How to Get Paid: A Cost-Practical Primer

Hon. Janet S. Baer
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2015

Pointers for Assuring That Your Fee Application Is Successful

1. Organize by subject matter. Include a narrative. Specify what work is new.

2. Categories should be logical and consistent. Add new categories only with permission, and that help understand necessity for work.

Pointers for Assuring That Your Fee Application Is Successful

3. Explain role of each biller, especially new billers.

4. Explain need for multiple billers on task.

Pointers for Assuring That Your Fee Application Is Successful

5. Explain why new billers were necessary.

6. Avoid numerous billers with limited time in the case.

Pointers for Assuring That Your Fee Application Is Successful

7. In complex cases, have a senior lawyer who is integrally involved review each application.

8. Explain rates / firm's billing scheme / comparison to market.

Pointers for Assuring That Your Fee Application Is Successful

9. Follow the local rules.

10. Focus on Code sections applicable, and explain consistent with those sections.

Pointers for Assuring That Your Fee Application Is Successful

- For Example:
  a) Section 330(a)(3)(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…"
  b) Section 330(a)(4)(A)(ii): services must be "(I) reasonably likely to benefit the debtor's estate; or (II) necessary to the administration of the case."

Pointers for Assuring That Your Fee Application Is Successful

Courts should use a *prospective* standard considering: (i) probability of success *at the time that the services were rendered*, (ii) reasonable cost of pursuing the action, (iii) whether reasonable lawyer would have performed under the same circumstances, (iv) any potential benefits to the estate (not to the Debtor).

(See *In re Underground Energy, Inc.*, No. 9:13-bk-10563-PC, 2015 WL 222476 (Bankr. C.D. Cal. Jan. 14, 2015), provided in materials.)

Pointers for Assuring That Your Fee Application Is Successful

11. The better the explanation, more likely fees approved, maybe even without a hearing (saving travel time, expenses, and litigation costs, avoiding the ASARCO issue).

Pointers for Assuring That Your Fee Application Is Successful

12. Were fees were reasonable in context of (i) case complexity, and (ii) value of unsecured claims?

    (See *Orenstein Law Group, P.C. v. Saldana (In re Saldana)*, Bankr. Nos. 13-34861-SGJ-7, 13-34862-SGJ-7, 13-34863-SGJ-7, 2015 WL 4429419 (N.D. Tex. July 20, 2015), provided in materials.)

Pointers for Assuring That Your Fee Application Is Successful

13. If you represent a trustee, distinguish between duties of the trustee/DIP and counsel (see § 328(b)).

14. Make retention agreement consistent with local rules.

Pointers for Assuring That Your Fee Application Is Successful

15. 2016(b) disclosure must be consistent with other fee-related documents.

16. Careful with Paragraphs 5 and 6 of 2016(b) statement regarding services included and excluded.

Pointers for Assuring That Your Fee Application Is Successful

17. Make the judge's and her law clerk's job easy. Follow the rules, double check, be consistent.

Pointers for Assuring That Your Fee Application Is Successful

18. Debtors – Object to costs of collection and other lender attorney's fees if unreasonable or not provided for in documents.

19. Creditors seeking fees must justify amounts sought.

Chapter 13 Fixed-Fee Cases

1. 2016(b) statement must agree with fixed-fee agreement – amounts and services.

2. Counsel may not carve out services from agreement UNLESS local rules permit it. For extra services, file a traditional fee application.

Chapter 13 Fixed-Fee Cases

3. § 362(k) permits sanctions awarded to the debtor. Counsel may not request additional fees unless counsel charged debtor additional fees.

4. "Fee jumping" is not always allowed. Know your court and your trustee.

Chapter 13 Fixed-Fee Cases

5. Order allowing fees is not a judgment. It just permits trustees to pay fees under the plan.

6. Section D of the Chicago CARA regarding retainer is consistent with Illinois Rules of Professional Conduct regarding Advanced Payment Retainers ¶ D.1(a). Disclose your other financial arrangements in section F.

Jurisdiction	No-Look Fee (Chapter 13)
Central District of Illinois	$3,500
Northern District of Illinois	$4,000
Southern District of Illinois	$4,000/$4,500
Northern District of Indiana, Hammond Division	$3,400
Northern District of Indiana, Other than Hammond Division	None set
Southern District of Indiana	$4,000 (+ $500 per lien strip adversary, *see* General Order 14-0005)
Eastern District of Wisconsin	$3,500. However, if case includes a motion to participate in the Court's MMM [Mortgage Modification Mediation] program, then no-look fee is $4,000, per Local Rule 2016.
Western District of Wisconsin	$3,500 (up to $5,000 if attorney provides lien avoidance services or helps debtor with participation in the Mortgage Mediation Program)

Jurisdiction	Duties Required
Central District of Illinois, Danville Division	None specified.
Central District of Illinois, Peoria & Urbana Divisions	Standing Order specifies attorneys' duties.
Central District of Illinois, Springfield Division	Standing Order specifies attorneys' duties.
Northern District of Illinois	The CARA specifies attorneys' duties.
Southern District of Illinois	Rights and Responsibilities Form specifies attorneys' duties.
Northern District of Indiana, Hammond Division	None specified.
Northern District of Indiana, Other than Hammond Division	Practice tips are available on the Court's website.
Southern District of Indiana	Rights and Responsibilities Form specifies attorneys' duties.
Eastern District of Wisconsin	If the debtor uses the Court's MMM Program, then program requirements must be met.
Western District of Wisconsin	None specified.

Jurisdiction	No-Look Fee Restrictions
Central District of Illinois, Peoria & Urbana Divisions	Debtors' total plan payments must be ≥ $5,400 (≥ $150 per month for 36-month plan), unless otherwise ordered by the Court.
Central District of Illinois, Springfield Division	Fees shall not exceed the lesser of: (1) 50% of funds distributed by the trustee after payment of administrative expenses (including trustee's fee), or (2) $350 per month, unless the trustee recommends and the Court approves a larger month payment amount.
All Others	None.

Jurisdiction	Procedure (Chapter 13)
Central District of Illinois, Danville Division	Fees are brought on their own motion, usually with confirmation.
Central District of Illinois, Peoria & Urbana Divisions	Fees are brought on their own motion, usually with confirmation.
Central District of Illinois, Springfield Division	Fees are brought on their own motion, usually with confirmation.
Northern District of Illinois	Fees are brought on their own motion, usually with confirmation. Attorneys must comply with Local Rule 5082-2.
Southern District of Illinois	Fees are included within the plan.

Jurisdiction	Procedure (Chapter 13)
Northern District of Indiana, Hammond Division	Fees may simply be included in a chapter 13 plan that is noticed to all interested parties. For Judge Klingeberger, the client contract must be provided or else the confirmation order will not include fees and must be brought separately.
Northern District of Indiana, Other than Hammond Division	Fees are included in a chapter 13 plan noticed to all interested parties.
Southern District of Indiana	Fees are brought on their own motion, usually with confirmation.
Eastern District of Wisconsin	Fees are brought on their own motion, usually with confirmation. If seeking an additional $500, itemization is required.
Western District of Wisconsin	Fees are typically not brought by separate motion. If the debtor uses the MMMWD (Mortgage Modification Mediation Program in the Western District), then program requirements must be met.

Jurisdiction	Forms Required in Addition to Form B203 for No-Look Fee (Chapter 13)
Central District of Illinois, Danville Division	Form Plan
Central District of Illinois, Peoria & Urbana Divisions	Form Plan
Central District of Illinois, Springfield Division	Form Plan
Northern District of Illinois	Local Bankruptcy Forms 21, 22, 23, 23a, 23b, & 23c; Official Form B9I
Southern District of Illinois	Rights and Responsibilities Form
Northern District of Indiana, Hammond Division	Plan
Northern District of Indiana, Other than Hammond Division	Plan
Southern District of Indiana	Rights and Responsibilities Form; Motion
Eastern District of Wisconsin	If seeking $4,000, reference to the MMM Program must be included in the motion, and the requirements for the MMM Program must be met.
Western District of Wisconsin	Plan

Jurisdiction	Forms Required in Addition to Form B203 for Itemized Fees
Central District of Illinois, Danville Division	Motion
Central District of Illinois, Peoria & Urbana Divisions	Motion
Central District of Illinois, Springfield Division	Motion
Northern District of Illinois	Attorneys must comply with Local Rule 5082-1 when itemizing fees brought by Motion.
Southern District of Illinois	Motion
Northern District of Indiana, Hammond Division	Motion
Northern District of Indiana, Other than Hammond Division	Local Rule B-2002-2: Fees are considered following a motion and notice of the opportunity to object.
Southern District of Indiana	Motion
Eastern District of Wisconsin	Motion
Western District of Wisconsin	Motion

Pointers for Assuring That Your Fee Application Is Successful

Generally:

1. Organize the fee application by subject matter categories and include a short narrative about what was done in each category in the time period of the application, including what was new and what was carry-over from previous applications.

2. Make sure that the subject matter categories are logical for the case and consistent among all professionals in the case. Use and add categories as the case evolves (with the permission of the fee examiner, fee committee, U.S. Trustee, or Court, as applicable) that assist the Court in understanding why the work was necessary.

3. Include an explanation of the role that each person billing time serves in the case, especially when new people are added to the case.

4. When more than one attorney is billing for the same conference or court appearance, etc., provide an explanation as to why more than one attorney was necessary. (This explanation can be addressed in 3 above with respect to each attorney's role.)

5. When the fee application includes time billed by people who do not regularly or have not previously worked on the case, explain why they became involved in the case during this period and why others more familiar with the case could not do what these new people did.

6. Avoid billing time for numerous people not otherwise working on the case who bill only a few hours and are not otherwise familiar with the case.

7. In larger and more complicated cases, have a senior lawyer who is integrally involved in the case supervise, organize, and read each fee application before it is submitted.

8. Include representations about the rates being charged by the firm in the case—how they fit into the firm's billing scheme and how they compare to the overall market in the jurisdiction in which the case is pending and/or the firm is located.

9. Consult your local rules. Often the local rules provide a guide for how your fee applications should be structured, including organization, detail in descriptions, no "lumping", expense restrictions, etc.

10. Focus on the sections of the Bankruptcy Code that are applicable to your fee application and make sure that your narrative explains why you are entitled to compensation pursuant to those sections. For example:

    a. Section 330(a)(3)(c) addresses the reasonableness factors, *including* "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…"

    b. Section 330(a)(4)(A)(ii) states that compensation shall *not* be awarded if the services were not "(I) reasonably likely to benefit the debtor's estate; or (II) necessary to the administration of the case."

    c. In assessing whether services were reasonably likely to benefit the estate, courts generally adhere to a *prospective* standard which considers, among other things, the probability of success at the time that the services were rendered, the reasonable cost of pursuing the action, which services a reasonable lawyer or firm would have performed under the same circumstances, and any potential benefits to the estate (rather than to the individual debtor).

