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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

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6 In re:) Case No. 02-93549-D-11L
7 DAVID ROBINETTE and)
MARGIE ROBINETTE,) Docket Control No. JTCN-3
8) Date: May 27, 2009
Debtors.) Time: 10:30 a.m.
9) Dept: D

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

12 MEMORANDUM DECISION

13 On April 24, 2009, the law firm of Neumiller & Beardslee, as
14 counsel for the Official Committee of Unsecured Creditors in this
15 case, filed its first interim application for attorney's fees and
16 costs, seeking approval of \$21,659.00 in fees and \$492.41 in
17 costs (\$22,151.41 in total) ("the Application"). For the reasons
18 set forth below, the Application will be granted in part.

19 I. Introduction

20 David and Margie Robinette ("the debtors") filed a voluntary
21 petition for relief under chapter 11 of the United States
22 Bankruptcy Code ("Code") on September 23, 2002.¹ Their chapter
23 11 plan ("the plan"), confirmed by order dated September 17,
24 2003, provided that the Class 3 general unsecured creditors were
25 to be paid in full on or before January 31, 2005. The debtors
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27 1. Unless otherwise indicated, all Code, chapter, section
28 and Rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-
1532, and to the Federal Rules of Bankruptcy Procedure, Rules
1001-9037.

1 failed to comply with this aspect of the plan. On November 21,
2 2008, coincidentally as the four-year anniversary of January 31,
3 2005 was approaching, the debtors filed a motion to approve the
4 sale of their remaining parcel of real property. The motion
5 stated that the net sale proceeds would be paid to creditors
6 according to the provisions of the plan.

7 In response to the motion, attorney James Nuss raised the
8 concern that the debtors might assert the four-year statute of
9 limitations as a bar to enforcement of the Class 3 claims, to the
10 extent those claims were not paid by January 31, 2009.^{2 3} As a
11 result, the Committee sought to employ Neumiller & Beardslee
12 ("Counsel") as its counsel, and the court approved the firm's
13 employment on January 7, 2009.

14 The Committee, through Counsel, then filed a motion to
15 interpret or correct certain provisions of the plan. The motion
16 was granted, and on February 2, 2009, the court issued an order
17 that, among other things, the plan requirements for payments to
18 general unsecured creditors are continuing, and that "a failure
19 of payment or default thereunder shall not commence the running
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22 2. Mr. Nuss had been a partner in the law firm that had
23 represented the Official Committee of Unsecured Creditors
24 ("Committee") earlier in the case. That firm has since been
dissolved, and Mr. Nuss is of counsel with the firm of Neumiller
& Beardslee, the applicant herein.

25 3. California Code of Civil Procedure § 337 provides that
26 the statute of limitations for an action on a written contract is
27 four years. The four-year period does not begin to run until the
28 cause of action accrues, which in turn, occurs when the
obligation is breached, in this case, January 31, 2005. Romano
v. Rockwell Internat., 14 Cal.4th 479, 488 (1996); Niles v. Louis
H. Rapoport & Sons, Inc. (1942) 53 Cal.App.2d 644, 651).

1 of a statute of limitations or otherwise result in relieving or
2 providing the reorganized debtors a defense from making the
3 payments thereunder."⁴

4 This is Counsel's first fee application. Both unsecured
5 creditor Stanislaus Farm Supply and the debtors have filed
6 limited opposition to the Application. In addition, the court
7 has an independent duty to review all requests for compensation
8 and to determine their reasonableness pursuant to § 328.

9 **II. Whether Counsel's Services Were Necessary**

10 Stanislaus Farm Supply and the debtors first object to the
11 Application on the ground that the services provided by Counsel
12 were unnecessary. In particular, they challenge the necessity of
13 the Committee's motion to interpret or correct the plan.

14 Assuming, without conceding, that the services were
15 unnecessary in hindsight, that is not the yardstick. Instead,
16 the court must determine whether, at the time, it was reasonable
17 for Counsel to provide the services in question. The plan,
18 drafted and submitted by the debtors, did not address the
19 consequences of the debtors' failure to timely pay the Class 3
20 creditors, except to say that upon breach, creditors would be
21 free to pursue their claims in state court. However, the plan
22 also provided that all assets and property of the debtors would
23 remain in the estate, and would continue to be protected by the
24 automatic stay until property was sold to a third person.

25 The latter provision casts doubt on the effectiveness of the
26 former, in that although creditors might be free to pursue their

27
28 4. Order Correcting and Reconciling Inconsistencies in the
Confirmed Plan of Reorganization, filed February 2, 2009.

1 claims after January 31, 2005, their ability to collect would
2 remain in doubt so long as the debtors' assets remained in the
3 estate. The plan said nothing about the effect of the statute of
4 limitations on the creditors' ability to pursue their claims.

5 This omission created an ambiguity within the plan. Where
6 a chapter 11 plan is ambiguous, the resulting uncertainty will
7 often make assistance of counsel reasonable. The court finds the
8 chapter 11 plan here was sufficiently ambiguous to make Counsel's
9 services reasonable at the time they were performed.

