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FILED
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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

In re:)	Case No. 15-23586-B-7
)	
DIANE KAY McCRAY,)	DC No. HCS-8
)	
)	
Debtor(s).)	

MEMORANDUM AND ORDER GRANTING IN PART AND DENYING IN PART
APPLICATION FOR COMPENSATION

Before the court is a first and final application for compensation and reimbursement of expenses filed by the attorney ("Counsel") employed by the chapter 7 trustee ("Trustee") to represent the estate in the above-captioned chapter 7 case and the related adversary proceeding identified below. The court authorized and approved Counsel's employment on June 18, 2015.

Counsel's application requests attorney's fees in the amount of \$113,209.88¹ and expenses in the amount of \$5,329.15 for total compensation of \$118,539.03. Counsel's request is governed by 11 U.S.C. § 330 and Federal Rule of Bankruptcy Procedure 2016.

A hearing on the § 330 fee application was held on September 19, 2017. Appearances were noted on the record. At the conclusion of that hearing the court stated findings of fact and conclusions of law on the record pursuant to Federal Rule of Civil Procedure 52(a) applicable by Federal Rules of Bankruptcy

¹The fee amount represents a 10% voluntary reduction by Counsel. The actual fee amount is \$125,788.75.

1 Procedure 7052 and 9014. This written order amends, supplements,
2 and clarifies the court's oral findings of fact and conclusions
3 of law. To the extent this written order conflicts with the
4 court's oral findings of fact and conclusions of law, this
5 written order controls.

6
7 **Introduction**

8 Starr's Building Supply, Inc., a creditor, and Diana McCray,
9 the debtor, objected to Counsel's \$ 330 fee application. Both
10 objections concern fees that were incurred, requested, and denied
11 with prejudice in the related adversary proceeding of Richards v.
12 Starr's Building Supply, Inc., Adv. 15-2184.² The Trustee
13 commenced that adversary proceeding with a complaint filed on
14 September 17, 2015. That adversary proceeding ended with a
15 memorandum decision and judgment entered after trial on August
16 22, 2016.

17 Starr's objects to Counsel's request for \$22,784.75 as the
18 fees that were incurred after it voluntarily released abstracts
19 of judgment recorded in four California counties and effectively
20 provided the Trustee with the relief sought in the adversary
21 proceeding. Starr's contends that its voluntary release of those
22 abstracts of judgment mooted all remaining claims and,
23 thereafter, rendered the adversary proceeding against it
24 unnecessary and of no benefit to the estate. Because that
25 adversary proceeding was unnecessary, Starr's also contends that

26
27 ²Facts below are taken from the memorandum decision entered
28 in the Starr's adversary proceeding. See Adv. No. 15-2184, Dkt.
69.

1 the fees after it voluntarily released all of its liens are not
2 reasonable. Starr's further notes that the fees incurred and
3 requested in the adversary proceeding were denied with prejudice.

4 The debtor objects to all fees incurred, requested, and
5 denied with prejudice in the Starr's adversary proceeding. The
6 debtor's objection is similar to Starr's objection except that
7 the debtor contends the entire adversary proceeding against
8 Starr's was unnecessary and resulted in no benefit to the estate.
9 The debtor further contends that the \$ 330 fee application fails
10 to comply with the court's local rules and the order approving
11 Counsel's employment.

12 The court initially sustained the debtor's objection and in
13 so doing overruled Starr's objection as moot. Upon further
14 consideration, the court amends that ruling as follows: (1) to
15 the extent the debtor objects to all the fees incurred,
16 requested, and denied with prejudice in the Starr's adversary
17 proceeding the objection is sustained up to \$59,677.30; and (2)
18 to the extent Starr's objects on the basis that the \$ 330 fee
19 application includes a request for the same fees incurred,
20 requested, and denied with prejudice in the Starr's adversary
21 proceeding the objection is sustained.

22 The amount of fees disallowed is also amended. At the
23 conclusion of the hearing on the \$ 330 fee application the court
24 stated that it intended to disallow \$59,827.30 in fees as the
25 amount of fees requested, incurred, and denied with prejudice in
26 the Starr's adversary proceeding. The court adjusts and reduces
27 that amount by \$150.00.

