

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA**



**CHARLES L. NAIL, JR.
BANKRUPTCY JUDGE**

UNITED STATES COURTHOUSE
400 SOUTH PHILLIPS AVENUE, ROOM 401
SIOUX FALLS, SOUTH DAKOTA 57104-6851

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VIA ELECTRONIC FILING

July 8, 2021

Trustee Lee Ann Pierce
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Brookings, South Dakota 57006-0524
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Acting United States Trustee James L. Snyder
210 Walnut Street, Room 793
Des Moines, Iowa 50309-2108
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Subject: *In re Brenon K. Farmer and Kristie Elizabeth Farmer*
Chapter 7; Bankr. No. 19-40378

Dear Trustee Pierce and Acting United States Trustee Snyder:

The matter before the Court *sua sponte* in the above-named case is whether the chapter 7 trustee may include in her reimbursable expenses the mailing costs for serving another estate professional's fee application and the notice of the application. This is a core proceeding under 28 U.S.C. § 157(b)(2). The Court enters this letter decision pursuant to Fed.R.Bankr.P. 9014(c). For the reasons discussed below, the Court will award the trustee's requested expenses.

SUMMARY OF MATERIAL FACTS. Lee Ann Pierce serves as the chapter 7 case trustee in *In re Farmer*, Bankr. No. 19-40378. She sought and obtained approval to employ an auctioneer to sell personal property (docs. 32 and 41). The terms of employment were:

The auctioneer's compensation will be an eight percent (8%) commission of the gross sales, any expenses and sales tax on services. The advertising cost for the auction will be pro-rated between all sellers at the auction based upon the gross sale amount for each sellers' items sold at the sale.

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The auction sale proceeds totaled \$13,738.00 (doc. 59). The auctioneer sought fees of \$2,009.46 (doc. 60); the only expense the auctioneer included in the fee application was advertising. Trustee Pierce signed and filed the auctioneer's fee application in her own name--a practice the Court has been discouraging. Trustee Pierce served both the fee application and the notice on all creditors and other parties in interest.¹ No party in interest filed an objection to the auctioneer's fee application, and the Court entered an order approving it (doc. 70). Trustee Pierce has paid the auctioneer.

As part of her final report and proposed distribution, Trustee Pierce sought \$145.75 for postage for mailing the auctioneer's fee application and the notice of the fee application and she sought \$66.25 for the envelopes for this mailing (doc. 82-1). She stated there were 265 postage units at \$.55 each and 265 envelopes at \$.25 each. These two expenses totaled \$212.00. Trustee Pierce did not charge a copying expense for the auctioneer's fee application and the notice. Neither Trustee Pierce nor the bankruptcy estate's attorney sought fees for preparing the auctioneer's fee application or the notice.

No objection to Trustee Pierce's expenses, as set forth in her final report and proposed distribution, was timely filed. *Sua sponte*, the Court raised the issue of whether these expenses were the trustee's actual, necessary expenses that may be reimbursed under 11 U.S.C. § 330(a)(1)(B) and sought responses from the United States Trustee and Trustee Pierce (doc. 86).

Citing 11 U.S.C. § 330(a)(1)(B), *In re Computer Learning Ctrs., Inc.*, 285 B.R. 191, 234 (Bankr. E.D. Va. 2002), and *In re First State Bancorporation*, Bankr. No. 7-11-11916 JA, 2014 WL 1203141, at *6 (Bankr. D.N.M. Mar. 24, 2014), the United States Trustee argued it is not inappropriate for the case trustee to prepare and file a fee application for another estate professional (doc. 88). Trustee Pierce made similar arguments in her response and noted she did not request compensation for the time

¹ Under Fed.R.Bankr.P. 2002(a)(6) and Bankr. D.S.D. R. 2016-2(a), the fee application should have been served only on parties in interest who are not electronically served and just the notice of the fee application should have been served on all creditors and other parties in interest. In this case, only Debtors needed to be served with the fee application by mail. Correct service of the application in this case would have reduced the copy expense, which Trustee Pierce did not seek, but not the postage or envelope expenses. Because the general proof of claim deadline had not passed when the auctioneer's fee application and the notice were served, notice of the application could not yet have been limited under Fed.R.Bankr.P. 2002(h).

