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8 **UNITED STATES BANKRUPTCY COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**

10 In re:
11
12 ALOOJIAN ENTERPRISES, LLC,
13
14 Debtor.

Case No.: 2:14-bk-19565-BB

Chapter 11

13 **MEMORANDUM DECISION**
14 **CONDITIONALLY APPROVING THE**
15 **EMPLOYMENT APPLICATION OF**
16 **GLASSRATNER ADVISORY & CAPITAL**
17 **GROUP, LLC**

[No hearing required]

18 **I. SUMMARY**

19 The debtor's application to employ GlassRatner Advisory & Capital Group, LLC
20 (the "Company") (dkt. 74) will be granted by separate order, subject to the following
21 conditions. No later than 14 days after entry of this Memorandum Decision on the
22 docket, one or more declarations must be filed (a) verifying the establishment of certain
23 ethical and financial screens previously alleged, (b) providing resumes of the
24 professionals with the Company who are anticipated to be working on this case,
25 sufficient to establish that such professionals have experience and other qualifications
26 commensurate with their hourly rates, and (c) clarifying apparently inconsistent
27 statements regarding whether the Company has or has not received a post-petition
28 retainer.

1 **II. FACTUAL BACKGROUND**

2 On May 15, 2014, the debtor filed its voluntary chapter 11 bankruptcy petition
3 (dkt. 1) and this case was randomly assigned to the Hon. Sheri Bluebond. This case
4 remains pending before her.

5 On June 20, 2014, the debtor filed and served its application to employ the
6 Company (dkt. 74, the "Employment Application"). The Employment Application
7 discloses (*id.* at 4:16–18) that the Company "employs Brad Smith as a Managing
8 Director in its Los Angeles, California office" and "Mr. Smith is the spouse of the
9 Honorable Sheri Bluebond." No party in interest has filed any objection to the
10 Employment Application.

11 The record reflects that Mr. Smith will not be working on the case (*id.* at 4:16–
12 18), nor will he have any other involvement in this case and none of the debtor's
13 confidential information or work product will be shared with him (the "Ethical Screens").
14 See Disclosures etc. (dkt. 110) at 2:9–16. The record also reflects that Mr. Smith is a
15 salaried employee of the Company and his compensation will not be affected by any
16 amounts that may or may not be allowed to the Company as compensation for services
17 or reimbursement of expenses in connection with this case (the "Financial Screens").
18 *Id.* at 2:17–19.

19 Nevertheless, in view of the potential ethical concerns, and pursuant to 28 U.S.C.
20 § 455(e), (a) Judge Bluebond provided a "full disclosure on the record" of the facts
21 relevant to her possible disqualification due to her relationship to Mr. Smith (see
22 Disclosures etc., dkt. 110), (b) she authorized a procedure whereby parties in interest
23 could elect on a confidential basis whether or not to waive her possible disqualification
24 on account of her relationship with Mr. Smith (see *id.*), pursuant to which each party in
25 interest has now either waived or been deemed to have waived that possible
26 disqualification (see Notice (dkt. 141), and (c) she has established that she will not
27 adjudicate the Employment Application and, if the debtor is authorized to employ the
28 Company, she will not adjudicate any disputes concerning compensation or

1 reimbursement to be paid to the Company in connection with this case, and all such
2 matters will be assigned to another judge. Pursuant to those procedures, the
3 undersigned is adjudicating the Employment Application.

4 **III. ETHICAL ISSUES GENERALLY**

5 The ethical considerations in this situation have two sides. On the one hand,
6 employment should not be authorized if it would run afoul of any applicable statute, rule,
7 or ethical precept. On the other hand, an over-zealous application of those constraints
8 would raise its own ethical problems, including depriving parties of access to
9 professionals of their choice, depriving professionals of the freedom to associate with
10 firms of their choice, and making it too easy to object to employment such that in a
11 future case parties would be encouraged to use unmeritorious objections as a means of
12 “judge shopping” or of precluding the employment of professionals precisely because
13 those professionals may be sufficiently skilled or diligent that, if employed, they likely
14 would uncover and pursue legitimate claims against the objecting party. *See generally*
15 *In re Nat’l Store Fixture Co.*, 37 B.R. 481, 485-90 (Bankr. W.D. MO, 1984) (prior version
16 of Rule 5002 was void for violation of due process because, “to bar the appointment of
17 those persons associating with a relative of a judge of the court making the appointment
18 ... deprives persons of their right of association, their right to engage in a particular
19 profession or activity and frustrates future opportunities through injury to profession or
20 reputation.”).

