

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA
FRESNO DIVISION

In re Case No. 12-17945
LeRoy Edward Green DCN: BCS-7
and Kristie Johnson Green
Debtors.

MEMORANDUM DECISION

1 Shein Law Group represented the Greens in a Chapter 13. Except
2 for a modestly difficult contested matter, the case is routine. Two
3 attorneys worked on the case. Some duplication of effort and
4 overstaffing occurred. In other instances, the fees requested are
5 disproportionate to the tasks performed. Chapter 13 attorneys are
6 entitled to reasonable compensation. Shein Law Group seeks fees of
7 \$21,494. Are the fees reasonable?

8 **FACTS**

9 LeRoy Edward Green is a semi-retired real estate broker; his
10 wife, Kristie Johnson Green is an escrow officer. The Greens own a
11 home, two timeshares, a 401(k) account, two vehicles, and other
12 ordinary types of personal property. Their income is above the
13 applicable median income for the State of California. Secured debts
14 include a loan secured by a deed of trust against their home and a car
15 debt. No priority debts were scheduled. Unsecured debts aggregate
16 almost \$102,000, including a \$9,000 loan from Mr. Green's employer,
17 Guarantee Real Estate Services.

18 The Greens filed an emergency Chapter 13 bankruptcy petition.
19 Shein Law Group, PC ("Shein") represents them. This case was the
20 Greens' second case within one year. Because the stay would have
21 terminated under 11 U.S.C. § 362(c)(3), the Greens moved to extend the
22 stay, which the court granted.

23 The Greens filed a plan on the same day that they filed the
24 petition. The Greens later amended their plan, which the court
25 confirmed.

26 The case involved a dispute over a stay violation that required
27 modest efforts to resolve. About six months after the order for
28 relief, Guarantee Real Estate withheld \$1,000 from Mr. Green's

1 paycheck to recover on their claim against the Greens, and it
2 threatened to continue to withhold amounts until the entire sum was
3 paid. The Greens brought a motion for sanctions to address the stay
4 violation. The dispute settled two months later, and Guarantee Real
5 Estate returned the \$1,000 it had obtained and agreed not to withhold
6 further amounts. But in the interim period before the dispute
7 settled, Shein performed services relating to the dispute that
8 resulted in \$10,477 in fees.

9 Shein has filed a First Interim Application for Compensation. In
10 the application, Shein requests that the court approve fees of \$21,494
11 and costs of \$1,099.76.

12 JURISDICTION

13 This court has jurisdiction. See 28 U.S.C. § 1334; 11 U.S.C. §
14 330(a); General Order No. 182 of the U.S. District Court for the
15 Eastern District of California. This is a core proceeding. See 28
16 U.S.C. § 157(b)(2)(A).

17 DISCUSSION

18 I. Standards for Reasonable Compensation under § 330

19 A debtor's attorney in a Chapter 13 case may be allowed
20 "reasonable compensation for actual, necessary services" and
21 "reimbursement for actual, necessary expenses." 11 U.S.C.
22 § 330(a)(1),(3)(A)-(F), (4)(B). The applicant bears the burden of
23 proof. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983); *In re Roderick*
24 *Timber Co.*, 185 B.R. 601, 606 (B.A.P. 9th Cir. 1995).

25 Unless the attorney agrees to accept a flat rate fee, the
26 customary method for ascertaining a reasonable fee for a debtor's
27 attorney in a Chapter 13 case is the lodestar, which requires
28 multiplying "the number of hours reasonably expended" by "a reasonable

1 hourly rate for the person providing the services." *Law Offices of*
2 *David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 598 (9th
3 Cir. 2006) (quoting *Hensley*, 461 U.S. at 433) (internal quotation
4 marks omitted). The number of hours billed must be well documented
5 and may not include: (1) non-compensable time, such as time spent on
6 administrative tasks or secretarial work billed at paralegal rates,
7 see *Missouri v. Jenkins*, 491 U.S. 274, 288 n.10 (1989); (2) time
8 resulting from "duplicative, unproductive, excessive, or otherwise
9 unnecessary" work, *In re Sullivan*, 454 B.R. 1, 4 (D. Mass. 2011);
10 accord 11 U.S.C. § 330(a)(4)(A); and (3) entries demonstrating that
11 the applicant has failed to exercise prudent billing judgment,
12 *Hensley*, 461 U.S. at 434, 437; *Unsecured Creditors' Comm. v. Puget*
13 *Sound Plywood, Inc.*, 924 F.2d 955, 958-59 (9th Cir. 1991).