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expended preparing the fee application itself (doc. 89).²

In *In re Daniels*, Bankr. No. 19-50188, chapter 7 bankruptcy estate attorney Forrest C. Allred sought compensation of \$450.00, sales tax of \$29.25, and expenses of \$56.25 to prepare and serve fee applications for an auctioneer and a realtor who were employed by the estate. Attorney Allred's fee application was part of Trustee Allred's final report and proposed distribution. In *Daniels*, the Court raised *sua sponte* the issue of whether those services and expenses fell within the scope of Attorney Allred's employment and could be paid from the bankruptcy estate under 11 U.S.C. § 330. The Court set a hearing in *Daniels* and gave Attorney Allred an opportunity to file authority in support of those fees. Trustee Allred thereafter withdrew his original final report and proposed distribution and filed a new one in which Attorney Allred did not seek fees for preparing the other professionals' fee applications. The Court raised the similar issue regarding the expenses sought by Trustee Pierce in *Farmer* just a handful of days after the compensation and expenses issue came up in *Daniels*. With the change in circumstances in *Daniels*, the Court is unable to address the compensation and expense issues concurrently since only the expense issue in *Farmer* remains formally before the Court.

² Both the United States Trustee and Trustee Pierce appear to read Bankr. D.S.D. R. 2016-2(a) as *requiring* the case trustee to file the auctioneer's fee application. The rule, however, only says an attorney for the trustee may electronically file another nonattorney's fee application. It provides (emphasis added):

(a) Fee application: required content and service. An application by a professional employed by the estate for payment of fees (compensation for services, applicable sales tax, and reimbursement of expenses, including any Clerk's fees) from the estate shall contain the information required by Fed.R.Bankr.P. 2016(a), shall identify the applicable sales tax rate, and shall conform to Appendix 20. An attorney for a trustee or a debtor in possession may electronically file a fee application on behalf of an estate professional, other than another attorney, but the application shall be signed and dated by the estate professional. The application shall be served on parties in interest not electronically served. If the application seeks compensation for services and reimbursement of expenses, excluding sales tax, of more than \$1,000.00, a notice of the application shall be served on all creditors and other parties in interest not electronically served. The notice shall conform to Bankr. D.S.D. R. 2002-1(e) and Appendix 2G.

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DISCUSSION. Section 330(a)(6) of the bankruptcy code provides: "Any compensation awarded for the preparation of a fee application shall be based on the level and skill reasonably required to prepare the application." This code provision does not encompass compensation for defending a fee application. *Baker Botts L.L.P. v. ASARCO LLC*, 576 U.S. 121 (2015). Further,

[t]he [c]ourt notes section 330(a)(6) permits recovery of reasonable fees for the preparation of fee applications. It does not specify to whom. The filing of fee applications is necessary to the administration of the estate and is a service to the estate and its administrator, the Trustee. *Baker Botts, LLP v. ASARCO, LLC*, 576 U.S. 121, 132 (2015); *In re Stanton*, 559 B.R. 781, 784 (Bankr. M.D. Fla. 2016).

In re Nilhan Devs., LLC, No. 15-58443-WLH, 2021 WL 408977, at *18 (Bankr. N.D. Ga. Feb. 4, 2021).

There is no similar provision in § 330(a) focused on the *expenses* attendant to preparing, filing, and serving a fee application and the notice of a fee application. The only guiding code provision is 11 U.S.C. § 330(a)(1)(B)³, which states:

(a)(1) After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to . . . a professional person employed under section 327 or 1103–

. . . .

(B) reimbursement for actual, necessary expenses.

