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District of New Mexico**

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UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEW MEXICO

In re  
LEO SIMS,  
Debtor.

No. 7-96-14099 SR

**MEMORANDUM OPINION ON FINAL APPLICATION  
OF ALICE NYSTEL PAGE, CHAPTER 11 TRUSTEE,  
FOR FEES AND COSTS**

This matter came before the Court on the final application of Alice Nystel Page, Chapter 11 Trustee ("Applicant"), for fees and costs, filed August 23, 1999 ("final application"). Notice of the final application was given to all parties in interest on August 23, 1999, and objections were filed by: Gary B. Ottinger, Chapter 7 trustee, on August 31, 1999; the United States Trustee on September 13, 1999; and Thomas and Winnie Kennann on September 16, 1999. The legal issues<sup>1</sup> before the Court relate to the application of section 326<sup>2</sup> when two trustees are involved in a

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<sup>1</sup>There are some factual issues raised in Kennann's objection which will not be addressed in this Memorandum Opinion. The Court will set those for hearing at a later time.

<sup>2</sup>Section 326 provides:

- (a) In a case under chapter 7 or 11, the court may allow reasonable compensation under section 330 of this title of the trustee for the trustee's services, payable after the trustee renders such services, not to exceed 25 percent on the first \$5,000 or less, 10 percent on any amount in excess of \$5,000 but not in excess of \$50,000, 5 percent on any amount in excess of \$50,000 but not in excess of \$1,000,000, and reasonable compensation not to exceed 3 percent of such moneys in excess of \$1,000,000, upon all moneys disbursed or turned over in the case by the trustee to parties in interest, excluding the debtor, but including holders of secured claims.
- ...
- (c) If more than one person serves as trustee in the case, the aggregate compensation of such persons for such service may

case, and the allowability of charging New Mexico gross receipts taxes on trustee fees.

The final application covers the period April 24, 1997 through the election of a chapter 7 trustee on April 21, 1998. As Chapter 11 Trustee, Applicant disbursed \$191,491.56 to parties in interest other than the debtor. (The parties subsequently stipulated that \$3,000,000.00 would be the figure deemed to have been distributed to creditors throughout the case. See page 3 below.) Upon conversion, she turned over \$256,248.40 to the chapter 7 trustee. Applicant requests \$25,590 in fees (calculated pursuant to the formula of Section 326(a) of the Code), New Mexico gross receipts taxes<sup>3</sup> thereon of \$1,534.15, and costs and expenses of \$5,203.49.<sup>4</sup> Ms. Page is an experienced bankruptcy practitioner and the detailed monthly bills she maintained are attached as Exhibit C to the application. These bills total more than \$100,000.00 calculated at the then hourly rates of her law firm.

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not exceed the maximum compensation prescribed for a single trustee by subsection (a) or (b) of this section, as the case may be.

<sup>3</sup>In New Mexico, services are subject to taxation. See § 7-9-1 et seq. NMSA 1978 (1998 Repl.)

<sup>4</sup>The parties subsequently submitted an Agreed Order on Expenses which resolved all issues related to the expenses claimed in the final application.

On July 30, 1999, the Chapter 7 trustee and all major creditors entered into a global settlement of most issues in the case. Proper notice was given of this settlement and on August 25, 1999, the Court entered an Order Granting the Joint Motion to Approve Settlement Agreements. Exhibit B to this order provides:

2. Value of Bankruptcy Estate: It is stipulated that the value of the Bankruptcy Estate property to be distributed to creditors is \$3 million for the purposes of this settlement only, and not as an adjudication of the value or solvency of this Chapter 7 estate.
3. Trustee's Commissions: It is stipulated that the Trustee's commission will be based on the \$3 million value of the Bankruptcy Estate's cash and non-cash assets, and that the Trustee may receive the maximum statutory compensation based on that amount.

The Chapter 7 Trustee, also an experienced bankruptcy practitioner, filed an application<sup>5</sup> for compensation based on these provisions of the Order in the amount of \$113,250.00 and requested that the "Court allow and allocate among the persons who have served and are now serving as trustee." The Trustee urges the Court to allocate by considering the results obtained by the various trustees or a "lodestar factor" and also by considering the amount of attorneys' fees awarded to the respective attorneys and their law firms. The Chapter 7 Trustee did not submit as part of his application time records or bills that would enable the Court to determine a dollar value (as

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<sup>5</sup>One objection to the application was filed, by Ms. Page. She later withdrew this objection.

measured merely by the lodestar approach: numbers of hours multiplied by the hourly rate) of the services he provided as trustee.

