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Baker Botts, LLP v. ASARCO, LLC: Supreme Court to Decide Whether § 330 Allows Compensation for Defense of Fee Applications

Brent R. Wilson[1]

"[I]n bankruptcy 'almost everyone loses something.'"[2] The United States Supreme Court will soon decide, in Baker Botts, LLP v. ASARCO, LLC, whether bankruptcy practitioners in the Ninth Circuit, and elsewhere, will lose their ability to be compensated for defense of their fee applications. The United States Court of Appeals for the Fifth Circuit decided below that compensation for a successful defense of a fee application is never allowed by § 330(a).[3] The Fifth Circuit's decision deepened an already-existing circuit split, siding with the Eleventh Circuit[4] on one side, and the Ninth Circuit[5] on the other. The Supreme Court should resolve the split by June 2015.

The facts of the case that places this important issue before the Justices are remarkable. ASARCO ("Debtor"), a copper mining, smelting, and refining company, filed for chapter 11 in 2005. Leading up to the filing, Debtor was in serious financial trouble. It had major cash flow issues, enormous environmental liabilities, tax issues, and labor problems, to name a few. Even in the face of such financial dire straits, two years before the filing, Debtor's parent company directed Debtor to transfer a controlling interest in a corporation to the parent company.

After the case was filed, Baker Botts, LLP, along with another firm, as counsel for Debtor, successfully prosecuted a fraudulent transfer action against Debtor's parent company for the prepetition transfer of Debtor's interest in the corporation and obtained a judgment for a staggering amount valued between $7 and $10 billion. The Fifth Circuit described the result as "the largest fraudulent transfer judgment in Chapter 11 history."[6] To paraphrase Forrest

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[1] Brent R. Wilson is the term law clerk for the Honorable Jim D. Pappas, U.S. Bankruptcy Court for the District of Idaho and Bankruptcy Appellate Panel for the Ninth Circuit. His three-year term with the Judge will conclude in July/August 2015. He may be reached at brent_wilson@id.uscourts.gov or wilson.brent.r@gmail.com. The views expressed in this article are solely those of the author.

[2] In re ASARCO, LLC, 751 F.3d 291, 300 (5th Cir. 2014), cert. granted sub nom., Baker Botts, LLP v. ASARCO, LLC, 135 S. Ct. 44 (2014) (quoting Grant v. George Schumann Tire & Battery Co., 908 F.2d 874 (11th Cir. 1990)).

[3] In re ASARCO, LLC, 751 F.3d at 299.

[4] See Grant v. George Schumann Tire & Battery Co., 908 F.2d 874, 883 (11th Cir. 1990).

[5] See Smith v. Edwards & Hale, Ltd. (In re Smith), 317 F.3d 918, 928 (9th Cir. 2002).

[6] In re ASARCO, LLC, 751 F.3d at 293.

Gump, after that; paying debts was easy.[7] The judgment compelled the parent company to fund Debtor's chapter 11 plan, and Debtor emerged from chapter 11, after 52 months in bankruptcy, having paid its creditors in full for all claims, totaling $3.56 billion. Moreover, approximately $70 million was refunded to Debtor. Upon the effective date of the plan, however, the parent company regained control of the reorganized ASARCO.

After the plan took effect, Baker Botts filed a final fee application seeking approval under § 330(a) of the $113 million in "core" fees and $6 million in expenses that the bankruptcy court had previously awarded on an interim basis. The law firm also sought a twenty percent enhancement (approximately $22 million) to the fee award for its exceptional performance.

Of course, obtaining a $7 to $10 billion judgment against a party tends to create ill will. The parent company, now in control of reorganized ASARCO, objected vociferously to the fee application. In Baker Bott's briefing to the Supreme Court the firm described the parent company's tactics in disputing the fee application as a "scorched-earth fee attack" that was "tremendously costly to Baker Botts." Indeed, Baker Botts incurred over $5.2 million in fees to defend its "core" fees and $2.8 million pursuing its enhancement requests.

After a six-day trial, the bankruptcy court issued an opinion that evaluated the law firm's fee applications under § 330 and overruled the parent company's objections to all of Baker Bott's "core" fees. The bankruptcy court also determined the firm should be given an enhancement of $4.1 million based upon the fraudulent transfer litigation success. In addition, the bankruptcy court found the firm was entitled to recover $5 million for fees incurred in litigating and defending the fee application.

On appeal to the district court, the parent company abandoned its objection to the "core" fee award but it did challenge the enhancement award and the fee award for defending the fee application. The district court affirmed.

Fifth Circuit Analysis: Adopting the Eleventh Circuit Approach

The district court's judgment was then appealed to the Fifth Circuit. The parent company challenged again both the fee enhancement and the fee allowance for defending the fee application. It did not challenge the amount granted to Baker Botts for the fees incurred in defending the fee application. The only issue before the Fifth Circuit, as to the fees incurred defending the fee application, was whether bankruptcy courts may ever award fees under § 330(a) for successfully defending a fee application. The Fifth Circuit reversed the award to Baker Botts for successfully defending its fee application. However, it affirmed the enhancement amount in favor of the firm.

The Fifth Circuit reasoned, in a section of the opinion labelled "Fees for Defense of Fees," that even though the parent company's tactics were burdensome on Baker Botts, § 330 "does not authorize compensation for the costs counsel or professionals bear to defend their fee applications."[8] To reach this conclusion, the Fifth Circuit began with the language of § 330: "Section 330(a)(3) instructs the court

[7] See FORREST GUMP (Paramount Pictures 1994) (Forrest described his initially unsuccessful efforts to break into the very competitive shrimping business in Bayou La Batre, Alabama to a couple of people on a bus bench, but he explained a hurricane wiped out all the other shrimping boats in the area soon thereafter, and he noted, "after that, shrimpin' [sic] was easy!").

[8] In re ASARCO, LLC, 751 F.3d at 299.

to consider 'all relevant factors' concerning the professional services rendered, 'including' 'whether their services were necessary for the administration of, or beneficial . . . toward the completion of the case . . . ,' and 'whether the compensation is reasonable' based on charges by comparable practitioners in non-bankruptcy cases. Section 330(a)(3)(C), (F). Compensation is not allowed for services that were not reasonably likely to benefit the debtor's estate or necessary to case administration. Section 330(a)(4)."[9] From these sections of § 330, the Fifth Circuit held: "Section 330 states twice, both in positive and negative terms . . . that professional services are compensable only if they are likely to benefit a debtor's estate or are necessary to case administration . . . . The primary beneficiary of a professional fee application . . . is the professional. While the debtor's estate or its administration must have benefitted from the services rendered, the debtor's estate, and therefore normally the creditors, bear the cost. This straightforward reading strongly suggests that fees for defense of a fee application are not compensable from the debtor's estate."[10] The Fifth Circuit then sided with the Eleventh Circuit case of Grant v. George Schumann Tire & Battery, Co., 908 F.2d 874 (11th Cir. 1990) and rejected the Ninth Circuit case of Smith v. Edwards & Hale, Ltd. (In re Smith), 317 F.3d 918 (9th Cir. 2002).

In its briefing to the Supreme Court, Baker Botts argued the Fifth Circuit analysis above, "focused exclusively on whether defending the fee application directly benefits the estate" rather than also considering the fact that § 330(a)(3)(C) also allows for fees to be paid if they are "necessary to [case] administration." Baker Botts also discounted the Fifth Circuit's reliance on the Eleventh Circuit case of Grant, decided in 1990, because, it pointed out, "Grant was decided under a materially different prior version of § 330(a) and, unlike here, [that case] involved meritorious objections to core fees." Baker Botts argued instead that the correct approach was adopted by the Ninth Circuit in In re Smith.

Ninth Circuit Analysis

As relevant to the fees issue, In re Smith involved an individual debtor who had retained counsel to represent him in his chapter 11 case. The debtor's plan was unsuccessful and his case was converted to chapter 7. The law firm that had represented the debtor in the chapter 11 case filed a fee application that was opposed by the debtor in the bankruptcy court. The law firm obtained the bankruptcy court's approval of its fees but the debtor appealed the bankruptcy court's order to the district court. The law firm successfully defended its fees and was granted additional fees it incurred in the process. The debtor then appealed the grant of the additional fees for defending the fee application to the district court, which affirmed. The Ninth Circuit also affirmed this decision after its review of § 330.