       [For a recent and thoughtful example of how this standard is applied, see *In re Underground Energy, Inc.*, No. 9:13-bk-10563-PC, 2015 WL 222476 (Bankr. C.D. Cal. Jan. 14, 2015), which is provided in the materials.]

11. Remember, the better the explanation for why the time billed meets the criteria, the more likely the Court will approve the fees, maybe even without a hearing, saving travel time and expense, as well as the need to incur fees for litigating fees (and avoiding the ASARCO issue).

12. In submitting your fee application, step back and consider whether the fees incurred were reasonable in the context of the case–both with respect to its complexity and the amount of unsecured claims for which you may be pursuing causes of action.

    [For a recent discussion of this issue, see *Orenstein Law Group, P.C. v. Saldana (In re Saldana)*, Bankr. Case Nos. 13-34861-SGJ-7, 13-34862-SGJ-7, 13-34863-SGJ-7, 2015 WL 4429419 (N.D. Tex. July 20, 2015), which is provided in the materials.]

13. If you represent a trustee, make sure to distinguish between duties of the trustee/DIP and counsel to same. An attorney may not charge legal fees to the estate for work within the trustee's statutory duties (see section 328(b)).

14. Make sure your retention agreement is consistent with the local rules. Some jurisdictions require certain services *at a minimum* must be provided by all chapter 7 counsel and may not be carved out of the retention agreement.

15. Disclosure of compensation statements under Rule 2016(b) are required in all cases and are due within 14 days of the filing of the petition. These are sworn certifications. Make sure that they are correct and that the amounts listed in these statements, as well as the services provided, agree with the other fee-related documents you file in the case, the schedules, and any other fee agreements you may have executed with this client. Also, note that Rule 2016(b) requires that a supplement to the statement be filed within 15 days after any payment or agreement not previously disclosed.

16. Take special care regarding paragraphs 5 and 6 of your 2016(b) statement. If you are providing additional types of services not listed in the form, you need to add those in paragraph 5, and if you are NOT providing certain types of services, you need to outline those in paragraph 6 (subject to the local rules, as outlined in paragraph 14 above.)

17. Make the judge's and her law clerk's job easy. Check all of your fee-related documents to make sure that they agree with each other. Then check again. Clients may sign various documents and agreements at various times and may pay retainers at various times. Make sure that the fee application, draft order, and other related documents are all consistent. If things have changed between the filing of one document and the filing of another, amend the documents so that the Court has the correct information when reviewing the documents for final award.

18. Debtors may and should object to costs of collection and other lender attorney's fees when they are unreasonable or not provided for in the agreements among the parties.

19. Creditors seeking costs of collection and other attorney's fees should provide adequate information to the Court to justify the amount sought. A traditional fee application is usually not required, but in order to assure prompt allowance, provide the Court with enough information about the services rendered for the Court to understand why the amount requested is appropriate.

Chapter 13 Fixed-Fee Cases:

1. Make sure that your 2016(b) statement agrees with your applicable fixed-fee agreement with respect to both amounts and services. Even if, for example, the Chicago version of the Court-Approved Retention Agreement ("CARA") states that in the event of a conflict, the CARA controls, the 2016(b) statement is a sworn certification, and it must be amended if it is incorrect.

2. Be mindful of the services that your fixed-fee agreement states you are providing. If it states you are providing those services, you must provide them and may not charge extra for them UNLESS your local rules provide a mechanism for requesting additional fees. See, e.g., Chicago CARA paragraph F.4, which permits additional fees "[i]n extraordinary circumstances, such as extended evidentiary hearings or appeals." A traditional fee application which follows the general rules outlined above, as well as the local rules of your jurisdiction, is required under these circumstances.

3. If you are representing a client seeking sanctions for violation of the automatic stay under section 362(k), remember that it is the client who is entitled to the sanctions. Thus, if you are not charging the client any fees (because it is a flat-fee case), then you may not request any fees.

4. Courts are not consistent on "fee jumping," but it is often allowed unless objected to. Know your court and your trustee.

5. The order allowing fees in a chapter 13 case is not a judgment which, in the event of dismissal of the case, may be used to seek collection of the fees in state court. It is simply an order permitting the chapter 13 trustee to pay fees to counsel as part of the payments it makes to creditors under a confirmed chapter 13 plan. See, e.g., paragraph C.2 of the Chicago CARA.

6. Section D of the Chicago CARA clarifies what kind of a retainer has been paid, if any. The purpose of section D is to aid counsel in complying with the Illinois Rules of Professional Conduct, especially regarding Advanced Payment Retainers as addressed in paragraph D.1(a). The specific financial arrangements, however, should be disclosed in section F.

Summary of Fees for Consumer Debtors' Attorneys within the Seventh Circuit

	No-Look Fee (Ch 13)	Duties Required	No-Look Fee Restrictions
Central District of Illinois, Danville Division	$3,500	None specified.	None
Central District of Illinois, Peoria & Urbana Divisions	$3,500	Standing Order stipulates specific duties of debtors' attorneys for chapter 13 cases in which attorneys seek a no-look fee.	Debtors' total plan payments must be ≥ $5,400 (≥ $150 per month for 36-month plan), unless otherwise ordered by the Court.
Central District of Illinois, Springfield Division	$3,500	Standing Order stipulates specific duties of debtors' attorneys for chapter 13 cases in which attorneys seek a no-look fee.	Fees shall not exceed the lesser of: (1) 50% of funds distributed by the trustee after payment of administrative expenses (including trustee's fee), or (2) $350 per month, unless the trustee recommends and the Court approves a larger month payment amount.
Northern District of Illinois	$4,000	The Court-Approved Retention Agreement stipulates specific duties of debtors' attorneys for chapter 13 cases in which attorneys seek a no-look fee.	None
Southern District of Illinois	$4,000/$4,500	The Rights and Responsibilities Form stipulates specific duties of debtors' attorneys. The requirements specified must be met for all chapter 13 cases whether or not the attorney seeks a no-look fee.	None
Northern District of Indiana, Hammond Division	$3,400 (Hammond)	None specified.	None
Northern District of Indiana, Other than Hammond Division	None set	Practice tips concerning applications for fees before Judge Grant and Judge Dees are available on the Court's website.	N/A
Southern District of Indiana	$4,000 (+ $500 per lien strip adversary; *see* General Order 14-0005)	The Rights and Responsibilities Form stipulates specific duties of debtors' attorneys and attorneys must meet the requirements specified therein for all chapter 13 cases.	None
Eastern District of Wisconsin	$3,500/$4,000	The no-look fee is $3,500. However, if the case includes a motion to participate in the Court's MMM [Mortgage Modification Mediation] program, then the no-look fee is $4,000, per Local Rule 2016.	None
Western District of Wisconsin	$3,500 (up to $5,000 if attorney provides lien avoidance services or helps debtor with participation in the Mortgage Mediation Program)	None specified.	None

This summary was compiled during September, 2015. Counsel should always review local rules and practice.

Summary of Fees for Consumer Debtors' Attorneys within the Seventh Circuit

	Procedure (Ch 13)	Forms Required in Addition to Form B203 for No-Look Fee (Ch 13)	Forms Required in Addition to Form B203 (Itemized)
Central District of Illinois, Danville Division	Fees are properly brought before the Court on their own motion, usually heard with confirmation.	Form Plan	Motion
Central District of Illinois, Peoria & Urbana Divisions	Fees are properly brought before the Court on their own motion, usually heard with confirmation.	Form Plan	Motion
Central District of Illinois, Springfield Division	Fees are properly brought before the Court on their own motion, usually heard with confirmation.	Form Plan	Motion
Northern District of Illinois	Fees are properly brought before the Court on their own motion, usually heard with confirmation. Attorneys must comply with Local Rule 5082-2 when seeking the no-look fee for chapter 13 cases.	Local Bankruptcy Forms 21, 22, 23, 23a, 23b, & 23c; Official Form B9I	Attorneys must comply with Local Rule 5082-1 when itemizing fees brought by Motion.
Southern District of Illinois	Fees are included within the plan.	Rights and Responsibilities Form	Motion
Northern District of Indiana, Hammond Division	Fees may simply be included in a chapter 13 plan that is noticed to all interested parties. For Judge Klingeberger, the Attorney-Client contract must be provided to the Court; otherwise, fees will not be included in the order confirming the chapter 13 plan and must then be brought by separate motion.	Plan	Motion
Northern District of Indiana, Other than Hammond Division	Fees may simply be included in a chapter 13 plan that is noticed to all interested parties.	Plan	Fees are considered following a motion and notice of the opportunity for objection, per Local Rule B-2002-2.
Southern District of Indiana	Fees are properly brought before the Court on their own motion, usually heard with confirmation.	Rights and Responsibilities Form; Motion	Motion
Eastern District of Wisconsin	Fees are properly brought before the Court on their own motion. If seeking the no-look fee, itemization is not included. If seeking the additional $500 (MMM Program), then itemization of fees in excess of $3,500 is required.	If seeking $4,000, reference to the MMM Program must be included in the motion, and the requirements for the MMM Program must be met. See www.wieb.uscourts.gov for more information on the MMM Program.	Motion
Western District of Wisconsin	File Form B203 within 14 days of filing petition. Fees are typically not brought by separate motion. If the debtor uses the MMMWD (Mortgage Modification Mediation Program in the Western District), then program requirements must be met. See www.wiwb.uscourts.gov for more information.	Plan	Motion

This summary was compiled during September, 2015. Counsel should always review local rules and practice.

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

SANTA BARBARA DIVISION

In re: UNDERGROUND ENERGY, INC., a Delaware corporation, Debtor.	Case No. 9:13-bk-10563-PC Chapter 11 **MEMORANDUM DECISION** Date: December 10, 2014 Time: 9:30 a.m. Place: United States Bankruptcy Court Courtroom # 201 1415 State Street Santa Barbara, CA 93101

Before the court is the First and Final Application of Cooley LLP for Compensation and Reimbursement of Expenses as Attorneys for the Official Committee of Unsecured Creditors ("Application"). Cooley LLP ("Cooley"), former counsel to the Official Committee of Unsecured Creditors ("Committee"), seeks final allowance of $768,771.20 in attorneys' fees, plus $19,301.22 in expenses, for a total of $788,072.42, for the period of April 29, 2013 through December 10, 2014.[1] Underground Energy, Inc. ("Debtor"), the Committee, and the United

[1] The final compensation sought in the Application includes "$25,000, estimated to be incurred in connection with the preparation of [the] Final Fee Application and litigation and hearing thereon." Application, 2:n.8. On December 24, 2014, Cooley filed a Supplemental Declaration of Ali M.M. Mojdehi in Support of First and Final Application of Cooley LLP for Compensation and Reimbursement of Expenses as Attorneys for the Official Committee of Unsecured Creditors

States trustee ("UST") object to allowance and payment of the fees and expenses sought in the Application. Having considered the Application and objections thereto, the evidentiary record, and arguments of counsel, the court will sustain, in part, and overrule, in part, the objections to the Application and allow as final compensation the sum of $747,913.82 in reasonable attorneys' fees, plus $16,272.87 in expenses, for a total of $764,186.69, based on the following findings of fact and conclusions of law pursuant to F.R.Civ.P. 52(a),[2] as incorporated into FRBP 7052 and applied to contested matters by FRBP 9014(c).[3]

[Dkt. # 786] ("Supplemental Declaration"), seeking an additional award of $57,393.80 in attorneys' fees for 113.40 hours of legal services rendered at a blended hourly rate of $506.12 between November 4, 2014 and December 10, 2014, in connection with preparation of the Application, responding to objections thereto, and attending the hearing thereon.

