UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

In re: 2202 East Anderson St., LLC, Debtor.	Case No.: 2:23-bk-11695-NB Chapter: 11 **MEMORANDUM DECISION ON AVER FEE APPLICATION** Hearing: Date: December 19, 2023 Time: 2:00 p.m. Place: Courtroom 1545 255 E. Temple Street Los Angeles, CA 90012 (and via Zoomgov per posted procedures)

The Law Offices of Raymond H. Aver ("Aver") was bankruptcy counsel for the above-captioned Debtor. On the one hand, Aver substituted into this case and provided very experienced services when this "bankruptcy case was in simple terms 'a mess.'" Reply (dkt. 188) p. 2:10-11. On the other hand, from the inception of its employment, there was a tension between Aver's representation of Debtor, in its role as a trustee for the benefit of creditors, and Aver's relationship with Debtor's principal, Mr. Zion Vanounou ("Vanounou").

That tension infected both Aver's handling of its employment application and its efforts to explore possible alternatives to a sale of Debtor's only substantial asset. For

the reasons set forth below, this Court will adhere to its tentative ruling posted prior to the above-captioned hearing, which is to reduce Aver's requested fees by $3,000.00 for employment issues and $8,000.00 for so-called "Conversion/Dismissal" issues.

1. POTENTIAL CONFLICTS, AND DISCLOSURE ISSUES

Vanounou paid Aver's retainer and guaranteed payment of Aver's fees. *See* Memorialization of [subsequently adopted] Tentative Rulings (dkt. 210, the "Adopted Tentatives"), p. 6, part (1)(e)(i). Those things raise serious ethical concerns, that should have been disclosed and addressed right away, in Aver's employment application, and easily could have been disclosed and addressed using this Court's forms. As noted in the posted "Procedures of Judge Bason":

> Form F 2014-1 required. Professionals are ***required*** to execute local form F 2014-1.STMT.DISINTEREST.PROF (statement of disinterestedness), except when using local forms F 2081-2.5.MOTION.EMPLOY.GEN.COUNSEL or **F 2081-2.5.MOTION.EMPLOY.OTHER (the [latter form is] designed for individuals, but the judge encourages [its] use in non-individual cases with minor changes such as striking the word "individual" in the title)**. Note: the judge prefers that local form F 2014-1 not repeat the employment application – instead simply say "see application" or the like (reasons: proposed professionals frequently do not track the language of Rule 2014, so the judge requires use of the form so that someone verifies the elements of that rule under penalty of perjury, and so the court staff does not have to do a line-by-line comparison with each element of the Rule)
>
> * * *
>
> Retainer paid by third party. Declarations and/or briefs generally are required to address the **ethical concerns involved whenever a retainer is paid by a third party. *See* Cal. Rule of Prof'l Conduct 1.8.6; In re 9469 Beverly Crest, LLC (Case No. 2:19-bk-20000-NB, dkt.44) ["Beverly Crest"]**. [Procedures of Judge Bason (Rev. 9/20/23) pp. 10-12 (boldface added, other emphasis in original) (available at www.cacb.uscourts.gov, last checked 3/26/24) (the "Posted Procedures").]

To be clear, Aver was entitled to use its own form of employment application, rather than this Court's form of employment application that tracks Rule 2014 (Fed. R. Bankr. P.). But, as discussed in more detail below, Aver used its own form at great expense and without adequately disclosing and addressing the ethical issues until

multiple rounds of added papers. *See, e.g.,* Second Supp. Decl. of Zion Vanounou (dkt. 98).

In fact, it is arguable that Aver never adequately disclosed and addressed its potential or actual conflicts of interest. As later pointed out by the chapter 11 trustee ("Trustee"), Aver ended up spending substantial time on possible alternatives to a sale of Debtor's only substantial asset, when those services had only a small chance of benefitting the bankruptcy estate and when, as Trustee points out, the actual sale was very predictable and "worked out extremely well for all secured and unsecured creditors of the estate." Trustee Opp. (dkt. 185) p. 6. Rather than being calculated to benefit the bankruptcy estate, Aver's services to which Trustee has objected arguably were principally motivated to benefit Vanounou. See Trustee Obj. (dkt. 185) pp. 4-7.