The Ninth Circuit noted that § 330(a) "does not mention compensation for other services associated with the preparation of fee applications, such as litigation in defense of fee applications. Section 330(a) does not, however, forbid compensation for those services as long as they meet all the requirements of the section."[11] In reaching this conclusion, the Ninth Circuit cited past precedent in the circuit that had held "[f]ailure to grant fees for successfully defending challenges to an authorized fee application would dilute fee awards, in

[9] Id. (emphasis in original).
[10] Id.
[11] Smith v. Edwards & Hale, Ltd. (In re Smith), 317 F.3d 918, 928 (9th Cir. 2002)

violation of section 330(a), and this would reduce the effective compensation of bankruptcy attorneys to levels below the compensation available to attorneys generally."[12] After reviewing other in-circuit precedent, the Ninth Circuit stated "to be compensated for the time and expense spent litigating a fee application, the fee applicant must demonstrate that the services for which compensation is sought satisfy the requirements of section 330(a)(4)(A) and that its case exemplifies a 'set of circumstances' where the time and expense incurred by the litigation is 'necessary' within the meaning of section 330(a)(1)."[13] In applying that rule, the Ninth Circuit held that the law firm had met its requirements and therefore affirmed the district court's affirmance of the bankruptcy court's order allowing the additional fees.

Conclusion

Will bankruptcy practitioners lose the ability to seek fees in defense of their fees and become the next victims to the Fifth Circuit's rule that "in bankruptcy almost everyone loses something?" By June 2015, we should have the Justices' thoughts on this important issue.

[12] Id.

[13] Id. (citing In re Nucorp Energy, Inc., 764 F.2d 655, 661 (9th Cir. 1985) (emphasis in original).

MAY A STANDING CHAPTER 13 TRUSTEE COLLECT AND KEEP HER 28 U.S.C. § 586(e)(2) PERCENTAGE FEE IN A CASE DISMISSEDPRIOR TO CONFIRMATION OF THE PLAN?

Jeffrey P. Kaufman[1]

There once was this Chapter 13 debtor that had a dispute with the Trustee regarding his calculation of disposable monthly income.[1] When the Court ruled against him, he opted to dismiss his case instead of paying the higher plan payment necessitated § 1325(b)(1)(B).[2] During the nine months his case was open, he paid into the plan $3,195. However, when the Trustee filed her Final Accounting, she only refunded to the debtor, $2,947.39 and kept the remaining $247.61 (7.75%) as her Trustee's percentage fee. She had not otherwise made any disbursements during the pendency of the case; the refund was the only one. Though the client opted not to pursue the issue, he wondered whether the Trustee was authorized to take her percentage fee in a case dismissed before the plan was confirmed.

To understand this issue, one must first begin with the statutes that are in play. In

§ 586(e), Congress imposed upon the Attorney General the duty to consult with the United States Trustee ("UST") and "fix" a maximum annual compensation and a percentage fee for standing trustees in Chapter 12 and 13 cases. § 586(e)(1)(A) & (B). The sub-section further provides how the percentage fee is to be collected: the standing trustee "shall collect such percentage fee *from all payments received by such individual under plans* in [the cases] for which such individual serves as standing trustee." § 586(e)(2) (*emphasis* added). Thus the place where Congress establishes and delineates the UST's duties and compensation, Chapter 39 of Title 28 of the US Code, is the same place where you will find the authority establishing a Chapter 13 standing trustee's right to her percentage fee and the funds from which her percentage fee shall be calculated.

However § 1326(a), which governs payments and disbursements associated with Chapter 13 cases, pertinently provides:

(1) Unless the court orders otherwise, the debtor shall commence making payments not later than 30 days after the date of the filing of the plan or the order for relief, whichever is earlier, in the amount—

(A) proposed by the plan to the trustee;

...

(2) A payment made under paragraph (1)(A) shall be retained by the trustee until confirmation or denial of confirmation. If a plan is confirmed, the trustee shall distribute any such payment in accordance with the plan as soon as is practicable. *If a plan is not confirmed, the trustee shall return any such payments not previously paid and not yet due and owing to creditors pursuant to paragraph (3) to the debtor, after deducting any unpaid claim allowed under section 503(b).*

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[1] Jeffrey P. Kaufman practices bankruptcy law in Boise, Idaho primarily representing debtors.

[1] All references to "Chapter 12" or "Chapter 13" refer to Title 11 of the United States Juridical Code.

[2] All references to "Section 586" or "§ 586," or any subsection thereof, refer to Title 28 of the United States Judicial Code. All other references to "Section" or "§" in this opinion refer to Title 11 of the United States Bankruptcy Code.

§ 1326(a) (*emphasis* added). Thus if the case is dismissed prior to the confirmation of the plan, then the trustee shall refund to the debtor the any funds she has received and not yet disbursed, or due and owed, to creditors pursuant to § 363, after deducting any unpaid claims allowed under § 503(b).

Section 503(b) provides for the allowance of administrative claims and allows as an administrative expense, the actual, necessary, costs and expenses of preserving the estate.[3] It also provides for compensation and reimbursement under § 330(a).[4] However, § 330(a) is subject to the limitations imposed by § 326, which provides that a "court may not allow compensation for services or reimbursement of expenses of the United States trustee or of a standing trustee appointed under [§ 586(b).]" *§ 326(b)*. Therefore a standing chapter 13 trustee's percentage fee is not a claim allowed under § 503(b).[5] As such, unless the Trustee has disbursed funds to creditors pursuant to § 363, or paid other claims allowed under § 503(b), the Trustee, according § 1326(a)(2), shall return the debtor's plan payments to the debtor without deducting her percentage fee.

To reconcile the two statutes, § 586(e)(2) provides the source from which the Chapter 13 trustee is to collect her percentage fees whereas § 1326(a) provides if and when said percentage fee may be irrevocably taken. This is the interpretation reached by two of the three courts that have recently published decisions on this precise issue.

Acevedo

The first case is *In re Acevedo*, 497 B.R. 112 (Bankr. D.N.M. 2013). Remarkably, this decision involved two cases, one from each of the two bankruptcy judges, heard *en banc*. The facts are straight forward and rather simple. The debtors filed chapter 13 cases and began making their payments to the Trustee in amounts proposed by their plans; one couple paid a total of $650 and the other couple paid $350 in total. *Id*. at 114. Each case was dismissed prior to confirmation of their respective plans. *Id*. at 115. The debtors argued that pursuant to § 1326(a)(2) they were entitled to a refund of all the funds paid to the Trustee. *Id*. The Trustee, however, argued "that § 586(e)(2) unambiguously requires her to deduct the trustee's percentage fee from all payments she receives from the debtors, whether or not a plan is confirmed, and to apply the funds received for the fee to pay the percentage fee." *Id*. at 116. The UST then argued that §1326(a)(2) required "the trustee to return to the debtor only those payments made to the trustee for distribution to creditors (less payment of administrative expenses), but not to require return of the trustee's percentage fee in unconfirmed cases." *Id.*

The Court began its discussion by interpreting § 1326(a). It held that under the plain language of § 1326(a)(1), the ordinary and natural meaning of the phrase "the amount proposed by the plan to the trustee" is whatever amount is paid to the Trustee under the plan, including both the trustee's percentage fee and the amount to be distributed to creditors. *Id*. at 119. That payments made under § 1326(a)(1)(A) necessarily include the amount for the trustee's fee. *Id*. It found support for this conclusion in an unpublished decision from the 10th Circuit, *In re BDT Farms, Inc.*, 21 F.3d 1019 (10th Cir. 1994), which addressed § 1326(a)'s Chapter 12 parallel section, §1226(a).

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[3] *§ 503(b)(1)(A)*.

[4] § 503(b)(2).

[5] This is not to say the Trustee is not entitled to seek the allowance of an administrative expense under §503(b)(1)(A) for the actual, necessary costs and expenses of preserving the estate. See *In re Barrera*, 1999 Bankr. LEXIS 2115, 1999 WL 33486717 (Case No. 98-02092). However to do so would require the Trustee to at a minimum to provide notice and opportunity for the Debtor to object. *Id* at note 2.

