**WRITTEN DECISION - NOT FOR PUBLICATION**



UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF CALIFORNIA

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| In re: Dana Aaron Linett, dba Early American Numismatics,<br><br>Debtor. | Bk. No. 19-05831-LA11<br>Chapter 11<br><br>Cont. Hrg. Feb. 17, 2022<br>Time: 2:00 p.m.<br>Ctrm. 2<br>Judge: Hon. Louise De Carl Adler |

Smaha Law Group ("Applicant") requests a Second Interim Fee Award of $456,630.00, and $2,137.81 in costs; and a Final Fee Award of $597,817.00, and $4,005.80 in costs ("Second/Final Application") for its services in representing Dana A. Linett in his capacity as the debtor-in-possession ("Debtor" or "DIP") in this bankruptcy case. Objections have been filed by the United States Trustee ("UST") and creditor Barbara Linett ("Barbara") who is a co-proponent of the now-confirmed plan of reorganization ("Objections"). Based upon this Court's review of the various pleadings and the record in the case including an in-depth review of the fee invoices for the First Interim

Application and the Second/Final Application, and the Objections and Reply and good cause appearing, the Court grants the Second/Final Application in part and denied it in part. The Court will address each of the Objections separately:

## I.

## THE UNITED STATES TRUSTEE'S OBJECTION

The UST cites four areas of concern in her Objection to this Second/Final Application. First, she objects that many of Applicant's descriptions of the nature of its legal services are vague. Vague time entries are an independent basis for disallowance of fees. *See In re Waters*, 634 B.R. 478, 499-500 (Bankr. D.S.C. 2021) (compiling cases). The UST Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses ("UST Guidelines") require that entries for telephone calls, letters, and other communications such as emails give sufficient detail to identify the parties to and the nature of the communication. [*See* UST Guidelines, § II(D)(5)] It is Applicant's burden to provide this information and NOT the Court's burden to guess. Exhibit 1 to her Objection details $15,495.00 in vague entries. And Exhibit 1 addresses only the entries in the Second/Final Application and not the First Interim Application that is also before the Court for a final award of the fees provisionally awarded without a final determination of their reasonableness and necessity.

Second, the UST criticizes Applicant's "lumping" -- the practice of aggregating numerous tasks in one entry, which, if reported individually, might not be compensable. As she correctly observes, lumped entries prevent the Court from determining whether the individual tasks were expeditiously performed within a reasonable period of time because it is impossible to disaggregate the various tasks. The UST cites a host of well-reasoned cases addressing the issue that are persuasive. [*See* ECF No. 326 (UST Objection, Pg. 5:12-20)] Her Exhibit 2 identifies $20,255.00 in lumped time entries that she requests be disallowed or, alternatively, requests that Applicant file an amended fee application.

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Third, the UST identifies administrative and clerical tasks which are not compensable under 11 U.S.C. § 330(a) and identifies those entries on Exhibit 3 to her Objection. The entries total $2,720.00. As the UST correctly argues, the time entries for filing and serving documents constitute administrative overhead and they are not compensable by the estate. *See, e.g., In re Mohsen*, 473 B.R. 779, 795 (Bankr. N.D. Cal 2012), *aff'd.* 506 B.R. 96 (N.D. Cal 2013).

Finally, the UST identifies time entries totaling $8,220.00 that appear to constitute unnecessary duplication of services by attorneys, which is non-compensable under 11 U.S.C. § 330(a)(4)(A)(i). She identifies those entries on Exhibit 4 and asks Applicant to explain why these duplicative services were necessary such that they are compensable by the estate.

In total, the UST objects to $46,690.00 of the fees billed by Applicant in the second interim period and asks that they be disallowed and/or that Applicant amended its Second/Final Application as appropriate. In an attempt to resolve this Objection, the Applicant offered, and the UST accepted, a compromise in a Stipulation to reduce Applicant's fees by $50,000 "in new attorneys' fees." [ECF No. 337 (Agreement ¶ 1)] While the Stipulation is a reasonable attempt by the UST and Applicant to resolve the UST's objections to the new fees in the Second/Final Application, the Stipulation is silent on the $141,187.00 in fees and $1,867.99 in costs sought in the First Interim Application. [ECF No. 89] The Court undertook a careful review of the First Interim Application to determine whether the same defects in description (specificity and lumping) and non-compensable clerical tasks found in the Second/Final Application were present in the First Interim Application.[1] The Court concludes that there are, indeed, instances of the same objectionable practices; however, they are significantly fewer than were in the Second/Final Application. The Court will not make any further downward adjustments based on the UST's objections, but strongly cautions Applicant to reform its descriptions of

[1] Although the Court awarded $98,830.90 as an interim award for the First Interim Application, there was no finding at that time that such fees were reasonable and necessary.

services performed in bankruptcy cases to include a detailed description of what exactly is being done or discussed (within the parameters of protecting the attorney/client privilege) by the billing attorney or paralegal. The UST's Objection details a pattern and practice that warrants an even greater reduction in fees than that which these two parties ultimately agreed on.

