

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MARYLAND  
BALTIMORE DIVISION**

In re:

**Merry-Go-Round Enterprises, Inc.,**  
  
Debtor.

Case No. 94-5-0161-SD

Chapter 7

**OPPOSITION OF THE UNITED STATES TRUSTEE  
TO EIGHTH AND FINAL APPLICATION BY  
TRUSTEE FOR ALLOWANCE OF COMPENSATION**

The U.S. Trustee for Region Four, in furtherance of the administrative responsibilities imposed pursuant to 28 U.S.C. § 586(a), and pursuant to 11 U.S.C. §§ 326 and 330, files this opposition to the Eighth and Final Application for Allowance of Compensation filed by Deborah Hunt Devan and states:

**I. Introduction**

Beginning on or about January 11, 1994, and on subsequent dates thereafter Merry-Go-Round Enterprises, Inc. and numerous affiliated companies filed for protection under Chapter 11 of the Bankruptcy Code. This Court ordered the joint administration of the cases. After just over two years in bankruptcy, on or about February 15, 1996, the U.S. Trustee filed an emergency motion to convert the cases from Chapter 11 to Chapter 7, requesting the appointment of a Chapter 11 trustee in the alternative. On March 1, 1996, this Court Ordered the cases converted to cases under Chapter 7 of the Bankruptcy Code pursuant to that motion and after a contested hearing. On March 2, 1996, the U.S. Trustee appointed Ms. Devan (the “Trustee”) as the Chapter 7 Trustee for the jointly administered Merry-Go-Round cases.

At the time of the conversion, all interested parties believed these debtors to be Chapter

11 administratively insolvent. In addition to performing the voluminous administrative duties required by a case of this size, the Trustee was able to uncover and market a malpractice cause of action that greatly affected the outcome in this matter. The U.S. Trustee commends the Trustee for her exceptional work in this case that will likely provide for a nearly 40% payout to general unsecured creditors.

The Trustee, on or about October 10, 2005, filed her Eighth and Final Application for Allowance of Compensation (the “Application”). Prior to filing the Application, the Trustee filed seven interim applications for compensation, each of which were based upon hours spent and each of which were approved by this Court. The Trustee already has been compensated for Nine Thousand Three Hundred Twenty Seven and Two Tenths hours (9,327.2)<sup>1</sup> in the amount of Two Million Five Hundred Ten Thousand Nine Hundred Ninety-Nine Dollars and Fifty-Seven Cents (\$2,510,992.57). During this case, the Trustee’s hourly fees ranged from \$225.00 to \$330.00. The Application requests compensation in the amount of the cap set out by 11 U.S.C. §326(a) or Eight Million Eight Hundred Thirty Three Thousand Three Hundred Fifty Dollars and No Cents (\$8,833,350.00). The Trustee has not billed for additional time since the seventh interim application for compensation was filed and granted. The Application is, in essence, a request for final approval of all interim awards and an enhancement of Six Million Three Hundred Ten Thousand Seven Hundred Thirty Nine Dollars and Ninety Two Cents (\$6,310,739.92). In support of the Application, on December 1, 2005, the Trustee filed the

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<sup>1</sup> Although the Trustee has been compensated for 9,327.2 hours spent from March 1, 1996 to August 31, 2005, her time records reflect that 9,985 hours were actually spent. It appears that in each interim application, the Trustee adjusted her actual hours as she deemed appropriate.

Trustee's Memorandum of Law in Support of the Eighth and Final Application for Allowance of Compensation (the "Memorandum").

## **II. Standard of Review**

The Bankruptcy Court is independently obligated to review the validity and reasonableness of fee applications regardless of proposed resolutions or the lack of objections because "each creditor individually has little reason to object . . . due to the costs incidental to the objection . . . compared to the possible amount of recovery from the estate." In re Silvus, 329 B.R. 193, 204 (Bankr.E.D.Va. 2005) quoting In re Elder, 321 B.R. 820, 825 (Bankr.E.D.Va. 2005) and In re Great Sweats, Inc., 113 B.R. 240, 242 (Bankr.E.D.Va.1990).

