

DEC 11 2015

ORDERED PUBLISHED

SUSAN M. SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No.	EC-15-1133-DJuF
)		
DELIA RUIZ,)	Bk. No.	14-10282
)		
Debtor.)		
_____)		
PETER L. FEAR, Chapter 7)		
Trustee,)		
)		
Appellant,)		
)		
v.)	O P I N I O N	
)		
UNITED STATES TRUSTEE,)		
)		
Appellee. ¹)		
_____)		

Argued and Submitted on November 19, 2015
at Sacramento, California

Filed - December 11, 2015

Appeal from the United States Bankruptcy Court
for the Eastern District of California

Honorable W. Richard Lee, Bankruptcy Judge, Presiding

Appearances: Appellant Peter L. Fear, argued pro se.

Before: DUNN, JURY, and FARIS, Bankruptcy Judges.

Opinion by Judge Dunn
Concurrence by Judge Jury

¹ The United States Trustee did not participate in this appeal.

1 DUNN, Bankruptcy Judge:

2
3 Chapter 7² trustee Peter L. Fear ("Trustee") applied to the
4 bankruptcy court for compensation and payment of expenses.
5 Although the application was unopposed, the bankruptcy court
6 awarded the Trustee only a portion of the requested
7 compensation, reasoning that the requested amount, which
8 exceeded the amount available for distribution on allowed
9 unsecured claims, was too high. The Trustee appeals. We VACATE
10 the order of the bankruptcy court and REMAND the matter for
11 further proceedings.

12 **I. FACTUAL BACKGROUND**

13 The Debtor, Delia Ruiz, filed a chapter 7 petition on
14 January 23, 2014. The Trustee was appointed on the same date.
15 On Schedule B, the Debtor listed an ownership interest in seven
16 motor vehicles, including a 2007 Dodge Ram pickup truck (the
17 "Dodge"), which the Debtor valued at \$28,525.³ According to the
18 Debtor's Schedule D, the Dodge was subject to a lien in the
19 amount of \$16,477.35. The Debtor also claimed exemptions in the
20 Dodge in the total amount of \$12,047.65, the full amount of the
21 Dodge's scheduled value net of the lien.

22 Based on the Debtor's schedules, along with information the
23 Debtor provided following the first § 341(a) meeting of

24 _____
25 ² Unless otherwise indicated, all chapter and section
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.

27 ³ We exercise our discretion to take judicial notice of
28 documents filed in the Debtor's bankruptcy case, including the
29 Debtor's schedules. See Atwood v. Chase Manhattan Mortg. Co.
(In re Atwood), 293 B.R. 227, 233 n.9 (9th Cir. BAP 2003).

1 creditors, the Trustee tentatively concluded that the estate
2 likely had no interest in the Dodge. This conclusion changed
3 over the course of the next four months and several continuances
4 of the meeting of creditors, as the Debtor twice amended her
5 schedules to revise her claimed exemptions and contemplated
6 making an offer to purchase her nonexempt assets back from the
7 estate. Ultimately, the Debtor removed her claimed exemptions
8 in the Dodge, and the Trustee concluded the meeting of creditors
9 and commenced the process of selling the Dodge at auction.

10 The auctioneer expressed some skepticism that he could sell
11 the Dodge for its scheduled value,⁴ but he believed it would
12 provide some return for unsecured creditors. The bankruptcy
13 court approved the auctioneer's employment, and the auction took
14 place as scheduled on July 26, 2014. The auctioneer's
15 expectation proved correct: the Dodge sold for \$21,000,
16 significantly less than its scheduled value but enough to pay
17 unsecured claims in part.

18 On October 24, 2014, the Trustee filed his Final Report,
19 Application for Compensation and Applications for Compensation
20 of Professionals ("Final Report"). The Trustee reported total
21 receipts of \$21,000, all attributable to the sale of the Dodge.
22 From that amount, the Trustee disbursed \$15,046.84 to Safe 1
23 Credit Union, the holder of the lien on the Dodge, and \$2,758 to
24 the auctioneer. This left the estate with \$3,195.16, which the
25 Trustee proposed to distribute as follows: \$2,300 to the Trustee
26

27
28 ⁴ The Debtor's most recently filed Schedule B valued the Dodge at \$32,000.

