UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

LOS ANGELES DIVISION

In re: Richard A Sorci Judy E Sorci Debtor(s).	Case No.: 2:16-bk-17461-NB CHAPTER 13 **MEMORANDUM DECISION GRANTING IN PART, DENYING IN PART APPLICATION FOR SUPPLEMENTAL FEES** Date: February 2, 2017 Time: 8:30 AM Courtroom: 1545

At the above-captioned time and place, this court held a hearing on the application of the debtors' attorney, Daniel Hayes Esq., for $9,625 in supplemental fees and $1,225.51 in expenses (with supporting documents, the "Fee Application," dkt. 88, 89, 92, 95, 96). Prior to that hearing, in addition to the Fee Application, this court considered the other filed documents and records in this case, including this court's own order provisionally allowing $3,000 in fees and expenses (dkt. 93), and the factors enumerated in 11 U.S.C. § 330 and decisions interpreting that section.

Among other things, because this court has acted on its own motion rather than at the request of any party in interest, this court recognizes that it must proceed

cautiously and must make detailed findings of fact regarding the various tasks and requested fees and expenses at issue. One other important lesson from the cases is that Mr. Hayes must exercise billing judgment. *See, e.g., In re Eliapo,* 468 F.3d 592, 598-602 & n.4 (9th Cir. 2006) (discussing supplemental fees generally; requiring opportunity for hearing if court intends to reduce fees materially; and noting that bankruptcy court must "proceed cautiously" when it reviews fees *sua sponte* and thereby "simulates the role of an adversary, albeit to a circumscribed degree") (citations, internal quotation marks, and footnote omitted); *Unsecured Creditors' Comm. V. Puget Sound Plywood, Inc.,* 924 F.2d 955, 957-61 (9th Cir. 1991) (applicant must exercise reasonable billing judgment, and bankruptcy court is not bound by "lodestar" method of calculating fees); *In re Auto Parts Club, Inc.,* 211 B.R. 29, 33-35 (9th Cir. BAP 1997) (court has independent obligation to review fees, and counsel must exercise billing judgment from objective perspective at time services were rendered; but vacating and remanding due to lack of sufficiently specific findings of fact).

After hearing the arguments and representations of Mr. Hayes and counsel for the Chapter 13 Trustee at the hearing, this court conducted further review of this matter, including re-reviewing the statute and the filed documents. The statute provides, in relevant part:

> **§ 330. Compensation of officers.**
> (a)
>
> (1) After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, a consumer privacy ombudsman appointed under section 332, an examiner, an ombudsman appointed under section 333, or a professional person employed under section 327 or 1103—
>
> (A) **reasonable compensation** for **actual, necessary services** rendered by the trustee, examiner, ombudsman, professional person, or attorney and by any paraprofessional person employed by any such person; and
> (B) reimbursement for **actual, necessary expenses**.
>
> (2) The court may, **on its own motion** or on the motion of the United States Trustee, the United States Trustee for the District or Region, the trustee for the estate, or any other party in interest, award compensation that is less than the amount of compensation that is requested.
>
> (3) In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall

> consider the nature, the extent, and the value of such services, taking into account all relevant factors, including—
>
> (A) the **time spent** on such services;
>
> (B) the **rates charged** for such services;
>
> (C) whether the services were **necessary** to the administration of, **or beneficial** at the time at which the service was rendered toward the completion of, a case under this title;
>
> (D) whether the services were performed within a reasonable amount of time **commensurate with the complexity, importance, and nature of the problem, issue, or task** addressed;
>
> (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.
>
> (4)
>
> (A) Except as provided in subparagraph (B), the court shall not allow compensation for—
>
> (i) **unnecessary duplication** of services; or
>
> (ii) services that were not—
>
> (I) **reasonably likely to benefit the debtor's estate**; or
>
> (II) **necessary to the administration of the case**.
>
> (B) In a chapter 12 or **chapter 13 case** in which the debtor is an individual, the court may allow reasonable compensation to the debtor's attorney for **representing the interests of the debtor** in connection with the bankruptcy case based on a consideration of the benefit and necessity of such services to the debtor and the other factors set forth in this section. [11 U.S.C. § 330(a)(1)-(4) (emphasis added)]