## II.

## BARBARA LINETT'S OBJECTION

Barbara's Objection, if granted in full, seeks to disallow a total of $245,758.50 of Applicant's fees or 41% of the final fees requested. She argues that certain services are non-compensable because they served the Debtor's vindictive self-interest toward Barbara and various attorneys, and not the estate's interest. *See In re Perez*, 30 F.3d 1209 (9th Cir. 1994). In *Perez*, the Ninth Circuit explained:

> Counsel for the estate must keep firmly in mind that his client is the estate and not the debtor individually. Counsel has an independent responsibility to determine whether a proposed course of action is likely to benefit the estate or will merely cause delay or produce some other procedural advantage to the debtor. While he must always take his directions from his client, where counsel for the estate develops material doubts about whether a proposed course of action in fact serves the estate's interests, he must seek to persuade his client to take a different course or, failing that, resign. Under no circumstances, however, may the lawyer for a bankruptcy estate pursue a course of action, unless he has determined in good faith and as an exercise of his professional judgment that the course complies with the Bankruptcy Code and serves the best interests of the estate.

*In re Perez*, 30 F.3d at 1219. Based on the reasoning in the *Perez* decision, Barbara objects to the following:

### A. The First Adversary Proceeding No. 19-90121-LA in "Litigation" Category:

Barbara objects to all of the fees billed by Applicant in the "Litigation" category in the First Interim Application which total $51,053.50. [See ECF No. 89 (First Application, Ex. "A"] According to Barbara all of these fees related to Applicant's ill-fated endeavor of

opening Adversary Proceeding No. 19-90121-LA (the "First Adversary Proceeding") in order to remove the Debtor's pending appeal of the family court's final order upholding the Marital Settlement Agreement between the Debtor and Barbara ("MSA"), and Applicant's time spent opposing Barbara's motion to remand the appeal back to the state court of appeals. Barbara contends that the time spent on this matter was not in furtherance of any legitimate Chapter 11 reorganization goal. Rather, these services furthered the Debtor's personal regret over voluntarily entering into the MSA back in December 2014, which he has unsuccessfully fought to modify for almost five years. The Court correctly granted Barbara's motion to remand and ruled that it must abstain from deciding the state court appeal because it had "no jurisdiction under federal law" to adjudicate a state court appeal of a final family court order. [Adv. Proc. 19-90121-LA; ECF No. 9] Barbara contends that experienced bankruptcy attorneys such as Applicant would have or should have known these basic jurisdictional points of law and that the appeal would be remanded. She contends the only reasonable inference is that Applicant performed these services to carry out the Debtor's personal objectives and not to advance the legitimate goals of Chapter 11, so all fees billed in this category for the First Interim Application should be disallowed.

The Court agrees that experienced bankruptcy attorneys would have or should have understood these bankruptcy jurisdictional concepts and known that the Debtor's appeal would be remanded back to the state court of appeals. Except for a preliminary evaluation of this strategy, these services were not reasonably necessary or beneficial to the estate because there was no reasonable, good faith basis for DIP counsel to believe this strategy would succeed. The Court agrees that these services were performed for the Debtor's personal goal to aggravate Barbara and obtain a more debtor-friendly court to adjudicate his appeal, which the Debtor believed to be the bankruptcy court, but counsel should have known the Debtor's objective would not succeed.

However, not all of the fees billed to the "Litigation" category in the First Interim Application related to the First Adversary Proceeding. The Court's review of the time

records reveals that this strategy of removal began actively on 10/2/2019 (ECF No. 89, Pg. 94) and ended on 1/2/2020 (ECF No. 89, Pg. 102). During this relevant time period, there were tasks other than removal being pursued by Applicant which deserve compensation and are not *Perez*-type services. The Court has identified time entries totaling $10,488.00 billed in the "Litigation" category during the relevant time period in the First Interim Application, plus it has identified another $855.00 in entries improperly billed in the "Business Operations" category in the First Interim Application that also related to this ill-fated removal strategy. Both of these amounts which total $11,343.00, will be disallowed.

