

ORDERED in the Southern District of Florida on December 10, 2008.



A. Jay Cristol

**A. Jay Cristol, Chief Judge Emeritus
United States Bankruptcy Court**

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
www.flsb.uscourts.gov**

In re:

Case No. 05-19571-BKC-AJC

FRASER L. ALLPORT,
d/b/a The Constellation Group, LLC,
d/b/a The Constellation Concierge, LLC,
d/b/a The Constellation Compass, LLC,
d/b/a One2one Living, LLC,
d/b/a Next Galaxy Media, LLC,

Debtor. /

**ORDER OVERRULING DEBTOR'S OBJECTION TO TRUSTEE'S APPLICATION
FOR COMPENSATION AND ALLOWANCE OF ADMINISTRATIVE EXPENSES**

THIS MATTER came before the Court for hearing on November 19, 2008 at 10:30 a.m. in Miami, Florida upon the (I) *Trustee's Application for Compensation and Allowance of Administrative Expenses* (the "Application") (D.E. 239) filed by Court-appointed Trustee Alan L. Goldberg (the "Trustee"), and (ii) *Objection to Fee Application* (the "Fee Objection") filed by Debtor Fraser L. Allport (the "Debtor"). The Court, having reviewed the Application, the Fee Objection and the Court file, having heard argument of counsel, and being otherwise duly

advised in the premises, finds for the reasons explained below that the Fee Objection should be **OVERRULED** and the Application is **GRANTED** as follows.

The Court finds the Debtor has standing to object to the Application because he has established that if the Fee Objection is successful and the fees sought are denied in their entirety, then funds would be available to pay certain priority claims that would otherwise be a non-dischargeable debt for which the Debtor remains personally liable. However, even accepting Debtor's argument that the statutory formula set forth in 11 U.S.C. § 326(a) is a cap which allows the Court to consider whether to award the maximum provided or some lesser amount, the Court finds the fees sought by the Trustee for the services performed are reasonable. The services provided by the Trustee were necessary for the full and fair administration of the estate and should be compensated accordingly. Finally, no objections to the reimbursement of costs having been raised, the Trustee is awarded costs in the amount of \$361.94.

A. The Debtor has standing to object to the Application

The Trustee argued that, under the standard adopted in *In re Walker*, 356 B.R. 834, 848 (Bankr. S.D. Fla. 2006), a debtor only possesses standing to object to a claim if the debtor establishes that a successful objection would result in a surplus being distributed directly to the debtor. The Trustee asserts the Fee Objection should be overruled because this Debtor has not and cannot make such a showing. The Debtor argued that he possesses standing because a successful Fee Objection would reduce his liability of non-dischargeable taxes to the United States of America, Department of the Treasury, Internal Revenue Service ("IRS"). The Trustee acknowledged that while a successful Fee Objection might well reduce the Debtor's liability to the IRS, that was not the appropriate legal standard adopted by the courts to determine standing.

Upon the facts of this case, the Court believes the Debtor has standing and finds the *Walker* case to be distinguishable. In a case factually similar to this one, the Court explains the concept of standing in a bankruptcy case and the exceptions that apply:

Generally, to have standing in a bankruptcy case, “a person must have a pecuniary interest in the outcome of the bankruptcy proceedings.” (Citations omitted). One rule that follows from this “pecuniary interest” standard is that an insolvent Chapter 7 debtor generally does not have standing to object to claims, because “he is considered to have no interest in how his assets are distributed among his creditors and is held not to be a party in interest.” (Citations omitted). **Courts recognize an exception to this rule, however, when the debtor has a non-dischargeable debt, for which the debtor will remain personally liable after the bankruptcy.** (Citations omitted and emphasis added).

In re Moss, 320 B.R. 143, 149-150 (Bankr. E.D. Mich. 2005).

