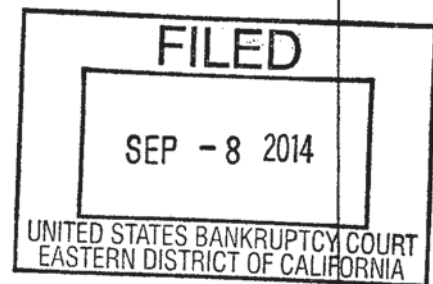


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FOR PUBLICATION  
UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA

In re:

SHARON LEE SCOGGINS,

Debtor.)

Case No. 12-42158-C-7 ✓  
DC No. JRR-3

In re:

JOE ALEX RUELAS and CYNTHIA  
RENEE RUELAS,

Debtors.)

Case No. 13-21100-C-7  
DC No. JRR-2

In re:

GEORGE POPESCU and VIOLA  
POPESCU,

Debtors.)

Case No. 12-41237-C-7  
DC No. JRR-4

In re:

DRY-MIX PRODUCTS COMPANY, INC.,  
a California Corporation,

Debtor.)

Case No. 11-21956-C-7  
DC No. TAA-7

OPINION  
REGARDING CHAPTER 7 TRUSTEE FEES

Before: Christopher M. Klein, Chief Judge

Concurrence by:

Michael S. McManus, Thomas C. Holman, W. Richard Lee, Robert S.  
Bardwil, Ronald H. Sargis, and Fredrick E. Clement,  
Bankruptcy Judges

John R. Roberts, Placerville, California, in propria persona

Thomas A. Aceituno, Folsom, California, in propria persona

Allen C. Massey, Sacramento, California, for Tracy Hope Davis,  
United States Trustee for Region 17

1 KLEIN, Bankruptcy Judge:

2  
3 Bankruptcy trustee compensation has been a puzzle since  
4 enactment of 11 U.S.C. § 330(a)(7) providing that "reasonable"  
5 trustee compensation under the "not to exceed" formula of  
6 § 326(a) be "treated" as a "commission." Two chapter 7 trustees  
7 now request four "commissions" totaling \$121,415.

8 The first issue is whether other subsections of § 330,  
9 including the § 330(a)(2) power to award "less than the amount of  
10 compensation that is requested," retain vitality in view of the  
11 § 330(a)(7) "commission" provision. The answer is yes.

12 The second issue is what constitutes "extraordinary" in the  
13 wake of the decision of the Ninth Circuit Bankruptcy Appellate  
14 Panel in Appeal of Hopkins, Ch. 7 Trustee<sup>1</sup> (In re Salgado-Nava),  
15 473 B.R. 911 (9th Cir. BAP 2012). The trustees and U.S. trustee  
16 equate "commission" with a fixed fee and say that fees may be  
17 reduced only in "extraordinary circumstances," but they do not  
18 explain what is "extraordinary." This decision holds that  
19 whether the fee is "unreasonably disproportionate" is important  
20 to the analysis of § 330(a)(2) fee reductions under any standard,  
21 including "extraordinary" circumstances.

22 The third issue is what constitutes "meaningful"  
23 distribution in the wake of the BAP decision in Appeal of Green,  
24 Ch. 7 Trustee (In re KVN Corp.), \_\_\_ B.R. \_\_\_, 2014 Westlaw

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26 <sup>1</sup>The case name is so styled for accuracy. The BAP listed  
27 all creditors as appellees, but no creditor appeared.

1 3738655 (9th Cir. BAP 2014). This decision holds that a  
2 distribution to unsecured priority and general claims that is  
3 less than the trustee's fee is not "meaningful" and is  
4 disproportionate and presents an "extraordinary" circumstance.

5 This decision also addresses the procedural problem of how  
6 to screen for fees that are not "reasonable" by requiring  
7 detailed fee applications backed by time records and narrative  
8 statement of services for: (1) the top 5 percent of trustee fee  
9 requests in this district, i.e. above \$10,000; (2) all cases in  
10 which the trustee seeks fees exceeding the amount remaining for  
11 unsecured priority and general claims; (3) all cases involving  
12 "carve-out" and "short sale"; and (4) all cases where the trustee  
13 operates a business.

14 Finally, this decision supplies a heretofore missing  
15 evidentiary link in the form of evidence of actual compensation  
16 of chapter 7 and chapter 13 trustees so as to enlighten  
17 assessment of "reasonable" trustee compensation.

#### 18 19 Facts

20 The four chapter 7 trustee fee requests consolidated here  
21 for decision illuminate different facets of the same question.  
22 Three are individual cases; the fourth is a corporate liquidation  
23 case. Informed analysis of trustee compensation, heretofore  
24 lacking in reported decisions, requires the type of evidence of  
25 their actual total fees identified here.

26 The motions were briefed and argued by the trustees and the  
27  
28



1 U.S. trustee, who supported the trustees requests in full and in  
2 their contention that the § 330(a)(7) "commission" is rigid.

3  
4 Individual Cases

5 In re Scoggins, No. 12-42158, was filed December 31, 2012,  
6 as a no-asset case with a residence valued at \$473,254, subject  
7 to a \$523,339 first deed of trust and a \$82,806 junior deed of  
8 trust. The trustee hired real estate professionals who were paid  
9 \$28,568 and negotiated a \$535,000 short sale with agreement of  
10 the secured creditors, with a "carve-out" for the estate of  
11 \$26,750. The trustee wants a fee of \$16,000, leaving \$8,572 for  
12 unsecured priority and general claims - a 5 percent dividend.

13 In re Ruelas, No. 13-21100, was filed January 28, 2013, as a  
14 no-asset case with a residence valued at \$223,000, subject to a  
15 \$404,000 deed of trust. The trustee hired real estate  
16 professionals who were paid \$11,400 and negotiated a \$205,000  
17 short sale with consent of the secured creditor, with a "carve-  
18 out" of \$15,000. The trustee wants a fee of \$9,000, leaving  
19 \$5,784 for unsecured priority and general claims - a 32 percent  
20 dividend.

21 In re Popescu, No. 12-41237, was filed December 10, 2012,  
22 with a parcel of real estate valued at \$550,000, subject to  
23 \$588,750 in secured debt. The trustee, without marketing,  
24 received an offer of \$665,000 for that property, which enabled a  
25 sale that netted the estate \$58,945 once another secured creditor  
26 acquiesced in partial payment. The trustee hired a real estate  
27  
28

1 professional who was paid \$39,900 and wants a fee of \$36,500,  
2 leaving \$20,105 for unsecured priority (who will not be paid in  
3 full) and general claims - a 0 percent dividend.

#### 4 5 Business Case

6 In re Dry-Mix Products Co., Inc., No 11-21956, was filed  
7 January 26, 2011, to liquidate a manufacturer and supplier of  
8 concrete and concrete products. The trustee marketed and sold  
9 multiple parcels of real estate, heavy transportation equipment,  
10 heavy equipment used in manufacturing, substantial inventory,  
11 accounts receivable, and other property characteristic of a  
12 million-dollar enterprise that had operated for 60 years. In the  
13 end, \$1,222,159 was realized. Secured claims (\$414,651) and  
14 priority claims are paid in full. Professional expenses for an  
15 attorney and an accountant totaled \$18,967. The trustee requests  
16 a fee of \$59,915, leaving \$498,284 for unsecured priority and  
17 general claims - a 47 percent dividend.

#### 18 19 Actual Chapter 7 Trustee Compensation

20 Actual chapter 7 trustee compensation in 2013 in this  
21 district, based on public records maintained pursuant to Federal  
22 Rule of Bankruptcy Procedure 2013,<sup>2</sup> for the 28 panel trustees

23  
24 <sup>2</sup>Rule 2013(a) provides:

25 (a) RECORD TO BE KEPT. The clerk shall maintain a public  
26 record listing fees awarded by the court (1) to trustees and  
27 attorneys, accountants, appraisers, auctioneers and other  
28 professionals employed by trustees; and (2) to examiners.  
The record shall include the name and docket number of the



1 routinely assigned cases in 2013 by the U.S. trustee pursuant to  
 2 11 U.S.C. §§ 701(a) and 702(d) and 28 U.S.C. § 586 was as  
 3 indicated in the following table.