## **III. Lodestar and Multipliers**

Assessing the reasonableness of fee applications for trustees is a two step process involving first arriving at a reasonable fee by looking to the criteria of 11 U.S.C. §330(a) and then adjusting that reasonable fee down to the cap set out in 11 U.S.C. §326(a), if necessary. In re Draina, 191 B.R. 646, 648 (Bankr.D.Md. 1995). Section 326(a) of title 11 merely "sets the maximum compensation payable to the trustee; it does not establish a presumptive or minimum compensation." Id.; Connolly v. Harris Trust Co. of California (In re Miniscribe Corp.), 309 F.3d 1234, 1241 (10<sup>th</sup> Cir. 2002); In re Marvel Entertainment Group, Inc., 234 B.R. 21, 38-39 (D. Del. 1999).

Section 326(a) is entitled *Limitation on compensation of trustee* and states, in relevant part:

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 . . .

Section 326, therefore, provides a cap to the reasonable compensation of a trustee arrived at pursuant to the criteria set out in 11 U.S.C. §330.

Section 330(a), as applicable, provides that “. . . the court may award to a trustee . . . reasonable compensation for actual necessary services rendered by the trustee . . . and by any paraprofessional person employed by any such person . . . .” It goes on to provide the following non-exhaustive list of criteria for consideration in determining reasonable compensation,

(A) the time spent on such services; (B) the rates charged for such services; (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under the title; (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue or task addressed; and (E) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

11 U.S.C. §330(a).<sup>2</sup>

“Accordingly, a court awarding trustee fees must begin by assessing reasonableness under § 330(a) before applying the percentage-based cap under §326(a).” Miniscribe, 306 F.3d at 1241. Under the provisions of the Bankruptcy Code in effect at the time this case was filed, it is well established that “the trustee's compensation is not a commission based on distributions and the maximum fee permitted is not the presumptive fee for the trustee.” In re Computer

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<sup>2</sup> Subsequent to the filing of this case, 11 U.S.C. § 330(a) was amended by the Bankruptcy Reform Act of 1994, Pub. L. 103-394 (Oct. 22, 1994). The amendments to Section 330(a) are applicable only to cases commenced after October 22, 1994 and, thus, are not applicable to this case.

Learning Centers, 285 B.R. 191, 229-230 (Bankr. E.D. Va 2002); appeal dismissed on other grounds, In re Computer Learning Centers, 407 F.3d 656 (4<sup>th</sup> Cir. 2005); see In re Lan Assoc. XI, L.P., 192 F.3d 109, 115-16 (3rd Cir.1999); In re Neill, 242 B.R. 685, 689 (Bankr.D.N.D.1999); In re Biskup, 236 B.R. 332, 336 (Bankr.W.D.Pa.1999); In re Moore, 235 B.R. 414, 416 (Bankr.W.D.Ky.1999).

The burden of proving that requested compensation is reasonable falls to the trustee who must also show that the compensation is for necessary services performed by the trustee. In re Moss, 320 B.R. 143, 153 (Bankr.E.D.Mi. 2005). In determining a reasonable fee, compensation is subject to reduction or enhancement based upon the criteria set forth in Section 330(a) as well as the factors enumerated in Johnson v. Georgia Highway Express, 488, F.2d 714, 717-19 (5<sup>th</sup> Cir. 1974) and Barber v. Kimbrell's, Inc., 577 F.2d 216, 226-27 (4<sup>th</sup> Cir. 1978). See also In re Southeast Banking Corporation, 314 B.R. 250, 269 (S.D.Fl. 2004). When a court is called upon to determine the “reasonableness” of a professional's compensation, the starting point is the reasonable number of hours that the professional spent on the engagement times a reasonable hourly rate. Pennsylvania v. Delaware Valley Citizens' Council, 478 U.S. 546, 565, 106 S.Ct. 3088, 3098 (1986)(“A strong presumption the lodestar figure—the product of reasonable hours times a reasonable rate—represents a 'reasonable' fee is wholly consistent with the rationale behind the usual fee-shifting statute”); Blum v. Stenson, 465 U.S. 886, 888, 104 S.Ct. 1541, 1544 (1984) (the first step in determining a professionals compensation is to multiply “the number of hours reasonably expended on the litigation times a reasonable hourly rate.”); Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S.Ct. 1933, 1939 (1983)(“The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the

