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NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA  
FRESNO DIVISION

In re	)	Case No. 09-14298-B-11
Capital Corp of the West,	)	DC No. None
Debtor.	)	

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**MEMORANDUM DECISION REGARDING APPLICATION  
OF PLAN ADMINISTRATOR (DAVID A. HEABERLIN)  
FOR ALLOWANCE AND PAYMENT OF POST-  
CONFIRMATION COMPENSATION (APRIL 2012)**

This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9<sup>th</sup> Cir. BAP Rule 8013-1.

David A. Heaberlin appeared on behalf of himself.

Paul J. Pascuzzi, Esq., of Felderstein Fitzgerald Willoughby & Pascuzzi, LLP, appeared on behalf of the post-confirmation debtor, Capital Corp of the West.

Philip S. Warden, Esq., of Pillsbury Winthrop Shaw Pittman LLP, appeared on behalf of the objecting creditors, Thomas Hawker, David Kraechan, Edwin Jay Lee, Ed Rocha and John Incandela.

Christian D. Jinkerson, Esq., of Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball, LLP, appeared on behalf of the Unsecured Creditors' Committee.

Before the court is an application by the chapter 11 plan administrator, David A. Heaberlin ("Heaberlin"), for allowance and payment of post-confirmation compensation for the month of April 2012 (the "April Application"). The April Application is opposed by creditors

1 Thomas Hawker, David Kraechan, Edwin Jay Lee, Ed Rocha and John  
2 Incandela (the “Creditors”). For the reasons set forth below, the April  
3 Application will be approved in full.

4 This memorandum decision contains findings of fact and conclusions  
5 of law required by Federal Rule of Civil Procedure 52(a), made applicable  
6 to this contested matter by Federal Rule of Bankruptcy Procedure 7052.<sup>1</sup>  
7 The bankruptcy court has jurisdiction over this matter pursuant to 28 U.S.C.  
8 §§ 1334 and 157, 11 U.S.C. § 523 and General Orders 182 and 330 of the  
9 U.S. District Court for the Eastern District of California. This is a core  
10 proceeding pursuant to 28 U.S.C. §§ 157(b)(2)(A).

11 **Background and Findings of Fact.**

12 Heaberlin is the Plan Administrator for the post-confirmation  
13 Debtor. Under the confirmed plan, the appointed professionals may submit  
14 monthly applications for their fees and expenses. Unless there is an  
15 objection, the Debtor may pay the fees and expenses without court  
16 approval.<sup>2</sup> On May 7, 2012, Heaberlin submitted his April Application for  
17 the services he performed during the month of April 2012. Heaberlin  
18 requests \$33,600 in fees representing 149.2 hours of time spent in service to  
19 the Debtor. 120.7 hours were billed at the rate of \$250 per hour. The  
20 remaining time, 28.5 hours were billed at the reduced rate of \$125 per hour.  
21 Heaberlin did not request reimbursement of expenses. The April  
22 Application is supported by time records to show how Heaberlin spent his  
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24 <sup>1</sup>Unless otherwise indicated, all chapter, section and rule references are to  
25 the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of  
26 Bankruptcy Procedure, Rules 1001-9036, as enacted and promulgated *after*  
27 October 17, 2005, the effective date of The Bankruptcy Abuse Prevention and  
Consumer Protection Act of 2005, Pub. L. 109-8, Apr. 20, 2005, 119 Stat. 23.

28 <sup>2</sup>This procedure has been in place and operating without any litigation  
since the Debtor’s chapter 11 plan was confirmed on January 20, 2010.

1 time for the services billed. Heaberlin is a certified public accountant;  
2 however, his services were performed as an employee of the Debtor, rather  
3 than as an independent contractor. Heaberlin is the Debtor's sole remaining  
4 employee and handles all of the accounting and reporting functions for the  
5 Debtor, in addition to the document control and litigation support as needed  
6 by the Debtor's counsel.

7         The Creditors filed a timely objection to the April Application.<sup>3</sup>  
8 Both the Debtor and the Unsecured Creditors' Committee responded with  
9 statements in support of Heaberlin and the April Application. The Creditors  
10 objected generally to all of the fees requested by Heaberlin and requested  
11 that the April Application be disallowed in full. This was based on the  
12 Creditors' contention that the administration of this case has taken too long  
13 and should be brought to a conclusion.<sup>4</sup> Even though the Creditors have not  
14 previously objected to any of Heaberlin's fee applications, they now protest  
15 vehemently the total amount of all of the fees that have been paid to all of  
16 the professionals since confirmation of the plan.

17         Turning specifically to Heaberlin's April Application, the Creditors  
18 object to fees incurred in numerous categories and ask that those fees be  
19 either disallowed or reduced to a "reasonable amount." The Creditors  
20 prepared an extensive spreadsheet showing which of Heaberlin's fees were  
21 in their view "excessive." After the hearing, the court gave Heaberlin an  
22 opportunity to file a response.

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24         <sup>3</sup>The Creditors also file objections to the April 2012 fee applications filed  
25 by the Debtor's counsel and by counsel for the Unsecured Creditors' Committee.