4  
 5 Chapter 7 Trustee Compensation  
 Eastern District of California  
 2013

Trustee	11 U.S.C. § 330(b) Fees Awarded (\$60)	11 U.S.C. § 330(a) Fees Awarded	Total § 330 Awards
1	\$33,838.02	\$497,626.02	\$531,009.04
2	43,695.41	439,538.57	483,233.98
3	57,034.57	310,658.90	367,693.47
4	49,684.30	296,593.35	346,277.65
5	49,437.72	242,543.54	291,981.26
6	48,669.87	207,301.01	255,970.88
7	55,014.86	180,714.89	235,729.75
8	71,482.64	161,985.88	233,468.52
9	53,424.70	150,414.31	203,839.01
10	45,511.77	121,078.86	166,590.63
11	50,179.69	116,342.33	166,522.09
12	33,450.68	132,495.50	165,946.18
13	43,008.91	121,091.80	164,100.71
14	46,351.26	114,843.92	161,195.18
15	53,481.45	96,689.88	150,171.33
16	56,239.10	92,761.56	149,000.66
17	53,549.97	93,840.59	147,390.56
18	45,295.29	87,528.01	132,823.30
19	47,872.54	83,714.11	131,586.65
20	51,126.65	76,215.74	127,342.39
21	47,201.66	59,978.90	107,180.56
22	27,180.00	91,848.01	119,028.01
23	34,110.10	82,979.03	117,089.13
24	46,814.40	39,495.15	86,309.55
25	46,863.29	21,868.90	68,732.19
26	24,322.91	39,282.83	63,605.74
27	30,854.90	26,580.71	57,435.61
28	27,303.92	11,965.27	39,269.19

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23 case, the name of the individual or firm receiving the fee  
 24 and the amount of the fee awarded. The record shall be  
 25 maintained chronologically and shall be kept current and  
 open to examination by the public without charge.  
 26 "Trustees," as used in this rule, does not include debtors  
 in possession.

27 Fed. R. Bankr. P. 2013(a).

Total	\$1,273,000.58	\$4,052,203.85	\$5,325,204.43
Average	45,464.30	144,722.17	190,185.87
Median	47,201.66	114,843.92	161,195.18

Ex. C to Decl. Wayne Blackwelder, Clerk, U.S. Bankruptcy Ct.,  
E.D. Cal., In re Scoggins, No. 12-42158, Dkt. #83.

Total chapter 7 trustee compensation for those 28 trustees in 2013 was \$5,325,204.43, consisting of \$4,052,203.85 as "reasonable compensation" per § 330(a) based on moneys paid to creditors, plus \$1,273,000.58 as the trustee's § 330(b) \$60.00 share of the filing fee (or pro rata share of a partially paid fee) in all cases, including no-asset cases.

Individualizing the totals, the average chapter 7 trustee received \$190,185.87 in total compensation in 2013, consisting of \$144,722.17 in § 330(a) asset-based "reasonable compensation" and \$45,464.30 in § 330(b) filing fee payments.<sup>3</sup>

The percentiles of asset-based fee requests under § 330(a) for 2013 were:

<u>Percentile</u>	<u>Amount</u>
10	\$400
20	\$625
30	\$839
40	\$1,199
50	\$1,351
60	\$1,657
70	\$2,232
80	\$3,219
90	\$6,000
95	\$10,114
98	\$17,701
99	\$30,563

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<sup>3</sup>The medians are total compensation of \$161,195.18, consisting of § 330(a) asset-based "reasonable" compensation of \$114,843.92 and \$47,201.66 in § 330(b) filing fee payments.

1           99.5                               \$59,998

2 Ex. B to id.

3           Thus, only 10 percent of § 330(a) chapter 7 fee applications  
4 exceeded \$6,000. Only 5 percent of requests exceeded \$10,114.

5  
6                               Jurisdiction

7           Federal subject-matter jurisdiction is founded on 28 U.S.C.  
8 § 1334. This matter concerning the administration of the estate  
9 is a core proceeding that a bankruptcy judge may hear and  
10 determine. 28 U.S.C. § 157(b)(2)(A). To the extent it may ever  
11 be determined to be a matter a bankruptcy judge may not hear and  
12 determine without consent, the parties nevertheless consent to  
13 such determination by a bankruptcy judge. 28 U.S.C. § 157(c)(2).

14  
15                               Discussion

16           Discerning why a naked "exceptional circumstances" standard  
17 means little without a method to winnow the "exceptional" fee  
18 request from the chaff begins with the relevant provisions of  
19 §§ 326(a) and 330. Conflicting lines of interpretation will be  
20 addressed in search of synthesis and a workable test, as well as  
21 a procedure for screening trustee compensation requests.

22  
23                               I

24           In this statutory construction exercise, one begins with the  
25 precise terms of Bankruptcy Code §§ 326(a) and 330(a)-(b).



A

The following statutes applicable to compensation for chapter 7 trustees must be harmonized.

§ 326. Limitation on compensation of trustee

(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.

11 U.S.C. § 326(a) (emphasis supplied).

§ 330. Compensation of officers

(a)(1) After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, ... the court may award to a trustee ... -

(A) reasonable compensation for actual, necessary services rendered by the trustee ... and by any paraprofessional person employed by any such person; and

(B) reimbursement for actual, necessary expenses.

(2) The court may, on its own motion ... award compensation that is less than the amount of compensation that is requested.

... [(a)(3) omitted]

(4)(A) ... the court shall not allow compensation for -

(I) unnecessary duplication of services; or

(ii) services that were not -

(I) reasonably likely to benefit the debtor's estate; or

(II) necessary to the administration of the case.

... [(a)(5) and (6) omitted]

(7) In determining the amount of reasonable compensation to be awarded to a trustee, the court shall treat such compensation as a commission, based on section 326.

11 U.S.C. § 330(a).

The § 330(b) \$60 allocation of the filing fee stands apart

1 from the fray.<sup>4</sup> The trustee receives \$60 from a fully-paid  
2 filing fee and a pro rata share of a partially-paid filing fee.

3  
4 B

5 The critical rule for construing these provisions is the  
6 requirement that courts give effect insofar as possible to all  
7 words of a statute. E.g., Corley v. United States, 556 U.S. 303  
8 (2009) (construe statute "so that no part will be inoperative or  
9 superfluous, void or insignificant"). This is crucial where, as  
10 here, an interconnected statute creates a seamless web.

11  
12 II

13 The basic question is how one honors the requirement, added  
14 in 2005, that in determining reasonable compensation for a  
15 trustee the court "treat" compensation as a "commission" in the  
16 face of other seemingly inconsistent provisions.

17  
18 A

19 The difficulty of construing what it means to "treat"  
20 trustee compensation as a "commission, based on section 326" as  
21

22 <sup>4</sup>That provision is:

23 (b)(1) There shall be paid from the filing fee in a case  
24 under chapter 7 of this title \$45 to the trustee serving in  
such case, after such trustee's services are rendered [and]  
25 (2) \$15 to trustees serving in cases ... such \$15 shall  
be paid in addition to the amount paid under paragraph (1).

26 11 U.S.C. § 330(b).  
27  
28



1 provided in § 330(a)(7) is evident from the other provisions that  
2 apply to chapter 7 trustee compensation.

3 First, trustee compensation must be "reasonable" and for  
4 "actual, necessary services rendered." 11 U.S.C. § 330(a)(1).

5 Second, the court is authorized "on its own motion" to  
6 "award compensation that is less than the amount of compensation  
7 that is requested" by a trustee. 11 U.S.C. § 330(a)(2).

8 Third, the court is prohibited from allowing trustee  
9 compensation for "unnecessary duplication of services" and for  
10 services that were not "reasonably likely to benefit the debtor's  
11 estate" or "necessary to the administration of the case." 11  
12 U.S.C. § 330(a)(4)(A).

13 Fourth, § 326(a) is plain, by virtue of the qualifier "not  
14 to exceed," that its formula fixes a ceiling on compensation.  
15 That it was not being amended in 2005 concurrent with enactment  
16 of the § 330(a)(7) "treat"-as-"commission" provision suggests  
17 that "not to exceed" provisions retain vitality. Its legislative  
18 history is unambiguous that the tendency under prior law to treat  
19 the ceiling as the floor was being disapproved.<sup>5</sup> Viewing the  
20

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21 <sup>5</sup>In the enactment of § 326(a), which has never been amended,  
22 the House and Senate Judiciary Committees explained:

23 ... This section simply fixes the maximum compensation of  
24 a trustee. Proposed 11 U.S.C. section 330 authorizes and  
25 fixes the standard of compensation. Under section 48c of  
26 current law, the maximum limits have tended to become  
27 minimums in many cases. This section is not intended to be  
28 so interpreted. The limits in this section, together with  
the limitations found in section 330, are to be applied as  
outer limits, and not as grants or entitlements to the  
maximum fees specified.



"commission" as inflexible requires a conclusion that § 326 was implicitly amended by the addition of § 330(a)(7) in 2005.

Fifth, the language of § 330(a)(7) stating that the court shall "treat" trustee compensation as a "commission" is too ambiguous to be plain. Even if "commission" were to have a fixed meaning (it does not), the word "treat" equates with "regard," is less than mandatory, and does not dictate a result.