1 for his fees and \$52.44 for his expenses; and the remaining
2 \$842.72 to general unsecured creditors. Concurrently with the
3 Final Report, the Trustee filed a Narrative Report and
4 Application for Compensation and Expenses ("Application"). As
5 shown in a table included in the Application, the maximum
6 compensation allowed under § 326 was \$2,850, but the Trustee
7 requested less than the full amount in an apparent effort to
8 provide a greater distribution to creditors.⁵ Notwithstanding
9 this \$550 reduction from the statutory commission, the Trustee's
10 proposed distribution would have allowed the Trustee to receive
11 roughly three quarters of the funds remaining in the estate.⁶

12 Though no objections were filed to the Final Report, the
13 bankruptcy court entered an order setting the matter for hearing
14 to address the lopsided proposed distribution ("Hearing
15 Order").⁷ The bankruptcy court noted that under our decision in
16 Hopkins v. Asset Acceptance LLC (In re Salgado-Nava), 473 B.R.
17 911 (9th Cir. BAP 2012), a trustee's commission as calculated
18 under § 326 is presumptively reasonable except in extraordinary
19 circumstances. Citing In re Scoggins, 517 B.R. 206 (Bankr. E.D.
20 Cal. 2014), the bankruptcy court stated that "[a] chapter 7

22 ⁵ The calculation of the Trustee's maximum compensation
23 under § 326 is as follows, based on total disbursements of
24 \$21,000: 25% of the first \$5,000 = \$1,250; 10% of the remaining
\$16,000 = \$1,600; \$1,250 + \$1,600 = \$2,850.

25 ⁶ The proposed \$842.72 distribution would have allowed
26 unsecured creditors to recover 5.7% of their allowed claims.

27 ⁷ The Panel may review on appeal all earlier interlocutory
28 orders that merge in the final appealed order. McBride v. CITGO
Petroleum Corp., 281 F.3d 1099, 1104 (10th Cir. 2002).

1 trustee's request for compensation that exceeds the amount of
2 money the trustee proposes to distribute to unsecured creditors
3 constitutes one of those 'extraordinary circumstances' which
4 commands a review of the fees for reasonableness." On that
5 basis, the bankruptcy court found that extraordinary
6 circumstances existed warranting scrutiny of the Application.
7 To guide its determination of the reasonableness of the
8 Trustee's requested compensation, the bankruptcy court ordered
9 the Trustee to produce his time records for the case.

10 The Trustee submitted a declaration in which he explained
11 that he did not keep detailed case-by-case time records for his
12 work as a chapter 7 panel trustee. Instead of time records, he
13 included a narrative of his services in the case. To provide
14 justification for his request for compensation in lieu of
15 specific time records for the case, the Trustee reported the
16 total hours he worked as a chapter 7 trustee in 2014 and the
17 compensation he received. Based on his calculations, including
18 estimates of the time his legal assistant spent on activities
19 that would qualify as billable, the Trustee estimated that the
20 value of his chapter 7 trustee services in 2014 was \$280,327,
21 while in fact he received \$184,838.51 for those services.

22 After receiving the Trustee's declaration, the bankruptcy
23 court entered an order on the Final Report and Application
24 ("Compensation Order"). In the Compensation Order, the
25 bankruptcy court acknowledged that it had "no reservations about
26 the Trustee's diligence and the performance of his duties."
27 Nevertheless, the bankruptcy court found that there were
28 extraordinary circumstances present justifying compensation in