[2] Unless otherwise indicated, all "Code," "chapter" and "section" references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 after its amendment by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23 (2005). "Rule" references are to the Federal Rules of Bankruptcy Procedure ("FRBP"), which make applicable certain Federal Rules of Civil Procedure ("F.R.Civ.P."). "LBR" references are to the Local Bankruptcy Rules of the United States Bankruptcy Court for the Central District of California ("LBR").

[3] In making its findings and conclusions, the court has considered the following documents: (1) Application [Dkt. # 722]; (2) Declaration of Ali M.M. Mojdehi in Support of First and Final Application of Cooley LLP for Compensation and Reimbursement of Expenses as Attorneys for the Official Committee of Unsecured Creditors [Dkt. # 723]; (3) Joint Objection of Debtor and Official Committee of Unsecured Creditors to the First and Final Application of Cooley LLP for Compensation and Reimbursement of Expenses as Attorneys for the Official Committee of Unsecured Creditors ("Joint Objection") [Dkt. # 730]; Objection to First and Final Application of Cooley LLP for Compensation and Reimbursement of Expenses as Attorneys for the Official Committee of Unsecured Creditors ("UST Objection") [Dkt. # 734]; (5) Omnibus Reply to (I) Joint Objection of Debtor and Official Committee of Unsecured Creditors to First and Final Application of Cooley LLP for Compensation and Reimbursement of Expenses as Attorneys for the Official Committee of Unsecured Creditors; and (II) Objection of the United States Trustee to First and Final Application of Cooley LLP for Compensation and Reimbursement of Expenses as Attorneys for the Official Committee of Unsecured Creditors ("Omnibus Reply") [Dkt. # 740]; (6) Declaration of Brian W. Byun in Support of Omnibus Reply to (I) Joint Objection of Debtor and Official Committee of Unsecured Creditors to First and Final Application of Cooley LLP for Compensation and Reimbursement of Expenses as Attorneys for the Official Committee of Unsecured Creditors; and (II) Objection of the United States Trustee to First and Final Application of Cooley LLP for Compensation and Reimbursement of Expenses as Attorneys for the Official Committee of Unsecured Creditors [Dkt. # 741]; (7) Declaration of Allison M. Rego

A. Standard for Final Allowance of Attorneys Fees and Expenses

Section 330(a)(1) permits the court to award "reasonable compensation" for "actual, necessary services" rendered by a trustee, examiner or properly employed professional person. 11 U.S.C. § 330(a)(1)(A). Compensation may not be awarded for: (1) unnecessary duplication of services; or (2) services that were not: (i) reasonably likely to benefit the debtor's estate; or (ii) necessary to the administration of the case. 11 U.S.C. § 330(a)(4)(A)(i) & (ii).

In determining "reasonable compensation," the court must consider the nature, extent and value of the services, taking into account "all relevant factors," including: (1) time spent on the

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in Support of Omnibus Reply to (I) Joint Objection of Debtor and Official Committee of Unsecured Creditors to First and Final Application of Cooley LLP for Compensation and Reimbursement of Expenses as Attorneys for the Official Committee of Unsecured Creditors; and (II) Objection of the United States Trustee to First and Final Application of Cooley LLP for Compensation and Reimbursement of Expenses as Attorneys for the Official Committee of Unsecured Creditors [Dkt. # 742]; (8) Declaration of Ali M.M. Mojdehi in Support of Omnibus Reply to (I) Joint Objection of Debtor and Official Committee of Unsecured Creditors to First and Final Application of Cooley LLP for Compensation and Reimbursement of Expenses as Attorneys for the Official Committee of Unsecured Creditors; and (II) Objection of the United States Trustee to First and Final Application of Cooley LLP for Compensation and Reimbursement of Expenses as Attorneys for the Official Committee of Unsecured Creditors [Dkt. # 743]; (9) Transcript of Proceedings [Dkt. # 765]; and (10) facts evident from documents filed in the case as reflected on the court's docket of which the court has taken judicial notice pursuant to F.R.Evid. 201(c)(1). The court has given little weight, if any, to the following documents in making its determination: (1) Declaration of Carl Dore, Jr. in Support of Omnibus Reply to (I) Joint Objection of Debtor and Official Committee of Unsecured Creditors to First and Final Application of Cooley LLP for Compensation and Reimbursement of Expenses as Attorneys for the Official Committee of Unsecured Creditors; and (II) Objection of the United States Trustee to First and Final Application of Cooley LLP for Compensation and Reimbursement of Expenses as Attorneys for the Official Committee of Unsecured Creditors [Dkt. # 744]; (2) Declaration of T. Todd Egland in Support of Omnibus Reply to (I) Joint Objection of Debtor and Official Committee of Unsecured Creditors to First and Final Application of Cooley LLP for Compensation and Reimbursement of Expenses as Attorneys for the Official Committee of Unsecured Creditors; and (II) Objection of the United States Trustee to First and Final Application of Cooley LLP for Compensation and Reimbursement of Expenses as Attorneys for the Official Committee of Unsecured Creditors [Dkt. # 745]; and (3) Request for Judicial Notice in Support of Omnibus Reply to (I) Joint Objection of Debtor and Official Committee of Unsecured Creditors to First and Final Application of Cooley LLP for Compensation and Reimbursement of Expenses as Attorneys for the Official Committee of Unsecured Creditors; and (II) Objection of the United States Trustee to First and Final Application of Cooley LLP for Compensation and Reimbursement of Expenses as Attorneys for the Official Committee of Unsecured Creditors [Dkt. # 746].

services (11 U.S.C. § 330(a)(3)(A)); (2) rates charged for the services (11 U.S.C. § 330(a)(3)(B)); (3) whether the services were: (i) necessary to the administration of the bankruptcy case; or (ii) beneficial at the time the services were rendered toward completion of the case (11 U.S.C. § 330(a)(3)(C)); (4) 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 (11 U.S.C. § 330(a)(3)(D)); (5) with respect to a professional person, whether the person is board certified or has otherwise demonstrated skill and experience in the bankruptcy field (11 U.S.C. § 330(a)(3)(E)); and (6) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in nonbankruptcy cases (11 U.S.C. § 330(a)(3)(F)).

The "lodestar" formula (under which the number of hours reasonably expended is multiplied by a reasonable hourly rate for the person providing the services) is the traditional standard for assessing an attorneys' fee application in bankruptcy. See Law Offices of David A. Boone v. Berham-Burk (In re Eliapo), 468 F.3d 592, 598–99 (9th Cir. 2006); Yermakov v. Fitzsimmons (In re Yermakov), 718 F.2d 1465, 1471 (9th Cir. 1983). A bankruptcy practitioner's compensation, including the hourly rate charged, must be commensurate with the compensation received by comparably skilled attorneys in other practice areas. 11 U.S.C. § 330(a)(3)(F); In re Fleming Cos., Inc., 304 B.R. 85, 93 (Bankr. D. Del. 2003).

B. Cooley's Application

In the Application and Supplemental Declaration, Cooley seeks final allowance of $768,771.20 in attorneys' fees, plus $19,301.22 in expenses, for a total of $788,072.42, for the period of April 29, 2013 through December 10, 2014. The court approved Cooley's employment on June 24, 2013, retroactive to April 29, 2013. Cooley rendered a total of 1,303 hours of services to the estate between April 29, 2013 and August 26, 2014, according to the Application, billed at a blended hourly rate of $556.93. The legal services rendered for which Cooley seeks compensation in the Application are documented by invoices, copies of which are included in Exhibit 3 to the declaration of Ali M.M. Mojdehi in support of the Application. Cooley's invoices reflect the services performed by Cooley on behalf of the Committee by category of

service. Within each category of service, the work performed is documented by (a) the date the service was performed; (b) the attorney who performed the service; (c) a description of the task performed; and (d) the time expended in performing the service recorded in increments of 1/10th of an hour. Each invoice contains a summary of the work performed by each Cooley attorney or paralegal for the Committee and their respective hourly rates, together with a list of costs advanced during the billing period. The court takes judicial notice that the hourly rates reflected in each of the invoices are within the range of hourly rates charged by attorneys and paralegals for similar legal services rendered in chapter 11 cases pending in the United States Bankruptcy Court for the Central District of California. There is no allegation nor evidence that, at any time during its employment under § 1103, Cooley represented or held an interest adverse to the estate with respect to the matters on which it was employed or was not disinterested. See 11 U.S.C. § 328(c).

C. The Objections to Cooley's Application

In their Joint Objection, Debtor and the Committee first complain that "[t]he fees sought by Cooley are completely disproportionate to the size of the estate and the results (or lack thereof) achieved."[4] They argue that Cooley must establish, "[i]n addition to the factors outlined in Sections 330(a)(3)(A)," that its services "made a 'substantial contribution' [to the] case;" and further, that "[t]he measure of any 'substantial contribution' is the extent of the [actual] benefit to the estate," citing Cellular 101, Inc. v. Channel Commc'n, Inc (In re Cellular 101, Inc.), 377 F.3d 1092, 1096 (9th Cir. 2004).[5] Given this standard, Debtor and the Committee reason that all fees and expenses sought by Cooley with respect to (a) Cooley's investigation and litigation of the Mountain View/Arvin Project Area ("MVA Project"); (b) the adversary proceeding against Bruce A Berwager ("Berwager") and David E. Hoyt ("Hoyt") (the "Berwager and Hoyt Adversary"); and (c) Cooley's work formulating a disclosure statement and proposed plan should be disallowed entirely because the "substantial contribution" threshold has not been met.

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[4] Joint Objection, 1:10-11.

[5] Id. at 4:17-22.

Cooley's fees with respect to hours expended on the MVA Project and developing a disclosure statement and plan are also attacked by the UST.

1. *A Determination of Reasonable Compensation Under § 330(a)(3) Does Not Hinge on a Finding of a Substantial Contribution to the Case or Estate*

First, in seeking to bootstrap a "substantial contribution" requirement to § 330(a), Debtor and the Committee improperly conflate § 502(b)(1) with § 502(d)(3)(D) and § 502(d)(4), apparently hoping to incorporate the best of each section while avoiding their respective limitations. The Committee was appointed by the United States trustee pursuant to § 1102(a)(1), and the Committee elected to employ Cooley as its counsel pursuant to § 1103(a). Cooley is seeking compensation as former Committee counsel pursuant to § 503(b)(2) and § 330(a), not either § 502(d)(3)(D) or § 502(d)(4). Section 330(a) sets forth the applicable standard for determining the allowance and payment of compensation to counsel employed under § 1103. 11 U.S.C. § 330(a)(1).