A final complication regarding the § 330(a)(7) provision to "treat" trustee "compensation as a commission" is that it applies to all trustees, but chapter 11 trustees are also subject to the lodestar-type scrutiny dictated by § 330(a)(3). This wrinkle makes it hard to achieve the same meaning of § 330(a)(7) for chapter 7 trustees and chapter 11 trustees. Surely, § 330(a)(7) does not have different meanings for different trustees.

## B

The conventional understanding of the effect of the § 330(a)(7) "commission" provision is that in the majority of cases the chapter 7 trustee's compensation will presumptively be the § 326(a) formula. 3 COLLIER ON BANKRUPTCY ¶ 330.02[1][a] (16th ed. Alan N. Resnick & Henry J. Sommer, eds. 2013) ("COLLIER").

Nevertheless, as the Collier treatise points out, the effect of the "commission" provision is no more than a presumption, because § 330(a)(7) does not override the separate requirements

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House Report No. 95-595, 95th Cong., 1st Sess. 327 (1977); Senate Report No. 95-989, 95th Cong., 2d Sess. 37 (1978).

1 that trustee compensation be "reasonable" and that services be  
2 "actual and necessary." 11 U.S.C. § 330(a)(1)(A). Nor does it  
3 override prohibitions on compensation for "unnecessary  
4 duplication of services" or services "not reasonably likely to  
5 benefit" the estate or not "necessary to the administration of  
6 the case." 11 U.S.C. § 330(a)(4). Finally, it does not override  
7 a court's authority to award "less than the amount of  
8 compensation that is requested." 11 U.S.C. § 330(a)(2). Thus,  
9 courts continue to test the reasonableness of a trustee's fee and  
10 to ensure there is not compensation for prohibited services. 3  
11 COLLIER at ¶ 330.02[1][a].

12 A persuasive trial court analysis for the view that the  
13 § 330(a)(7) "commission" provision creates a presumption is In re  
14 McKinney, 383 B.R. 490, 494 (Bankr. N.D. Cal. 2008), cited with  
15 approval, 3 COLLIER 330.02[1][a].

16 Under the McKinney analysis, reasonableness is determined  
17 "with an eye on the statutory cap." The § 330(a)(7) "commission"  
18 provision operates as a presumption that the statutory maximum is  
19 "reasonable" compensation. The court, on review of the materials  
20 supporting a fee application and other relevant facts and  
21 circumstances, will award the statutory maximum if that sum is  
22 not substantially disproportionate to the value of the services  
23 required from the trustee. If the court determines that the  
24 statutory maximum is substantially disproportionate, the court  
25 should award as a "reasonable" commission the maximum that is not  
26 substantially disproportionate to the value of the trustee's



1 services. McKinney, 383 B.R. at 494.

2 Another commentator endorsing the McKinney approach suggests  
3 that the disproportion analysis be refined so that the statutory  
4 maximum would be paid if it is "not unreasonably  
5 disproportionate" in a general sense, without reference to the  
6 value of the trustee's services, and that "extraordinary"  
7 circumstances may occasion a determination of unreasonable  
8 disproportion. John Silas Hopkins, III, Effective Review of  
9 Compensation in Large Bankruptcy Cases, 88 AM. BANKR. L.J. 127,  
10 141 (2014) ("Effective Review").

11 The notion of unreasonable disproportion in the general  
12 sense has some appeal so long as it is understood that the value  
13 of the trustee's services are nevertheless relevant, but not  
14 necessarily essential, to the question of unreasonable  
15 disproportion. Circumstances independent of the value of the  
16 trustee's services might lead to unreasonable disproportion.

17  
18 C

19 Two appellate courts have recently taken what is contended  
20 to be a more stringent view of the § 330(a)(7) "commission" than  
21 the approach in the Collier treatise and in McKinney, holding  
22 that in chapter 7 cases the court must determine the § 330(a)(7)  
23 "commission" and then decide whether "extraordinary  
24 circumstances" exist that make unreasonable the presumptively  
25 reasonable commission before reducing any chapter 7 fee request.

26 The "extraordinary circumstance" tangent started with the  
27  
28



1 Ninth Circuit BAP decision in Salgado-Nava, which the Fourth  
2 Circuit relied on in In re Rowe, 750 F.3d 392 (4th Cir. 2014).

3 Both Salgado-Nava and Rowe departed from a key norm of the  
4 adversary system. Each was a non-adversarial appeal by a chapter  
5 7 trustee supported by the National Association of Bankruptcy  
6 Trustees and by the U.S. trustee as amicus curiae advocating a  
7 rigid "commission" approach. Although the Fourth Circuit  
8 appointed an academic to argue the other side, neither case had a  
9 bona fide appellee with an economic stake in the outcome.

10  
11 1

12 In Salgado-Nava, the chapter 7 trustee appealed the court's  
13 \$561.41 reduction of a \$1,315.41 "commission."

14  
15 a

16 The BAP panel undertook to harmonize § 330(a)(7) with  
17 §§ 326(a) and 330. Recognizing that § 330(a)(3), prescribing  
18 five lodestar-type factors pertinent to "reasonable"  
19 compensation, expressly applies to chapter 11 trustees (but not  
20 chapter 7 trustees), it gave up<sup>6</sup> after searching fruitlessly for  
21 a unified meaning for § 330(a)(7) that could be applied in all  
22 chapters. Salgado-Nava, 473 B.R. at 919-21.

23 Ultimately, the BAP panel concluded that "absent  
24

---

25 <sup>6</sup>The BAP's harmonized rule required an exception for chapter  
26 11 cases: "In the case of a chapter 11 trustee, this  
27 determination necessarily requires consideration of the  
§ 330(a)(3) factors, and also requires a lodestar analysis."  
Salgado-Nava, 473 B.R. at 921.

extraordinary circumstances, chapter 7, 12, and 13 trustee fees should be presumed reasonable if they are requested at the statutory ['commission'] rate." Salgado-Nava, 473 B.R. at 921.

But, if "extraordinary" circumstances exist, the bankruptcy court may "determine whether there exists a rational relationship between the amount of the commission and the type and level of services rendered." Salgado-Nava, 473 B.R. at 921. At that juncture, "the bankruptcy court's examination of the relationship between the commission rate and the services rendered may, but need not necessarily include, the § 330(a)(3) factors and a lodestar analysis." Id.

It is ironic that, while saying that it was rejecting the analysis of McKinney and of the Collier treatise, the BAP panel's purported harmonization winds up focusing on whether there is a rational relationship between the duties to be compensated by the commission rate and the nature and range of services actually provided. Salgado-Nava, 473 B.R. at 920-21. This is essentially the same as the McKinney inquiry, endorsed in the Collier treatise, focusing on whether the commission rate is unreasonably disproportionate to the value of the trustee's services.

McKinney, 383 B.R. at 494. The difference is that Collier and McKinney view § 330(a)(7) as a presumption that the fee is "reasonable," while the addition of "extraordinary" in Salgado-Nava could elevate the presumption to a more exalted status.

The BAP panel sowed seeds of confusion when it ducked the question of what might constitute "extraordinary" circumstances:



1 "We thus leave for another day the issue of what facts might  
2 qualify as extraordinary for purposes of activating the  
3 bankruptcy court's duty to determine the reasonableness of  
4 § 326(a) commission rates." Salgado-Nava, 473 B.R. at 922 n.16.  
5 The appeal involved a garden-variety \$1,315 fee request; would  
6 the BAP have regarded a \$13,000 fee request as "extraordinary?"

7 The only holding in Salgado-Nava that is useful for purposes  
8 of judicial administration - "extraordinary" having been left to  
9 case-by-case development - is: "Simply put, a bankruptcy court  
10 that diminishes a trustee's compensation from the statutorily-set  
11 rate errs if the only basis offered for this diminution is a  
12 lodestar analysis." Salgado-Nava, 473 B.R. at 921 (emphasis  
13 supplied). That holding leaves much unresolved.

14  
15 b

16 There are other reasons for caution about reading too much  
17 into Salgado-Nava.

18 The BAP panel says that it is applying the time-honored  
19 canon of construction that each word is being given meaning and  
20 that no part is being rendered inoperative, superfluous, void, or  
21 insignificant. Salgado-Nava, 473 B.R. at 917-18. But then it  
22 proceeds to ignore § 330(a)(1) requiring that compensation be  
23 "reasonable" and based on actual, necessary services, to ignore  
24 § 330(a)(2) authorizing the court to award less than the amount  
25 that is requested, and to ignore § 330(a)(4) prohibiting  
26 compensation for unnecessary duplication of services.