All of this could be characterized as Aver's nondisclosure of its true motivations to favor Vanounou at the expense of the estate, which would warrant denial of all fees for all matters in this case. *See In re Park-Helena Corp.*, 63 F.3d 877, 882 (9th Cir. 1995) ("Even a negligent or inadvertent failure to disclose fully relevant information may result in a denial of all requested fees."). But Trustee has not argued for reconsideration of this Court's order authorizing Aver's employment, nor has this Court explored that issue *sua sponte*.

The point is only that subsequent events in this case have called into question whether Aver was sufficiently motivated to act for the benefit of the bankruptcy estate, rather than for Vanounou's benefit. That question is relevant when assessing the value of Aver's services.

2. TRUSTEE'S ARGUMENTS

Trustee argued for a reduction in Aver's requested fees in the so-called "Conversion/Dismissal" category, as well as requested fees for Aver's employment and claims objections. This Court's tentative ruling posted prior to the above-captioned hearing partially sustained Trustee's objections. Among other things, this Court pointed

out that Aver, like all professionals representing the bankruptcy estate, must engage in a "cost/benefit" analysis:

> …seeking to preserve the possibility of a consensual resolution [as Aver did] does not warrant excessive time advancing arguments that have little or no chance of success. The time incurred must be proportionate to the potential results (a cost/benefit analysis, or put differently a rough "present discounted value" analysis, is required **so that the cost of services does not exceed the likely benefit**). [Adopted Tentatives (dkt. 210) p. 9 (emphasis added).]

To illustrate with a hypothetical example, it would not be reasonable to bill the bankruptcy estate $10,000.00 for a 5% chance of a $20,000.00 benefit to creditors. The present discounted value of 5% x $20,000.00 is $1,000.00, so the estate would be spending $10,000.00 for services worth $1,000.00.

Of course, in the real world it impossible to apply mathematical precision to probabilities and potential benefits. But the point is that, as Trustee has pointed out, it is questionable whether Aver's services satisfy the cost/benefit requirement, including Aver's pursuit of alternatives to a sale of Debtor's only substantial asset.

3. THIS COURT'S TENTATIVE RULINGS

The foregoing issues were addressed in this Court's tentative rulings posted prior to status conferences and other hearings. Despite what this Court has characterized (above) as the "questionable" value of Aver's services in pursuing alternatives to a sale, this Court's tentative rulings were in large part in Aver's favor on all of the foregoing issues.

Those favorable tentative rulings reflect this Court's awareness that if Aver had been able to negotiate a deal with the Stepen family and other parties in interest then it is possible that creditors ***might*** have received as much benefit as a sale was likely to generate, or conceivably even a greater benefit, while other parties in interest such as the Stepens and Vanounou also might have benefitted. In addition, for multiple reasons this Court is cautious when reducing fees: the dangers of "20/20 hindsight"; this Court's lack of first-hand knowledge of out-of-court negotiations; the difficulty of examining the

pros and cons of alternative courses of action without impinging on Debtor's attorney-client privilege; and the value of having experienced bankruptcy counsel such as Aver be willing to substitute into a chapter 11 case that is a "mess" and attempt to salvage the case.

A countervailing consideration is that Trustee has had to spend time and attorney fees addressing Aver's apparent lack of justification for its fees. Trustee must engage in her own cost/benefit analysis, and it would be unfortunate if the result of this Court's reticence to reduce professionals' fees were to disincentivize legitimate objections by Trustee.

Summarizing the above considerations, this Court believes that to a limited extent and given the unique circumstances of this case it is appropriate to give Aver some benefit of the doubt. But that benefit is limited, as addressed below.