The Court further found support in §1326(b):

"Section 1326(b) requires the standing Chapter 13 trustee to pay the trustee's percentage fee 'before or at the time of each payment to creditors under the plan.' But the trustee may pay creditors only under a confirmed plan. [*See* § 1326(a)(2)]. Because the trustee will never pay creditors if no plan is confirmed, and § 1326(b) provides for payment of trustee fees before or the time the trustee pays creditors, it follows that, if confirmation never happens, § 1326(b) does not contemplate payment of the trustee's percentage fee."[6]

The Court also noted that this interpretation was consistent with the overall purpose of § 1326. That when the section was enacted in 1984, it seemed "very unlikely that Congress intended to require that debtors to only make partial payments, i.e. the payments for the benefit of creditors and not trustee's fees." *Id.* Lastly, the Court found its interpretation of §1326(a)(1)(A) was consistent with the structure of §1326 as a whole. That the proposed plan payments paid to the Trustee under §1326(a)(1)(A) include the trustee's percentage fees, "so the proposed amount matches what the trustee is required to pay out under §1326(b) and (c)."[7]

The Court then tackled § 586(e)(2) and found that it could be construed at least three different ways, each being plausible.[8] And when read in isolation, the "mandatory" construction made sense and supported the Trustee's position. However, such a construction creates conflict with §1326(a)(2) because it would require the Trustee to collect and retain her percentage fee in the face of §1326(a)(2)'s directive to the Trustee that if a plan is not confirmed she shall return to the debtor any payments she received pursuant to §1326(a)(1)(A).[9]

To avoid this conflict, the Court adopted the "collect and hold" construction, which it believed provided the most harmonious reading of the two statutes. *Id.* Under this approach, § 586(e)(2) "directs the trustee to collect and hold the percentage fees pending plan confirmation, while § 1326(a)(2) tells the trustee when and how to disburse payments after confirmation or denial of confirmation, including the trustee's percentage fee." *Id.* It rejected the UST's argument that §586(e)(2) that the term "collect" includes not only setting aside funds from payments received under plans for the trustee's fees but also paying those funds to the Trustee or the UST System Fund; such a construction would run afoul of §§1326(a)(1)(A) and 1326(a)(2).[10] *Id.*

The Court then compared § 1326 with its chapter 12 counter-part, § 1226, which provides:

(a) Payments and funds received by the trustee shall be retained by the trustee until confirmation or denial of confirmation of a plan. If a plan is confirmed, the trustee shall distribute any such payment in accordance with the plan. If a plan is not confirmed, the trustee shall return any such payments to the debtor, after deducting—

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[6] *In re Acevedo*, 497 B.R. at 120-21.

[7] *Id.* at 122.

[8] Such constructions were: Mandatory Construction (the subsection obligates the trustee to collect fees from received payments, regardless of confirmed plan); Collect and Hold Construction (the subsection obligates the trustee to collect fees, yet hold them until confirmation, then disbursed pursuant to §1326(a)(2) and 28 U.S.C. § 586(e)(2)); Responsibility and Source Construction (the subsection identifies the trustee as the party responsibility for collecting her percentage fee, and identifies the plan payments as the sole source for collection, but does not address when the should be collected or paid to the trustee.

[9] *Id.*

[10] The decision actually cites to § 1326(b)(2) instead of § 1326(a)(2). This appears to have been in error. When read in conjunction with the decision's next sentence: "As discussed above § 1326(b)(2) requires the trustee in unconfirmed cases to return to the debtor all funds received, including the trustee's fee, after payment of administrative expenses," it is believed that the Court meant to cite §1326(a)(2), not (b)(2), as (b)(2) doesn't address unconfirmed cases whatsoever.

(1) any unpaid claim allowed under section 503(b) of this title; and

(2) if a standing trustee is serving in the case, the percentage fee fixed for such standing trustee.

§ 1226(a). The Court noted that Congress specifically addressed the issue by allowing the standing Chapter 12 trustee to deduct her percentage fee in unconfirmed cases.

When Congress enacted § 1226(a), it also amended § 1326, leading the Court to conclude that Congress could have easily inserted a similar provision into § 1326(a). The fact that it did not supports an inference that Congress intended different treatment of trustee fees in Chapter 12 and 13 cases.[11]

The Court stood by this inference and stated it would be improper to read *§ 1226(a)(2)* into Chapter 13 or ignore the crucial difference between the two sections. *Id*. at 124.

Though the Court acknowledged that its interpretation of the two statutes is based on a "somewhat unnatural reading of the first sentence of § 586(e)(2). The only alternative is a substantially less natural reading of §1326(a)." *Id*. at 124. The Court thus concluded that the more natural reading of the two statutes is to construe § 586(e)(2) to identify the source from which Chapter 13 trustee's percentage fees are to be paid, as well as to instruct the Trustee to collect and hold the fees pending plan confirmation, and construe § 1326(a) to dictate the conditions and timing of the payment. *Id*.

Dickens

The second case is *In re Dickens*, 513 B.R. 906 (Bankr. E.D. Ark 2014). The facts in this case are not quite as simple as those in *Acevedo*: the Dickens made eight plan payments to the Trustee, totaling $21,900. *Id*. at 908. Of that, $9,000 went to two secured creditors for adequate protection payments and $477.26 to the Trustee as her percentage fee.[12] *Id*. Upon dismissal of their case, the Trustee only returned $11,770.55; she deducted $652.19 from the remaining undisbursed funds she received as her percentage fee.[13] *Id*. Shortly after the Trustee filed her final report, the debtors, relying on *In re Acevedo*, moved to disgorge her of the $652.19. Naturally the Trustee objected and the UST joined in the Trustee's objection. *Id*. at 909.

Similar to the UST's argument in *Acevedo*, the Trustee and UST in this case argued that § 586(e)(2) is "unambiguous and clearly authorizes standing trustees to be paid their percentage fees in all their cases, regardless of whether a plan has been confirmed." *Id*. at 910. Relying on the first sentence of § 586(e)(2), the UST argued "(1) 'plans' includes both confirmed and unconfirmed plans; (2) 'collect' means to 'obtain payment'; and (3) payment of the percentage fee is irrevocable and cannot be returned to the debtor." *Id*. at 910-11. The Court only took issue with the last part of the UST's argument and disagreed that to 'collect' a percentage fee under § 586(e)(2) is to obtain an irrevocable payment. *Id*. at 912.

Relying on Acevedo's posit of multiple ways to interpret the first sentence of § 586(e)(2), the Court found that the UST's definition of 'collect' was unsupported, at odds with the standing trustee's duty to pay into the UST Program fund any fees that put her over her § 586(e)(2)(A) cap, and makes § 1226 superfluous as § 586(e)(2) pertains to standing

[11] *In re Acevedo*, 497 B.R. at 123-24.

[12] Though the decision does say, it is presumed the adequate protection payments were made pursuant to §363.

[13] $21,900 - $9,000 - $477.26 = $12,422.74 - $11,770.55 = $652.19.

Chapter 12 trustees as well. On this last point it stated, "if the collection of the percentage fee upon receipt is irrevocable under § 586(e)(2), then § 1226(a)(2) would not need to specifically provide for the retention of the fee in Chapter 12 cases when the plan was not confirmation." *Id.* at 912.

The Court noted that a plain a natural reading of § 586(e)(2) leads to the basic conclusion that a standing trustee is entitled to collected a percentage fee from certain specified amounts; but is silent with regards to whether confirmation is a prerequisite, or the effects of a dismissal prior to confirmation. *Id.* Due to this silence, the Court concluded that § 586(e)(2) is ambiguous on this point and thus needs to be read in conjunction with § 1326(a), which governs payments and disbursements associated with Chapter 13 plans. *Id*.

As in *Acevedo*, the UST argued that because payment of the percentage fee is mandatory, and thus the debtor cannot 'propose' to pay something that is mandatory, the percentage fee is not an amount 'proposed by the plan' paid to the Trustee. The Court understood the UST's interpretation of 'proposed by the plan' to "only [include] that portion of the Debtors' payments to the standing trustee allocated for ultimate distribution to creditors, and does not include the fee portion." *Id.* at 913.

Following the lead from the Court in *In re Acevedo*, this Court also rejected the UST's argument based upon the ordinary and natural meaning of "the amount proposed by the plan to the trustee" phrase from § 1326(a)(1)(A). It further reasoned that "while the percentage fee is mandated by statute, the debtor 'proposes' the exact amount of the monthly payment upon filing her plan under *§* 1326(a)(1)(A). *Id*. at 913 (citing *In re Acevedo*, 497 B.R. at 120).

The UST additionally argued that public policy favored its interpretation because 1) it discourages debtors to file cases merely to obtain the benefits of the automatic stay, and 2) much of Chapter13 trustees' work is 'front-loaded' and done before a trustee will ever know if a plan is confirmed. Not surprisingly, the Court rejected, the former contention as unfounded "given the cost debtors must first bear to file bankruptcy and the current checks in place to prevent abuse of the bankruptcy system." *Id*. at 915 (referring to §§ 362(d)(1) and 1307(c)). The Court also dismissed the 'front-loaded' contention by noting that the Trustee's own administrator testified that the total amount of trustee percentage fees collected in 2012 cases that were dismissed prior to confirmation was $19,500, whereas the amount of fees collected on confirmed plans during the Trustee's last fiscal year was $2,672,000; that the percentage fees collected in cases that were dismissed prior to confirmation was insignificant compared to the total revenues.[14] *Id*. at 916.

Nardello

The third recent decision to be published on this issue is *Nardello v. Balboa (In re Nardello)*, 514 B.R. 105 (D.N.J. 2014), a decision issued ten days after *Dickens* by the district Court on appeal from the bankruptcy Court. While this too involved a Chapter 13 case that was dismissed prior to confirmation of the plan, there are significant differences in both the facts and the Court's analysis of the issue.

