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4 UNITED STATES BANKRUPTCY COURT  
5 EASTERN DISTRICT OF CALIFORNIA  
6

7 In re )  
8 ) Case No. 08-23603-D-7  
9 ) Docket Control No. WW-5  
10 GUY TYRONE LYNN and JAMIE )  
11 ARCHER LYNN, )  
12 Debtors. ) DATE: September 2, 2009  
13 ) TIME: 10:00 a.m.  
14 ) DEPT: D (Courtroom 34)  
15 \_\_\_\_\_ )

16 MEMORANDUM DECISION ON MOTION FOR  
17 COMPENSATION AND REIMBURSEMENT OF EXPENSES

18 This memorandum decision is not approved for publication and may  
19 not be cited except when relevant under the doctrine of law of  
20 the case or the rules of claim preclusion or issue preclusion.  
21

22 On July 24, 2009 Wolff & Wolff ("Counsel") filed its First  
23 and Final Application for Attorneys Fees for Representation of  
24 Debtors in Connection with Chapter 13 (the "Application"). Viola  
25 Haviland ("Haviland"), a creditor herein, and the United States  
26 Trustee ("UST") each filed opposition to the Application. The  
27 matter came on for hearing on the date and at the time indicated  
28 above. After oral argument the matter was taken as submitted.  
For the reasons set forth below, the Application will be granted  
in part and denied in part.

29 I. BACKGROUND

30 On March 25, 2008 Guy Lynn and Jamie Lynn (the "debtors")  
31 filed a petition for relief under Chapter 13 of the Bankruptcy  
32 / / /

1 Code ("Code")<sup>1</sup>. On that date the debtors also filed their  
2 schedules, statement of financial affairs and a Chapter 13 Plan  
3 (the "Plan"). Counsel has continuously represented the debtors  
4 in this case.

5 On May 6, 2008 Haviland filed an objection to the Plan (the  
6 "Objection"). The Objection is based, in part, on Haviland's  
7 assertion that the debtors' debt exceeded the Chapter 13 debt  
8 limit, that the Plan did not properly identify her claim, that  
9 the Plan was not the debtors' best effort, that the Plan was not  
10 feasible, and that the Plan did not satisfy the best interest of  
11 the creditors' test. At a hearing on June 17, 2008 the court  
12 sustained the Objection, and stated its findings of facts and  
13 conclusions of law orally on the record. In its finding the  
14 court stated the reasons the Plan was not confirmable.

15 As a result of the debtors' failure to timely file a new  
16 plan, on July 28, 2008 the Chapter 13 trustee filed a motion to  
17 dismiss the debtors' case. After hearing on the motion to  
18 dismiss, the court issued a conditional order requiring the  
19 debtors to file an amended plan no later than September 9, 2008,  
20 or their case would be dismissed (the "Conditional Dismissal  
21 Order").

22 The debtors filed an amended plan on September 9, 2008 (the  
23 "Amended Plan"), the last day allowed by the Conditional  
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25 1. Unless otherwise indicated, all Code, chapter, section  
26 and Rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-  
27 1330, and to the Federal Rules of Bankruptcy Procedure, Rules  
28 1001-9036, as enacted and promulgated prior to the effective date  
(October 17, 2005) of the Bankruptcy Abuse Prevention and  
Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23  
(2005).

1 Dismissal Order. The Amended Plan was virtually identical to the  
2 Plan. Thus, the Amended Plan contained all of the same  
3 impediments to confirmation that were contained in the Plan.

4 Predictably, on December 5, 2008 Haviland filed an objection  
5 to the Amended Plan. Haviland also requested the debtors' case  
6 be converted to a Chapter 7. Haviland's objection to the Amended  
7 Plan, and her request to convert the case to Chapter 7, came on  
8 for hearing on January 6, 2009.

9 At the January 6, 2009 hearing, the court sustain Haviland's  
10 objection to confirmation of the Amended Plan. The court further  
11 found that the debtors had engaged in unreasonable delay that was  
12 prejudicial to creditors, and ordered the case be converted to  
13 Chapter 7. The court stated its findings of facts and  
14 conclusions of law orally on the record. At the conclusion of  
15 this hearing, and after the court had made its ruling, Counsel  
16 made an oral motion that the debtors' case be dismissed. Based  
17 on the court's prior ruling converting the case to Chapter 7, the  
18 court denied Counsel's oral motion to dismiss the case.

19 Notwithstanding the denial of the debtors' oral motion to  
20 dismiss the case, immediately following the January 6, 2009  
21 hearing Counsel filed a motion to dismiss the debtors' case. The  
22 motion did not disclose any of the above procedural history.

23 On January 7, 2009, before the court entered its minute  
24 order converting the debtors' case to Chapter 7, the court  
25 inadvertently entered an order dismissing the debtors' case. On  
26 January 12, 2009 the court vacated the order of dismissal and  
27 entered an order converting the debtors' case to Chapter 7.

