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2 UNITED STATES BANKRUPTCY COURT
3 EASTERN DISTRICT OF CALIFORNIA
4 SACRAMENTO DIVISION
5

6 In re:)
7)
8 JOHNNIE ALEXANDER AGUILERA, JR.) Case No. 02-28581-D-13L
9 and TERESA ANN AGUILERA,) D.C. No. FF-8
10)
11) Submitted March 15, 2005
12)
13 Debtors.)
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23 MEMORANDUM DECISION

24 By this motion (the "Third Additional Fee Request"), Gary Ray
25 Fraley, Esq. of the Law Offices of Fraley & Fraley ("Applicant"),
26 counsel for debtors, seeks approval of attorney's fees and costs
27 totaling \$5,625.91. For the reasons set forth herein, the Third
28 Additional Fee Request is granted in part and denied in part.
Additional fees are approved in the amount of \$4,905.00,¹ and
additional costs are approved in the amount of \$0.91, for a total
of \$4,905.91 to be paid as an administrative expense through the

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¹This figure consists of 18 hours of Applicant's time at \$200.00 per hour (\$3,600.00) and 17.4 hours of "case analyst" time at \$75.00 per hour (\$1,305.00). The number of hours of Applicant's time is different from that sought in the motion but conforms to the attached billing records. The records indicate Applicant billed two hours in two entries dated August 6, 2004. According to the court docket, no hearings took place in this case on that date. The billing records also indicate that Applicant billed those hours at \$0.00 per hour. It appears that the error was either noticed by Applicant or his staff and thus was not included in the dollar amount requested in the motion (\$5,625).

1 plan. The following constitutes the court's findings of fact and
2 conclusions of law pursuant to Fed. R. Bankr. P. 7052.²

3 On August 2, 2002, the debtors filed a chapter 13 petition.
4 Applicant consented to compensation in accordance with the
5 Guidelines For Payment Of Attorneys' Fees In Chapter 13 Cases
6 (Effective March 1, 2001) ("Guidelines"). As part of the
7 confirmation process, the court approved attorney's fees and costs
8 in the amount of \$2,000, the maximum initial fee permitted by the
9 Guidelines for a non-business case. The Guidelines permit
10 attorneys to apply to the court for additional fees if the initial
11 fee is not sufficient to compensate counsel fully for the legal
12 services rendered in the case. Guidelines, ¶ 4.

13 During the course of this chapter 13 case, Applicant prepared
14 the initial petition, schedules, and plan; obtained confirmation of
15 two modified plans; obtained two orders permitting debtors to
16 refinance their residence; responded to one motion to dismiss from
17 the trustee; responded to two motions for relief from the automatic
18 stay; and obtained relief pursuant to Federal Rule of Civil
19 Procedure 60(b)(1) from an order granting a third motion for relief
20 from the stay. Applicant also filed three applications for
21 additional fees, including the one at issue here.

22 The court notes that there were no adversary complaints filed
23 and no objections to claims, contested or otherwise. While there
24 were several motions for relief from stay, they raised no issues
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26 ² Unless otherwise noted, all statutory references are to the
27 Bankruptcy Code, 11 U.S.C. §101 *et seq.*, and all "Rule" references are
28 to the Federal Rules of Bankruptcy Procedure.

1 atypical in chapter 13 practice. The two plan modifications filed
2 in this case are routine. The first modified the plan to conform
3 to claims filed in the case. The debtors filed the second in
4 conjunction with a motion to refinance their residence and exit
5 bankruptcy early. The only unusual motion in this case was a
6 motion brought by debtors pursuant to Bankruptcy Rule 9024
7 incorporating Fed. R. Civ. P. 60(b). That motion was necessitated
8 by debtors' failure to file written opposition to a motion for
9 relief from the automatic stay because of a calendaring error in
10 Applicant's office. The court therefore concludes that the work
11 done by Applicant in this case exceeds in amount, although not in
12 complexity, the work required of a debtor's attorney in a "typical"
13 chapter 13 case. See, In re Pedersen, 229 B.R. 445, 448 (Bankr.
14 E.D. Cal. 1999). As a result, Applicant has been awarded
15 additional fees on two prior occasions.

16 This is Applicant's third supplemental request for fees and
17 costs in this case. The court approved Applicant' first
18 supplemental request in part on March 11, 2004 (ECF-70). The court
19 compensated Applicant for all time spent, but reduced Applicant's
20 requested hourly rate from \$240.00 to \$200.00 awarding \$1,812.50; a
21 reduction from the \$2,396.50 requested. The court approved
22 Applicant's second supplemental request on June 1, 2004 (ECF-81).
23 The court again compensated Applicant for all time spent, but did
24 not reduce the \$992.50 sought in fees because Applicant voluntarily
25 reduced his hourly rate to \$200.00. Prior to this motion,
26 Applicant has been awarded total compensation of \$4,805.00.