Accordingly, the Court sustains in part this portion of Barbara's Objection. The Court disallows fees totaling **$11,343.00** related to the Applicant's pursuit of the removal strategy in the First Adversary Proceeding.

**B. The Second Adversary Proceeding No. 20-90031-LA in the "Litigation" Category:**

Additionally, Barbara seeks disallowance of all fees billed by Applicant in the "Litigation" category in the Second/Final Application in the amount of $78,277.50. [ECF No. 312 (Second/Final Application, Ex. "A")] She contends that all of these services furthered the Debtor's personal interest so they are not compensable per *In re Perez*, and/or they should be disallowed as excessive and unreasonable or duplicative of the services billed in the "Plan and Disclosure Statement" category. [ECF No. 327, Pg. 6:21-28]

The Court **overrules** these objections. The Court has reviewed the Second Amended Complaint in the Second Adversary Proceeding and concludes that the issues and scope of this litigation was far broader than Barbara's Objection claims, and that Applicant's goal in filing this action was in the best interests of estate. [Adv. Proc. 20-90031-LA, ECF No. 12] This Second Adversary Proceeding sought to value the personal property collateral held by U.S. Bank and Barbara, and to determine the nature and extent of their competing interests in same. Also, it sought to offset the amount of Barbara's secured claim by approximately $1,098,850.00 for various undisclosed gifts and transfers

of community property made by Barbara which were discovered after the MSA was executed by the Debtor and are allegedly excluded from the MSA calculations because they were allegedly undisclosed by Barbara. The Second Amended Complaint confirms that Applicant intended this litigation to be the foundation for the Debtor's plan of reorganization, which would surrender this personal property collateral to U.S. Bank in full satisfaction of its Proof of Claim No. 9 and in full satisfaction of Barbara's claims after the appropriate offsets were applied, as the "indubitable equivalent" of their secured claims. [*Id.* at ¶ 27] This litigation strategy to value and transfer collateral to secured creditors to fully pay their claims would clearly benefit the estate and the services are compensable.

Further, the Court is not persuaded that the services billed in this category were excessive or unreasonable or duplicative of the services billed in the "Plan and Disclosure Statement" category. The Court has reviewed the billing entries in light of Applicant's strategy at the time the services were billed, and concludes that these services were properly billed to the "Litigation" category. It also concludes that there was a lot of activity occurring outside the Court's official record that is clearly compensable, and the time spent on these activities appears to be reasonable; and it concludes that Barbara's claim that "little ha[d] been done other than file the initial pleadings ..." is misleading.[2]

**C. The "Plan and Disclosure Statement" Category:**

Applicant's Second/Final Application requests $300,847.00 in fees billed to this category from 5/1/2020 through 12/30/2021.[3] Barbara seeks disallowance of a significant portion of the time because it was either non-compensable per *In re Perez*, or it was excessive and/or unduly vague as follows:

**(i) Non-Compensable Time:** First, Barbara raises an *In re Perez* objection and seeks disallowance of all time pertaining to Applicant's preparation and advocacy of the Debtor's initial and first amended plan of reorganization and disclosure statement calculated as follows:

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2 Barbara did not identify any specific billing entries in this category that are excessive or unreasonable and merely asked that all fees in this category to be disallowed.

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| Billing for May 29, 2020 | $ 4,850.00 |
| Billing to June 10, 2020 | $ 320.00 |
| Billing to July 31, 2020 | $ 6,830.00 |
| Billing to August 31,2020 | $33,427.50 |
| **Total:** | **$45,427.50** |

Barbara indicates that this time pertained to the Debtor's ill-fated "payment in-kind" plan and disclosure statement. She seeks disallowance of all of this time because it was performed solely to further the Debtor's personal objective in mistreating Barbara's claim in order to accomplish what the Debtor was unable to achieve in the family court hearings and in his appeal of the family court's rulings, and not for a legitimate Chapter 11 objective. The Court denied the disclosure statement outright because the plan was unconfirmable as a matter of law. Accordingly, she contends that these services provided no benefit to the estate and all fees pertaining to this unsuccessful endeavor should be disallowed in full.