The services for which Mr. Hayes seeks compensation in his Fee Application fall into two groups: his work on five motions on local check-the-box forms objecting to creditors' judicial liens under 11 U.S.C. § 522(f) (dkt. 25, 26, 27, 28, 29) and his work in connection with two motions objecting to tax liens under 11 U.S.C. § 506 – one held by the Internal Revenue Service ("IRS") and the other held by the California Franchise Tax Board ("FTB") (dkt. 21, 22). Within those two categories the motions are substantially identical, and even as between those two categories there is little difference between the motions.

(1) <u>The judicial liens</u>

The avoidance of liens under 11 U.S.C. § 522(f) is simple, at least when applied to the facts of cases like this. The statute provides:

> **§ 522. Exemptions.**
> * * *
> (f)
> (1) Notwithstanding any waiver of exemptions but subject to paragraph (3), **the debtor may avoid the fixing of a lien** on an interest of the debtor in property **to the extent that such lien impairs an exemption** to which the debtor would have been entitled under subsection (b) of this section, if such lien is—
> (A) **a judicial lien**, other than a judicial lien that secures a debt of a kind that is specified in section 523(a)(5); or
> (B) a nonpossessory, nonpurchase-money security interest in any—
> (i) household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor;
> (ii) implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor; or
> (iii) professionally prescribed health aids for the debtor or a dependent of the debtor.
>
> (2)
> (A) For the purposes of this subsection, **a lien shall be considered to impair an exemption to the extent that the sum of—**
> **(i) the lien;**
> **(ii) all other liens on the property; and**
> **(iii) the amount of the exemption that the debtor could claim if there were no liens on the property;**
> **exceeds the value that the debtor's interest in the property would have in the absence of any liens.**
>
> (B) In the case of a property subject to more than 1 lien, a lien that has been avoided shall not be considered in making the calculation under subparagraph (A) with respect to other liens.
>
> (C) This paragraph shall not apply with respect to a judgment arising out of a mortgage foreclosure. [11 U.S.C. 522(f)(1)-(3) (emphasis added)]

In other words, a judicial lien can be avoided if the sum of (a) the subject lien, (b) all other liens on the property, and (c) the homestead exemption exceeds (d) the value of the property. *See, e.g., In re Higgins*, 201 B.R. 965, 967-69 (9th Cir. BAP, 1996) (quoting the statute and applying its simple formula); *In re Charnock,* 318 B.R. 720 (9th Cir. BAP 2004) (rejecting attempt to depart from simple statutory formula, and holding that, even if the judgment lien is senior to the consensual lien, the judgment lien can be avoided); *and compare, e.g., In re Meyer,* 373 B.R. 84 (9th Cir. BAP 2007) (addressing more complex situation when debtor is co-owner of property).

In this case, the statutory calculation is as simple as can be. The debt secured

by the first priority deed of trust ("DOT"), plus the homestead exemption, was enough to exceed the property's value. Therefore all judicial liens could be avoided. *See, e.g., Higgins,* 201 B.R. 965, 967-69; *Charnock,* 318 B.R. 720.

This court is not persuaded by Mr. Hayes' arguments that each motion required any complex recalculations (or, indeed, any recalculations at all) from one motion to the next. All that appears to have been needed by the statute was (a) evidence that the DOT did actually constitute a lien on the property (*e.g.,* a title report, or a copy of the real estate recorder's stamp on the DOT showing that it had been duly recorded, which could be a page or two), (b) evidence of the dollar amount owed under that deed of trust (*i.e.,* a mortgage statement showing the approximate debt as of the petition date, which would be another page or two), (c) a mathematical sum of that lien plus the (uncontroverted) statutory homestead exemption amount claimed in the debtor's bankruptcy schedule "C" (which could be a couple of lines in the form motion), and (d) a copy of the appraisal, showing a value less than that sum.