1 an amount less than that requested. In support of this
2 determination, the bankruptcy court noted that the Trustee had
3 administered only one asset (the Dodge); that the Dodge had sold
4 for less than expected; and that, as a result of the
5 disappointing sale price, the Trustee's requested compensation
6 exceeded - by almost a factor of three - the amount unsecured
7 creditors would receive under the proposed distribution. With
8 no time records to guide its determination of an appropriate
9 level of compensation, the bankruptcy court turned to the United
10 States Trustee's Handbook for Chapter 7 Trustees, which
11 instructs trustees not to administer assets "primarily for the
12 benefit of the trustee." Based on this principle, the
13 bankruptcy court reasoned that "the unsecured creditors should
14 receive at least as much" as the Trustee himself. The
15 bankruptcy court awarded the Trustee \$1,597.58, exactly half of
16 the net proceeds from the sale of the Dodge.

17 The Trustee filed a timely appeal of the Compensation
18 Order.

19 **II. JURISDICTION**

20 The bankruptcy court had jurisdiction under 28 U.S.C.
21 §§ 1334 and 157(b)(2)(A). We have jurisdiction under 28 U.S.C.
22 § 158.

23 **III. ISSUE**

24 Whether the bankruptcy court abused its discretion in
25 awarding compensation to the Trustee in an amount less than that
26 requested in the Application.

27 **IV. STANDARD FOR REVIEW**

28 We review for abuse of discretion the bankruptcy court's

1 award of fees under § 330(a). In re Salgado-Nava, 473 B.R. at
2 915. A bankruptcy court abuses its discretion if it applies an
3 incorrect legal standard or misapplies the correct legal
4 standard, or if its factual findings are illogical, implausible
5 or unsupported by evidence in the record. TrafficSchool.com,
6 Inc. v. Edriver Inc., 653 F.3d 820, 832 (9th Cir. 2011); United
7 States v. Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009) (en
8 banc).

9 V. DISCUSSION

10 As stated above, we review the Compensation Order for abuse
11 of discretion. Review for abuse of discretion requires us first
12 “to determine de novo whether the [bankruptcy] court identified
13 the correct legal rule to apply to the relief requested.”
14 Hinkson, 585 F.3d at 1262. If a bankruptcy court fails to
15 identify or misapplies the correct rule of law, the inquiry ends
16 there, and we “must conclude [the bankruptcy court] abused its
17 discretion.” Id. Accordingly, we must identify the applicable
18 rule of law and determine whether the bankruptcy court applied
19 it correctly.

20 A. The “extraordinary circumstances” test

21 Section 326(a) provides a formula for determining the
22 maximum compensation a trustee may receive in a chapter 7 case.
23 In our decision in Salgado-Nava, we analyzed the interaction
24 between this maximum compensation formula and the provision of
25 § 330(a)(7) that the bankruptcy court must “treat [a trustee’s]
26 compensation as a commission, based on section 326.” In re
27 Salgado-Nava, 473 B.R. at 915-22. We held that a trustee’s
28 request for compensation should be presumed reasonable as long

1 as the amount requested does not exceed the statutory maximum
2 calculated pursuant to § 326. “[A]bsent extraordinary
3 circumstances, bankruptcy courts should approve chapter 7, 12
4 and 13 trustee fees without any significant additional review.”
5 Id. at 921. If the court has found that extraordinary
6 circumstances are present, only then does it become appropriate
7 to conduct a further inquiry to “determine whether there exists
8 a rational relationship” between the compensation requested and
9 the services rendered. Id.

10 B. The bankruptcy court’s extraordinary circumstances inquiry

11 To begin with, the bankruptcy court correctly identified
12 the legal rule articulated in Salgado-Nava, acknowledging both
13 the presumption of reasonableness and the “extraordinary
14 circumstances” standard. In applying this standard, however,
15 the bankruptcy court went on to state: “A chapter 7 trustee’s
16 request for compensation that exceeds the amount of money the
17 trustee proposes to distribute to unsecured creditors
18 constitutes one of those ‘extraordinary circumstances’ which
19 commands a review of the fees for reasonableness.” See In re
20 Scoggins, 517 B.R. at 217.

