroll* that the *Barton* doctrine did not require a plaintiff to seek permission from the bankruptcy court before filing suit in the district court when the bankruptcy trustee's challenged conduct took place while carrying out orders issued by that same district court. *Carroll*, 788 F.3d at 502. A brief summary of the facts of *Villegas* and *Carroll* follows below.

a. *Villegas v. Schmidt*

In *Villegas*, the bankruptcy trustee liquidated the estate of the debtor, a limited liability company. *Villegas*, 788 F.3d at 157. Four (4) years after the bankruptcy case was closed, the debtor and its president filed suit against the trustee in district court, alleging that the trustee committed gross negligence and breached his fiduciary duty by failing to pursue an action against an insurance company for coverage under an insurance policy worth $10 million (that the insurance company denied it had issued to the debtor). The district court dismissed the case because the plaintiffs failed to obtain leave from the bankruptcy court before filing suit against the trustee. The plaintiffs appealed the dismissal to the Fifth Circuit, arguing that the *Barton* doctrine did not apply to *Stern* claims. The Fifth Circuit rejected this contention for two reasons. First, the U.S. Supreme Court has directed courts to abstain from concluding that one of its later cases has limited or overruled one of its earlier cases by implication. *Id*. at 158

(citing *Agostini v. Felton*, 521 U.S. 203, 237 (1997)). Second, the U.S. Supreme Court in *Executive Benefits Ins. Agency v. Arkison*, 134 S. Ct. 2165, 2168 (2014), held that "*Stern* did not . . . decide how bankruptcy or district courts should proceed when a '*Stern* claim' is identified," thus suggesting that *Stern* would not limit the *Barton* doctrine. *Villegas*, 788 F.3d at 156; *see Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015) (holding that litigants may consent to a bankruptcy court's final adjudication of *Stern* claims). The Fifth Circuit also rejected the plaintiffs' argument that the *Barton* doctrine does not apply when a party brings suit in the court that exercises supervisory authority over the bankruptcy court that appointed the trustee. The Fifth Circuit refused to construe "appointing court" to include the court with supervisory authority over the bankruptcy court. Accordingly, the Fifth Circuit affirmed the district court's dismissal of the plaintiffs' lawsuit.

Villegas signifies the continued viability of the *Barton* doctrine after the enactment of the Bankruptcy Reform Act of 1978. *See Kaliner v. Antonoplos (In re DMW Marine, LLC)*, 509 B.R. 497 (Bankr. E.D. Pa. 2014). Because bankruptcy courts no longer appoint the trustee under § 701(a)(1), and because § 323 provides that a trustee has the "capacity to sue and be sued," but does not expressly require prior court approval, it was unknown before *Villegas* whether the *Barton* doctrine applied in the Fifth Circuit. The plaintiffs in *Villegas* did not raise this issue on appeal and, thus, the Fifth Circuit applied the doctrine without addressing the impact of the changes in bankruptcy law. As the Third Circuit explained in *In re VistaCare Group, LLC*, 678 F.3d at 218, however, § 323 merely indicates the proper party to sue for standing purposes and does not abrogate the *Barton* doctrine.

b. *Carroll v. Abide*

In *Carroll*, the debtors and RedPen Properties LLC ("RedPen"), their closely-held corporation, filed for bankruptcy. *Carroll*, 788 F.3d at 503. The same individual served as the trustee for both estates. The debtors' children asked the bankruptcy court to determine that prepetition documents transferred certain movable properties to them. The trustee counterclaimed, alleging that the transfer documents were void and seeking a determination of ownership of the movables. The district court withdrew the referral of the dispute to the bankruptcy court because of uncertainty regarding the bankruptcy court's jurisdiction created by the U.S. Supreme Court's decision in *Stern*. The district court then ordered the debtors and their children to produce all of the original documents, records, computer disks, financial and legal folders of RedPen to the trustee and also directed them to turnover all of RedPen's computers. The trustee collected the items listed in the district court's order from the debtors' residence. The debtors insisted that a particular computer was personal, not a RedPen computer, but the trustee took it anyway because it was identified as an asset in RedPen's bankruptcy schedules. The debtors asked the district court to order the trustee to release the computer. One year later, the district court granted summary judgment in favor of the trustee on the issue of ownership of the movables and, in the same ruling, ordered the trustee to return the computer in question to the debtors. The debtors then filed a separate lawsuit in the same district court, alleging that the trustee violated their Fourth Amendment rights by seizing and accessing their personal computer. The district court dismissed the lawsuit for lack of subject matter jurisdiction under the *Barton* doctrine because of the debtors' failure to obtain permission from the bankruptcy court.

