U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

IN RE:	§	
	§	
BAC GROUP, INC.,	§	
Debtor.	§	
	§	CASE NO. 4-01-41947-DML-7

Memorandum Opinion

Before the court is the First Interim Application of Marilyn D. Garner, Trustee, for Allowance of Administrative Claim and to Authorize Payment (the "Application"). The Application was filed on October 28, 2003, by Marilyn Garner ("Garner" or "BAC Trustee") seeking compensation for services as chapter 7 trustee in the above-styled case. The United States Trustee (the "UST") filed an objection (the "Objection") to the Application on November 17, 2003. The court considered the Application initially on November 18, 2003, after which it entered an order on November 24 allowing Garner's fees to the extent not objected to by the UST. The court held a further hearing on the Application and Objection on December 4, 2003, after which it invited Garner and the UST to submit briefs in support of their respective positions. The court has now reviewed those briefs and the authorities cited by the parties. This matter is within the court's core jurisdiction pursuant to 28 U.S.C. §§ 1334(a) and 157(b)(2)(A). This memorandum opinion constitutes the court's findings of fact and conclusions of law. Fed. R. Bankr. P. 7052 and 9014.

I. Background

This chapter 7 case was filed as a companion case to the chapter 13 case of Robert Ladd Holton ("Holton"), the owner of Debtor. The principal assets of both the chapter 7 and chapter

13 estates consisted of malpractice litigation against attorneys who formerly represented Holton and Debtor. The largest claimant against each estate is also the same.

Holton, his chapter 13 trustee (the "13 Trustee") and Garner retained the same counsel ("Litigation Counsel") to pursue the malpractice litigation. The first suit brought by Litigation Counsel resulted in a total recovery of $825,000, which was paid into Litigation Counsel's trust account. After deducting his fees and expenses, Litigation Counsel distributed the balance to the 13 Trustee and the BAC Trustee, in accordance with their prior agreement, 60% to the former and 40% to the latter.

II. Issue

The sole issue which must be decided by the court is on what portion of the $825,000 Garner is entitled to calculate her trustee's commission pursuant to section 326(a) of the Bankruptcy Code (the "Code").[1] The UST takes the position that the calculation must be limited to the moneys actually turned over to the BAC Trustee by Litigation Counsel.[2] Garner claims she is entitled to a commission on Debtor's estate's share of amounts retained for his fees and expenses by Litigation Counsel.[3]

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1 11 U.S.C. §§ 101, *et seq.*

2 The UST actually asserts Garner is only entitled to a commission on amounts distributed by her. However, the entire amount received by Garner will eventually be distributed. The real question is whether moneys retained by Litigation Counsel should count as distributions by the BAC Trustee.

3 The court's calculations of the amount due to the BAC Trustee under her theory is different than her calculation. However, the court does not have before it data reflecting other receipts the BAC Trustee may rely upon. The court will therefor limit itself to ruling on the portion of the $825,000 subject to receipt and disbursement by Garner and so subject to commission under section 326(a).

III. Discussion

The UST argues that the trustee is entitled to a commission only on moneys "disbursed or turned over." The UST relies on the words of section 326(a) of the Code[4] and the Fifth Circuit Court of Appeals' decision in *Pritchard v. United States Trustee (In re England)*, 153 F.3d 232 (5th Cir. 1998). The UST also cites the court to *In re Music Merchandisers, Inc.*, 131 B.R. 377 (Bankr. M.D. Tenn. 1991) and *In re Dodge*, 104 B.R. 491 (Bankr. S.D. Fla. 1989).

Garner argues that moneys "disbursed or turned over" include moneys constructively disbursed by one, such as Litigation Counsel, who is acting on a trustee's behalf. She distinguishes *In re England* on the basis that that case involved an effort by the trustee to claim a commission on property turned over to a creditor, *i.e.*, property not administered by the trustee as part of the estate created under section 541 of the Code. Garner relies on *Commercial Finish Group, Inc. v. Milbank*, Nos. 3:02-CV-1630-L and 3:02-CV-1631-P, 2003 U.S. Dist. LEXIS 15338 (N.D. Tex. Aug. 29, 2003), in which the District Court for this district held that a commission calculated pursuant to section 326(a) of the Code included funds distributed, other than through the trustee, by a title company as a result of a sale of real property owned by the estate. Garner points to the similar case, *In re Reid*, 251 B.R. 512 (Bankr. W.D. Mo. 2000), in which disbursements for costs at a sale closing qualified as disbursements under section 326(a).