Once that evidence was assembled, very little work was required to fill out Local Form F 4003-2.1.AVOID.LIEN.RP.MOTION. The vast majority of bankruptcy practitioners who use that form attach only a very brief declaration authenticating the evidence of recording and lien amounts, and no memorandum of points and authorities because the analysis is so simple.

What Mr. Hayes attached to each motion was a five page declaration of the debtors (*e.g.,* dkt. 25 at PDF pp. 5-10) and a three page memorandum of points and authorities (*e.g.,* dkt. 25 at PDF pp. 12-14), but he has not shown that anything more than the typical brief declaration was necessary or reasonable. He has not explained why he was required to engage in any further analysis than the very simple calculation outlined above (DOT + homestead > value).

Alternatively, even supposing for the sake of discussion that Mr. Hayes had shown that he needed to make the calculation separately for each lien (which he has not shown), that calculation is still very simple. His own motion papers show that, even

using his more extensive summation of numerous liens, the analysis is still a simple addition of liens plus the homestead exemption, and then a comparison of that sum against the total value of the property – or, in the statutory phrase echoed in the motions, "the value that the debtor's interest in the property would have in the absence of any liens." 11 U.S.C. 522(f)(2)(A); *and, e.g.,* dkt. 25 at PDF p. 13.

The only complicating factor in these cases is that there were more liens than usual against the property. Although that does not change the legal analysis, it does mean that Mr. Hayes had more papers to retrieve and review, so he is justified in having spent slightly more time than typically would be required for those tasks.

Mr. Hayes has charged $1,225.00 for each of these five motions (dkt. 88, at PDF pp. 5-9). Although this court's prior order (dkt. 92) provisionally awarded only $750.00 for the first motion plus $500 for the rest, this court is now persuaded to award $1,225 for the first motion (because of the numerous liens to be reviewed, notwithstanding the very simple calculation to avoid all of the judicial liens) plus $1,000 for the other four substantially identical motions (which might have required substantial secretarial time for copying and mailing, but minimal attorney time given the simple and identical analysis). This results in a total of **$2,225** ($1,225 + $1,000 = $2,225) for Mr. Hayes' fees related to the five motions under section 522(f).

(2) <u>The tax liens</u>

The debtor's motions seeking to avoid tax liens under section 506 are, once again, check-the-box forms: Local Form F 4003-2.4.JR.LIEN.MOTION. *See* dkt. 21, 22. The attached evidence is substantially the same as the evidence for the section 522(f) motions.

By way of background, this court takes judicial notice of the usual practice of both the IRS and the FTB, in many cases before this court. These tax authorities tend to file provisional proofs of claim ("POCs") in relatively high dollar amounts when they have not yet received or reviewed tax returns. Once those things have occurred, they file amended proofs of claim or stipulations with adjusted dollar amounts (typically lower).

What happened in this case is consistent with that pattern.

(a) The IRS

According to the IRS' first POC, the debtors had not filed federal income tax returns for 2013, 2014, or 2015, and the IRS initially claimed a secured debt of over $176,000. *See* POC 1-1 at PDF pp. 2&4 (filed 6/10/16). Approximately one month later, after the filing of the missing federal tax returns for 2013 and 2014, the IRS filed its amended POC 1-2 with a reduced secured claim amount of $17,625. *See* POC 1-2, pp. 2 & 4 (filed 7/14/16).

Mr. Hayes has not shown that he did anything to cause that reduction; but that is not to say that his services lacked value. To the contrary, the record shows the value of his services in arguing that, whatever the dollar amount of the IRS claim, that claim should not be secured by a lien against the debtors' real property under section 506.