The most relevant tentative rulings were as follows:

> **Tentative Ruling for 4/25/23:**
> * * *
> (1) Current issues
> * * *
> (c) Incomplete employment application (dkt. 17, 18)
> **Debtor has not revealed the source(s) and timing of retainer payments.** See Empl. App. (dkt. 17), p. 8. The tentative ruling is to direct Debtor to file, and serve on the United States Trustee ("UST"), a supplemental declaration providing full disclosure regarding the source(s) and timing of retainer payments. [Emphasis added.]
>
> **Tentative Ruling for 6/27/23:**
> * * *
> (1) Current issues
> * * *
> (b) Debtor's application to employ Law Offices of Raymond H. Aver, APC as its substitute bankruptcy counsel (dkt. 47, 48), Order setting hearing (dkt. 80), Supplemental Declarations of Mr. Aver and Vanounou (dkt. 86), Stipulation with UST to strike certain provisions of retainer agreement (dkt. 90), no opposition on file
> This Court's order (dkt. 80) setting this matter for hearing set a deadline of 6/13/23 for Debtor to file supplemental declarations addressing the ethical concerns involved whenever a retainer is paid by a third party. This Court has reviewed Mr. Vanounou's original declaration (dkt. 47, pp. 8-10) and supplemental declaration (dkt. 86, pp. 5-6), and the tentative

ruling is that **the declarations still do not address the following ethical issues:**

(i) Source/Terms. Mr. Vanounou originally disclosed that he funded a $10,000.00 post-petition retainer fee for the Aver Firm (dkt. 47, p. 9:9-11) and most recently disclosed that he "caused two transfers to be made to "Debtor's former proposed bankruptcy counsel" - one of which came from Debtor's bank account and the other from "the account of another entity [he] control[s]." Dkt. 86, p. 5:11-16. Were these transfers gifts? Loans? What is the identity of the other entity and is there any evidence from that entity regarding the nature of the transfer (*i.e.*, a gift or a loan)?

(ii) Connections. What are **all** of the connections between Mr. Vanounou, on the one hand, and Debtor, Debtor's proposed counsel, and any of the other types of persons listed in FRBP 2014, on the other hand -- *e.g.,* have there been any economic or business or personal connections between Mr. Vanounou and proposed counsel or any creditor or other party in interest, or their respective attorneys or accountants? Additionally, what are **all** of the connections between the other entity in which Mr. Vanounou states provided funding and all of the persons listed above?

In addition, this Court notes that the Clerk's Office issued an error notice on 6/14/23 (see dkt. 87) directing Applicant to withdraw the supplemental declarations and refile them using the correct event code but that has not been corrected.

The tentative ruling is to set a **deadline of 7/11/23** for Debtor to (i) cure the deficiencies noted by the Clerk's Office (dkt. 87), (ii) file a supplemental declaration from Mr. Vanounou addressing the issues noted above, and (iii) lodge a proposed order granting the employment application, subject to the terms of the stipulation with the U.S. Trustee (dkt. 90). Meanwhile, the tentative ruling is to continue this employment application to be concurrent with the continued status conference …, subject to being vacated if this Court enters an order authorizing Applicant's employment prior to the continued hearing.

* * *

This Court presumes that Debtor's proposed counsel is not charging Debtor or the estate for (A) correct prior errors or (B) conflicts-check issues (this Court is not aware of authority or evidence that attorneys ethically can or do charge their clients for running conflicts checks - *i.e.,* charging the prospective client before a minute of work has been done on the client's actual issues, for the privilege of finding out if the attorney is conflicted out of the representation). If this Court's presumptions about the lack of charges are incorrect, **counsel is directed to raise these issues at this hearing**. [Emphasis altered.]

Tentative Ruling for 12/19/23:

… Grant the final fee applications filed by professionals (except that the fees sought by Debtor's Counsel will be reduced by $3,000.00 for

employment issues and $8,000.00 for so-called "Conversion/Dismissal" issues) ….

