UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

LOS ANGELES DIVISION

In re: ROBERT GERARD SPEHAR and SUSAN MILLER SPEHAR, Debtors.	Case No. 2:10-bk-47181-RK Chapter 11 **MEMORANDUM DECISION ON FIRST AND FINAL APPLICATION FOR ALLOWANCE AND PAYMENT OF FEES AND EXPENSES TO DEBTORS' BANKRUPTCY COUNSEL**

The First and Final Application for Allowance and Payment of Fees and Expenses to Debtors' Bankruptcy Counsel (Docket No. 115)(the "Application") filed by Jerome S. Cohen ("Cohen" or "Applicant") came on for trial before the undersigned United States Bankruptcy Judge on December 12, 2012 and January 9, 2013, and appearances were made as noted on the record.

The Application requests final approval of fees in the amount of $91,635.00 and expenses in the amount of $2,722.91, as well as approval of a prior post-petition retainer draw in the amount of $43,309.66 and authorization and direction that Debtors pay the remaining fees, pursuant to 11 U.S.C. § 330, Rule 2016(a) of the Federal Rules of Bankruptcy Procedure ("FRBP"), and Local Bankruptcy Rule ("LBR") 2016-1(a). *Application* at 1:2-13.

The United States Trustee filed an objection to the Application on June 12, 2012 (Docket No. 120) ("UST Objection"), asserting that certain line items were non-reimbursable overhead expenses, non-reimbursable basic legal research expenses, or duplicative. *UST Objection* at 1:25-4:19. The UST Objection was resolved by stipulation filed on July 23, 2013 (Docket No. 134) (the "UST Stipulation"). The UST Stipulation provided that Applicant shall reduce his request for compensation by $3,135.00 attributed to overhead expenses and $420.00 attributed to research expenses, and the UST Objection shall be deemed resolved. *UST Stipulation* at 3:12-17. As a result, the requested compensation in the Application remaining at issue is $88,500.00 in fees and $2,302.91 in expenses. *Id.*; *Applicant's Reply* at 42:8-17.

Debtors Robert and Susan Spehar ("Debtors" or "Spehars") filed an opposition to the Application on June 12, 2012 and a corrected opposition on June 18, 2012. *Debtors' Opposition to First and Final Application of Fees by Jerome S. Cohen and Debtors' Request to Oppose Pro Se* (Docket No. 122) *and Debtors' Corrected Opposition to First and Final Application for Payment of Fees by Jerome S. Cohen and Debtors' Request to Oppose Pro Se,* filed on June 18, 2012. (Docket No. 123). Applicant filed his reply to the Opposition on June 19, 2012. *Reply to Debtors' Objection to First and Final Application for Allowance and Payment of Fees and Expenses to Debtors' Bankruptcy Counsel; Declaration of Jerome S. Cohen,* Docket No. 124, filed on June 19, 2012. Debtors filed a surreply on July 3, 2012, and a further objection on July 20, 2012. *Surreply to Cohen's Reply to Debtors' Opposition to First and Final Application for Allowance and Payment of Fees and Expenses of Jerome S. Cohen,* filed on July 3, 2012 (Docket Nos. 130 and 133). Evidence was also presented at the evidentiary hearings. After the evidentiary hearings, Applicant filed a declaration and request for judicial notice on February 8, 2013, to which the Debtors filed an objection on March 8, 2013. *Declaration of Jerome S. Cohen Concerning Percentage of All Chapter 11 Filings that Achieve Plan Confirmation* (Docket No. 142)*; Applicant's Proposed Findings of Fact and Conclusions of Law Re First and Final Application for Allowance and Payment of Fees and Expenses to Debtors'*

Bankruptcy Counsel (Docket No. 143); *and Debtors' Objection to Jerome S. Cohen's Request for Judicial Notice in Support of Findings of Fact and Conclusions of Law Re First and Final Application for Allowance and Payment of Cohen's Fees and Expenses* (Docket No. 145). Also, after the trial, Applicant and Debtors both filed proposed findings of fact and conclusions of law. *Applicant's Proposed Findings of Fact and Conclusions of Law Re First and Final Application for Allowance and Payment of Fees and Expenses to Debtors' Bankruptcy Counsel,* filed on February 5, 2013, (Docket No. 143) ("Applicant's Proposed Findings"); *and Debtors' Proposed Findings of Fact and Conclusions of Law Re: First and Final Application for Allowance and Payment of Fees and Expenses to Debtors' Bankruptcy Counsel, Jerome S. Cohen*, filed on March 8, 2013 (Docket No 146*)("Debtors' Proposed Findings").*[1]