After the motion was prepared and served (which took 3.5 hours, per dkt. 88, at PDF p.3), Mr. Hayes negotiated with the IRS for a total of about 1.25 hours (dkt. 88, at PDF p.3), and then the IRS stipulated that its lien against the debtors' home will be avoided when and if the debtors complete their chapter 13 plan and receive their discharge. *See* dkt. 47, pp. 2:20-24 & 3:4-7 (stipulation). In other words, the motion was successful.[1]

In sum, Mr. Hayes has adequately established that he provided valuable services in connection with the motion to avoid the IRS' tax lien under section 506, and his

[1] It is true that the stipulation is not necessarily a clean "win" for the debtors or their bankruptcy estate. For one thing, the debtors stipulated that the IRS will continue to have a lien of $17,625 against their personal property, but this court does not presume that this has any negative effect on the value of Mr. Hayes' services because the debtors do not appear to have more than *de minimus* equity in any personal property. *See* dkt. 11 at PDF pp. 4-11 (bankruptcy schedule "A/B").

It is also true that, as to the lien against their real property, the debtors apparently stipulated to less than they were entitled to: they stipulated that any future avoidance of the IRS' liens would be conditioned on both the completion of all plan payments and receipt of a discharge; whereas the local practice and local form F4003-2.4.AVOID.JR.LIEN.ORDER contemplate that either one generally will be sufficient when a lien is entirely underwater (in fact, that is how debtors in "chapter 20" cases can "strip off" liens even though they are not eligible for a discharge). *In re Boukatch,* 533 B.R. 292 (9th Cir. BAP, 2015). Nevertheless, the whole point of a stipulation is that both sides usually give up some potential rights, so again this court does not presume that this has any negative effect on Mr. Hayes' fees.

For all of these reasons, the caveats in this footnote do not in any way reduce the value of Mr. Hayes' services in connection with the IRS liens.

subsequent negotiations with the IRS. He should receive reasonable compensation for those services.

(b) The FTB

A different analysis applies with respect to the FTB, although it begins with the same pattern. According to the FTB's first and second POCs, the debtors had not filed California income tax returns for 2010 through 2015, and therefore the FTB initially asserted a secured claim of over $41,000. *See* POC 4-1 & 4-2, at PDF pp. 3&5 (both filed 7/7/16). A month and a half later, after the missing returns had been filed, the FTB reduced its claim to $20,636.90. *See* POC 4-3, at PDF pp. 3&5 (filed 8/23/16). As with the IRS, Mr. Hayes has not established that he did anything to cause that reduction, so the question is whether there was value to whatever objections he did raise to the FTB's lien.

Mr. Hayes' motion to avoid the FTB's tax lien under section 506 is substantially identical to his motion to avoid the IRS' tax lien. But the math is different.

As pointed out by the FTB in its opposition papers (dkt. 34, pp. 2:11-14 and 6:17-7:6, filed 7/14/16), if the other liens that the debtors sought to avoid on the property were avoided (which they were), then under the debtors' own valuation they could not avoid $36,109.78 of the FTB's tax liens because that was the net equity in the property. Given that the FTB's total asserted claim was less than $42,000, the maximum benefit to the debtors or the bankruptcy estate was less than $6,000 (*i.e.,* $42,000 - $36,109.78).

In fact, as noted above, after the debtors filed their missing tax returns the FTB reduced its secured claim from over $41,000 to $20,636.90, all of which was a secured claim under the debtor's own analysis, so there was no benefit from the motion. *See* POC 4-3, at PDF pp. 3&5 (filed 8/23/16). On September 13, 2016, the debtors withdrew their motion objecting to the FTB's claim because it had been "made moot" (dkt. 71, p. 1:24-27) by the FTB's amended proof of claim.

True, the reasonableness of the services must be analyzed as of the time when

those services were rendered, rather than with "20/20 hindsight." But in the exercise of reasonable billing judgment Mr. Hayes should have realized that his own math made it unlikely that there would be much if any benefit from filing a motion to avoid the FTB's lien, so he should not have spent much if any time in preparing the motion.

It is also true that Mr. Hayes raised various other issues that he did not understand about the FTB's claim, in a letter to the FTB on July 20, 2016. Dkt. 95, Ex.A, at PDF pp. 12-13. But those issues appear to have been adequately addressed by the FTB's response on August 2, 2016, which concludes by stating that based on those issues the FTB "does not intend to file another amended proof of claim" (dkt. 95, Ex.A, p. 3 (PDF p.11)). In other words, although the FTB did later file a third amended POC, that third amendment does not appear to have been prompted by anything that Mr. Hayes did.