21 **IV. EMPLOYMENT UNDER 11 U.S.C. § 327(a)**

22 The Employment Application seeks to employ the Company pursuant to 11
23 U.S.C. § 327(a), which provides in full:

24 (a) Except as otherwise provided in this section, the trustee, with
25 the court's approval, may employ one or more attorneys,
26 accountants, appraisers, auctioneers, or other professional
27 persons, that do not hold or represent an *interest adverse to the*
estate, and that are *disinterested persons*, to represent or assist the
trustee in carrying out the trustee's duties under this title. [Emphasis
added.]

28 The term “disinterested person” is defined by 11 U.S.C. § 101(14) to mean:

1 a person that (A) is not a creditor, an equity security holder, or an
2 insider; (B) is not and was not, within 2 years before the date of the
3 filing of the petition, a director, officer, or employee of the debtor;
4 and (C) does not have an interest materially adverse to the interest
of the estate or of any class of creditors or equity security holders,
by reason of any direct or indirect relationship to, connection with,
or interest in, the debtor, *or for any other reason*. [Emphasis
added.]

5 The record does not reflect any basis for disqualification of the Company from
6 employment, unless the catchall provisions emphasized above were to apply. They do
7 not, for the reasons set forth below.

8 **V. FEDERAL RULE OF BANKRUPTCY PROCEDURE 5002(a)**

9 The authority of a bankruptcy judge to approve employment of professionals is
10 limited by Rule 5002 of the Federal Rules of Bankruptcy Procedure (“Rule 5002”).
11 Formerly the rule provided that certain professionals or their firms could not be
12 employed if they were “a relative of any judge or referee of the court ... authorizing the
13 employment.” See *In re Hilltop Sand & Gravel, Inc.*, 35 B.R. 412, 414 (N.D. Ohio 1983)
14 (quoting a prior version of Rule 5002) (emphasis added). In 1985, however, the rule
15 was amended to provide, in relevant part:

16 (a) Approval or Appointment of Relatives Prohibited. ... The
17 employment of an individual as an attorney, accountant, appraiser,
18 auctioneer, or other professional person pursuant to §§ 327, 1103,
or 1114 shall not be approved by the court if the individual is a
19 relative ***of the bankruptcy judge approving the employment.*** ...
Whenever under this subdivision an individual may be not be
20 approved for appointment or employment, the individual’s firm,
21 partnership, corporation, or any other form of business association
or relationship, and all members, associates and professional
employees thereof also may not be approved for appointment or
employment. [Fed. R. Bankr. P. 5002(a), emphasis added.]

22 The plain meaning of the amended rule is that, although “the bankruptcy judge
23 approving the employment” cannot be a relative of the professional at issue, the
24 employment may be authorized by any *other* (unrelated) judge of the court. Further
25 support for this straightforward reading of the rule is provided by Rule 5004(b), which
26 clearly contemplates that a bankruptcy judge might preside over a case in which a
27 relative is seeking compensation:

28 (b) Disqualification of Judge From Allowing Compensation. A
bankruptcy judge shall be disqualified from allowing compensation

1 to a person who is a relative of the bankruptcy judge or with whom
2 the judge is so connected as to render it improper for the judge to
3 authorize such compensation. [Fed. R. Bankr. P. 5004(b); *see also*
4 *Nat'l Store Fixture Co.*, 37 B.R. at 488 (pointing out that Rule 5004
5 contemplates fee awards to persons who are relatives of the
6 bankruptcy judge presiding over the case).]

7 It is true that *Collier on Bankruptcy* appears to adopt a broader reading of Rule
8 5002: "Bankruptcy judges may not appoint relatives of themselves or relatives of other
9 bankruptcy judges sitting on the same bankruptcy court." 9 *Collier on Bankruptcy*
10 ¶ 5002-3[1] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.) ("*Collier on*
11 *Bankruptcy*"). That sentence may be a holdover from the analysis of the prior version of
12 Rule 5002. In any event, that analysis is contrary to the plain meaning of the amended
13 version of Rule 5002.

14 Alternatively, assuming for the sake of discussion that there were any ambiguity
15 in Rule 5002, the intent of the rule is highlighted by the Advisory Committee Note, which
16 contrasts the original rule with the amended rule. As to the former, the Advisory
17 Committee Note states:

18 The **original** rule prohibited all bankruptcy judges in a district from
19 appointing or approving the employment of (i) a relative of **any**
20 bankruptcy judge serving in the district, (ii) the firm or business
21 association of any ineligible relative and (iii) any member or
22 professional employee of the firm or business association of an
23 ineligible relative. ...

