

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

In re:

Case No.: 04-32008-BKC-SHF

Chapter 7 Proceeding

GUSTAVO EMILIO SALAZAR,

Debtor. _____/

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 \$7,168.69 plus expenses of \$2,218.31.

The Court finds that reasonable compensation for John A. Moffa, Esq., Attorney for Trustee, is \$7,444.00 plus expenses of \$872.04.

The Trustee is authorized and directed to pay the foregoing sums and shall pay to the Clerk of the Court \$150.00 for fees and/or charges assessed against this estate.

In allowing the foregoing fees, the Court has reduced the fee request of John P. Barbee, chapter 7 trustee, by \$6,370.50, and the Court has reduced the fee request of John A. Moffa, attorney for chapter 7 trustee, by \$378.00. 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 \$205,783.77 during the course of the administration of this

estate (C. P. 65). 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...". As indicated by the Notice of Filing of Trustee's Final Report of Estate and Proposed Dividends and Applications for Compensation and Setting Deadline for Objections ("Notice of Filing" - C. P. 67), the Trustee contends that he has administered total receipts of \$78,382.35¹. In accordance with the provisions limiting the amount of compensation to chapter 7 trustees pursuant to § 326(a), the maximum compensation allowable to the trustee is \$7,168.69, and **not** \$13,539.19 as sought by the Trustee. The Trustee has computed the amount of his fee request based upon claimed total "purported" disbursements of \$205,783.77, which amount is categorized as "Gross Receipts" in the Trustee's Fee Application (C. P. 65). In analyzing the Trustee's Fee Application, together with the Estate Cash Receipts and Disbursements Record attached thereto, it appears that the Trustee has predicated his fee application, to a large extent, upon his contention that **he** disbursed **all**, or **a large portion of**, the sum of \$240,000.00, relating to the sale of real property located at 18641 Shauna Manor Drive, in Boca Raton, Florida (C. P. 59 - Trustee's Report of Sale). However, a thorough review of the record of this bankruptcy case reveals that there exists no evidence that John P. Barbee, Trustee, actually disbursed \$240,000.00² relating to the sale of the property. Rather, the total of the funds actually received by

¹A review of Estate Cash Receipts and Disbursements Record attached to the Trustee's Fee Application reflects that the total funds **actually received** by John P. Barbee, Trustee equal \$78,373.75, and **not** \$78,382.35.

²C.P. 64, page 1 - Individual Estate Property Record and Reports, which sets forth that the total funds received by the estate from the sale of the property equals \$240,000.00. This document is a form prepared by a chapter 7 trustee annually to account for the disposition of a bankruptcy estate's assets. However, it is the Estate Cash Receipts and Disbursements Record

the Trustee, including the net proceeds from the sale of the referenced real property; the refund received from Florida Power & Light Company; and the interest earned upon the funds actually deposited into the bank account maintained by the Trustee for this bankruptcy estate; equals \$78,373.75.

REDUCTION IN FEE REQUEST BY ATTORNEY FOR TRUSTEE

The position implicitly advanced by the Trustee is that, since he constructively received \$240,000.00, or a substantial portion thereof, from the sale of the Shauna Manor real property, his compensation should be computed so as to account for all of the disbursements made in connection with the real property sale.³ The language contained in Section 326 provides that "...the court may allow reasonable compensation under section 330 of this title of the trustee for the trustee's services...upon all monies disbursed or turned over in the case by the trustee to parties in interest, excluding the debtor...". The Trustee contends that, since he constructively disbursed the \$240,000.00, or \$205,783.77,⁴ his compensation should be computed upon the basis that he actually disbursed \$240,000.00 or \$205,783.77. However, this Court, consistent with the interpretations of

that itemizes the actual receipts and disbursements of the bankruptcy estate.

³ The sum of \$13,539.19 sought by the Trustee as compensation under the formula prescribed by 11U.S.C. § 326(a) is predicated upon "total disbursements" of \$205,783.77. The Trustee categorizes the sum of \$205,783.77 in his fee application as "Gross Receipts" (C. P. 65). However, on the Trustee's Form I - Individual Estate Property Record and Report, the Trustee reflects that the Shauna Manor property was sold, and that the **funds received by the estate** equal \$240,000.00.

⁴There is no specific delineation, within the Trustee's Final Report, which corroborates or verifies the actual disbursement of funds by the Trustee which, in the aggregate, approximates \$205,783.77, or even an aggregate amount of disbursements which approaches such an amount.

Section 326 by various courts, has rejected the “constructive disbursement” theory relating to computation of compensation to bankruptcy trustees. *See, In re Moreno*, 295 B. R. 402 (Bankr. S. D. Fla. 2003); *In re Carter*, 326 B. R. 892 (Bankr. S. D. Fla. 2005); *Lan Associates XI, L. P.*, 192 F.3d 109 (3rd Cir. 1999); *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). As noted in *Lan Associates XI, L. P.*, *supra*:

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.

As noted in *Lamie vs. United States Trustee*, 540 U. S. 526, 534; 124 S. Ct. 1023, 1030 (2004), in regard to the interpretation of the above-cited portion of Section 326, “[I]t is well-established that ‘when the statute’s language is plain, the sole function of the courts - - at least where the disposition required by the text is not absurd - - is to enforce it according to its terms’”. (*citing Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U. S. 1, 6, 120 S. Ct. 1942, 147 L. Ed. 2d 1 (2000) (internal quotation marks omitted) (quoting *United States v. Ron Pair Enterprises, Inc.*, 489 U. S. 235, 241, 109 S. Ct. 1026, 103 L. Ed. 2d 290 (1989) (in turn quoting *Caminetti v. United States*, 242 U. S. 470, 485, 37 S. Ct. 192, 61 L. Ed. 442 (1917))).

The above-cited portion of Section 326 is quite clear. Bankruptcy trustees are to be compensated based upon funds which they **actually disbursed** and **not** which are **disbursed through an escrow agent or title agent**, as apparently occurred *sub judice* (*see* page 1 of Estate Cash Receipts and

Disbursement Record, attached to C. P. 65).

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 \$7,822.00 together with reimbursement of expenses in the amount of \$872.04. Included among the itemized time entries attached to Moffa’s fee application are various time entries reflecting tasks performed by individuals employed by Moffa as secretaries or paralegals. The tasks performed by Kellye Norelius and Ann Marie Ellison consist largely of services which are secretarial in nature, and for which professional compensation is not allowable. The tasks performed by Moffa’s paralegals include: 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; and typing of letters and documents. An itemization of referenced services, compensation for which this Court deems inappropriate, is attached to this Order.

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 \$525.00 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 16th day of September, 2005.

STEVEN H. FRIEDMAN
U. S. Bankruptcy Judge

Copy to:

John P. Barbee, Trustee
John A. Moffa, Esq.
Office of the U. S. Trustee