21 It is clear from this statement that the bankruptcy court
22 applied a per se rule in its extraordinary circumstances
23 inquiry, which would require a finding of extraordinary
24 circumstances in every case in which the trustee’s requested
25 compensation exceeds the proposed distribution to unsecured
26 creditors. Thus, our task is to determine whether this per se
27 rule is consistent with the applicable statutory provisions, as
28 analyzed in Salgado-Nava. For the reasons that follow, we

1 conclude that it is not.

2 C. Trustee compensation in excess of distribution to unsecured
3 creditors is not per se an extraordinary circumstance

4 In Salgado-Nava, we left open the question of “what facts
5 might qualify as extraordinary for purposes of activating the
6 bankruptcy court’s duty to determine the reasonableness of the
7 § 326(a) commission rates.” In re Salgado-Nava, 473 B.R. at 922
8 n.16. But we recognized “Congress’s clearly expressed intent to
9 fix trustee commission rates for the **vast majority** of cases.”
10 Id. at 920 (emphasis added). We noted that “we must assume that
11 Congress already has approved fees set as commissions in § 326
12 as reasonable,” and that payment of a commission without close
13 scrutiny in the absence of extraordinary circumstances provided
14 “a certain symmetry” when balanced against the modest \$60 fee
15 that trustees receive in no-asset cases. Id. at 921-22. The
16 per se rule would disrupt this symmetry and would vitiate the
17 congressional imperative that trustee compensation requests at
18 or below the § 326 commission level be approved in “the vast
19 majority of cases.”⁸

20 This does not mean, of course, that the relationship
21 between trustee compensation and distributions to unsecured
22 creditors is irrelevant to a finding of extraordinary
23 circumstances. We do not adopt, as the Trustee urges us to do,
24 a rule allowing chapter 7 trustees to receive the statutory
25 commission in all cases unless the trustee’s performance of his

26
27 ⁸ The Trustee notes, correctly, that the per se rule would
28 require a finding of extraordinary circumstances in such cases
even if all creditors are paid 100 cents on the dollar.

1 or her duties has been deficient. But see Mohns, Inc. v.
2 Lanser, 522 B.R. 594, 601-02 (E.D. Wis. 2015) (holding chapter 7
3 trustees are entitled to statutory commission in “nearly every
4 case” and rejecting any consideration of disproportionateness of
5 compensation). We decline to give “extraordinary circumstances”
6 the narrow and categorical definition the Trustee espouses. We
7 do hold, however, that trustee compensation exceeding
8 distributions to unsecured creditors is not per se an
9 extraordinary circumstance.

10 The fact that the Trustee’s requested compensation exceeded
11 the proposed distribution to unsecured creditors was not
12 sufficient, standing alone, to establish extraordinary
13 circumstances. By holding that it was, the bankruptcy court
14 applied an incorrect legal standard and thus abused its
15 discretion.

16 VI. CONCLUSION

17 Based upon the foregoing, we conclude that the bankruptcy
18 court abused its discretion by applying an incorrect legal
19 standard in reviewing the Trustee’s Application. Accordingly,
20 we VACATE the Hearing Order and the Compensation Order and
21 REMAND the matter to the bankruptcy court for further
22 proceedings consistent with this Opinion.

23
24
25
26 Concurrence begins on next page.
27
28

1 JURY, Bankruptcy Judge, Concurring:

2
3 I have no disagreement with the majority Opinion on this
4 matter. Without question the adoption by the bankruptcy judge
5 of a per se rule that an extraordinary circumstance exists any
6 time a trustee's requested compensation, as measured by § 326,
7 exceeds the proposed distribution to unsecured creditors is
8 inconsistent with our holding in Salgado-Nava. However, I would
9 take our disagreement with the practices in the Eastern District
10 of California somewhat further.

