

1  
2  
3 POSTED ON WEBSITE  
4

5 UNITED STATES BANKRUPTCY COURT  
6 EASTERN DISTRICT OF CALIFORNIA  
7 FRESNO DIVISION

8 In re ) Case No. 13-16845-B-7  
9 Keystone Mine Management II, ) DC No. KDG-8  
10 Debtor. )  
11 \_\_\_\_\_)

12 **MEMORANDUM DECISION REGARDING**  
13 **APPLICATION FOR INTERIM COMPENSATION**

14 The law firm of Klein, DeNatale, Goldner, et al. (“KDG”) has filed its first  
15 application for interim compensation under 11 U.S.C. § 331 (the “Fee  
16 Application”). KDG was authorized to serve as counsel for the chapter 7 trustee,  
17 Vincent Gorski (the “Trustee”) after the case was converted from chapter 11.  
18 The Fee Application is opposed by a group of related parties, specifically Kirk L.  
19 DuShane, Keystone Mining Company, Ltd., Keystone Mine Management, Ltd.,  
20 Patrick O’Brien and Roger Smith (the “Respondents”). The briefing for this  
21 contested matter is now complete. Neither party filed a separate statement of  
22 disputed material factual issues in compliance with Local Bankruptcy Rule 9014-  
23 1(f)(B). They have therefore consented to resolution of the Fee Application and  
24 all disputed material factual issues without an evidentiary hearing pursuant to  
25 Fed.R.Civ.P. 43(c). The Fee Application was originally noticed for a hearing,  
26 however, the court deemed this matter suitable for resolution without oral  
27 argument and the hearing was dropped from calendar. For the reason set forth  
28 below, the Fee Application will be approved.

1 This memorandum decision contains findings of fact and conclusions of  
2 law required by Federal Rule of Civil Procedure 52(a), made applicable to this  
3 contested matter by Federal Rule of Bankruptcy Procedure 7052.<sup>1</sup> The  
4 bankruptcy court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334  
5 and 157, 11 U.S.C. §§ 330 & 331 and General Orders 182 and 330 of the U.S.  
6 District Court for the Eastern District of California. This is a core proceeding  
7 pursuant to 28 U.S.C. §§ 157(b)(2)(A).

8 **Background and Findings of Fact.**

9 This bankruptcy began as a voluntary chapter 11 on October 21, 2013.  
10 The debtor, Keystone Mine Management II (the “Debtor”), is a California  
11 general partnership. The bankruptcy was filed in response to a contentious civil  
12 action involving related partnerships and parties, then pending in the Orange  
13 County Superior Court (the “State Litigation”). Respondent Kirk L. DuShane  
14 (“DuShane”) signed the schedules in this case under penalty of perjury in his  
15 capacity as the Debtor’s general partner. The Debtor’s schedules list essentially  
16 one asset described as “50 U.S. Bureau of Land Mines [sic] Claims (20 acres  
17 each)” and some related equipment, much of which is described as “badly  
18 damaged.” The Debtor valued these 50 BLM claims at \$319 million based on a  
19 1991 geologic projection of the gold reserves. It valued the equipment at  
20 \$134,000. (The 50 BLM mining claims and related equipment are hereafter  
21 referred to as the “Mining Assets.”) The schedules list only two secured  
22 creditors, Dr. William T. Weyerhaeuser and the WBW Trust, with a claim in the  
23 amount of \$2.7 million secured by a lien against some or all of the Mining  
24

---

25 <sup>1</sup>Unless otherwise indicated, all chapter, section and rule references are to the  
26 Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of Bankruptcy  
27 Procedure, Rules 1001-9036, as enacted and promulgated *after* October 17, 2005, the  
28 effective date of The Bankruptcy Abuse Prevention and Consumer Protection Act of  
2005, Pub. L. 109-8, Apr. 20, 2005, 119 Stat. 23.

1 Assets, and the Inyo County Tax Collector with a property tax claim in excess of  
2 \$47,000. None of the Mining Assets had been operated in over 20 years. The  
3 Debtor had no income, no expenses, and no employees.<sup>2</sup> Virtually all of the  
4 creditors who filed proofs of claim in this case are insiders and taxing authorities.