1       There is no explanation why ignoring §§ 330(a)(1), (a)(2),  
2 and (a)(4), all of which apply to trustee compensation, does not  
3 render them inoperative, superfluous, void, or insignificant.

4       In a decision that pledges fidelity to every word of the  
5 statute, it is odd that a word that is not in the statute –  
6 "extraordinary" – assumes such a prominent position in the BAP's  
7 decision. As between § 326 and § 330(a), the word "reasonable"  
8 appears seven times regarding trustee compensation, but  
9 "extraordinary" is purely extra-statutory. It follows that it is  
10 not ineluctable that "extraordinary" applies to § 330(a)(7).

11       The source of the "extraordinary circumstances" gloss is the  
12 U.S. trustee program, which appears to have made it up out of  
13 whole cloth. Without referring to any statute or other  
14 authority, the U.S. trustee program announced that it would not  
15 object to maximum commissions for chapter 7 trustees except in  
16 "extraordinary circumstances" that it "expected to arise only in  
17 rare and unusual circumstances." U.S. Trustee, HANDBOOK FOR CHAPTER  
18 7 TRUSTEES, ch. 2-1 at 39 ("U.S. Trustee HANDBOOK"); Rowe, 750 F.3d  
19 at 397; Salgado-Nava, 473 B.R. at 922 n.16.

20       This is merely the U.S. trustee's statement of policy issued  
21 without rulemaking authority and lacks force of law. It is an  
22 announcement that the U.S. trustee, except in "extraordinary"  
23 circumstances that can be as rare as the U.S. trustee pleases,  
24 will focus attention elsewhere and leave chapter 7 trustee  
25 compensation to parties and the courts.

Rowe was not quite the victory that the trustees and the U.S. trustee now proclaim.

In Rowe, the Fourth Circuit filled one of the gaps in the Salgado-Nava analysis by taking § 330(a)(2) into account. Focusing on the relation between the § 330(a)(2) power to award a reduced fee and the § 330(a)(7) "commission" provision, it held that "§ 330(a)(7) creates a presumption, but not a right, to a statutory maximum commission-based fee for chapter 7 trustees." Rowe, 750 F.3d at 398. It further ruled that the starting point for deciding chapter 7 trustee compensation is always the commission rate to which the trustee normally would be entitled if no extraordinary circumstances existed. Id.

The Fourth Circuit reasoned that § 330(a)(2) permits awarding less than the § 330(a)(7) commission: "it strains the bounds of credulity to think that Congress would have thought those [§ 326] rates to be reasonable – or meant for Chapter 7 trustees to receive those rates – when extraordinary circumstances are present." Rowe, 750 F.3d at 398.

Accordingly, it remanded to the bankruptcy court to apply the correct analysis: start with the commission rate and then determine whether and why "extraordinary" circumstances exist. If reducing the fee, there must be "findings of fact explaining the 'rational relationship between the amount of the commission and the type and level of services rendered.'" Rowe, 750 F.3d at 399, quoting Salgado-Nava, 473 B.R. at 921.



As with Salgado-Nava, the Rowe analysis is remarkably similar to that of McKinney according to which § 330(a)(7) "creates a presumption that the statutory maximum is reasonable compensation" and would reduce the fee if the court, after reviewing time records and all other relevant facts and circumstances, determines that "the statutory maximum is substantially disproportionate to the value of the trustee's services." McKinney, 383 B.R. at 494.

While the Fourth Circuit, unlike the BAP, grappled with the implications of the continuing applicability of § 330(a)(1) (reasonable compensation for actual, necessary services) and § 330(a)(2) (court may award less than amount requested) and reached a plausible harmonization, it ignored § 330(a)(4) (no compensation for unnecessary duplication of services), which also applies to chapter 7 trustee compensation.

And the Fourth Circuit, although pledging allegiance to the "plain language" of the statute, uncritically accepted the Salgado-Nava addition to § 330(a)(7) of the word "extraordinary" as the trigger for implementing a § 330(a)(2) fee reduction.

As to the meaning of "extraordinary" circumstances, the Fourth Circuit, taking no position on the merits, ruled: (1) bankruptcy courts determine what is "extraordinary" on a case-by-case basis; and (2) reducing a fee needs to be supported by detailed findings of fact explaining the rational relationship between the commission and the type and level of services rendered. Rowe, 750 F.3d at 397 & 399. This emphasis on



findings of fact appears to presage a deferential appellate review of the bankruptcy court's eventual findings.

Although intimating no view, the Fourth Circuit listed versions of "extraordinary" urged by the parties as if all were plausible: inadequate or negligent performance; substandard case administration; and delegation of trustee duties to an attorney or other professional. These, and others, would be before the bankruptcy court on remand. Rowe, 750 F.3d at 397.

In the end, Rowe seems to stand for the proposition that § 330(a)(7) creates a presumption, but not a right, to a statutory maximum commission-based fee for chapter 7 trustees that can be rebutted on a case-by-case basis in a decision that contains detailed findings explaining a rational relationship between the award and the type and level of services rendered.

3

Taken together, Salgado-Nava and Rowe, like McKinney, teach that there is a perhaps strong, but rebuttable, presumption that the maximum compensation permitted by § 326(a) is "reasonable." Hopkins, Effective Review, 88 AM. BANKR. L.J. at 138-39.

D

The procedural task, regardless of whether courts start with the formalistic two-step "commission"-plus-"extraordinary"-circumstances analysis or merely apply a presumption that a "commission" is reasonable and not to be reduced without

justification, is how to identify the situations that warrant reductions pursuant to § 330(a)(2) in order to achieve a fee that is "reasonable" for purposes of § 330 and § 330(a)(1)(A).

1

The key question in an "extraordinary" circumstances jurisdiction is: what constitutes an "extraordinary" circumstance? Seven examples suggest themselves.

The trustees in Salgado-Nava and in Rowe (and the trustees here) concede that "extraordinary" circumstances exist when: (1) case administration falls below acceptable standards; and (2) trustee duties are delegated to an attorney or other professional. U.S. Trustee HANDBOOK, ch. 2-1 at 39; Rowe, 750 F.3d at 397; Salgado-Nava, 473 B.R. at 922 n.16.

A third category of "extraordinary" circumstances also comes from the U.S. Trustee Handbook: (3) trustee fees greater than the amount left for unsecured claims. U.S. Trustee HANDBOOK, ch. 7 at 4-1 ("A trustee shall not administer an estate or an asset in an estate where the proceeds of liquidation will primarily benefit the trustee or the professionals").

Other situations in which maximum commissions might not be "reasonable" compensation are suggested by the Collier treatise. The "moneys disbursed" (the § 326(a) basis for commission percentages) might sometimes be high in relation to trustee services performed. Examples include, (4) a case filed with a lot of cash or liquid assets, (5) a case in which the trustee



operates the business, and (6) cases in which there are significant disbursements without proportionate effort by the trustee. All of these may lead to a maximum commission so high as to be not reasonable. 3 COLLIER ¶ 330.02[1][a].

A maximum commission on a sale in which the trustee merely assumes and completes a sale contract that was executed before bankruptcy may exceed reasonable compensation: "extraordinary." McKinney, 383 B.R. at 492.

Seventh, (7) artificial inflation of the estate by way of "carve-out" or "short sale." Usually, over-encumbered property is abandoned as of inconsequential value and benefit to the estate. 11 U.S.C. § 554. An undersecured creditor facing the time and expense of enforcing rights under nonbankruptcy law may prefer to accept less than its claim in exchange for a prompt sale by the trustee and is willing to pay, i.e., "carve-out," a premium for the estate for that service in liquidating the collateral. KVN Corp., 2014 Westlaw 3738655 at \*4.

Two of the instant cases have "carve-outs" that are the sole source of funds in those cases. The trustee, supported by the U.S. trustee, wants commissions measured on the amount paid to the secured creditor to whom the property would otherwise have been abandoned, rather than measured on the net "carve-out" the estate received. On this theory, for example, a \$1,000,000 short sale with a "carve-out" of \$53,250 to the estate would entitle the trustee to a maximum commission of \$53,250, leaving nothing for unsecured claims.



Not only is it doubtful that such a high fee is "reasonable" compensation under any analysis, permitting the trustee to appropriate the lion's share of available funds offends the U.S. trustee's "fundamental principle" that "a trustee shall not administer an estate or an asset in an estate where the proceeds of liquidation will primarily benefit the trustee." U.S. Trustee HANDBOOK, ch. 7 at 4-1. The U.S. trustee's renunciation of its "fundamental principle" that is implicit in its support of the present trustee motions is a mystery.