In this case, the Debtor has demonstrated a pecuniary interest in the estate by virtue of the non-dischargeable priority debt, which to the extent paid from the estate reduces his liability dollar-for-dollar. The *Walker* case did not involve a proposed distribution to a non-dischargeable priority debt; the debtor in *Walker* stood to gain nothing from a successful fee objection, thus failing to establish the requisite pecuniary interest. The Trustee does not dispute that the Debtor owes a priority debt to the IRS that is non-dischargeable. Thus, to the extent the Court reduces or disallows the Trustee’s fees, more money will be available for distribution to pay the IRS’ priority claim, which will in turn reduce Debtor’s non-dischargeable liability to the IRS. *See Moss*, 320 B.R. at 150. The Court therefore concludes that the Debtor’s personal liability for the non-dischargeable debt to the IRS gives him a sufficient pecuniary interest to confer upon him standing to object to the Trustee’s fee application. *See Focus on the Family v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263, 1273 (11th Cir. 2003) (standing question is measured by whether the plaintiff has alleged a personal stake in the outcome of the controversy;

plaintiff must show that he himself is injured by the challenged action of the defendant, and such injury may be indirect).

B. Trustee's fees are reasonable; and services performed were necessary

Even accepting the Debtor's position that the statutory formula set forth in section 326(a) is a cap and the Court has discretion to consider whether to award the maximum provided or some lesser amount, the Court believes the fees sought by the Trustee are reasonable given the necessary services performed and the substantial responsibility upon the Trustee in the performance of his fiduciary duties. While the Court does indeed have the discretion as to whether to award the maximum fee sought by the Trustee, the Court rejects the Debtor's argument that the Trustee is required to submit detailed time records. Admittedly, in some cases, the Court may find it necessary to review the work performed and the time expended in a particular case. However, where, as here, the Court is familiar with the case and the activities performed by the Trustee, the Court finds no need for a more detailed fee application. Bankruptcy trustees, *unlike* Section 330 professionals—primarily attorneys—are *not* compensated on an hourly basis but instead on a statutory formula set forth by Congress based upon monies brought into the estate. 11 U.S.C. §326(a). A Chapter 7 trustee has the fiduciary duty to fully administer the estate, and make every effort to recover assets if it is reasonable to make such an attempt, and is compensated on his/her efficient performance of his/her duties.

The Debtor has argued that the Trustee's efforts failed to add value to the Debtor's bankruptcy estate. The Debtor argues that the Trustee's statutorily based fee is "unreasonable" under the circumstances and based on the results obtained by the Trustee. The Court disagrees. In this case, the Trustee's efforts to recover and administer assets in a timely fashion brought

value into the estate, and will result in a distribution being made to one of the Debtor's largest creditors, the IRS.

As evidenced by the record, the Trustee has been active in this case with respect to the administration of the Debtor's estate and the recovery of assets on behalf of the estate. The Trustee negotiated with the Debtor to arrange for the timely sale of the Debtor's claimed homestead property (the "Homestead Property"), a condominium unit located on Miami Beach. To facilitate the sale of the Homestead Property in a timely fashion, and thereby avoid the worst of the downturn in the real estate market, the Trustee entered into a settlement agreement with the Debtor (the "First Settlement") which provided that the Homestead Property would be sold prior to a determination of whether the Homestead Property was in fact an exempt asset as the Debtor alleged.

As noted in the First Settlement, the Debtor did not have sufficient current income to pay the mortgage, maintenance and taxes related to the Homestead Property; and, the Debtor and the Trustee agreed that the best interests of both the Debtor and the estate were served by offering for sale the Homestead Property at the earliest possible date, and through the best method of sale to achieve the highest reasonable price within the shortest reasonable time. Instead of dragging his feet with respect to the sale of the Homestead Property, the Trustee agreed to sell the Homestead Property quickly to realize value.

The Trustee agreed to permit the Debtor to engage Statewide Realty Corp. and Marika Tolz as the broker (the "Broker"), to list, market, and sell the Homestead Property. The Trustee negotiated the terms of commission with Statewide Realty, entitling Statewide Realty to a commission of 5% on the gross sales price. Pursuant to the First Settlement, the net proceeds of

the sale of the Homestead Property were to be placed in an escrow account, pending resolution of the Trustee's objection to the Debtor's homestead exemption (the "Objection") (D.E. 139), which Trustee timely filed on September 29, 2006. On October 10, 2006, the Trustee obtained the *Order Granting Motion To Approve Compromise and Settlement* (the "First Settlement Order") (D.E. 143), the initial step in the process for the sale of the Homestead Property.