27 Prior to the initial hearing on the Third Additional Fee
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1 Request on February 15, 2005, the court issued a tentative ruling
2 indicating that it proposed sua sponte to allow Applicant's fees
3 based on an hourly rate of \$200.00, rather than the \$240.00
4 requested in the Third Additional Fee Request. The rationale set
5 forth in the tentative ruling was that Applicant's requested rate
6 was disproportionate to that charged by other bankruptcy
7 practitioners. Applicant opposed application of the lower rate and
8 requested an opportunity to brief the issue. The court continued
9 the matter to March 1, 2005 to allow Applicant to submit briefing
10 on the issue of the appropriate hourly rate.

11 On February 22, 2005, Applicant filed a request to continue
12 the matter to March 15, 2005 because his computer had "crashed" and
13 because he needed additional time to accumulate evidence in support
14 of his position. The court granted the request for a continuance
15 at the March 1, 2005 hearing.

16 On March 8, 2005, Applicant filed a Memorandum of Points and
17 Authorities supported by a declaration and exhibits. The exhibits
18 included five declarations from practitioners who are certified
19 specialists in family law and copies of two orders in which the
20 Sacramento District Court made fee awards. The Memorandum of
21 Points and Authorities filed March 8, 2005 by Applicant to support
22 his position is unsigned in violation of Local Bankruptcy Rule
23 ("LBR") 9004-1(c) and Fed. R. Bankr. P. 9011(a). However, the
24 court neither struck the memorandum nor imposed sanctions.

25 The matter came on again for hearing on March 15, 2005. After
26 oral argument, the court took the matter under submission.

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1 **ANALYSIS**

2 "The burden is upon the Applicant to demonstrate that the fees
3 are reasonable." In re Basham, 208 B.R. 926, 931-32 (9th Cir BAP
4 1997) *citing* Hensley v. Eckerhart, 461 U.S. 424, 437, 103 S.Ct.
5 1933, 1941, 76 L.Ed.2d 40 (1983). The court does not question the
6 amount of time that Applicant spent during the period covered by
7 the Third Additional Fee Request. The only issue is the
8 appropriate hourly rate to be applied to the time spent. Applicant
9 has failed to meet his burden that he is entitled to an hourly rate
10 of \$240. As set forth in the court's prior tentative ruling, it is
11 the court's experience that chapter 13 debtors' attorneys charge
12 between \$150 to \$200 per hour in the Sacramento Division of this
13 district. The evidence provided by Applicant is insufficient to
14 show his entitlement to a 20% premium over the highest rate charged
15 by others in this division.

16 11 U.S.C. Section 330(a)(3) requires the court to look at all
17 relevant factors. Applicant focuses on 11 U.S.C. § 330(a)(3)(E)
18 which provides that a relevant factor is "whether the compensation
19 is reasonable based on the customary compensation charged by
20 comparably skilled practitioners in cases other than cases under
21 this title." (West 2005). Applicant argues that he is entitled to
22 a rate equal to the highest hourly rate that he can show to have
23 been awarded to other specialists with similar years of experience
24 in other areas of practice. At oral argument on March 15, 2005,
25 Applicant stated that, based on his research as reflected in the
26 documents filed in support of the Third Additional Fee Request, he
27 will in the future request compensation based on an hourly rate of
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1 \$300.00, or more.

2 Applicant mis-construes the intention and effect of Section
3 330(a)(3)(E). This section codifies the fifth compensation factor
4 (the customary fee for similar work in the community) of Johnson v.
5 Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974), a Title
6 VII class action case.³ 3 Collier on Bankruptcy ¶ 330.04[6] (15th
7 Ed. Rev. 2004). Section 330(a)(3)(E) also overruled prior cases
8 such as In re First Colonial Corp. Of America, 544 F.2d 1291 (5th
9 Cir. 1977), *cert. denied*, 431 U.S. 904, 97 S.Ct. 1696, 52 L.Ed. 2d
10 388 (1977), that applied the Johnson factors in the context of
11 bankruptcy, but limited compensation in bankruptcy cases based on
12 the "spirit of economy." The "spirit of economy" dictated that:

13 "...the bankruptcy judge should...award an amount which is 'at
14 the lower end of the spectrum of reasonableness.' Since
15 attorneys assisting the trustee in the administration of a
16 bankruptcy estate are acting not as private persons but as
officers of the court, they should not expect to be
compensated as generously for their services as they might be
were they privately employed."

17 First Colonial, 544 F.2d at 1299 (citations omitted).

18 Collier notes that:

19 "The economy factor was abandoned under the Bankruptcy Code in
20 favor of the new policy that attorneys engaged in bankruptcy
cases should receive compensation in parity with that received
21 by attorneys performing services in comparable situations.
22 The legislative history of section 330 reflects this
significant shift in policy, observing that notions of economy
of the estate in fixing fees are outdated and no longer have a
23 place under bankruptcy law. The original Johnson factors, as
embraced by First Colonial, remain applicable to the
24 determination of reasonableness of fees awarded under the

25 ³Prior to the enactment of the Bankruptcy Code, the Ninth Circuit
26 adopted the Johnson factors as the standard for determining
reasonableness of attorney's fees. Kerr v. Screen Extras Guild, Inc.,
27 526 F.2d 67, 70 (9th Cir. 1975), *cert. denied*, 425 U.S. 951, 96 S.Ct.
1726, 48 L.Ed.2d 195 (1976).

