

13

FILED

DPAS

FEB 12 2014

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

POSTED ON WEBSITE
NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA**

In re)	Case No. 13-33513-E-13
)	Docket Control No. DPC-1
MARLON HILL LAWAS and)	
REBECCA GARCIA LAWAS,)	
)	
Debtors.)	

This memorandum decision is not approved for publication and may not be cited except when relevant under the doctrine of law of the case or the rules of claim preclusion or issue preclusion.

**MEMORANDUM OPINION AND DECISION
Determination of Fees for Debtors' Counsel**

The court conducted an evidentiary hearing on the Trustee's Motion to Disgorge Attorneys' Fees on February 10, 2014. Jurisdiction for this Motion exists pursuant to 28 U.S.C. §§ 1334 and 157(a), and the referral of bankruptcy cases and all related matters to the bankruptcy judges in this District. ED Cal. Gen Order 182, 223. This Adversary Proceeding is a core matter arising under Title 11, including 11 U.S.C. §§ 329 and 526. 28 U.S.C. § 157(b)(2)(A).

The Chapter 13 Trustee moves the court for an order disgorging attorney fees from Yasha Rahimzadeh, attorney of record for the Debtors ("Counsel"), in this case pursuant to 11 U.S.C. §§ 329

1 & 526. It is asserted that the fees received exceed the reasonable
2 value of such services. The Trustee argues that the Debtors'
3 attorney has charged and received \$2,250.00 and failed to properly
4 prosecute the case.

5 The Trustee bases this motion on several facts. First, the
6 Debtors did not sign the petition. Second, no wet or electronic
7 signatures appear on the Rights and Responsibilities of Chapter 13
8 Debtors and their Attorneys, which were filed on October 18, 2013.
9 The Trustee states he is not certain if the Debtors ever reviewed
10 it or understood the contents. Debtors failed to commence plan
11 payments to date and Debtors signed the proposed plan filed
12 October 30, 2013.

13 Third, the Trustee states that on December 10, 2013, Debtors'
14 Counsel sent an email to their office stating that Debtors
15 experienced a financial emergency in November and were unable to
16 provide a payment to their office. Debtors sought a "wavier of the
17 requirement to make such a payment" and requested the payment due
18 date be moved to the 30th of the month. Trustee states that Counsel
19 was advised that all payments are due on the 25th of the month on
20 all cases and that if Debtors are unable to make the payment, the
21 plan may be amended. Debtor responded, "In light of the Trustee's
22 decision denying the Debtors' requests for a waiver of their
23 November payment and change of their future payment dates, Debtors
24 have indicated that they will not be able to provide plan payments.
25 As such, they have also indicated that they will not oppose a
26 dismissal of the above-referenced bankruptcy proceeding."

27 Trustee seeks an order disgorging attorney fees in the full
28 amount of \$2,250.00 in this case.

**SUPPLEMENTAL PLEADINGS AND EVIDENCE
PRESENTED AT EVIDENTIARY HEARING**

1
2
3 At the hearing on the Motion set for the court's regular law
4 and motion calendar, the Debtors requested that the court conduct
5 an evidentiary hearing so that they could present their evidence.
6 At the time of the evidentiary hearing the Debtors, while present,
7 elected not to testify. The Debtors did advise the court that they
8 were engaging the services of a different attorney to determine how
9 to proceed.

10 At the Evidentiary Hearing testimony was provided by David
11 Cusick, the Chapter 13 Trustee, and Counsel. The testimony was
12 consistent with the declarations presented. The court accepted all
13 of the declarations presented as Direct Testimony Statements for
14 the Evidentiary Hearing. Local Bankruptcy Rule (L.B.R.) 9017-1.
15 The testimony provided was clear and of assistance to the court on
16 several points.

17 Counsel's testimony clarified that the chart provided for the
18 task billing analysis (showing date, task, time, rate, and fees)
19 was not a contemporaneous time record, but constructed from
20 Counsel's calendar, notes, and file in this case. Declaration,
21 Dckt. 55. The court uses the term "constructed" not as a negative
22 term, but in recognition that counsel did not maintain
23 contemporaneous time records. As is common with many consumer
24 attorneys, Counsel generally bills his clients a fixed fee for the
25 bankruptcy services provided. In Chapter 13 cases, the Local
26 Bankruptcy Rules provided for a Fixed Fee (commonly called a "no-
27 look fee") in the maximum amount of \$4,000.00 for a non-business
28 case and not more than \$6,000.00 if the debtor has a business which

1 is part of the case. L.B.R. 2016-1(c).

