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UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA

In re:	)	Case No. 15-20600-D-11
	)	
SAEED REZA ZARAKANI,	)	Docket Control No. HLC-1
	)	
Debtor.	)	Date: September 7, 2016
	)	Time: 10:00 a.m.
_____	)	Dept: D

# MEMORANDUM DECISION

On August 10, 2016, Westwood-Benson Business Brokers ("Westwood") filed a motion for allowance and payment of an administrative expense, Docket Control No. HLC-1. Saeed Zarakani (the "debtor") has filed opposition, Westwood has filed a reply, and the court has heard oral argument and considered the parties' declarations and exhibits. Neither party requested an evidentiary hearing and the court finds an evidentiary hearing is not necessary. For the following reasons, the motion will be granted in part.

The motion centers on the employment by the debtor, during his tenure as the debtor-in-possession in this chapter 11 case, of Westwood to market two businesses, a Chevron gas station and convenience market and a mobile home park. The debtor and Westwood entered into Representation Agreements for Westwood's marketing of the two properties, which provided for the following compensation to Westwood: a "5% commission for any real estate sold and 7% for any business assets sold," with a minimum broker's fee of \$15,000 for each business. The agreements

1 confirm that Westwood was aware the debtor was a debtor-in-  
2 possession in a pending bankruptcy case.

3 In September of 2015, the debtor filed an application to  
4 employ Westwood. In support, Richard K. Thompson, a principal of  
5 Westwood, signed a declaration in which he stated,

6 I understand that the Debtor seeks court approval of  
7 the estate's employment of Westwood, that if Westwood's  
8 employment is approved any compensation payable by the  
9 Debtor or the bankruptcy estate for pre-confirmation  
services is subject to Bankruptcy Court approval, and  
that such compensation must be applied for and approved  
by the Bankruptcy Court pursuant to 11 U.S.C. § 330.

10 Westwood Decl., DN 152, at ¶ 9. The application itself, which  
11 was served on Mr. Thompson at the time, added, "If the employment  
12 is approved, Westwood will, with the Debtor's assistance, file  
13 any pre-confirmation motion or motions that may be necessary to  
14 obtain approval of pre-confirmation compensation payable to  
15 Westwood." Debtor's App., DN 150, at ¶ 9.

16 The court authorized the debtor to employ Westwood by order  
17 signed September 21, 2015. The order stated the debtor was  
18 authorized to employ Westwood "as the debtor's broker for the  
19 purposes described in the application, subject to the following  
20 terms and conditions pursuant to 11 U.S.C. § 328(a): 1. No  
21 compensation is permitted except upon court order following  
22 application pursuant to 11 U.S.C. § 330(a)." Order, DN 157, at  
23 1:22-26. The order was served on Mr. Thompson, among others, the  
24 next day, September 22, 2015.

25 Ultimately, however, the debtor, with court approval,  
26 obtained financing that enabled him to pay all claims secured by  
27 the real property where the Chevron station is located, as well  
28 as allowed unsecured claims, and neither the Chevron station nor

1 the mobile home park was sold. Despite the fact that no sale  
2 occurred, Westwood seeks allowance and payment of an  
3 administrative claim for (1) \$15,000 as the minimum fee for the  
4 mobile home park and (2) \$131,400 as a commission based on an  
5 offer Westwood obtained for the gas station business and real  
6 property, for a total of \$146,400. Relying on provisions in the  
7 Representation Agreements, Westwood also seeks an award of  
8 attorney's fees and costs for prosecuting this motion.

9 The court begins by observing that, apparently based on the  
10 order authorizing Westwood's employment, both parties appear to  
11 be of the mind that the Representation Agreements are fully  
12 enforceable agreements the court is bound to enforce according to  
13 their specific terms. Thus, Westwood refers to the "Court-  
14 approved contract[s]" and the parties spend considerable effort  
15 analyzing the language in the fine print of the agreements and  
16 emphasizing one or another provision they find helpful to their  
17 position. The court, however, never approved the agreements  
18 themselves or their specific terms and does not consider itself  
19 bound by the Representation Agreements or either the \$15,000  
20 minimum fee or the commission structure.