In this case, the debtor filed a Chapter 13 plan in which he proposed to pay the Trustee $360.80 for 60 months funded from his future wages and the sale of his yacht, valued at

[14] The percentage fee the Trustee took in cases dismissed prior confirmation amounted to a whopping 0.72% of the Trustee's gross receipts.

$225,000.[15] *Id*. at 106. However, before the plan was filed, the Supnicks filed a motion to sell the North Wildwood property, real estate in which both the Supnicks and the Debtor held a joint interest. *Id*. The Supnicks had originally proposed that the sale proceeds sit in escrow pending order from the Court, but the Trustee filed a limited objection requesting that she hold the proceeds of the sale pending order from the Court. *Id*. After the Trustee's objection was sustained, the real estate sale closed and the Trustee received the $147,076.57 sale proceeds; only to later disburse $18,375.00 to the real estate agent, $64,350.78 to the Supnicks for their one-half share of the net proceeds, and $19,500.00 to the Supnicks for the debtor's share of the mortgage on the property. *Id*. at 106-07.

The Court then granted debtor's motion to dismiss after his plan was denied confirmation. *Id*. at 107. His attorney then requested and was granted $4,546.78 in fees and costs. *Id*. Also, debtor's counsel was ordered to pay the Trustee $5,625.00, funds which remained from the real estate sale, and the Trustee was to pay such funds to the Supnick's attorney. *Id*. The Trustee then refunded to the debtors a total of $25,308.94. *Id*. Her final report stated $147,437.29 in total gross receipts, $25,308.94 was refunded to debtor thus yielding $122,128.35 as her net receipts. *Id*. The report contained four line-items accounting for the disposition of the $122,128.35:1) $4,546.78 for debtor's attorney fees; 2) $0.00 for Court costs; 3) $9,730.79 for Trustee's expenses (which represented the Trustee's 6.6% percentage fee on her total gross receipts); and 4) $107,850.78[16] for 'Other.' *Id*.

The debtor objected to Trustee taking her percentage fees and argued that § 1326(a) and (b) do not provide for a payment of the trustee's percentage fee when the case is dismissed prior to confirmation. *Id*. The bankruptcy Court held below that § 1326(a) was inapplicable "because the funds on which the trustee's percentage fee was based were not payments proposed by the plan." *Id*. That only § 586(e) applied and noted that Congress's the use of the plural, "plans," indicated its intent for the section to apply to all plans, not just confirmed plans. *Id*. Ultimately the bankruptcy Court concluded that "the trustee relied upon the Court orders to render service to the estate and should not be penalized now for performing those services which were necessitated by the debtor's actions and consensual Court orders in anticipation of a modified plan, which was to have been provided by the debtor." *Id*. at 108.

On appeal, the debtor argued that because his plan only provided for two sources of funding (future wages and yacht proceeds) the North Wildwood proceeds could not have been any payments under the plan for purposes of § 586(e)(2) and § 1326(b). *Id*. He emphasized that the "amounts distributed to the Supnicks for their share of the sale proceeds from the North Wildwood property could not constitute a payment received under the plan because they were not Debtor's property nor part of Debtor's earnings."

The Trustee countered that she was entitled to her percentage fee pursuant to § 586(e)(2) and that § 1326 did not prohibit collection of such fee in an unconfirmed case. The Trustee further contended that she was allowed to collect her percentage fee on all monies received in a Chapter 13 case, including amounts disbursed to non-creditors.

The district Court thus focused on two

[15] Shortly after his case was commenced, Wells Fargo, N.A. sought stay relief so it could auction off and sell the yacht, in which it held a security interest. The amount of lien is not disclosed in the decision.

[16] $107,850.78 (net proceeds) - $18,375.00 (RE agent) - $64,350.78 (Supnick's share) - $19,500 (Supnick's claim) - $5,625 (remaining sales proceeds) = $0.00.

issues: 1) under § 586, what amount is used to calculate the trustee's percentage fee, and 2) under §§ 586 and 1326, whether the Trustee may collect a percentage fee in a Chapter 13 case dismissed prior to confirmation.

With regards to the first issue, the Court began its analysis with *§ 586* and recognized that § 586(e)(2) provided that the Chapter 13 standing trustee "shall collect such percentage fee from all payments received by such individual under plans in [Chapter 13 cases] for which such individual serves as standing trustee." *Id*. at 110. In so noting, the Court found that § 586 is ambiguous "because it does not define 'all payments received under plans.' " *Id*. It noted that when read in conjunction with §§ 1325 and 1326, "it is unclear whether 'payments received' is coextensive with payments to creditors and whether it includes amounts to cover the percentage fee." *Id*. Ultimately, however, the Court concluded that "amounts received under plans refers to all monies received by the trustee, including the trustee's percentage fee." *Id*. at 111.

The Court further held that "the plain language of § 586 directs the standing trustee to collect a percentage fee based on 'all payments received' by the trustee and this language makes the percentage fee mandatory." *Id*. To reach this conclusion the stated:

> Such an interpretation is consistent with the 1986 amendments, which directed the fee to be collected from 'all payments received by the trustee under plans' as opposed to 'all payments under plans.' To give effect to this change, the Court must conclude that 'all payments received' is not synonymous with 'all payments under plans' and includes payments received by the standing trustee for the percentage fee.

Id. The Court concluded that § 586 "means what it says: the standing trustee's percentage fee is to be calculated based on all payments received by the trustee, including amounts intended to cover the trustee's percentage fee." *Id*. at 113.

With regards to the second issue, the Court noted that both § 586 and § 1326 are clear enough when read independently - but that ambiguity arises when read together. *Id*. The ambiguities noted by this Court was that § 586 was silent as to whether the percentage fee is mandatory in cases dismissed before confirmation and though § 1326 required the Trustee to return certain funds to the debtor after dismissal before confirmation, it did not address amounts for the percentage fee. *Id*.

In concluding that § 586 makes the percentage fee mandatory on all payments received, including cases dismissed before plan confirmation, the Court noted the percentage fee is clearly distinct from payments made to creditors and § 1326(a)(2) is "silent as to whether the trustee's percentage fee shall be returned when a plan is unconfirmed." *Id*. And because the percentage fee is separate and apart from payments to creditors, § 1326(a)(2) does not require that it be returned to the debtor. *Id*.

The Court rejected the debtor's argument that § 1326 controls the Trustee's compensation and that pursuant to § 1326(a)(2) the Trustee is not entitled to her percentage fee in unconfirmed cases. *Id*. at 115. The Court reasoned that § 1326 is simply inapplicable and that § 586 mandates payment of the percentage fee even in cased dismissed before confirmation. *Id*. The Court further found "the distinction between creditors and non-creditors to be irrelevant for purposes of § 586 because the statutory language is directed to 'all payments received' without regard to creditors or non-creditors. *Id*.

The Court reasoned that the Chapter 13 standing trustee percentage fee is best viewed as

a 'user fee." *Id*. at 114. "It is unlikely that Congress added § 1326(a) to require payments from Debtor prior to confirmation, but not to allow compensation to the standing trustee for services, particularly in circumstances, as here, where the standing trustee was required to hold certain funds." *Id*. The Court held that "the trustee relied upon the Court orders to render service to the estate, and should not be penalized now for performing those service which were necessitated by the debtor's actions and consensual Court orders in anticipation of a modified plan, which was to have been provided by the debtor." *Id*. at 116. Thus the Court permitted the Trustee to collect a percentage fee on all payments received regardless of the debtor's particular interest in the relevant property and regardless of whether a plan was confirmed.

Discussion

The conclusions reached in *Acevedo* and *Dickens* appear to be the more well-reasoned and persuasive decisions. Though the issue can get a little murky. Frankly, that is mainly due to the trustees' arguments that § 1326(a)(1)(A)'s "payments [...] in amount- proposed by the plan to the trustee" refers only to the trustee's net receipts, after the trustee siphons off her percentage fee upon receipt of the payments. Such a position would mean the payments received by a Chapter 13 trustee under plans in Chapter 13 cases, pursuant to § 586(e)(2), are MORE than the amount debtor proposes in the plan to pay the Trustee pursuant to § 1326(a)(1)(A). This approach to §§ 586 and 1326 was addressed at length by all three courts and rejected by all three.

Yet the *Nardello* Court still sided with the Trustee and allowed her to take a 6.6% percentage on the entirety of funds she received, even though the plan did not provide for her receipt of any of such funds. That Court opined that § 586(e)(2) is directed to 'all payments received' by the Trustee, not payments to creditors. However, such a statement ignores the rest of the sentence: "all payments received by [the trustee] under plans in [chapter 13 cases] for which the trustee is the standing trustee." *§ 586(e)(2)* (emphasis added). If the North Wildwood sale proceeds were not received under the plan (i.e., proposed by the debtor in the plan to be paid to the trustee), then such proceeds should not meet the definition of "all payments received by the trustee under plans in Chapter 13."