2 Counsel described his office as a "one-man shop," without any
3 clerical or secretarial help. That results in some of the time
4 shown in the constructed time record in having clerical time
5 purportedly being billed at \$200.00 an hour. Clearly that is not
6 proper. As discussed at the hearing, the Chapter 13 Fixed Fee of
7 \$4,000.00/\$6,000.00 is allowed without regard to the actual
8 billing. The judges in this district determined that such was a
9 fair "no-look" Fixed Fee for the "average" case. Attorneys can
10 elect such fee and avoid the cost and expense of maintaining time
11 records and filing separate fee applications. However, when in
12 this type of situation, the court looks behind the fixed fee and
13 considers the actual services provided in the case.

14 While Counsel repeated his comments that there were "technical
15 defects" with respect to pleadings in this case, that
16 characterization is incorrect. As discussed below and show at the
17 Evidentiary Hearing, multiple pleadings were filed by Counsel which
18 were unsigned and did not have required "/s/ Signature" when a
19 pleading did not have a digital-imaged signature on it. L.B.R.
20 5005-1, 5005.5-1, 9004-1. The failure to have signed documents
21 filed is not a "technical defect."

22 Counsel testified that while he has been licensed as an
23 attorney since 2004, he has not represented any debtor in a
24 Chapter 13 case by himself. While working at the Desmond law firm
25 in Sacramento he assisted other attorneys. The court's review of
26 the files in this District disclose that while counsel has appeared
27 in many bankruptcy cases (96), other than some adversary
28 proceedings, all have been Chapter 7 cases.

1 The testimony at the Evidentiary Hearing also brought to light
2 the Debtors' conduct and expectations in this case. Counsel
3 testified it was the Debtors who ultimately said they could not
4 make the required payments and wanted the case dismissed. At this
5 time, the attorney-client relationship has ruptured and there is no
6 professional communication occurring.

7 Though the testimony of counsel might be perceived as colored,
8 the court's review of the Schedules, Statement of Financial
9 Affairs, and proposed Chapter 13 Plans is not. The Original
10 Chapter 13 Plan (Dckt. 13) required a monthly plan payment of
11 \$5,390.60 a month for 60 months. These payments were to be used to
12 pay the mortgage on the Debtors' home and debts securing a
13 2009 Nissan Altima, 2010 Mercedes Benz E350, and a 2008 Mercedes
14 Benz S550. The Debtors were surrendering a fourth vehicle, a
15 2007 Mercedes Benz GL-450. Creditors holding general unsecured
16 claims were to receive a 76% dividend.

17 The Debtors filed an Amended Chapter 13 Plan (Dckt. 26) which
18 reduced the monthly plan payment fo \$4,644.00 for 60 months. The
19 Debtors continued to make the mortgage payment and the monthly plan
20 payments for the 2009 Nissan Altima, 2010 Mercedes Benz E350, and
21 2008 Mercedes Benz S550. They continued to surrender the
22 2007 Mercedes Benz GL-450. The dividend for unsecured claims was
23 dropped to 22%.

24 No plan was moved toward confirmation. As discussed at the
25 Evidentiary Hearing, Debtors defaulted in the Plan payments and
26 failed to make payments.

27 The Schedules indicate that these Debtors are fortunate,
28 having stable, well paying jobs. Their monthly gross income is

1 \$10,159.89 (both employed by the State of California). Schedule I,
2 Dckt. 1 at 36. After deducting taxes and usual withholding, the
3 Debtors' have a reported take-home income of \$7,683.63. The
4 Debtors' Original Schedule J listed expenses (after removing the
5 mortgage payment of \$2,309.00 and vehicle payments of \$2,203.00) of
6 \$2,383.00. Schedule J, *Id.* at 37. This resulted in a monthly net
7 income of \$5,300.63. This was more than enough to fund the
8 Original Chapter 13 Plan.

9 On December 10, 2013, the Debtors filed an Amended Schedule J
10 which listed expenses of \$3,033.00 (which excluded the mortgage and
11 auto payments). Dckt. 22. The Debtors increased their other
12 monthly expenses by \$200.00 for clothing (to \$200.00 a month),
13 \$300.00 for food (to \$650.00 a month), \$70.00 for home maintenance
14 (to \$70.00 a month). With these increased expenses, the Debtors
15 now showed Monthly Net Income of only \$4,650.00 a month.

16 The Original and Amended Schedules J indicate debtors who have
17 a flexible concept of expenses - meaning that expenses can be
18 whatever they need to be to achieve our goal. What also becomes
19 clear is that for the two Debtors, retaining two Mercedes Benz and
20 the Altima was more important than constructing a real budget and
21 prosecuting a Chapter 13 Plan which they could afford.