Perhaps Mr. Hayes' questions were still worth raising, even if they were not ultimately unsuccessful in reducing the FTB's lien, but the burden is on Mr. Hayes to show that and establish the value of his services, and there is little evidence in the record to show any such value.

Mr. Hayes' timesheets show only (a) a "lumped" entry (in violation of LBR 2016-1(a)(1)(E)(iii)) for one hour over the period from "7-20-16 through 8-4-16" for "Phone calls, text messages, letters to/from Charles Tsai Deputy Attorney General of the State of California <u>to negotiate Stipulation and Order [to continue the hearing</u> on the motion]" (emphasis added) and (b) a half hour entry on "7-20-16" to "Negotiate, Review, sign and email Stipulation and Order <u>to Continue Hearing</u> on Motion [there were two stipulated continuances of the hearing]." *See* dkt. 88 at PDF p. 4 (emphasis added). The second stipulation states that the FTB has agreed to continue the hearing "to enable the FTB to process the Debtors' recently filed tax returns" and consider any proposals by the Debtors and, "if necessary," amend its POC (which it did, mooting the debtor's motion, as noted above). *See* dkt. 55 (filed 7/22/16) *and* dkt. 61 p. 2:20-22 (filed 8/10/16).

In other words, most of Mr. Hayes' time appears to have been spent in preparing and arranging for a continuance of a motion that was at best questionable to bring in the first place. In addition, it is difficult to quantify any alleged value because the timesheets lump his tasks together.

This is not to say that Mr. Hayes' services in connection with the FTB had no value, or at least were not reasonably calculated to provide some value at the time they were rendered. But at most he has justified only a modest amount of time to prepare what is essentially a duplicate of the motion to avoid the IRS' tax lien, and then negotiate continuances of that motion while seeking the FTB's assistance in understanding its claim.

(c) Fees for services related to the IRS and FTB, and total fees

Mr. Hayes has charged fees of $1,750.00 for the motions to avoid the tax liens of the IRS and FTB under section 506, and related services (*see* dkt. 88 at PDF pp.3-4). Although this court's prior order (dkt. 92) provisionally awarded only $1,500.00 for services related to the first motion under section 506, plus $250 for the second, this court is now persuaded to award the full $1,750 for the first motion plus $1,000 for services related to the FTB's lien, for a total of $2,750 related to the tax liens.

Combined with the $2,225 awarded above for the five motions under section 522(f), the **total award for fees is $4,975**.

(3) Policy arguments

At the hearing Mr. Hayes argued that if he were not compensated in the dollar amounts that he seeks then he might be dissuaded from taking on this sort of work in the future. The undersigned Bankruptcy Judge is very much aware that consumer attorneys need to be adequately compensated for their work, and that the consumer bankruptcy practice is not easy. Nevertheless, the dollar amount requested by Mr. Hayes is substantially above the typical supplemental fee application presented to this court, and it is nowhere near adequately justified for the reasons set forth above. In fact, it would essentially penalize those counsel who are careful to exercise reasonable

billing judgment, and who file well prepared supplemental fee applications, to award higher fees to counsel who do not do those things.

Mr. Hayes also argued that counsel for the Chapter 13 Trustee has not objected to his fees, and to contrary made comments at the meeting of creditors (under 11 U.S.C. § 341(a)) and at the hearing on the Fee Application recognizing the amount of work that would be involved in addressing the numerous liens in this case. This court certainly values the views of the Chapter 13 Trustee and her counsel, particularly when the Chapter 13 Trustee is in a better situation to assess the services performed. But in this situation there is no showing that the Chapter 13 Trustee or her counsel had any occasion to review this matter in detail, or have any greater insights into this matter than this court, and if anything the situation is likely the opposite.