Having considered the parties' written and oral arguments and the evidence received at the hearings, the court makes its decision as discussed in detail below. The Applicant's Proposed Findings and Debtors' Proposed Findings have narrowed the disputed issues that remain after the evidentiary hearing, so that the court will refer to those documents in framing the parties' arguments.

Debtors object to a total of $32,467.17 of the amounts requested by Cohen as "unreasonable, unnecessary, and/or having provided to benefit to their estate." *Debtors' Proposed Findings* at ¶ 8. Debtors raise numerous objections to the allowance of Cohen's fees and expenses. The court addresses each objection raised by the Debtors in turn: (1) the General Objection[2] (the Investigation Objection and the Chase Objection); (2) the Payment Omission Objection; (3) the O'Brien Objections; (4) the Disclosure Statement Objection; and (5) the Confirmation Hearing Objection. *Id.* Additionally,

[1] On February 8, 2013, Cohen also filed a declaration to clarify his trial testimony regarding percentages of Chapter 11 bankruptcy case filings that achieve plan confirmation. *Declaration of Jerome S. Cohen Concerning Percentage of All Chapter 11 Filings that Achieve Plan Confirmation,* Docket No. 142, filed on February 8, 2013. The court does not consider this declaration because it was submitted after the close of the evidence and without leave of court.

[2] For the purpose of clarity, the court uses the defined terms for each objection as set forth by the Debtors in Debtors' Proposed Findings.

Debtors object to $2,013.28 attributable to Cohen's prepetition fact investigation, which are not subject of his fee application. *Id.* at ¶10.

The court may award compensation to a professional person employed on behalf of the estate for:

> (A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, ombudsman, professional person, or attorney and by any paraprofessional person employed by any such person; and
> (B) reimbursement for actual, necessary expenses.

11 U.S.C. § 330(a)(1). In determining the amount of reasonable compensation to be awarded, "the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors." 11 U.S.C. § 330(a)(3). The relevant factors include (1) the time spent on the services, (2) the rates charged, (3) whether the services were necessary or beneficial toward completion of the case at the time they were rendered, (4) "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," (5) whether the professional person has demonstrated skill and experience in the bankruptcy field, and (6) whether the compensation is reasonable in relation to comparably skilled practitioners in other bankruptcy cases. *Id.*

A professional fee applicant bears the burden of proof in establishing that he is entitled to the fees requested and the bankruptcy judge, as the finder of fact, has wide discretion in determining reasonable compensation. *In re Roderick Timber Co.*, 185 B.R. 601, 606 (9th Cir. BAP 1995). However, a fee calculated by multiplying a reasonable hourly rate by the number of hours actually worked (the "lodestar" method) results in a presumptively reasonable fee. *In re Manoa Finance Co., Inc.*, 853 F.2d 687, 691 (9th Cir. 1988). In support of his Application, Cohen provided declaration testimony that the amounts requested for fees were based on services actually rendered on behalf of Debtors for this bankruptcy case. *Cohen Declaration attached to Application* at ¶ 4. Cohen attested in his declaration that the attached monthly bills and invoices reflected these services and that these records were kept in the ordinary course of business. *Id.*

The court has reviewed this evidence and finds that the invoices reflect fees calculated at a reasonable hourly rate under the lodestar method. Thus, Applicant's declaration and supporting documentation establish that the hours were actually worked. As such, these fees are presumptively reasonable under *Manoa Finance*, and Debtors must set forth sufficient evidence to contradict Applicant's evidence and overcome the presumption of reasonableness, but if they are able to rebut this presumption, Applicant bears the ultimate burden of proof to establish entitlement to the award of fees. *In re Roderick Timber Co.,* 185 B.R. at 606.