22 On Schedule I the Debtors list as dependants a twenty-two year
23 old daughter and a five month old granddaughter. No information is
24 provided as to income generated by the twenty-two year old
25 daughter, any support received from the granddaughter's father, or
26 the ability of the daughter to generate income for the family unit.
27 However, the Debtors seek to assert this five person family unit.

28 The court addressed at the hearing that this may well be a

1 situation where younger counsel not familiar with prosecuting
2 Chapter 13 restructures did not have the experience or chutzpah to
3 tell consumer clients that their expectations or goals were
4 unreasonable. These Debtors sought to use \$4,216.44 of their
5 monthly \$7,683.63 take-home income (55%) just to pay for their
6 mortgage and three cars. This left little for everyday and
7 emergency expenses. It is no surprise that these Debtors could not
8 make the plan payments necessary to fund such payments.

9 DISCUSSION

10 This court has the authority, and responsibility, to consider
11 attorneys' fees obtained or to be paid prior to or during a
12 bankruptcy case. 11 U.S.C. §§ 329, 330, 331. Fees in excess of
13 the reasonable value of such services may be ordered repaid. The
14 application of 11 U.S.C. § 329 and Federal Rule of Bankruptcy
15 Procedure, may seem harsh, but are necessary to not only protect
16 vulnerable consumers and business owners, but to protect the
17 integrity of the federal judicial process. See *Neben & Starrett v.*
18 *Chartwell Fin. Corp. (In re Park-Helena Corp.)*, 63 F.3d 877, 881
19 (9th Cir. Cal. 1995). Debtor's counsel must lay bare all its
20 dealings regarding compensation and must be direct and
21 comprehensive. See *In re Bob's Supermarket's, Inc.*, 146 Bankr. 20,
22 25 (Bankr. D. Mont. 1992) *aff'd in part and rev'd in part*,
23 165 Bankr. 339 (Bankr. 9th Cir. 1993). The burden is on the person
24 to be employed to come forward and make full, candid, and complete
25 disclosure. See *In re B.E.S. Concrete Products, Inc.*, 93 B.R. 228
26 (E.D. Cal. 1988). The federal courts are not mere devices to be
27 used to generate fees for attorneys irrespective of any *bona fide*
28 rights to be adjudicated.

1 The court is not satisfied with the response of Counsel. Even
2 if the court finds the testimony that Counsel reviewed and Debtors
3 properly signed the Rights and Responsibilities, petition and plan,
4 there appear to be other fundamental problems. The correspondence
5 provided by Counsel, namely the email sent to Debtors regarding the
6 Trustee's "rejection of the request to waive the required payment
7 for November and to change the plan payment date" shows Counsel's
8 misunderstanding of the Bankruptcy Code and Rules. Exhibit,
9 Dckt. 63. Counsel only relayed that the payment had to be made and
10 made no mention of the possibility to amend the plan and possibly
11 reduce the plan payment (the court notes that the initial plan
12 called for 76% to unsecured claims which could have been reduced).
13 The response from the Debtors shows one of their reasons for
14 allowing the case to be dismissed is that they could not come up
15 with the November payment. Exhibit, Dckt. 64.

16 Further, Counsel's response indicates a lack of knowledge
17 about the local rules. Local Bankruptcy Rule 3015-1(f)(1) provides
18 that the plan payments shall be made monthly and **must** be received
19 by the Trustee on the twenty-fifth (25th) day of each month. Local
20 Bankr. R. 3015-1(f)(1) (emphasis added). The local rules do not
21 allow the Trustee to alter the payment date. Additionally, a
22 modification of the plan (pursuant to 11 U.S.C. § 1329 and Local
23 Bankruptcy Rule 3015-1(d)) is allowed in order to make up missed
24 payments (with language in the Additional Provisions section
25 disclosing the distribution of payments).

26 In reviewing the various documents and arguments, there
27 appears to be a clear misunderstanding of the Chapter 13 Plan
28 process and required payments from Debtors. Debtor payments must

1 be made by the 25th day of each month. L.B.R. 3015-1(f)(1).
2 Counsel argues that the Debtors could not make the payments until
3 the 30th of the month, and so the request was made of the Trustee
4 to give these Debtors a different payment date. The Trustee
5 refused to create a *sui generis* plan payment date for these
6 Debtors, and noted for Counsel that the proposed plan would have to
7 be amended as the Trustee could not ignore a defaulted payment.