An expense is "actual" if it was in fact incurred and attributable to the bankruptcy estate. *In re Borders Group, Inc.*, 456 B.R. 195, 203 (Bankr. S.D.N.Y. 2011). An expense is "necessary" if it was "required to accomplish the task for which the professional was employed" or "incurred because it was required to accomplish the proper representation" of the bankruptcy estate, *id.* (internal cites and quotations omitted), and does not fall under what constitutes office overhead.⁴ The party seeking

³ Prior to a 1994 code amendment, the expense provision was found at 11 U.S.C. § 330(a)(2).

⁴ "Overhead expenses typically include rent, insurance, taxes, utilities, secretarial and clerical pay, library, computer costs, office supplies, local telephone

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reimbursement bears the burden of proof. *Chamberlain v. Kula (In re Kula)*, 213 B.R. 729, 736 (B.A.P. 8th Cir. 1997). Though Judge Peder K. Ecker's decision in *Yankton College* is over three decades old, certain principles remain.

The burden of proof to show entitlement to fees is, in all fee matters, always on the applicant. *In re Lindberg Products, Inc.*, 50 B.R. 220, 221 (Bankr. N.D. Ill. 1985); *In re Harman Supermarket, Inc.*, 44 B.R. 918, 920 (Bankr. W.D. Va. 1984); *In re Horn & Hardart Baking Co.*, 30 B.R. 938, 939 (Bankr. E.D. Pa. 1983); see *Pettibone*, 74 B.R. at 299. This burden is not to be taken lightly, especially given that every dollar expended on legal fees results in a dollar less that is available for distribution to the creditors or use by the debtor. *In re Hotel Associates, Inc.*, 15 B.R. 487, 488 (Bankr. E.D. Pa. 1981); see *Pettibone*, 74 B.R. at 299.

Even if no objections are raised to a fee request, the bankruptcy court is still not bound to award the fee as prayed. *Pettibone*, 74 B.R. at 299. Indeed [the] court has the independent authority and responsibility to determine the reasonableness of all fee requests, regardless of whether objections are filed. *In re NRG Resources, Inc.*, 64 B.R. 643, 650 (W.D. La. 1986); *In re Esar Ventures*, 62 B.R. 204, 205 (Bankr. D. Haw. 1986); *In re Jensen-Farley Pictures, Inc.*, 47 B.R. 557, 585 (Bankr. D. Utah 1985); *In re Wilson Foods Corp.*, 36 B.R. 317, 320 (Bankr. W.D. Okla. 1984).

In re Yankton College, 101 B.R. 151, 157-58 (Bankr. D.S.D. 1989).

The courts in the two cases cited by Acting United States Trustee Snyder briefly spoke to one of this Court's concerns when it *sua sponte* raised the issues in *Farmer*

charges, meals, and local travel." *In re Pothoven*, 84 B.R. 579, 586 (Bankr. S.D. Iowa 1988), cited in *Sousa v. Miguel (In re United States Trustee)*, 32 F.3d 1370, 1375 (9th Cir. 1994). For both attorney and nonattorney professionals employed by the bankruptcy estate, § 330(a)(1)(B) [formerly § 330(a)(2)] does not allow reimbursement for normal overhead expenses. *Sousa*, 32 F.3d at 1372-75.

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and *Daniels*. The court in *Computer Learning Centers* recognized while a trustee's attorney may prepare, file, and serve a fee application for another estate professional, professionals who regularly do work for bankruptcy estates should learn to do the applications themselves.

Traditionally, this court allows the trustee or his law firm to be compensated for preparing the fee applications for professionals the trustee employs. Typically, this includes auctioneers, real estate brokers, non-bankruptcy counsel and other professionals. The fees have always been modest and assist all involved. Non-bankruptcy professionals are rarely experienced in preparing or presenting fee applications and the trustee or his law firm can produce routine fee applications quickly and efficiently. The estate is benefitted principally by avoiding the inevitable responses to inarticulate fee applications which, if properly presented, are generally routinely approved. In addition, the trustee has an independent duty to review fee applications to determine whether they are appropriate. In this case, though, Frank & Company [the bankruptcy estate's accounting firm] regularly participates in bankruptcy cases for this trustee and cannot be characterized as a novice. It should know the fee application process and be able to substantially prepare acceptable fee applications without significant assistance from the trustee.