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[4] Section 326(a) states:

> 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.

She finally notes that at least one court has held disbursements by a settlement agent should be treated in the same way – *i.e.*, as constructive disbursements by the trustee. *In re Moreno*, 295 B.R. 402 (Bankr. S.D. Fla. 2003).

The court concludes that its decision is controlled by *Milbank*. The UST's reliance on *In re England* is misplaced. The focus of the Court's decision in that case was that *property* rather than *money* was the subject of the "disbursements" in question. *In re England*, 153 F.3d at 235-36. As to the UST's other authorities, *In re Dodge* was decided under the former bankruptcy act, and *In re Music Merchandisers, Inc.*, is inapposite.[5]

The UST's attempt to distinguish *Milbank* on the basis that it involved a real estate transaction, which necessarily implicated the services of a title company, whereas in the instant case the BAC Trustee could have processed the settlement funds herself, is not persuasive. First, the BAC Trustee shared the litigation with the 13 Trustee. Thus, as in a real estate transaction, the funds required division between them at a neutral point – here Litigation Counsel's trust account. Second, to have passed the settlement proceeds through the BAC Trustee (all $825,000) would result in commissions due on a portion of that sum to both her and the 13 Trustee. This is precisely the type of manipulation of trustee's fees against which the *England* Court cautioned. *See In re England*, 153 F.3d at 236-37. Finally, the Application reflects that Garner played an

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[5] *In re Music Merchandisers, Inc.*, involved a settlement netting the trustee's fraudulent transfer claim against the Internal Revenue Service against the latter's priority claim. Aside from the fact that no money changed hands, the settlement did not, as here, actually quantify the trustee's recovery. Rather, the settlement disposed of both the trustee's suit and an objection to the IRS claim. Finally, *In Re Music Merchandisers, Inc.*, is not controlling precedent, whereas *In re Milbank* is. *See Rand Energy Co. v Strata Directional Tech., Inc. (In re Rand Energy Co.)*, 259 B.R. 274, 276 (Bankr. N.D. Tex. 2001) (holding that under the federal hierarchical judicial structure of the Northern District of Texas, decisions by the United States District Courts of the Northern District of Texas are binding on bankruptcy courts within the district).

active role as Litigation Counsel's client. Her efforts at coordinating Debtor's estate's position with that of Holton's were meaningful and contributed to what promises to be successful outcomes in both cases. It would be inappropriate on the facts of this case to find that the litigation which resulted in the $825,000 settlement was not "administered" by the BAC Trustee.

IV. Conclusion

For the foregoing reasons, the court holds that Garner's commission should be calculated under section 326(a) of the Code based on inclusion of 40% of the $825,000 in settlement proceeds (assuming such amount is "disbursed" other than to the Debtor). As the Application seeks an interim award of fees, the court need not finally address the amount to be paid to Garner at this time.

The court also understands that the commission calculated for a trustee under section 326(a) of the Code represents the upper limit of the trustee's compensation. *See In re England,* 153 F.3d at 236, citing legislative history to section 326.[6] The actual amount a trustee is entitled to must be determined in accordance with section 330 of the Code. The parties are therefore directed to calculate the commission at this time due to Garner based on the court's holding herein and present a joint order authorizing payment to Garner of an amount which, when added to fees paid pursuant to the court's November 24 order, will effect payment to Garner of a total of 90% of the maximum commission she would be entitled to under section 326(a). The balance

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[6] The court does not mean to establish a rule applicable in every case in which a trustee is one of several plaintiffs. Besides the active participation of the trustee and the other factors present in this case, the agreement among the parties, the nature and structure of the settlement (as with *In re Music Merchandiser, Inc.*), whether the trustee is serving as his or her own counsel and other matters will affect, if not commission calculation under section 326(a), certainly allowance of fees under section 330.

of Garner's fees (including from future receipts) will be subject to consideration at further hearings.

It is so ORDERED.

Signed this the 6th day of January 2004.

HON. DENNIS MICHAEL LYNN,
UNITED STATES BANKRUPTCY JUDGE