litigation multiplied by the reasonable hourly rate”). Although the Supreme Court cases cited *supra* involved attorneys fees in federal litigation rather than in bankruptcy cases, the same analysis has been applied in the bankruptcy context. See In re Manoa Finance Co., 853 F.2d 687, 690 (9<sup>th</sup> Cir. 1988)(“In determining a reasonable attorney's fee under § 330, many courts have adopted the formulae used to calculate fees under various federal fee shifting statutes.”), Computer Learning Centers, 285 B.R. at 226-27 (“The starting point for considering the fee applications of the trustee . . . is the hourly rate applicable for each timekeeper and the trustee.”).

Prior to the filing of the Application, and pursuant to requests based upon the Trustee’s regular billable rates and hours spent, the Trustee has already been compensated in an amount to which she would be entitled under traditional lodestar analysis: Two Million Five Hundred Ten Thousand Nine Hundred Ninety-Nine Dollars and Fifty-Seven Cents (\$2,510,992.57) for Nine Thousand Three Hundred Twenty Seven and two tenths of an hour (9,327.2). The Application, however, requests Eight Million Eight Hundred Thirty Three Thousand Three Hundred Fifty Dollars and No Cents (\$8,833,350.00). This amount represents a 3.52 multiple of the amount the Trustee is entitled to under the lodestar analysis.

In spite of the clear language of the Bankruptcy Code and the clear weight of authority, the Trustee's Application and Memorandum urges the Court to abandon the lodestar approach and argues that the Court should focus exclusively on the results achieved by the trustee, to the exclusion of the other factors that the Bankruptcy Code and case law rely upon in measuring trustee compensation. The Trustee’s Application failed to address any of the criteria of Section 330 or the lodestar analysis, or any of the factors of Johnson and Barber that would justify an enhancement of her compensation. Her Memorandum addresses the reasonableness criteria of

Section 330 and the Johnson and Barber factors, but as a secondary consideration to her main argument—that Section 326(a) entitles her to the full amount requested in her application.

**IV. Section 326 is Not a Measure of Reasonable Trustee Compensation.**

The language of Section 326(a) makes clear that a trustee's compensation is subject to a test of “reasonableness” under Section 330, and that the formula set forth in Section 326(a) operates as a limit on trustee compensation, not as a statutory basis, independent of Section 330, for calculating a trustee's compensation. The Trustee argues that Congress intended the trustee compensation scheme to provide incentives to trustees to find assets. Memorandum at 9-11. However, under the applicable version of Section 326, this incentive operates only as one element in a multifaceted statutory scheme. As one court in the Fourth Circuit noted:

In many chapter 7, cases, the trustee is ultimately paid the maximum fee permitted by § 326(a). That does not make §326(a) the presumptive fee. It is simply a recognition that in the smaller cases trustees provide services that are of a value that is at least the amount capped by § 326(a). However, in larger cases, the same result does not follow with such regularity. The appropriate standards are those set out in Blum and Johnson, modified for the unique responsibilities imposed on a trustee.

Computer Learning Centers, 285 B.R. at 230.

The Trustee acknowledges that her application is governed by the provisions of the Bankruptcy Code in place prior to the enactment of the Bankruptcy Abuse Protection and Consumer Protection Act of 2005, Pub. L. No. 109-8 (2005) (“BAPCPA”). Memorandum at 10. Notwithstanding this acknowledgment, the Trustee argues that BAPCPA’s inclusion of new Section 330(a)(7), which requires courts to treat trustees compensation as a commission based on Section 326, “implicitly overruled the decisions of the Third and Tenth Circuit Courts of Appeal [in In re Lan Assoc. XI, L.P., 192 F.3d 109 (3<sup>rd</sup> Cir. 1999) and In re Miniscribe Corp., 309 F.3d

