

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

In re: LANCE JAMIESON MERRILL and
JUDITH VALERIE MERRILL,

No. 22-10499-j13

Debtors.

**MEMORANDUM OPINION AND ORDER ON FIRST AND SECOND
APPLICATIONS FOR COMPENSATION**

THIS MATTER is before the Court on the Attorney's Second Fee Application ("Second Fee Application" – Doc. 54) filed by Debtors' counsel, New Mexico Financial and Family Law, P.C. (Don F. Harris and Dennis A. Banning) ("Attorney"). Attorney requests approval, as a priority, administrative expense, of total fees and expenses in the amount of \$1,336.12 for services performed in connection with this bankruptcy case from September 21, 2022 through July 5, 2023. The Court previously approved Attorney's First Application ("First Fee Application" – Doc. 36), which approved total fees and expenses in the amount of \$7,466.19 for services performed from April 12, 2022 to September 20, 2022. *See* Doc. 39. Because the total requested compensation in this case is now close to \$9,000 (significantly more than typically charged in most chapter 13 cases in this district), the Court has reexamined the reasonableness of the compensation sought in the First Fee Application in addition to considering the Second Fee Application.

Having examined the billing statements attached to the First Fee Application, the billing statements attached to the Second Fee Application, and the record of this bankruptcy case,¹ and being otherwise sufficiently informed, the Court has concluded that Attorney inappropriately

¹ The Court takes judicial notice of the docket and the documents filed of record in this bankruptcy case. *See St. Louis Baptist Temple, Inc. v. Fed. Deposit Ins. Corp.*, 605 F.2d 1169, 1171-72 (10th Cir. 1979) ("[A] court may . . . take judicial notice, whether requested or not of its own records and files . . .") (citation omitted), *abrogated on other grounds by McGregor v. Gibson*, 248 F.3d 946 (10th Cir. 2001).

charged for work correcting its own mistakes. Though such work was actual and necessary, it is not reasonable for an attorney to charge its client for such work. Consequently, the fees Attorney charged for correcting its own mistakes are not compensable under 11 U.S.C. § 330(a)(4)(B). The Court will, therefore, disallow previously approved compensation requested under the First Fee Application in the amount of \$520.00 as unreasonable charges for correcting Attorney's own mistakes, plus applicable gross receipts taxes. The Second Fee Application requests compensation for reasonable and necessary work that provided a benefit to the Debtors. The Court will, therefore, approve the total compensation requested in the Second Fee Application.

BACKGROUND AND FACTS

Debtors filed a voluntary petition under chapter 13 of the Bankruptcy Code on June 15, 2022. Doc. 1. Debtors filed their chapter 13 plan with the petition (the "Original Plan"). Doc. 2. The Original Plan contained several deficiencies, including,

- (1) Part 2.3 (method of payment) and Part 2.4 (Income Tax Returns and Refunds) were left blank;
- (2) The start and end dates of mortgage payments under the plan in Part 4.1 were left blank;
- (3) The mortgage payments and GAP payment description were left blank in Part 4.1.C;
- (4) A mortgage on Debtors' principal residence was treated in both Part 4.1.C (arrearages) and in Part 4.2.B (bifurcating claims secured by real property);
- (5) Two encumbered vehicles were not treated in Part 5.2; and
- (6) Part 3 reported that Attorney received \$250.00 pre-petition for representing the Debtors in connection with the case and anticipated charging an additional \$0.00 in fees and costs through confirmation.²

² The Chapter 13 Trustee identified these deficiencies in the Chapter 13 Trustee's Objection to Confirmation of Debtors' First Amended Plan ("Objection" – Doc. 24). The Objection also pointed out discrepancies in Debtors' best interest of creditors calculation. *Id.*

Further, contrary to what was reported in the Original Plan in Part 3, Counsel's Rule 2016(b) Disclosure of Compensation (Doc. 5) reported that Attorney received a \$3,000 pre-petition retainer.

Debtors filed an amended plan (the "First Amended Plan" – Doc. 23) on August 9, 2023. The First Amended Plan corrected the errors in the Original Plan, but did not complete Part 12, which requires identification of the amendments and the reason for the amendments. The Clerk of Court issued a notice of error on August 10, 2023, identifying the failure to complete Part 12 in the First Amended Plan. The First Amended Plan estimated that Attorney would charge \$17,000 in fees and costs through plan confirmation in addition to a \$3,000 pre-petition retainer, for a total of \$20,000. *See* First Amended Plan – Part 3. No notice of the deadline to object to the First Amended Plan was sent.