I. General Objection (the Investigation Objection and the Chase Objection)

Debtors object to $13,074.07 in fees claimed by Application for what they label as their "General Objection." *Debtors' Proposed Findings* at ¶¶ 26-30. Of this amount, $2,013.28 is attributed to their objection to prepetition fees, and $11,060.79 is attributed to their objection of fees incurred in connection with creditor Chase.

A. Prepetition Investigation Fees

First, Debtors specifically object to 20% of the fees claimed by Cohen for prepetition work in the amount of $2,013.28 as unreasonable due to his allegedly "unnecessary" prepetition "due diligence" investigative work resulting in allegedly erroneous advice (the "Investigation Objection"). *Debtors' Proposed Findings* at ¶¶ 9 and 29. Debtors contend that before they consulted with Cohen, they intended to pay all of their creditors. *Id*. at ¶ 19. However, Debtors assert that they relied upon Cohen's prepetition legal advice that they could treat certain creditors consisting of their family members and friends referred to as the so-called "Friendly Creditors" preferentially as a separate class of secured creditors and could use that separate class to cram down a Chapter 11 reorganization plan on their other general unsecured creditors. *Id.* Debtors contend that Cohen advised them their Chapter 11 plan would be submitted to the court by January 2011 and that the fees for the bankruptcy case would be no more than $50,000 in total. *Id*. at ¶ 20.

Debtors' bankruptcy petition listed the Friendly Creditors' Promissory Notes as unrecorded, but classified these claims as secured. *Debtors' Bankruptcy Petition, Schedule D.* Debtors argue that Cohen's fees for his prepetition "due diligence" investigative work should be reduced because the Friendly Creditors could not be properly classified as secured creditors, Cohen's advice that they could be classified as secured creditors was erroneous and due to this error, the Plan was delayed. *Id*. at ¶¶ 21-25. However, the Application does not seek approval of any of Cohen's fees incurred or paid for services rendered prepetition, and this objection is outside of the scope of the matter before the court. The Application only seeks approval of fees for services rendered from August 31, 2010, the date of the filing of the bankruptcy petition, to February 25, 2012 (the "Compensation Period"). *Application* at 1:2-6. Applicant's request for approval of only those fees incurred after the petition date is proper because the court reviews fees under 11 U.S.C. § 330 only where the professional has been employed pursuant to § 327. *Lamie v. United States Trustee*, 540 U.S. 526, 538 (2004). Cohen's employment application recognized this and only sought employment *nunc pro tunc* to the petition date. *Application to Employ Jerome S. Cohen as General Bankruptcy Counsel* (Docket No. 10) at 3:14-18. To the extent that Debtors' objection is to prepetition fees, on the other hand, these are properly not before the court. These fees are governed by 11 U.S.C. § 329(b). *See also,* FRBP 2017(a). Debtors have not brought a motion seeking disgorgement of fees under § 329, and the court declines to consider prepetition fees in the context of this motion under § 330.

Debtors' Investigation Objection should be therefore overruled.

B. The Chase Objection

Debtors also object to Cohen's fees for allegedly erroneous advice that resulted in the unnecessary expense of $11,060.69 regarding their mortgage with Chase Bank (the "Chase Objection"). *Debtors' Proposed Findings* at ¶ 26. As asserted in their Proposed Findings, "Debtors contend that Cohen should have pursued Chase for cramdown immediately after filing the Petition, instead of relying on misclassified creditors [i.e., the

Friendly Creditors] for over four months." *Id.* at ¶ 27 (emphasis in original). Debtors argue this would have avoided the "Chase expense," which consisted of Cohen's fees and expenses billed for his services to negotiate a stipulation to resolve Chase's motion for relief from the automatic stay after Debtors did not make four monthly postpetition mortgage payments and for his services regarding a related stipulation with Chase for adequate protection. *Id.*

Debtors fail to provide any evidence or argument that Applicant's services in negotiating the stipulations were not reasonable, i.e. that they were not actual and necessary at the time the services were rendered or that the time spent or rates charged were excessive, which are the standards the court is instructed to consider when determining reasonable compensation under § 330(a). Rather, they argue that the necessity for the services could have been avoided if Applicant sought to negotiate with Chase at an earlier time. Even if Debtors are correct and Chase would have been more amenable to an agreement before it filed its motion seeking relief from the automatic stay, there would still be some fees incurred in connection with the negotiation. Therefore, it would be incorrect to disallow the fees entirely because there would have been other fees to negotiate an agreement with Chase which could be higher or lower, but would not be zero.