26         <sup>4</sup>Ironically, the Creditors are all respondents in hotly contested claim  
27 objection matters involving over \$45 million of disputed claims. At the parties'  
28 request, those claim objections have been set for non-binding mediation in August  
2012. If a settlement is not reached through mediation, it is likely that the claim  
objection process will continue for a substantial time in the future.

1 **Analysis and Conclusions of Law.**

2 When bankruptcy courts are asked to review the fees incurred by a  
3 professional person employed to work in a case under § 327, the process  
4 begins with reference to the Bankruptcy Code which offers a statutory  
5 framework for analyzing the fees. The Code mandates that professional  
6 fees must be actual, necessary and reasonable.<sup>5</sup>

7  
8 <sup>5</sup>Professional compensation for persons employed to work for the  
9 bankruptcy estate is governed by § 330(a) which provides in pertinent part:

10 (a)(1) After notice to the parties in interest and the United States Trustee  
11 and a hearing, . . . the court may award . . . a professional person  
employed under section 327 or 1103–

12 (A) reasonable compensation for actual, necessary services  
13 rendered by the . . . professional person, or attorney . . . ; and

14 (B) reimbursement for actual, necessary expenses.

15 (2) The court may, on its own motion or on the motion of . . . any other  
16 party in interest, award compensation that is less than the amount of  
17 compensation that is requested.

18 (3) In determining the amount of reasonable compensation to be awarded  
19 to . . . [a] professional person, the court shall consider the nature, the  
20 extent, and the value of such services, taking into account all relevant  
factors, including–

21 (A) the time spent on such services;

22 (B) the rates charged for such services;

23 (C) whether the services were necessary to the administration of,  
24 or beneficial at the time at which the service was rendered toward  
the completion of, a case under this title;

25 (D) whether the services were performed within a reasonable  
26 amount of time commensurate with the complexity, importance,  
27 and nature of the problem, issue, or task addressed;

28 (E) with respect to a professional person, whether the person is  
board certified or otherwise has demonstrated skill and experience

1           The concept of reasonableness when applied to professional fees  
2 invokes a combination of objective and subjective inquiries. Objectively,  
3 the court must be persuaded that the work performed in a particular case  
4 was consistent with the kind of service which a similarly situated debtor  
5 might require. The court must also determine that the value of the services  
6 is consistent with the cost of similar services for similar work.  
7 Subjectively, the court must inquire whether the professionals exercised  
8 prudent billing judgment in the decisions that were made to engage the  
9 services, the way the work was assigned, and the manner in which it was  
10 actually performed.

11           **Valuing Professional Services, the Lodestar Approach.** In the  
12 Ninth Circuit, the customary method for determining the reasonableness of  
13 a professional’s fees is the “lodestar” calculation. *Morales v. City of San*  
14 *Rafael*, 96 F.3d 359, 363 (9th Cir. 1996), *amended*, 108 F.3d 981 (9th Cir.  
15 1997). “The ‘lodestar’ is calculated by multiplying the number of hours the  
16 prevailing party reasonably expended on the litigation by a reasonable  
17 hourly rate.” *Morales*, 96 F.3d at 363 (citation omitted). “This calculation  
18 provides an objective basis on which to make an initial estimate of the value  
19 of a lawyer’s services.” *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). A  
20 compensation award based on the loadstar is a presumptively reasonable  
21 fee. *In re Manoa Fin. Co.*, 853 F.2d 687, 691 (9th Cir. 1988).

22           In rare or exceptional instances, if the court determines that the  
23 lodestar figure is unreasonably low or high, it may adjust the figure upward  
24 or downward based on factors enumerated in *Kerr v. Screen Guild Extras*,

25 \_\_\_\_\_  
26                           in the bankruptcy field; and

27                           (F) whether the compensation is reasonable based on the  
28                           customary compensation charged by comparably skilled  
                                practitioners in cases other than cases under this title.

1 *Inc.*, 526 F.2d 67 (9th Cir. 1975). *Morales*, 96 F.3d at 363–64. The  
2 original *Kerr* factors include:

- 3 (1) the time and labor required,
- 4 (2) the novelty and difficulty of the questions involved,
- 5 (3) the skill requisite to perform the professional service  
6 properly,
- 7 (4) the preclusion of other employment by the professional  
8 due to acceptance of the case,
- 9 (5) the customary fee,
- 10 (6) whether the fee is fixed or contingent,
- 11 (7) time limitations imposed by the client or the  
12 circumstances,
- 13 (8) the amount involved and the results obtained,
- 14 (9) the experience, reputation, and ability of the professionals,
- 15 (10) the “undesirability” of the case,
- 16 (11) the nature and length of the professional relationship  
17 with the client, and
- 18 (12) awards in similar cases.

17 *Kerr*, 526 F.2d at 70 (citing *Johnson v. Ga. Highway Express, Inc.*, 488  
18 F.2d 714 (5th Cir. 1974)).

