UNITED STATES BANKRUPTCY COURT

DISTRICT OF IDAHO

In Re:	
GREG V. THOMASON and DIANA THOMASON,	**Bankruptcy Case No. 03-42400-JDP**
Debtors.	

MEMORANDUM OF DECISION

Appearances:

Greg Thomason, Rexburg, Idaho, Pro-Se Debtor.

Jim Spinner, SERVICE & SPINNER and Monte Gray, GRAY LAW OFFICES, PLLC., Pocatello, Idaho, Attorneys for R. Sam Hopkins, Chapter 7 Trustee.

David Newman, Boise, Idaho, Assistant U.S. Trustee.

Introduction

Attorneys Monte Gray and Jim Spinner ("Attorneys"), co-counsel for chapter 7[1] trustee R. Sam Hopkins ("Trustee"), have applied for an award of $7,567.95 in compensation and expenses in this case. In addition, in their application, Attorneys requested a $41,255 "bonus,"[2] consisting of a $19,255 "adjustment" to previously awarded interim compensation, and a $22,000 "true bonus" over and above the amount of fees otherwise calculated by using an hourly rate to compensate them for the excessive delay, stress, and costs resulting from repeated and extensive litigation and appeals they experienced in this case as the result of the actions of Marilynn, Byron, Nicholas, and Sandra Thomason, relatives and former business associates of the Debtors Greg and Diana Thomason ("Debtors").

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[1] Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101–1532, and all rule references are to the Federal Rules of Bankruptcy Procedure, Rules 1001–9037.

[2] Attorneys "request a bonus of $42,000.00 in connection with this case." Dkt. No. 377 at 3. However, Attorneys request $19,255 as an adjustment to the amounts previously approved for their interim compensation, and $22,000 as a "true bonus." Together, those figures amount to $41,255.

Not surprisingly, the United States Trustee ("UST") objected to the bonus component of Attorneys' request. Marilynn, Byron, Nicholas, and Sandra[3] also objected to the award of any fees or expenses to Attorneys. The Court conducted a hearing on Attorneys' application on July 10, 2012, considered the argument and comments of Attorneys, counsel for the UST, and Debtor Greg Thomason, and took the issues under advisement. This Memorandum sets forth the Court's findings of fact and conclusions of law concerning Attorneys' application. Rule 7052, 9014.

Facts

Debtor Greg Thomason and his brothers, Byron and Nicholas, were partners in two entities engaged in farming operations. The brothers, and Diana, Marilynn, and Sandra, their wives, worked cooperatively in the family farming business for many years. Due to pressures introduced by declining crop production and low farm income, however, the family's cooperative venture fractured in the late 1990's. The disintegration in the

[3] References to first names is solely for the clarity of this decision; no disrespect is intended.

Thomasons' relationship has spawned multiple bankruptcies and years of contentious litigation between family members, creditors, and bankruptcy trustees.

In particular, Debtors, who filed a chapter 7 bankruptcy petition in November 2003, have been relentlessly pursued by Marilynn, Byron, Nicholas, and Sandra (the "Litigants"). Beginning in June 2004, Litigants commenced a series of adversary proceedings against Debtors, Trustee, Attorneys, and others. Litigants have appealed the multiple adverse decisions made by this Court in this bankruptcy case and associated adversary proceedings, first to the Bankruptcy Appellate Panel of the Ninth Circuit, and, when they lost there, to the Ninth Circuit Court of Appeals, where they again enjoyed no success.

Ultimately, for all of their time and trouble, Litigants' efforts accomplished little, if anything. Indeed, in the end, Litigants were deemed to not even be creditors in Debtors' bankruptcy case. *See* Order Disallowing Claims, Dkt. No. 369. Despite that determination, Trustee, in fulfilling his statutory duty, was required to participate in the judicial

resolution of all of Litigants' various objections to his motions and applications, the adversary proceedings, and the appeals. Trustee was also required to commence several of his own adversary proceedings against Litigants to settle Debtors' bankruptcy estate's rights in certain real property and to otherwise administer the bankruptcy estate.