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1 Code.

2 3 Collier on Bankruptcy ¶ 330.04[3][b] (15th Ed. Rev. 2004)(emphasis
3 added).

4 First, Applicant has failed to establish that the fees paid to
5 the lawyers described in the documents filed in support of the
6 Third Additional Fee Request reflect "compensation...received by
7 attorneys performing services in comparable situations," i.e.,
8 situations comparable to representation of debtors in chapter 13
9 cases.

10 Second, the sampling provided by Applicant is statistically
11 insufficient. The court takes judicial notice of the member
12 demographics page on the website for the State Bar of California.
13 (http://members.calbar.ca.gov/search/demographics_counties.aspx).
14 According to the State Bar's website, there are 7,085 active
15 attorneys practicing in Sacramento County alone. Applicant has
16 provided declarations from five family law attorneys; has cited the
17 rates approved for two attorneys who principally practice in the
18 Modesto Division representing chapter 7 trustees and a third
19 attorney who was employed as special litigation counsel; and has
20 culled rates for seven attorneys who have had fees awarded by Judge
21 Damrell in the District Court in Sacramento. The sample of fifteen
22 attorneys is approximately twenty-one one-hundredths of one percent
23 (0.21%) of the attorneys practicing in just Sacramento County. If
24 all attorneys who practice in the Sacramento Division are included,
25 11,262 according to the State Bar's website, the percentage is even
26 smaller; (0.13%). Even if the work done by the attorneys in the
27 sampling were proven to be services performed in comparable

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1 situations, the sampling is insufficient to establish a benchmark
2 for non-bankruptcy practitioners.

3 Applicant also asks the court to award his requested hourly
4 rate based on two specific factors: his years of practice and his
5 status as a specialist certified by the State Bar of California
6 Board of Legal Specialization.

7 As to the first factor, Applicant has failed to establish any
8 correlation between his time in practice and any particular hourly
9 rate. Johnson points out under factor (9) "the experience,
10 reputation, and ability of the attorneys" that:

11 Most fee scales reflect an experience differential with the
12 more experienced attorneys receiving larger compensation. An
13 attorney specializing in civil rights cases may enjoy a higher
14 rate for his expertise than others, providing his ability
15 corresponds with his experience. Longevity per se, however,
16 should not dictate the higher fee. If a young attorney
17 demonstrates the skill and ability, he should not be penalized
18 for only recently being admitted to the bar.

19 Johnson, 488 F.2d at 718-719 (emphasis added). In the court's
20 experience, Applicant's skills as a practitioner are no better than
21 those of many other chapter 13 debtor attorneys with less
22 experience practicing before this court. Therefore, it is
23 inappropriate to enhance Applicant's hourly rate simply on the
24 basis of his longevity as a lawyer.

25 As to the second factor, Applicant has provided no evidence of
26 the criteria for obtaining his certification as a bankruptcy
27 specialist. Even if he had, the same reasoning stated above
28 regarding the first factor would apply. Specialty certification,
per se, does not dictate a higher fee. Applicant's skill and
ability must dictate the higher fee. Because Applicant has not,

1 based on the court's observations of him in practice, demonstrated
2 skill or ability greater than that possessed by many other chapter
3 13 debtor lawyers practicing in the Sacramento Division, he has
4 failed to show that he is entitled to an enhanced hourly rate
5 simply because he is a certified bankruptcy specialist.

6 The "standard rates for bankruptcy representation in the area"
7 is a relevant factor to determine an appropriate hourly rate.
8 American Law Center PC v. Stanley (In re Jastrem), 253 F.3d 438,
9 443 (9th Cir. 2001). Applicant has provided insufficient evidence
10 to cause the court to deviate from its prior finding that in
11 consumer chapter 13 cases, attorneys bill at rates ranging from
12 \$150 to \$200 per hour. Those rates are charged by other attorneys
13 appearing in this court in identical, not just similar, situations.
14 The court's finding is also consistent with the experience of the
15 other two Judges in this Division who hear chapter 13 cases. See
16 In re Loberq, Bankr. case 02-21875-B-13J (ECF-119)(Judge Jane
17 McKeag) and Chief Judge Michael McManus' March 9, 2004 ruling in
18 this case (ECF-69). The court therefore allows fees at the rate of
19 \$200.00 per hour, the high end of the prevailing range in the
20 Sacramento Division.

21 **CONCLUSION**

22 For the reasons set forth above, the motion is granted in part
23 and denied in part. The application is approved for a total of
24 \$4,905.91 in fees and costs to be paid as an administrative expense
25 through the plan. As set forth in the attorney's application,
26 these fees, as adjusted above, are reasonable compensation for
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