On January 25, 2007, the Debtor and the Trustee filed a *Motion to Sell Real Property Free and Clear of Interests* (the "Sale Motion") (D.E. 158) which represented the combined efforts of the Debtor, the Broker and the Trustee to find a buyer for the Homestead Property. Because the Debtor, the Broker and the Trustee all sought to obtain the highest possible sale price for the Homestead Property, the Debtor and the Trustee filed a *Joint Motion to Consider Competing Contracts for the Sale of Real Property* (the "Auction Motion") (D.E. 165).

On February 19, 2007, just two days prior to the hearing on the Auction Motion, the Trustee filed a *Notice of Competing Contract* (the "Notice") (D.E. 170) which contained an increased offer of \$1,300,000.00 for the purchase of the Homestead Property (increased from the original contract price of \$1,250,000.00). On February 21, 2007, this Court entered the *Order Granting Motion to Sell Property Free and Clear of Liens* (the "Sale Order") (D.E. 173). As evidenced by the Trustee's Final Report (the "TFR") (D.E. 244), the final sale price of the Homestead Property totaled \$1,386,246.87 (the "Sale Amount"). From the Sale Amount, proceeds were allocated for the payment of the secured claim of Bank One. Based on the TFR, from the Sale Amount, a total of \$1,006,780.10 was paid to Bank One on account of its secured claim. After the payment of Bank One's secured claim, and as per the First Settlement, the

remaining funds (the “Net Sale Proceeds”) were held in escrow pending the outcome of the Objection.

The Court notes that the timing of the sale of the Homestead Property was fortunate given the burst of the real estate bubble and the particular fallout suffered by the South Florida condo market. Had the Trustee dragged his feet with respect to the negotiation of the First Settlement and waited to fully litigate the Objection prior to the sale of the Homestead Property, it is highly likely that the Sale Amount would have decreased dramatically. Instead, the Trustee agreed to a mechanism contained within the First Settlement that allowed for the Homestead Property to be sold in a timely manner, thus increasing the resulting value to the Debtor’s estate. As discussed further herein, it was not until September 12, 2007 that the Debtor and the Trustee were able to reach an agreement as to the Objection, over seven months after the filing of the Sale Motion.

On April 6, 2007, prior to finalizing a settlement with the Debtor in respect of the Objection, the Trustee filed a *Motion to Compromise Controversy with Trustee and Mary Spio, Next Galaxy Media and One2One Living* (the “Spio Settlement Motion”) (D.E. 181). The settlement with Mary Spio (“Spio”) and certain entities related to the Debtor, came as a result of the Trustee’s analysis of the Debtor’s schedules and statements of affairs, the voluminous documents produced by the Debtor, and the Debtor’s extensive 2004 Examination testimony. Based on this analysis, the Trustee determined that potential litigation claims existed against Spio, Next Galaxy and One2One. Furthermore, as part of the Trustee’s investigation into the operational and financial history of Next Galaxy and One2One, the Trustee determined that potential claims for membership interest distributions and fraudulent transfers pursuant to 11

U.S.C. § 548 and Fla. Stat. § 726 exist in favor of the Debtor's estate. Based on the Trustee's detailed analysis, the Trustee entered into negotiations with Spio, and as a result of such negotiations, the Trustee was able to reach a favorable settlement with Spio, Next Galaxy and One2One without the need for filing a complaint. Without objection, on April 30, 2007, this Court entered its *Order Granting Motion to Compromise Controversy and Settlement* (the "Spio Settlement Order") (D.E. 183). As a result of the Trustee's diligent efforts with respect to the matters raised in the Spio Settlement Motion, the Debtor's estate received a benefit of \$80,000 without the need for associated litigation.

On September 12, 2007, the Trustee filed the *Motion to Approve Compromise and Settlement Between the Trustee, Fraser L. Allport, and Kevin Gleason, P.A.* (the "Second Settlement Motion") (D.E. 192). Through the Second Settlement Motion, the Trustee and the Debtor sought to approve a settlement which resolved the Objection, as well as issues raised by a scheduled claim on behalf of Debtor's counsel, Kevin Gleason, P.A. (the "Gleason Claim"). The Gleason Claim resulted from the fact that the Debtor's counsel was listed as a secured creditor in the Debtor's schedules, and asserted a collateral interest in certain artwork.

The agreed-upon resolution of the Objection resulted in the Debtor and the Trustee splitting the Net Sale Proceeds on a 50/50 basis. The Debtor's estate realized a gain of \$116,026.82, and the Debtor received a direct distribution of \$116,026.82. On October 5, 2007, this Court entered an *Order Granting Motion to Compromise Controversy* (the "Second Settlement Order") (D.E. 211).

