IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
MEDLEY LLC,[1]	Case No. 21-10526 (KBO)
Debtor.	**Related Docket No. 610**

EVERSHEDS SUTHERLAND (US) LLP'S RESPONSE IN OPPOSITION TO MEDLEY LLC LIQUIDATING TRUST'S MOTION PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 60(b) TO VACATE TWO ORDERS

Eversheds Sutherland (US) LLP ("Eversheds"), special counsel to the debtor and debtor-in-possession (the "Debtor"), hereby files this response in opposition to the motion of the Medley LLC Liquidating Trust (the "Liquidating Trust") to vacate the Court's orders (1) allowing the Debtor to retain Eversheds as special counsel and (2) granting Eversheds's final fee application.

PRELIMINARY STATEMENT

1. By asking the Court to vacate its orders approving Eversheds's retention and compensation, the Liquidating Trust seeks to require Eversheds to return fees for legal services undisputedly provided to the Debtor in relation to an ongoing investigation by the U.S. Securities and Exchange Commission ("SEC"), based on two inadvertent misstatements that Eversheds voluntarily corrected once they became known.

2. The Liquidating Trust provides no authority for imposition of such a draconian penalty, in the complete absence of any recognized legal basis for such relief (*i.e.*, there was no willful misstatement, no undisclosed conflict of interest, and no harm to the Debtor caused by

[1] The last four digits of the Debtor's taxpayer identification number are 7343. The Debtor's principal executive office is located at 280 Park Avenue, 6th Floor East, New York, New York 10017.

2110526230213000000000001

any incorrect disclosure). On the contrary, Eversheds has acted in good faith at all times, disclosing from the outset that it had obtained legal fees from the Debtor prepetition for services performed months prior. When Eversheds learned from the Liquidating Trustee and from a review of the firm's records that the figure in its initial disclosure had been understated, it immediately corrected this mistake. And, when Eversheds learned from the Liquidating Trustee that some of its legal fees may not have been paid by or from the Debtor's available insurance, as Eversheds initially believed, it provided clarification for any potential misunderstanding on this point.

3. The Liquidating Trust offers no suggestion, much less evidence, that either of these inadvertent inaccuracies would have affected the Court's orders or injured the estate. The Liquidating Trust's motion should be denied, and both orders should stand as entered by the Court.

BACKGROUND

4. The Debtor filed this Chapter 11 case on March 7, 2021.

5. In the years leading up to the Debtor's Chapter 11 filing, Eversheds had been representing the Debtor in corporate securities and related regulatory and litigation matters, including an investigation initiated by the SEC in late 2019.

6. Eversheds understood that the Debtor had submitted claims to its insurers for coverage of the costs and fees associated with the SEC investigation, including the legal fees charged by Eversheds for its services. As set out in the Liquidating Trust's motion, the Debtor's parent company and its insurer had entered into an interim funding agreement through which the insurer agreed to advance funds to cover reasonable fees and expenses, including those payable to Eversheds, in connection with the SEC investigation. [Docket No. 610 Ex. B.]

7. On April 6, 2021, the Debtor moved the Court, under section 327(e) of the Bankruptcy Code, to appoint Eversheds as special counsel for the Debtor with respect to the securities and related regulatory and litigation matters, including the SEC investigation. [Docket No. 87.]

8. The Debtor's application included an affidavit from Eversheds attorney Mark D. Sherrill, attesting to the continuing services that Eversheds would provide to the Debtor; Eversheds's qualifications and expertise in such matters; the compensation paid to Eversheds prepetition; and the firm's agreement with the Debtor as to compensation for continued work. [Docket No. 87-2.]

9. Mr. Sherrill's declaration disclosed the fact that Eversheds had received substantial payments for its work for the Debtor in the 90 days prepetition, specifying a total of $1,039,500.81. [*Id*. ¶ 14.] The declaration also stated that, in the prepetition period, "Eversheds was compensated for its work … by two insurers." [*Id*. ¶ 9.] As to insurance, the declaration further stated that the Debtor would be charged for any of Eversheds's fees that exceeded insurance policy limits. [*Id*. ¶¶ 10, 13.]

10. No party filed any objections to the Debtor's application to employ Eversheds as special counsel [*see* Docket No. 156], and the Court entered an order granting the application on May 17, 2021 [Docket No. 167].

11. On July 26, 2021, Eversheds filed a supplemental declaration from Mr. Sherrill, disclosing that the firm's scope of work for the Debtor had expanded to include preparation of certain regulatory filings which, while within the scope of services specified in the application, would incur fees that did not qualify for payment by insurance and thus would need to be paid directly from the estate. [Docket No. 280 ¶¶ 8–11.]