14 While the lodestar is the primary method for determining fees, it
15 is neither the exclusive, nor mandatory, method for doing so. See
16 *Puget Sound Plywood*, 924 F.2d at 960-61. Departure from the lodestar
17 is appropriate where: (1) the fee application or supporting billing
18 records are inadequate or insufficiently detailed, *id.* at 960-61; (2)
19 the fee sought is disproportionate to the potential benefit to the
20 estate, see *Leichty v. Neary (In re Strand)*, 375 F.3d 854, 860-61 (9th
21 Cir. 2004); (3) the application of the lodestar would not yield a
22 numerically precise fee award, see *Puget Sound Plywood*, 924 F.2d at
23 960; or (4) the professional has not exercised prudent billing
24 judgment, see *Hensley*, 461 U.S. at 434, 437; *In re Parreira*, 464 B.R.
25 410, 417 (Bankr. E.D. Cal. 2012).

26 **II. Reasons for Departure from the Lodestar Method**

27 Shein's records reveal three primary problems. First, there has
28 been unnecessary duplication of effort. See 11 U.S.C. §

1 330(a)(4)(A)(i); *Hensley*, 461 U.S. at 434 (overstaffing). Shein had
2 two attorneys working on this Chapter 13 case, Benjamin C. Shein
3 ("Benjamin Shein") and Katy L. McCully. In some instances, both
4 attorneys duplicated services by attending or preparing for the same
5 hearing. For example, on April 11, 2013, the court held a scheduling
6 conference on the Greens' motion for sanctions. Only Benjamin Shein
7 appeared, but he and McCully each billed \$450 for the appearance. A
8 similar instance of double billing occurred in preparation for the
9 hearing on the motion for sanctions, in which Benjamin Shein and
10 McCully each billed \$337.50.

11 A more subtle version of the problem appears in the entries for
12 September 12, 2012. Shein billed \$337.50 for "Office conference with
13 Ms. McCully and [the Greens] to (1) review credit report; (2) review
14 client questionnaire and client documents; and (3) answer questions
15 related to payment of debts and the bankruptcy process." The same
16 day, McCully billed \$112.50 for "Review and organization of client
17 documents and client questionnaire in order to draft petition and
18 schedules." The use of two attorneys in a Chapter 13 case is not per
19 se impermissible. But total fees should not increase appreciably by
20 the use of more than one lawyer, unless the size or complexity of the
21 case is such that one lawyer could not reasonably be expected to
22 handle it. This is not such a case. And the court finds that the use
23 of two lawyers has, in fact, resulted in unnecessary duplication of
24 efforts and unnecessary fees.

25 Second, the applicant has not exercised prudent billing judgment.
26 Several examples illustrate this point. The applicant billed
27 \$1,227.50 for successfully prosecuting a routine motion to extend the
28 automatic stay. The motion and supporting documents ran approximately

1 34 pages in length. But the motion was unopposed, and Shein should
2 have anticipated the lack of opposition. Since the Chapter 13 plan
3 was filed prior to the motion to extend the stay and proposed a 100%
4 dividend to unsecured creditors, opposition was unlikely. Ordinarily,
5 motions to extend the stay are routine and uncomplicated.

6 Another example is helpful. Shein sought sanctions against
7 Guarantee Real Estate for violating the stay when it engaged in
8 postpetition collection activity. The dispute concerned \$1,000
9 actually withheld from Mr. Green's paycheck plus a threat of continued
10 wage deductions. This threat of continued wage deduction is less
11 serious than Shein perceived, given that the court would not dismiss a
12 Chapter 13 for plan defaults arising from stay violations. But before
13 the matter was resolved by settlement, Shein incurred fees of \$10,477
14 for services relating to the dispute. Fees associated with the
15 sanctions motion were excessive given the size of the dispute and
16 potential consequences to the client.

17 In part, these fees were higher than necessary because Shein
18 refused a professional courtesy and prepared for the initial hearing
19 to a greater extent than was warranted. The sanctions motion was
20 noticed for hearing on April 11, 2013. On April 3, 2013, counsel for
21 Guarantee Real Estate emailed Benjamin Shein and McCully requesting a
22 continuance because of a calendaring error he had made. Shein refused
23 the professional courtesy. *See Ahanchian v. Xenon Pictures, Inc.*, 624
24 F.3d 1253, 1263 (9th Cir. 2010) ("Where . . . there is no indication
25 of bad faith, prejudice, or undue delay, attorneys should not oppose
26 reasonable requests for extensions of time brought by their
27 adversaries."). And then, Shein spent \$2,812.50 preparing for and
28 attending the hearing, which resulted in an unnecessary expense to the

1 estate. 11 U.S.C. § 330(a)(4). The parties resolved the matter
2 before the next hearing. But because Shein took an inflexible
3 position regarding allowing the continuance, it prepared for an
4 unnecessary hearing. Under the circumstances, it was certain that the
5 court would not resolve the matter on the initial hearing date. See
6 *United States v. Ayres*, 166 F.3d 991, 9996 (9th Cir. 1999)
7 (discouraging contempt sanctions "on the papers" where issues are
8 controverted); see also Fed. R. Bankr. P. 9014(d) (requiring testimony
9 for "disputed material factual issues"); Fed. R. Civ. Proc. 60(b)
10 (permitting relief from an order based on mistake, inadvertence, or
11 excusable neglect), incorporated by Fed. R. Bankr. P. 9024. And even
12 if the matter had proceeded as scheduled, fees of \$2,812.50 for
13 preparing for and attending such a law and motion hearing is more than
14 what is reasonably necessary. Preparation for and attendance at this
15 one hearing accounts for 27% of the fees for the entire contested
16 matter (\$2,812.50 of \$10,477.00).

