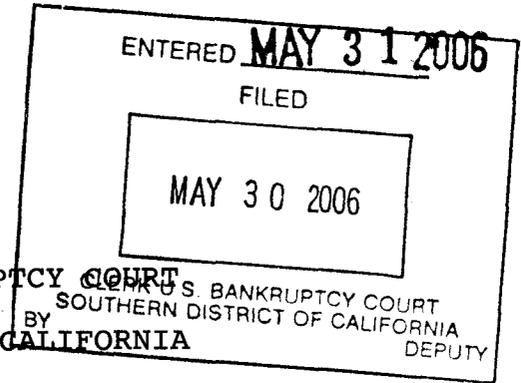


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NOT FOR PUBLICATION



UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY DEPUTY

In re

BARRY RAY WALTERS,

Debtor.

Bankruptcy No. 04-06902-JM7

MEMORANDUM DECISION

Background

Barry Ray Walters ("Debtor") filed for relief under Chapter 7 of the Bankruptcy Code ("Code") on August 4, 2004. James Kennedy was appointed the Chapter 7 trustee ("Trustee"). On August 4, 2005, Pyle Sims Duncan and & Stevenson ("PSDS"), as counsel for the Trustee, filed its "First and Final Application for Compensation and Reimbursement of Expenses." PSDS sought fees of \$20,720.00 and expenses of \$485.25.

PSDS represented that the Trustee had cash on hand of \$71,760.88 from the sale of the Debtor's residence. The unsecured claims in this case totaled \$30,952.34.

The Debtor's residence is at the center of this controversy. The Debtor and his wife, Kimberly Walters, were involved in a marital

1 dissolution proceeding when each filed individual cases. Kimberly
2 Walters filed for relief under Chapter 13 of the Code on June 8, 2004,
3 just two months before the Debtor's bankruptcy filing. As addressed
4 below, the controversy concerned whether the residence was community
5 property or held in joint tenancy.

6 The Debtor filed opposition to PSDS's fee application on August
7 19, 2005. He contended that the fees sought were excessive. He also
8 argued that certain services provided were unnecessary. Furthermore,
9 he contended that counsel performed services that should have been
10 performed instead by the Trustee. The matter first came on for
11 hearing on September 1, 2005, at which time the hearing was continued
12 until October 27, 2005.

13 PSDS filed the Supplemental Declaration of Susan Stevenson on
14 September 26, 2005, and the Debtor filed a supplemental opposition on
15 October 20, 2005. At the hearing on October 27, 2005, the Court
16 indicated that resolution of this dispute could be impacted by the
17 Trustee's fee application. Consequently, the matter was continued to
18 January 13, 2006, to allow the Trustee time to file his fee
19 application. By stipulation of the parties the hearing was continued
20 to February 23, 2006.

21 On January 10, 2006, the Court issued an order giving the parties
22 an opportunity to file supplemental briefs to address the Bankruptcy
23 Appellate Panel's decision in In re Garcia, 335 B.R. 717 (9th Cir. BAP
24 2005), which was decided on December 7, 2005. Both parties filed
25 supplemental briefs.

26 The Trustee filed his fee application on January 26, 2006. In
27 it he sought compensation of \$18,625.00. The Debtor did not file
28 opposition to the Trustee's fee application. On that same date, PSDS

1 filed a supplement to its fee application in which it sought an
2 additional \$12,393.00 in fees and \$97.07 in expenses.

3 On January 31, 2006, the Trustee filed a declaration in which he
4 stated that prior to the PSDS supplemental fee application, the
5 Trustee calculated that creditors would receive a pro rata
6 distribution of 93.4%. However, based on the additional fees sought
7 by PSDS, the estimated payout to creditors would only be 51%.

8 On February 23, 2006, the Court held a hearing on both the
9 Trustee's fee application and PSDS's fee application. Counsel for the
10 Debtor confirmed that there was no opposition to the Trustee's fee
11 application. He also believed the Trustee had performed the services
12 and he had no reason to dispute the Trustee's assertion regarding time
13 spent on the case. The Court took both fee applications under
14 submission at that time.

