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6 **IN THE UNITED STATES BANKRUPTCY COURT**
7 **FOR THE DISTRICT OF ARIZONA**

8 In re:

9 MICHAEL THOMAS HERZOG,

10
11 Debtor.

In Proceedings Under Chapter 13

Case No. 2-05-BK-14971 RJH

12 **TRUSTEE'S OBJECTION TO**
APPLICATION FOR PAYMENT AND
COMPENSATION OF ATTORNEY
FEES AND COSTS

13 The Trustee, Russell A. Brown, by and through counsel undersigned, hereby objects to the
14 Application for Payment of Administrative Expense filed by Debtors' counsel. This objection is
15 supported by the attached Memorandum of Points and Authorities.

16 The Trustee requests that the Court should deny a portion of counsel's fee application.

17 Dated: April 20, 2006.

18 */s/ Scott Lieske*

19 Scott A. Lieske, Esq. ABN 16250
20 Staff Attorney for Chapter 13 Trustee
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

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3 Debtors filed their petition for Chapter 13 relief on August 16, 2005.

4 Debtors' counsel filed the Application for attorney fees on April 7, 2006, seeking fees and
5 costs in the amount of \$10,453.75, less a \$3,194.00 pre-petition retainer, for an award sought of
6 \$7,259.75 to be paid from the monies held by the Chapter 13 Trustee.

7 Debtors filed their Chapter 13 Plan on August 30, 2005. There have been no Objections to
8 the Plan filed by any creditors. The only significant issues in the January 3, 2006 Trustee
9 Recommendation were the Trustee's objection to several Schedule J expenses and resolution of
10 discrepancies with Proofs of Claim filed by the Internal Revenue Service, the Arizona Department
11 of Revenue, Onyx Acceptance, and Saxon Mortgage.

12 Although 11 U.S.C. § 330(a)(4)(B) allows debtor's counsel to qualify for fees from the estate
13 for representing the debtor's interests, it specifically allows the Court to consider "the benefit and
14 necessity of such services to the debtor and the other factors set forth in this section." Those 'other
15 factors' mentioned in the statute refer to those enumerated in § 330(a)(3).¹ *In re Collida*, 270 B.R.
16 209, 213 (Bankr. S.D. Tex. 2001). "The burden of proving that the compensation requested by
17 counsel is reasonable and that the services provided by counsel were actual and necessary falls on
18 the attorney requesting the fees." *In re Rothman*, 206 B.R. 99, 110 (Bankr. E.D. Pa. 1997); *See also*

19 _____
20 ¹In determining the amount of reasonable compensation to be awarded, the court shall consider
21 the nature, the extent, and the value of such services, taking into account all relevant factors, including—

- 22 (A) the time spent on such services;
- 23 (B) the rates charged for such services;
- 24 (C) whether the services were necessary to the administration of, or beneficial at the time at
25 which the service was rendered toward the completion of, a case under this title;
- 26 (D) whether the services were performed within a reasonable amount of time commensurate
27 with the complexity, importance, and nature of the problem, issue, or task addressed; and
- 28 (E) whether the compensation is reasonable, based on the customary compensation charged by
comparably skilled practitioners in cases other than cases under this title.

1 *In re Pirani*, 232 B.R. 891 (Bankr. E.D. Tex. 1999); and *In re Polishuk*, 258 B.R. 238 (Bankr. N.D.
2 Okla. 2001).

3 The Ninth Circuit *Yermakov* decision provides guidance on calculating appropriate fees.
4 “The primary method used to determine a reasonable attorneys’ fee in a bankruptcy case is to
5 multiply the number of hours expended by an hourly rate. *In re Yermakov*, 718 F.2d 1465 1471 (9th
6 Cir. 1983). The *Yermakov* Court also referenced the twelve factors outlined in the Fifth Circuit’s
7 *Johnson*² decision that should be considered in awarding attorneys’ fees. It is the Ninth Circuit
8 Bankruptcy Appellate Panel’s opinion that the appropriate standard is to use the “lodestar” approach
9 in consideration of the factors from the *Johnson* decision. *In re Powerline Oil Co.*, 71 B.R. 767 (9th
10 Cir. BAP 1986).

11 11 U.S.C. §330(a)(3)(B) requires that the Court consider the rates charged for such services.
12 The Trustee notes that counsel’s time records attached as Exhibit A to the Application contain
13 multiple entries for tasks that could/should have been performed by a paralegal. In counsel’s Fee
14 Application, only 1.95 hours of the 42.60 total hours (approximately 4.5%) were performed by a
15 paralegal at the rate of \$140.00 per hour. The remaining 40.65 hours (approximately 95.5%) is billed
16 at the full attorney hourly rate of \$250.00 per hour. Regardless of whether a paralegal or an attorney
17 actually performed the work, Debtors’ counsel should not be billing his full attorney rate for work
18 that could/should be performed by a paralegal or other administrative staff member. Tasks that are
19 primarily administrative in nature should be billed only at the paralegal rate rather than the full
20 attorney rate. The Trustee believes that approximately 30% of the total time spent on a case should
21 be performed at a paralegal rate.

22 11 U.S.C. §330(a)(3)(D) requires that the Court consider whether the work was “...performed
23 within a reasonable amount of time commensurate with the complexity, importance and nature of
24 the problem, issue or task addressed.” The Trustee notes that there are several entries on counsel’s
25 time records that the Trustee believes exceed the reasonable amount of time necessary to complete
26 the task. On January 5, 2006 counsel allegedly spent 5.0 hours to “Receive and Review amended
27

28 ² *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974).

1 expense statement from Debtor.” On January 11, 2006 counsel allegedly spent 2.0 hours to “Receive
2 call from Joyce at Ascension Capital re: Amended POC.” The Trustee suspects that these time
3 entries may have been typographical errors and were supposed to be 0.5 and 0.2, respectively. If the
4 Trustee is correct, counsel’s time should be reduced by 6.3 hours.

5 If the 42.60 total time spent in this case is reduced by the 6.3 erroneous hours, the remaining
6 time would be 36.30 hours. If 70% of that time (25.41 hours) was billed at the \$250.00 attorney rate
7 (\$6,352.50) and 30% of the time (10.89 hours) were billed at the \$140.00 paralegal rate (\$1,524.60),
8 the total amount of fees would calculate to \$7,877.10. After adding \$18.25 of costs and subtracting
9 the \$3,194.00 pre-petition retainer, the remaining unpaid fees and costs would be \$4,701.35. Based
10 on the foregoing, the Court should deny a portion of counsel’s fee application.

11 Dated: April 20, 2006.

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13 /s/ Scott Lieske
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18 A copy of the foregoing
19 was mailed on April 20, 2006, to:

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33 /s/ Scott Lieske