17 In addition, fees expended working on Chapter 13 plans were
18 excessive. The fees for this work were \$2,771.00. Debtors' original
19 plan provided for 60 payments of \$4,235.00. It treated two secured
20 claims, one inside and the other outside the plan. It provided a 100%
21 dividend to unsecured creditors. The Greens filed a modified plan
22 prior to confirmation that was identical to the original plan, except
23 that it added a lease to the plan. The modified plan was confirmed
24 without objection.

25 Third, secretarial work has been billed at paralegal rates. See
26 *Missouri*, 491 U.S. at 288 n.10. By way of illustration, on October 3,
27 2012, Anna B. Dusi, the paralegal, billed time for lodging an order
28 granting the motion to extend the stay. She also entered time on May

1 10, 2013 for preparing a proof of service for "amended Schedules I and
2 J for filing with the Court and serve [sic] on parties." The court
3 notes the existence of at least 24 such entries, totaling
4 approximately \$414.

5 Because of these problems, Shein has not sustained its burden
6 that the lodestar provides a reliable method for computing a
7 reasonable fee for debtor's counsel.

8 **III. An Alternative Approach to Establishing a Reasonable Fee for**
9 **Services Rendered**

10 Unable to apply the lodestar method, the court adopts an approach
11 that uses an across-the-board reduction as described in *In re Strand*,
12 375 F.3d at 857. The court considers several factors in making this
13 determination. The first factor is the size and complexity of the
14 case. *In re Wheeler*, 439 B.R. 107, 111 (Bankr. E.D. Mich. 2010)
15 (noting the complexity of the case as a proper factor for
16 consideration in Chapter 13 compensation motions). The Greens' case
17 presents a garden-variety Chapter 13 case. The stay violation was the
18 only non-routine matter in the case.

19 Second, the court considers the stage of the case in which the
20 application is filed. This application represents fees from the
21 commencement of the case through plan confirmation and the claims
22 review period.

23 Third, the court considers the level of acrimony between the
24 parties in the case. With the exception of the skirmish with
25 Guarantee Real Estate over the stay violation, the case was not
26 acrimonious. The stay violation was resolved within two months.

27 Fourth, the court considers the prevailing fees for other Chapter
28 13 cases. The Bankruptcy Court for the Eastern District of California

1 has already determined that \$4,000 for a nonbusiness Chapter 13 and
2 \$6,000 for a business Chapter 13 are amounts that are presumptively
3 reasonable. See LBR 2016-1(c)(1). The court also considers the opt-
4 out fees in other Chapter 13 cases of similar size, complexity, and
5 acrimony. Based on the court's experience with Chapter 13 cases, the
6 fees requested well exceed the usual opt-out fees of Chapter 13
7 practitioners in similar cases.

8 Fifth, to its credit, Shein has voluntarily reduced its fees 7.9
9 hours in connection with the contested matter involving Guarantee Real
10 Estate Services and .2 hours in connection with plan confirmation.

11 For the reasons discussed, the court will award Shein interim
12 compensation of two-thirds of the compensation requested, which
13 amounts to \$14,329.33, and all of the applicant's costs, which total
14 \$1,099.76. These amounts cover services rendered and expenses
15 incurred in the period from September 11, 2012, to May 13, 2013. To
16 the extent that the application seeks fees exceeding such amount, the
17 court finds that Shein has not carried its burden of proof that the
18 fees are reasonable. Future fee applications in this case should not
19 request compensation for preparing or confirming the Second Modified
20 Chapter 13 Plan, July 3, 2013, ECF No. 108, or the Second Interim
21 Application for Compensation, improperly designated First Interim
22 Application for Compensation, July 3, 2013, ECF No. 97, which the
23 court views as primarily benefitting Shein.

24 CONCLUSION

25 The application will be approved in part and disapproved in part
26 without prejudice. Fees of \$14,329.33 and costs of \$1,099.76 are
27 awarded on an interim basis. The remaining fees requested are
28 disallowed without prejudice. Prior to the close of the case, Shein

1 will make a final application for compensation, at which time the
2 court may adjust the award. The court will issue an order consistent
3 with the findings herein.

4 Dated: August 28, 2013 /S/

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Fredrick E. Clement
United States Bankruptcy Judge

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