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1 Through the Application, Counsel seeks approval of \$16,936  
2 in fees and \$22.51 in expenses for services rendered in the  
3 debtors' Chapter 13 case for the period of January 25, 2008  
4 through January 8, 2009.

## 5 II. LAW AND ANALYSIS

6 Pursuant to section 330(a)(4)(B) of the Code, the court may  
7 award compensation to a debtor's attorney in a Chapter 13 case  
8 upon a showing that the services were necessary and benefitted  
9 the debtor. In allowing compensation to debtor's attorney in a  
10 Chapter 13 case, the court is to consider all the other factors  
11 enumerated in section 330 of the Code.

12 Section 330 of the Code sets out the standard by which the  
13 court should determine the reasonableness of fees under Section  
14 329, and reasonableness is determined by looking at the nature,  
15 extent and value of the services rendered. See In re Eliapo 298  
16 B.R. 392, 401 (9th Cir. BAP 2003).

17 It is the applicant's burden to establish the value of the  
18 services rendered. See In re Gianulias, 111 B.R. 867, 869 (E.D.  
19 CA 1989). The initial burden under § 329(b) is on the attorney  
20 to justify the compensation charged in connection with a  
21 bankruptcy case. In re Jastream, 253 F.3d 438, 443 (9<sup>th</sup> Cir.  
22 2001); In re Basham, 208 B.R. 926, 931 (9<sup>th</sup> Cir. 1997).

23 The court notes that under the Guidelines for Payment of  
24 Attorneys Fees in Chapter 13 Cases Applicable in the Eastern  
25 District of California (the "Fee Guidelines"), the allowed "opt-  
26 in" fee for a Chapter 13 case is \$3,500 and \$5,000 for a business  
27 case. Attorneys can "opt-out" of the Fee Guidelines; however,  
28 there is a general presumption that the amount of attorneys fees

1 allowed in the Fee Guidelines for those who "opt-in," is  
2 sufficient to cover the basic attorney services necessary in a  
3 Chapter 13 case. See Fee Guidelines, para. 2 and 4.

4 The court recognizes that when an attorney "opts-out" of the  
5 Fee Guidelines, the Fee Guidelines are only one factor to  
6 consider in assessing the reasonableness of an attorney's fees in  
7 a Chapter 13 case. Further, the court is prepared to compensate  
8 an attorney on an hourly rate when the attorney has made a proper  
9 showing under Section 330 of the Code. However, if an attorney  
10 "opts-out" and seeks hourly fees, the fees must not only be  
11 reasonable, but the services rendered must be necessary and have  
12 provided benefit to the debtor.

13 Turning now to the Application. As Counsel has "opted-out"  
14 of the Fee Guidelines, the court will consider the fees sought  
15 under section 330 of the Code. Certain actions taken by Counsel  
16 in this case support the conclusion that the case was  
17 administered in a fashion to maximize delay to creditors.  
18 Specifically, the court finds troubling that after the Plan was  
19 denied confirmation, Counsel waited to the last day allowed by  
20 the Conditional Dismissal Order before filing a new plan that was  
21 virtually identical to the Plan. The debtors' filing of the  
22 Amended Plan, which suffered from the same defects as the Plan,  
23 and then proceeding to confirmation, appears to be nothing more  
24 than a delay tactic. Another troubling aspect of the services  
25 rendered by Counsel was the filing of the motion to dismiss the  
26 debtors' case immediately following the January 6, 2009 hearing.  
27 This was done after the court ordered the case converted to

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1 Chapter 7, and after the court had denied Counsel's oral motion  
2 to dismiss the case.

3 The debtors' Chapter 13 case was pending for some ten months  
4 with little, if any, progress being made toward confirmation of a  
5 plan. The administration of the case suggests intentional delay,  
6 and a lack of good faith. These issues were squarely put in play  
7 in the objections to the Application, yet Counsel failed to  
8 address these issues by way of a reply, or otherwise. It is  
9 Counsel's burden to demonstrate the reasonableness of the fees  
10 sought, as well as the necessity of the services and the value to  
11 the debtors of the services rendered. In this case Counsel has  
12 failed to show that services rendered were reasonable, or that  
13 Counsel's services were necessary or that they provided benefit  
14 to the debtors.

15 Considering the totality of the circumstances, the court  
16 will allow fees of \$6,000 for the period of March 25, 2008  
17 through January 7, 2009. As this amount is 20% more than the  
18 "opt-in" fee for a standard business case, this award is  
19 generous. In addition, the court will allow costs of \$22.51 for  
20 a total award of \$6,022.51.

21 Counsel is authorized to pay the court allowed fees and  
22 costs of \$6,022.51 from its pre-petition retainer. The balance  
23 of the retainer shall be paid to the Chapter 7 trustee within 15  
24 days of entry of order.

25 A separate order will be entered consistent with this  
26 memorandum decision.

27 Dated: September 21, 2009

28 /s/  
Robert S. Bardwil  
United States Bankruptcy Judge