The Court agrees that the "payment in-kind" provision that was proposed in the Debtor's initial and first amended plan and disclosure statement smacked of bad faith.[4] This provision was proposed solely to further the Debtor's personal objective to modify the MSA and falls squarely within the warnings of *In re Perez.* Applicant would have or should have known that a plan containing this "payment in-kind" provision had no possibility of being confirmed. He owed a duty to refuse to include this bad faith provision in the plan irrespective of the Debtor's insistence. Applicant does not seriously argue otherwise, and instead says the attorney/client privilege prevents him from explaining why he modified his initial draft of the plan to include it.

It is difficult to disaggregate this non-compensable time from the other legitimate plan and disclosure statement time. A DIP is expected to propose a plan and disclosure statement, and the initial plan is often a starting point for productive negotiations even

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3 *See* ECF No. 312, Pg. 208-337 (billing entries).

4 The plan's "payment in-kind" transfer provision did not transfer Barbara's collateral to her in full satisfaction of her secured claim. Instead, it permitted the Debtor to unilaterally select and substitute different personal property to transfer to Barbara as the "indubitable equivalent" in full satisfaction of her secured claim which unfairly transferred risks and tax consequences to Barbara.

when the plan violates the absolute priority rule (as here). These fees incurred in working through the drafts of a plan and disclosure statement are compensable. The Court has carefully reviewed every item billed between 7/28/20 when this "payment in-kind" concept took hold of the plan's direction, to 12/17/20 when this Court issued her tentative ruling rejecting approval of the Debtor's disclosure statement to this plan and put an end to this misguided idea proposed in this plan. In tallying all entries that appear to discuss the idea of substituting Barbara's collateral with other collateral chosen by the Debtor (a task made incredibly difficult by the vague descriptions during this period), the Court believes a reduction of **$7,505.00** for actions taken in violation of the holding and spirit of the *In re Perez* decision is reasonable.

**(ii) Unreasonable and Excessive Time:** Second, Barbara objects to 27.1 hours equaling $10,840.00 in fees incurred by Applicant in November 2020 to oppose Barbara's competing liquidating plan and disclosure statement as excessive and unreasonable. The Court does not agree that the time spent on this endeavor was excessive or unreasonable. Barbara's competing plan and disclosure statement proposed a type of liquidating trust that triggered a huge and immediate tax consequence to the estate. The tax issues were complex, and the Debtor's analysis was vigorously contested by Barbara. Applicant's services assisted the Court's understanding of the issues and the Court disapproved Barbara's liquidating plan due to its negative tax consequences. In this Court's view 27.1 hours to analyze these complicated tax issues and to prepare opposition and advocate same is reasonable and compensable and so this objection is **overruled**.

**(iii) Vague Time Entries:** After the Court rejected both of the competing plans, the parties began working toward a joint plan of reorganization and joint disclosure statement which the Court ultimately confirmed. Barbara objects to the additional $182,305.00 in fees billed by Applicant in working toward this joint endeavor calculated as follows:

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| Billing for January 2021 | $20,430.00 |
| Billing for February 2021 | $21,240.00 |
| Billing for March 2021 | $12,360.00 |

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| Billing for April 2021 | $ 8,235.00 |
| Billing for May 2021 | $21,460.00 |
| Billing for June 2021 | $16,590.00 |
| Billing for July 2021 | $14,805.00 |
| Billing for August 2021 | $26,435.00 |
| Billing for Sept. 2021 | $16,235.00 |
| Billing for Oct. 2021 | $11,210.00 |
| Billing for Nov. 2021 | $11,020.00 |
| Billing for Dec. 2021 | $ 2,285.00 |
| **TOTAL:** | **$182,305.00** |

Barbara contends these fees are excessive because they are more than triple what her counsel, Mr. Gorrill, billed. Additionally, she contends that the time entries for many of the services contain descriptions too vague to determine whether the services were reasonable and necessary endeavors taken in furtherance of the parties' joint plan, *e.g.*, 1/19/2021 entries:

> GEB Finalize revision of documents – [what documents?]
> GEB Follow up emails – [emails regarding what?]
> GEB Emails with Mr. Linett regarding ongoing issues – [what issues?]

Although Barbara did not parse every page and identify other offending instances of vague billing, she suggests a 33% reduction ($60,160.00) of the $182,305.00 in fees pertaining to Applicant's "joint plan" services as a reasonable adjustment based on what her own counsel billed.