10 Equally important, on December 24, 2009, Counsel sought
11 written assurance from the debtors' attorney that California Code
12 of Civil Procedure § 337 would not be used as a bar to the
13 payment of unsecured creditors.⁵ The debtors' attorney failed to
14 provide such assurance, thus necessitating further action by the
15 Committee's counsel. Viewed in this light, Counsel's additional
16 services were reasonable and prudent at the time they were
17 undertaken.

18 The court notes that Stanislaus Farm Supply had apparently
19 already filed a lawsuit and obtained a judgment against the
20 debtors. Thus, it would not be concerned with the running of the
21 statute of limitations. For their part, the debtors implied, in
22 their response to the Committee's opposition to the proposed
23 sale, that they might very well rely on the statute of
24 limitations as a defense to payment. See debtors' response to
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26 5. Specifically, counsel asked the debtors' counsel to
27 include in a pending motion for sale of property an
28 acknowledgment of the debtors' debts to the unsecured creditors,
a waiver of the statute of limitations, and an agreement to pay
the unsecured creditors from the sale proceeds. See declaration
of James T.C. Nuss, filed January 14, 2009, DN 916.

1 Committee's opposition, filed January 16, 2009, DN 925, p. 3.
2 The limited opposition of both Stanislaus Farm Supply and the
3 debtors is somewhat ironic when viewed in this light.

4 **III. Reasonableness of Counsel's Fees**

5 Stanislaus Farm Supply and the debtors also object to the
6 reasonableness of the fees requested in the Application. Section
7 330 sets out the standards by which courts should determine the
8 reasonableness of fees under § 329. Reasonableness is determined
9 by considering the nature, extent, and value of the services
10 rendered (see In re Eliapo, 298 B.R. 392, 401 (9th Cir. BAP
11 2003)), taking account of all relevant factors, including the
12 time spent on the services, the rates charged for the services,
13 and the customary compensation of comparably skilled attorneys in
14 other cases. § 330(a)(3).

15 Applying these standards, the court finds that Counsel's
16 hourly rate is reasonable, the services rendered are of good
17 quality, and the services were skillfully performed. With that
18 said, the court does have some concern with certain aspects of
19 the Application, including the following: (1) in some instances
20 the Application lumps time entries, and (2) some of the time
21 charged is excessive.

22 **A. Lumping Multiple Time Entries**

23 There are several instances of lumping together multiple
24 time entries in the Application. By way of illustration, on
25 January 14, 2009, Counsel charged 5.3 hours for e-mails to three
26 individuals, a note to file, telephone conferences with three
27 individuals, preparation of a declaration, exhibits, and related
28 documents, and an e-mail to a fourth individual. Where "lumping"

1 occurs, as here, the court cannot properly assess whether the
2 time spent on each task was reasonable.

3 The practice of lumping appears elsewhere in the
4 Application:

- 5 1. On January 8, 2009, 1.4 hours;
- 6 2. On January 9, 2009, 3.0 hours;
- 7 3. On January 16, 2009, 1.0 hour;
- 8 4. On February 5, 2009, 2.6 hours.

9 The court cannot determine the reasonableness of the above
10 listed services, rendering them non-compensable. Accordingly,
11 the court will reduce the fee request by \$3,990.00.⁶

12 **B. Excessive Time Entries**

13 Additionally, there are instances where the amount of time
14 charged for a specific task appears excessive:

15 1. On January 11 and 12, 2009, JTCN billed more than 9
16 hours (9.4 hours) to prepare opposition to an amended motion to
17 sell real property, to prepare a request for judicial notice,
18 exhibits, and a declaration, to conduct legal research, to
19 finalize objections to the sale motion, and to prepare an e-mail
20 to committee members. After a review of these items, the court
21 finds charging over 9 hours for this work is excessive.
22 Therefore, the court will reduce these charges to 5 hours.

23 2. On January 20, 2009, JTCN billed 2.1 hours for
24 preparation for an opposition to an amended motion to sell real
25 property and 2.1 hours for preparation for a hearing on the
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27 6. The court will re-visit the issue of these fees in a
28 final fee application should Counsel set forth, with specificity,
the amount of time spent on each task.

1 motion to interpret or correct the plan. After a review of these
2 items, the court finds charging over 4 hours for this work is
3 excessive. Consequently, the court will reduce these charges to
4 a total of 2 hours.

5 Consistent with the above, the court will reduce the fee
6 request by an additional \$1,980.00.


7 Finally, on January 7, 2009, JTCN billed 0.2 hours to
8 "download court order for approval of employment." This is a
9 non-compensable secretarial task and thus must be subtracted from
10 the fee request.

11 In light of the above deductions, Counsel's request for fees
12 of \$21,659.00 will be reduced by \$6,030.00 (\$3,990 + \$1,980 +
13 \$60), and the court will allow fees of \$15,629 and costs of
14 \$492.41, for a total of \$16,121.41.

15 A separate order will be entered consistent with this
16 memorandum decision.

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Dated: June/9, 2009



ROBERT S. BARDWIL
United States Bankruptcy Judge