(1) Current issues

* * *

(e) Final fee application of Debtor's general bankruptcy counsel Law Offices of Raymond H. Aver, APC ("Aver," dkt. 182), Notice of final fee application (dkt. 183), Chapter 11 Trustee's objection to final fee application (dkt. 185), Reply in support of final fee application (dkt. 188)

* * *

(v) Aver's entitlement to fees from the estate

Under 11 U.S.C. 330(a)(1), this Court is authorized to award "reasonable compensation for actual, necessary services rendered" by an estate professional. In determining the amount of compensation to award, this Court considers the nature, the extent, and the value of such services, taking into account all relevant factors, including—

(A) the time spent on such services;
(B) the rates charged for such services;
(C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
(D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;
(E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and
(F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title. [11 U.S.C. 330(a)(3).]

"The statute does not require that the services result in a material benefit to the estate in order for the professional to be compensated; the applicant must demonstrate only that the services were 'reasonably likely' to benefit the estate at the time the services were rendered." *In re Mednet*, 251 B.R. 103, 108 (9th Cir. B.A.P. 2000).

(vi) Services in so-called "Conversion/Dismissal" category

Trustee contends that of the $22,385 billed under the "Conversion/Dismissal" task category, Aver is entitled to be paid only $7,000. Trustee's theory is that it was essentially inevitable that Debtor's Subchapter V designation would be stricken and that a Chapter 11 Trustee would be appointed, and therefore Aver's attempts to obtain a different result are not compensable.

The tentative ruling is largely to overrule Trustee's objection and to determine that time spent by Aver attempting to obtain a stipulated resolution under which Debtor could continue to proceed under Subchapter V is mostly compensable. Trustee is correct that because Debtor's "primary activity is the business of owning single asset real

estate," 11 U.S.C. 1182(1)(A), its eligibility to proceed under Subchapter V is subject to challenge. But the fact that a Subchapter V designation is subject to challenge does not necessarily mean that the designation will ultimately be stricken — even if, as was the case here, Debtor does not qualify as a Subchapter V debtor under the definition set forth in 11 U.S.C. 1182(1)(A).

The procedure to challenge a debtor's Subchapter V designation is set forth in Rule 1020 (Fed. R. Bankr. P.). As set forth in that rule, the "status of a case as … a case under subchapter V of chapter 11 shall be in accordance with the debtor's statement" in its petition, "unless and until the court enters an order finding that the debtor's statement is incorrect." Any objection to a debtor's Subchapter V designation initiates a contested matter governed by Rule 9014. *See* Rule 1020(c). That means an objecting party could subsequently stipulate to waive its objection.

This Court is vested with the authority to approve such a stipulation, deem objections to the Subchapter V designation waived, and allow the case to continue to proceed under Subchapter V — even when, as in the present case, Debtor does not satisfy the eligibility requirements specified in 11 U.S.C. 1182(1)(A). This Court takes judicial notice that in several other Subchapter V cases all parties have agreed to waive the ineligibility issues because, in those cases, the parties ultimately considered it more efficient to continue to use the services of the Subchapter V Trustee. A similar result might have been obtained in this case, and Debtor's preparation and filing of papers on this issue preserved this option.

True, seeking to preserve the possibility of a consensual resolution does not warrant excessive time advancing arguments that have little or no chance of success. The time incurred must be proportionate to the potential results (a cost/benefit analysis, or put differently a rough "present discounted value" analysis, is required so that the cost of services does not exceed the likely benefit). Accordingly, some downward adjustment is appropriate. But not as much as Trustee requests.

The upshot is that most of the services performed by Aver in an attempt to allow the case to continue to proceed under Subchapter V appear to have been "'reasonably likely' to benefit the estate at the time the services were rendered," *Mednet*, 251 B.R. 103, 108. For example, it is possible (although by no means certain) that administrative expenses may have been reduced had Aver succeeded in obtaining a stipulated withdrawal of the objection to Debtor's Subchapter V designation.

It is important to emphasize that in the Ninth Circuit, estate professionals are **not** required to show that the services "*resulted* in identifiable, tangible, and material benefit to the bankruptcy estate" to obtain compensation, *Mednet*, 251 B.R. 103, 107 (emphasis in original). This Court must not allow hindsight bias to interfere with its assessment of the value of a professional's services. The appropriate analytical framework is whether, *at the time the services were performed*, there was a reasonable probability that the services could inure to the estate's benefit….