Further, while some review of strategic decisions may be appropriate, bankruptcy courts generally refrain from second-guessing an attorney's choices about how to best represent the client's interests. *In re A.W. Logging, Inc.*, 356 B.R. 506, 516 (Bankr. D. Idaho 2006) (citations omitted). Instead, courts look at the totality of the circumstances and do not microscopically evaluate every strategic decision made by counsel in good faith. *Id.* Debtors have not provided sufficient evidence indicating that Applicant's failure to obtain Chase's consent to their Chapter 11 plan at an earlier date was unreasonable, or that the strategy relied on was so unreasonable as to justify disallowance of fees. The court declines to disallow the fees based on "20-20" hindsight and speculation as to a third party creditor's course of action if Applicant had chosen a different strategy.

The court is charged with finding only that the services provided were "reasonably likely" to benefit the estate at the time they were rendered, and need not even find an actual material benefit to the estate. *Roberts, Sheridan & Kotel, P.C. v. Bergen Brunswig Drug Co. (In re Mednet, MPC Corp.)*, 251 B.R. 103, 108 (9th Cir. BAP 2000). At the time the stipulations with Chase were negotiated, Debtors themselves relate that they were faced with a motion for relief from the automatic stay and foreclosure of the loan on their residence. *Debtors' Proposed Findings* at ¶ 26. Debtors have not provided any persuasive evidence indicating that a negotiated settlement of that motion and related adequate protection agreement were not reasonably likely to benefit the estate at that time, and the stipulations resulted in the Debtors being able to retain property that could otherwise face foreclosure if relief from the automatic stay were granted. While the court need not find an actual benefit to the estate, it appears that there was actually a benefit to Debtors in negotiating the stipulations on terms agreeable to them rather than permitting the motion for relief from the automatic stay to be granted. The Debtors' objection to the fees incurred in negotiating automatic stay and adequate protection stipulations with Chase is overruled because the court finds that the fees in question are reasonable in light of the totality of the circumstances and that Debtors have not rebutted the presumption that the fees for these services were reasonable.

II. Payment Omission Objection

Next, Debtors argue that $11,400.00 of postpetition payments to Cohen should be applied to the requested fees to reduce the balance owed to him (the "Payment Omission Objection"). *Debtors' Proposed Findings* at ¶¶ 5-6. Debtors assert that on June 11, 2012, Applicant cashed two checks from them, dated May 26, 2012 and May 31, 2012 and deposited the sum of $11,400.00 in his client trust account. *Id.* This, they argue, results in a total payment of $65,857.99 by them for Cohen's postpetition services, leaving an unpaid balance due of only $24,944.92. *Id.*

Applicant does not dispute that Debtors have paid $65,857.99 for his postpetition services, but asserts that the funds from the two checks in question have not been

applied to their account. *Applicant's Proposed Findings* at ¶ 57. That would mean that the payment received by Applicant is only $54,457.99. *Id.* Debtors provided evidence consisting of copies of the two checks. *Debtors' Exhibit G,* Checks nos. 172 and 174 with bank statement, May 24, 2012 to June 25, 2012. Debtors also provided a copy of their bank statement reflecting that the funds from the two checks, no. 172 in the amount of $3,000.00 and no. 174 in the amount of $8,400.00, were withdrawn from their account. *Id.* At the evidentiary hearing on January 9, 2013, Applicant conceded that Debtors should receive credit for these payments, although that is not reflected in Applicant's Proposed Findings. *Statement of Jerome S. Cohen at hearing* held on January 9, 2013 at 3:08 p.m. The court finds Debtors' evidence on this point credible and finds that Debtors have paid a total of $65,857.99 to Applicant for postpetition services, but that to the extent that the funds have not been applied to their account, Cohen may do so. Otherwise, Debtors' Payment Omission Objection is sustained.