15 Standing

16 As an initial matter, the Court addresses whether the Debtor has
17 standing to object to the fee application. "Only those persons who
18 are directly and adversely affected pecuniarily by an order of the
19 bankruptcy court have been held to have standing to appeal that
20 order." Matter of Fondiller, 707 F.2d 441, 442 (9th Cir. 1983). PSDS
21 contends that the Debtor does not have standing because this has
22 become an insolvent estate.

23 The Court is satisfied that if the Debtor's objections are upheld
24 the estate would be solvent. Therefore, the Debtor has a pecuniary
25 interest in this matter, and as a result, he has standing.¹

26 _____
27 ¹D.J. Rausa, as counsel for Kimberly Walters, filed a declaration
28 in opposition to PSDS's fee application on October 24, 2005. This
declaration was filed after the first hearing on the fee application
and only three days before the second hearing. Therefore, it was not

1 Furthermore, even if the Debtor did not have standing, the Court has
2 an independent duty to review the fees requested. In re Nucorp
3 Energy, Inc., 764 F.2d 655, 658 (9th Cir.1985); In re Busy Beaver
4 Bldg. Ctrs., Inc., 19 F.3d 833, 841 (3rd Cir. 1994).

5 Trustee's Fee Application

6 The Trustee requests \$18,265.00 based on an estimate of 74.5
7 hours at a rate of \$250.00 per hour. Pursuant to Section 330(a)(3),
8 the Court considers the nature, extent, and value of services rendered
9 by the Trustee in determining the reasonable amount of compensation
10 to be paid to the Trustee.² As part of that analysis, the Court
11 considers the time spent by the Trustee.

12 The Trustee admits that he did not maintain proper time records.
13 Instead, he asserts that his time estimate is based on a review of
14 notes, phone logs, mileage logs, calendars, court docket and other
15 professional fee applications. Other than the court docket and the
16 other professional fee applications, the other documents relied on
17 have not been made part of the record.

18 The law in this circuit is clear, and has been for quite some
19 _____
20 timely filed. Additionally, it was duplicative of arguments raised
21 by the Debtor. In reaching its decision, the Court has not considered
Rausa's declaration.

22 ² Pursuant to the Bankruptcy Abuse Prevention and Consumer
23 Protection Act of 2005 ("BAPCPA"), Section 330(a)(3), which states
24 that the Court shall consider time spent in awarding compensation, now
25 includes a specific reference to Chapter 11 trustees, and does not
26 include a similar reference to Chapter 7 trustee. Additionally, the
27 BAPCPA added Section 330(a)(7), which provides that "[i]n determining
28 the amount of reasonable compensation to be awarded to a trustee, the
court shall treat such compensation as a commission, based on section
326." It is unclear then, whether under BAPCPA courts are to consider
time spent when determining compensation to be paid to Chapter 7
trustees, and if not, whether Chapter 7 trustees will still need to
maintain time records in cases filed after the effective date of the
BAPCPA. In any case, however, the amendments from the BAPCPA do not
apply in this case, so time records were required of the Trustee.

1 time. Trustees are required to maintain time records. In re Roderick
2 Timber Company, 185 B.R. 601 (9th Cir. BAP 1995).

3 The trustee has the burden of establishing that he or she
4 is entitled to the fees requested. As the fact finder, the
5 court must evaluate the sufficiency of the evidence
6 provided by the trustee in support of the fee application.
7 Due to the nature of the trustee's responsibilities, the
8 court may determine that the trustee need not keep time
9 records as detailed as those of an attorney. However, in
10 every case, a court should only award fees to the *level*
11 that has been proven to be actual, necessary and
12 reasonable. Any lesser requirement would make the
13 applicant's burden of proof a mere shell.

14 Id. at 606 (citations omitted).

15 The Court recognizes that there may be cases where a trustee
16 could provide justification for not maintaining time records. See,
17 e.g., In re Missionary Baptist Foundation of America, 77 B.R. 552, 554
18 (N.Tex.1987)(Where trustee was operating an ongoing business and
19 attempting to reorganize the debtor, it was "not realistic to expect
20 the Trustee to prepare a time slip on each function that he
21 perform[ed] during the day."). However, The Trustee has not offered
22 any explanation for why he failed to maintain time records.

23 Additionally, at a minimum, the Trustee should have maintained
24 time records when he had reason to know there would be assets in this
25 case to administer. Maintaining some semblance of contemporaneous
26 time records would also have been appropriate because there was a
27 dispute over the primary asset of the estate, a dispute which
28 ultimately resulted in litigation.