The tentative ruling is that reduction of the requested $22,385.00 to only $7,000.00 is excessive, but that reduction of $8,000.00 is appropriate

leaving a balance in this category of $14,385.00 ($22,385.00 - $8,000.00 = $14,385.00).

(vii) Service in the "Firm Employment" category

Trustee also objects to Debtor's Counsel's request for $9,060.40 in fees billed under the "Firm Employment" task category. Trustee's position is that Debtor's Counsel is entitled to compensation of only $1,000.00 for obtaining employment.

On 5/31/23, this Court issued an order setting a hearing on Debtor's Counsel's Employment Application. *See* Dkt. 80. As explained in that order, the Employment Application did not comply with the posted "Procedures of Judge Bason" (available at www.cacb.uscourts.gov) by, among other things, (A) failing to sufficiently address ethical concerns arising from payment of Debtor's Counsel's retainer by a third party and (B) failing to include local form F 2014-1.STMT.DISINTEREST.PROF (statement of disinterestedness).

The tentative ruling is that, had Debtor's Counsel exercised greater diligence in complying with this Court's procedures, he could have avoided billing $3,000.00 of the $9,060.40 charged to obtain employment. Accordingly, the tentative ruling is to disallow $3,000.00 in fees billed under the "Firm Employment" task code.

(viii) Conclusion regarding Aver's fee application

The tentative ruling is (A) to allow Aver $38,895.00 in fees and $140.25 in expenses, for a total award of $39,035.25 (the requested $50,035.25 minus $8,000.00 in the "Conversion/Dismissal" category minus another $3,000.00 in the "Firm Employment" category) which presumably will be paid from the estate, after resolution of the stipulated dismissal issues (payments from the estate consist of (i) the $26,000.00 post-petition retainer plus (ii) an additional $13,035.25 to be paid from cash on hand in the estate); and (B) to enter a judgment in favor of Aver and against Mr. Vanounou, requiring Mr. Vanounou to pay Aver $22,550.00 on account of Mr. Vanounou's guaranty. Again, no ***payment*** from the estate is authorized at this time (see part "(1)(b)" of this Tentative Ruling, above), and all rights are reserved for Mr. Vanounou to contest these tentative rulings by filing a written opposition and appearing at the continued hearing (see part "(1)(e)(iii)" of this Tentative Ruling, above). [Adopted Tentatives (dkt. 210) (emphasis in original).]

With this background in mind, this Court turns to the categories on which Aver challenged this Court's tentative rulings at the above-captioned hearing.

4. AVER'S SERVICES IN THE SO-CALLED "CONVERSION/DISMISSAL" CATEGORY

Aver objected that this Court's tentative ruling did not provide any precise calculation for the $8,000.00 reduction in his fees in this category. Aver has it backwards.

It is not this Court's burden to start with a precise calculation disproving Aver's entitlement to fees. It is Aver's burden to establish that his fee application seeks "*reasonable* compensation for *actual, necessary* services" (11 U.S.C. § 330(a)(1), emphasis added) including, but not limited to, a **cost/benefit analysis**. *See* 11 U.S.C. § 330(a)(3)(C)&(D) ("whether the services were *necessary* to the administration of, or *beneficial* at the time at which the service was rendered toward the completion of, [the bankruptcy] case" and "whether the services were performed within a reasonable amount of time commensurate with the complexity, *importance, and nature* of the problem, issue, or task addressed").

Aver itself recognizes the necessity of a cost/benefit analysis, and that the benefit must be to the bankruptcy estate as distinguished from Debtor or its principal. But Aver does not apply those standards by engaging in any cost/benefit analysis, or any distinction between services for Vanounou's benefit and for the estate's benefit.