On appeal, the Fifth Circuit held that the *Barton* doctrine did not apply because the search

of the home and seizure of the computer occurred while the trustee was acting pursuant to orders issued by the district court. The Fifth Circuit noted that the primary concern of the *Barton* doctrine is to prevent the usurpation of powers and duties that belong exclusively to the appointing court. Because a trustee is an officer of the appointing court, the Fifth Circuit reasoned that the bankruptcy court generally has a strong interest in protecting a trustee from unjustified personal liability. In *Carroll*, however, the trustee served as an officer of *both* the bankruptcy court and the district court. Because the seizure of the computer was done pursuant to an order of the district court, the Fifth Circuit found that the rationale underlying the *Barton* doctrine did not support its application.

The Fifth Circuit did not consider *Carroll* to be inconsistent with *Villegas.* "We hold only that when a bankruptcy trustee acts pursuant to an order by the district court, and the trustee's actions pursuant to that order are the basis of the claim, the district court has jurisdiction to entertain a suit with respect to that conduct." *Carroll*, 788 F.3d at 507.

B. Does the *Barton* doctrine even apply?

The threshold issue before the Court is whether Kitchens Brothers was required to obtain the Court's permission before filing the District Court Litigation. As noted previously, Heritage and its operating subsidiaries, Heritage Global Partners, Inc. and Equity Partners, were retained by Kitchens Brothers "to advertise, market, and sell" certain assets of the bankruptcy estate. (Dkt. 85). The question thus becomes whether there is legal authority for extending the protections afforded by the *Barton* doctrine to such professionals retained by a debtor in possession. The *Barton* doctrine has been held to apply not only to a bankruptcy trustee but also to any professional who is the "functional equivalent of a trustee." *Allard v. Weitzman (In*

re DeLorean Motor Co.), 991 F.2d 1236, 1241 (6th Cir. 1993); *see In re Lowenbraun*, 453 F.3d at 321 (applying *Barton* doctrine to counsel for the bankruptcy trustee); *Tshiani v. Monahan*, 533 B.R. 506, 509 (D. Md. 2015) (same); *Mammola v. Dwyer*, 497 B.R. 1, 2 (D. Mass. 2013) (same). Courts have recognized that auctioneers fall within this "functional equivalent" definition. *Carter*, 220 F.3d at 1249; *Lentz v. Cahaba Disaster Relief (In re CDP Corp.)*, 462 B.R. 615, 635-36 (Bankr. S.D. Miss. 2011) (noting that the *Barton* doctrine applies to suits against auctioneers "appointed by the trustee and approved by the court to represent the estate"); *see Equip. Leasing, LLC v. Three Deuces, Inc.*, No. 10-2628, 2011 WL 6141443 (E.D. La. Dec. 9, 2011) (granting auctioneer's motion to dismiss for lack of jurisdiction after applying the *Barton* doctrine); *see also Lawrence v. Goldberg*, 573 F.3d 1265 (11th Cir. 2009) (applying *Barton* doctrine to investigator retained with court approval and to creditor who agreed to finance trustee's efforts to bring property into the estate pursuant to a court-approved financing agreement).

Also, the *Barton* doctrine has been applied to lawsuits brought against a debtor in possession (or an officer/managing partner of a debtor in possession). *See, e.g.*, *Gordon*, 162 F.3d at 1155 (applying *Barton* doctrine to suit filed against the managing partner of the debtor in possession); *Helmer v. Pogue*, No. 2:12-cv-1635, 2012 WL 5231153 (N.D. Ala. Oct. 22, 2012) (holding that *Barton* doctrine applied to a debtor in possession); *In re General Growth Props., Inc.*, 426 B.R. 71 (Bankr. S.D.N.Y. 2010) (holding that *Barton* doctrine protects any fiduciary of the estate, including a debtor in possession). These courts reasoned that a chapter 11 debtor in possession should be treated in the same way as a trustee for purposes of the *Barton* doctrine, given that a debtor in possession is invested with many of the same powers as a bankruptcy

trustee.[9] 11 U.S.C. § 1107. Indeed, courts began extending the *Barton* doctrine to professionals retained by the debtor in possession for the same reasons it was extended to professionals retained by a bankruptcy trustee. *See, e.g., Hallock v. Key Fed. Savs. Bank* (*In re Silver Oak Homes, Ltd*.), 167 B.R. 389 (Bankr. D. Md. 1994) (holding that *Barton* doctrine barred suit against counsel retained by a debtor in possession).