1234 (10<sup>th</sup> Cir. 2002)] which had held that the sole function of Section 326 was to cap the amount of lodestar compensation that could be awarded.” Memorandum at 10-11. New Section 330(a)(7) undoubtedly marks a departure from prior practice. However, the Trustee has failed to provide any support whatsoever for her contention that the changes to new Section 330(a)(7) have rewritten the law governing trustee compensation in pre-BAPCPA cases. Like most of changes to the Bankruptcy Code under BAPCPA, the changes to Section 330 were explicitly made applicable only to cases filed on or after October 17, 2005. If Congress believed it was correcting a past mistake, rather than enacting a new provision, Congress would have made the provisions of Section 330(a)(7) immediately effective to new cases filed on or after BAPCPA’s enactment date of April 20, 2005 and, further, it would have made the changes effective to all cases already pending at that time, as it did with certain other BAPCPA provisions.<sup>3</sup> Congress did neither. BAPCPA, § 1501.<sup>4</sup>

The test of reasonableness and the case law interpreting it requires the Court to weigh multiple factors to determine a trustee's compensation. It also affords this Court ample discretion to evaluate the results of a trustee's efforts by considering such factors as “services

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<sup>3</sup> For example, BAPCPA’s new restriction on certain types of preference actions in 11 U.S.C. § 547 is effective for any cases pending or commenced on or after BAPCPA’s enactment date.

<sup>4</sup> SEC. 1501. EFFECTIVE DATE; APPLICATION OF AMENDMENTS.

(a) EFFECTIVE DATE- Except as otherwise provided in this Act, this Act and the amendments made by this Act shall take effect 180 days after the date of enactment of this Act.

(b) APPLICATION OF AMENDMENTS-

(1) IN GENERAL- Except as otherwise provided in this Act and paragraph (2), the amendments made by this Act shall not apply with respect to cases commenced under title 11, United States Code, before the effective date of this Act.

(2) CERTAIN LIMITATIONS APPLICABLE TO DEBTORS- The amendments made by sections 308, 322, and 330 shall apply with respect to cases commenced under title 11, United States Code, on or after the date of the enactment of this Act.



beneficial at the time at which the service was rendered,” 11 U.S.C. § 330(a)(3)(C), and the “results” of her work, Johnson, 488 F.2d at 719. The Trustee's argument that her compensation should reflect only the results of her work to the exclusion of other factors subsumed in the concept of “reasonableness” contradicts well-established principles governing the compensation of trustees and professionals in bankruptcy.

**V. Any Enhancement of the Trustee's Compensation Should be Based on the Lodestar Fee and Awarded Only to Extent the Lodestar Amount Does Not Adequately Compensate the Trustee**

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The procedure and grounds for fee enhancements are well established and start with the lodestar calculation—the reasonable hourly rate multiplied by the reasonable number of hours expended on the tasks she performed. Computer Learning Centers, 285 B.R. at 230. Although the court retains the discretion to adjust the lodestar figure up or down, Delaware Valley, 106 S.Ct. at 3098, the lodestar calculation “is *presumed* to be the reasonable fee” to which a professional is entitled. Blum, 104 S.Ct. At 1548. Further, the “burden of proving that such an [upward] adjustment is necessary is on the fee applicant.” Id.

The Trustee has not demonstrated that the compensation she has requested herein (i.e., her lodestar figure of \$2,522,556<sup>5</sup> plus an enhancement of \$6,310,739, for total compensation of \$8,833,350) is reasonable for the services she provided to this estate in her capacity as trustee.

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<sup>5</sup> In the Memorandum, the Trustee has inflated her lodestar fee by retroactively increasing her hourly rate from the \$225 to \$330 per hour requested in her interim compensation applications to a rate of \$400 per hour for all hours billed. The Trustee argues that \$400 is a more appropriate rate for all of her hours billed because of the results obtained in this case. “The trustee is an attorney, as are most other chapter 7 panel trustees. In these circumstances, the trustee’s hourly rate should generally be the same as his attorney hourly rate provided that it does not exceed the prevailing market rate. There is no basis to either increase or decrease the trustee’s hourly rate because he is performing trustee duties rather than attorney functions.” In re Computer Learning Centers, 285 B.R. 191, 230 (Bankr. E.D. Va 2002); appeal dismissed on other grounds, In re Computer Learning Centers, 407 F.3d 656 (4th Cir. 2005)

Her long narrative in her Application contains many references to novel issues, the complexity of the case, and the size and volume of the work and, again, the Trustee is commended for her work on these matters. The Trustee's Application and Memorandum, however, also describe a number of services and results that would reasonably be expected of any trustee in Maryland billing the rates charged by the Trustee in this case. For example, the Trustee spent a significant amount of time selling vehicles and other personalty, overseeing preference and claim objection litigation, making distributions to creditors, maintaining records, providing reports to the court and the U.S. Trustee, and managing the cash of the estate.