Mr. Hayes also notes that no creditor has objected to the Fee Application, and the debtors support it. As for creditors, there is too little at stake to expect them to raise any objections: the debtors' confirmed chapter 13 plan provides for only a 3% dividend. *See* dkt. 77, 85. As for the debtors, they have not been shown to have the legal expertise to assess the necessity and reasonableness of bankruptcy services. In addition, as a practical matter any fees are likely to come first out of the 3% dividend to general unsecured creditors; and debtors rarely want to antagonize their own counsel. It is for precisely these reasons that this court has an independent duty to review fee applications.

For the foregoing reasons, Mr. Hayes' policy arguments are unpersuasive.

(4) <u>Expenses</u>

The burden is on Mr. Hayes to justify his $1,225.51 in alleged expenses. That is a very substantial dollar amount for seven form motions with essentially identical exhibits.

It is true that Mr. Hayes had to make and serve multiple copies. Under Local Bankruptcy Rule ("LBR") 4003-2(c)(2) and (d), each lienholder had to be served not only with the motion affecting its own lien but also any motion affecting other liens, and the

motion papers had to include evidence of "the identity of any other holder of a lien encumbering the subject property and the amount due and owing on such lien." Although a reasonable interpretation of this LBR is that it only requires evidence of relevant lien priorities and amounts, this court will not reduce Mr. Hayes' allowable expenses for applying a very literal interpretation and providing evidence as to all liens. But that could have been done at much less expense.

According to his filed proofs of service, Mr. Hayes served the same 101 pages of exhibits to the judicial lien motions, and the same 95 pages of exhibits to the tax lien motions, dozens of times. He mailed duplicate copies to each address for each lienholder (21 addresses) for each motion (7 motions). *See, e.g.,* dkt. 21 at PDF pp. 15-20, and dkt. 25 at PDF pp. 15-17 (proofs of service of motions to 21 addresses).

Although Mr. Hayes apparently avoided some unnecessary duplication of exhibits being mailed to the same address, his bills still show a very substantial 4,821 pages copied at $0.20 per page, plus mailing costs. *See* dkt. 88, at PDF pp. 3-9 (charging for copying 459 pages for each of the five motions under § 522(f), for a subtotal of 2,295, plus 1263 pages for each of the two motions under § 506, for a subtotal of 2,526, resulting in a total of 4,821).

This was not an exercise of reasonable billing judgment. If Mr. Hayes truly believed that it was necessary to provide approximately 101 pages of exhibits for each motion (*see, e.g.,* dkt. 25 Ex. 1-15), he could have filed a single separate document containing all exhibits (entitled something like, "Exhibits to Lien Avoidance Motions") and then copied and served that document once on each lienholder, together with copies of each motion for a total of 2621 pages (101 pages of exhibits x 21 addresses = 2201, plus the motions themselves at approximately 20 pages x 21 = 420, equals 2621). Other alternatives (such replacing the entire DOT with just the first page, or replacing nearly all exhibits with a title report) could have reduced the copying and postage further.

That said, in a busy practice the number of copies and amount of postage can

mount up before counsel realizes what is going on. Taking all of the forgoing into account, this court concludes that it is appropriate to award **$1,000 in expenses** in this situation, with the caveat that in future this court will expect Mr. Hayes to exercise more careful judgment about incurring such large expenses.

(5) Conclusion

No additional fees may be charged for the supplemental papers filed on this matter, or for Mr. Hayes' appearance at the hearing on the Fee Application, because those things would not have been necessary if Mr. Hayes had been careful to exercise reasonable billing judgment, and had filed a supplemental Fee Application showing that reasonable billing judgment.

For the foregoing reasons, it is hereby

ORDERED that the Fee Application is granted to the extent of **$4,975 in fees**, and denied as to the remaining requested fees; and it is further

ORDERED that the Fee Application is granted to the extent of **$1,000 in expenses**, and denied as to the remaining requested expenses; and it is further

ORDERED that no fees are to be awarded for any supplemental papers filed on this matter, nor for Mr. Hayes' appearance at the hearing on the Fee Application; and it is finally

ORDERED that Mr. Hayes is directed within seven days of the entry of this memorandum decision on the docket to lodge a proposed order awarding fees and expenses as set forth above.

###

Date: April 24, 2017

Neil W. Bason
United States Bankruptcy Judge