Adding to the frustration that the *Nardello* decision begets is the district Court's finding of an ambiguity in § 1326(a)(2) because it does not address amounts for the percentage fee. Section 1326(a)(2) provides: "A payment made under paragraph (1)(A) shall be retained by the trustee until confirmation [...]. If a plan is not confirmed, the trustee shall return *any such payments* not previously paid and not yet due and owing to creditors pursuant to paragraph (3) to the debtor, after deducting [allowed § 503(b) claims]." It is difficult to comprehend how this creates an ambiguity. If the 'amount proposed by the plan to the trustee' (§ 1326(a)(1)(A)) includes whatever 'amount will be paid to the trustee under the plan' (§ 586(e)(2)) then § 1326(a)(2) has to apply to the percentage fee held by the Trustee. It is very clear § 1326(a)(2) specifies that *any such payments* includes ALL payments the debtor made under § 1326(a)(1)(A) unless said amount have been paid to a creditor under § 363 or for a claim allowed under § 503(b).

It is clear that the *Nardello* Trustee acted on her own accord when she sought to hold the sale proceeds for the preservation of the estate. And the *Nardello* Court did not want to penalize her for her services to the estate. So without

regard to the benefit her services bestowed on the estate, or her actual and necessary costs and expenses she incurred when providing such services, the Court allowed her to take her 6.6% percentage fee, a windfall of $9,730.79. By doing so, the Court failed to heed to § 326's prohibition on allowing standing Chapter 13 trustees compensation under § 330(a). A proper alternative would have been to offer the Trustee an opportunity to seek allowance of an administrative expense claim under § 503(b)(1)(A) for her actual, necessary costs and expenses of preserving the estate.

But what does this all mean? Well in the case referred to at the very beginning of this article, the Trustee retained $247.61. Was she entitled to do so? According to the Courts in *Acevedo* or *Dickens*, not likely. Some might think the resolution of this issue in favor of debtors will provide some financial incentive for a standing Chapter 13 trustee to reduce or ease its opposition to confirmation. However, given the numbers in cited in *Dickens*, it may really only have a *de minimis* impact. If the funds retained by the Trustee are relatively small, then it may not likely be worth any client's money to fight the issue, unless it's done *pro bono*. Or maybe an attorney might be able to get some help from the NACBA to fight this good fight.

Attorneys, however, should not fret. Recall § 1326(a)(2) provides that the Trustee is allowed to pay claims allowed under § 503(b). Well, § 503(b)(2) provides for compensation and reimbursement awarded under § 330(a). And § 330(a)(4)(B) allows for reasonable compensation to a debtor's attorney. Thus, according to § 507(a)(2), administrative expenses allowed under § 503(b) (i.e., attorney fees approved under § 330(a)(4)(B)) are priority second only to domestic support obligations.[17]

As such, an attorney seeking fees in a case dismissed pre-confirmation might seek to have his fees paid before the Trustee can take her percentage fee, if the Trustee is allowed to take her percentage fee in a dismissed case at all.

[17] Also, §1326(b) provides that claims allowed under §507(a)(2) shall be paid before the trustee's §586(e)(2) percentage fee.

COMPENSATION OF DEBTOR'S COUNSEL IN CHAPTER 13

Randal J. French[1]

Chapter 13 cases are becoming more challenging, and more time and litigation intensive, to prosecute to a successful conclusion. Chapter 13 allows debtor's counsel to be paid through the chapter 13 plan for services rendered. In this article, I will identify the rules and code sections which address compensation and provide copies of the Model Retention Agreement and of two forms of application and affidavit of attorney fees used in the district. I want to thank Sarah Bratton, a partner in Martelle, Bratton and Associates, P.A., for providing a form for a fee application that she uses, and which Chapter 13 Trustee Kathleen McCallister has identified as one of the better forms that she has seen.

Compensation of debtor's counsel in chapter 13 is governed by 11 U.S.C. § 330(a)(4)(B). It states:

> 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.

The "other factors set forth in this section" include the factors identified in sec. 330(a)(3):

> (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.

[1] Randal French has practiced bankruptcy law in Boise, Idaho representing both debtors and creditors, since 1986. He is currently chair of the Commercial Law & Bankruptcy Section. He is always willing to discuss bankruptcy issues with other practitioners.

Section 330(a)(4)(A) also adds some gloss:

> 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.

Arguably, because subsection (B) is an exception to (A), debtor's counsel in chapter 13 can be compensated for either unnecessary duplication of services, or for services that were not either reasonably likely to benefit the debtor's estate or not necessary to the administration of the estate. The exception might best be viewed in the context that §330(a)(3) explicitly applies to chapter 11 cases, in which the debtor acts as the trustee of the estate, has certain fiduciary duties to the estate and likewise debtor's counsel has duties to the estate which may override duties owed to a chapter 11 debtor. In chapter 11, services must benefit the estate and be necessary to the administration of the estate. In chapter 13, counsel may be compensated for services that benefit the debtor, even if they do not benefit the estate.

Section 330(a)(1) empowers the court to award compensation. Section 330(a)(4)(B) makes that section applicable to debtor's counsel in chapter 13, who are not otherwise among the persons identified as entitled to compensation in section 330(a)(1).

The alternatives for compensation are the Model Retention Agreement, a flat fee arrangement, and on an hourly basis, using an application for compensation and an affidavit of attorney fees and costs incurred.

I. Model Retention Agreement

Bankruptcy Local Rule 2016.1 allows counsel to use a "presumptive fee" established by the bankruptcy court as a flat fee to be paid without court review of the time expended in a chapter13 case. By General Order no. 291, the fixed fee is $3,500.00 for cases filed after January 1, 2015. Counsel must enter into a Model Retention Agreement ("MRA"), which is found on the Court's website as Appendix II to the Local Bankruptcy Rules. See MRA, ~ I(B), II(B). Each of these paragraphs lists the services that are typically rendered in a chapter 13, in a total of 21 subparagraphs, and concludes with the catch-all "provide any other legal services necessary for the administration of this case before the bankruptcy court." Counsel using the MRA "is responsible for representing the debtor on all matters arising in the case, unless otherwise ordered by the court."

The MRA covers all services rendered during the chapter 13, and all costs exclusive of court filing fees. While the fee is "presumptively reasonable," subsection (b)(1) of that rule provides:

> Inasmuch as such fee's reasonableness is presumptive only, the court may, in its discretion or upon request of the debtor, the chapter 13 trustee, the U.S. Trustee, a creditor or party in interest, conduct a hearing to consider the reasonableness of such fee under all the facts and circumstances of the case. The court may, as a result of such hearing, reduce or modify such fee.

If the Court does review and reduce the presumptively reasonable fee, that usually occurs within a short time after confirmation.

If counsel has not kept records of time actually expended and services rendered in sufficient detail, counsel may be unable to demonstrate the reasonableness of the presumptive fee or any fee. Nor can any person accurately forecast litigation that may occur at any point up to the conclusion of the chapter 13 case. If the Court happens to guess wrong on the reasonableness of the fee, counsel may be left to represent a client for compensation well below a reasonable fee, based upon time expended or any other analysis.

Local Rule 2016.1(d) provides the illusion of an escape hatch. It says:

> In extraordinary circumstances, an attorney receiving presumptive compensation under this rule may seek additional fees through an application for allowance of additional compensation and, if necessary, a motion to modify a confirmed plan. Such an application shall be set for a hearing upon notice to the debtor(s), the chapter 13 trustee, the U.S. Trustee, and all creditors and parties in interest. Such an application shall be accompanied by an affidavit justifying the request and including an itemization of all services rendered by the attorney, from the initiation of representation of the debtor(s) through the date of application, supporting the total amount of compensation sought. This affidavit shall be filed with the court and served on the debtor(s), the chapter 13 trustee, and the U.S. Trustee.

In practice, the courts have interpreted "extraordinary circumstances" to mean services rendered during a chapter 13 bankruptcy that are clearly not within the 21 subparagraphs of the MRA, ¶ I(B) and II(B). In *In re Kopel,* slip opinion issued October 13, 2005, in Case no. No. 05-00732, Judge Pappas allowed an additional $1,500 beyond the presumptive fee in attorney fees, for services the court characterized as "'extraordinary' because they involved matters beyond those that are normal and customary, and are not of the kind that a debtor's attorney should expect to provide in a typical Chapter 13 case. [Footnote omitted.]" Debtor's counsel "negotiat[ed] with creditors concerning the sale of Debtors' businesses and associated assets, and his efforts in Debtors' attempts to confirm a Chapter 13 plan involving the sale of those businesses to satisfy creditors' claims. [Footnote omitted.]."