The Court does not agree that Applicant's fees should be roughly the same the amount billed by Mr. Gorrill. Applicant explains that its fees are considerably higher because it was required to negotiate and memorialize agreements with multiple parties (not just Barbara), and it took on the burden of preparing the joint plan and joint disclosure statement which included complex tax analysis and the jointly negotiated liquidating trust along with its various attachments and exhibits. Again, this task required Applicant to communicate with and incorporate input from many professionals and parties in interest, not just Barbara. Further, Applicant prepared all of the briefs and declarations in support of the joint plan and coordinated with the Liquidating Trustee to ensure as smooth of a transition as possible on the joint plan's effective date.

With respect to the vagueness objection, the Court recognizes that Applicant can possibly amplify its billing entries to cure this objection, and that its fees have already been voluntarily reduced by $50,000.00 for reasons including vagueness. However, the Court does not view Applicant's agreement with the UST as the final word on the issue of vague billings. The three cited instances of vague descriptions in Barbara's Objection are replicated throughout this Second/Final Application. Some further adjustment is justified in this category.

Based on the Courts handling of this case and her review of the billing entries in this category, the Court infers that the Applicant had a difficult client to placate while pursuing this compensable joint plan endeavor. There was hardly a day that passed during the plan and disclosure statement billing period covered by this Second/Final Application that the Debtor failed to bombard Applicant with emails, telephone calls, *etc.*, to discuss his ideas for new plan provisions, to propose changes to plan provisions already drafted or give his own suggestions for arguments that Applicant should make on the estate's behalf. Applicant was in the delicate position of having an individual as the DIP who blurred the lines between his own interests and those of the DIP. This necessarily increased the time and cost of this proceeding, particularly so when the fees billed were for a joint plan to be proposed in concert with his ex-wife. In weighing these considerations and in conducting her own review of the billing entries during the relevant time period, the Court concludes that a reduction of an additional 5% of the fees billed in this "Plan and Disclosure Statement" category or **$9,115.00** for woefully inadequate descriptions of the services and/or excessiveness is appropriate and fair.

## III.

## CONCLUSION

For the above-stated reasons, the Court grants the Second/Final Application for fees and costs in part and denies it in part, and makes the following deductions:

1. Per the UST/Applicant Stipulation, the Applicant has agreed to a **$50,000.00** reduction in fees for vague descriptions, lumping, clerical work, and duplicative services in the Second/Final Fee Application.
2. For Barbara's objection to the fees billed in the First Interim Application in the "Litigation" category for the First Adversary Proceeding [removal/remand of the Debtor's state court appeal], the Court deducts **$11,343.00** in fees.
3. For Barbara's objection to the fees billed in the "Litigation" category in the Second/Final Application for the Second Adversary Proceeding [valuation of collateral and determination of lien rights], the objection is **overruled** and there is no deduction in fees.
4. For Barbara's objection to the fees billed in the "Plan and Disclosure Statement" category as non-compensable, the Court deducts the **$7,505.00** in fees billed in the Second/Final Application for the improper "payment in-kind" provision in this rejected plan.
5. For Barbara's objection to the fees billed in the "Plan and Disclosure Statement" category in the Second/Final Application in November 2020 as "unreasonable and excessive" [opposition to Barbara's competing Plan], the objection is **overruled** and there is no deduction in fees.
6. For Barbara's objection to the fees billed in the "Plan and Disclosure Statement" category in the Second/Final Application for the period of January 2021-December 2021 as vaguely described and excessive [joint plan of reorganization and joint disclosure statement], the Court deducts **$9,115.00** in fees.
7. Based on the above deductions, the Court awards the Applicant fees for the second interim period from April 1, 2020 through December 31, 2021 in the net amount of **$390,010.00**. The costs are without objection and will be awarded in the full amount of **$2,137.81**.

8. Except for the $11,342.00 disallowed in Paragraph 2 above, the Court confirms the fees and costs provisionally awarded for the First Interim Application as final fees and authorizes payment of the holdback amount.

9. Based upon the above deductions, the Court awards the Applicant final fees in the amount of **$519,854.00** and final costs in the amount of **$4,005.80** and authorizes payment of same pursuant to the terms of the liquidating trust and joint plan of reorganization.

Applicant shall prepare and lodge an order in accordance with this Memorandum Decision within ten (10) days of its entry.

DATED: 2 March 2022

Louise De Carl Adler, JUDGE
United States Bankruptcy Court