29 In his description of services, the Trustee breaks out four
30 categories. The categories and time spent are as follows: 1) "Asset
31 Investigation and Liquidation," (30.0 hours); 2) "Case
32 Administration," (24.0 hours); 3) "Claims Review and Objections" (3.5
33 hours); and 4) "Supervision of Professionals" (4.0 hours). With each

1 of these categories the Trustee attempted to provide a general list
2 of services for which he sought compensation. The total time for
3 these categories equals 61.5 hours.

4 However, after setting forth those categories, he continues his
5 narrative with the statement that the "reported time estimate does not
6 include time expended performing the routine administrative duties
7 associated with this bankruptcy estate." For those routine duties he
8 seeks compensation for additional eight hours. It is unclear why the
9 Trustee did not include this in his initial description of services
10 and placed this request later in his narrative. More important, it
11 is unclear how this time is different from the time spent on case
12 administration. Due to the lack of detail, as well as a lack of
13 supporting time records, the Trustee has not shown he should receive
14 compensation for this time. The Court will disallow those eight
15 hours. See In re Pruitt, 319 B.R. 636, 642 (S.Cal. 2004) (disallowing
16 estimated hours in addition to those actually recorded).

17 He then also seeks an additional five hours to "finalize the
18 Trustee's Final Report, attend the hearing on this fee application,
19 prepare the Notice of Distribution, prepare dividend checks, and
20 prepare the Trustee's Final Account." However, under the category of
21 "Case Administration" as set forth above, the Trustee stated he was
22 including "time expended in the preparation of the Trustee's Final
23 Report and Statements of Proposed Distribution and Proposed
24 Compensation . . . and the time expended in the preparation and filing
25 of the Trustee's Final Fee Application." It appears certain matters
26 are being counted twice. The Court will reduce the time for Case
27 Administration by the five hours sought for preparation of the Final
28 Report and other items related to closing the case.

1 community property. The Trustee took the position that the property
2 was held in joint tenancy and that he could administer the Debtor's
3 half interest in the property. The Court need not resolve that issue.

4 Initially, Kimberly Walters sought to retain the residence while
5 making payments through her Chapter 13 plan. During that time the
6 mortgagee filed for relief from the automatic stay, putting at risk
7 the estate's equity in the property. The Trustee was compelled to
8 file a complaint to force Kimberly Walters to accept a sale of the
9 residence under Code Section 362(h). The complaint was filed on
10 January 28, 2005, but it still took several months before Kimberly
11 Walters moved forward with the sale. The Court is satisfied that the
12 Trustee had a colorable claim and his willingness to pursue that claim
13 benefitted the estate. In general, the fees related to that adversary
14 proceeding will be allowed, but subject to specific adjustments as
15 detailed below.

16 The Court next turns to a review of the time charged and the
17 services provided, keeping in mind the Debtor's contention that PSDS
18 performed services that should have been performed instead by the
19 Trustee. The Trustee filed his motion to employ PSDS on December 8,
20 2004. The United States Trustee objected on the ground that the
21 employment application lacked specificity and it could be interpreted
22 as allowing counsel to perform services that would duplicate the
23 Trustee's duties, such as review filed claims. The U.S. Trustee cited
24 to Judge Hargrove's opinion in In re Garcia, 317 B.R. 810 (S.Cal.
25 2004), aff'd in part, rev'd in part, 335 B.R. 717 (9th Cir. BAP 2005).

26 In response to the U.S. trustee's objection, PSDS filed the
27 supplemental declaration by attorney Susan Stevenson, in which she
28 explained that "while PSDS is not being retained to sell the real

1 property discussed above, it is being retained to assist the Trustee
2 in the sale process, in this particular instance, by initiating
3 litigation." After considering this representation, the Court
4 approved the employment application.

5 PSDS requests \$1,517.00 for 5.5 hours for "Asset Analysis and
6 Recovery" and states that this time includes research on the effect
7 of the bankruptcy filing of Kimberly Walters and beginning preparation
8 of the complaint. PSDS also seeks compensation of \$2,912.00 for 12.6
9 hours spent on "Litigation," including time for research and
10 preparation of the complaint. The Court notes that an additional four
11 hours billed for research was listed not under "Litigation," but under
12 "Case Administration." [See 11/17/2004 entry of attorney Lisa Torres.]
13 Therefore, while PSDS places 12.6 hours under the category
14 "litigation," in fact, it appears that time spent related to the
15 litigation was closer to 22 hours.