12. On October 18, 2021, the Court entered an amended order confirming the Chapter 11 plan, which became effective that day. Under the plan, all assets of the Debtor were transferred to the Liquidating Trust. [Docket No. 445-1, Art. VII.E.]

13. On December 1, 2021, the Debtor filed Eversheds's final fee application for allowance of compensation through the Effective Date. [Docket No. 515.] Mr. Sherrill filed a declaration supporting the fee application on January 7, 2022. [Docket No. 561.]

14. The Court granted Eversheds's fee application, without objection, on January 26, 2022. [Docket No. 569.]

15. In January 2023, upon receiving new information from counsel for the Liquidating Trust regarding the prepetition payments made to Eversheds for its representation of the Debtor, and in reviewing its accounting records in light of that new information, Eversheds concluded that the amount of prepetition payments disclosed in the initial application to retain Eversheds had been inadvertently understated due to a miscalculation of the relevant time period. As soon as this mistake was discovered, Mr. Sherrill prepared a third supplemental declaration, which was filed on January 23, 2023, in order "to correct one error and to clarify one separate statement in my Original Declaration." [Docket No. 609 ¶ 6.]

16. Specifically, Mr. Sherrill attested that the statement in the original declaration that "Eversheds received a total of $1,039,500.81 on account of work performed for the Debtor" in the 90 days prior to the bankruptcy filing "is incorrect." [*Id*. ¶ 7.] In fact, he stated, "[t]he correct amount that Eversheds received in the 90-day period prior to the Debtor's bankruptcy filing (the 'Preference Period') on account of work performed for the Debtor is $2,015,986.53." [*Id*.]

17. Mr. Sherrill further attested to the reason for the mistaken figure:

> Upon a review of my files and records, it appears that the error documented in Paragraph 7, above, arose out of my mistaken request to Eversheds's Accounting Department.

> Although the petition date in the above-captioned bankruptcy case was March 7, 2021, it appears that I inadvertently calculated the Preference Period to be December 14, 2020 through March 14, 2021. Because I erroneously calculated the Preference Period as beginning on December 14, 2020 instead of December 7, 2020, the report that I received from our Accounting Department omitted $976,485.72 in payments that Eversheds received on or about December 10, 2020.

[*Id*. ¶ 8.] Mr. Sherrill's declaration attached emails evidencing his request to the accounting department with the mistaken dates. [*Id*. Ex. A.]

18. Mr. Sherrill went on to clarify his previous statement that "[i]n the prepetition period, Eversheds was compensated for its work within the Scope of Services by two insurers." [*Id*. ¶ 9 (quoting original declaration).] As he explained,

> Although the Original Declaration does not explicitly state that the payments were being made directly by insurers to Eversheds, it may be interpreted in that way. At the time of the Original Declaration, I believed that Eversheds was receiving some or all of its payments related to work for the Debtor directly from the Debtor's insurers. I reached that belief based on communications with Eversheds partners and/or administrative staff who then believed that to be the case, who informed me that Eversheds's invoices are forwarded to the insurers.

[*Id*. ¶ 10.]

19. Based on new information supplied by the Liquidating Trust (which had possession of all of the Debtor's records at least as of the Effective Date), Mr. Sherrill realized that Eversheds's previous understanding of the source of the payments may have been incomplete:

> In the post-petition period, Eversheds did receive payments directly from the Debtor's insurers. In the prepetition period, however, it has come to my attention through communications with counsel for the Liquidating Trust that some payments that were covered by the applicable insurance policies were made by the Debtor. To the best of my current understanding, upon satisfaction of the Debtor's self-insured retention, such payments by the Debtor were made either after receipt by the Debtor of insurance proceeds directed to payment of Eversheds statements or just prior to anticipated receipt of such insurance proceeds. In either case, I understand that the insurance proceeds were earmarked for payment of, or as reimbursement for payment of, the firm's invoices.

[*Id*. ¶ 11.]

20. The same day Mr. Sherrill filed his third supplemental declaration, and several hours after such filing, the Liquidating Trust filed its motion to vacate the Court's May 17, 2021, order approving the retention of Eversheds as special counsel and the January 26, 2022, order awarding Eversheds's final fee application. [Docket No. 610.] No mention was made in that motion of Mr. Sherrill's third supplemental declaration. [*Id*.]