The current MRA, ¶ II(B) includes as services that would be covered by the presumptive fee, provide knowledgeable legal representation of the debtor ... at any motion hearing, plan confirmation hearing, and/or plan modification hearing," ¶(3), and "prepare, file and serve necessary motions to buy or sell property and to incur debt." ¶ (10). The Court did not address whether the MRA in effect at that time included these requirements as part of the services that were to be rendered, and if so, why these services went beyond what was included in the services covered by the presumptive fee.

A concern with using the MRA is that a recalcitrant debtor or an aggressive trustee may cause a significant increase in time to be expended. The MRA requires representation under any circumstances, until the conclusion of the case, without regard to whether the fee is, ultimately, reasonable in light of the actual time and services rendered.

II. Compensation Based upon Services Rendered, Time Expended and Costs Incurred

Bankruptcy Rule 2016(a) applies to an application for compensation based upon time expended, services rendered and costs incurred. It provides in part "An entity seeking interim or final compensation for services, or reimbursement of necessary expenses, from the

estate shall file an application setting forth a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested."

The services must be sufficiently descriptive so that the Court need not speculate as to what services Counsel provided and why the services were necessary. *E.g. Kopet, supra, at p. 11.* Lumping services together can also draw scrutiny to an application. The Amended Affidavit of Sarah B. Bratton with the attached Description of Services demonstrates a format that Ms. Bratton has used successfully to comply with the requirements of disclosure. Using a table for the Description of Services allows the use the functions available in a word processing software to automatically calculate the total hours expended and amount charged for services.

An applicant must give at least 21 days' notice of an application for compensation. BR 2002(a). That notice must go to the debtor, the trustee, all creditors and indenture trustees. *Id* BR 2002 is applicable to "(6) a hearing on any entity's request for compensation or reimbursement of expenses ifthe request exceeds $1,000; ... " The Rules allow negative noticing for fee applications. Bankruptcy Local Rule 2002.2(d).

Ms. Bratton includes in the plan a stated amount for attorney fees. For instance, in one of her plans, she provided:

> Fees and costs to the Debtor(s)' attorney in an amount to be proven and allowed by the court but not to exceed $5,000.00, payable in equal monthly installments payable in equal monthly installments over the initial twelve (12) months of distribution. This is in addition to the fee retainer paid pre-petition ($1,815.00) and any sums allowed in any previous order(s).

It appears that including an amount for fees and costs in a plan that is served on all interested parties satisfies the requirement of filing and giving notice of an application for compensation, and leaves only the need to file an affidavit of fees and description of services. *E.g. In re Gray,* Case no. 14-01112-JDP. Use of this approach does require diligent and timely record-keeping and the additional time of preparing an application for compensation and attending hearings on that application. **I**t also encourages scrutiny of the application by interested parties and the court. However, it may also better insure that counsel is compensated for the time and effort actually expended in a case, and neither overcompensated nor undercompensated for services rendered.

Conclusion

Each of the approaches to compensation has advantages and disadvantages. Once the MRA is used, counsel may not withdraw from that arrangement. Given the uncertainty inherent in any chapter 13 case, careful consideration of the potential difficulties in the case, before entering into a fee agreement, is critical.

APPENDIX II

MODEL RETENTION AGREEMENT

Rights and responsibilities agreement between
Chapter 13 Debtors and their Attorneys

United States Bankruptcy Court
District of Idaho

Chapter 13 gives debtors important rights, such as the right to keep property that could otherwise be lost through repossession or foreclosure – but Chapter 13 also puts burdens on debtors, such as the burden of making complete and truthful disclosures of their financial situation. It is important for debtors who file a Chapter 13 bankruptcy case to understand their rights and responsibilities in bankruptcy. In this connection, the advice of an attorney is crucial. Debtors are entitled to expect certain services will be performed by their attorneys, but debtors also have responsibilities to their attorneys. In order to assure that debtors and their attorneys understand their rights and responsibilities in the Chapter 13 process, the Bankruptcy Court for the District of Idaho has approved the following agreement, setting out the rights and responsibilities of both debtors in Chapter 13 and their attorneys. By signing this agreement, debtors and their attorney accept these responsibilities.

I. BEFORE THE CASE IS FILED

A. THE DEBTOR AGREES TO:

1. Discuss with the attorney the debtor's objectives in filing the case.

2. Provide the attorney with full, accurate and timely information, financial and otherwise, including properly documented proof of income.

B. THE ATTORNEY AGREES TO:

1. Personally counsel the debtor regarding the advisability of filing either a Chapter 13 or a Chapter 7 case, discuss both procedures (as well as non-bankruptcy options) with the debtor, and answer the debtor's questions.

2. Personally explain to the debtor that the attorney is being engaged to represent the debtor on all matters arising in this case, as required by Local Bankruptcy Rule and explain how and when the attorney's fees and the trustee's fees are determined and paid.

3. Review with the debtor and sign the completed petition, plan, statements, and schedules, as well as all amendments thereto, whether filed with the petition or later.

4. Timely prepare and file the debtor's petition, plan, statements, and schedules.

5. Explain to the debtor how, when, and where to make all necessary payments,

including both payments that must be made directly to creditors and payments that must be made to the Chapter 13 trustee, with particular attention to housing and vehicle payments.

6. Advise the debtor of the need to maintain appropriate insurance.

II. AFTER THE CASE IS FILED

A. THE DEBTOR AGREES TO:

1. Make the required payments to the trustee and to whatever creditors are being paid directly, or, if required payments cannot be made, to notify the attorney immediately.

2. Appear at the meeting of creditors (also called the "§ 341(a) meeting") with recent proof of income, picture identification, and proof of the debtor's social security number, and any other required information.

3. Notify the attorney and the trustee of any change in the debtor's address or telephone number.

4. Inform the attorney of any wage garnishment, levies, liens or repossessions of or on assets that occur or continue after the filing of the case.

5. Contact the attorney immediately if the debtor loses employment, has a significant change in income, or experiences any other significant change in financial situation (such as serious illness, lottery winnings, or an inheritance.)

6. Notify the attorney if the debtor is sued or wishes to file a lawsuit (including divorce.)

7. Provide the attorney and the trustee with copies of income tax returns, and provide the trustee with any refunds received, as required by the Court's Income Tax Order. Inform the attorney if any tax refunds to which the debtor is entitled are seized or not received when due from the IRS, the State of Idaho, or other entities.

8. Contact the attorney before buying, refinancing or selling any property, real or personal, and before entering into any loan agreement.

9. Cooperate with the attorney and the trustee in regard to questions about the allowance or disallowance of claims.

B. THE ATTORNEY AGREES TO:

1. Advise the debtor of the requirement to attend the meeting of creditors, and notify the debtor of the date, time, and place of that meeting.

2. Inform the debtor that the debtor must be punctual and, in the case of a joint filing,

that both spouses must appear at the same meeting.

3. Provide knowledgeable legal representation for the debtor at the § 341(a) meeting of creditors and at any motion hearing, plan confirmation hearing, and/or plan modification hearing.

4. If the attorney finds it necessary for another attorney to appear and attend the § 341(a) meeting or any court hearing, personally explain to the debtor, in advance, the role and identity of the other attorney and provide the other attorney with the file in sufficient time to review it and properly represent the debtor.

5. Ensure timely submission to the trustee of properly documented proof of income for the debtor, including business reports for self-employed debtors.

6. Timely respond to objections to plan confirmation and, where necessary, prepare, file, and serve an amended plan.

7. Timely prepare, file, and serve any necessary amended statements and schedules and any change of address, in accordance with information provided by the debtor.

8. Be available to respond to the debtor's questions throughout the term of the plan.

9. Prepare, file, and serve timely modifications to the plan after confirmation, when necessary, including modifications to suspend, lower, or increase plan payments.

10. Prepare, file, and serve necessary motions to buy or sell property and to incur debt.

11. Evaluate claims which are filed and, where appropriate, object to filed claims.

12. Timely respond to the trustee's motion to dismiss the case, such as for payment default, or unfeasibility, and to motions to increase the payments into the plan.

13. Timely respond to motions for relief from stay.

14. Prepare, file, and serve all appropriate motions to avoid liens, if not included in the plan.

15. Provide any other legal services necessary for the administration of this case before the bankruptcy court.

ALLOWANCE AND PAYMENT OF ATTORNEYS' FEES

Any attorney retained to represent a debtor in a Chapter 13 case is responsible for representing the debtor on all matters arising in the case, unless otherwise ordered by the court. For such services, as set forth above, the attorney will be paid a fixed fee of $_____ (exclusive of court filing fees).

