

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA**

In re:

CASE NO. 02-30463-BKC-SHF
Chapter 7 Proceeding

DAVID ALLEN CARTER
ARIANE CARMEN-HELEN ESPINO-BROWN,

Debtors. _____ /

ORDER ALLOWING FEES

After notice to all creditors, this Court has examined all pending fee applications filed in this case. The Court has considered these applications and finds that the following allowances are reasonable.

The Court finds that reasonable compensation for John P. Barbee, trustee, is \$4,709.04 plus expenses of \$165.55.

The Court finds that reasonable compensation for John A. Moffa, attorney for trustee, is \$12,673.00 plus expenses of \$822.96.

In allowing the foregoing fees, the Court has reduced the fee request of John P. Barbee, chapter 7 trustee, by \$1,229.57, and the Court has reduced the fee request of John A. Moffa, attorney for chapter 7 trustee, by \$1,108.00. The rationale for the reductions in fee allowances is set forth below:

REDUCTION IN FEE REQUEST BY TRUSTEE

The fee application of John P. Barbee, as chapter 7 trustee ("Trustee"), is predicated upon the Trustee's purported disbursement of \$53,772.15 during the course of the administration of this estate (C. P. 82). Pursuant to 11 U.S.C. § 326(a), the court may allow reasonable compensation to a chapter 7 trustee subject to certain delineated limitations based upon "...all monies disbursed or turned over in the case by the trustee to parties in interest...". A component of the aggregate amount of gross receipts purportedly administered by the Trustee (\$53,772.15) is an amount equal to \$33,800.00, ostensibly representing the proceeds derived from the Trustee's sales of two parcels of real property, which sales were authorized by the Court by way of orders entered on July 15,

2003 (C. P. 50 and 51). However, the sales of both parcels were closed through escrow agents, and the net amount of proceeds actually received by the Trustee equals \$19,618.29. Nonetheless, the Trustee's fee application is computed on the basis that he disbursed a total of \$33,800.00 deriving from his sale of the two real estate parcels. In actuality, the total amount of disbursements by the Trustee equals \$39,590.44, and not \$53,722.15. Thus, based upon the formula prescribed by 11 U.S.C. § 326, the maximum allowable compensation to the Trustee equals \$4,709.04.

The position implicitly advanced by the Trustee is that, since he constructively received a total of \$33,800.00 in "proceeds" from the sales of the two real estate parcels, his compensation should be computed to include the \$33,800.00 as a component of his purported total disbursements of \$53,722.15. This Court previously has addressed the same issue. In the case of *In re Moreno*, 295 B. R. 402 (Bankr. S. D. Fla. 2003), the chapter 7 trustee sought an allowance of compensation based upon disbursements made, in part, through a settlement agent with regard to the trustee's sale of real property. In *Moreno*, the trustee sold a parcel of real property, and utilized the services of special counsel in the closing of the real estate transaction. Thereafter, the trustee sought compensation under 11 U.S.C. § 326(a), based upon disbursements ostensibly made by the trustee which included all disbursements effected by the trustee's special counsel deriving from the closing of the real estate parcel. In rejecting the "constructive disbursement" theory on trustee's disbursements, the Third Circuit Court of Appeals, in the case of *In re Lan Associates XI, L. P.*, 192 F.3d 109 (1999) noted:

We are not persuaded by these authorities' adoption of the constructive disbursement theory for several reasons. First, because the constructive disbursement theory allows the trustee to be compensated for disbursements of property and other types of consideration, rather than simply for money disbursements as Congress defined them, it conflicts with our narrow interpretation for § 326(a).

Id. at page 118. *In accord.*, see *New England Fish Company*, 34 B. R. 899 (Bankr. W. D. Wash. 1983); *In re Palm Beach Resort Properties, Inc.*, 73 B. R. 323 (Bankr. S. D. Fla. 1987). Under the

circumstances *sub judice*, the Court rejects the application of the constructive disbursement theory relating to compensation for the chapter 7 trustee.

REDUCTION IN FEE REQUEST BY ATTORNEY FOR TRUSTEE

The fee application of John A. Moffa, attorney for the chapter 7 trustee (“Moffa”) seeks compensation for professional services in the amount of \$13,781.00 together with reimbursement of expenses in the amount of \$822.96. Included among the itemized time entries attached to Moffa’s fee application are numerous time entries reflecting tasks performed by individuals employed by Moffa as secretaries or paralegals. The tasks performed by Kellye Norelius, Bridgette Paul, and Ann Marie Ellison consist almost entirely of services which are secretarial in nature, and for which professional compensation is not allowable. The tasks performed by Moffa’s paralegals include: preparation of notices of appearance; telephone conversations relating to the status of the administration of this case; preparation of certificates of service relating to motions and orders deriving from Moffa’s representation of the trustee; telephone conferences with the court’s official copy service relating to the obtaining of copies of court papers; and the preparation of correspondence and notices to the debtors and third parties and the preparation for typing of other court papers.

Secretarial tasks are overhead expenses of the attorney and are not additionally compensable. *Bonds Lucky Foods, Inc.*, No. 1 76 B. R. 664, 668 (Bankr. E. D. Ark. 1986).

A paralegal should be engaged in matters, under the supervision of an attorney, that require some independent judgment or are matters that an attorney would be expected to perform but can, under an attorney’s supervision, be performed by an individual with specialized training or experience. Clerical functions such as typing, filing, photocopying, faxing, scanning or filing documents either electronically or traditionally, are not such functions.

Valley Historic Ltd. P’ship, 307 B. R. 508, 517 (Bankr. E. D. Va. 2003), *citing In re Joseph Charles & Assoc., Inc.*, 295 B. R. 399 (Bankr. S. D. Fla. 2003). The Court accordingly reduces Moffa’s fee

application to the extent of \$1,108.00 which represents non-compensable time expended by his secretaries or paralegals.

In allowing the foregoing fees, this Court has considered the criteria specified in 11 U.S.C. §§326 and 330 and the requirements of B. R. 2016 in light of the principles stated in *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983); *Blum v. Stenson*, 465 U.S. 886, 897 (1984); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986); and *Norman v. Housing Authority of Montgomery*, 836 F.2d 1292, 1299 (11th Cir. 1988).

ORDERED in the Southern District of Florida this 1st day of July, 2005.

STEVEN H. FRIEDMAN
U. S. Bankruptcy Judge

Copy to:

John P. Barbee, Trustee

John A. Moffa, Esq.

Office of the U. S. Trustee