ARGUMENT AND CITATION TO AUTHORITY

21. These facts do not support the draconian relief sought by the Liquidating Trust. By moving to vacate the Court's orders, the Liquidating Trust essentially seeks to disqualify Eversheds from its prior representation of the Debtor on a completed matter, and to return all the fees received for that representation, based on an innocent mistake and an arguable ambiguity that provide no basis on which to think that the estate was injured or that any conflict existed. The authority cited in the Liquidating Trust's own motion makes clear that such severe consequences are imposed only in rare circumstances—none of which is present here—and that courts are extremely reluctant to require the return of fees for work actually performed for the debtor.

22. Here, there is no question that the mistaken disclosures were inadvertent, and the corrected disclosures reveal no injury to the Debtor. There is no basis to disqualify Eversheds or disgorge any fees. There is therefore no basis for vacating the Court's orders—under either Rule 60(b)(6) or 60(b)(3)—and the Liquidating Trust's motion should be denied.

A. Eversheds Complied in Good Faith with Bankruptcy Rules 2014 and 2016, and any Mistaken Disclosures Were Inadvertent and Corrected Once Discovered.

23. As set out in Mr. Sherrill's third supplemental declaration, neither Eversheds's understatement of the amount paid in the preference period nor any inaccurate statement as to the

source of those funds was willful. Eversheds attempted in good faith to make full disclosures under Bankruptcy Rules 2014 and 2016, as well as section 329 of the Bankruptcy Code.

24. Mr. Sherrill's testimony, as well as the contemporaneous email communication attached to his declaration, show that the inclusion of an incorrect figure was the result of his miscalculating the 90-day prepetition period as starting (and ending) one week later than it did. There was nothing nefarious or willful about that mistake. Indeed, Mr. Sherrill would not have known whether this mistake would have understated rather than overstated the amount. He did not have the dates and amounts of payments himself and had to obtain such information from the firm's accounting department. [Docket No. 609 ¶ 8 & Ex. A.] And to the extent the Debtor (rather than an insurer) paid the firm anything during the relevant 90-day period, information regarding any such payment was available to the Liquidating Trust at least as of the Effective Date. There was inarguably no intent to deceive, and certainly no basis for drawing any such inference.

25. As to the insurance payments, Mr. Sherrill believed in good faith that his original statement—that Eversheds's fees were being covered by insurance—was correct, based on the information Eversheds's attorneys had received from the Debtor. [*Id*. ¶ 10.] It was not until Eversheds received additional information *from the Liquidating Trustee* that it came to understand that some of the payments may not have been reimbursed by insurance. [*Id*. ¶ 11.]

26. Once Eversheds became aware of these issues, it immediately submitted a third supplemental declaration correcting the amount of payments received during the preference period and clarifying the statement regarding insurance. [*Id.*]

27. Eversheds's candor on these issues is further demonstrated by the fact that Mr. Sherrill had previously filed a second supplemental declaration when Eversheds became aware

that a portion of its work would not be covered by the Debtor's insurance. [Docket No. 280 ¶ 10.] This supplemental filing in July 2021, before Eversheds filed its fee application, shows that it continually acted in good faith to comply with its disclosure obligations.

28. The Liquidating Trust has not provided any evidence rebutting Mr. Sherrill's testimony or otherwise indicating that Eversheds willfully failed to disclose any information. And there is no rationale for why Eversheds would have intentionally made false statements about information possessed by the Liquidating Trust when Eversheds filed its fee application in December 2021.

29. These inadvertent misstatements do not warrant disqualification, much less the draconian penalty of disgorgement. Courts are clear that "[n]ot every violation of the disclosure requirements of the Code and Rules requires disgorgement." *In re ACandS, Inc.*, 297 B.R. 395, 405 (Bankr. D. Del. 2003). Indeed, only "a willful failure to disclose connections" with the debtor under Bankruptcy Rule 2014 would justify such severe punishment. *Id*. (quoting *In re Crivello*, 134 F.3d 831, 839 (7th Cir.1998)).

30. Here, there was no "willful failure to disclose" Eversheds's connection with the Debtor. Eversheds's relationship with the Debtor was disclosed from the outset: Eversheds had provided and been paid for legal services to the Debtor prepetition and was paid for that work during the preference period. Although the disclosure was mistaken as to the full amount and source of those funds, this mistake was not willful and was promptly corrected upon discovery.