III. The O'Brien Objections

Debtors argue that they should not pay Cohen $5,468.16 for: (1) his work in filing and prosecuting their objection to the claim of O'Brien Law Offices, P.C.; and (2) filing and prosecuting the motion to approve settlement with O'Brien (the O'Brien Matters). *Debtors' Proposed Findings* at ¶¶ 67-71. Specifically, Debtors object to Cohen's fees and expenses on the O'Brien matters as unreasonable and unnecessary because Cohen failed to associate attorney Steven Klenda ("Klenda"), who had already worked on the O'Brien litigation for them prepetition and allegedly would have saved them expense due to his familiarity with the litigation, which Debtors contend resulted in unnecessary fees and expenses of $4,253.13 (33% of the total fees and expenses identified by Debtors for the O'Brien claim objection) and of $1,215.00 (50% of the fees and expenses identified by Debtors for the O'Brien settlement approval motion). *Id*.

Debtors contend that their evidence demonstrates that Cohen had authority to associate Klenda, that Klenda had represented Debtors *pro bono* or under a "flexible, highly discounted approach," that Klenda provided Cohen with the materials required to

file an employment application on his behalf and that Cohen incurred excessive fees by re-drafting documents already drafted by Klenda. *Id.* at ¶¶ 72-80.

The court finds no grounds for reducing Cohen's fees related to the O'Brien Matters because the fees are reasonable compensation for actual, necessary services performed by Cohen on the matters. As previously stated, the court is generally not inclined to second-guess counsel's strategy through a microscopic review of each decision of counsel. *In re A.W. Logging, Inc.*, 356 B.R. at 516. The Amendment to Attorney Client Agreement, introduced into evidence in Debtors' Exhibit A, provided that Debtors would employ Mr. Klenda as special counsel to handle litigation in Illinois and advise them on the Chapter 11 case regarding the impact of litigation in Illinois. However, this Amendment contained a limiting provision that this employment would be "subject to Cohen's primary authority for direction of Client's Chapter 11 case." *Debtors' Exhibit A, Amendment to Attorney Client Agreement,* at 4.

Mr. Klenda testified that he did not know whether his knowledge of the history of the O'Brien litigation became important in this bankruptcy case. *Testimony of Steven Klenda,* December 12, 2012 at 4:01-4:02 p.m. Mr. Klenda's testimony shows that he was not actively participating in the Debtors' bankruptcy case or aware of developments in the case. As Cohen explained in his declaration in reply to Debtor's opposition: "A main reason Applicant did not seek Debtors' employment of Klenda is that, Klenda, despite Applicant's request, never provided Applicant with the information required to file an employment application for Klenda. Additionally, Applicant did not seek employment of Klenda because, as the case developed, Applicant was able to retrieve from Debtors the facts needed to address O'Brien. Until now, Debtors agreed with this approach." *Applicant's Reply* at 9, 33. The court finds this testimony to be credible. Based on this record, the evidence does not establish that Cohen's decision to provide the services himself (rather than use Mr. Klenda's services) in the O'Brien litigation under those circumstances was unreasonable or that Mr. Klenda's services would have resulted in cost savings to the estate. There is no dispute that Cohen resolved the O'Brien litigation

by successfully objecting to its claim and settling the remaining litigation, which actions were approved by orders of the court. Based on this record, this court finds that Cohen's services and fees for resolving the O'Brien litigation were reasonable under the circumstances. Debtors' O'Brien Objections should be overruled because Debtors have not provided sufficient evidence to overcome the presumptive reasonableness of Applicant's fees, and the court finds Cohen's fees incurred in connection with the O'Brien Matters were reasonable.

IV. Disclosure Statement Objection

Debtors contend that the fees requested relating to Cohen's handling of the disclosure statement and the three hearings on its approval set before Judge Ellen Carroll, who previously presided over this case, should be reduced by a total of $6,901.27 based on numerous deficiencies and problems with the disclosure statement for their Chapter 11 plan (the "Disclosure Statement Objection"). *Debtors' Proposed Findings* at ¶¶ 33-50. Specifically, Debtors object to (1) the fees of $4,981.27 charged for the First Early Discharge Brief and the second disclosure statement hearing on August 23, 2011, and to (2) the $1,920.00 charged for the Second Early Discharge Brief and the third disclosure statement hearing on September 20, 2011. *Id*. at ¶ 42. Debtors argue that the need for the First and Second Early Discharge Briefs would have been obviated if the Chase stipulation was submitted to the court before the first disclosure statement hearing on June 14, 2011 because the terms of the stipulation would have addressed the court's concern regarding the discharge. *Id*. at ¶¶ 43-50. Debtors contend that Cohen's fees and expenses regarding the further disclosure statement hearings should be disallowed as unreasonable and unnecessary because the disclosure statement should have been approved at the first hearing, but for Cohen's alleged failures and mistakes. *Id.*