Debtors filed a second amended plan (the "Second Amended Plan" – Doc. 28), on August 12, 2023. The Second Amended Plan is identical to the First Amended Plan, with the addition of a completed Part 12, which identifies eight provisions in the Original Plan that were amended by the First Amended Plan. The explanation in Part 12 given for the amended provisions that fill in information left blank in the Original Plan is "[l]eft blank due to software error. *See* Doc. 27. The explanation in Part 12 given for deletion of the provision in the Original Plan bifurcating the rights of the holder of a claim secured only by a lien against Debtors' principal residence is "[p]ut in originally due to software error." The explanation in Part 12 given for amending the best interest of creditors calculation is "[i]ncorrect number put in the plan due to software error." Debtors sent out a notice of the deadline to object to the Second Amended Plan on August 12, 2023. *See* Doc. 29.

Although Part 12 of the Second Amended Plan blamed the need for each amendment to correct errors in the Original Plan on “software error,” the mistakes corrected by the amendments actually were made by Attorney. Attorneys representing chapter 13 debtors have an obligation to read a plan and correct errors before the plan is filed.

Debtors resolved the Chapter 13 Trustee’s objection to the Second Amended Plan (Doc. 30), and the Court confirmed the Second Amended Plan on September 9, 2022, without a hearing. *See* Doc. 33. Attorney filed the First Fee Application (Doc. 36) on September 22, 2022, requesting approval of fees and expenses in the total amount of \$7,466.19. The Court approved the First Fee Application without objection on November 4, 2022. Doc. 39.

Invoices attached to the First Fee Application include work billed for drafting the Original Plan as well as work reviewing the Chapter 13 Trustee’s Objection which identified the errors in the Original Plan, drafting and finalizing the First Amended Plan and the Second Amended Plan, and preparing, filing, and serving the related notice of deadline to object to the Second Amended Plan. In particular, Attorney charged \$75.00 (0.3 hours at \$250.00/hour) for attorney time to revise Part 12 of the First Amended Plan. Attorney charged an additional \$375.00 of attorney time at \$250.00 per hour, and \$70.00 of paralegal time at \$100.00 per hour, in connection with preparing the First Amended Plan and the Second Amended Plan, reviewing the Chapter 13 Trustee’s Objection, and preparing the notice of the deadline to object to the Second Amended Plan. *See* Second Fee Application, pp. 12-13 and 15 – 16.

Attorney filed the Second Fee Application on July 25, 2023. Doc. 54. The Second Fee Application requests total fees, including applicable gross receipts taxes, in the amount of \$1,336.12 for the period from September 21, 2022 through July 5, 2023. The billing invoices attached to the Second Fee Application reflect that Attorney performed post-confirmation work,

including assisting Debtors with issues concerning their mortgage, a vehicle title transfer, post-petition taxes, and several transfers of claims. No expenses were requested in the Second Fee Application. No party objected to the Second Fee Application.

DISCUSSION

Attorneys representing debtors in a chapter 13 case are entitled to:

reasonable compensation . . . 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)(4)(B).

The other factors set forth in 11 U.S.C. § 330 are:

- (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.

11 U.S.C. § 330(a)(3).

The Court has an independent duty to assess the reasonableness of requested compensation, even when no party objects. *See In re Bird*, 577 B.R. 365, 373-74 (10th Cir. BAP 2017) (“When a professional submits an application for compensation, § 330 requires a bankruptcy court to independently review the requested fees and expenses, regardless of whether any objection has been made to the application.”); *In re Zamora*, 251 B.R. 591, 596 (D. Colo. 2000) (“A bankruptcy judge’s duty is to conduct a discrete inquiry into every request for attorney fees and that duty cannot be delegated.”).