28 The memorandum decision and judgment entered in the Starr's

1 adversary proceeding denied fees only. See Adv. No. 15-2184,
2 Dkt. 69 at 13:18-23, 23:5-6 (memorandum decision); Adv. No. 15-
3 2184, Dkt. 70 at 2:2-3 (judgment). The fees requested in that
4 adversary proceeding were \$59,677.30 (\$40,825.55 as of June 6,
5 2016 [Pl. Ex. 63] + \$18,851.75 for the period from June 7, 2016,
6 through June 30, 2016 [Pl. Ex. 64]) and not \$59,827.30.
7 Therefore, the court will disallow \$59,677.30 and not \$59,827.30.
8 The court will also deduct that \$59,667.30 from Counsel's gross
9 fee request amount of \$125,788.75 rather than the \$113,209.88
10 discounted amount which includes Counsel's voluntary 10%
11 reduction. That results in a fee award of **\$66,111.45**
12 (\$125,788.75 - \$59,677.30) and an expense award of **\$5,329.15** for
13 total compensation of **\$71,440.60** (\$66,111.45 + \$5,329.15). The
14 reasons for this reduction are set forth below.

15 16 **Background**

17 Except for minor adjustments to Starr's proof of claim, the
18 court ruled against the Trustee and for Starr's on every other
19 claim for relief the Trustee alleged against Starr's in the
20 adversary proceeding. There was no timely motion to alter or
21 amend the memorandum decision or judgment entered in that action.
22 And neither the memorandum decision nor the judgment were
23 appealed. Both are now final.

24 The Trustee filed the complaint that initiated the Starr's
25 adversary proceeding after Starr's declined to sign documents
26 releasing a prepetition lis pendens and an abstract of judgment
27 recorded against the debtor's "River Road" property so that the
28 Trustee could sell that property to an interested buyer for

1 \$612,000.00 shortly after the petition was filed. The Trustee
2 accused Starr's of breaching an agreement to sign those documents
3 and preventing or interfering with the Trustee's sale of the
4 River Road property.

5 It is true that because Starr's declined to sign lien
6 release documents the Trustee was unable to sell the River Road
7 property to the original buyer for \$612,000.00 as initially
8 anticipated. However, the Trustee was able to obtain a state
9 court order expunging Starr's lis pendens on the River Road
10 property and almost immediately thereafter Starr's provided the
11 Trustee with a partial satisfaction of judgment applicable to
12 that property. Thereafter, in January 2016, the Trustee sold the
13 River Road property not to the original buyer for \$612,000.00 but
14 to an over-bidder for \$730,000.00. Starr's ultimately released
15 all remaining abstracts of judgment in early April 2016.

16 The Trustee requested \$59,677.30 in fees for services that
17 Counsel provided to the estate in the Starr's adversary
18 proceeding. During the hearing on the \$ 330 fee application the
19 Trustee stated those fees were requested for Counsel's benefit.
20 Those fees were requested on the basis that the Trustee prevailed
21 on \$ 547 avoidance claims alleged against Starr's. Those fees
22 were denied with prejudice and thereby disallowed on the basis
23 there was no statutory or contractual basis established to
24 support the request. There was no timely motion to alter or
25 amend the memorandum decision or judgment denying the fees with
26 prejudice. And there was no appeal from either.

27 The \$ 330 fee application now before the court includes a
28 request for the same fees that were incurred, requested, and

1 denied with prejudice in the Starr's adversary proceeding.
2 Counsel confirmed that in response to a direct question from the
3 court during the hearing on the § 330 fee application.
4 Nevertheless, Counsel argues those same fees may now be recovered
5 in the § 330 fee application for two reasons.

6 First, Counsel contends the legal theories of recovery
7 differ. Whereas in the Starr's adversary proceeding the fees
8 were requested on a prevailing party theory those same fees are
9 now (again) requested in the § 330 fee application on a necessary
10 and benefit to the estate theory. Second, Counsel also contends
11 that the parties requesting the fees differ. Whereas it was the
12 Trustee who requested fees in the adversary proceeding those same
13 fees are now (again) requested in the § 330 application by
14 Counsel. Neither argument is persuasive.

15 16 Jurisdiction

17 The court has jurisdiction. 28 U.S.C. §§ 157, 1334; General
18 Order No. 182 for the U.S. District Court for the Eastern
19 District of California. This is a core proceeding. 28 U.S.C. §
20 157(b)(2)(A). Venue is proper. 28 U.S.C. § 1409.