2

All this leads to a conclusion that "extraordinary" circumstances is merely a label without analytic content.<sup>7</sup> One must dig deeper for something more substantial that gives content to "extraordinary" circumstances.

The Ninth Circuit has noted that the phrase "extraordinary circumstances" in connection with bankruptcy fees is inherently ambiguous and vulnerable to misinterpretation, with meanings ranging from extremely unusual circumstances to "out-of-the-ordinary" or "atypical" or "extra-ordinary." Law Offices of David A. Boone v. Derham-Burk (In re Eliapo), 468 F.3d 592, 601 (9th Cir. 2006). In context and in view of the number of potential examples, it is apparent that "extraordinary" as used in Salgado-Nava and Rowe means "out-of-the-ordinary" or

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<sup>7</sup>Cf., H.C. ANDERSEN, The Emperor's New Clothes, FAIRY TALES TOLD FOR CHILDREN (1837).

1 "atypical" but not "rare and unusual."

2 As one searches for a general principle underlying all of  
3 the proposed standards, including "extraordinary" circumstances,  
4 one keeps coming back to the McKinney formulation: whether the  
5 fee is substantially disproportionate - either in a general sense  
6 or in relation to the value of the trustee's services.

7 The analysis of whether a trustee's fee is substantially  
8 disproportionate provides operational guidance to what is  
9 required to overcome the presumption in favor of the § 330(a)(7)  
10 commission. Under such an analysis, for example, a trustee fee  
11 greater than distributions to unsecured priority and general  
12 claims in violation of what the U.S. trustee describes as a  
13 "fundamental principle" could be viewed as substantially  
14 disproportionate and an "extraordinary" circumstance.

### 16 III

17 It is difficult to appreciate the gravamen of the trustees'  
18 "extraordinary circumstances" argument without a comprehensive  
19 view of all facets of chapter 7 trustee compensation.

#### 21 A

22 The trustees' compensation argument depends on context but  
23 they exploit the fallacy of the illicit major by arguing out of  
24 context with a narrow focus on only a segment of compensation.

25 The context matters because there is an interplay that  
26 necessarily implicates total compensation. While it is axiomatic



1 that chapter 7 trustee compensation for no-asset cases (\$60 per  
2 case under § 330(b)) was never intended to be "reasonable"  
3 compensation for no-asset cases, Congress designed compensation  
4 for asset cases under § 330(a) to be sufficiently generous so as  
5 to fill the gap by subsidizing no-asset cases.<sup>8</sup>

6 The theory is that the U.S. trustee, who selects, assigns,  
7 and supervises trustees, will assign a portfolio of asset and no-  
8 asset cases that will on average reasonably compensate a trustee.

10 1

11 When trustees argue that they are not reasonably compensated  
12 without the full § 330(a)(7) "commission" in virtually every  
13 asset case, they open the door to the question of what is their  
14 total compensation. But they argue fallaciously by snippet.

15 The argument proceeds as follows. First, it is said that  
16 § 330(b) compensation of \$60 per case has been fixed since 1994.  
17 Second, it is said that fee waivers cause loss of some of that  
18 § 330(b) income. Third, it is noted (correctly) that § 330(a)  
19 fee income in asset cases is intended to subsidize no-asset  
20 cases, the source of which subsidy is overcompensation in the  
21 asset cases. The argument concludes that the court, except in  
22 "rare and unusual" and "extraordinary" circumstances, must  
23 slavishly award maximum commissions in chapter 7 cases. U.S.  
24 Trustee, HANDBOOK FOR CHAPTER 7 TRUSTEES, ch. 2-1 at 39.

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26 <sup>8</sup>A typical statement of the subsidy argument is: Hopkins,  
27 Effective Review, 88 AM. BANKR. L.R. at 143-44 & n.92.

1 The first snippet is misleading. While it is correct that  
2 the \$60 fixed fee under § 330(b) has not been adjusted since  
3 1994, there is no disclosure that the fixed fee provides only 25  
4 percent of current trustee compensation or that the remaining 75  
5 percent comes from § 330(a) asset-based fees that have always  
6 been de facto indexed for inflation. Asset-based fees are stated  
7 as a percentage of realized value, which a fortiori incorporate  
8 inflation. Thus, at most, the relative proportion of § 330(b)  
9 \$60 fees in total trustee compensation diminishes over time  
10 without impairing "reasonable" compensation. Tail wags dog.

11 But the main flaw in the trustees' argument is that it  
12 proves too much. It is one thing to say that the basic  
13 § 330(a)(7) "commission" is designed to subsidize the no-asset  
14 cases without offending the § 330(a)(1) requirement that the fee  
15 be "reasonable." It is quite another thing to say, as the  
16 trustees and the U.S. trustee contend, that every § 330(a)(7)  
17 commission, even (for example) on artificially inflated estates,  
18 is reasonable compensation.

19 Nor is there consideration on the extent to which the \$60  
20 § 330(b) fixed fee is actually inadequate. The actual § 330(b)  
21 payments to trustees in this district was \$47,201.66. That is a  
22 substantial contribution towards compensation in no-asset cases,  
23 the majority of which cases require less than one hour for a  
24 trustee with a computer to administer start-to-finish.

25 The reality is that the justification for the subsidization  
26 feature of trustee compensation - that generous fees in asset  
27



1 cases are needed to balance out inadequate compensation for no-  
2 asset cases in order to achieve the goal of overall "reasonable"  
3 compensation - is, at best, an "uneasy" case.

4 The more a chapter 7 trustee receives in § 330(a)(7)  
5 "commissions" in asset cases, the less the need for further  
6 subsidy of the no-asset cases. At some point, the trustee will  
7 have received full "reasonable" compensation for the  
8 uncompensated portion of the time needed to deal with no-asset  
9 cases. Beyond that point, the case for further subsidy becomes  
10 untenable because it comes at the expense of unsecured claims.  
11 That point is capable of measurement.

12  
13 2

14 Congress, in a related context heretofore ignored in  
15 reported cases, has decreed what constitutes full "reasonable"  
16 § 330(a) trustee compensation for one category of trustee.

17 Section 330(a) applies to trustees in all chapters, not  
18 merely chapter 7 and 11 trustees. And § 330(c) addresses monthly  
19 distributions to chapter 12 and 13 trustees during administration  
20 of a plan. 11 U.S.C. § 330(c).

21 The obscurity of § 330 in the context of chapter 12 and  
22 chapter 13 trustee compensation occurs because § 330 is eclipsed  
23 by separate Judicial Code provisions prescribing standing trustee  
24 compensation at 28 U.S.C. § 586(e). If the number of cases  
25 warrant, the U.S. trustee may appoint standing chapter 12 and 13  
26 trustees. 28 U.S.C. § 586(b). But if there is not a standing  
27

1 trustee, then 28 U.S.C. § 586(e) does not apply and § 330 is the  
2 sole source for compensating a trustee in chapter 12 or 13 case.

3 Congress decreed the maximum annual compensation for  
4 standing trustees under chapters 12 and 13 as not to exceed the  
5 highest annual rate of basic pay in effect for level V of the  
6 Executive Schedule, plus the cash value of employment benefits  
7 provided by the United States to level V employees as fixed by  
8 the Attorney General, plus actual, necessary expenses incurred by  
9 such trustee as standing trustee. 28 U.S.C. § 586(e)(1)(A).<sup>9</sup>

10 Chapter 13 trustee compensation is \$206,102 as of October 1,  
11 2014, consisting of \$147,200 (Executive Schedule level V), plus  
12 \$58,902 fixed as cash equivalent of benefits.

13 The source of payment is percentage fees dictated by 11  
14 U.S.C. § 586(e)(1)(B), which collections are used to fund trustee  
15 compensation and actual, necessary expenses, with the surplus

16  
17 <sup>9</sup>The relevant portion of the statute is:

18 (e)(1) The Attorney General, after consultation with a  
19 United States trustee that has appointed an individual under  
20 subsection (b) of this section to serve as standing trustee  
21 in cases under chapter 12 or 13 of title 11, shall fix -

22 (A) a maximum annual compensation for such individual  
23 consisting of -

24 (i) an amount not to exceed the highest annual  
25 rate of basic pay in effect for level V of the Executive  
26 Schedule; and

27 (ii) the cash value of employment benefits  
28 comparable to the employment benefits provided by the United  
29 States to individuals who are employed by the United States  
30 at the same rate of basic pay to perform similar services  
31 during the same period of time; and

32 (B) [payment source omitted] and the actual, necessary  
33 expenses incurred by such individual as standing trustee.

34 28 U.S.C. § 586(e)(1).



1 deposited in the U.S. trustee System Fund to finance the U.S.  
2 trustee program. 28 U.S.C. §§ 586(e)(2) & 589a.

