

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF KENTUCKY  
Covington Division

In re:

Herschel Thomas Moore  
Samantha Kay Moore

Debtors.

Case No. 11-20959  
Chapter 7

**Response of United States Trustee to Objection to Trustee's Final Report**

Samuel K. Crocker, United States Trustee, states the following in connection with the Debtors' objection to the Report, Account, and Application for Fees filed by trustee Michael L. Baker:

1. The United States Trustee does not object to Mr. Baker's requested compensation, although he recognizes that reasonable minds may differ on whether "extraordinary circumstances" exist to reduce Mr. Baker's compensation. The United States Trustee, however, disagrees with the Debtors' statement of the law on trustee compensation. The Debtors, *inter alia*, fail to take into account the 2005 amendments to the Bankruptcy Code.

2. Accordingly, the United States Trustee has filed this Response to set forth his view on the law governing trustee compensation.

*Statutory Framework*

3. Trustee compensation is governed by sections 326 and 330 of the Bankruptcy Code. First, section 326(a) establishes the maximum amount of compensation that a trustee may receive. Under section 326(a), a trustee's

fees may not exceed a percentage of “moneys disbursed or turned over in the case by the trustee to parties in interest, excluding the debtor, but including holders of secured claims.” 11 U.S.C. § 326(a).

4. Next, “subject to section[] 326,” a bankruptcy court may award “reasonable compensation for actual, necessary services rendered by the trustee.” 11 U.S.C. § 330(a)(1)(A). Prior to 2005, the amount of a chapter 7 trustee’s reasonable compensation was determined, subject to the cap set forth in section 326, under a lodestar analysis based primarily on the factors delineated in section 330(a)(3). See 11 U.S.C. § 330(a)(3)(A)-(F). But in 2005, Congress amended section 330 in two ways. First, it added subparagraph (7) to section 330(a), which requires the Court to “treat [trustees’] compensation as a commission, based on section 326.” 11 U.S.C. § 330(a)(7). Second, it completely removed chapter 7 trustee compensation from review under the section 330(a)(3) lodestar factors by expressly limiting its application “to an examiner, trustee under chapter 11, or professional person.”

*The authority of the Bankruptcy Court to reduce trustee commissions*

5. Courts agree that a bankruptcy court has the discretion to decline to award the statutory maximum commission if the resulting fee would be unreasonable. See, e.g., *In re Rowe*, 750 F.3d 392, 398 (4th Cir. 2014); *Hopkins v. Asset Acceptance LLC (In re Salgado-Nava)*, 473 B.R. 911, 921 (B.A.P. 9th Cir. 2012). But courts have articulated different standards for departing from the maximum statutory rate. There is no Sixth Circuit law on

what standard applies, although one decision on trustee compensation is currently before the Circuit on an appeal from the Western District of Kentucky. *Reisz v. Crocker*, No. 15-5066 (docketed Jan. 23, 2015).

6. The Fourth Circuit, the only circuit court that has ruled on the issue, applies the “extraordinary circumstances” standard for departing from the statutory maximum commission. *Rowe*, 750 F.3d at 396-97. In other words, compensation at the rate set forth under section 326 is presumed reasonable. *Salgado-Nava*, 473 B.R. at 921. *See also In re Robert Plan Corp.*, 493 B.R. 674, 685 Bankr. E.D.N.Y. 2012) (“[t]here is a presumption that the fee award will match the percentage calculation under § 326” (citation omitted)). The *Rowe* “extraordinary circumstances” test gives full meaning to the 2005 amendments which state that compensation “shall” be treated as a “commission” applying section 326, and excludes lodestar considerations (such as the “value” of the trustee’s services) from trustee compensation decisions. Accordingly, the United States Trustee respectfully urges the Court to apply *Rowe* in her analysis of the pending application.

7. “Extraordinary circumstances” include a failure to perform trustee duties, or performing them negligently or inadequately. *Rowe*, 750 F.3d at 397 (quoting court below). *Rowe* counsels that when a bankruptcy court reduces trustee compensation, it should “make detailed findings of fact explaining the ‘rational relationship between the amount of the commission and the type and level of services rendered.’” *Id.* at 399 (citation omitted).

8. Other lower courts have applied a different test, whether the maximum commission amount is “substantially disproportionate to the value of the trustee’s services to the estate.” *E.g., In re McKinney*, 383 B.R. 490, 493-95 (Bankr. N.D. Cal. 2008). That test is flawed, however, because it fails to give sufficient weight to the presumption that the section 326 calculation is reasonable, and continues to focus on a lodestar analysis (“value of the trustee’s services”) that was expressly rejected by Congress when it excluded chapter 7 trustees from the application of section 330(a)(3).

*Extent of “constructive disbursements”*

9. Finally, the United States Trustee disagrees with the Debtors’ argument that the payment to special counsel did not constitute “moneys disbursed ... to parties in interest,” 11 U.S.C. § 326(a), because it was not made directly by the trustee, but by special counsel himself from the settlement proceeds. In this situation, there is no question that special counsel was acting at the direction of the trustee in making the cash disbursement. This is no different than the routine distribution of sales proceeds by an escrow agent. Such cash disbursements at the direction of a trustee are properly included in the “base” to calculate the trustee’s commission. *See In re Rybka*, 339 B.R. 464, 470 (Bankr. N.D. Ill. 2006); *In re Tyczka*, 287 B.R. 465, 469 (Bankr. E.D. Mo. 2002); *In re Reid*, 251 B.R. 512, 518 (Bankr. W.D. Mo. 2000). The problem of “constructive disbursements” identified by the Debtors is not present here and only arises when a trustee

improperly attempts to include non-cash disbursements of property in the base. *See In re Lan Associates XI, L.P.*, 192 F.3d 109, 117 (3d Cir. 1999) (compensation not allowed on non-cash disbursements).

WHEREFORE, the United States Trustee respectfully requests that the trustee's application for compensation and the Debtors' objection thereto be resolved through application of the *Rowe* standard.

Dated: February 26, 2015

**Samuel K. Crocker**  
United States Trustee

By: /s/ John L. Daugherty  
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*Certificate of Service*

I certify that on February 26, 2015, I served a copy of the foregoing via ECF noticing upon all parties registered to receive notice electronically.

/s/ John L. Daugherty  
John L. Daugherty