Section 330(a)(3)(C) permits compensation for services that are "necessary to the administration of, or beneficial at the time at which the service was rendered toward completion of, a case." 11 U.S.C. § 330(a)(3)(C). The court may not allow compensation for unnecessary duplication of services, or services that were neither reasonably likely to benefit the estate nor necessary for its proper administration. 11 U.S.C. § 330(a)(4)(A). By its terms, § 502(d)(3)(D) does not apply to an official committee of unsecured creditors appointed under § 1102.[6] Nor does § 503(d)(4) apply to an attorney employed to represent a committee appointed under § 1102.[7] Whether services were necessary to the administration of the case or beneficial to the

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[6] Section 503(b)(3)(D) is the standard applicable to the allowance of actual, necessary expenses incurred by "a creditor, an indenture trustee, an equity security holder, or a committee representing creditors or equity security holders, other than a committee appointed under section 1102 of this title, in making a substantial contribution in a case under chapter 9 or 11 of this title." 11 U.S.C. § 502(b)(3)(D) (emphasis added).

[7] Section 503(b)(4) is the standard applicable to "reasonable compensation for professional services rendered by an attorney or an accountant of an entity whose expense is allowable under subparagraph (A), (B), (C), (D), or (E) of paragraph (3) of this subsection, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than

estate is determined, not in hindsight, but objectively with reference to the time the services were rendered. 11 U.S.C. § 330(a)(3)(A)&(C); In re Mednet, 251 B.R. 103, 108 (9th Cir. BAP 2000); In re Circle K Corp., 294 B.R. 111, 125 (Bankr. D Ariz. 2003). Furthermore, § 330 does not require that the services result in a material benefit to the estate. It need only be shown that the services were reasonably likely to benefit the estate at the time the services were rendered. Mednet, 251 B.R. at 108; Lobel & Opera v. U.S. Trustee (In re Auto Parts Club, Inc.), 211 B.R. 29, 33 (9th Cir. BAP 1997).

2. *The Objections Are Not Supported By Evidence to Overcome the Presumption That the Lodestar Represents a Reasonable Fee*

While a bankruptcy court has a duty to review a fee application even in the absence of an objection, the court should not, "not without evidence to the contrary, . . . change the facts initially presented to it in an otherwise complete fee application . . [and] on its own, second guess counsel in deciding whether this conference or that phone call were necessary, whose participation was appropriate, what the market generally pays for the time and services of counsel and its staff or how it reimburses certain expenses." Matter of Hunt's Health Care, Inc., 161 B.R. 971, 981 (Bankr. N.D. Ind. 1993). As the court correctly observed in Hunt's Health Care:

> Without being presented with facts beyond those contained in an otherwise sufficient fee application, the court should not reduce an attorney's hourly rate or decide what is or is not to be characterized as overhead or how certain expenses are properly billed. Neither should the court take the approach that, just because it frequently reviews a multitude of fee applications, it is somehow in a better position to determine the reasonableness of a requested fee than the market. An attorney's customary billing practices are presumptively correct. While they may not be dispositive, departing from them requires a reason and information which would warrant the conclusion that the presumption accorded to counsel's regular practice should not be followed. Thus, the burden is on the objector "to establish a good reason why a lower rate is essential to access a 'reasonable attorney's fee.'"

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in a case under this title, and reimbursement for actual, necessary expenses incurred by such attorney or accountant." 11 U.S.C. § 503(b)(4).

> A party objecting to a fee application may not do so based on the general proposition that the fee sought is simply too much. It should go beyond this assertion to articulate a reason why and, if necessary, present evidence in support thereof. . . The objector must, at some point, identify any allegedly improper, insufficient, or excessive entries and direct the court's attention to them. The objector should also be able to identify a reason why the hourly rates involved and the time charged are not reasonable or why the market would place a lower value on counsel's labors and offer evidence supporting its position.

Id. at 982 (citations omitted). Attorneys' fees should not be reduced based on "inarticulable and unsubstantiated dissatisfaction with the lawyers' efforts to economize on their time and expenses." Matter of Cont'l Ill. Sec. Litig., 962 F.2d 566, 570 (7th Cir. 1992).

In short, once an applicant has documented the hours expended and submitted evidence in support of the hours worked, "there is a strong presumption that the lodestar represents a reasonable fee." Gates v. Deukmejian, 987 F.2d 1392, 1397 (9th Cir. 1993). "The party opposing the fee application has a burden of rebuttal that requires submission of evidence challenging the hours charged or facts asserted" in the application. Id. at 1397-98. In this case, neither the Joint Objection nor the UST Objection is supported by a declaration or other evidence to support disallowance of the fees or expenses sought in the Application.

3. Cooley Will Be Allowed the Final Compensation Sought for Legal Services Rendered in Conjunction With the MVA Project, Berwager and Hoyt Adversary, and the Formulation of a Disclosure Statement and Proposed Plan

a. MVA Project. Debtor, Committee and the UST seek disallowance of $79,641 for 143 hours of legal services rendered to the estate in conjunction with the MVA Project. Debtor and the Committee assert that Cooley's services in connection with the MVA Project "clearly did not result in a substantial contribution to the estate."[8] In particular, Debtor and the Committee charge that "[t]he time spent on the MVA Project is unreasonable, the rate charged for such services is exorbitant in relation to the size of this case, and the services became unnecessary after the Sale Motion was withdrawn."[9]

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[8] Joint Objection, 7:14.

[9] Id. at 7:11-13.

Cooley's Application reveals that Cooley represented the Committee successfully in opposing the Debtor's motion seeking to sell the estate's interest in the MVA Project to MK California, LLC ("MK"); and then, after Debtor's "withdrawal of the Sale Motion and at the Committee's direction," Cooley engaged in an extensive investigation of potential claims against MK's principal, J. Michael Kerr ("Kerr") and R. Terrence Budden, a principal of Compass Global Resources, LLC. Cooley's investigation included the discovery of documents, protracted litigation with respect to discovery, and ultimately a Rule 2004 examination of Kerr. Once the investigation was completed, Cooley drafted a complaint alleging claims against MK and Kerr related to the MVA Project transaction. The complaint and supporting documents were delivered by Cooley to successor counsel to the Committee upon Cooley's withdrawal.[10]

Cooley has established that the services were authorized by the Committee and reasonably calculated to benefit the estate at the time the services were rendered. The Debtor, Committee, and UST have not offered evidence to the contrary. Nor is there any evidence that "the rate charged for such services is exorbitant," as claimed by Debtor and the Committee.[11]

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[10] Application, 8:9 – 9:14.

[11] Due to objections filed by Debtor and the UST, the order authorizing Cooley's employment by the Committee specifically states that "[t]he rights of all parties in interest to object to Cooley's hourly rates are reserved and may be raised at the time of Cooley's application for allowance of compensation and reimbursement of expenses." Order on Application to Authorize the Employment of Cooley LLP as Counsel to Official Committee of Unsecured Creditors, *Nunc Pro Tunc* to April 29, 2013 [Dkt. # 232], 2:4-6. However, the UST Objection does not challenge Cooley's hourly rates and the Joint Objection is not supported by any evidence to support a finding that Cooley's blended hourly rate of $556.93 is not within the range of prevailing hourly rates charged by firms in the Central District of California for similar services by lawyers of reasonably comparable skill, experience and reputation. Furthermore, Cooley's "associates' hours have been billed at a 10% discount and [Mojdehi's] hours have been billed at a 15% discount" in the Application. Declaration of Ali M.M. Mojdehi in Support of First and Final Application of Cooley LLP for Compensation and Reimbursement of Expenses as Attorneys for the Official Committee of Unsecured Creditors, [Dkt. # 723], at 3:12-13. "Cooley also has not charged for word processing services or secretarial overtime, although the firm bills its non-bankruptcy clients for such items." Id. 3:13-15. Finally, Cooley's blended hourly rate appears to be in line with the hourly rates charged by the Committee's current counsel, Loeb & Loeb LLP. The court takes judicial notice of the fact that "[t]he normal billing rates of Loeb's lawyers and paraprofessionals at the time of [its Employment] Application range from approximately $425.00

The fact that the adversary proceeding was not filed before Cooley's withdrawal as counsel for the Committee does not prevent Cooley from being reasonably compensated for actual and necessary services rendered to the Committee for investigating and pursuing the claims.

b. Berwager and Hoyt Adversary. Debtor and the Committee seek disallowance of $13,200 for 23.7 hours of legal services rendered to the estate in conjunction with the Berwager and Hoyt Adversary. Debtor and the Committee reason that "Cooley's time . . . did not make a substantial contribution to the estate because Cooley withdrew as counsel before the matters were fully adjudicated."[12] Neither Debtor nor the Committee appear to dispute the fact that Cooley actually rendered the legal services and advanced the costs itemized in the Application to investigate the Committee's potential claims against Berwager and Hoyt, made demands on counsel for Berwager and Hoyt for documents and information, prepared and filed an adversary proceeding against Berwager and Hoyt, and opposed their efforts to dismiss the adversary proceeding for lack of proper service and failure to state a claim.[13] Nor do Debtor or the Committee dispute the fact that the Committee is still pursuing the adversary proceeding which remains pending before the court.

Cooley has established that the services rendered with respect to the Berwager and Hoyt Adversary were reasonably calculated to benefit the estate at the time the services were rendered.

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to $800.00 per hour for partners, and $315 per hour for paraprofessionals" and that "Loeb has agreed to cap its rates for partners who will work on this matter at $675.00 during the pendency of this case." Declaration of Bernard R. Given, II in Support of Application of Official Committee of Creditors Holding Unsecured Claims to Retain Loeb & Loeb LLP [Dkt. # 633], 4:16-19. The court also takes judicial notice of the First Interim Fee Application of Loeb & Loeb LLP, Counsel for the Official Committee of Creditors Holding Unsecured Claims, Seeking Allowance and Payment of Compensation and Reimbursement of Expenses Under 11 U.S.C. §§ 330 and 331 for the Period From August 13, 2014 Through October 31, 2014 [Dkt. # 752] filed on December 8, 2014, in which Loeb seeks an interim allowance and payment of $89,601.00 in fees, plus $810.08 in expenses, for a total of $90,411.08, for 151.8 hours of services rendered at a blended hourly rate of approximately $596.00 during the two and one-half month period between August 13, 2014 and October 31, 2014. No objection was filed to Loeb's interim application, and the fees and expenses sought were allowed at a hearing on January 7, 2015.

[12] Joint Objection, 7:26-28.

[13] Application, 10:20 – 11:12.