3 Thus, Congress contemplates that full "reasonable"  
4 compensation of standing trustees appointed under 28 U.S.C.  
5 § 586(b) is \$206,102, net of expenses. In a district in which a  
6 standing trustee is not available to serve, the compensation  
7 limits of standing trustees elsewhere informs the meaning of  
8 "reasonable" trustee compensation under § 330(a) for a chapter 13  
9 trustee who is not a standing trustee.

10 By extension, the view of Congress also informs the meaning  
11 of full "reasonable" compensation for chapter 7 trustees.<sup>10</sup>

12  
13 3

14 Since evidence of actual total trustee compensation is a  
15 missing link in the records of Salgado-Nava and Rowe, such  
16 evidence is part of the record here.

17 The average chapter 7 trustee in this district received  
18 \$190,185.87 in total compensation in 2013, consisting of  
19 \$144,722.17 in § 330(a) asset-based "reasonable compensation" and  
20  
21  
22

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23 <sup>10</sup>To be sure, the analogy is imperfect. Chapter 7 trustees  
24 have overhead expenses that standing trustees recapture as  
25 actual, necessary expenses. 28 U.S.C. § 586(e)(1)(B). The  
26 burden, however, is on the chapter 7 trustees to demonstrate what  
27 overhead they have that might warrant an upward adjustment that  
28 would rebut the presumption associated with the chapter 12/13  
standing trustee income limit. Some have little overhead; others  
have more. Actual numbers will be important to persuasion.

1 \$45,464.30 in § 330(b) filing fee payments.<sup>11</sup> Proportionally, 76  
2 percent came from assets and 24 percent from filing fees.

3  
4 III

5 Courts have an independent duty to review fee applications  
6 under § 330. In re Busy Beaver Bldg. Ctrs., Inc., 19 F.3d 833,  
7 841 (3rd Cir. 1994), cited with approval, Eliapo, 468 F.3d 602-  
8 03; Law Offices of David A. Boone v. Derham-Burk (In re Eliapo),  
9 298 B.R. 392, 402 (9th Cir. BAP 2003), aff'd in relevant part,  
10 Eliapo, 468 F.3d at 604. The fee applicant has the burden of  
11 proof on the merits and bears the correlative risk of non-  
12 persuasion. In re Gianulias, 111 B.R. 867, 869 (E.D. Cal. 1989).

13  
14 A

15 In an ideal world, creditors and the U.S. trustee would  
16 exploit the genius of the adversary system by objecting to fees  
17

18 <sup>11</sup>Curiously, the U.S. trustee resisted disclosing this  
19 information in this case as if there is something to hide.

20 When directed to obtain and file a declaration from the  
21 Clerk of Court identifying the § 330(a)(7) and § 330(b) fees  
22 awarded to chapter 7 trustees in 2013 in this district, the U.S.  
23 trustee redacted all the fee amounts. As announced in open  
24 court, this court has caused an unredacted copy to be filed.

25 The U.S. trustee's excuse for its passive aggression was  
26 that the information "is sensitive information that, as a matter  
27 of practice, the U.S. trustee program does not make public, and  
28 which may be subject to the provisions of the Privacy Act of  
1974, 5 U.S.C. § 552a." U.S. Trustee's Response to Court's Order  
of May 18, 2014. The excuse lacks merit. This is information  
required by Rule 2013 to be maintained and made available to the  
public (see note 2 supra) and, hence, is neither "sensitive," nor  
"subject to the provisions of the Privacy Act."

Rule 2013 makes clear that public policy favors sunshine.



that exceed "reasonable" amounts.

But in the real world, chapter 7 trustee fee applications have no natural enemies. Creditors rarely object because the cost of monitoring and objecting exceeds the likely payoff.

While the U.S. trustee has a duty to monitor, comment, and object to fees,<sup>12</sup> it does not do its duty. From January 1, 2012, through June 30, 2014, there were 62,045 chapter 7 cases filed in this district; the U.S. trustee filed zero "comments" or "oppositions" to chapter 7 trustee fees during that period.

One may ask what is the harm in a disproportionate trustee or professional fee if nobody objects? The harm is the loss of public confidence in the integrity of the bankruptcy system if it comes to be regarded as managed primarily for the benefit of

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<sup>12</sup>The relevant duty is:

(a) Each United States trustee, within the region for which such United States trustee is appointed, shall -

...  
(3) supervise the administration of cases and trustees in cases under chapter 7, 11, 12, 13, or 15 of title 11 by, whenever the United States trustee considers it to be appropriate -

(A)(i) reviewing, in accordance with procedural guidelines adopted by the Executive Office of the United States Trustee (which guidelines shall be applied uniformly by the United States trustee except when circumstances warrant different treatment), applications filed for compensation and reimbursement under section 330 of title 11; and

(ii) filing with the court comments with respect to such application and, if the United States Trustee considers it to be appropriate, objections to such application.

28 U.S.C. § 586(a)(3)(A).

those who operate it.<sup>13</sup>

B

In the absence of help from creditors and the U.S. trustee, courts need screening procedures to sort wheat from chaff. The logical strategy is to require that there be detailed fee applications supported by time records and narrative statement of service (as opposed to short-form applications) for categories of cases that are more likely than others to entail "extraordinary" circumstances. The following categories suggest themselves. A judge, of course, may also require a formal fee application in any given case not in those categories.

1

First, since the highest fee requests present the greatest risk of exceeding "reasonable" compensation under § 330(a) by being substantially disproportionate - hence, "extraordinary" - to what the trustee was required to do, they warrant the scrutiny of a formal fee application. As a line needs to be drawn for convenience of administration, an appropriate level is \$10,000, which marks the top 5 percent of fee requests in this district. Since only about 10 percent of cases are asset cases, this

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<sup>13</sup>Cf., R.R. Palmer, A HISTORY OF THE MODERN WORLD, at 44 (Knopf 1963) ("The [14th Century] church faced the danger that besets every successful institution - a form of government, an army or navy, a business corporation, a labor union, a university, to choose modern examples - the danger of believing that the institution exists for the benefit of those who conduct its affairs.").



category actually applies to .5 percent of chapter 7 cases.

2

The second category comes as a "fundamental principle" from the U.S. Trustee Handbook:

A chapter 7 case must be administered to maximize and expedite dividends to creditors. A trustee shall not administer an estate or an asset in an estate where the proceeds of liquidation will primarily benefit the trustee or the professionals, or unduly delay the resolution of the case. The trustee must be guided by this fundamental principle when acting as trustee. Accordingly, the trustee must consider whether sufficient funds will be generated to make a meaningful distribution to unsecured creditors, including unsecured priority creditors, before administering a case as an asset case. 28 U.S.C. § 586.

U.S. Trustee HANDBOOK, ch.7 page 4-1 (emphasis supplied).

As the BAP recently held in KVN Corp. in the context of a "carve-out" agreement, sales of fully encumbered assets are generally inappropriate but there is no per se rule against a sale of such assets with a "carve-out" agreement. KVN Corp. 2014 Westlaw 3738655 at \*4. Rather, there is a rebuttable presumption of impropriety based on history of abuses of "carve-out" agreements. Id. at \*5-6.

The presumption of impropriety in the sale of a fully encumbered asset with a "carve-out" agreement can be rebutted by a combination of: (1) trustee performance of basic duties; (2) full disclosure; and (3) benefit to the estate, typically measured by "meaningful" distribution to unsecured claims.

The U.S. Trustee Handbook provides guidance emphasizing the importance of "meaningful" distribution to creditors other than

1 the holders of the liens when selling over-encumbered assets.

2 U.S. Trustee HANDBOOK, ch.7 page 4-14, cited by KVN Corp., 2014

3 Westlaw 3738655 at \*5.<sup>14</sup>

4 And the U.S. trustee provides guidance about what amounts to  
5 a "meaningful" distribution: "A trustee shall not administer an  
6 estate or an asset in an estate where the proceeds of liquidation  
7 will primarily benefit the trustee or the professionals." U.S.  
8 Trustee HANDBOOK, ch.7 page 4-1 (emphasis supplied).

9 It is beyond cavil that a trustee is "primarily" benefitted  
10 when the trustee's fee exceeds the funds that would be available  
11 to pay unsecured priority and general claims. It might, of  
12 course, also be the fact that, in any given case, a trustee fee  
13 that is less than the amount remaining available for unsecured  
14 claims might also "primarily" benefit the trustee.