5 The background of this case, and the difficulties encountered by the  
6 Trustee, are set forth in pertinent part in the Memorandum Decision, dated July 8,  
7 2015, which was submitted by the Trustee, signed by the court, and filed in  
8 support of a motion by the Trustee to sell the Mining Assets (Doc. No. 494) and  
9 the Declaration of Lisa Holder, Esq., filed in support of this motion (Doc. No.  
10 522). Briefly, this bankruptcy was filed as a chapter 11 by DuShane on October  
11 21, 2013. Ostensibly, DuShane's objective in filing chapter 11 was to secure  
12 sufficient financing to reopen and operate the Mining Assets. However, it very  
13 soon became apparent that the Debtor had little hope of successfully reorganizing  
14 and the court granted the U.S. Trustee's motion to convert the case to chapter 7  
15 on February 7, 2014. Vincent Gorski was appointed to act as the chapter 7  
16 trustee.

17 All the Trustee needed to do in this case was to advertise and sell the  
18 Mining Assets. Indeed, the Trustee originally attempted to sell the Mining Assets  
19 in May 2014 (Doc. No. 166). However, from the beginning, Gorski's efforts  
20 were met with passionate opposition, led by DuShane, and his counsel, Meir J.  
21 Westreich. The Respondents have been profoundly unhappy with the Trustee's  
22 administration of this case and they actively endeavored to delay the inevitable  
23 sale of the Mining Assets. They successfully delayed the case for many months  
24 by, *inter alia*, forcing the Trustee to first prosecute an adversary proceeding for  
25 quiet title to the Mining Assets. Ultimately, the Mining Assets were noticed for  
26

---

27 <sup>2</sup>Debtor's first monthly operating report, Doc. No. 55, filed January 7, 2014.  
28

1 sale subject to higher and better bids. The Respondents appeared at the hearing  
2 in opposition to the Trustee's motion, however, they declined to bring an  
3 interested buyer for the Mining Assets, there were no "higher and better" bids.  
4 The court therefore authorized the Trustee to sell the Mining Assets to the  
5 "stalking-horse" bidder, Bush Management Company, successor to the original  
6 secured creditor ("BMC").

7 **Respondent's Opposition.** The Respondents oppose the Application and  
8 request that much of KDG's fees be disallowed as unproductive (the  
9 "Opposition"). The Respondents offer no suggestion as to what might constitute  
10 an appropriate fee award for the substantial amount of work they forced the  
11 Trustee and his counsel to do in this case. Their specific objections to KDG's  
12 fees essentially just repeat the various objections they have lodged throughout the  
13 case. They accept no responsibility for making this case as lengthy and difficult  
14 as it turned out to be.

15 **Analysis and Conclusions of Law.**

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

---

22 <sup>3</sup>Professional compensation for persons employed to work for the bankruptcy  
23 estate is governed by § 330(a) which provides in pertinent part:

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

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

27 (B) reimbursement for actual, necessary expenses.  
28

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

10 **Valuing Professional Services, the Lodestar Approach.** In the Ninth  
11 Circuit, the customary method for determining the reasonableness of a  
12 professional's fees is the "lodestar" calculation. *Morales v. City of San Rafael*,

---

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

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

20 (A) the time spent on such services;

21 (B) the rates charged for such services;

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

25 (D) whether the services were performed within a reasonable amount of  
26 time commensurate with the complexity, importance, and nature of the  
27 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 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.

1 96 F.3d 359, 363 (9th Cir. 1996), *amended*, 108 F.3d 981 (9th Cir. 1997). “The  
2 ‘lodestar’ is calculated by multiplying the number of hours the prevailing party  
3 reasonably expended on the litigation by a reasonable hourly rate.” *Morales*, 96  
4 F.3d at 363 (citation omitted). “This calculation provides an objective basis on  
5 which to make an initial estimate of the value of a lawyer’s services.” *Hensley v.*  
6 *Eckerhart*, 461 U.S. 424, 433 (1983). A compensation award based on the  
7 lodestar is a presumptively reasonable fee. *In re Manoa Fin. Co.*, 853 F.2d 687,  
8 691 (9th Cir. 1988).

9 In rare or exceptional instances, if the court determines that the lodestar  
10 figure is unreasonably low or high, it may adjust the figure upward or downward  
11 based on factors enumerated in *Kerr v. Screen Guild Extras, Inc.*, 526 F.2d 67  
12 (9th Cir. 1975). *Morales*, 96 F.3d at 363–64. The original *Kerr* factors include:

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

26 *Kerr*, 526 F.2d at 70 (citing *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714  
27 (5th Cir. 1974)).