In the Motion to Authorize Litigation, Kitchens Brothers contends that the *Barton* doctrine does not apply to the District Court Defendants because the District Court Litigation involves "postpetition claims that are not against estate attorneys or accountants." Kitchens Brothers does not cite any legal authority for the proposition that the *Barton* doctrine only applies to attorneys and accountants. Moreover, as mentioned previously, the *Barton* doctrine has been applied to auctioneers and other professionals in other bankruptcy cases. But the Court finds another reason why the present situation is different. In those cases where the *Barton* doctrine has been applied, the debtor in possession was not the plaintiff. The Court has not found any reported case holding that the *Barton* doctrine precludes a debtor in possession from pursuing claims in the forum of its choice against a defendant who was a professional retained by that debtor in possession. At the Hearing, counsel for the District Court Defendants admitted that he too was unable to locate any such authority.

The underlying purpose of the *Barton* doctrine, which is to provide protection to bankruptcy trustees (and, by extension, to debtors in possession) acting in their official capacity, is critical to the Court's decision. "A bankruptcy trustee is an officer of the court that appoints

[9] The extension of the *Barton* doctrine to debtors in possession was viewed as being consistent with the amendment to 28 U.S.C. § 959 that added both "trustees" and "debtors in possession" as being within the scope of its provisions.

him," and, therefore, that court has a strong interest in protecting him from unjustified personal liability for acts taken within the scope of his official duties." *In re Lehal Realty Assocs.*, 101 F.3d at 276. "Without the requirement [of obtaining leave], trusteeship will become a more irksome duty, and so it will be harder for courts to find competent people to appoint as trustees. Trustees will have to pay higher malpractice premiums, and this will make the administration of the bankruptcy laws more expensive." *In re Linton*, 136 F.3d at 545. This concern is not implicated by the District Court Litigation.

In *Carroll*, the Fifth Circuit declined to apply the *Barton* doctrine because, *inter alia*, the suit was filed in a forum that shared the bankruptcy court's interest in protecting the trustee from personal liability. Here, the risk of personal liability also does not exist because Kitchens Brothers (the debtor in possession) is the plaintiff, not the defendant, in the District Court Litigation. For that reason, the Court finds that the *Barton* doctrine does not apply to Kitchens Brothers, and, thus, Kitchens Brothers does not need this Court's permission to pursue the District Court Litigation. Having reached this decision, it is unnecessary to consider whether Kitchens Brothers complied with the *Barton* doctrine or whether it is entitled to relief *nunc pro tunc*. Nevertheless, the Court addresses these issues in order to provide a more complete discussion.

C. Did Kitchens Brothers comply with the *Barton* doctrine by virtue of the Order Employing Special Counsel?

In its Motion to Authorize Litigation, Kitchens Brothers contends that the Court's approval of the engagement of Porter & Malouf "at least impliedly" indicated its approval of Kitchens Brothers' initiation of the District Court Litigation. The District Court Defendants, in turn, argue that Kitchens Brothers did not file a separate written motion expressly seeking

authority to sue under *Barton*. (Obj. ¶ 16). They also argues that any contention that this Court impliedly approved the District Court Litigation is "completely belied" by the language in the Order Employing Special Counsel. (Obj. ¶ 14). According to the District Court Defendants, the Order Employing Special Counsel authorized Porter & Malouf only "to assist the Debtor-in-Possession with a potential claim for damages." (Obj. ¶ 14). They maintain that there is no express language in the Order Employing Special Counsel authorizing Kitchens Brothers to file the District Court Litigation. They place great emphasis on the language in the Order Employing Special Counsel in which the Court declined to approve the Attorney-Client Contract.