B. Vacating the Court's Orders Is Not Warranted Under Rule 60(b)(6).

31. The Liquidating Trust has not established the extraordinary circumstances required to vacate either order under Rule 60(b)(6). As the Liquidating Trust acknowledges, Rule 60(b)(6) requires the movant to show some "other reason justifying relief" apart from the five reasons specified in the rule. [Mot. ¶ 23.] Accordingly, "if the reasons for seeking relief could

have been considered in an earlier motion under another subsection of the rule, [the movant] must show 'extraordinary circumstances' suggesting the party is faultless in the delay." (*Id*. (quoting *In re Benjamin's-Arnolds, Inc.*, No. 4-90-6127, 1997 WL 86463, at *10 (Bank. D. Minn. Feb 28, 1997)).) Because the Liquidating Trust contends that relief could have been considered under Rule 60(b)(3) (which allows an order to be vacated because of "fraud … misrepresentation, or misconduct by an opposing party"), the Liquidating Trust is required to show "extraordinary circumstances" suggesting that it is "faultless in the delay" in not bringing an earlier motion under subsection (b)(3). The Liquidating Trust has identified no such circumstances, and the cases on which it relies show that the circumstances here are anything but extraordinary.

32. The primary case relied upon by the Liquidating Trust, *In re eToys, Inc.*, 331 B.R. 176 (Bankr. D. Del. 2005), illustrates precisely why vacating the Court's orders is not appropriate here. *In re eToys* dealt with a motion seeking disqualification of the firm that had served as the debtors' bankruptcy counsel and disgorgement of all fees earned by that firm on the case. *Id*. at 188. The basis of the motion was that the firm had "failed to disclose in its retention application that it had a conflict of interest because it was concurrently representing" two other clients that were adverse to the debtors in the bankruptcy. *Id*. at 188–89. No such allegations have been made here, and would be baseless if made.

33. Moreover, in *In re eToys*, the court declined to vacate the order appointing counsel, and instead it modified the fee order only to disgorge fees related to the work for the debtor in relation to the firms' other clients. *Id*. at 193–94. There was no reason to disqualify the firm, because the bankruptcy case had concluded such that there was no longer any conflict. As to disgorgement, the court noted that disgorgement is proper only if there is an undisclosed

conflict of interest or harm to the estate caused by the failure to disclose. *Id*. at 193–93. The court therefore disgorged fees only to the extent the estate had been harmed by paying fees it otherwise would not have. *Id.* at 193–94; *see id*. at 193 ("The Court notes, further, that MNAT's actions did result in harm to the estate because of the duplication of effort during the summer of 2001 caused by MNAT's continued work on the Goldman matter while keeping the Committee advised at every turn. If MNAT had simply withdrawn, the Committee counsel alone would have been billing the estate for this work.").

34. None of the other cases relied upon by the Liquidating Trust has disqualified counsel or disgorged fees based on a disclosure violation that was not willful, did not present an actual undisclosed conflict, and caused no harm to the estate. On the contrary, these cases deal with situations where bankruptcy counsel failed to disclose fees the court found were excessive and/or willfully concealed an actual conflict. *See Henderson v. Kisseberth (In re Kisseberth)*, 273 F.3d 714, 719–21 (6th Cir. 2001) (concluding that bankruptcy court did not abuse its discretion in ordering disgorgement of fees paid to debtors' Chapter 7 counsel when the court had found that the fee was excessive "given the relative lack of complexity of" the case and that the attorney had failed to disclose the vast majority of fees he had been paid by the debtors both before and during the bankruptcy proceedings, noting that counsel "failed to file any supplemental fee disclosures" throughout the case); *Arnes v. Boughton (In re Prudhomme)*, 43 F.3d 1000, 1003–04 (5th Cir. 1995) (affirming bankruptcy court's order disgorging portion of prepetition retainer paid to debtors' Chapter 11 counsel who failed to disclose the retainer as money paid "in contemplation of or in connection with" the bankruptcy case, because the court found that "the fee was excessive" and "the entire retainer was unearned"); *In re Park–Helena Corp.*, 63 F.3d 877, 882 (9th Cir. 1995) (finding no abuse of discretion in denial of fees when

bankruptcy counsel failed to disclose that its prepetition retainer was paid by the debtor's president (who was a "party in interest" under Rule 2014(a)) out of his personal checking account, when the bankruptcy court found that counsel's "failure to disclose fully the circumstances surrounding payment of the retainer was not negligent or inadvertent, but willful" because counsel knew of "the salient facts regarding the payment of the retainer but chose not to reveal them"); *see also In re Southmark Corp.*, 181 B.R. 291, 296 (Bankr. N.D. Tex. 1995) (ordering partial disgorgement of compensation awarded to accounting firm that had failed to disclose client relationship that created an actual conflict of interest, and disgorging only compensation paid in connection with work regarding the undisclosed client).