1           However, some of the *Kerr* factors have been subsumed as a matter of law  
2 within the initial lodestar calculation and should be taken into account in either  
3 the reasonable hours component or reasonable hourly rate component. *Morales*,  
4 96 F.3d at 363–64 & nn.8–9. These include (1) the novelty and complexity of the  
5 issues, *Jordan v. Multnomah County*, 815 F.2d 1258, 1262 n.6 (9th Cir. 1987)  
6 (citing *Blum v. Stenson*, 465 U.S. 886, 898–900 (1984)); (2) the special skill and  
7 experience of the professional, *id.*; (3) the quality of representation, *id.*; (4) the  
8 results obtained, *id.*; and (5) the contingent nature of the fee agreement, *City of*  
9 *Burlington v. Dague*, 505 U.S. 557, 565–67 (1992). These subsumed factors may  
10 not act as independent bases for adjustments to the lodestar figure. *Miller v. Los*  
11 *Angeles County Bd. of Educ.*, 827 F.2d 617, 620 n.4 (9th Cir. 1987).

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

18           **Application of the Lodestar to This Case.** The first step in the  
19 “lodestar” process, the “reasonable hours” analysis, requires the court to  
20 determine if the professionals exercised prudent billing judgment in the  
21 performance of their duties to the client. Prudent billing judgment is an essential  
22 part of the lodestar analysis. Unless the court is satisfied that the professionals  
23 were prudent and made a good faith effort to perform their work efficiently, then  
24 the court cannot apply the lodestar presumption to any of their fees. On the  
25 “billing judgment” issue, the Supreme Court has commented,

26     ///

27     ///

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

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

9 It is not sufficient for the fee applicant to simply represent that all of the  
10 time claimed was usefully spent, and the court should not uncritically accept  
11 these representations. *Jordan*, 815 F.2d at 1263 n.8 (citation omitted). Instead,  
12 the fee applicant must show that the time spent was reasonably necessary and that  
13 the professional made a good faith effort to exclude excessive, redundant, or  
14 unnecessary hours. *Id.* (citation omitted).

15 The job of the chapter 7 trustee is to liquidate a debtor's assets and wind  
16 up the case as expeditiously as possible. § 704(a). Here, the difficulties inherent  
17 with a case that had failed reorganization in chapter 11 were multiplied  
18 many-fold by complex issues and by the actions of the Respondents. Instead of  
19 choosing to cooperate with the Trustee and make the most of the Debtor's assets,  
20 they instead worked to impede the Trustee at every step in one of this court's  
21 most contentious chapter 7 cases.

22 The court has reviewed carefully the Fee Application and KDG’s billing  
23 records offered in support of the Application. The court's record and KDG's time  
24 records, taken together, persuade the court that KDG exercised reasonable billing  
25 judgment in the services reflected in the Fee Application. For example, it  
26 appears that the attorney primarily responsible for the case delegated research on  
27 some of the issues to associates who billed at a lower rate, sometimes at \$0.0 per  
28



1 hour and there was virtually no billing for inter-office conferences. A large  
2 amount of the time billed was on account of communication, with the  
3 Respondents, the BLM, potential buyers, and the Trustee, among others.  
4 Accordingly, the “lodestar” presumption of reasonableness applies.

5 The court has also considered the specific time entries at issue, the amount  
6 of money in dispute, the rates charged by KDG compared to the cost of outside  
7 services, if available, and the scope of the work performed, the unusual  
8 difficulties encountered, and the results obtained. Based thereon, the court is  
9 persuaded that the hours billed by KDG were actual, necessary and reasonable.

10 **Conclusion.**

11 Based on the foregoing, the court finds and concludes that the fees billed  
12 by KDG in the Fee Application were actual, necessary and reasonable.  
13 Accordingly, the Respondents’ Objection will be overruled and KDG’s Fee  
14 Application will be approved. KDG shall submit a proposed order.

15 Dated: September 23, 2015

16  
17  
18 /s/ W. Richard Lee  
19 W. Richard Lee  
20 United States Bankruptcy Judge  
21  
22  
23  
24  
25  
26  
27  
28