Attorneys competently represented Trustee throughout.[4] Trustee did not execute a written employment contract with Attorneys. His initial application to the Court to employ Attorneys, however, provided, in part, that:

> [Attorneys'] proposed hourly rate is $125.00 for attorneys and $70.00 per hour for paralegal. This rate, however, is subject to being increased or decreased from time to time as a result of changed economic conditions and/or modifications in [Attorneys'] billing rates and procedures applicable to all [Attorneys'] clients, as well as unique circumstances to this particular case. Fees and expenses to be subject to Court approval.

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[4] Trustee was not assigned to Debtors' case, and Attorneys were not retained by Trustee, until March 2004, when Debtors converted from a chapter 13 to a chapter 7 case. Both Trustee and Attorneys have actively participated in the case since then.

Dkt. No. 45 at ¶ 3.

Attorneys assert that the services required from them in this case were extraordinary, and that the case's circumstances were unique. Litigants not only tenaciously pursued Debtors, but also zealously attempted to obstruct Trustee and Attorneys' legitimate efforts by, among other tactics, suing them and, Attorneys contend, by threatening to file complaints against them with the FBI, Department of Justice, State Bar, and criminal prosecutors. All things considered, while it is not "unique" for trustees and their counsel to encounter difficult parties in bankruptcy cases, the Court considers it fair to observe here that Attorneys were required to contend with extraordinarily engaged, enthused, vexatious litigants over the course of Debtors' bankruptcy case.

Attorneys made only one request for interim compensation, on November 13, 2009. In the interim application, Attorneys requested $179,771.72 in fees for work performed over more than five years. *See* Dkt. No. 342. That request spanned several periods in which Attorneys' normal billing rates, along with those of their paralegal, significantly increased. *Id.*

Broken down, the interim compensation request was:

Attorneys

Hours		Rate		Total
254.6	at	$125/hour	for	$31,824.00
380.9	at	$150/hour	for	$57,127.50
522.4	at	$170/hour	for	$88,774.22

Paralegal

Hours		Rate		Total
18.0	at	$60/hour	for	$1,080.00
13.8	at	$70/hour	for	$966.00
Total Request				**$179,771.72**

See id. Attorneys' hourly billing rate at the time they submitted the interim compensation application was $170 an hour; their charge for paralegal services was $70 an hour. *Id.* Attorneys delayed submitting this first interim application for compensation in order to reduce risk to themselves and the bankruptcy estate, and until Trustee was satisfied that Litigants' proceedings and appeals were sufficiently settled, such that funds could be distributed to them by Trustee without significant fear that any payments must later be repaid. The Court approved Attorneys' requested interim

fees, and they were paid. Dkt. No. 350.

Over eight years have passed since Debtors converted their case to chapter 7. Attorneys now make what they deem their "final" application for compensation and expenses. Essentially, there are three components to this application. First, Attorneys request $7,567.95 in fees and expenses for services provided since November 13, 2009. Second, Attorneys request a bonus or fee enhancement of $22,000 to compensate them for the aggravation, extra work, and harassment caused by Litigants', at times, inappropriate use of the legal system against Trustee and them. Lastly, Attorneys ask the Court to "adjust" the fees previously awarded in connection with their interim application to reflect the hourly rates charged when they made that application, $170 per hour for themselves and $70 per hour for their paralegal. Regarding this last request, Attorneys' proposed rate adjustment is as follows:

Attorneys

Hours		Rate		Total
254.6	at	$45/hour ($170 - $125 = $45)	for	$11,457

380.9	at	$20/hour ($170 - $150 = $20)	for	$7,618

Paralegal

Hours		Rate		Total
18.0	at	$10/hour ($70 - $60 = $10)	for	$180
Total Adjustment				**$19,255**

See Declaration of Monte Gray at 2–3, Dkt. No. 381.

UST objects to the $41,255 "bonus" components of Attorneys' application. Relying on § 330, and the lodestar approach to calculating compensation, UST argues that, absent exceptional circumstances, Attorneys' reasonable compensation should be based purely on their hourly rate at the time the services are rendered as multiplied by the number of hours billed, and that any sort of enhancement or bonus is inappropriate. In UST's opinion, there are no exceptional circumstances here to justify a bonus.

Litigants also object to Attorneys' request. Their objection, however, appears to be a procedural, rather than a substantive one. Litigants assert that Attorneys did not comply with certain local rules, state statutes, and

federal statutes by not serving Litigants with a detailed itemization of Attorneys' requested fees and costs. In addition, Litigants, disregarding § 330, appear to argue that Attorneys' fees must be somehow connected to a final judgment. Because Litigants cannot identify that judgment, they contend Attorneys are further prohibited from seeking fees.

