

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
LUBBOCK DIVISION

IN RE:	§	
	§	
GARY PRODUCTS GROUP, INC.,	§	CASE NO. 01-51313-RLJ-7
	§	
DEBTOR	§	

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IN RE:	§	
	§	
MINAMI INTERNATIONAL CORPORATION,	§	CASE NO. 01-51315-RLJ-7
	§	
DEBTOR	§	

**MEMORANDUM OPINION AND ORDER**

Before the court in each of these two cases is the Chapter 7 Trustee’s application requesting that the court approve, in accordance with an agreement between her and Wells Fargo Bank, N.A., a distribution to the Trustee of funds realized from sale of property that secures the bank’s claim. Specifically, in the *Minami International Corporation* case, the Trustee recovered \$2,027,030.38 upon sale of the encumbered property and is seeking “§ 506(c) fees” of \$60,810.90; in the *Gary Products Group, Inc.* case, the Trustee recovered \$312,223.92 from sale of the encumbered property and seeks “§ 506(c) fees” of \$9,656.41.

Notice of the applications was provided to all creditors and no objections were filed.

Wells Fargo is undersecured as it holds a claim in the approximate amount of \$85,000,000.

While each of the applications characterizes the distribution as section 506(c) fees, the Trustee concedes that the so-called fees represent the Trustee’s commissions under section 326(a) of the

Bankruptcy Code.<sup>1</sup>

The Trustee advised the court that she has other assets to administer and that other administrative claims may arise in the case. At the initial hearing on the applications, the court expressed concern that if other administrative expenses arise and there are inadequate funds to satisfy such claims, direct payment to the Trustee of the requested commissions would violate the priority scheme of the Bankruptcy Code. Some courts have held that an agreement under which a secured creditor consents to use of its collateral for payment of a specific claim allows the funds (derived from the collateral) to pass outside the bankruptcy estate and directly to the claimant. *See, e.g., In re Debbie Reynolds Hotel & Casino, Inc.*, 255 F.3d 1061 (9th Cir. 2001) (a section 506(c) surcharge is not an administrative claim, but an assessment against a secured party's collateral and, as such, comes directly from the secured party's recovery, not the debtor's estate); *In re SPN Mfg. Corp.*, 984 F.2d 1305 (1st Cir. 1993)(agreement between an undersecured creditor and Chapter 11 creditors' committee under which a portion of the creditor's collateral was to be distributed to unsecured creditors was, after conversion of the case to Chapter 7, upheld over objection by the Chapter 7

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<sup>1</sup>Section 506(c) of the Bankruptcy Code provides that a "trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving or disposing of, such property to the extent of any benefit to the holder of such claim." 11 U.S.C. § 506(c).

Section 326(a) of the Bankruptcy Code provides that in a case under Chapter 7,

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.

trustee ); *In re Nuclear Imaging Sys. Inc.*, 270 B.R. 365 (Bankr. E.D. Pa. 2001)(bankruptcy court held that secured creditor’s consent to a “carve out” from its collateral for benefit of debtor’s counsel is enforceable as parties intended, and thus carved-out funds did not have to be turned over to Chapter 7 trustee). Other courts have held that such funds are indeed property of the bankruptcy estate to be disbursed by the trustee strictly in accordance with the Code’s priority scheme. *See, e.g., Walsh v. Northwestern Nat’l Ins. Co. of Milwaukee (In re Ferrante)*, 51 F.3d 1473, 1479 (9th Cir. 1995); *Ford Motor Credit Co. v. Reynolds & Reynolds Co. (In re JKJ Chevrolet Inc.)*, 26 F.3d 481, 484 (4th Cir. 1994)(holding that funds obtained pursuant to section 506(c) “become available as an unencumbered asset for distribution to the unsecured creditors”); *United States Tr. v. Messer (In re Pink Cadillac Assocs.)*, 1997 WL 164282 \*6 (S.D.N.Y. 1997); *In re Ben Franklin Retail Store Inc.*, 210 B.R. 315, 317-18 (Bankr. N.D. Ill 1997)(“Section 506(c) does not entitle a trustee to recover personal compensation directly from a secured creditor . . . If he recovers such expenses, the recovered funds become available as an unencumbered asset for distribution to the unsecured creditors”); *In the Matter of Iberica Mfg. Inc.*, 180 B.R. at 716; *In re Goffena*, 175 B.R. at 392; *In re Dinsmore Tire Ctr. Inc.*, 81 B.R. 136, 138 (Bankr. S.D. Fla. 1987)(“If the trustee and the secured creditor reached agreement that a surcharge to the creditor for the benefit of this estate in the amount of \$1,500 is a reasonable charge for those services, I would have no reason to question or disapprove the surcharge. However, this is a recovery by the trustee for the estate. There is no authorization for the trustee to retain this money as his personal compensation.”).

Assuming the amount of the trustee’s commission is proper and the estate is administratively solvent, the Trustee will be paid the entire commission regardless. By allowing a partial distribution at

this time, subject to final review and approval, the court need not address the specific question whether the funds are property of the estate or not. However, given the circumstances of this case – i.e. a trustee seeking recovery of her commission through agreement with a secured creditor – the court is presently inclined to view any recovery upon sale of the collateral as property of the bankruptcy estate. *See* 11 U.S.C. § 541(a)(6).

It is, therefore,

ORDERED that the Trustee may remit half of the requested fees (\$30,405.45 and \$4,828.20, respectively) to herself as an interim distribution subject to final approval upon the court's consideration of the Trustee's final request for approval of her trustee's commissions.

DATED: \_\_\_\_\_.

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ROBERT L. JONES  
UNITED STATES BANKRUPTCY JUDGE