15 This distills to a proposition that there is a rebuttable  
16 presumption that a § 330(a)(7) trustee "commission" exceeding the  
17 proposed payout to unsecured priority and general claims  
18 "primarily" benefits the trustee and does not leave enough for a  
19

---

20 <sup>14</sup>The U.S. Trustee Handbook provides:

21 A trustee may sell assets only if the sale will result  
22 in a meaningful distribution to creditors. In evaluating  
23 whether an asset has equity, the trustee must determine  
24 whether there are valid liens against the asset and whether  
25 the value of the asset exceed the liens. The trustee may  
26 seek a "carve-out" from a secured creditor and sell the  
property at issue if the "carve-out" will result in a  
meaningful distribution to creditors. ... If the sale will  
not result in a meaningful distribution to creditors, the  
trustee must abandon the asset.

27 U.S. Trustee HANDBOOK, ch.7 page 4-14.



1 "meaningful" distribution. The court, without more explanation,  
2 would be justified in invoking § 330(a)(2) as an "extraordinary"  
3 circumstance when determining a "reasonable" fee.

4 In other circumstances in which the court perceives a lack  
5 of "meaningful" distribution, the court would need to explain  
6 itself with specific findings because a "meaningful" distribution  
7 to creditors is, in the end, a question of fact for the court to  
8 determine. KVN Corp., 2014 Westlaw 3738655 at \*6.

9 It warrants note that the BAP's decision in KVN Corp. is not  
10 inconsistent with its decision in Salgado-Nava. The author of  
11 KVN Corp. was a member of the Salgado-Nava panel and, hence, is  
12 one of the three people most knowledgeable about what Salgado-  
13 Nava means. KVN Corp. provides an instructive gloss on Salgado-  
14 Nava by noting that, if the sale is approved on remand, then the  
15 court "may consider the appropriate fee at a hearing on  
16 compensation." KVN Corp., 2014 Westlaw 3738655 at \*7 n.4.

17 As note 4 to KVN Corp. would be nonsense if the § 330(a)(7)  
18 "commission" is as apodictic as the trustees and U.S. trustee  
19 argue, it follows that the BAP regards the lack of a "meaningful"  
20 distribution, in the absence of evidence from the trustee  
21 rebutting the presumption, as a Salgado-Nava "extraordinary"  
22 circumstance potentially warranting a § 330(a)(2) departure from  
23 the § 330(a)(7) "commission."<sup>15</sup>

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24  
25 <sup>15</sup>As to rebutting the presumption, in another recent case,  
26 the BAP notes that it is conceivable that all net estate funds  
27 might be permitted to be applied to fees where a meaningful  
benefit other than payment accrues to creditors. Galloway v.  
Ford (In re Galloway), 2014 Westlaw 4212621, at \*9, n.11 (order

Third, a risk of overreaching applies to situations in which the estate is either artificially increased or is outsized compared to the standard mold. For example, when the trustee operates the business of the debtor, the "money disbursed" criterion of § 326(a) would reflect gross revenues and, especially for a high volume, low margin business, might result in a commission that is not "reasonable." This category also overlaps the second category in the context of "carve-out."

The appropriate method of scrutiny is the examination of detailed fee applications (in lieu of short-form applications) backed by time records and narrative statement of services.

That examination will enable the court to determine whether the presumption in favor of a § 330(a)(7) commission is rebutted by facts suggesting that there was a substantial disparity by what was done by the trustee and the value of the trustee's services to the estate.

It is appropriate that the Local Rules be amended promptly on the basis of "immediate need" to require fee applications supported by time records and narrative statement of services for chapter 7 trustee fee requests that occur in the circumstances described in this section III-B.

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approving settlement that would pay only trustee and trustee's counsel vacated for better justification).



1 The Rules Enabling Act, 28 U.S.C. §§ 2071-77, provides that  
2 all courts established by Act of Congress may make rules for the  
3 conduct of their business. 28 U.S.C. § 2071(a). The Bankruptcy  
4 Court is created by Act of Congress as a "unit" of the District  
5 Court. 28 U.S.C. § 151.

6 Federal Rule of Civil Procedure 83 governs local rulemaking  
7 in the District Court. That rule is incorporated into Federal  
8 Rule of Bankruptcy Procedure 9029, which governs local rulemaking  
9 in the Bankruptcy Court.

10 The District Court, acting pursuant to Rule 9029(a)(1), has  
11 authorized this Bankruptcy Court to make and amend rules of  
12 practice and procedure that are consistent with Acts of Congress  
13 and the national rules. Fed. R. Bankr. P. 9029(a)(1); General  
14 Order 295, E.D. Cal. (Feb. 23, 1993).

15 This court has formed a Local Bankruptcy Rules Advisory  
16 Committee as required by 28 U.S.C. § 2077(b) to study rules of  
17 practice and make recommendations to the court. Although the  
18 court respects and relies on the work of the advisory committee,  
19 it is the court that determines the rules to propose.

20 A new or amended rule proposed by the court is ordinarily  
21 not to be formally prescribed until after giving appropriate  
22 public notice and opportunity for comment. 28 U.S.C. § 2071(b).

23 However, when a prescribing court determines that there is  
24 an "immediate need" for a rule, it is permitted to proceed  
25 without public notice and opportunity for comment, so long as it  
26 promptly thereafter affords such notice and opportunity for  
27

comment. 28 U.S.C. § 2071(e).

Here, there is an "immediate need" for a rule prescribing the circumstances in which chapter 7 trustees must make formal fee applications so that the consideration and approval of their fees will not be unduly delayed.

As the advisory committee is presently completing a study of proposed local rule amendments to recommend to the court that likely will result in the court soon proposing new or amended rules as a package for public comment, the notice required by Judicial Code § 2071(e) may be provided at that time.

#### IV

Turning to the four fee applications at hand, the question is whether trustee fees requested are disproportionate. If there is a material disproportion sufficient to rebut the presumption in favor of the § 330(a)(7) commission, then that will be an "extraordinary" circumstance that opens the door to a downward departure. Likewise, if there is some other significant factor — such as the violation of a "fundamental" principle — that counsels against a full "commission," that also will be an "extraordinary" circumstance.

#### A

The three fee applications in the individual cases are all made by one, part-time trustee. According to the records of the clerk of court, he received \$288,676 for work as chapter 7



1 trustee from July 2013 through June 2014. This included \$53,340  
2 under § 330(b) and \$235,336 under § 330(a). In addition, he was  
3 paid \$11,250 for acting as his own attorney (few of this  
4 district's 28 trustees are lawyers).

5 In his private law practice during that period, he filed 49  
6 bankruptcy cases for debtors who paid him in excess of \$110,000.

8 1

9 The fact that this trustee received actual trustee  
10 compensation within the past year materially in excess of the  
11 \$206,102 to which Congress limits chapter 13 trustees implies  
12 that the subsidy component embodied in the \$288,676 already  
13 received has operated to provide full "reasonable" compensation  
14 for his no-asset cases. This constitutes an "extraordinary"  
15 circumstance for purposes of Salgado-Nava and Rowe.

16 This conclusion that the no-asset subsidy has been fully  
17 recovered is not affected by the trustee's evidence that waivers  
18 of filing fees in 2013 deprived him of \$3,540 in § 330(b) \$60  
19 fees.<sup>16</sup> The clerk's records indicate that during the same  
20 period, 2013, this trustee was paid \$53,424.70 in § 330(b) fees.  
21 This, combined with the fact that total § 330 compensation for  
22 this trustee exceeded the maximum that Congress permits for a  
23 chapter 13 trustee, reduces the trustee's complaint to the trivial.

24 It follows that whether the fees requested are "reasonable"  
25 for purposes of § 330(a)(1) will be evaluated on the basis of

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26  
27 <sup>16</sup>Houseworth Decl., In re Scoggins, No. 12-42158, Dkt. # 59.

1 whether the § 330(a)(7) commission is substantially  
2 disproportionate without reference to the need to subsidize  
3 under-compensation in no-asset cases or whether some other factor  
4 rebuts the presumption in favor of the commission.  
5

6 2

7 Two of the three fee requests result from "short-sale"  
8 "carve-outs" in cases that would otherwise have been no-asset  
9 cases. The third was a sale that landed in the trustee's lap.

10 In Scoggins, the "short sale" was for \$535,000. The trustee  
11 paid real estate commissions of \$26,750 and received another  
12 \$26,750 for the estate. After trustee expenses of \$360 and  
13 \$1,818 to another real estate professional, the trustee wants a  
14 § 330(a)(7) "commission" of \$16,000 (65 percent of the  
15 remainder), leaving \$8,572 for priority and general unsecured  
16 claims - a 5 percent dividend.

17 In Ruelas, the "short sale" was for \$205,000. The trustee  
18 paid real estate commissions of \$11,400 and received another  
19 \$15,000 for the estate. After expenses of \$306, the trustee  
20 wants a § 330(a)(7) "commission" of \$9,000 (63 percent of the  
21 remainder), leaving \$5,784 for priority and general unsecured  
22 claims - a 32 percent dividend.