The court rejects the assertion in the Joint Objection that Cooley's compensation should be contingent on a successful outcome of the litigation. A final adjudication in favor of the Committee of all claims against Berwager and Hoyt in the adversary proceeding is not a condition to allowing Cooley reasonable compensation for actual and necessary services rendered to the Committee in pursuing the claims prior to its withdrawal as counsel for the Committee.

c. Plan and Disclosure Statement. Debtor, Committee and UST seek disallowance of $191,974 for 344.7 hours of legal services rendered in conjunction with Cooley's efforts to formulate, draft, and file a disclosure statement and proposed plan of reorganization. In the Joint Objection, Debtor and the Committee point out that "Loeb billed $43,656.00 to negotiate, prepare, and file the Joint Plan and Disclosure Statement (and the attendant Disclosure Statement Hearing),"[14] and argue that "Cooley['s] efforts were largely duplicative of efforts of others and thus do not constitute 'substantial contributions.'"[15] Debtor and the Committee further argue that "[e]ven if they had been consummated, almost $200,000 to prepare, and not even confirm, a Plan for a 4 million dollar estate exceeds all bounds of reasonableness."[16]

In its reply, Cooley points out that the Application, in fact, seeks "reimbursement of 315.5 hours of work constituting fees of $137,801.40 for time relating to plan and disclosure statement matters," divided as follows:

> $82,514.70 (approximately) was expended in negotiating, drafting and revising the plan and disclosure statement that . . . a majority of the Committee, in number and amount of claims held, voted to pursue but later, a majority of the Committee in number directed not to be filed; [and]
>
> $55,286.70 (approximately) was expended analyzing, negotiating, and objecting to the adequacy of disclosure as to the plans and disclosure statements the Debtor proposed after the Committee determined not to file its plan as well as analysis of

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[14] Joint Objection, 8:13-15.

[15] Id. at 9:2-3.

[16] Id. at 8:11-13.

> the plan prepared by counsel for Baker Hughes/Scientific Drilling/Schlumberger that was later proposed to be filed by the Committee . . . .[17]

Neither the Joint Objection nor the UST Objection identifies any specific task performed by Cooley with respect to formulation of a disclosure statement and plan that was either not authorized by the Committee or not calculated to lead to a benefit to the estate at the time the work was performed.

At the hearing on December 10, 2014, Debtor's counsel conceded that Cooley's contributions resulted in a disclosure statement and plan that formed the basis of the disclosure statement ultimately approved and the consensual plan that followed, stating:

> [W]hile they . . . didn't file the disclosure statement, they provided a draft which provided the basis for the first amended disclosure statement and first amended disclosure statement which the Court ultimately approved. And it was the approval of the disclosure statement that changed the playing field and ultimately resulted in a consensual plan. That's all true.[18]

It is undisputed that the case has been litigious. Debtor's counsel was also asked whether the Debtor was suggesting that Cooley "ran up the fees for the past year and a half and created litigation that caused a division among members of the Committee and delayed an effective reorganization in the case?"[19] In response, Debtor's counsel stated:

> [I]t's my belief that [Cooley] acted in good faith to help seek a resolution and a reorganization of the case under very difficult circumstances. . . We think that the overall fees are high in light of the size of the case, but it doesn't have anything to do with good faith or the fact that they weren't trying to facilitate a reorganization"[20]

In sum, the objecting parties seek to curb Cooley's final fees and expenses because they believe that the amount sought is simply too much. As previously stated, "[a] party objecting to

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[17] Omnibus Reply, 11:12-25.

[18] Transcript of Hearing Re: First and Final Application of Cooley, LLP for Compensation and Reimbursement of Expenses as Attorneys for the Official Committee of Unsecured Creditors [Dkt. # 765] ("Transcript"), 2:9-15.

[19] Id. at 14:9-13.

[20] Id. at 14:14-17.

a fee application may not do so based on the general proposition that the fee sought is simply too much." Hunt's Health Care, 161 B.R. at 982. The Joint Objection and UST Objection fail to point to any specific instances of allegedly duplicative, unnecessary, or insufficient work, nor is there evidence that Cooley's services, at the time rendered, were not reasonably calculated to lead to a benefit to the estate.

4. Cooley is Entitled to the Final Compensation Requested for Attending Court Hearings and Depositions and the Travel Time Associated Therewith

Debtor and the Committee object to $53,368.20 in fees for 73.3 hours of legal services rendered by Cooley "related to meetings and preparation for and attendance of hearings,"[21] again arguing that Cooley has not demonstrated that such work resulted in a "substantial contribution to the estate."[22]

"There is no consensus among courts about what hourly rate should be allowed for professional's travel time under § 330." Thomas v. Namba (In re Thomas), 2009 WL 7751299, *9 (9th Cir. BAP 2009), aff'd, 474 Fed.Appx. 500 (9th Cir. 2012). "[W]hether travel time is to be compensated at a full or partial rate should be evaluated 'not as to whether such time was productive, but whether it was reasonable and necessary.'" Id. Four of the challenged time entries relate to time spent by Cooley on behalf of the Committee attending depositions, and traveling to and from the depositions. Cooley's Omnibus Reply points out that all but one of the remaining time entries challenged in the Joint Objection relate "to travel and attendance at hearings before the Hon. Robin Riblet (Ret.) who did not allow for telephonic appearances."[23] The Committee knew that Cooley's offices were in San Diego at the time it sought approval of Cooley's employment as counsel for the Committee. There is no evidence that Cooley was not authorized by the Committee to either attend the depositions identified in the challenged time entries or to travel to and from each such deposition. Given the inability to appear

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[21] Joint Objection, 9:13.

[22] Id. at 10:9.

[23] Omnibus Reply, 13:15-16.

telephonically, Cooley had no option but to travel from San Diego to Santa Barbara to properly represent the Committee to attend hearings in the case. There is no evidence that Cooley had the ability to bill other clients during the time Cooley was travelling to and from Santa Barbara for hearings or elsewhere for depositions. Under the circumstances, the court concludes that Cooley's time attending depositions and hearings, and the travel time associated therewith, was reasonable and necessary and compensable at its full hourly rate.

5. Cooley's De-Lumped Time Entries are Compensable

Debtor and the Committee identify 46 instances of "lumping" in Cooley's Application with respect to its request for $118,806.22 in fees for 245.9 hours of legal services rendered on various tasks for the Committee. They seek a blanket 30% reduction of the compensation sought by Cooley for such services "due to the amount of Cooley's request for compensation and the size of the estate."[24]

"Lumping services in a single billing entry in a fee application is 'universally disapproved' by bankruptcy courts." Thomas, 2009 WL 7751299, *5. "When services are lumped together, the bankruptcy court is prevented from determining the necessity of each service and 'from fairly evaluating whether individual tasks were expeditiously performed within a reasonable period of time.'" Id. "When fee applications are submitted with a portion or all of the requested fees based on lumped entries, courts may reduce, rather than disallow, compensation." Id. at *6.

Here, Cooley in Exhibit 1 of its Omnibus Reply sought to "de-lump" each of the time entries challenged in the Joint Objection. The time entries, as restated in Exhibit 1, de-lump the tasks undertaken and allocate the time spent on each task in increments of 1/10 of an hour. Some of the time entries in Exhibit 1 are not de-lumped, but are identified as a "single task" or "closely related tasks." The time entries, as restated in Exhibit 1, are sufficient for the court to determine the nature of the task performed and the necessity of the work undertaken, and to evaluate whether the task was performed within a reasonable period of time.

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[24] Joint Objection, 10:22-23.

6. There is No Evidence That Legal Services Performed by Cooley Were Not Authorized by the Committee

Debtor and the Committee object to the allowance and payment of fees for legal services rendered by Cooley to perform tasks "not required or authorized by the Committee."[25] Services must be authorized to be compensable. See Mednet, 251 B.R. at 108. However, the Joint Objection does not disclose the specific legal services rendered by Cooley that ostensibly were unauthorized nor is the Joint Objection supported by evidence that any of the legal services performed by Cooley were not, in fact, authorized by the Committee.

D. Cooley is Entitled to Reasonable Attorneys' Fees and Costs Incurred in Defending the Application.

In its Supplemental Declaration, Cooley seeks an additional award of $57,393.80 in attorneys' fees for 113.40 hours of legal services rendered at a blended hourly rate of $506.12 between November 4, 2014 and December 10, 2014, in connection with preparation of the Application, responding to the Joint Objection and the UST Objection, and attending the hearing on the Application and objections thereto.[26] The Committee objects "to the over 50 hours spent by several attorneys at Cooley in the preparation of the Reply and attending the hearing on the Application."[27] The Committee further objects "to the over $3,000 in Research Database and Document retrieval expenses."[28]

In the Ninth Circuit a bankruptcy court may award compensation for time spent and expenses incurred in successfully litigating objections to a fee application, provided the applicant demonstrates that: (1) the services rendered satisfy the requirements of § 330(a)(4)(A); and (2) the case exemplifies a "set of circumstances" that made the time spent and expenses incurred in

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[25] Id. at 13:25-26.

[26] Supplemental Declaration, 3:9-14.

[27] Opposition of the Official Committee of Creditors Holding Unsecured Claims to Supplemental Fees Requested by Cooley LLP ("Supplemental Opposition"), 2:11-12.

[28] Id. at 2:14-15.

the litigation "necessary" under § 330(a)(1). Smith v. Edwards & Hale, Ltd. (In re Smith), 317 F.3d 918, 928 (9th Cir. 2002) (abrogated on other grounds by Lamie v. United States Trustee, 540 U.S. 526, 531–39 (2004)).[29]

In the Application, Cooley included a request for an estimated $25,000 in fees and expenses "to be incurred in connection with the preparation of [the Application] and litigation and hearing thereon."[30] At the hearing on December 10, 2014, the court gave Cooley an opportunity to file a supplemental declaration setting "forth an itemization of fees and expenses incurred to support [its] claim for a $25,000 estimate of fees."[31] The amount now sought is more than twice the estimate contained in the Application.

According to Exhibit 1 to the Supplemental Declaration, the cost of preparing, filing and serving the Application alone exceeded $19,000 – 41.5 hours of legal services at a cost of $19,390.90. Preparing for and attending the hearing on the Application required another 12.8 hours of legal services at a cost of $9,047.60. The remaining 59.1 hours were spent by Cooley researching, preparing, filing and serving the Omnibus Reply at a cost of $28,955.30. Incredibly, Cooley spent 33% more time replying to the Joint Objection and UST Objection than it did preparing and filing its final fee application. As previously stated, the court gave little weight to the bulk of the documentation filed in support of the Omnibus Reply.[32]

Three Cooley attorneys combined to spend 59.1 hours between November 30, 2014 and December 5, 2014, analyzing the objections and drafting, filing and serving the Omnibus Reply thereto, averaging 9.85 hours per day on the task over a six-day period. The reasonableness of the time expended is an integral component of the lodestar analysis. In this case, the extravagant

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[29] The Supreme Court will soon rectify a split between the circuits on the issue of whether § 330(a) authorizes compensation for the costs professionals bear to defend their fee applications. See ASARCO, L.L.C. v. Jordan Hyden Womble Culbreth & Holzer, P.C. (In re ASARCO, L.L.C.), 751 F.3d 291, 299 (5th Cir. 2014), cert. granted, Baker Botts, L.L.P. v. ASARCO, L.L.C., 135 S.Ct. 44 (2014).