In extraordinary circumstances, the attorney may apply to the court for additional compensation. Any such application must be accompanied by an affidavit of the attorney, and include an itemization of the services rendered, showing the date, the time expended, the identity of the attorney or other person performing the services, the rate(s) charged, and the total amount sought. Such an application must be set for a hearing before the court. The debtor must be served with a copy of the application, affidavit, and notice of hearing, and advised of the right to appear in court to comment on or object to such application. The debtor is hereby informed that, in the event of such a request, fees shall be calculated or claimed at the following rate(s):

_____ .

The attorney may receive some portion of the described fixed fee before the filing of the case. The attorney may not receive payment on the fee directly from the debtor after the filing of the case, but must receive any remaining portion of such fee through the plan. In addition to other disclosures required by the Rules, the attorney shall disclose, in any application for additional fees, any and all fees previously paid by the debtor.

If the debtor disputes the sufficiency or quality of the legal services provided or the amount of the fees charged by the attorney, including this fixed fee, the debtor may file an objection with the court and request a hearing.

If the attorney believes that the debtor is not complying with the debtor's responsibilities under this agreement or is otherwise not engaging in proper conduct, the attorney may apply for an order allowing the attorney to withdraw from the case.

The debtor may discharge the attorney at any time.

/s/_____ Date: _____
Debtor

/s/_____ Date: _____
Joint Debtor (if applicable)

/s/_____ Date: _____
Attorney for Debtor(s)

MARTELLE, BRATTON & ASSOCIATES, P.A.
Martin J. Martelle ISB No. 3304
Sarah B. Bratton ISB No. 7771
873 East State Street
Eagle, ID 83616
Telephone: (208) 938-8500
Facsimile: (208) 938-8503
E-mail: sarah@martellelaw.com

Attorney for Debtor(s)

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF IDAHO

IN RE:	CHAPTER 13
	Case No.
Debtor(s).	AMENDED AFFIDAVIT OF SARAH B. BRATTON IN SUPPORT OF DEBTOR'S PROPOSED ATTORNEYS FEES

STATE OF IDAHO)
: ss.
County of Ada)

SARAH B. BRATTON, being first duly sworn upon oath, deposes and says:

1. That I am an attorney at MARTELLE, BRATTON & ASSOCIATES, P.A. and that MARTELLE, BRATTON & ASSOCIATES, P.A. is the attorney of record for the above named Debtors (hereafter referred to as the 'Debtors') in the above entitled and numbered matter;
2. The attached invoice, detailing hours expended is correct and accurate to the best of my knowledge after reasonable inquiry and review, and in compliance with applicable rules;

3. That the following hourly rates are indicated in the DISCLOSURE OF COMPENSATION OF ATTORNEY FOR DEBTORS previously filed and are agreed upon by the client in the retainer agreement.

   a. That the hourly rate for Martin Martelle for these matters is $250.00 per hour for attorney fees. On the invoice Martin Martelle is represented with an entry of MM.

   b. The notation SBB represents Sarah B. Bratton, her hourly rate is up to $250.00;

   c. The rate of up to $85.00 per hour is for paralegal fees. Only items that are professional in nature will be billed at this rate. Any administrative or secretarial type work is not billed but detailed records our kept.

      i. TLH represents Traci L. Hossfeld; Traci has over 5 years of legal experience, is certified legal secretary, and has earned an Associate of Science Degree as a Paralegal.

4. Said hourly rates have been computed in our offices client billing system and attached hereto. Some of the actual billed time may be at an hourly rate lower than the maximum amount indicated in the retainer agreement and the disclosure of compensation filed in this case. Rates for attorneys and paraprofessionals are directly related to experience and value offered. Affiant has exercised judgment regarding the appropriate billing rate for each individual in this case. This necessitates some individual's rates being set at a lower amount than the maximum amount agreed to by the client and previously disclosed to this court. The actual billing rate per time entry is reflected in the attached invoice.

5. Said Invoice indicates that Martelle, Bratton and Associates, P.A. has expended additional hours of service as detailed on the attached invoice. The total time expended in this action is equal to **$7,166.62** in fees and costs, less the **$1,500.00** retainer previously paid to me by Debtor for attorney fees, and less **$310.00** filing fee and **$75.00** credit report fee previously paid to me by the Debtor for costs, for a total remaining due in fees and costs incurred herein in the amount of **$5,281.62.**

6. Debtor and Debtor's attorney have proposed, that the Debtor's Attorney shall be paid an additional **$5,000.00** through the bankruptcy plan to fully satisfy the

outstanding fees for attorneys services reasonably generated in connection with the Debtor's bankruptcy case to date.

7. Said Invoice accurately reflects a summary journal description of the legal services that were provided and the work that was performed during the course of this case.

8. For simplicity reasons affiant states that additional time entries may have been removed from the attached invoice if they are non-compensable items. The no charge time entries are being removed if they do not contain details relevant to the determination of the appropriateness of requested fees in this case. Some no charge entries may remain on the invoice if Affiant feels they have details that are valuable to the determination of fees and will clearly be indicated as a no charge entry.

9. The time entries are both detailed and specific and do not charge professional rates, with reference to the attorneys or the paralegals, for clerical functions.

10. That Martelle, Bratton and Associates, P.A. and this Affiant have exercised appropriate and reasonable billing judgment in the review of the invoicing statement attached hereto and in preparation of this Affidavit for Attorneys fees.

11. That the proposed attorney fees are for no more than the amount of fees for services that have been generated in connection with the Debtors case.

12. That as outlined in invoice attached hereto, the fees requested are for reasonable compensation for actual and necessary legal services rendered by both professional, and paraprofessional persons (paraprofessional persons employed by the professional persons) and that the invoicing of such services has been based on the nature, the extent, and the value of such services, and the time spent on such services.

13. That the billing rates for professional and paraprofessional services is appropriate and reasonable in light of the cost of comparable services other than those involved in a case under Title 11 of the U.S.C.

14. That in addition to compensable legal services, as indicated in the attached invoice, expense fees are invoiced for reimbursement of actual and necessary costs and expenses associated with filing.

15. That the amount of attorney's fees proposed in connection with this case are appropriate and reasonable for all of the foregoing reasons.

16. Affiant states that this Court should properly approve the amount of attorney's fees proposed.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

/s/
Sarah B. Bratton
Martelle, Bratton and Associates, P.A.
Attorneys for Debtors

SUBSCRIBED AND SWORN to before me this day; Friday, March 06, 2015.

SEAL

/s/
Traci L. Hossfeld
Notary Public for State of Idaho
Residing at Boise, Idaho.
Commission expires: 06-20-2019

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 6, 2015 I filed the foregoing AFFIDAVIT OF SARAH B. BRATTON IN SUPPORT OF DEBTOR'S PROPOSED ATTORNEYS FEES electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

Kathleen McCallister	kam@kam13trustee.com
US Trustee	ustp.region18.bs.efc@usdoj.gov

AND I FURTHER CERTIFY that on March 6, 2015 I served, or caused to be served the foregoing on the following non-CM/ECF Registered Participants at the following address via USPS, First Class, Prepaid:

DATED THIS DAY; Friday, March 06, 2015

/s/
Sarah B. Bratton
Martelle, Bratton and Associates, P.A.
Attorneys for Debtors

Date: Thursday, January 22, 2015

File Number: 4108/001

Re: CHAPTER 13

Date		Description of Service	Hours	Amount
May 23/14	SBB	SBB - Phone Consultation with client for Initial Consultation on May 23, 2014.	0.50	125.00
Jun 2/14	TLH	TLH: Prepared Retainer Agreement, CIN Authorization Form, Fee Schedule, Etc. For Debtor to Sign. Emailed all said documents to client. Client needs to provide a copy of DL.	0.50	42.50
Jun 12/14	TLH	TLH: Met with client to review paperwork. Discussed IRS Levy Release with MM.	0.50	42.50
Jun 16/14	TLH	TLH: Updated Best Case client file with Certificates of Pre-Filing Credit Counseling and attached said Certificates to Voluntary Petition.	0.20	17.00
Jun 16/14	TLH	TLH: Reviewed client physical file for sufficiency of proof and potential legal issues prior to beginning drafting petition, Disclosure of Attorney Statement, and Schedules. Reviewed Credit Report prior to drafting Schedules for sufficiency and ascertaining secured, unsecured, priority and non-priority creditors. Researched and pulled PACER report for prior filings to be included in petition. Researched and pulled State Repository report for involvement in cases and/or judgments to be included into SOFA. Researched and pulled DMV Title report to be cross-referenced with Schedule B.	1.00	85.00
Jun 16/14	MM	Rev of file to prepare for conf with Revenue Officer; she has levied 450 and won't levy again for 2 weeks; he has to file by Juen30; need to send her a copy of the petition	0.50	125.00
Jun 23/14	SBB	Sbb-spoke to client and explained why we feel chp 13 is a better options then a chp 7.	0.50	125.00
Jun 25/14	TLH	TLH: Data entry of ENTIRE client questionnaire, with the EXCEPTION of Schedule F, in order to prepare a draft petition for client review. Prepared Exhibit A and applied appropriate exemptions to Schedules A and B. Prepared draft petition highlighting needed information and clarification of items for client to respond. Emailed draft petition to client for review.	4.00	340.00
Jun 25/14	SBB	Sbb-rev info and file and P&L and Taxes, updated I and J appropriately	0.50	125.00
Jun 26/14	TLH	TLH: Updated draft petition with revisions provided by client at time of Signing appointment. Prepared final petition for Signing. Provided	1.00	85.00