The court has reviewed the transcript from the initial disclosure statement hearing on June 14, 2011. *Transcript Regarding Hearing Held on June 14, 2011 Re: Approval of Disclosure Statement* (Docket No. 102). At that hearing, Judge Carroll first raised the issue of the IRS proof of claim, and Cohen's associate attorney represented to the court

that an amended proof of claim had been prepared, but not yet filed. *Id*. at 1:7-2:8. The court notes that the filing of an amended proof of claim is a matter within the control of the creditor, and not debtor's counsel, because a debtor may file a proof of claim only if a creditor has not timely done so. FRBP 3004. Therefore, there was at least one outstanding issue raised by Judge Carroll was outside of counsel's control.

Judge Carroll's primary concern, however, was feasibility of Debtor's Chapter 11 plan. *Transcript Regarding Hearing Held on June 14, 2011 Re: Approval of Disclosure Statement* (Docket No. 102) at 2:10-14:9. A bankruptcy court will sometimes decline approval of a disclosure statement on grounds that the proposed Chapter 11 plan is patently unconfirmable. *California Federal Bank, F.S.B. v. Moorpark Adventure (In re Moorpark Adventure)*, 161 B.R. 254, 258 (Bankr. C.D. Cal. 1993). However, feasibility of a Chapter 11 reorganization plan is generally determined in connection with plan confirmation, and not approval of the disclosure statement. 11 U.S.C. § 1129(a)(11).

Debtors' case had also been reassigned from Judge Ahart to Judge Carroll a little more than one month prior to the first disclosure statement hearing, and it does not appear from the record that Applicant had an opportunity to receive input from Judge Carroll on the case prior to that initial disclosure statement hearing. *Docket Entry No. 56*. stating "In Accordance with the Administrative Order 11-04 dated 4/15/11, this case is hereby reassigned from Judge Alan M. Ahart to Judge Ellen Carroll." While Cohen provided some discussion of feasibility in the disclosure statement, the court requested further evidence at the hearing on the approval of the disclosure statement. *See Disclosure Statement and Plan of Reorganization* at 18-21 (Docket No. 38); *see also, Transcript Regarding Hearing Held on June 14, 2011 Re: Approval of Disclosure Statement* (Docket No. 102) at 16-18. Since the court requested further evidence regarding the feasibility of the plan, Cohen was required to file additional briefing and to do further work regarding the disclosure statement and plan. The court finds that the fees incurred in connection with the disclosure statement were reasonable.

The court also notes that it is not uncommon for it to continue a disclosure

statement hearing to provide an opportunity to the plan proponent to obtain further information and amend a plan to address the court's concerns as was the case here. Because Cohen had to amend the disclosure statement to address the court's concerns about the plan, this court finds the fees in connection with the continued disclosure statement hearings to be reasonable for purposes of § 330.

In regard to the briefing regarding Chapter 11 discharge in this case, the court notes that such briefing was requested by Judge Carroll. *Transcript Regarding Hearing Held on June 14, 2011 Re: Approval of Disclosure Statement* (Docket No. 102) at 17:17-24. It cannot be said that the briefs were unnecessary, as argued by Debtors, when Applicant was specifically directed by the court to file them in order to aid its determination of the Debtors' plan and disclosure statement.

Debtors also contend that Applicant's attendance at the second disclosure statement hearing was not necessary, even though a property valuation motion was also considered and granted at the same hearing, because the valuation motion could have been granted without a hearing. *Debtors' Proposed Findings* at ¶ 46. However, this argument fails because the motion sought valuation under 11 U.S.C. § 506, and § 506 valuation motions in Chapter 11 cases are specifically excluded from those motions that can be determined without a hearing under the Local Bankruptcy Rules of the Central District of California. LBR 9013-1(o)(2)(M*); Order Granting in part, Denying in part Motion Setting Property Value for real property located at 1625 Grandview Avenue, Glendale, Ca,* Docket No. 82, filed on September 9, 2011.