Aver cites authority that professionals are obligated to consider whether "the burden of the probable cost of legal services [is] disproportionately large in relation to the … maximum probable recovery," to what extent the estate might "suffer if the services are not rendered," and the extent of likely benefit to the estate and "the likelihood of the disputed issues being resolved successfully." Reply (dkt. 188) p. 7:4-20 (quoting *Unsecured Cred. Comm. V. Puget Sound Plywood, Inc.,* 924 F.2d 955, 959-60 (9th Cir. 1991) (internal quotation marks omitted). Aver also recognizes that a fee application "will be denied to the extent that the services rendered were for the benefit of the debtor and did not benefit the estate." Reply (dkt. 188) p. 8:11-14 (quoting *In re Crown Oil, Inc.,* 257 B.R. 531, 540 (Bankr. D. Mont. 2000) (further citation and internal quotation marks omitted).

Aver describes its services, such as negotiations with various parties. *See, e.g.,* Aver Decl. (dkt. 188) pp. 15:20-16:15. But there is no cost/benefit analysis, and no discussion of the problem that to a substantial extent any time and legal fees incurred in

exploring alternatives to a sale appear on their face to be primarily for the benefit of Vanounou and not creditors.

For example, the following passage in Aver's Reply describes his work but says nothing about cost/benefit or benefit to Vanounou versus benefit to creditors:

> As the Court will recall, the Aver Firm was able to **negotiate a stipulation with the Stepen Family resulting in that creditor supporting 2202 East Anderson's efforts [to find an alternative to selling the property]**. While the Aver Firm's efforts in this regard ultimately proved unsuccessful, the test is whether the time spent was reasonable, the rates charged were reasonable, and the services were necessary to the administration of, or beneficial at the time at which the service were rendered, etc. [Reply (dkt. 188) p. 4:9-16 (emphasis added).]

In the absence of any specific analysis by Aver on whether the cost of its fees exceed the likely benefits to creditors, this Court used Trustee's analysis and this Court's own experience, both with this specific bankruptcy case and with many other chapter 11 cases. This Court used that analysis to come up with a rough estimate of the potential benefits to creditors as compared with the expense of Aver's legal fees, and to what extent Aver's work was primarily for Vanounou's benefit rather than for creditors' benefit.

As Trustee argues, from the inception of this bankruptcy case it appeared very likely that a sale of Debtor's property was probably the best alternative, and that any attempted reorganization leaving Vanounou in control was unlikely. Among other things, by the time Aver substituted into this case this Court had already strongly cautioned Vanounou regarding his postpetition history of questionable acts and omissions. As Trustee put it:

> [A]ny experienced bankruptcy attorney should have been able to see that, in light of the singular history of the debtor and Mr. Vanounou's management of it, a sale, whether in Chapter 11 or Chapter 7, was well nigh inevitable and certainly [or, in this Court's view, ***almost*** certainly] the best result for all the creditors, secured and unsecured. [Trustee Obj. (dkt. 185) p. 5.]

The ultimate question is whether Aver's pursuit of alternatives to a sale would be likely to generate an even better result for the bankruptcy estate, and at what cost.

Trustee does the sort of analysis that is notably absent from Aver's papers. In Trustee's view:

> she was fortunate to get the $7 million she finally received [for Debtor's property] and that had the buyer dropped out of escrow, a new buyer could not be expected to pay as much. Even $7 million was just enough to pay the principal amount of the Stepen Family claim and other general unsecured creditors. In the absence of a sale, and even if the debtor could somehow pay enough monthly to satisfy the bank, the property taxes ($581,262.91 at closing) and the Emory Park lien ($826,875.74 at closing) would have continued to accrue. **The risks to the non-bank creditors of foregoing a sale and letting Mr. Vanounou continue to manage the property were considerable** and payment through a bankruptcy sale was indisputably the superior option. [Aver] thought it was able to overcome this problem as to the Stepen Family members by entering into a settlement that would give them a secured lien on the property that would be senior to the Emory Park judgment lien. However, the trustee rejected this because **there was no basis for treating the Stepen Family claim as being secured** and, as such, it would have extremely unfair to Emory Park.
>
> Last, but by no means least, the bank itself would never have agreed to simply walk back the foreclosure proceeding and let Mr. Vanounou continue to operate the property either in or outside of a bankruptcy. And in the absence of the bank's agreement, at a minimum the appointment of a Chapter 11 trustee was inevitable. …. [T]he highly improbable [alternative] prospect of a hard-money lender being in first position on the property would clearly have posed enormous risks for the other creditors. [Trustee Opp. (dkt. 185) p. 6 (emphasis added).]