21 22 Applicable Legal Standard

23 An attorney employed by the bankruptcy estate is entitled to
24 reasonable compensation for "actual, necessary services" and
25 reimbursement for "actual, necessary expenses." 11 U.S.C. §
26 330(a)(1). The applicant bears the burden of proof. Hensley v.
27 Eckerhart, 461 U.S. 424, 437 (1983). In fixing the amount of a
28 reasonable fee, the court considers all relevant factors. See 11

1 U.S.C. § 330(a)(3)(A)-(F).

2 The customary method in the Ninth Circuit for ascertaining a
3 reasonable fee in a bankruptcy case is the lodestar method, which
4 is calculated by multiplying the number of hours reasonably
5 expended by a reasonable hourly rate for the person providing the
6 services. Law Offices of David A. Boone v. Derham-Burk (In re
7 Eliapo), 468 F.3d 592, 598 (9th Cir. 2006); The Margulies Law
8 Firm, APLC v. Placide (In re Placide), 459 B.R. 64, 73 (9th Cir.
9 BAP 2011). However, the lodestar method is not the exclusive
10 method or mandatory and a court may depart from it when
11 appropriate. Eliapo, 468 F.3d at 598-599; Unsecured Creditors'
12 Committee v. Puget Sound Plywood, Inc. (In re Puget Sound
13 Plywood), 924 F.2d 955, 960-961 (9th Cir. 1991); Placide, 459
14 B.R. at 73; In re South Dairy Farm, 2014 WL 271635, *2 (Bankr.
15 E.D. Cal. 2014). Departure from the lodestar method is
16 appropriate in several circumstances, such as when: (1) the fee
17 application or supporting billing records are inadequate,
18 Unsecured Creditors' Committee, 924 F.2d at 960-961; (2) the fee
19 sought is disproportionate to the potential benefit to the
20 estate, Leichty v. Neary (In re Strand), 375 F.3d 854 (9th Cir.
21 2004); (3) application of the lodestar method would not yield a
22 numerically precise fee award, Unsecured Creditors' Committee,
23 924 F.2d at 960; or (4) the professional has not exercised
24 prudent billing judgment, Hensley 461 U.S. at 434; In re
25 Parreira, 464 B.R. 410 (Bankr. E.D. Cal. 2012).

26 When departing from the lodestar method, the court
27 ultimately may "award compensation that is less than the amount
28 of compensation that is requested." 11 U.S.C. § 330(a)(2). In

1 fact, the court shall not allow compensation for "services that
2 were not- reasonably likely to benefit the debtor's estate," 11
3 U.S.C. § 330(a)(4)(A)(ii)(I), or "necessary to the administration
4 of the case." 11 U.S.C. § 330(a)(4)(A)(ii)(II).

5
6 **Discussion**

7 I. Reasonableness of the Fees Incurred, Requested, and Denied
8 With Prejudice in the Starr's Adversary Proceeding and Now
9 Again Requested in the § 330 Fee Application

10 The court finds it appropriate in this case to depart from
11 the lodestar method. Counsel acknowledges that the § 330 fee
12 application includes a request for the same fees that the court
13 previously denied with prejudice and thereby disallowed in the
14 Starr's adversary proceeding. Disallowed fees are not reasonable
15 fees. See Jensen v. U.S. Trustee (In re Abraham), 221 B.R. 782,
16 785 (10th Cir. BAP 1998). Therefore, the question for purposes
17 of the § 330 fee application is whether the same fees that were
18 denied with prejudice and thereby disallowed in the Starr's
19 adversary proceeding are now disallowed fees for purposes of the
20 § 330 fee application and as such not reasonable. Under the
21 facts and circumstances of this case, and the doctrine of res
22 judicata or claim preclusion, the court concludes they are.³

23 The doctrine of res judicata, or claim preclusion, "provides

24 ³Perhaps the outcome would be different had there been a
25 timely motion to alter or amend the memorandum decision and
26 judgment so that the fees incurred and requested in the Starr's
27 adversary proceeding were denied without prejudice. See In re
28 Bryce, 2013 WL 5676327, *3 (Bankr. W.D. Wa. 2013) (concluding
that fees incurred in adversary proceeding that were denied
without prejudice and could be later considered under § 330 in
the parent bankruptcy case).

1 that a final judgment on the merits bars further claims by
2 parties or their privies based on the same cause of action."
3 TahoeSierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency,
4 322 F.3d 1064, 1077 (9th Cir. 2003) (internal quotation marks,
5 citations, and italics omitted). "Res judicata is applicable
6 whenever there is (1) an identity of claims, (2) a final judgment
7 on the merits, and (3) privity between parties." Id. (internal
8 quotation marks omitted). The doctrine extends to "any claims
9 that were raised or *could have been raised* in a prior action."
10 Stewart v. U.S. Bancorp, 297 F.3d 953, 956 (9th Cir. 2002)
11 (emphasis in original, internal quotations omitted). "A
12 plaintiff need not bring every possible claim. But where claims
13 arise from the same factual circumstances, a plaintiff must bring
14 all related claims together or forfeit the opportunity to bring
15 any omitted claim in a subsequent proceeding." Turtle Island
16 Restoration Network v. U.S. Dep't of State, 673 F.3d 914, 918
17 (9th Cir. 2012).