The order approving the First Fee Application is an order approving an interim request for approval of compensation. Because an order approving an interim request for compensation is not a final order, the Court is free to revisit previously approved fees prior to final approval. *See In re Union Home & Indus., Inc.*, 376 B.R. 298, 301-02 (10th Cir. BAP 2007) (“[O]rders approving interim fee awards, are purely interlocutory . . . and interim fee awards are subject to modification and possibly forfeiture.”); *In re Stevens*, No. 05-12056, 2006 WL 2711467, at *1 (Bankr. D. Colo. Sept. 14, 2006) (“Interim fee awards are discretionary, and are subject to reexamination and adjustment during the course of the case.” (citing *In re Callister*, 673 F.2d 305, 307 (10th Cir. 1982))); *In re Fernandez*, 441 B.R. 84, 98 (Bankr S.D. Tex. 2010) (stating that the court “has the absolute right to reexamine” applications for interim compensation in chapter 13 cases), *aff’d*, No. BR 07-35173-H4-13, 2011 WL 1404891 (S.D. Tex. Apr. 13, 2011), *aff’d*, 478 F. App’x 138 (5th Cir. 2012); *see also In re Taxman Clothing Co.*, 49 F.3d 310, 312, 314 (7th Cir. 1995) (“[A]ll awards of interim compensation are tentative, hence reviewable—and revisable—at the end of the case.”); Fed. R. Civ. P. 54(b) (providing that the court may revise an interlocutory order at any time before a final order or judgment is entered) (made applicable by Fed. R. Bankr. P. 9014(c) and Fed. R. Bankr. P. 7054)). The party requesting compensation bears the burden of establishing that the requested fees are reasonable. *In re Mkt. Ctr. E. Retail Prop., Inc.*, 730 F.3d 1239, 1246 (10th Cir. 2013).

Further, Attorney’s estimate in the First Amended Plan and Second Amended Plan of fees and costs in the amount to of \$17,000 in addition to a \$3,000 prepetition retainer through plan confirmation does not insulate Attorney from the Court’s further scrutiny of previously approved fees as well as fees requested in the Second Fee Application even though the total requested compensation is far less than the exaggerated estimate disclosed in the First Amended

Plan and the Second Amended Plan. This is not a case in which \$20,000 is a reasonable estimate. The Court reminds counsel of its duty to make a good faith estimate.

A. The First Fee Application

Courts should approve reasonable compensation under 11 U.S.C. § 330 for services that are actual and necessary. *See* 11 U.S.C. § 330(a)(1)(A) (“[T]he court may award . . . reasonable compensation for actual, necessary services”); *In re Railyard Co.*, No. 15-12386-t11, 2017 WL 3017092, at *3 (Bankr. D.N.M. July 14, 2017) (“To be compensable, the fees must be for services that were ‘actual’ and ‘necessary.’ If the applicant clears these hurdles, then the fees must be ‘reasonable.’”) (citation omitted). The billing entries in the invoices attached to the First Fee Application describe the work Attorney performed in connection with the case. All work performed was necessary inasmuch as it contributed to the administration of the estate and resulted in Debtors obtaining a confirmed chapter 13 plan. The issue here is the “reasonableness” of Attorney’s requested compensation.

The Court will reexamine only the billing entries in the First Fee Application relating to work necessitated by Attorney’s initial mistakes contained in the Original Plan and the First Amended Plan. The First Amended Plan did nothing more than correct Attorney’s own mistakes in the Original Plan. The Second Amended Plan likewise did nothing more than correct Attorney’s prior omission in Part 12 of the First Amended Plan. The notice of the Second Amended Plan was needed only because of those errors.

It is clear from the docket and the documents filed in the case that the Original Plan had multiple deficiencies. Various sections in the Original Plan that should have been completed were simply left blank. The attempted mortgage bifurcation was in clear violation 11 U.S.C. § 1322(b)(2) and was recognized by Attorney as unintended. The explanation for the

amendments enumerated in Part 12 of the Second Amended Plan is that “software error” caused the need for correction. In fact, the amendments were necessary to correct Attorney’s own mistakes. Although an attorney certainly should correct its own mistakes, an attorney should not charge its client for correcting the mistakes. *See In re Wheeler*, 439 B.R. 107, 110-11 (Bankr. E.D. Mich. 2010) (work performed to correct a mistake in a plan that either should not have been made in the first instance, or corrected before the plan was filed, is unnecessary and non-compensable). The requested compensation for the time Attorney spent correcting its own mistakes, even though the corrections ultimately provided a benefit to the Debtors and contributed to the administration of the estate, is patently unreasonable.