35. Here, the circumstances bear no resemblance to those in *eToys* or the other cases cited in the motion. First, as discussed above, there is no claim that the inaccuracies in Eversheds's original disclosure were willful or even knowing. And these inaccuracies did not pertain to any possible conflict of interest, which in any event did not exist. On the contrary, Eversheds disclosed in good faith the nature of its relationship with the Debtor. Eversheds disclosed that it was paid more than $1 million by the Debtor in the 90-day prepetition period. Although that number actually was higher, that fact did not create any conflict of interest. Similarly, the statement in the original disclosures that Eversheds was compensated through insurance was based on information Eversheds received from the Debtor. The original disclosure also noted that the Debtor would be responsible for payment of amounts beyond those covered by insurance. Once Eversheds learned of additional information from the Liquidating Trust, it clarified its understanding of the insurance coverage promptly.

36. Further, Eversheds was not appointed as bankruptcy counsel but as special counsel under section 327(e) on an unrelated matter (which has since concluded). There was no

harm to the Debtor, because none of the firm's fees are alleged to have been incurred while doing work for which it was conflicted. Indeed, Eversheds's continued work on the SEC investigation and related regulatory matters benefitted the estate, not only because of Eversheds's expertise on these matters, but also because it avoided duplication of effort and inefficiencies had a different firm taken over in the midst of the SEC's investigation.

C. Vacating the Court's Compensation Order Is Not Warranted Under Rule 60(b)(3).

37. Vacating the compensation order similarly is not warranted under Rule 60(b)(3). Again, the Liquidating Trust can point to no authority for vacating a compensation order—essentially requiring the return of all fees earned—in circumstances such as these.

38. As noted above, courts are clear that "[n]ot every violation of the disclosure requirements of the Code and Rules requires disgorgement." *In re ACandS, Inc.*, 297 B.R. at 405 (noting that such severe punishment generally is appropriate only in the case of "a willful failure to disclose connections" with the debtor (quoting *In re Crivello*, 134 F.3d 831 at 839)). Also as discussed above, disgorgement generally is ordered only in the face of willful misconduct, an undisclosed actual conflict, or harm to the estate, none of which is alleged to be, or in fact is, present here.

39. Moreover, to justify vacating an order under Rule 60(b)(3), the movant "must demonstrate that the misrepresentation or misconduct was material." [Mot. ¶ 28.] While the Liquidating Trust vaguely asserts that it and other parties "were unable to evaluate whether it had a valid basis to object" to the fee application, it does not actually identify any such objection that would or could have been made. [*Id.* ¶ 29.] (Indeed, it was the Liquidating Trust that provided Eversheds with the additional information regarding insurance payments, indicating that the Liquidating Trust had ample opportunity to evaluate any basis to object to the fee application.)

Conclusory assertions about unspecified, hypothetical objections do not meet the Liquidating Trust's burden to show materiality sufficient to vacate the Court's order under Rule 60(b)(3).

CONCLUSION

For these reasons, the Liquidating Trust's motion to vacate the Court's order should be denied.

Dated: February 13, 2023

CHIPMAN BROWN CICERO & COLE, LLP

By: */s/ William E. Chipman, Jr.*

William E. Chipman, Jr. (No. 3818)
Chipman Brown Cicero & Cole, LLP
Hercules Plaza
1313 N. Market Street, Suite 5400
Wilmington, Delaware 19801
(302) 295-0193
Chipman@ChipmanBrown.com

Counsel for Eversheds Sutherland (US) LLP

CERTIFICATE OF SERVICE

I, William E. Chipman, Jr., hereby certify that, on February 13, 2023, the *Eversheds Sutherland (US) LLP's Response in Opposition to Medley LLC Liquidating Trust's Motion Pursuant to Federal Rule of Civil Procedure 60(b) to Vacate Two Orders* (the "**Motion**") was filed *via* the Court's CM/ECF electronic filing system ("**CM/ECF**"), which sent notice to all parties receiving notification through CM/ECF.

I further certify that, in addition, on the same day, I caused the Motion to be served on the below parties via electronic mail.

/s/ William E. Chipman, Jr.
William E. Chipman, Jr. (No. 3818)

Christopher M. Samis
Sameen Rizvi
POTTER ANDERSON & CORROON LLP
1313 N. Market Street, 6th Floor
Wilmington, Delaware 19801
Email: csamis@potteranderson.com
srizvi@potteranderson.com

James S. Carr, Esq.
Whitney Smith, Esq.
Sean T. Wilson, Esq.
KELLEY DRYE & WARREN LLP
3 World Trade Center
175 Greenwich Street
New York, New York 10007
Email: jcarr@kelleydrye.com
wsmith@kelleydrye.com
swilson@kelleydrye.com