In addition to the settlements described above, the record in this case indicates that the Trustee also devoted time and efforts relative to the sale of personal property of the Debtor

which the Debtor abandoned. Specifically, on May 30, 2006, the Trustee filed a *Motion to Sell Personal Property by Public Auction* (the “Personal Property Motion”) (D.E. 89) to liquidate a significant amount of the Debtor’s personal property. On June 8, 2006, this Court entered the *Order Granting Motion to Sell* (the “Personal Property Order”) (D.E. 99).

Based on the *Report of Auctioneer* (the “Auctioneer’s Report”) (D.E. 103), which was filed on June 26, 2006, it appears that the Trustee swiftly moved to have the Debtor’s personal property sold at auction, such auction taking place on June 13, 2006 (the “Auction”). As a result of the Auction, the estate received a benefit of \$16,585, less the \$4,500 charged by the auctioneer for fees and costs. Given the dates represented in the docket of the Debtor’s case, it again appears that the Trustee moved quickly to sell the Debtor’s assets and bring value into the Debtor’s estate.

Overall, the Trustee generated a grand total of \$1,486,843.47 of funds for the Debtor’s bankruptcy estate (the “Total Funds”), a substantial amount and a serious and heavy responsibility in the administration thereof. *See* TFR, pg. 6. In an attempt to reduce the fee being sought by the Trustee in the Application, the Debtor argues that the sale of the Homestead Property, and the proceeds generated thereby, should not be considered by this Court in terms of the overall amount of funds disbursed by the Trustee. The Court disagrees. The mere fact that the Homestead Property was encumbered by a mortgage in favor of Bank One, and that Bank One’s mortgage was paid at the closing of the sale of the Homestead Property, does not change the fact that the sale of the Homestead Property generated substantial funds for the Debtor’s bankruptcy estate, and that in fact those funds were “disbursed” by the Trustee for purposes of

calculation pursuant to 11 U.S.C. § 326(a). It is important to note that the United States Trustee has not objected to the Application, nor to any part of the fees sought by the Trustee.

The Trustee's position that the funds generated by the sale of the Homestead Property were in fact "disbursed" by the Trustee is supported by decisional law and the legislative history of section 326(a). Specifically, the legislative history states as follows:

It should be noted that the base on which the maximum fee is computed includes moneys turned over to secured creditors, **to cover the situation where the trustee liquidates property subject to a lien and distributes the proceeds**. It does not cover cases in which the trustee simply turns over the property to the secured creditor, nor where the trustee abandons the property and the secured creditor is permitted to foreclose.

See In re Blair, 313 B.R. 865, 868 (Bankr. E.D. Cal. 2004) (quoting H.R. REP. NO. 95-595, at 327 (1978), U.S.Code Cong. & Admin.News 1978, 5963, 6283-6284)) (Emphasis added).

In *Blair*, the Bankruptcy Court for the Eastern District of California examined the issue of whether funds disbursed by an escrow company to a secured creditor after the trustee sold properties subject to the secured creditor's security interest could be included in trustee's fee base for purposes of calculating the applicable percentage under section 326(a). *Id.* After analysis of the case law and the legislative history, the *Blair* court held that such disbursements should be included within the trustee's fee base. In so holding, the *Blair* court addressed two factors that must be analyzed in determining whether funds should be included in the trustee's fee base. *Id.* (deriving factors from the legislative history of section 326(a), as well as the Third Circuit Court of Appeals opinion in *In re Lan*, 192 F.3d 109 (3rd Cir.1999)). The *Blair* court described the two factor test as follows:

First, the bankruptcy court must examine whether the trustee sold assets and whether he disbursed something other than just turning over property to secured creditors. Second, the bankruptcy court must find that the trustee justifiably administered a property or fund. This depends on whether administering the asset benefitted the general estate.

Id. at 868-869 (internal citation omitted).