The court finds that Debtors have not provided sufficient evidence to overcome the presumption of reasonableness, and they have not established that the disclosure statement would have been approved at the first hearing even if Applicant had taken the actions that Debtors urge were correct in light of the court's concerns raised at the hearing and Debtors aided by counsel needed to address after the hearing. Thus, the court concludes that Debtors' Disclosure Statement Objections should be overruled because the services and fees of counsel are reasonable under the circumstances.

V. Confirmation Hearing Objection

Finally, Debtors argue that Cohen's fees pertaining to confirmation of their Chapter 11 reorganization plan should be reduced by a total of $9,036.96 because confirmation required two separate hearings rather than one due to (1) Judge Carroll's view that the absolute priority rule applies in individual Chapter 11 plans, and (2) the misclassification of Real Time Resolutions' claim (the "Confirmation Hearing Objection"). *Debtors' Proposed Findings* at ¶¶ 51-66. Specifically, Debtors argue that additional confirmation votes and hearings were required due to Cohen's alleged failure to recognize that the court could reject their original "cramdown" plan. *Id*. at ¶¶ 64-66.

The court has reviewed the transcript from the first confirmation hearing on December 6, 2011, located on the court's docket at Entry No. 101. Despite Debtors' multiple arguments regarding who would have voted when and what advice was given to them by Applicant, the transcript indicates that the failure to obtain confirmation at that hearing was due to a disputed legal issue regarding the application of the absolute priority rule in individual Chapter 11 cases. *Transcript Regarding Hearing Held on December 6, 2011 Re: Approval of Disclosure Statement* (Docket No. 101) at 1:9-7:13. Applicant took the position that the absolute priority rule has been abolished by the 2005 Bankruptcy Code amendments in individual Chapter 11 cases, but Judge Carroll stated that she was of the contrary view. *Id.* Judge Ahart who was the original judge assigned to this case has publicly written that the 2005 Code amendments abolished the absolute priority rule in individual Chapter 11 cases. Alan M. Ahart, *The Absolute Abolition of the Absolute Priority Rule in Individual Chapter 11 Cases*, 31 Cal.Bankr.J. 731 (2011).

As the Ninth Circuit Bankruptcy Appellate Panel's opinion in *In re Friedman* shows, the application of the absolute priority rule in individual Chapter 11 bankruptcy cases is currently in controversy among the courts as the case law is sharply divided. *Friedman v. P+P, LLC (In re Friedman)*, 466 B.R. 471 (9th Cir. BAP 2012). The law on this issue is not settled in this circuit, and individual judges within the Central District of California take divergent positions on it, even subsequent to *In re Friedman*. It should be noted that the

authors of the majority opinion and the dissent in *In re Friedman* are both bankruptcy judges sitting in the Central District of California. *In re Friedman,* 466 B.R. at 473 and 484. This court, to which Debtors' case was subsequently assigned, also issued an opinion after *Friedman* coming to the opposite conclusion. *In re Arnold*, 471 B.R. 578, 614 (Bankr. C.D. Cal. 2012).

At approximately the time of Debtors' confirmation hearing, two opposing positions on the absolute priority rule in individual Chapter 11 cases were expressed by bankruptcy judges sitting in this district. *In re Kamell*, 451 B.R. 505, 512 (Bankr. C.D. Cal. 2011); Alan M. Ahart, *The Absolute Abolition of the Absolute Priority Rule in Individual Chapter 11 Cases*, 31 Cal. Bankr. J. 731 (2011). In this circuit, there is no binding precedent on the issue, and Judge Carroll never issued a written opinion stating her position. *See In re Arnold,* 471 B.R. at 587-590. Therefore, the court finds that under these circumstances, it cannot be said that Applicant's failure to accurately predict the court's position on the issue in 2011 and to have to address the issue in the plan confirmation proceedings is unreasonable or that any subsequent confirmation hearing necessitating work by Cohen to address this issue should be deemed excessive or otherwise unreasonable. Therefore, based on this record, the court finds that Debtors' Confirmation Hearing Objection should be overruled because the services and fees of counsel are reasonable under the circumstances.