8 At this juncture the Debtors and Counsel could have simply
9 modified the plan to have the payments start with the first month
10 after the first monthly plan payment otherwise would have been due.
11 Thus, when the Debtors make a payment on the 30th day of a month,
12 that payment applied to the payment due on the 25th day of the next
13 month. This did not occur, with the Debtors and Counsel instead
14 walking away from the bankruptcy case.

15 The reason that modification was not possible is that the
16 Debtors were proceeding down a "fools' budget," focused on
17 maintaining ownership of two Mercedes Benz and the Altima
18 (\$1,819.67 a month), while throwing \$2,496.77 a month at their
19 mortgage. While Counsel did the Debtors' bidding, it did not, and
20 could not, end successfully. Both Debtors and Counsel share
21 responsibility for the failure in this case. All attorneys suffer
22 cases like this, in which the desire to fulfill the clients' wishes
23 overwhelm good sense and reality. Consumers with substantial
24 income, such as these, often ignore economic reality and believe
25 that they can just continue spending money, drive luxury cars, and
26 keep their home, with a Chapter 13 bankruptcy not impinging on
27 their lifestyle.

28 Counsel has not provided detailed, contemporaneous time

1 records in order for the court to properly determine if the time
2 spent is reasonable. Based on the information provided in
3 Counsel's opposition as to the time spent, the court determines
4 Counsel spent approximately 5.5 hours in meeting with and analyzing
5 the Debtors' circumstances, preparing the bankruptcy documents and
6 attending the 341 meeting. This is a reasonable amount of time for
7 the services provided in this case. With the retainer provided of
8 \$2,250.00, this equates to an hourly rate of approximately \$410.00
9 per hour. The court finds this rate unreasonable in light of
10 Counsel's skill and knowledge of Chapter 13 bankruptcy.

11 Further, Local Bankruptcy Rule 2016-1(c)(4) provides that in
12 a Chapter 13 case if the plan is not confirmed, counsel for the
13 debtor may not be paid more than 50% of the fees which were
14 contracted for to prosecute the case, absent further order of the
15 court. No such further order of the court has been issued in this
16 case. The Disclosure of Compensation states that counsel agreed to
17 accept \$4,000.00 for the fees in this case, getting the Debtor
18 through confirmation and entry of discharge. Dckt. 1 at 40.

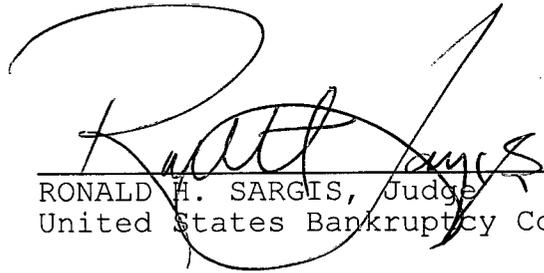
19 Counsel did provide some services for which he should be
20 compensated. The Debtors got what they wanted, a shot at keeping
21 it all through a Chapter 13 bankruptcy "restructure." It did not
22 end successfully. Sometimes clients gamble unwisely.

23 The court finds \$250.00 an hour a more appropriate rate for
24 counsel and the knowledge of Chapter 13 bankruptcies shown in this
25 case.¹ Allowing counsel the full 53.5 hours (which in light of
26

27 ¹ Though Counsel testifies that if he were to bill hourly he
28 would bill \$200.00, the court does not reduce the rate from that
stated in the tentative ruling of \$250.00 an hour. For the 5.5 hours
of time, a \$250.00 rate is not unreasonable. At \$200.00 an hour, the

1 what has transpired in this case may be generous) the court finds
2 that fees of \$1,375.00 are appropriate pursuant to 11 U.S.C.
3 § 329(b). The remainder of the attorney fees, \$875.00 are ordered
4 to be disgorged, paid to the Chapter 13 Trustee, and the Chapter 13
5 Trustee disburse the full \$875.00 to the Debtors.

6 Dated: February 12, 2014

7
8 
9 RONALD H. SARGIS, Judge
United States Bankruptcy Court

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

\$1,375.00 in fees represents 6.875 hours, not an outrageous number.

Instructions to Clerk of Court
Service List - Not Part of Order/Judgment

The Clerk of Court is instructed to send the Order/Judgment or other court generated document transmitted herewith to the parties below. The Clerk of Court will send the Order via the BNC or, if checked , via the U.S. mail.

Debtor(s), Attorney for the Debtor(s), Bankruptcy Trustee (if appointed in the case),
and Other Persons Specified Below:

Office of the U.S. Trustee
Robert T. Matsui United States Courthouse
501 I Street, Room 7-500
Sacramento, CA 95814