21 The employment application did not expressly seek approval  
22 of and the order did not approve the underlying agreements or  
23 their terms.<sup>1</sup> In fact, the order is explicit that "[n]o  
24 compensation is permitted except upon court order pursuant to 11  
25 U.S.C. § 330(a)." Further, the order states compensation will be

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26  
27 1. Although the application referred to the agreements as  
28 being subject to the court's approval, it also made clear that  
Westwood understood its compensation would be subject to court  
approval on a subsequent motion.

1 at the lodestar rate; that is, on an hourly basis, not a  
2 commission basis. In hindsight, the application and order should  
3 have been clearer. However, both were served on Westwood at the  
4 time and Westwood raised no objection, to either the lodestar  
5 rate reference or the absence of approval of the agreements or  
6 their terms.

7 The employment application was served only on the United  
8 States Trustee and those creditors who had requested special  
9 notice, not on all creditors, and it was filed on an ex parte  
10 basis, without a hearing, and ruled on after only ten days, in  
11 accordance with the court's usual practice for employment  
12 applications. Further, the application did not so much as  
13 suggest that regardless of whether either business was sold,  
14 Westwood would be entitled to an administrative claim equal to 5%  
15 and 7% of the listing prices for the real property and business  
16 assets, respectively, or of the amounts of an offer Westwood  
17 obtained. Copies of the agreements were filed with the  
18 application and the fine print in the agreements included  
19 language purporting to entitle Westwood to its full percentage  
20 fee if the debtor decided not to or was unable to go through with  
21 a sale. However, the court would not have approved the specific  
22 terms of the agreements without a noticed hearing of those terms,  
23 along with service on all creditors.

24 Although this would have been true in any case, it is  
25 especially noteworthy here, given the amounts of the expected  
26 listing prices and the consequent size of the commissions  
27 involved. For the Chevron station alone, the commission - not  
28 disclosed in the application itself - would have resulted in an

1 administrative claim in excess of \$130,000 without any notice to  
2 creditors and other parties in interest. This is a figure so  
3 large it would have significantly affected and greatly limited  
4 the debtor's ability to obtain confirmation of a chapter 11 plan.  
5 A claim of that size would be by far the largest administrative  
6 claim in the case - almost double the amount of the debtor's  
7 attorney's fees for the entire case, and if approved at the time  
8 of Westwood's employment, it likely would have jeopardized the  
9 debtor's ability to reorganize. To allow an administrative claim  
10 of that size without notice to creditors and parties in interest  
11 based solely on the employment order would be contrary to both  
12 the requirements and the spirit of the Bankruptcy Code.

13       The Code charges a debtor-in-possession with a fiduciary  
14 duty that requires him or her to act in the best interest of  
15 creditors. Thus, a debtor-in-possession can operate in the  
16 ordinary course of business, but any transactions outside the  
17 ordinary course require court approval after a hearing on notice  
18 to all creditors, and all professional administrative claims  
19 require such notice. The court simply would not consider, let  
20 alone allow, an administrative claim the size of the one at issue  
21 here based solely on an employment order without a noticed  
22 hearing to all creditors that explicitly advised creditors that a  
23 commission of that size would be payable even if the properties  
24 were not sold.

25       With that said, and considering the way the case developed,  
26 the court is readily persuaded Westwood is entitled to some  
27 compensation for its services. Here, the court begins by noting  
28 the record makes clear that, from before the time the debtor

1 employed Westwood, the debtor was contemplating a sale or  
2 refinance of one or both businesses as a means of funding a  
3 chapter 11 plan. In fact, the plan on file at the time the  
4 Westwood employment application was filed indicated it would be  
5 funded through a sale or refinance, and it is clear from an email  
6 from the debtor's counsel dated October 5, 2015 that Mr. Thompson  
7 knew the plan was on file. Further, the debtor's counsel's  
8 declaration and billing statements make clear counsel spoke with  
9 Mr. Thompson about possible sources of refinancing in mid-  
10 December of 2015. Also as early as mid-December, Mr. Thompson  
11 initiated communications with someone at Plumas Bank about a  
12 possible refinance of the debt on the Chevron station. Thus, Mr.  
13 Thompson was aware from early on that refinancing as an  
14 alternative to sale was in play.