18 There is an identity of claims. The Ninth Circuit looks to
19 four factors in determining whether claims in successive actions
20 are identical for res judicata purposes: (i) whether rights or
21 interests established in the prior judgment would be destroyed or
22 impaired by prosecution of the second action; (ii) whether
23 substantially the same evidence is presented in the two actions;
24 (iii) whether the two suits involve infringement of the same
25 right; and (iv) whether the two suits arise out of the same
26 transactional nucleus of facts. Turtle Island, 673 F.3d at
27 917-18 (internal quotation marks omitted). The fourth factor is
28 the most important and the Ninth Circuit has repeatedly described

1 it as "outcome determinative." ProShipLine Inc. v. Aspen
2 Infrastructures Ltd., 609 F.3d 960, 968 (9th Cir. 2010); Mpoyo v.
3 Litton Electro-Optical Sys., 430 F.3d 985, 988 (9th Cir. 2005).

4 The § 330 fee application includes a request for the same
5 fees that were incurred, requested, and denied with prejudice in
6 the Starr's adversary proceeding. Both fee requests arise out of
7 and are based on the same core facts in that both are identical
8 requests for compensation for services that Counsel provided the
9 estate in the Starr's adversary proceeding. It is true, as
10 Counsel argues, that the legal theories of recovery for the same
11 fees now requested in the § 330 fee application and previously
12 requested in the Starr's adversary proceeding differ. However,
13 it has long been recognized that merely changing the legal theory
14 does not make claims different particularly when, as here, the
15 two claims arise out of (and admittedly are based on) the same
16 nucleus of operative and underlying facts, *i.e.*, services that
17 Counsel provided to the estate in the Starr's adversary
18 proceeding. Costantini v. Trans World Airlines, 681 F.2d 1199,
19 1201 (9th Cir. 1982).

20 The other relevant factors also confirm the existence of an
21 identity of claims. The second proceeding, *i.e.*, the § 330 fee
22 application, and the first proceeding, *i.e.*, the Starr's adversary
23 proceeding, rely on the same evidence; namely, counsel's billing
24 records and testimony regarding the services that Counsel
25 provided the estate in the Starr's adversary proceeding.
26 Prosecution of the second proceeding, *i.e.*, the § 330 fee
27 application, also threatens to impair rights established in the
28 first proceeding, *i.e.*, the Starr's adversary proceeding, in that

1 awarding the same fees that were previously denied with prejudice
2 would undermine the finality of the memorandum decision and
3 judgment. Finally, the basis for the relief requested in the §
4 330 fee application and the Starr's adversary proceeding is the
5 same; namely, Counsel's services to the estate in the prosecution
6 of the Starr's adversary proceeding.

7 The second element is also satisfied. The memorandum
8 decision and judgment denying the fees incurred and requested in
9 the Starr's adversary proceeding with prejudice are final
10 adjudications disallowing those fees on the merits.

11 And the third element is satisfied. Privity between parties
12 exists when the parties in both actions are identical or
13 substantially identical, "that is, when there is sufficient
14 commonality of interest." Tahoe-Sierra, 322 F.3d at 1081
15 (internal quotation marks omitted). It is true, as Counsel
16 argues, that in the § 330 fee application it is Counsel who now
17 requests fees for the Starr's adversary proceeding and in the
18 Starr's adversary proceeding it was the Trustee who requested the
19 same fees for Counsel's services. However, that distinction is
20 not persuasive for two reasons. First, the Trustee and his
21 court-approved Counsel are in privity with one another. See
22 Jenkins v. Ollason (In re JNC Companies), 996 F.2d 1225, *3 (9th
23 Cir. 1993) (table). Second, there is a commonality of interest
24 between the Trustee and Counsel. Both represent the estate but,
25 beyond that, during the hearing on the § 330 fee application the
26 Trustee stated that the fees requested in the Starr's adversary
27 were requested for Counsel's benefit and that they would have
28 come into the estate only to be paid by the estate to Counsel.