24 Turning to the amended version of the rule, the Advisory Committee Note
25 continues:

26 Relatives are not eligible for appointment or employment when the
27 bankruptcy judge **to whom they are related** makes the
28 appointment or approves the employment. Canon 3(b)(4) of the
Code of Judicial Conduct, which provides that the judge "shall
exercise his power of appointment only on the basis of merit,
avoiding nepotism and favoritism," should guide a bankruptcy judge
when **a relative of a judge of the same bankruptcy court** is
considered for appointment or employment. [Advisory Committee
Note to Rule 5002(a), subdivision (a), as quoted in 9 *Collier on*
Bankruptcy App. 5002[2] p. 5002-12 (Alan N. Resnick & Henry J.
Somme reds., 16th ed.)].

29 The undersigned has reviewed Canon 3(b)(4) – referenced in the above
30 quotation – as well as the other ethical Canons, and the published opinions and
31 summaries of unpublished opinions of the Committee on Codes of Conduct. No such

1 authorities are directly on point, but the procedures established by Judge Bluebond are
2 fully consistent with the approach favored by the relevant opinions. In addition, those
3 procedures are fully adequate to protect against (a) adverse consequences to the
4 bankruptcy estate or any class of creditors or equity holders and (b) either actual or
5 perceived nepotism or favoritism. See, e.g., Advisory Opinion No. 58 (“Disqualification
6 When Relative is Employed by a Participating Law Firm”) (stating, in the analogous
7 context of recusal: “If the relative is an associate or non-equity partner and has not
8 participated in the preparation or presentation of the case before the judge, and the
9 relative's compensation is in no manner dependent upon the result of the case, recusal
10 is not mandated.”).

11 The record reflects that there are both Ethical Screens and Financial Screens in
12 this case, and in addition Judge Bluebond has established that she will not adjudicate
13 the Employment Application nor any disputes concerning compensation or
14 reimbursement to be paid to the Company in connection with this case. Based on these
15 safeguards, and the foregoing analysis, the undersigned is persuaded that it is proper to
16 approve the Employment Application, subject only to the conditions summarized at the
17 start of this memorandum decision as set forth in greater detail below.

18 **VI. CONDITIONS ON APPROVAL OF EMPLOYMENT APPLICATION**

19 No later than 14 days from the date of entry of this memorandum decision, the
20 supplemental documents described below must be filed, with a copy served on the
21 United States Trustee.

22 (a) Ethical and Financial Screens. Although the record reflects the existence of
23 the Ethical Screens and Financial Screens, those things have not been verified by a
24 declaration under penalty of perjury. Such a declaration may be filed by an authorized
25 representative of the Company, or Mr. Smith, or both.

26 (b) Resumes. Although the Employment Application provides the resume of the
27 principal professional with the Company who will be working on this case, no other
28 resumes are provided. A declaration should be filed with attached, authenticated

1 resumes of the professionals and paraprofessionals with the Company who are
2 anticipated to be working on this case. Those resumes should be sufficient to establish
3 that such persons have experience and other qualifications commensurate with their
4 hourly rates as set forth in the Employment Application.

5 (c) Postpetition retainer. The Company should file a declaration clarifying
6 apparently inconsistent statements regarding whether the Company has or has not
7 received a post-petition retainer. *Compare* Employment Application (dkt. 74) at 3:12-13
8 (“It is anticipated that the Post-Petition Retainer will be funded by the post-petition DIP
9 financing recently approved by this Court.”) *with* Notice of Employment Application (dkt.
10 75) at 2:15-16 (“GlassRatner has requested and received a post-petition retainer from a
11 third party DIP lender in the amount of \$10,000.00.”). The employment will be approved
12 regardless whether the postpetition retainer has or has not been received, because the
13 undersigned is satisfied that a postpetition retainer in the amount of \$10,000.00 is
14 proper, but the record should be clear as to whether or not these funds have been
15 received.

16 VII. CONCLUSION

17 After the foregoing supplemental declarations have been filed and served,
18 counsel for the debtor should notify the chambers of the undersigned. It is anticipated
19 that the previously-lodged order will be issued thereafter – with minor amendments to
20 reflect the matters set forth in this memorandum decision – after a very brief period in
21 case the United States Trustee wishes to respond to the supplemental declarations.
22 Subject to the foregoing, the Employment Application will be approved.

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24 Date: August 6, 2014

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Neil W. Bason
United States Bankruptcy Judge