#### ALLOCATION OF FEES

Under the Bankruptcy Code, the Bankruptcy Court may allow trustee fees under section 330, but may not allow more than the amount fixed by section 326. In re Arius, Inc., 237 B.R. 843, 846 (Bankr. M.D. Fl. 1999). If there are two or more trustees involved in a case<sup>6</sup>, the total compensation awarded may not exceed the maximum compensation prescribed for a single trustee. Id. (citing In re Bank of New England Corp., 134 B.R. 450, 465 (Bankr. D. Ma. 1991) aff'd 142 B.R. 584 (D. Ma. 1992).)

This Court interprets 326(c) as excluding amounts turned over to successor trustees from the computation of maximum allowable compensation. First, the plain language of 326(c) states that compensation "may not exceed the maximum compensation

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<sup>6</sup>Some courts have ruled that when a case converts from chapter 11 to chapter 7 there are in fact two cases; the chapter 11 trustee is allowed a fee based on actual disbursements plus amounts turned over to the chapter 7 trustee, and the chapter 7 trustee is allowed a fee based on his or her disbursements. See Gill v. Wittenburg (In re Financial Corporation of America), 114 B.R. 221, 224 (9<sup>th</sup> Cir. B.A.P. 1990) aff'd 946 F.2d 689 (9<sup>th</sup> Cir. 1991); In re Yale Mining Corp., 59 B.R. 302, 305-06 (Bankr. W.D. Va. 1986), overruled by United States Trustee v. Kinser, 128 B.R. 417 (W.D.Va. 1991). This Court disagrees with the reasoning of the Gill and Yale Mining cases. There is only one bankruptcy "case" that is commenced by the filing of an original petition. See In re Rodriguez, 240 B.R. 912, 915 (Bankr. D. Co. 1999).

prescribed for a single trustee." If there were only a single trustee in a case, there would be no question of amounts turned over to a subsequent trustee, and the maximum compensation would be based only on that single trustee's total distributions to creditors. See also Arius, Inc., 237 B.R. at 846. Second, Congress' intent in enacting section 326(c) was to limit the administrative cost of a case. Allowing each trustee to receive a fee based on amounts turned over to subsequent trustees would permit the administrative costs to exceed the costs of one trustee administering an estate. Id.

However, the fee for a trustee (whether an "interim" trustee, a "successor" trustee, or a trustee under a different chapter of the code) is not determined solely by the amount distributed; rather, the fee is based on the criteria of section 330, subject to the discretion of the court, to be determined based on the reasonable value of the services. In re Unclaimed Freight of Monroe, Inc., 1999 WL 1334772, 7 (Bankr. W.D. La. 1999). A trustee is never entitled to maximum compensation as a matter of right. Id.

While the Bankruptcy Code recognizes the situation in which two trustees serve, it does not provide a formula that the Bankruptcy Court can apply to allocate compensation between those trustees. For example, compare: 1) a case in which a chapter 11 trustee expends tremendous effort in collecting assets but makes

no disbursements before a conversion to chapter 7, followed by a simple chapter 7 administration, to 2) a case in which a trustee is handed a large sum of cash by the debtor, makes no disbursements and performs little work before turning the entire sum over to a successor trustee who then is involved in extensive claim litigation before making disbursements. In both cases the first trustee has collected the assets, and in both cases the second trustee has disbursed. In the first case, however, logic dictates that the first trustee should be rewarded for his or her efforts and receive the bulk of the trustee fees; in the second case, the second trustee should receive the bulk of the fees. Therefore it is clear that the allocation of fees should not be based simply or solely on receipts or disbursements.