This Court does not need to agree 100% with Trustee (*e.g.,* that the bank would "never" have agreed to walk back the foreclosure proceeding) to find and conclude that Aver's requested fees outweigh the potential benefits to the estate, as distinguished from benefits to Vanounou. In other words, it is conceivable that Aver could have worked a miracle and negotiated a solution that would have generated an even better outcome for creditors than a sale of Debtor's property. For example, perhaps Aver could have arranged for Debtor to hire an independent manager whom the bank, the Stepens, and other creditors could trust, and who could somehow generate large enough monthly profits from the property to pay creditors, over time, more than they would get from a sale, with interest sufficient to compensate them for the delay and risks. But Aver does not outline any such scenario, let alone perform any cost/benefit

analysis or any explanation of how his services were for the benefit of the estate rather than primarily for Vanounou's benefit.

The only basis for Aver to receive any compensation at all in this category, beyond what Trustee concedes, is this Court's presumption, based on its experience, that miracles sometimes do happen, particularly given the complex and somewhat ambiguous situation between Vanounou and the Stepens. In this Court's experience, it is often worth a few thousand dollars of legal fees to explore alternatives to a sale in circumstances such as those presented in this case. But that leeway is narrow: Aver is not entitled to more compensation than what this Court provided in its tentative ruling.

Aver is cautioned that, in future, it should engage in its own cost/benefit analysis, and present its own evidence that it is acting for the benefit of the bankruptcy estate and not for the benefit of the debtor's principal. Failure to do so may result in complete denial of all fees – not because this Court expects that such fees could never be justified, but due to a lack of evidence combined with a lack of circumstances similar to those in this case that persuade this Court *sua sponte* to rule partially in Aver's favor *despite* its lack of evidence.

5. AVER'S TIME SPENT ON ITS OWN EMPLOYMENT

As noted above, this Court's Posted Procedures warn against the ethical dangers of payment for a debtor's attorney coming not from the debtor but from a third party, such as Vanounou (a "Funder"). The very reason why a Funder might want to pay for a debtor's counsel is that the Funder might want to avoid having a trustee inquire too closely into the Funder's transactions with the debtor, or otherwise assure that the estate will be managed primarily for the benefit of the Funder as opposed to the benefit of creditors. *See, e.g., In re Park-Helena Corp.,* 63 F.3d 877, 880 (9th Cir. 1995); *In re Lotus Properties LP,* 200 B.R. 388 (Bankr. C.D. Cal. 1996); *In re Hathaway Ranch Partnership,* 116 B.R. 208, 219 (Bankr. C.D. Cal. 1990); *In re Kelton Motors, Inc.,* 109 B.R. 641 (Bankr. D. Vt. 1989); *see also In re 9469 Beverly Crest, LLC* (Case No. 2:19-

bk-20000-NB, dkt. 44) ("Beverly Crest") (explaining the ethical issues arising whenever a Funder pays debtor's counsel).

For these reasons, this Court requires persuasive declarations addressing the ethical issues when a Funder is involved. *See generally Beverly Crest*. But this Court has almost always approved professionals' employment even with a Funder after sufficient evidence is presented.

This Court does so because it recognizes that a debtor may have few or no alternative sources of funding other than insiders and other persons on whom suspicions might fall. In addition, having a Funder might be the only way for a debtor to stay in possession, consistent with Congress' mandate that a debtor normally should stay in possession absent evidence of gross mismanagement or other special circumstances. *See* 11 U.S.C. § 1104. In this Court's view, that makes sense because usually it is not in the best interests of either creditors or the debtor to incur the added expense and risks from turning management and control over to a trustee.