11 Although not the articulated basis for the bankruptcy
12 judge's request for detailed time records in this case and his
13 per se determination that a hearing on the reasonableness of the
14 requested fees was required, as the Trustee points out in his
15 brief, the procedure followed by the judge was consistent with
16 the recently adopted Local Bankruptcy Rule 2016-2¹ in the
17 Eastern District of California, which states:

18 Compensation of Chapter 7 Trustees

19 (a) Motion Procedure. Every application for
20 compensation of a Chapter 7 trustee in the categories
21 set forth in paragraph (b) shall be presented by
22 motion noticed and set for hearing pursuant to LBR
9014-1. Such motion shall be supported by time
records and a narrative statement of the trustee's
services.

23 (b) Categories. The procedure specified in paragraph
24 (a) shall be followed for requests that satisfy any of
the following criteria:

- 25 (1) Fee requests seeking \$10,000.00, or more;
26 (2) Cases in which the trustee seeks fees
exceeding the amount remaining to pay unsecured

27
28 ¹ New LBR 2016-2 was adopted in May 2015, after the
bankruptcy judge here set the hearing and ruled on this case.

1 priority and general claims;
2 (3) Cases in which there is a "carve out" for the
3 estate or a "short sale";
4 (4) Cases where the trustee has operated the
5 business of the debtor; or
6 (5) Cases in which the court specifically orders
7 such a fee application.

8 This rule was adopted in apparent response to In re
9 Scoggins, 517 B.R. 206 (Bankr. E.D. Cal. 2014), a published
10 opinion joined by all the Eastern District bankruptcy judges,
11 who called for the new local rule in their concurrence. Id. at
12 227.

13 This rule and the reason it was enacted, as described in
14 Scoggins, is inconsistent with our holding in Salgado-Nava.
15 I submit that LBR 2016-2 stands on its head the presumption of
16 reasonableness of the § 326 commission as called for in
17 § 330(a)(7).

18 After bemoaning the fact that the U.S. Trustee and
19 creditors offered little help to a reviewing bankruptcy court
20 when it considers a chapter 7 trustee's fee application,
21 Scoggins adopts a bright line requirement that detailed fee
22 applications, supported by time records kept by the trustee,
23 must be filed in a list of predetermined circumstances (which
24 are articulated as #'s (b) 1-5 in LBR 2016-2) to "sort wheat
25 from chaff" because the "categories suggest themselves." Id. at
26 222. Therefore, like the bankruptcy judge's decision in this
27 case about when a per se extraordinary circumstance exists, the
28 local rule requires detailed time records every time a trustee
requests compensation which exceeds the dollars returned to
unsecured creditors and in the other four predetermined
categories of cases.

1 Such requirement flies in the face of Salgado-Nava and the
2 presumption that the commission is reasonable. Our case
3 suggests that **even when** a bankruptcy court makes an independent,
4 discretionary determination that extraordinary circumstances
5 exist, measuring the worth of the trustee's service by time
6 billings is error:

7 But bankruptcy courts still must keep in mind that
8 tallying trustee time expended in performing services
9 and multiplying that time by a reasonable hourly rate
10 ordinarily is beyond the scope of a reasonableness
11 inquiry involving commissions. Simply put, a
12 bankruptcy court that diminishes a trustee's
13 compensation from the statutorily-set rate errs if the
14 only basis offered for this diminution is a lodestar
15 analysis.

16 Salgado-Nava, 473 B.R. at 921.

17 This statement is preceded by a discussion of the
18 impropriety of using a lodestar measure in a commission-based
19 compensation calculation. Id. at 920. Yet, the new Eastern
20 District rule does not just suggest that time records might be
21 requested in some individually screened cases; instead it
22 requires them in every case which falls within the predetermined
23 list. Where did the presumption of reasonableness go?

24 I do not suggest that this rule mandates the judge to **only**
25 consider a lodestar approach. However, by inserting it into the
26 middle of the review process **every time**, it strongly suggests
27 the time expended cannot be ignored, knocking the props out from
28 under the presumption of reasonableness of the commission.

 It is not my place to suggest that this new rule be
stricken from the books. However, it is fundamentally
inconsistent with the holding and reasoning of Salgado-Nava and
teeters on unstable ground in light of that opinion.