Charging to prepare, file, and serve the associated notice of the deadline to object to the Second Amended Plan likewise is unreasonable because the need to do so was necessitated by Attorney’s initial mistakes. By local rule, if a debtor files a chapter 13 plan with the petition, the clerk of court will include a copy of the plan with the notice of the bankruptcy filing, relieving the debtor of the requirement to send out a separate notice of the deadline to object to confirmation of a proposed chapter 13 plan. *See NM LBR 3015-2(e)*.³ Had the Original Plan, which was filed with the petition, not been patently deficient, Debtors would not have been charged for preparing and serving the notice of deadline to object to confirmation.

Attorney expended a total of 2.5 hours (including paralegal time) in connection with the preparation and filing of the First Amended Plan, review of the Chapter 13 Trustee’s Objection, which identified Attorney’s errors, preparation and filing of the Second Amended Plan, and

³ The Bankruptcy Rules do not *require* a debtor to file the plan with the petition. *See Fed. R. Bankr. P. 3015(b)* (“The debtor may file a chapter 13 plan with the petition. If a plan is not filed with the petition, it shall be filed within 14 days thereafter . . .”). Thus, if a debtor does not file a chapter 13 plan with the petition, the debtor is required to prepare and send a notice of the deadline to object to the proposed plan. In that instance it is appropriate to charge for preparing and sending the notice of the deadline to object to confirmation.

preparation, filing and service of the notice of the deadline to object to the Second Amended Plan, resulting in total requested compensation in the amount of \$520.00. The Court will disallow that amount, plus applicable gross receipts taxes.⁴

Attorneys charging clients for time spent to correct what are clearly and entirely the attorneys' own mistakes calls into question the integrity of the legal profession. Asking a court in a fee application to approve fees charged to a client for time spent correcting the attorney's own mistakes, as reasonable compensation to be paid by the client, is sanctionable, particularly where it is clear that counsel was entirely responsible for the mistake. *Cf. Trevino v. U.S. Bank Trust, N.A. (In re Trevino)*, 648 B.R. 847, 905 (Bankr. S.D. Tex. 2023) ("Section 105(a) operates as a codification of this Court's inherent authority to sanction a party for bad faith behavior," including counsel seeking fees for which it clearly is not entitled.). The Court will not impose sanctions here but cautions Attorney to exercise care in the future not to charge for correcting its own mistakes.

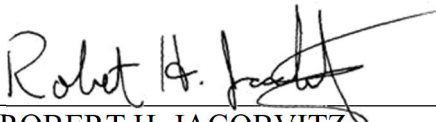
B. The Second Fee Application.

Upon consideration of the Second Fee Application, and after considering the factors outlined in 11 U.S.C. § 330(a)(3), the Court is satisfied that the requested compensation was for actual and necessary services rendered by Attorney in connection with the bankruptcy case, that the work performed provided a benefit to the Debtors, and that the requested compensation is reasonable. Attorney performed post-confirmation work, including assisting Debtors with issues concerning their mortgage, a vehicle title transfer, post-petition taxes, and several transfers of claims. The Court will approve the compensation in the amount requested in the Second Fee Application.

⁴ The Court has resolved any doubt in construing the scope of work reporting in billing entries that related to preparing the First Amended Plan and Second Amended Plan in favor of disallowing the charges.

WHEREFORE, IT IS HEREBY ORDERED:

1. First Fee Application. Previously allowed fees in the amount of \$520.00, plus applicable gross receipts taxes in the amount of \$40.30, are DISALLOWED.⁵
2. Second Fee Application. The compensation requested in the Second Fee Application in the amount of \$1,336.12 is hereby allowed as a priority, administrative expense in the case.
3. Payment. The Chapter 13 Trustee is authorized to pay approved fees and expenses to Attorney from estate funds, less the retainer, if applicable, and any previous estate-fund payments.


ROBERT H. JACOBVITZ
United States Bankruptcy Judge

Date entered on docket: August 30, 2023

COPY TO:

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⁵ If the Chapter 13 Trustee has already paid in full the previously approved fees and expenses under the First Fee Application, the Chapter 13 Trustee may deduct the disallowed amount from the total amount approved under the Second Fee Application.