19 However, some of the *Kerr* factors have been subsumed as a matter  
20 of law within the initial lodestar calculation and should be taken into  
21 account in either the reasonable hours component or reasonable hourly rate  
22 component. *Morales*, 96 F.3d at 363–64 & nn.8–9. These include (1) the  
23 novelty and complexity of the issues, *Jordan v. Multnomah County*, 815 F.2d  
24 1258, 1262 n.6 (9th Cir. 1987) (citing *Blum v. Stenson*, 465 U.S. 886,  
25 898–900 (1984)); (2) the special skill and experience of the professional,  
26 *id.*; (3) the quality of representation, *id.*; (4) the results obtained, *id.*; and (5)  
27 the contingent nature of the fee agreement, *City of Burlington v. Dague*, 505  
28 U.S. 557, 565–67 (1992). These subsumed factors may not act as

1 independent bases for adjustments to the lodestar figure. *Miller v. Los*  
2 *Angeles County Bd. of Educ.*, 827 F.2d 617, 620 n.4 (9th Cir. 1987).

3 Given the two-step “lodestar” approach, the court has considerable  
4 discretion in determining the reasonableness of professional’s fees. *Gates v.*  
5 *Duekmejian*, 987 F.2d 1392, 1398 (9th Cir. 1992). It is appropriate for the  
6 court to have this discretion “in view of the [court’s] superior understanding  
7 of the litigation and the desirability of avoiding frequent appellate review of  
8 what essentially are factual matters.” *Hensley*, 461 U.S. at 437.

9 **Application of the Lodestar to This Case.** The first step in the  
10 “lodestar” process, the “reasonable hours” analysis, requires the court to  
11 determine if the professionals exercised prudent billing judgment in the  
12 performance of their duties to the client. Prudent billing judgment is an  
13 essential part of the lodestar analysis. Unless the court is satisfied that the  
14 professionals were prudent and made a good faith effort to perform their  
15 work efficiently, then the court cannot apply the lodestar presumption to  
16 any of their fees. On the “billing judgment” issue, the Supreme Court has  
17 commented,

18 The [court] . . . should exclude from this initial fee calculation  
19 hours that were not “reasonably expended.” Cases may be  
20 overstaffed, and the skill and experience of lawyers vary  
21 widely. Counsel for the [party requesting attorney’s fees]  
22 should make a good faith effort to exclude from a fee request  
23 hours that are excessive, redundant, or otherwise unnecessary,  
24 just as a lawyer in private practice ethically is obligated to  
25 exclude such hours from his fee submission. In the private  
26 sector, “billing judgment” is an important component in fee  
27 setting. It is no less important here. Hours that are not  
28 properly billed to one’s *client* also are not properly billed to  
one’s *adversary* pursuant to statutory authority.

25 *Hensley*, 461 U.S. at 434 (citations and internal quotation marks omitted,  
26 emphasis in original).

27 It is not sufficient for the fee applicant to simply represent that all of  
28 the time claimed was usefully spent, and the court should not uncritically

1 accept these representations. *Jordan*, 815 F.2d at 1263 n.8 (citation  
2 omitted). Instead, the fee applicant must show that the time spent was  
3 reasonably necessary and that the professional made a good faith effort to  
4 exclude excessive, redundant, or unnecessary hours. *Id.* (citation omitted).

5 In support of their objection, the Creditors discuss seven categories  
6 of services billed by Heaberlin which they contend were unnecessary or  
7 excessive. At the court's invitation, Heaberlin provided a comprehensive  
8 and detailed response to each of the Creditors' objections. Heaberlin's  
9 response also details the history and complexity of this case, the difficulties  
10 that have been encountered post-petition, particularly in ongoing litigation  
11 with the FDIC and claim objections with the objecting Creditors. Heaberlin  
12 also offers an enlightening discussion of his own internal work policies and  
13 billing procedures. The court adopts Heaberlin's supplemental Declaration  
14 filed on June 19, 2012 (docket no. 1816) in support of its ruling on each of  
15 the objections raised by the Creditors.

16 The court has carefully considered each of the objections and  
17 Heaberlin's response to each of the questions raised in the disputed  
18 categories. Based thereon, the court is persuaded that Heaberlin has  
19 exercised reasonable billing judgment in the services reflected in the April  
20 Application. Accordingly, the "lodestar" presumption of reasonableness  
21 applies. The court has also considered the specific time entries at issue, the  
22 amount of money in dispute, the rates charged by Heaberlin compared to  
23 the cost of outside services, if available, and the scope of the work  
24 performed and the results obtained. Based thereon, the court is persuaded  
25 that the hours billed by Heaberlin were actual, necessary and reasonable.

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1 **Conclusion.**

2           Based on the foregoing, the court finds and concludes that the fees  
3 billed by Heaberlin in the April Application were actual, necessary and  
4 reasonable. Accordingly, the Creditors objection will be overruled and  
5 Heaberlin's April Application will be approved. Heaberlin shall submit a  
6 proposed order.

7           Dated: July 17, 2012

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/s/ W. Richard Lee  
W. Richard Lee  
United States Bankruptcy Judge

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