With respect to the first argument of the District Court Defendants, the Court has not found any reported case interpreting the *Barton* doctrine as requiring a separate motion, and they cite no legal authority that supports such a procedural requirement. The Court, therefore, rejects their technical argument. As to their second argument, the primary issue is whether the Order Employing Special Counsel satisfies the *Barton* doctrine. In that regard, the Court notes that the standard for granting a *Barton* order has been likened to the one used in evaluating a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). *In re VistaCare*, 678 F.3d at 232. The party requesting a *Barton* order must establish only a plausible claim for relief. *Strand v. Loverdidge*, No. 2:07-CV-00576, 2008 WL 893004 (D. Utah Mar. 28, 2008). Permission to sue generally is granted unless a claim is frivolous. *Id*. Given this minimum standard, the Court agrees with Kitchens Brothers that the approval of Porter & Malouf's employment constituted authorization for Kitchens Brothers to sue the District Court Defendants consistent with *Barton*. The Court reaches this conclusion even though the Order Employing

Special Counsel did not specifically include a finding that Kitchens Brothers met its burden of proving a *prima facie* claim.

By way of background, a debtor in possession's retention and compensation of attorneys is governed by §§ 327-330. First, under § 327, the debtor in possession must obtain the bankruptcy court's permission to employ the attorney. Second, under § 330, the attorney who has been employed under § 327(a) may request reasonable compensation "for actual, necessary services rendered" after his representation has concluded. 11 U.S.C. § 330(a)(1)(A). Before his representation has begun, the attorney may obtain court approval of a compensation agreement under § 328. But once a compensation plan has been approved under § 328, "the court may allow compensation different from the compensation provided under such terms and conditions after the conclusion of such employment, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions." 11 U.S.C. § 328(a).

The Court was aware of the allegations against the District Court Defendants even before Kitchens Brothers filed the Application to retain Porter & Malouf under § 327. The parties alluded to problems in the auction process at the hearing held on December 2, 2013 on the Motion to Confirm Asset Sale. Thereafter, Kitchens Brothers provided greater detail of these same allegations at a status conference held on July 15, 2014 in connection with an order extending the time for Kitchens Brothers to file its plan of reorganization and disclosure statement. (Dkt. 179). The Court's firm belief that the allegations against the District Court Defendants were not frivolous and stated a plausible claim for relief was implicit in this Court's approval of Kitchens Brothers' engagement of Porter & Malouf under § 327. For this reason,

the Court finds that the Order Employing Special Counsel satisfied the *Barton* doctrine.

The District Court Defendants place too much emphasis on the language in the Order Employing Special Counsel that denies approval of the Attorney-Client Contract "at this time." (Dkt. 271). They argue that in order to grant Kitchens Brothers authority to sue, the Court had to approve the Attorney-Client Contract, which it expressly declined to do. According to the District Court Defendants, the Court authorized Kitchens Brothers only to pursue "a potential claim for damages." The language in question appears in a paragraph regarding the payment of fees, not the scope of employment, and the denial was without prejudice. The Court's intent was to reserve the fee issue for later decision because prior approval of the compensation agreement would have prevented the Court from later adjusting the fee in the absence of intervening circumstances "not capable of being anticipated" at the time the award was approved. 11 U.S.C. § 328; *ASARCO, L.L.C. v. Barclays Capital, Inc. (In re ASARCO, L.L.C.)*, 702 F.3d 250, 258-59 (5th Cir. 2012). If, for example, Porter & Malouf had settled the claim against the District Court Defendants without having to file a lawsuit or otherwise expend much time or effort during its representation of Kitchens Brothers, the proposed contingency fee of forty percent (40%) may be too high. Even so, the Court could not revise the fee in the absence of intervening circumstances. The Court's denial of the Attorney-Client Contract, therefore, was not intended to limit the scope of Porter & Malouf's employment but to withhold approval of the forty percent (40%) contingency fee until the end of the representation. The District Court Defendants misconstrue the import of the Court's denial of the Attorney-Client Contract.

D. Should this Court grant Kitchens Brothers *nunc pro tunc* authority to file the District Court Litigation?

Kitchens Brothers asks the Court to approve the District Court Litigation retroactively in

order to remove any doubt about the subject matter jurisdiction of the District Court and, perhaps more pressing, in order to defeat the Motion to Dismiss pending before the District Court. The District Court Defendants argue that it would be unfair for this Court to approve the District Court Litigation *nunc pro tunc* because Kitchens Brothers took affirmative steps to seek confirmation of the auction sale and disbursement of the sales proceeds. (Obj. ¶ 18). They also argue that *nunc pro tunc* approval would be a waste of judicial resources because it will not preclude the District Court from considering the alternative relief requested in the Motion to Dismiss, namely the referral of the dispute to this Court. According to the District Court Defendants, "[t]he District Court will likely decide to refer the action back to this Honorable Court because the core of the District Court Litigation involves conduct that occurred during the pendency of this Bankruptcy Case, which was overseen entirely by this Court." (Obj. ¶ 20).