16 The legal issue regarding whether the residence was community
17 property or held in joint tenancy revolved primarily around one
18 California statute. The number of published opinions on that statute
19 are not extensive. Also, the complaint that was filed under Section
20 363(h) in January 2005 was essentially just two pages long, and most
21 of that was simple language concerning things such as venue and
22 jurisdiction and when the Debtor's case was filed. The Court
23 determines that the time spent related to the litigation was excessive
24 in light of the lack of complexity involved. It will reduce the
25 amount allowed by \$1,400.00, representing five hours at \$280/hr.

26 PSDS states it charged \$924.00 for an objection to the Debtor's
27 claim of exemption. The Debtor was not entitled to his claimed
28 homestead exemption, and never should have listed it on his schedules.

1 The Court would be satisfied with time spent by counsel in preparing
2 an objection to the claimed exemption. However, the time records
3 suggest a slightly different picture. The time records show an entry
4 on 10/25/2004 for 2.60 hours for "Review, revise, and finalize reply
5 to opposition of Debtor's to Trustee's objection to Debtor's
6 homeowner's exemption." The Debtor never filed opposition to the
7 objection. The Debtor amended his claim of exemption before the
8 Trustee filed his opposition. The Court will reduce the fees by the
9 \$924.00 attributed to preparation of a reply to opposition. The
10 remaining time billed on the exemption matter will be allowed because
11 the Debtor should never have claimed the exemption in the first place
12 and some expenditure of time spent on preparation of an opposition to
13 the exemption was reasonable.

14 The Trustee billed 3.5 hours for reviewing claims. PSDS also
15 seeks compensation for that task with a request of \$1,103.00 for 5.50
16 hours. There were few claims in this case and any issue regarding
17 duplication of claims between this estate and Kimberly Walters'
18 bankruptcy estate could have been resolved by the Trustee. There is
19 no showing that it was necessary to have PSDS review the claims. The
20 Court denies the request for compensation of \$1,103.00 for those
21 services.

22 The most significant category of time for PSDS is "Asset
23 Disposition." It seeks payment of \$9,225.50 for 33.40 hours. PSDS
24 acknowledges that a certain amount of that time was incurred in
25 negotiating with counsel for Kimberly Walters regarding the estate's
26 interest in the residence and an eventual sale of the property ("once
27 the exemption issue was resolved, Applicant, on the Trustee's behalf,
28 began negotiating with the co-owner for the potential purchase of the

1 estate's one-half interest in the property"). This was beyond PSDS's
2 role in this case.

3 This did not involve a complex business transaction. It simply
4 involved ownership of a residence and sale of that residence. Issues
5 concerning the condition of the property did not rise to such a level
6 that the Trustee was no longer competent to handle negotiations in
7 line with his duties and obligations.

8 The brevity of the complaint that the Trustee eventually filed
9 is an indication of the lack of complexity involved in this matter.
10 While it was appropriate for PSDS to provide an analysis of whether
11 the Trustee needed stay relief before filing the complaint against
12 Kimberly Walters, negotiation of the sale was not a proper role for
13 PSDS, especially after being alerted to the decision in Garcia. See
14 also, In re Castro, 320 B.R. 690, 696 (S.Cal. 2005)(Adler, J.)(time
15 records "show an unfortunate tendency by counsel to stray into
16 performing duties which should have been performed by the Trustee.")

17 The Court has reviewed all the time entries. It calculates that
18 13.4 hours was incurred in drafting and responding to proposals and
19 counter proposals regarding the sale of the property. All that time
20 was billed by attorney Stevenson. Therefore, the Court will deny
21 \$3,752.00 in this category(13.4 hours x \$280/hr.).