The Court finds that trustee compensation, when limited by section 326, should be allocated among the trustees based on the relative value (measured as a percentage of the total value) of the services provided to the estate by each trustee. The question then is presented of what methodology to use to make the allocation. For purposes of this case, the Court first will permit Mr. Ottinger, if he wishes, to file a more specific statement (or summary) of what he has done for the estate and what value his efforts brought to the estate. Mr. Ottinger has already filed an application for payment of trustee compensation (docket no. 577), in which he suggests that the Court consider

the amount of the attorney fees awarded to the law firms of the two trustees as a way of determining how the trustee fees should be allocated. The Court is specifically not requiring the filing of time sheets showing hours and rates (particularly rates); however, to the extent Mr. Ottinger may wish to show how much time he spent on various tasks as a way of illustrating the amount of effort required to accomplish certain tasks, he should provide some evidence, such as time sheets, of that time.<sup>7</sup> Mr. Ottinger's attorney fee applications will not be as helpful to the Court as would be the requested summary, with or without time calculations.

As noted above, Ms. Page has already filed such an application (docket no. 589) which includes time sheets and a statement about the value of her services to the estate. (The time sheets attached to the final application were in addition to those attached to the Trustee's counsel's fee application.) She has also filed what is effectively a restatement or summary of

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<sup>7</sup> Unlike the lodestar calculation which ordinarily serves as the beginning point and frequently the ending point for determining an award of fees to a professional being paid on an hourly basis, the time spent by a trustee on a project is not by itself determinative of the fee to be awarded. See In re Bank of New England Corp., 134 B.R. at 465. However, that information can be useful to the Court in determining how much effort a certain task required, and the amount of effort may be useful in the allocation process or perhaps, in other cases, in determining whether to award the maximum compensation allowed by the Code. In re Guyana Development Corp., 201 B.R. 462, 481 (Bankr. S.D. Texas 1996).

what she did for the estate, and why, in her response to the Chapter 7 trustee's objection to her application for compensation (docket no. 611). However, if she wishes, in light of this opinion, to supplement, or summarize, her statement of value (although the Court is not suggesting or hinting that she should do so), she will also be permitted an additional filing. Second, the parties have already submitted legal authorities to the Court, and so the Court assumes the parties have no further interest in oral argument or an evidentiary hearing, which could include the presentation of expert testimony. Third, the Court will review the materials submitted by each trustee and the file, and make a decision based on "the factors set forth in Section 330(a)(3) and (4), including the results obtained, time expended by the trustee, return to the estate, intricacies of the problems involved, and opposition involved."<sup>8</sup> 3 King et al., Collier on Bankruptcy, ¶ 330.03[1] at 330-13 (15<sup>th</sup> Ed.), cited in In re Frost, 214 B.R. 295, 297 (Bankr. S.D. N.Y. 1997). The result of this calculation will ensure (at least in theory) that each trustee receives the percentage of the total awarded fees that represent her or his proportionate contribution of value to the

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<sup>8</sup> Among the factors to take into account in this case is the internecine contentiousness which characterized so much of this case, and which made service in the case much more difficult and thus made approval of the maximum compensation in the settlement agreement an easy decision.

estate, and satisfies the "prime bankruptcy policy of equality of distribution among creditors." Union Bank v. Wolas, 112 S.Ct. 527, 533 (1991)(citing H.R.Rep. No. 95-595, 177-78 (1977), U.S.Code Cong. & Admin. News 1978, pp. 6137-38.)

#### GROSS RECEIPTS TAX

The final application seeks gross receipts tax on the trustee fees awarded. For the reasons set forth below, this request is denied, although the trustee may amend her final application to provide for payment of that tax in accordance with this opinion.

Under New Mexico law, the legal incidence of the gross receipts tax is on the seller of goods or provider of services. § 7-9-4(A) NMSA 1978 (1998 Repl.)("For the privilege of engaging in business, an excise tax equal to five percent of gross receipts is imposed on any person engaging in business in New Mexico."); First National Bank of Santa Fe v. Commissioner of Revenue, 80 N.M. 699, 705, 460 P.2d 64, 70 (Ct. App. 1969) cert. denied 80 N.M. 707, 460 P.2d 72 (1969) appeal dismissed 397 U.S. 661 (1970) (legal incidence of tax is on provider, who has no obligation to pass it on to the buyer, but it is common practice to do so); Mescalero Apache Tribe v. O'Cheskey, 625 F.2d 967, 970 (10<sup>th</sup> Cir. 1979) cert. denied 450 U.S. 959 (1981)(incidence is on seller); United States v. State of New Mexico, 581 F.2d 803, 806

(10<sup>th</sup> Cir. 1979)(same). Therefore, the incidence of the gross receipts tax is on the trustee. It is not a tax on the estate.<sup>9</sup>

The Court is aware that the general practice in this District is for professionals hired by an estate, whether it is an attorney, accountant, real estate salesperson, etc., to charge and be reimbursed for gross receipts taxes. However, those taxes are generally approved in the motion to employ the professional at the outset, and can be considered to be part of the effective hourly rate being charged (as opposed to an "actual, necessary expense," see footnote 12).