15 It is also clear that while the debtor was considering  
16 refinancing, he wanted to keep his options open, and thus, had  
17 Mr. Thompson continue with his efforts toward a sale of the  
18 properties. The parties disagree as to whether Mr. Thompson  
19 abandoned his marketing efforts for the mobile home park or  
20 whether the fault lies with the alleged failure of the debtor to  
21 provide the necessary financial information. However, the court  
22 finds resolution of that factual dispute would entail additional  
23 attorney's fees for both parties with little chance of a  
24 definitive conclusion on the issue. In any event, the fact that  
25 the debtor, as debtor-in-possession, decided a refinance was a  
26 better way for him to restructure his affairs, in part for tax  
27 reasons, should not deprive Westwood of reasonable compensation  
28 for services that were reasonably expected to benefit the estate.

1 If nothing else, Westwood's services allowed the debtor to keep  
2 his options open.

3 In determining the amount of reasonable compensation for  
4 those services, the court notes that Mr. Thompson kept virtually  
5 no time records; instead, he testifies he has reviewed his  
6 calendar and the extensive files he developed during the  
7 marketing process and determined he spent roughly 160 to 175  
8 hours each month for seven months and 80 to 100 hours in the  
9 first and last months of his employment. These estimates are  
10 extremely summary and do not conform with the Guidelines for  
11 Compensation of Professionals issued by the United States  
12 Trustee's office. On the other hand, it is not common or  
13 expected that a business or real estate broker will keep detailed  
14 time records and, while such records would be helpful at this  
15 stage, the court cannot reasonably expect Mr. Thompson to have  
16 kept them.

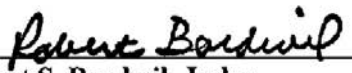
17 The court needs to consider Westwood's administrative claim  
18 in terms of benefit to the estate. In assessing benefits to the  
19 estate, the court views the claim with an eye toward  
20 proportionality compared to other administrative claims in the  
21 case, such as that of the debtor's counsel. The attorney's fees  
22 incurred in the representation of the debtor, as debtor-in-  
23 possession, were \$67,390 for the whole case. The court finds  
24 that the demands of acting as general counsel for this debtor-in-  
25 possession, as well as the benefit to the estate, would have  
26 exceeded those of a professional charged with the more specific  
27 task of marketing properties, even ongoing businesses. The court  
28 recognizes that the case was ultimately dismissed on the debtor's

1 motion, but it went as far as a contested plan confirmation  
2 hearing on a couple of occasions.

3 As an aside, it appears to the court that, unfortunately,  
4 both parties dropped the ball to a large extent in terms of  
5 their relationship with one another. A debtor-in-possession has  
6 a duty to ensure his utilization of professionals in the case is  
7 efficient and the services they rendered are necessary and  
8 beneficial to the estate. At the same time, a professional must  
9 ensure the services he renders are performed efficiently and will  
10 be of benefit to the estate. Here, the debtor had a  
11 responsibility to keep Mr. Thompson in the loop about his  
12 prospects for a refinance and to let him know when a decision had  
13 been made, even if only tentatively, and Mr. Thompson had a  
14 responsibility not to thoughtlessly put in hours marketing the  
15 properties and to be sensitive to the possibilities of a sale or  
16 refinance and to keep informed about the direction the case was  
17 heading. Both parties were remiss in the above regard.

18 To conclude, with no contemporaneous records as a guide, but  
19 considering all the factors discussed above, the court believes  
20 reasonable compensation for Mr. Thompson's services in this case  
21 is \$40,000, and the court will set the debtor's liability to  
22 Westwood at that amount. The court will issue an appropriate  
23 order.

24  
25 **Dated:** September 21, 2016

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27   
28 **Robert S. Bardwil, Judge**  
**United States Bankruptcy Court**