Trustee represents that he is very close to proposing a final accounting of his administration of this bankruptcy case, and that, when he does, it will indicate that he can pay all administrative costs and expenses, together with all allowed unsecured creditor claims with interest, and still return funds to Debtors. In other words, Trustee, who supports Attorneys' fee requests, represents this will be a surplus case. Since no other party challenges this representation, the Court will presume Trustee is correct.

If indeed this is a surplus case, and creditors will receive payment in full on their claims regardless of whether the amount of compensation in Attorneys' application is approved or not, it is Debtors who have a direct, pecuniary interest in the outcome of this contest. Debtors did not object to Attorneys' application. At the hearing, when the Court offered Greg

Thomason an opportunity to be heard, he confirmed that Debtors had no objection to the Application, and were satisfied to, instead, rely solely on the discretion of the Court in determining an appropriate amount for Attorneys' compensation.

The issue for resolution, then, is what is a reasonable amount for compensation for Attorneys' services in this case?

Discussion and Disposition

I. Litigants' objection.

Litigants objected to Attorneys' final application for compensation. In response, Attorneys argue that Litigants lack standing to object. Attorneys are correct.

The standing doctrine limits those who may appear and be heard by a court in a proceeding to those parties with a direct stake in a proceeding's outcome. *See Sierra Club v. Morton*, 405 U.S. 727, 731–32 (1972); *In re Johns-Manville Corp.*, 68 B.R. 618, 624 (Bankr. S.D.N.Y. 1986). Whether a party has a sufficient "direct stake" in a proceeding is often based on whether the party has an actual pecuniary interest in the outcome of the controversy.

See Duckor Spradling & Metzger v. Baum Trust (In re P.R.T.C., Inc.), 177 F.3d 774, 777 (9th Cir. 1999) (citing *Fondiller v. Robertson (In re Fondiller)*, 707 F.2d 441, 442 (9th Cir. 1983)); *Abbott v. Daff (In re Abbott)*, 183 B.R. 198, 200 (9th Cir. BAP 1995); *In re Stone*, 03.2 I.B.C.R. 134, 135 (Bankr. D. Idaho 2003).

Litigants have no pecuniary interest in fixing of the the amount to be awarded as compensation to Attorneys, or otherwise in the results of Debtors' case. Their claims have been disallowed, they are not creditors, *see* Dkt. No. 369, and therefore have no right to participate in any distributions of estate funds by Trustee. *See also* §§ 507(a), 726. Because the outcome of this contest will have no adverse pecuniary impact on Litigants, they have no legal standing to object to Attorneys' fee application. Litigants objection is therefore legally irrelevant and overruled.

II. Attorneys' most recent fees and expenses.

Among the amounts requested by Attorneys in this application is $7,567.95 in compensation and expenses for services rendered after November 13, 2009. There has been no objection to that request. For estate

professionals employed under § 327(a), such as Attorneys, the Court may award "reasonable compensation" and "reimbursement for actual, necessary expenses." § 330(a)(1). The initial, and often, only, method for determining whether a fee is reasonable in bankruptcy cases in the Ninth Circuit is the so-called "lodestar" calculation. *The Margulies Law Firm, APLC v. Placide (In re Placide)*, 459 B.R. 64, 73 (9th Cir. BAP 2011) (citing *Yermakov v. Fitzsimmons (In re Yermakov)*, 718 F.2d 1465, 1471 (9th Cir. 1983)). That calculation requires multiplying the number of hours a professional has reasonably expended by his reasonable hourly rate. *Id.*

Here, Attorneys' requested fee amount is the product of the number of hours they have worked on this case since November 13, 2009, multiplied by their hourly rate. The Court finds the number of hours expended, the requested hourly rate, and Attorneys' amounts requested for expenses to be reasonable;[5] Attorneys' request for $7,567.95 will

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[5] In determining whether Attorneys' requested compensation is reasonable, the Court is to:

> consider the nature, the extent, and the value of such services, taking into account all relevant factors,

(continued...)

therefore be approved.