[30] See footnote # 1, supra.

[31] Transcript, 32:18-19.

[32] See footnote # 2, supra.

expenditure of time devoted to the Omnibus Reply exceeds the amount reasonably necessary given the complexity of the issues raised in the Joint Objection and UST Objection. Furthermore, the court declines to compensate Cooley for work performed in conjunction with the Omnibus Reply to "de-lump" the time entries challenged in the Joint Objection. This was work Cooley should have performed, but failed to do so, in preparation of its final fee application. The Committee's objection was meritorious insofar as it pointed out this deficiency. While the court ultimately overruled the Committee's objection and allowed the compensation sought based on the information belatedly provided by Cooley, the court will not reward Cooley by allowing further compensation for work performed to correct a deficiency in its original application. Accordingly, the court reduces by 43.1 the number of hours which reasonably should have been expended by Cooley in connection with the Omnibus Reply. Cooley will be allowed $8,097.92 for 16.0 hours, at a blended hourly rate of $506.12, as compensation for legal services rendered to perform this task.

With respect to Cooley's request for reimbursement of $3,028.35 in expenses incurred for "Research Database / Document Retrieval," the court assumes that the expense was incurred for computer assisted legal research but the Supplemental Declaration does not provide the court with any explanation of the cost nor concrete documentation establishing the necessity of the expense. Applicant has the burden to establish that an expense was actually and necessarily incurred. In re Gillett Holdings, Inc., 137 B.R. 462, 471 (Bankr. D. Colo. 1992). A reimbursable expense is one that is actually incurred and required to accomplish properly a task for which the professional was employed. See In re Williams, 102 B.R. 197, 199 (Bankr. N.D. Cal. 1989) ("[A]n expense is not 'actual,' and therefore not reimbursable under section 330(a)(2), to the extent that it is based on any sort of guesswork, formula, or pro rata allocation."); In re Convent Guardian Corp., 103 B.R. 937, 939 (Bankr.N.D. Ill. 1989) ("An expense is necessary if it was included because it was reasonably needed to accomplish the proper representation of the client.").

"Lexis and Westlaw expenses may be compensable where they are both necessary and attributable to a particular client." Gillett Holdings, 137 B.R. at 473. "Ideally, the billing

statements should indicate the date, the person conducting the search, the length of the search, as well as providing evidence of the necessity for the use of the service." Id. See In re Fibermark, Inc., 349 B.R. 385, 400 (Bankr. D. Vt. 2006) (Computer assisted legal research (CALR) is reimbursable, "provided the applicant: (1) demonstrates that the use charges incurred were reasonable and necessary (which necessarily includes a description of the research topic and the length of time spent on each topic); (2) affirms that the applicant bills its non-bankruptcy clients for CALR use charges, including the rate at which it bills its non-bankruptcy clients; and (3) certifies the invoiced cost from the vendor."). In its Application, Cooley states that "computer-aided research [is] billed at actual cost."[33] However, the Supplemental Declaration contains little, if any, factual information that would assist the court in divining what portion, if any, of the amount sought for "Research Database / Document Retrieval" was necessary to a proper reply to the Joint Objection or UST Objection. Furthermore, "[t]he purpose of computer research is to cut down the amount of time necessary to research a particular issue, not to increase the costs." In re Wildman, 72 B.R. 700, 732 (Bankr. N.D. Ill. 1987). This purpose does not appear to have been served given the time spent on the Omnibus Reply and the fees sought therefor. Accordingly, the Committee's objection to allowance of Cooley's request for reimbursement of $3,028.35 in expenses incurred for "Research Database / Document Retrieval" is sustained.

In sum, the court will allow Cooley reasonable attorneys' fees of $36,536.42, plus expenses of $962.13, incurred in preparing its Application and defending its Application against the objections of the Debtor, Committee and UST finding that such services were not unnecessarily duplicative, were reasonably likely to benefit the estate, and aided in the administration of the case. Cooley sought to discharge its fiduciary obligations to the Committee notwithstanding intense disagreement and increasing animosity among members of the Committee which ultimately resulted in the resignation of all but one member of the Committee and Cooley's withdrawal from representation. Cooley's services on behalf of the Committee

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[33] Application, 12:21.

until its withdrawal were not unnecessarily duplicative and were reasonably likely to benefit the estate or necessary to its proper administration. Debtor's counsel acknowledged at the hearing that Cooley "acted in good faith to help seek a resolution and a reorganization of the case under very difficult circumstances . . . ."[34] For these reasons, Cooley's defense of the objections to its final compensation request exemplifies a "set of circumstances" that made the time spent and expenses incurred in the litigation "necessary" under § 330(a)(1).

F. Conclusion.

Except as discussed above, Cooley's Application, as supplemented, satisfies the requirements of 11 U.S.C. § 330(a), FRBP 2016(a) and LBR 2016-1(c), and demonstrates that (a) Cooley rendered actual services to the estate that were necessary to the administration of, or beneficial at the time at which the services were rendered toward the completion of, the case, and that the compensation sought for such services is reasonable; and (b) the expenses incurred on behalf of the estate for which reimbursement is sought were actual and necessary. Based on the foregoing, the court will allow as final fees the sum of $747,913.82 in reasonable attorneys' fees, plus $16,272.87 in expenses, for a total of $764,186.69.

A separate order will be entered consistent with this memorandum.

###

Date: January 14, 2015

Peter H. Carroll
United States Bankruptcy Judge

[34] Transcript, 14:15-17.

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(Cite as: 2015 WL 4429419 (N.D.Tex.))

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Only the Westlaw citation is currently available.

United States District Court,
N.D. Texas,
Dallas Division.
In re Gonzalo SALDANA, Mexia Nursery & Tree Farm, Inc., and Mexia Tire Service, LLC, Debtors.
Orenstein Law Group, P.C., Appellant,
v.
Estela Saldana, Appellee.

Bankruptcy Case Nos. 13–34861–SGJ–7, 13–34862–SGJ–7, 13–34863–SGJ–7.
Civil Action Nos. 3:15–CV–0362–G, 3:15–CV–0363–G, 3:15–CV–0364–G.
Signed July 20, 2015.

Rosa R. Orenstein, Carol Lynn Wolfram, Orenstein Law Group PC, Nathan M. Nichols, Sullivan & Holston, Dallas, TX, for Appellant.

Charles B. Hendricks, Emily Scott Wall, Cavazos, Hendricks, Poirot & Smitham, P.C., Dallas, TX, for Appellee.

MEMORANDUM OPINION AND ORDER

A. JOE FISH, Senior District Judge.

***1** Appellant and cross-appellee, Orenstein Law Group, P.C. ("OLG"), and appellee and cross-appellant, Estela Saldana ("Estela"),[FN1] appeal from an order of the United States Bankruptcy Court denying in part OLG's application for compensation. The court has jurisdiction to hear these appeals under 28 U.S.C. § 158(a). For the reasons discussed below, the bankruptcy court's order regarding the application for compensation is affirmed in part and remanded in part.

I. *BACKGROUND*

A. *Factual Background*

In December 2010, Gonzalo Saldana ("Gonzalo") filed for divorce from Estela. Appellant's Brief at 5 (docket entry 19). The parties eventually entered into a divorce settlement agreement that awarded Estela $2.6 million. *Id.* Over two-and-a-half years after this settlement, Gonzalo, Mexia Nursery, and Mexia Tire (collectively, "the debtors")-the latter two being businesses Gonzalo owned-filed separate voluntary Chapter 11 bankruptcy petitions. *Id.* at 4. The bankruptcy court jointly administered the debtors' cases for procedural purposes during many of the bankruptcy proceedings, but the cases were not substantively consolidated. Record on Appeal ("R.") 290–92 (docket entry 6).

On January 1, 2014, OLG commenced its representation of the debtors in their Chapter 11 bankruptcy cases. Appellee's Response to Appellant's Principal Brief and Principal Brief in Cross–Appeal ("Appellee's Brief") at 4 (docket entry 20). OLG performed various services for the debtors until August 4, 2014, when the court converted Gonzalo's and Mexia Tire's cases to Chapter 7 and appointed a Chapter 11 trustee in the Mexia Nursery case. R. 850. With its legal work complete, OLG filed an application for compensation with the bankruptcy court. R. 93–183.

On December 22, 2014, the bankruptcy court held a hearing regarding OLG's application. R. 855–928. The bankruptcy court provided both OLG and Estela, who filed an objection to OLG's application, R. 184–92, an opportunity to present their arguments regarding the reasonableness of the fee application. *See* R. 855–928. At the conclusion of this hearing, the bankruptcy

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court granted OLG a portion of the fees requested. R. 925–27. Pertinent to the present appeal are the bankruptcy court's decisions to (1) deny OLG any compensation for its work regarding the adversary complaint the debtors filed against Estela, (2) grant OLG half of its requested compensation for its work opposing Estela's motions to convert, and (3) grant OLG all of its requested fees concerning its preparation and support of the debtors' Chapter 11 bankruptcy plan and disclosure statement. R. 923–27; *see also* Appellant's Brief at 19–30; Appellee's Brief at 11–23.

B. *Issues Raised on Appeal*

Both OLG and Estela filed timely notices to appeal the bankruptcy court's order. R. 1–4. The court consolidated all three appeals after the necessary transfers. Order to Consolidate (docket entry 17). OLG appeals multiple issues that concern the award of attorney's fees in one or more of the three underlying bankruptcy cases:

***2** 1. Did Estela have standing to object to and appeal the attorney's fees awarded in the Mexia Tire and Mexia Nursery cases?

2. When ruling on OLG's application for compensation, did the bankruptcy court improperly interpret 11 U.S.C. § 330(a)(3)? Specifically, does the statute authorize consideration of legal fees earned by another law firm that were all incurred prior to OLG's participation in the case and some of which were incurred prior to the bankruptcy petitions?

3. Did the bankruptcy court improperly evaluate OLG's application for compensation by using a retrospective standard, *see In re Pro–Snax Distributors, Inc.*, 157 F.3d 414, 426 (5th Cir.1998), or did it use the prospective standard recently enunciated by the Fifth Circuit? *See In re Woerner*, 783 F.3d 266, 273–76 (5th Cir.2015) (en banc).

4. Were the bankruptcy court's two factual conclusions listed below clearly erroneous?

a. The debtors' filing and prosecution of the adversary complaint against Estela was not

(1) reasonably likely to benefit the debtors' estates or

(2) necessary to the administration of the cases.

b. As of late June 2014, defending against Estela's motions to convert [FN2] was not (1) reasonably likely to benefit the debtors' estates or (2) necessary to the administration of the cases.

Appellant's Brief 1–3.