VI. Fees For Litigating Fee Application

Applicant requests fees and expenses for defending this Application, and proposes filing an application for those fees. *Applicant's Proposed Findings of Fact and Conclusions of Law* (Docket No. 143) at 49:11-50:21, 51:14-15. As the Ninth Circuit has recognized, bankruptcy counsel is "entitled to compensation for the time and effort spent in preparing fee applications." *In re Nucorp Energy, Inc.*, 764 F.2d 655, 662 (9th Cir. 1985). However, the Ninth Circuit has also stated that this entitlement may not extend to fees incurred in opposing an objection to the fee application, and it would not necessarily

be an abuse of discretion to deny such fees. *Boldt v. Crake (In re Riverside-Linden Investment Co.)*, 945 F.2d 320, 322-323 (9th Cir. 1991).

In a subsequent decision, the Ninth Circuit clarified that fees for litigation in defense of fee applications are not forbidden either. *Smith v. Edwards & Hale, Ltd. (n re Smith)*, 317 F.3d 918, 928 (9th Cir. 2002), *abrogated by Lamie v. United States Trustee*, 540 U.S. at 538, to the extent *Smith* holds that a professional person employed by the debtor may be compensated from the estate without being employed under 11 U.S.C. § 327. In order to be compensated for fee application litigation, the applicant must demonstrate both that the services satisfy the requirements of 11 U.S.C. § 330(a)(4)(A) and that the case exemplifies a set of circumstances in which the time and expense incurred by the litigation is necessary within the meaning of 11 U.S.C. § 330(a)(1). *Id.* Section 330(a)(4)(A) provides that, in cases other than those under Chapters 12 or 13, the court shall not allow compensation for unnecessary duplication of services or services that were not reasonably likely to benefit the estate or necessary for the administration of the case.

For example, fee application litigation services can be necessary where they benefit the estate by determining the amount of administrative fees owed and the services provided are not duplicative of those of other professionals. *In re Smith*, 317 F.3d at 928-929. The Ninth Circuit recognized in *Smith* that this is particularly true where the applicant prevails in the fee dispute litigation and the objections were frivolous because to hold otherwise would encourage meritless objections to fee applications. *Id.* at 929. The determination of whether fees should be awarded for fee application litigation depends on the particular circumstances of the case and is largely within the informed discretion of the bankruptcy court. *Id.*

As discussed herein, in the case at bar, Applicant has prevailed in the defense of fees he sought in the Application. The court has only sustained Debtors' objection with respect to granting Debtors credit for two checks that Applicant initially contended were not cashed, but later conceded by Cohen that the checks had been received. Several of

Debtors' arguments objecting to Cohen's fees appear to be based more on what they had hoped for in this case rather than what was achieved in light of the actions of the court and other parties in litigating this case. Debtors have not shown that Applicant's requested fees for litigating this fee application were duplicative or otherwise unnecessary, and the court finds that the fees were necessitated by Debtors' objections and the need in this case to ascertain the proper amount of fees due and owing to Cohen for his services in this case. This case is closer to *In re Smith* than *In re Riverside-Linden Investment Co.*, and Applicant may be awarded his reasonable fees in defending the Application. Accordingly, Applicant is not precluded from submitting a further application seeking approval of fees incurred in defending Debtors' objections to the Application.

VII. Conclusion

For the foregoing reasons, the court determines that Applicant shall be awarded professional fees and costs of $90,802.91 ($88,500.00 in fees and $2,302.91 in expenses) as reasonable compensation pursuant to 11 U.S.C. § 330 for services

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rendered as counsel for the debtors-in-possession during the period from August 31, 2010 through February 25, 2012, and the First and Final Application for Allowance and Payment of Fees and Expenses to Debtors' Bankruptcy Counsel is granted in part and denied in part. The court further determines that Debtors should be credited with payments in the amount of $65,857.99, so that the remaining balance due for this time period is $24,944.92.

This memorandum decision constitutes the court's findings of fact and conclusions of law. A separate final order reflecting the award of fees and expenses in accordance with this memorandum decision is being filed concurrently herewith.

IT IS SO ORDERED.

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Date: February 24, 2014

Robert Kwan
United States Bankruptcy Judge