22 In this category PSDS also included approximately eight hours for
23 a reply to Debtor's opposition to the Trustee's motion to sell the
24 residence. The Debtor did not oppose the sale. He only raised an
25 issue about how the proceeds would be distributed. PSDS argues that
26 "the motivating factor for the opposition appeared to be an effort to
27 gain an edge in the parties' dissolution rather than address any legal
28 issue directly related to the proposal." Given that, any dispute

1 raised by the opposition was mostly between the Debtor and Kimberly
2 Walters, and it was not up to PSDS, to intervene on behalf of Kimberly
3 Walters. A short reply setting forth the Trustee's position on
4 distribution of the proceeds would have been sufficient. The time
5 spent on the reply was excessive. The Court will cut the time allowed
6 in half, resulting in a reduction of \$1,120.00 (4 hours at \$280/hr.).

7 On the other hand, the Court will allow time incurred preparing
8 addendums to any of the legal documents. The Court is satisfied that
9 such services represented legal services properly provided by counsel.

10 PSDS also billed time spent on the employment of the broker. The
11 explanation for counsel's involvement in a matter clearly within the
12 scope of the Trustee's duties is that the broker was inexperienced in
13 bankruptcy matters. This is a questionable expense. However, given
14 that this case involved a sale that needed approval in two bankruptcy
15 cases, and the Trustee was attempting to move this case forward by
16 agreeing to Kimberly Walters' choice of brokers, the Court will allow
17 compensation to PSDS for this time.

18 The Court also wants to address PSDS's contention that the rates
19 it charges are lower than the Trustee's own hourly rates, and
20 therefore, it was actually economical to have counsel take over
21 certain responsibilities. First, it is not for the Trustee and
22 counsel to decide what duties the Trustee wishes to fulfill and which
23 he would prefer to delegate to counsel. Second, this argument fails
24 to take into consideration the limits on the Trustee's compensation
25 under Section 326. Allowing counsel to perform the Trustee's duties
26 creates the risk of an end run of the limitations on a trustee's
27 compensation as set forth in Section 326. In other words, as a
28 trustee's own anticipated compensation nears the statutory limits, he

1 or she might otherwise have an incentive to delegate duties to counsel
2 rather than expend time for which he might not be compensated. In re
3 Jenkins, 130 F.3d 1335, 1341 (9th Cir. 1997).

4 Summary of Deductions on Initial Fee Application

5 The Court will make the following reductions in PSDS's fee
6 application:

- 7 1) \$1,400.00 reduction related to the litigation;
- 8 2) \$924.00 attributed to preparation of a reply to opposition on
9 the claim of exemption;
- 10 3) \$3,752.00 related to negotiating the sale;
- 11 4) \$1,120.00 for the Trustee's reply to opposition to the sale.

12 This amounts to a reduction of \$7,196.00.

13 The Court will award PSDS fees of \$13,524.00 based on its initial
14 fee application.

15 Supplemental Fee Application

16 As of January 21, 2006, the trustee had cash on hand of
17 \$69,239.18. PSDS's first fee application was for \$20,720.00. In its
18 supplemental fee application it seeks an additional \$12,393.00 in
19 fees, representing 50.2 hours of attorney time on the fee application
20 litigation alone. At the hearing on September 1, 2005, counsel for
21 both parties were directed to meet and confer during a recess in the
22 hearing so that they could determine the exact amount in dispute. The
23 attorneys reviewed the time records filed by PSDS in support of its
24 initial fee application and reached an agreement as to the specific
25 time entries in dispute. Counsel for PSDS represented to the Court
26 that the amount of fees in dispute based on those time entries was
27 \$8,240.00.

28 PSDS contends that it is entitled to payment of fees it has

1 incurred in litigating its initial fee application. In the Ninth
2 Circuit, fees incurred by counsel in preparing and presenting a fee
3 application are considered a necessary expense because of the
4 statutory requirement that counsel submit such fee applications for
5 court approval. In re Nucorp Energy, Inc., 764 F.2d 655 (9th Cir.
6 1985). PSDS is clearly allowed fees in preparing the initial fee
7 application. Furthermore, the Court in Nucorp Energy indicated that
8 professionals in bankruptcy cases can also seek compensation for fees
9 incurred in litigating their entitlement to fees. The Ninth Circuit
10 addressed that issue more directly in two subsequent cases.