The Fifth Circuit has recognized that in exceptional circumstances, a bankruptcy court may grant approval, *nunc pro tunc*, to employ an attorney under § 327, provided that the required showing is made supporting the approval of such employment. *Fanelli v. Hensley (In re Triangle Chems., Inc.)*, 697 F.2d 1280, 1284-85 (5th Cir. 1983). In reaching its decision in *Triangle Chemicals*, the Fifth Circuit relied on the equitable powers of a bankruptcy court. *Id*. The same equitable principles render a *nunc pro tunc Barton* order permissible under the facts here presented.

In an analogous case, *Falck Properties, LLC v. Walnut Capital Real Estate (In re Brownsville Property Corp.)*, 473 B.R. 89 (Bankr. W.D. Pa. 2012), the bankruptcy court concluded that the plaintiff had satisfied the minimal burden of showing that its claim was "not without foundation" and gave its *nunc pro tunc* approval of a lawsuit. Although the bankruptcy

court considered dismissing the case, it concluded that any such dismissal would be without prejudice, and the plaintiff simply would refile the same lawsuit after obtaining the requisite approval. "Rather than exalt form over substance in that fashion, the Court finds that the better course is to simply make the determination now whether the case should be permitted to proceed under the *Barton* doctrine." *Id*. at 92. As in *Brownsville*, the Court finds that sufficient reason exists here to approve the District Court Litigation. Thus, the Court exercises its equitable powers to grant such relief *nunc pro tunc* to the extent that the *Barton* doctrine applies or that the Order Employing Special Counsel does not satisfy the *Barton* doctrine. Given the minimal standard that applies, the Court would have authorized the District Court Litigation if Kitchens Brothers had sought a *Barton* order before filing the lawsuit.[10]

The Court rejects the arguments of the District Court Defendants in opposition to *nunc pro tunc* relief. First, the Court finds that their argument regarding Kitchens Brothers' conduct after the public auction goes to the merits of the claims asserted in the District Court Litigation, not to the conditions under which leave to sue should be granted. It is inappropriate at this juncture for the Court to engage in a summary judgment-type analysis of Kitchens Brothers' claims. As stated previously, a *Barton* order requires only proof of a *prima facie* claim of possible merit. The District Court Defendants' argument, which suggests an estoppel defense, is better addressed in the context of the District Court Litigation, where the facts can be more fully developed. With regard to their second argument related to judicial resources, the Court declines to speculate about the manner in which the District Court may resolve the Motion to

[10] For purposes of the request for *nunc pro tunc* relief, it is assumed that *Barton* applies and that Kitchens Brothers did not obtain prior approval to sue the District Court Defendants. As previously stated, however, the Court has found otherwise as to both assumptions.

Dismiss pending before it.

Conclusion

For the reasons previously stated, the Court concludes that the *Barton* doctrine does not apply to the District Court Defendants in the District Court Litigation. Even if the *Barton* doctrine applied, Kitchens Brothers satisfied *Barton* by virtue of the Order Employing Special Counsel. Finally, even if the Order Employing Special Counsel did not satisfy *Barton*, Kitchens Brothers is entitled to a new *Barton* order, *nunc pro tunc.*

IT IS, THEREFORE, ORDERED that the Motion is granted to the extent set forth below.

IT IS FURTHER ORDERED that the *Barton* doctrine does not require Kitchens Brothers to obtain prior approval from this Court to pursue the District Court Litigation.

IT IS FURTHER ORDERED that assuming the *Barton* doctrine applies, Kitchens Brothers obtained prior approval to pursue the District Court Litigation from this Court by virtue of the Order Employing Special Counsel.

IT IS FURTHER ORDERED that even if Kitchens Brothers failed to obtain prior approval of this Court under the *Barton* doctrine, the Court now grants Kitchens Brothers the necessary approval to pursue the District Court Litigation on a *nunc pro tunc* basis.

##END OF ORDER##