III. Attorneys' entitlement to a "true bonus."

Attorneys argue that the extraordinary circumstances of this case entitle them to a bonus in addition to the compensation to which they are entitled under the lodestar approach. The UST objects to this request as

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[5](...continued)

> including—
>
> (A) the time spent on such services;
>
> (B) the rates charged for such services;
>
> (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 under this title;
>
> (D) 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;
>
> (E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and
>
> (F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

§ 330(a)(3). The Court has done so here, and finds the amount requested for compensation for Attorneys to be reasonable. Attorneys' expenses were actual and necessary, and are also approved for reimbursement.

unreasonable.

In determining whether a fee award is reasonable, the Court begins its analysis with a presumption that the lodestar calculation is a reasonable fee. *See Burgess v. Klenske (In re Manoa Fin. Co., Inc.)*, 853 F.2d 687, 691 (9th Cir. 1988). That presumption is, however, rebuttable. *See Meronk v. Arter & Hadden, LLP*, 249 B.R. 208, 213 (9th Cir. BAP 2000). To rebut the presumption, the party requesting compensation must, with specific evidence, demonstrate (1) how the results obtained via their services were exceptional such that those results are not adequately reflected in the lodestar's standard hourly rate times billed hours calculation, and (2) that the requested bonus is necessary to make an award commensurate with what the party's compensation would have been for comparable nonbankruptcy services. *Id.*

Attorneys argue that the results obtained from their services in this case here were exceptionally good, especially considering that they were required to contend with such particularly vexatious parties. At the same time, however, Attorneys admit that they billed, and have been

compensated, for all of their time spent in dealing with the various delays and tactics employed by Litigants. In addition, the only evidence before the Court of much of Litigants' obstreperous behavior, such as their threats of filing reports with the FBI, Department of Justice, and criminal prosecutors, are Attorneys' bare assertions in their application for final compensation. While the Court can speculate that Litigants caused Attorneys significant aggravation, Attorneys have not shown, and, in particular, have not demonstrated with specific evidence, that dealing with Litigants required exceptional work beyond that for which they have already billed and been compensated.

Attorneys also argue that, absent a bonus, the fees they will receive are less than they would have recovered for comparable nonbankruptcy services. In particular, Attorneys argue that, if this had been a contingent fee case, they would be entitled to significantly more for fees than they will receive in this case, even if the requested bonus is awarded.

In essence, Attorneys' argument is not that their fees are less than they would have been for comparable nonbankruptcy services, but that

they are less than they would have been had Attorneys and Trustee used a different fee arrangement. Because Attorneys agreed to be compensated on an hourly rate, the court must look at whether Attorneys were adequately compensated under that agreement. "A nonbankruptcy lawyer who contracted to litigate for hourly rates without discount or other bargained-for condition, would be hard put to demand more than what has been promised." *In re Meronk*, 249 B.R. at 214. Likewise, the Court finds an hourly rate award adequately compensates Attorneys, and there is no particular reason to award compensation based on a hypothetical contingency fee.

Alternatively, Attorneys contend that, had they not been representing Trustee in a bankruptcy case, they could have billed and received payment for their services on a monthly basis, and charged their client interest for any unpaid fees. However, interest is not available to professionals in a bankruptcy case unless there is a delay in payment of a previously approved award. *See Boldt v. Crake (In re Riverside-Linden Inv. Co.)*, 945 F.2d 320, 324 (9th Cir. 1991); *In re Child World, Inc.*, 185 B.R. 14,

18–19 (Bankr. S.D.N.Y. 1995); *In re Commercial Consortium of Cal.*, 135 B.R. 120, 127 (Bankr. C.D. Cal. 1991). There has been no award of final fees in this case, and no delay in payment by Trustee of any approved interim compensation. An award for "interest" is therefore not appropriate for Attorneys in this case.

While the Court acknowledges that Attorneys encountered many challenges in this case, the Court will not approve Attorneys' request for a $22,000 bonus. Attorneys have not demonstrated with specific evidence, that truly extraordinary circumstances existed in this case for which Attorneys will not be otherwise reasonably compensated, or that they would have been entitled to greater compensation for comparable nonbankruptcy work.

IV. Attorneys' request for an adjustment based on changes in billing rates during their tenure as Trustee's counsel.

Attorneys request $19,255 as an adjustment to the Court's previous award of interim compensation, arguing that, because of the five-and-a-half year delay in their ability to receive interim compensation, and the

change in applicable reasonable billing rates during that time, an adjustment in the amount of final compensation is warranted.