23 In Popescu, the trustee received and accepted an offer to  
24 purchase a parcel of property for \$665,000. The trustee paid  
25 real estate commissions of \$39,900 and received another \$58,564  
26 for the estate. After trustee expenses of \$500 and \$1,459 for an  
27



1 accountant, the trustee wants a \$ 330(a)(7) "commission" of  
2 \$36,500 (64 percent of the remainder), leaving \$20,105 for  
3 priority claims which would not be paid in full and nothing for  
4 unsecured claims.

5  
6 B

7 The corporate liquidation of Dry-Mix Products Co. was a  
8 complex, multi-year affair involving a manufacturer and supplier  
9 of concrete and concrete products to the construction industry.  
10 It was necessary to market and sell multiple parcels of real  
11 estate that presented complex issues incident to the history of  
12 their utilization. Heavy transportation equipment and  
13 manufacturing equipment were sold in a commercially reasonable  
14 manner. Accounts receivable were collected. The trustee dealt  
15 with employees and shareholders, prosecuted numerous claim  
16 objections, and resolved tax issues. The process of liquidation  
17 to maximize value in a commercially reasonable manner demanded  
18 considerable effort and expertise complicated by the need for a  
19 successor trustee when the first died during the case.

20 This effort produced \$1,222,159. Secured and priority  
21 claims are paid in full. After paying professional expenses for  
22 an attorney and an accountant totaling \$18,967, the trustee  
23 requests a \$ 330(a)(7) "commission" of \$59,915 (5 percent of the  
24 proceeds; to be shared with the decedent's estate of his  
25 predecessor), leaving \$498,284 for unsecured claims. If the  
26 requested fee is awarded in full, unsecured claims will realize a  
27  
28

1 47 percent dividend.

3 C

4 The easy case for evaluation of a "reasonable" fee under  
5 § 330(a) is Dry-Mix Products. The trustee, who received § 330  
6 compensation of \$162,961 from July 2013 through June 2014  
7 (\$44,629 under § 330(b) and \$118,332 under § 330(a)), was  
8 required to manage a complicated program of liquidation of a wide  
9 range of assets in a commercially reasonable manner. This was  
10 accomplished with only a modest amount of professional legal and  
11 accounting assistance.

12 The results were good. Secured and priority claims are paid  
13 in full. Unsecured claims are in line for a 47 percent dividend  
14 based on a distribution to them of \$498,284.

15 Compared with those results, a § 330(a)(7) "commission" of  
16 \$59,915 is not disproportionate. As the trustee's compensation  
17 of \$162,961 during the past year does not exceed the \$206,102  
18 Congressional limit on chapter 13 trustee "reasonable"  
19 compensation, there are no issues calling into question the  
20 legitimacy of subsidy of other loss-making cases. The current  
21 trustee would realize an hourly compensation rate of \$310 for his  
22 portion of the fee (the rest going to his deceased predecessor),  
23 which compensation is not unreasonably disproportionate.

24 No other factor suggests that any "extraordinary"  
25 circumstances might exist that would warrant a downward departure  
26 on fees. The requested fee is "reasonable" within the meaning of  
27



1 § 330(a) and § 330(a)(1)(A).

2 Accordingly, the fee request of the Dry-Mix Products trustee  
3 for a § 330(a)(7) "commission" of \$59,915 will be granted.

5 D

6 The fee requests in the individual cases are more difficult.

7 Each request seeks more than the amount that would remain  
8 for distribution to unsecured priority and general claims.

9 Hence, each is presumed not to provide "meaningful" distribution  
10 to creditors. The trustee, who has the burden of proof, has not  
11 rebutted that presumption. It follows that there is an

12 "extraordinary" circumstance within the meaning of Salgado-Nava.  
13 The fees are unreasonably disproportionate in the general sense.

14 It is also noted that a reduction to 50 percent of the  
15 amount available to pay trustee fees and unsecured priority and  
16 general claims will not lead to unfairly low compensation of the  
17 trustee. Based on the number of hours reported by the trustee as  
18 attributable to each case, it pencils out to an overall rate of  
19 \$315 per hour.<sup>17</sup>

20 Pursuant to § 330(a)(2), in this "extraordinary"  
21 circumstance this court concludes that the requested fees are  
22 "unreasonably disproportionate" and reduces the § 330(a)(7)  
23 "commission" to the highest amount that is not greater than the  
24 amount available for distribution to unsecured priority and

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26 <sup>17</sup>Scoggins, \$13,375, 44.9 hr; Popescu, \$28,052.50, 87 hr;  
27 Ruelas, \$7,500, 23.5 hr.  $\$48,927.50 \div 155.4 \text{ hr} = \$314.85/\text{hr}$ .

1 general claims: Scoggins, \$13,375; Popescu, \$28,052.50; and  
2 Ruelas, \$7,500. This is "reasonable" compensation within the  
3 meaning of § 330(a)(1)(A).

#### 4 5 Conclusion

6 The effect of § 330(a)(7) requiring that a court "treat"  
7 trustee compensation as a "commission" operates to create a  
8 rebuttable presumption that the maximum fee provided by § 326(a)  
9 is "reasonable" for purposes of § 330 and § 330(a)(1)(A). The  
10 court remains entitled, pursuant to § 330(a)(2), to award less  
11 than the amount requested. The presumption in favor of the  
12 maximum commission is rebutted, among other potential reasons, if  
13 the fee is unreasonably disproportionate.

14 A formal fee application supported by time records and  
15 narrative statement of services (in lieu of a short-form  
16 application) is required for all trustee fee requests: (1) of  
17 \$10,000 or more; (2) all cases in which the trustee seeks fees  
18 exceeding the amount remaining for unsecured priority and general  
19 claims; (3) all cases involving a "carve-out" or "short sale";  
20 (4) all cases where the trustee operates a business; and (5) any  
21 case in which the court orders a formal fee application.

22 The three trustee fees in these consolidated cases that  
23 exceed the amounts remaining for creditors are unreasonably  
24 disproportionate and, hence, not "reasonable" for purposes of  
25 § 330 and § 330(a)(1)(A). They will be reduced so as to equal  
26 the amounts that, after payment, will remain for distribution to  
27



1 unsecured claims. The trustee fee in the business case is not  
2 unreasonably disproportionate and will be awarded in full.

3 Appropriate orders will issue.

4 Dated: SEP 8 2014

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7 UNITED STATES BANKRUPTCY JUDGE  
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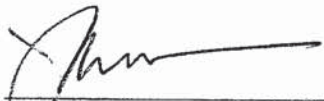
McMANUS, HOLMAN, LEE, BARDWIL, SARGIS, CLEMENT, Bankruptcy  
Judges, CONCURRING:

We CONCUR that this opinion demonstrates that there is an immediate need for a local bankruptcy rule requiring that chapter 7 trustees prepare, file, and notice for hearing fee applications supported by time records and a narrative statement of services in the following circumstances:

- (1) All requests seeking \$10,000 or more;
- (2) All cases in which the trustee seeks fees exceeding the amount remaining for unsecured priority and general claims;
- (3) All cases involving a "carve out" or "short sale";
- (4) All cases where the trustee operates a business; and
- (5) Any case in which the court specifically orders such a fee application.


The rule will be prescribed by separate general order issued pursuant to 28 U.S.C. § 2071(e) to have immediate effect, with notice and opportunity for comment provided promptly thereafter.

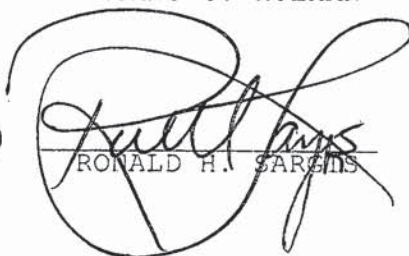
The Clerk will hereafter provide the court with quarterly reports identifying total chapter 7 trustee compensation awards under 11 U.S.C. §§ 330(a) and 330(b) for each chapter 7 trustee.

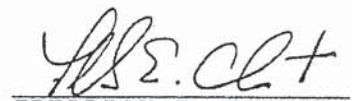
  
MICHAEL S. McMANUS

  
THOMAS C. HOLMAN

  
W. RICHARD LEE

  
ROBERT S. BARDWIL

  
RONALD H. SARGIS

  
FREDRICK E. CLEMENT



INSTRUCTIONS TO CLERK OF COURT  
SERVICE LIST

The Clerk of Court is instructed to send the attached document, via the BNC, to the following parties:

John R. Roberts  
PO Box 1506  
Placerville CA 95667

Thomas A. Aceituno  
PO Box 189  
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