On cross-appeal, Estela presents four major issues:

1. Did OLG have standing to object to and appeal the attorney's fees awarded in the Mexia Tire case?

2. Should the bankruptcy court have denied all of OLG's fees relating to Estela's motions to convert because the bankruptcy court could not timely confirm the debtors' proposed plan to prevent conversion?

3. Were these three bankruptcy cases filed to improperly gain review of the divorce settlement between Gonzalo and Estela, thus rendering all three cases essentially a two-party dispute? And, if so, does this imply that the bankruptcy court should have denied all fees to OLG be-

cause none of its services were (1) reasonably likely to benefit the debtors' estates or (2) necessary to the administration of the cases?

4. Should the bankruptcy court have denied all of OLG's fees relating to the debtors' proposed plan and disclosure statement because the bankruptcy court could not timely confirm the debtors' proposed plan and, even if statutory time limits were not at issue, would Estela's lack of approval prevent the debtors from obtaining approval of a plan?

Appellee's Brief at 14–21; Appellant's Brief at 15–16; Appellee's Reply at 1–3 (docket entry 22). Both parties filed two briefs in accordance with the court's briefing schedule. Order (docket entry 18). The appeal is now ripe for consideration.

II. *ANALYSIS*

A. *Legal Principles*

1. *Standards of Review*

The court reviews the bankruptcy court's award of attorney's fees for abuse of discretion. *In re Cahill,* 428 F.3d 536, 539 (5th Cir.2005) (citations omitted). "An abuse of discretion occurs where the bankruptcy court (1) applies an improper legal standard or follows improper procedures in calculating the fee award, or (2) rests its decision on findings of fact that are clearly erroneous. *Id.* (citing *In re Evangeline Refining Company,* 890 F.2d 1312, 1325 (5th Cir.1989)). Thus, the court reviews "legal conclusions de novo and ... findings of fact for clear error." *Id.* (citations omitted). When considering a mixed question of law and fact, the court considers the question de novo, but reviews the "underlying facts" for clear error. *In re Green Hills Development Company, LLC,* 741 F.3d 651, 654–55 (5th Cir.2014).

2. *Appellate Standing in Bankruptcy Cases*

***3** District courts possess statutory authority to hear appeals from bankruptcy court "final judgments, orders, and decrees...." 28 U.S.C. § 158(a). "As Article III is inapplicable to bankruptcy courts, standing to appeal in a bankruptcy proceeding is derived originally from statute...." *Rohm & Hass Texas, Inc. v. Ortiz Brothers Insulation, Inc.,* 32 F.3d 205, 210 n. 18 (5th Cir.1994). Congress established the "person aggrieved" standard to govern bankruptcy appellate standing. 11 U.S.C. § 67(c) (repealed 1978). Despite the statute's eventual repeal, the "person aggrieved" standard "continues to govern standing" in bankruptcy cases. *In re Coho Energy Inc.,* 395 F.3d 198, 202 (5th Cir.2004).

The "person aggrieved" standard is more rigorous than the standard for traditional Article III standing. *See In re Coho Energy Inc.,* 395 F.3d at 202–03 ("Because bankruptcy cases typically affect numerous parties, the 'person aggrieved' test demands a higher causal nexus between act and injury."). To facilitate the efficient administration of bankruptcy estates, the standard circumscribes litigation to those individuals directly affected by the bankruptcy court's proceedings. *In re El San Juan Hotel,* 809 F.2d 151, 154 (1st Cir.1987). An appellant must show that the bankruptcy court's order "directly and adversely affected" his pecuniary interest, *In re Fondiller,* 707 F.2d 441, 443 (9th Cir.1983), by "diminish[ing] his property, increas[ing] his burdens, or impair[ing] his rights." *In re El San Juan Hotel,* 809 F.2d at 154 (citation omitted).

For example, in *In re Coho Energy,* 395 F.3d at 203, the Fifth Circuit concluded that a law firm previously discharged by a Chapter 11 debtor was not a "person ag-

grieved" by the bankruptcy court's order approving an attorney's fees settlement between the debtor and a successor firm. The discharged firm alleged that its claim for attorney's fees, which had no ceiling given accruing interest, could possibly exceed the amount in the court's registry. *Id.* at 203. However, after subtracting the settlement amount and the debtor's shareholders' share, $4.5 million remained to pay the discharged firm's estimated $3.4 million plus interest. *Id.* According to the Fifth Circuit, the discharged firm's interest in the settlement agreement was "improbable" in light of the nearly one million dollars of excess funds to cover accruing interest. *Id.* This "remote possibility" of possessing a financial interest was insufficient to satisfy the "person aggrieved" test. *Id.*

3. *Compensation of Attorneys in a Chapter 11 Proceeding*

A bankruptcy court can grant a Chapter 11 debtor-in-possession permission to employ attorneys to "assist ... with the reorganization of the bankruptcy estate." *In re Woerner,* 783 F.3d at 271 (citing 11 U.S.C. § 327). After court-approved attorneys complete their work, they can request "reasonable compensation for actual, necessary services rendered" and "reimbursement for actual, necessary expenses." 11 U.S.C. § 330(a)(1).

***4** To determine whether an amount is reasonable, "the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors...." *Id.* § 330(a) (3). Among other things, a court can consider "the time spent on such services," "the rates charged for such services," and "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...." *Id.*

In a recent opinion, the Fifth Circuit read the last of the above listed considerations together with the statutory prohibition of compensation for services *not* "reasonably likely to benefit the debtor's estate," *id.* § 330(a)(4)(A)(ii), to conclude that courts must assess the reasonability of services prospectively. *In re Woerner,* 783 F.3d at 273–77 (discussing Section 330's statutory text, legislative history, and other circuits' interpretations to justify jettisoning the former retrospective standard of *In re Pro–Snax*). "Under this framework, if a fee applicant establishes that its services were 'necessary to the administration' of a bankruptcy case or 'reasonably likely to benefit' the bankruptcy estate 'at the time at which [they were] rendered,' *see* 11 U.S.C. § 330(a)(3)(C), (4)(A), then the services are compensable." *Id.* at 276 (alteration in original). The Fifth Circuit emphasized, however, that this framework does not "limit courts' broad discretion to award or curtail attorney's fees under § 330 , 'taking into account all relevant factors,' 11 U.S .C. § 330(a)(3)." *Id.* at 277.

B. *Application*

1. *Standing Analysis*

a. Estela Possesses Standing in the Mexia Nursery Case

Estela qualifies as a "person aggrieved" by the bankruptcy court's award of attorney's fees in the Mexia Nursery case. Any assets remaining in the Mexia Nursery estate will flow to Gonzalo as the sole owner of Mexia Nursery stock. R. 219. Gonzalo's present assets are insufficient to pay Estela's claim in full; consequently, assets that reach Gonzalo's estate following Mexia Nursery's liquidation will reduce Estela's claim. R. 211, 226. Any money OLG receives as attorney's fees from Mexia Nurs-

ery, however, will reduce the amount available to satisfy Estela's claim. As opposed to a "remote possibility" of the bankruptcy court's order affecting Estela's interests, *In re Coho Energy,* 395 F.3d at 203, any attorney's fees the bankruptcy court awards in the Mexia Nursery case diminishes Estela's recovery and thus qualifies her as a "person aggrieved."

b. Estela Lacks Standing but OLG Possesses Standing in the Mexia Tire Case

Due to the paucity of assets in the Mexia Tire estate, *see* Appellant's Brief at 15; Appellee's Reply at 2, both parties rely on the possible disgorgement of approximately $106,000 Estela received from the sale of a parcel of real property in the Mexia Tire estate. *See* R. 394–96; 732–33. OLG claims that if the state court finds Estela guilty of fraud, *see* R. 863–64, she may have to send the money back to the Mexia Tire estate.[FN3] Appellant's Brief at 16. In this event, Mexia Tire would possess funds to pay OLG's attorney's fees. *Id.* It is improper for this court to conduct a merits-based assessment of Gonzalo's state court claims. The court therefore concludes that OLG possesses greater than a "remote possibility" of recovering attorney's fees from Mexia Tire's estate, *In re Coho Energy,* 395 F.3d at 203, and consequently has standing to appeal the bankruptcy court's decision in the Mexia Tire case.

***5** In contrast, Estela lacks standing to appeal in the Mexia Tire case. Estela undoubtedly has a pecuniary interest in the possibility of disgorgement. However, this does not establish her interest in amount of attorney's fees awarded to OLG in the Mexia Tire case. If the state court orders the disgorgement of funds, it will have concluded Estela engaged in fraudulent activity. *See* R. 403–10. Such conduct would undermine Estela's claim to any assets in Gonzalo's estate that flowed from the Mexia Tire estate.[FN4] Because Estela's interest in the Mexia Tire attorney's fees award is "improbable," she lacks standing to appeal. *In re Coho Energy,* 395 F.3d at 203.

2. *The Bankruptcy Court Applied a Prospective Analysis Under 11 U.S.C. § 330*

The bankruptcy court noted the "staggering" amount of attorney's fees accumulated across the three cases in light of, among other things, "the overall results while in Chapter 11." R. 924. This statement, according to OLG, indicates that the bankruptcy court "erroneously applied an after-the-fact, results based analysis" when assessing the application for compensation. Appellant's Brief at 27. This lone statement, however, occurred before the bankruptcy court's ultimate determination of the appropriate compensation in these cases. *See* R. 924–27. After considering the statements the bankruptcy court made contemporaneously with its ruling on OLG's application for compensation, the court is confident the bankruptcy court applied the correct prospective standard. *See, e.g.,* R. 925–26 ("[B]y the time the second motion to dismiss or convert was filed in late June of 2014, it was obvious *at that point* that a reorganization was not in prospect ..."; "By that point, the bar date, the deadline for proofs of claim had occurred, all of the proofs of claim were in, and it was clear to all *at that point* that a Chapter 11 plan just no longer was reasonable, made sense"; *"At that point in time,* I cannot find it was ever reasonably likely to benefit the estate or administration of the case.") (emphasis added).

3. *Section 330 Authorizes a Bankruptcy Court to Consider Legal Fees Incurred by*

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Another Law Firm Both Prior to and During the Bankruptcy Case

As indicated above, Section 330(a)(3) instructs a bankruptcy court to take "into account all relevant factors" when analyzing an application for compensation. The bankruptcy court noted that another law firm incurred approximately $47,000 of fees in preparation for the bankruptcy filings and another $58,000 of fees during the early stages of the bankruptcy proceedings before OLG assumed the role of counsel. R. 924. Combined with OLG's requested legal fees, these fees produce an aggregate total of approximately $230,000. *Id.* In the bankruptcy court's judgment, these fees were "somewhat staggering given the number of creditors [and] the size of creditor claims...." *Id.*

OLG criticizes the bankruptcy court's consideration of fees earned by another law firm by noting that "[n]one of these factors or assumptions upon which the Bankruptcy Court premised its analysis under 11 U.S.C. § 330(a)(3) is even mentioned under the language of the statute." Appellant's Brief at 28. However, the statute's text "indicates that its list of factors is not exclusive: bankruptcy courts may consider 'all relevant factors,' including factors not specified in the statute." *In re Pilgrim's Pride Corporation,* 690 F.3d 650, 665 (5th Cir.2012) (citations omitted). The total amount of attorney's fees incurred in preparation for and during a bankruptcy case is certainly a relevant factor for bankruptcy courts to consider under Section 330, especially when this total appears excessive given the complexity or size of the bankruptcy proceeding.