			client physical file to JSW.		
Jun 26/14		TLH	TLH: Updated petition with revisions provided by client. Still waiting for additional information prior to filing case.	0.50	42.50
Jun 26/14		SBB	Sbb-rev file in full, drafted plan worksheet and calculations, drafted plan met with client to discuss options and sign and file.	2.50	625.00
Jun 30/14		TLH	TLH: Updated petition with additional information provided by client. Filed Chapter 13 Voluntary Petition and Plan with the Court through ECF along with required additional documents.	3.00	255.00
Jun 30/14		SBB	Sbb-rev items and had JSW let client know nothing needs done. We filed today they are all	0.30	75.00
Jul 22/14		TLH	TLH: Updated Best Case client file with Certificates of Post-Filing Credit Counseling. Filed said Certificates with the Court through	0.20	17.00
Jul 24/14		TLH	TLH: Amended Schedule F to disclose additional two creditors based upon a fax I received from the client. Emailed said Amended Schedule to client for review. Attached Amended Declaration of Schedules SigPage for client to SIGN, and	0.30	25.50
07/30/2014	SBB		Sbb-rev file and email from A@T responded Yes it appears that they are just taking all money received and su	0.30	75.00
08/05/2014	SBB		Sbb-spoke with T about bus inspection talked to client and explained what it was and set up time, calendared and let T know	0.40	100.00
08/05/2014	TLH		TLH: Prepared Amended Schedule C and Schedule F. Filed Amended Schedules and Amended Declaration of Schedules SigPage with the Court through ECF.	0.50	42.50
08/05/2014	TLH		TLH: Prepared COS for Amended Schedule F. Filed said COS with the Court through ECF.	0.30	25.50
08/07/2014	SBB		Sbb-travel and attend Bus. inspection -made notes of items in question regarding income and expenses, there is still a significant amount of work needing done to document business income and expenses vs personal	1.50	375.00
08/11/2014	SBB		BK 341 MTG - Gray, Sam & Tanya -	1.50	375.00
08/26/2014	SBB		Sbb-rev epiq client current	0.10	25.00
09/03/2014	SBB		BK CONF HRG - Gray, Sam & Tanya - sbb-rev file, made notes, travel and attend confirmation hearing. Requested continuance.	0.50	125.00
10/10/2014	SBB		Sbb-rev epiq client current	0.10	25.00
11/03/2014	SBB		Sbb-email to A@T We will need an amended plan and it is at the top of my pile. I hope to have more info before the hearing tomorrow but at this point I would propose we deny confirmation	0.30	75.00

11/04/2014	SBB	Sbb-rev file and travel to conf, need to deny and file amend plan	0.80	200.00
11/18/2014	TLH	TLH: Amended Schedules B & C to disclose pool table, freezer, and fridge located in the Debtors' garage. Also amended SOFA #10 to disclose the sale of the 1997 Ford F150. Prepared Amended Declaration of Schedules	0.40	34.00
11/20/2014	SBB	Sbb-rev file and information, drafted amended calculations, analyzed claims and made amendments to I and J and means and B. Amended Plan. Drafted NOH	1.50	375.00
11/21/2014	SBB	Sbb-rev file, spoke to client. Had NOH and amended plan mailed and filed	0.50	125.00
12/02/2014	TLH	TLH: Filed Amended Schedules B, C, I & J with the Court through ECF. Filed Amended Declaration of Schedules SigPage with the Court through ECF.	0.40	34.00
12/03/2014	TLH	TLH: Filed Amended SOFA with the Court through ECF showing the sale of vehicle pre-petition. Filed SigPage with the Court through ECF.	0.30	25.50
12/03/2014	TLH	TLH: Filed Notice of Change of Address for Creditor Y2K with the Court through ECF.	0.30	25.50
12/17/2014	SBB	Sbb-rev for progress, set reminders	0.10	25.00
01/03/2015	SBB	Sbb-rev file in detail along w/Ts recs. Emailed client I have recently reviewed your case in light of the Trustee'sc	1.00	250.00
01/04/2015	SBB	Sbb-rev file and information. Email from T, are they going to provide info or do 100%. Resp that I was thinking it would be dismissed but will look into 100%	0.30	75.00
01/06/2015	SBB	Sbb-rev file in detail and major issues, spoke to client and to T. Need reciepts and order in 10 days, if not dismissed and start over everyone is on same page with this. Sbb-travel and attend conf hearing	1.80	450.00
01/08/2015	SBB	Sbb-rev info and set deadlines	0.20	50.00
01/23/2015	SBB	Sbb-pulled invoice from new system combined old and new. Drafted aff of fees	1.00	225.00
01/24/2015	SBB	Sbb-rev file and email from N@T. Emailed client We are progressing and so far so good. We need to get the following information and we should be able to confirm your case.	0.40	90.00
02/02/2015	SBB	Sbb-rev file, spoke w/N@T and emailed client You are correct your payment needs to be $1,165 me know if you have any questions.	0.30	67.50
02/03/2015	SBB	info to T (see main notes) - Send to NM@T Employee Payroll – cancelled checks would be ideal	0.20	45.00

		Business Insurance – a copy of the insurance policy or billing statement Utilities – copies of the utility bills that relate to the business Documentation is only needed for August and September. Last, we are satisfied with most of August's proof, but we would like a transaction detail by account for uncategorized expenses for September. We are unable to locate around $1,300 in expenses.		
02/03/2015	SBB	Sbb-rev file and info was delivered last Thursday. Spoke to N@T Still need new Sept P&L. Called client he will fax today	0.50	112.50
02/04/2015	SBB	Sbb-rev info w/T and it income is way understated pmt likely going up significantly, scheduled apt to go meet with her.	0.50	112.50
02/11/2015	SBB	Sbb-rev file, travel and met w/T re:chp 13 and recent income ect.	1.20	270.00
02/25/2015	SBB	Sbb-rev file and information and drafted amended I and J. Emailed client Sbb-spoke to client and emailed T	1.00	225.00
02/26/2015	SBB	Sbb-calculated income and made changes to schedule I, l/m w/client that $2200 is where it has to be. Emailed T about dismissing and refiling at a later date. Spoke to T; Spoke to client	0.90	202.50
02/26/2015	TLH	TLH: Filed Amended Schedules I & J with the Court through ECF. Filed Amended Declaration of Schedules SigPage with the Court through ECF.	0.30	25.50
03/04/2015	SBB	Sbb-rev file and info, drafted updated aff of fees, filed and mailed.	0.80	180.00
		Our Fee		**$6,619.50**

Non-Taxable Expenses

E108 Postage Pulled Credit Report from CIN at time of Retain	50.00	
$Filing Fee	310.00	
Court fees	0.30	

Expenses

08/05/2014	$Filing Fee for adding additional creditors after the time of filing.	30.00
08/05/2014	Printing/Mailing COS, Amended Schedule F, and 341 Notice to three (3) additional creditors	2.87

	Printing: 5 pgs x .10 = .50 Postage: 3 x .69 = 2.07 ECF Costs: .30	
08/06/2014	E108 Postage Mailed client standard 341 Meeting Reminder Letter, Bankruptcy Information Sheet, & 341 Questions.	0.69
11/24/2014	E108 Postage. Printing / Mailing COS NOH Amended Plan Printing Costs: 656 X .10 = 65.60 ECF / PACER Fees: 1.30 Postage Costs: 82 at the 1oz rate = 38.54	105.44
12/02/2014	E108 Postage. Printing / Mailing COS Amended NOH Printing Costs: 81 X .10 = 8.10 Postage Costs: 81 at the 1oz rate = 38.07	46.17
12/03/2014	E108 Postage. Re-sent Amended Chapter 13 Plan and Notice to Creditor Y2K Inc at new address.	0.48
12/12/2014	E108 Postage. Re-sent Amended Notice of Continued Confirmation Hearing to Y2K Inc at new address.	0.48
01/23/2015	E108 Postage. Mailed client Affidavit of Proposed Attorneys Fees.	0.69
	Total Expenses	**$0.69**
	Total Expenses	**$547.12**
	TOTAL NEW CHARGES	**$7,166.62**
	General Retainer applied	1,885.00
	Net amount owing on this bill	**$5,281.62**