More to the point, professional fees are not subject to the same statutory cap that section 326(a) imposes on trustee fees. That cap -- an absolute percentage limitation -- is a specific expression of an important Congressional policy, see In re Rodriguez, 240 B.R. at 914 and n.1, and thus differs from the limitations placed by Congress on (non-trustee) professional fees. Compare e.g., section 328(a) ("reasonable terms and conditions of employment" for professionals) with section 329(b) ("if such compensation exceeds the reasonable value of any such

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<sup>9</sup> This fact resolves a concern that the Court had expressed earlier in this case in connection with a professional fee application by an out-of-state law firm which did not seek reimbursement for gross receipts tax. If the incidence of the tax does not fall on the estate, then there should be no danger of the State of New Mexico coming back later in the case to demand potentially unexpected tax payments.

services," dealing with review of compensation paid by debtor to debtor's counsel).

Similarly, a trustee could seek to add gross receipts taxes to his or her compensation, provided however that the total award (excluding cost reimbursement) would still be limited by the statutory maximum set forth in section 326(a).<sup>10</sup> So, while it is probably acceptable to seek the tax, in the majority of cases it will not matter because the trustee would, as in this case, be receiving the maximum compensation anyway.<sup>11</sup>

In a somewhat different context (construction contractors selling materials and services to the Mescalero Apache tribe), the Tenth Circuit Court of Appeals has held that the gross receipts tax is an overhead item of the taxpayer. See Mescalero Apache Tribe, 625 F.2d at 970; § 7-9-4(A) NMSA 1978 (the tax is a cost of doing business in New Mexico). Assuming for purposes of argument that that ruling is applicable in the bankruptcy context, the gross receipts tax would therefore be part of the

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<sup>10</sup>The purpose of the amendment would be an award, the total of which was comprised of the fee together with a reimbursement of the gross receipts tax. That would result effectively in the trustee paying less gross receipts tax than if the entire sum was treated as a fee subject to the tax.

<sup>11</sup>Trustees in this district also routinely are reimbursed for the costs they incur in administering cases, in addition to the compensation received pursuant to Section 326. Since none of the parties have argued whether or how the gross receipts tax would differ from or be other than a "cost", the Court will not address this issue.

trustee fee itself, and thus not compensable as "reimbursement for actual, necessary<sup>12</sup> expenses" under 11 U.S.C. § 330(a)(1)(B). See Sousa v. Miquel (In re United States Trustee), 32 F.3d 1370, 1372-77 (9th Cir. 1994)(collecting cases that disallow overhead as an expense).

As noted more particularly above at pages 6-7, the Chapter 7 Trustee may file an amended fee application that will enable the Court to determine the value of his services to the estate. The Chapter 11 trustee may amend or supplement her fee application to reflect the value of her services to the estate (without limitation by section 326). The Chapter 7 trustee's fee application requested maximum compensation, and notice was given to all creditors and parties in interest. Therefore, no new notice will be required for either amended application. The Court will set a status conference on the applications and the remaining factual issues raised in the objections to the original final application.

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<sup>12</sup> Under the interpretation of section 330(a)(1) adopted by the Court of Appeals for the Tenth Circuit in In re Lederman Enterprises, Inc., 997 F.2d 1321, 1323 (10<sup>th</sup> Cir. 1993) the Bankruptcy Court must find that a charge benefits the estate for it to be "necessary." Although it might be argued that the pool of potential trustees is reduced by not allowing gross receipts tax in addition to the trustee's maximum compensation, it is difficult to see how a tax on the trustee's income provides any direct benefit to the estate. See also In re Ewing, 167 B.R. 233, 235 (Bankr. D. N.M. 1994).



Honorable James S. Starzynski  
United States Bankruptcy Judge

I hereby certify that, on the date file stamped above, a true and correct copy of the foregoing was either electronically transmitted, faxed, mailed, or delivered to the listed counsel and parties.

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