4. *The Bankruptcy Court's Factual Conclusion Regarding the Adversary Complaint Was Not Clearly Erroneous*

***6** The bankruptcy court discussed the claims registers in each of the three cases to support its conclusion that the April 2014 adversary complaint, R. 1556–71, was not reasonably likely to benefit the debtors' estates or necessary to the administration of the cases. OLG admits that "by some point in fall of 2013, it would have been generally understood [that Estela] was not asserting a lien in ... the tree inventory" of Mexia Nursery. R. 903. With only $82,045.35 in unsecured claims, R. 1377–78, the proceeds from the sale of the tree inventory would clearly pay all unsecured claims. R. 903–07; Mexia Nursery ("MN") R. 385 (noting that the tree inventory sold for a total of $671,153.92) (docket entry 8, case 3:15–CV–0363–G); *see also* R. 990 (indicating that as of May 31, 2013 the tree inventory was worth over $2,000,000 "in ordinary course of business and not bulk sales"). With respect to the Mexia Tire and Gonzalo cases, creditors filed a total of $4,325.35 in unsecured claims. R. 1371–76, 1380. The $17,595.00 in fees incurred while prosecuting the adversary complaint appear excessive given this small amount of unsecured claims and support the inference that "only Gonzalo Saldana personally was benefitting." R. 926. The near certainty that Mexia Nursery's unsecured creditors would be paid in full combined with the inordinate amount of legal fees relative to the amount of unsecured claims in the Mexia Tire and Gonzalo cases support the bankruptcy court's conclusion.

5. *The Bankruptcy Court's Factual Conclusion Regarding the Motion to Dismiss/ Convert Category of Fees Was Not Clearly Erroneous*

The bankruptcy court indicated its concern whether various time limits would prevent it from confirming any proposed

plan. *See* R. 830–39. Specifically, the amended scheduling order listed June 2, 2014 as the deadline to file a plan and disclosure statement and July 17, 2014 as the deadline to confirm the plan. R.2081. The debtors filed their joint plan and disclosure statement on time. *See* R. 413–492. However, the plan was not confirmed by July 17, and the debtors did not file a motion to extend both the scheduling order's deadline and the statutory deadline for approving a plan following its initial filing. 11 U.S.C. § 1129(e) ("In a small business case, the court shall confirm a plan ... not later than 45 days after the plan is filed unless the time for confirmation is extended in accordance with section 1121(e)(3).")

Moreover, as of June 23, 2014–the date Estela filed the relevant motion to convert-the debtors had not set a hearing for consideration of the disclosure statement. With only twenty-four days remaining until the July 17th confirmation deadline, the debtors were incapable of providing the necessary twenty-eight days' notice before creditors' consideration of a disclosure statement or plan. FED. R. BANKR. P.2002(b).

Following these two relevant dates (*i.e.*, June 23 and July 17), a significant portion of the fees sought by OLG was incurred. *See* R. 141–154. The "context of the case in June, July and August 2014," as detailed above, supports the bankruptcy court's conclusion that "it was not reasonable to be incurring this high level of fees," with the resulting reduction of the fees by fifty percent. R. 926.

6. The Bankruptcy Court Had Authority to Award OLG Fifty–Percent of the Fees in the Motion to Dismiss/Convert Category [FN5]

*7 Section 330(a) (3)(C) authorizes compensation for fees that are "necessary to the administration of" a Chapter 11 case. The bankruptcy court made a factual determination that some of the discovery material [FN6] OLG secured "could have been useful to the overall case administration," R. 925, even though the debtors were likely unable to defeat Estela's motion to convert. *See supra* at 15. While the bankruptcy court used the word "useful" rather than "necessary," the court cannot conclude that awarding fifty-percent of OLG's fees in this category was clearly erroneous. *See In re Green Hills Development Company, LLC,* 741 F.3d at 654–55 (noting that a court reviews the "underlying facts" in a mixed question for clear error).

Following Estela's third motion to convert, the bankruptcy court converted both the Gonzalo and Mexia Tire cases to Chapter 7. R. 529–30; Mexia Tire R. 23435 (docket entry 9, case 3:15–CV–0364–G). Mexia Nursery continued to operate under the oversight of a Chapter 11 Trustee until the business was ultimately liquidated under Chapter 7. MN 25, 247–48. The discovery material, specifically the depositions of Richard Sadler-the debtors' accountant-and Gonzalo, provided the appointed trustees pertinent information such as "funds flow" on their respective cases, R. 925, and also delivered insight on the interrelatedness of the three cases. This court cannot conclude that finding such information "necessary to the administration of" these cases was clearly erroneous. [FN7] § 330(a) (3)(C).

7. Estela Waived the Right to Appeal Her Claim that the Bankruptcy Cases Were Primarily a Two–Party Dispute Through Which Gonzalo Sought to Secure Review of the Divorce Decree

Estela failed to raise this issue in her objection to the final fee application. *See*

R. 184–92. Moreover, Estela failed to raise the issue during the bankruptcy court's hearing on the fee application.[FN8] *See* R. 865–928. As the issue was not presented to the bankruptcy court, this court declines to consider it.

8. *Remand of the Mexia Nursery and Gonzalo Cases to the Bankruptcy Court to Determine Whether Fees Awarded in the Proposed Plan and Disclosure Statement Category Should be Reduced*

As noted above, the bankruptcy court reached the conclusion that any fees defending against Estela's June 23, 2014 motion to convert were not reasonably likely to benefit the debtors' estates.[FN9] *See supra* at 15–16. This conclusion relied on, *inter alia,* the debtors' inability to satisfy the requirement of twenty-eight days' notice before a disclosure statement or proposed plan could be considered. FED. R. BANKR. P.2002(b). The bankruptcy court provided no insight why any of the fees in the "plan and disclosure statement" category, *see* R. 155–162, following June 19, 2014 (*i.e.,* twenty-eight days preceding the July 17, 2014 deadline to confirm a plan) should be allowed if the debtors were incapable of confirming a plan as of this date. Moreover, even if the bankruptcy court could have reduced the twenty-eight day requirement listed in the rules, it failed to explain why it awarded any fees incurred after July 17, 2014–the deadline both listed in the scheduling order and resulting from 11 U.S.C. § 1129(e) for confirming a plan. *See* R. 162, 2081.

***8** On remand, the bankruptcy court should consider how the above issues affect the fees awarded in the "plan and disclosure statement" category *in the Mexia Nursery and Gonzalo cases.*[FN10] R. 155–62. This court's decision to remand does not imply that the bankruptcy court should reduce any, or all, of the attorney's fees in this category. Rather, the bankruptcy court should explain why OLG's services are-or are not-compensable by discussing either their necessity to the administration of the cases or their benefit to the cases at the time the fees were incurred. *See* § 330(a)(3)(C). If the bankruptcy court concludes the fees are compensable because they were "beneficial at the time at which" the services were performed, it should address Estela's argument regarding the impossibility of reaching a consensual plan with Estela and the absolute priority rule. *See* R. 892–93; Appellee's Brief at 20–21.

III. *CONCLUSION*

For the reasons discussed above, the bankruptcy court's order regarding OLG's application for attorney's fees is **AFFIRMED** in part and **REMANDED** in part.

SO ORDERED.

FN1. To avoid confusion, the court refers to both Estela Saldana and Gonzalo Saldana by their first names.

FN2. The category labeled "motion to dismiss/convert" includes fees incurred defending against three separate motions to convert filed by Estela on January 3, June 23, and July 24, 2014. *See* R. 139–54; *see also* docket entries 85, 175, and 187 in case number 13–34861–SGJ–7 before the Northern District of Texas Bankruptcy Court. The vast majority of fees were incurred following the June 23 motion. *See* R. 141–54.

FN3. After dismissing all of the claims in the adversary proceeding against Estela, the bankruptcy court lifted the bankruptcy stay, allowing Gonzalo to advance his fraudulent transfer theories against Estela in state court. *See* R. 862–64.

FN4. This is the key distinction between Estela's arguments for standing in the Mexia Tire and Mexia Nursery cases. Assets will flow from the Mexia Nursery estate to Gonzalo's estate regardless of the state court proceeding. However, the Mexia Tire estate will only possess leftover assets that will flow to Gonzalo's estate if Gonzalo succeeds in his state court action. To succeed in state court, Gonzalo must demonstrate that Estela engaged in fraudulent conduct. If proven, this fraudulent conduct would render Estela's likelihood of recovery from Gonzalo's estate uncertain.

FN5. Given the standing analysis above, Estela's appeal pertains only to the attorney's fees awarded in the Gonzalo and Mexia Nursery cases. *See supra* at 10–11.

FN6. Expenses expended on discovery comprise a large portion of fees in this category. The discovery-related fees following the June 23, 2014 motion to convert totaled $26,600. *See* R. 142–45. Combined with the $3,100 in fees incurred responding to Estela's first motion to convert, R. 139–40, this totals $29,700–an amount quite close to the $30,578 in fees awarded by the bankruptcy court in this category. R. 926.

FN7. The Fifth Circuit's *In re Woerner* decision does not require a different result. *See* 783 F.3d at 273–76. Bankruptcy courts can consider "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." § 330(a)(3)(C) (emphasis added). The *In re Woerner* court focused on the portion of this statutory provision following the "or." 783 F.3d at 273. Specifically, the Fifth Circuit concluded that when assessing whether services are "reasonably likely to benefit the debtor's estate," § 330(a)(4)(A)(ii)(I), a bankruptcy court must follow the instruction of Section 330(a)(3) (C) and look to the "time at which the service was rendered...." 783 F.3d at 273–74. However, the statute authorizes a bankruptcy court to award fees that are "necessary to the administration of ... a case," § 330(a)(3)(C), even if the fees were incurred as the result of a poor choice. While OLG's defending against the motions to convert may have been ill-advised, the bankruptcy court concluded some of the fees related to work that was necessary to administration of the bankruptcy cases and thus was compensable.

FN8. The closest Estela came to raising the issue during the hearing was when she noted that "she is the only beneficiary in this estate...." R. 922. However, this lone reference fails to properly present the issue to the bankruptcy court. Moreover, even if Estela had properly raised

> the issue, she failed to inform the bankruptcy court how the issue should influence its legal analysis of OLG's application for compensation.
>
> FN9. However, the bankruptcy court concluded that half of these fees were compensable because they were necessary to the administration of the estates.
>
> FN10. *See supra* note 5.

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