11 In In re Riverside-Linden Investment Co., 945 F.2d 320 (9th Cir.
12 1991), the bankruptcy court denied a fee request by counsel for the
13 trustee. Counsel then filed a supplemental fee application seeking
14 payment of fees in litigating the initial fee application. The
15 bankruptcy court denied the supplemental request as well. The Ninth
16 Circuit Court of Appeals affirmed, noting that the fees were incurred
17 by counsel in unsuccessfully litigating over the initial fee
18 application. 945 F.2d at 323. The Court held that "unlike the
19 presentation and preparation of the fee application itself, there is
20 no statutory or Bankruptcy Rule requirement that attorneys for the
21 debtor oppose objections to the fee application." Id.

22 In In re Smith, 317 F.3d 918 (9th Cir. 2002), fees incurred in
23 litigating a fee application were allowed. The Court specifically
24 noted that the facts before it were unlike those in Riverside-Linden
25 because the initial fee applications were meritorious and the
26 objections by the debtor were frivolous. The Court stated that
27 denying an attorney reasonable compensation for successfully defending
28 its fee awards would dilute its compensation for actual and necessary

1 services. 317 F.3d at 929.

2 As is made clear in both Nucorp Energy and Smith, the Court needs
3 to be mindful of whether litigation over PSDS's could result in an
4 unacceptable dilution of its compensation if PSDS was not allowed
5 reasonable compensation for litigation over its fees. In other words,
6 even though fees of \$12,490.07 may seem excessive in comparison to the
7 \$8,248.00 in dispute, that might actually be a reasonable amount
8 depending on the merits of objections raised and what efforts were
9 reasonably needed to defend its fee application. On the other hand,
10 the Court must also take into consideration whether PSDS has exercised
11 reasonable billing judgment. In re Mednet, 251 B.R. 103, 108 (9th
12 Cir. BAP 2000).

13 In analyzing the supplemental fee application the Court has taken
14 into consideration that several hearings were held on this matter.
15 Furthermore, the declaration of Susan Stevenson filed in September
16 2005, did provide the Court with a detailed explanation of the fees
17 in dispute. On the other hand, the detail was initially provided by
18 the Debtor in his opposition, wherein he set forth all of the
19 contested time entries.

20 The Court notes that many of the objections raised by the Debtor
21 had merit. PSDS admitted that it negotiated the sale with the co-
22 debtor even though that was outside its role as counsel. The Court
23 has also ruled that certain billings were excessive. Also, given that
24 the amount actually in dispute from the initial fee application was
25 \$8,248.00 and the end result is a reduction of \$7,196.00, it is fair
26 to say that PSDS was largely unsuccessful in defending its fee
27 application against the opposition raised by the Debtor.

28 The Court determines that the issues raised in the Debtor's

1 objection were not complicated and could have been addressed much more
2 efficiently than was done by PSDS. Given that, the Court determines
3 that the amount of time spent by PSDS in litigating its fee
4 application, namely 50 hours, was excessive.

5 The Court notes that in the supplemental fee application, PSDS
6 billed \$924.00 for 3.3 hours related to preparing the initial fee
7 application and the first hearing on it. In its initial fee
8 application, PSDS only billed 1.9 hours for the initial fee
9 application. Pursuant to Nucorp Energy, the Court will allow the 3.3
10 hours, or \$924.00, set forth in the supplemental fee application that
11 was, in fact, related to the initial fee application.

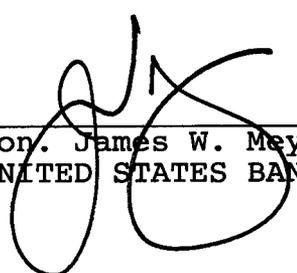
12 In addition, the Court believes that a reasonable award for
13 litigation over its fee application after the first hearing on
14 September 1, 2005, would be based on 10 hours of legal work at a rate
15 of \$280. Based on that, the Court will allow \$3,724.00 to PSDS for
16 the supplemental fee application.

17 Conclusion

18 The Court will allow compensation to the Trustee in the amount
19 of \$15,375.00. As for fees and expenses requested by PSDS, the Court
20 will reduce the initial request of \$20,720.00 by \$7,196.00, resulting
21 in an award of \$13,524.00 for the initial fee application. It will
22 also allow \$3,724.00 for the supplemental fee application. The Court
23 has also reviewed the request for expenses and finds them reasonable.
24 In total then, the Court will award PSDS fees in the amount
25 \$17,248.00, and expenses of \$582.32.

26
27 Date: _____

MAY 30 2006

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Hon. James W. Meyers
UNITED STATES BANKRUPTCY JUDGE