In analyzing the above two factors, the *Blair* court relied upon *In re Tyczka*, 287 B.R. 465 (Bankr. E.D. Mo. 2002), a case cited by the trustee which significantly mirrors the facts presented by the instant case. As noted by the *Blair* court, the *Tyczka* case directly addressed “whether the trustee could include funds disbursed on her behalf by the title company in her fee base.” *Id.* at 869. The *Blair* court continued, stating that “[i]n *Tyczka*, the trustee included in his fee base disbursements of sale proceeds from the debtor’s residence to secured creditors even though the disbursements were made by the title company. *Id.* (citing *Tyczka*, 287 B.R. at 469).

Agreeing with the position taken by the trustee, the *Tyczka* court stated that

[i]t is of no consequence that the disbursements of sale proceeds to the secured creditors and for expenses were actually made by the title company, rather than by the Trustee. Trustee authorized these disbursements through his participation in the closing process.

Id. (quoting *Tyczka*, 287 B.R. at 469).

After analyzing *Tyczka*, the *Blair* court continued its analysis, providing further detail as to the manner in which a bankruptcy court should determine whether disbursements made to secured creditors should be included in a trustee’s fee base. The *Blair* court stated:

Therefore, when determining whether a trustee properly calculated her fee base pursuant to § 326(a), the court should examine how the trustee

administered the property of the estate. Where a sale has been negotiated and the Trustee obtained approval of the sale which included employment of an escrow agent, **the court need not focus on who technically disbursed the funds.** The emphasis should be on whether the trustee negotiated the sale, whether the trustee disbursed something, rather than just turning over the property, and whether the sale benefitted the estate.

Id. at 869-870 (Emphasis added).

In light of the holdings of *Blair* and *Tyczka* to the facts of the instant case, the Court is not persuaded by the Debtor's argument that the Trustee should not include, for purposes of calculation of the Trustee's fee pursuant to section 326(a), the funds "disbursed" from the sale of the Homestead Property to the secured creditor. The Homestead Property was property of the Debtor's bankruptcy estate pursuant to 11 U.S.C. § 541, and was timely and efficiently sold by the Trustee, adding value to the Debtor's estate to ensure the payment of claims, including the claim of Bank One, a secured creditor. As stated in the legislative history of section 326(a), "the base on which the maximum fee is computed includes moneys turned over to secured creditors to cover the situation where the trustee liquidates property subject to a lien and distributes the proceeds."

In the instant case, the Trustee filed a motion, jointly with the Debtor, to sell the Homestead Property free and clear of liens. In addition, the Trustee presented a competing contract to this Court prior to the date that the Homestead Property was to be sold, thus resulting in an auction that increased the value to the bankruptcy estate. Eventually, through an expeditious sale to the highest bidder, the Homestead Property was liquidated, and the proceeds distributed. The fact that a portion of the Sale Amount was disbursed to Bank One, a secured

creditor, by the closing agent responsible for the closing of the sale of the Homestead Property does not serve to limit the amount of funds that can or should be considered by the Trustee in calculating the fee base under section 326(a).

Based on the teaching of *Blair* and *Tyczka*, this Court has focused on the fact the Trustee (1) negotiated the sale of estate property; (2) disbursed something, rather than simply turning over property to secured creditors; (3) benefitted the estate by the sale and liquidation of assets; and, was subject to substantial responsibility and liability in the handling of well over one million dollars. The record in this case indicates the Trustee negotiated the sale of real and personal property. The sale resulted in a disbursement to a secured creditor, Bank One, on account of its secured claim; and, the sale also benefitted the Debtor's estate, as it satisfied, in full, the largest claim in the case [to the IRS], as well as providing a funds to the Debtor's estate for distribution to holders of administrative and general unsecured claims.

Overall, comparing the amount of the Total Funds to the amount of fees sought by the Trustee through the Application, and considering the substantial efforts of the Trustee as evidenced by the sales of assets and the favorable settlements reached, the fees sought by the Trustee are completely reasonable, and payment of such fees are completely justified under the circumstances. Accordingly, the Court **OVERRULES** the Fee Objection and awards fees to the Trustee in the amount of \$67,854.44 and awards reimbursement of costs in the amount of \$361.94.

###

Copies furnished to:

Douglas A. Bates, Esq.
BERGER SINGERMAN, P.A.
200 S. Biscayne Blvd., Ste. 1000
Miami, FL 33131
Tel. (305) 755-9500
Fax (305) 714-4340

(Attorney Bates shall serve a copy of this Order upon all interested parties upon receipt and file a certificate of service.)