1 In short, the \$ 330 fee application includes a request for
2 the same fees that were previously denied with prejudice and
3 thereby disallowed in a final memorandum decision and judgment
4 entered in the Starr's adversary proceeding. Under the doctrine
5 of res judicata or claim preclusion those fees are disallowed
6 fees for purposes of the \$ 330 fee application now before the
7 court. And as disallowed fees, the fees requested for services
8 that Counsel provided to the estate in the Starr's adversary
9 proceeding are not reasonable. Therefore, Counsel's request for
10 compensation will be reduced by \$59,677.30.

11 II. No Meaningful Benefit to the Estate From the Starr's
12 Adversary Proceeding

13 The court is not persuaded that the estate benefitted from
14 the Starr's adversary proceeding. The court is persuaded that it
15 was reasonably obvious from the outset of that litigation that
16 the Starr's adversary proceeding would not benefit the estate.
17 See In re Auto Parts Club, 211 B.R. 29, 35 (9th Cir. BAP 1997);
18 see also In re Coxeter, 2012 WL 7070198, *11-13 (Bankr. E.D. Cal.
19 2012).

20 The Starr's adversary proceeding was not necessary to
21 enforce any agreement between Starr's and the Trustee for the
22 release of Starr's liens on the River Road property so that the
23 Trustee could sell that property because, as the court concluded
24 in the memorandum decision entered in the Starr's adversary
25 proceeding, no such agreement existed in the first instance. The
26 Starr's adversary proceeding also was not necessary to expunge
27 Starr's lis pendens on the River Road property because the
28 Trustee was able to obtain a state court expungement order and

1 very shortly after that Starr's released any other lien on the
2 property.

3 Once the Starr's liens were removed from the River Road
4 property the Trustee proceeded with the sale of that property,
5 albeit a delayed sale. However, the delay did not harm or damage
6 the estate which means the Starr's adversary proceeding was not
7 necessary to remedy or recover for either. As the court also
8 explained in the memorandum decision entered in the Starr's
9 adversary proceeding, if anything, Starr's refusal to sign lien
10 release documents and the ensuing delay in the sale of the River
11 Road property benefitted the estate by \$118,000.00. As a result
12 of Starr's actions, the Trustee was able to sell the River Road
13 property for \$730,000.00 rather than for the \$612,000.00
14 originally contemplated.

15 Finally, Starr's ultimately released all of its remaining
16 abstracts of judgment in early April 2016. However, during the
17 period when the abstracts of judgment remained of record they did
18 not interfere with any sales of estate property because no sales
19 of estate property were pending or contemplated after January
20 2016 when the Trustee sold the River Road property and April 2016
21 when Starr's released all of its abstracts of judgment. In fact,
22 during that time the parties stipulated to continue deadlines and
23 trial because they were engaged in settlement discussions. Thus,
24 during the three-month period between the sale of the River Road
25 Property and Starr's release of all of its abstracts of judgment
26 the fact that the abstracts of judgment remained of record caused
27 no harm or damage to the estate. And, of course, once those
28 abstracts of judgment were released, the Starr's adversary

1 proceeding served no purpose whatsoever.

2 At best, the adversary proceeding resulted in a de minimis
3 reduction in the amount of Starr's proof of claim and a
4 reclassification of a portion of the claim in that proof of claim
5 from secured to unsecured. The former, however, could have been
6 achieved through the less-costly claims objection process and the
7 latter is a natural consequence of the release by Starr's of all
8 of its liens which means it would have occurred in any event.

9 In short, the services that Counsel provided the estate in
10 the adversary proceeding did not benefit the estate. Therefore,
11 on this alternative and independent basis, the court would
12 disallow at least \$59,677.30 of the fees in the \$ 330 fee
13 application requested for services that Counsel provided the
14 estate in the Starr's adversary proceeding.

15

16 **Conclusion**

17 For the foregoing reasons, the \$ 330 fee application is
18 **GRANTED IN PART AND DENIED IN PART** as follows:

- 19 (1) GRANTED, and attorney's fees in the amount of
20 \$66,111.45 (\$125,788.75 - \$59,677.30) and expenses
21 in the amount of \$5,329.15 are allowed for total
22 compensation allowed in the amount of \$71,440.60.
- 23 (2) DENIED, and attorney's fees in the amount of
24 \$59,677.30 are not allowed.

25

26 **Dated:** October 12, 2017

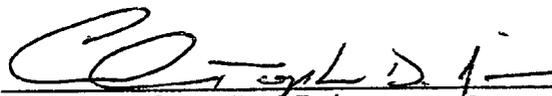
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Christopher D. Jaime, Judge
United States Bankruptcy Court

**INSTRUCTIONS TO CLERK OF COURT
SERVICE LIST**

The Clerk of Court is instructed to send the attached document, via the BNC, to the following parties:

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