The Trustee's Memorandum refers to several cases to support her enhancement of 3.5 times her lodestar amount. However, in the cases cited where the lodestar fee can be calculated,<sup>6</sup> none awarded an enhancement of the magnitude sought by the Trustee in this case. Miniscribe, 309 F.3d at 1245 (trustee's fee enhanced 2.57 times lodestar amount after rejection of 3.5 multiplier); In re Southeast Banking Corp., 314 B.R. 250, 269-274 (Bankr. S.D. Fla. 2004) (fee enhancement of 1.48 times lodestar amount based on settlement; court would have awarded enhancement 2 times lodestar amount); In re Bennett Funding Group, No. 96-61376, slip op. at 4 (Bankr. N.D.N.Y. Feb. 20, 2003)<sup>7</sup> (fee enhancement of 2.19 times lodestar amount). Even the Trustee's expert, Professor Geoffrey Hazard, believes that a reasonable enhancement in this case is less than that requested by the Trustee and would fall within the range of 2.5 to 3 multiplied by the lodestar amount. Exhibit 2 to Trustee's Memorandum, Declaration of Geoffrey C. Hazard in

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<sup>6</sup> In the other cases cited by the Trustee, In re Guyana Development Corp., 201 B.R. 462 (Bankr. S.D. Tex. 1996) and In re Blue Coal Corp., 206 B.R. 730 (Bankr. M.D. Pa. 1997), the opinions do not calculate the lodestar amount. Neither case discusses the hourly rate charged by the trustee in the case.

<sup>7</sup> The trustee in Bennett Funding stated that he had 15,750 billable hours in the case and he charged \$400 per hour. His award increased his hourly rate by a multiple of 2.19 to approximately \$880 per hour.

Support of Trustee Compensation, p. 4.

The United States Trustee does not contest that the Trustee's work in this case and certain of the results obtained were extraordinary and merit a significant enhancement of her fee.

However, any enhancement should be awarded for those efforts by the trustee that contributed to the extraordinary result and not those efforts that would reasonably be expected of any trustee in Maryland billing at the rates charged by the Trustee in this case.

## **VI. Conclusion**

The burden is on the Trustee to demonstrate that her compensation request is appropriate under Section 330 and the applicable case law. Although the Trustee's overall efforts and the results obtained in this case are outstanding, her Application and Memorandum fail to provide a sufficient basis for this Court to award her compensation that is a 3.5 multiple of her lodestar fee. The Trustee's reliance on Section 326 is misplaced. Under the law in effect at the time of this case, it is clear that Section 326 serves as cap on trustees fees and is not a basis for enhancing trustee fees over the "reasonable" amount determined pursuant to Section 330.

For these reasons, the U.S. Trustee respectfully requests that the Trustee's request for approval of compensation in the amount of Eight Million Eight Hundred Thirty Three Thousand Three Hundred Fifty Dollars and No Cents (\$8,833,350.00) be denied and that the Court award reasonable compensation based on the factors set forth herein.

[counsel's signature appears on next page]

Respectfully Submitted,

W. Clarkson McDow, Jr.  
United States Trustee

Date: December 15, 2005

By: /s/ Katherine A. Levin  
Katherine A. Levin  
Federal Bar No.: 10916  
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 15<sup>th</sup> day of December 2005, that a copy of the foregoing Opposition of the United States Trustee to Eighth and Final Application by Trustee for Allowance of Compensation will be mailed on December 16, 2006 by first class mail, postage prepaid to the Administrative Order No. 1 Service List.

/s/ Katherine A. Levin  
Katherine A. Levin