Delays in receiving compensation burden estate professionals. *In re Commercial Consortium of Cal.*, 135 B.R. at 126. To compensate for delays, courts may adjust lodestar amounts by awarding fees based on current, rather than historical, hourly billing rates. *Id.* (citing *Missouri v. Jenkins*, 491 U.S. 274, 283 (1989)). In other words, courts may base an awarded fee on the rate charged by a professional at the time the fee award is requested and paid, rather than based on the rate charged when the services were performed. *Id.* Such an adjustment recognizes that "compensation received several years after services were rendered . . . is not equivalent to the same dollar amount received reasonably promptly as the legal services are performed, as would normally be the case with private billings." *Jenkins*, 491 U.S. at 283 (analyzing delayed compensation and lodestar adjustments in civil rights litigation). While an adjustment based on delayed compensation is not required by law, delay is certainly a factor the Court may consider in determining whether a professional has been

reasonably compensated. *Malpass v. Rodgers (In re Music Merchants, Inc.)*, 208 B.R. 944, 946–48 (9th Cir. BAP 1997). Retroactively adjusting a fee award to the rates in effect at the time the request is made is, therefore, appropriate where the delay in approval of fees has burdened a professional to a degree that would not normally occur outside of the bankruptcy context. *In re Commercial Consortium of Cal.*, 135 B.R. at 126–27; *In re Fall*, 93 B.R. 1003, 1009–10 (Bankr. D. Or. 1988); *In re D.C. Sullivan & Co., Inc.*, 69 B.R. 212, 218 (Bankr. D. Mass. 1986).

Here, Attorneys request that the Court upwardly adjust the rates previously used by the Court to award their interim compensation. By definition, interim compensation awards are interlocutory, often may require future adjustments, and are subject to reexamination by the Court at any time during the course of a case. *Leichty v. Neary (In re Strand)*, 375 F.3d 854, 858 (9th Cir. 2004); *In re A.W. Logging, Inc.*, 356 B.R. 506, 511 (Bankr. D. Idaho 2006). When considering a final fee application, the Court has a duty to review the reasonableness of the total fees awarded pursuant to § 330. *In re Four Star Terminals, Inc.*, 42 B.R. 419, 439–40 (Bankr. D.

Alaska 1984).

After reviewing the total fees requested by Attorneys over the course of this bankruptcy case, the Court is persuaded to exercise its discretion to grant an adjustment to Attorneys' previously awarded interim fees. Such an increase in compensation is reasonable in this case because of the extraordinary delay in Attorneys' ability to request and receive interim compensation. By any standard, the five-plus years of delay encountered by Attorneys here before they were able to request an interim payment of fees and costs was longer than would typically be seen in the bankruptcy context. During this time, Attorneys' normal billing rates increased not once, but twice. The Court, therefore, finds that this is one of those rare cases where the requested $19,255 upward adjustment to Attorneys' interim compensation to reflect current billing rates is reasonable and appropriate.

Conclusion

Attorneys' fee application is approved in part, and denied in part. Attorneys are awarded a total of $7,567.95 for compensation for services

provided and expenses incurred since November 13, 2009. In addition, Attorneys are awarded an additional $19,255 as an upward adjustment for compensation previously awarded by this Court on an interim basis due to the unique compensation delay Attorneys experienced in this case. Attorneys' request for a bonus of $22,000 for exceptional circumstances, however, is denied.

Attorneys requested that this fee and expense award be deemed "final" for all purposes in this case. The Court declines to so order. Because the Court's determination of the amount of Attorneys' compensation is influenced, at least in part, by Trustee's representations concerning the final outcome of the administration of this estate, the Court deems it proper to withhold final approval of Attorneys' compensation until Trustee's final accounting is submitted. Therefore, Attorneys' compensation and expenses in the amounts set forth above are approved on an interim basis per § 331. Trustee may, upon entry of an order, immediately disburse these amounts to Attorneys, and unless ordered otherwise, this interim approval shall be deemed final upon entry of an

order approving Trustee's final accounting.

Attorneys shall submit an appropriate order in a form approved by the UST for entry by the Court.

Dated: July 25, 2012

Honorable Jim D. Pappas
United States Bankruptcy Judge