With this background, this Court has attempted in all chapter 11 cases to reduce the expense of dealing with the Funder situation, by spelling out in detail the evidence that is required. This Court has done so in the Posted Procedures that direct professionals to review the Beverly Crest decision. If any proposed counsel fail to read those Procedures and that decision, this Court typically either posts a tentative ruling with a reminder or issues an order (as in this case) to provide the missing evidence and address the ethical issues. *See* Order (dkt. 80). If that is not enough, this Court sometimes gives proposed counsel yet another opportunity, as in this case in which this Court posted a more detailed tentative ruling spelling out the ways in which the initial evidence was defective.

But proposed counsel should not expect to bill for all these multiple bites at the apple, when a single, efficient bite would have sufficed. That is the situation in this case, as reflected in the following summary of Aver's time records, with this Court's

notes. *See* Ex. 6 to Aver Reply (dkt. 188) (time records, at PDF pp. 53-55); *and see also* Aver Fee App. (dkt. 182) Ex. 2 (same, starting at PDF p. 27).

Date	Time	Charge	Allow-low	Allow-high	Notes
4/26/23	2.2	$1,210.00	$1,210.00	$1,210.00	Appropriately includes research re disinterestedness – but employment application did not address same.
4/27/23	0.4	220.00	220.00	220.00	Prepare Aver's "standard" retainer agreement.
5/1/23	0.5	275.00	275.00	275.00	Appropriate work re substitution of attorney.
5/7/23	1.8	990.00	200.00	500.00	Prepare employment application – Court's standard form would have taken minimal time, and this supplement was inadequate, as reflected in the need for a second supplemental declaration (dkt. 98, filed 6/27/23).
5/10/23	2.0	1,100.00	200.00	500.00	Same.
5/11/23	1.0	550.00	200.00	300.00	Same.
5/26/23	0.5	275.00	50.00	100.00	A declaration of no response and a notice of lodgment are standard forms that should take minimal attorney time (this Court takes judicial notice that the tasks are almost ministerial).
6/1/23	0.2	110.00	110.00	110.00	Appropriate time for review of this Court's order setting hearing on employment application.
6/12/23	1.0	550.00	350.00	550.00	Initial preparation of further supplement in response to this Court's order.
6/13/23	3.6	1,980.00	1,000.00	1,200.00	Inefficiency in not simply quoting and addressing the evidence spelled out in *Beverly Glen*.
6/15/23	0.2	110.00	80.00	90.00	Respond to US Trustee concerns – partly unnecessary if employment

Date	Time	Charge	Allow-low	Allow-high	Notes
					application had been better prepared the first two times.
6/17/23	0.5	275.00	200.00	250.00	Same.
6/19/23	0.2	110.00	110.00	110.00	Substitution of counsel issues.
6/20/23	0.3	165.00	50.00	165.00	Stipulation with UST re employment, would have been unnecessary if employment app. had adequately addressed issues.
6/26/23	0.3	165.00	165.00	165.00	Substitution of counsel issues.
6/27/23	1.7	935.00	600.00	850.00	Inefficiency belatedly addressing issues instead of following *Beverly Crest* in original employment app.
	16.4	$9,020.00	$5,020.00	$6,595.00	Tentative ruling is for $3,000.00 reduction, *i.e.,* $9,020.00 - $3,000.00 = $6,020.00.

This Court's rough estimate of a $3,000.00 reduction in fees in this employment category is within the range of the above adjustments to each daily time entry. This Court continues to be persuaded that the rough estimate is appropriate.

This court is concurrently issuing an appropriate order implementing the foregoing memorandum decision. On a related matter, Aver is reminded of the need to lodge a proposed judgment against Vanounou regarding his portion of the allowed fees (*see* dkt. 202), or if that matter has been mooted (*e.g.,* by payment) to file a declaration or other appropriate documents to memorialize that such matter is no longer at issue.

###

Date: March 28, 2024

Neil W. Bason
United States Bankruptcy Judge