Computer Learning Centers, 285 B.R. at 234 (emphasis added).⁵ Similarly, in the second decision cited by Acting United States Trustee Snyder, the court reflected the same reasoning.

With respect to the time spent preparing the second fee application for the accountants employed by the Chapter 7 Trustee, the Court finds that compensation is appropriate as requested. FDIC-R points out that the Chapter 7 Trustee has not been hired as the attorney for the accountants. But in preparing the accountants' fee application, Ms. Bloom performed a legal service for which a professional employed by the estate may be compensated. Accountants who do not regularly provide services in connection with bankruptcy cases would not be familiar with the requirements for filing a fee application in a bankruptcy

⁵ The decision in *Computer Learning Centers* was entered before the Supreme Court held bankruptcy estate professionals may not be paid fees from the estate for *defending* a fee application. *Baker Botts L.L.P.*, 576 U.S. at 127-35.

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case. There is no evidence before the Court that the accountants also charged for preparing their fee application. It is in the estate's interest to provide counsel to assist professionals who do not regularly perform services in bankruptcy cases with employment and fee applications. Otherwise, the estate may have to pay other professionals to perform those services at a much greater cost to the estate. Further, requiring all non-bankruptcy attorney professionals to retain their own counsel in connection with employment and fee applications could impact the ability of the estate to retain competent professionals at a reasonable cost. It is not inappropriate for the Chapter 7 Trustee's counsel to complete that work and seek compensation for it as part of counsel's own fee application.

First State Bancorporation, 2014 WL 1203141, at *6 (emphasis added).

The auction company for which Trustee Pierce served the fee application and the notice frequently performs professional services for bankruptcy estates. Whether the auction company or Trustee Pierce made the service, the cost to the bankruptcy estate would have been the same. Thus, the expenses will be allowed for Trustee Pierce. The Court, however, encourages the chapter 7 trustees, as well as the debtor's attorneys in chapter 11, 12, and 13 cases, to in turn encourage estate professionals retained in multiple cases to follow Fed.Rs.Bankr.P. 2002(a)(6) and 2016(a) and Bankr. D.S.D. R. 2016-2 and Appendices 2G and 2O and prepare and serve their own fee applications. The attorney for a chapter 7 trustee or the attorney for a chapter 11, 12, or 13 debtor may still, as permitted by Bankr. D.S.D. R. 2016-2(a), electronically file the fee application and the notice for the estate's other professionals, excluding attorneys.

Second, the Court would like to briefly discuss a chapter 7 trustee's and the United States Trustee's roles in the fee application and award process.⁶ While some of the

⁶ The *Computer Learning Centers* decision and the *First State Bancorporation* decision cited by the United States Trustee did not directly address a third concern the Court had, *i.e.*, the seemingly inherent conflict of interest arising from a trustee's or a bankruptcy estate's attorney's preparation of a fee application for another estate professional, irrespective of whether the trustee or the attorney for the estate charges for those services. Both decisions momentarily touched on it and determined a trustee or a bankruptcy estate's attorney's preparation of another estate professional's fee application benefits the estate. The Court did not find any decision to the contrary.

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enumerated duties set forth in 11 U.S.C. § 704(a) may certainly be interpreted as obligating a chapter 7 trustee to review estate professionals' fee applications and object when appropriate, 28 U.S.C. § 586(a)(3)(A) squarely places that burden on the United States Trustee.⁷

Because of a chapter 7 trustee's selection of and relationship with the other estate professionals, the United States Trustee should continue to bear the principal burden to review and object to fee applications. This is especially important when a chapter 7 trustee has employed his or her own firm as an estate professional.

Further, a case trustee should not screen fee applications for nonattorney professionals before electronically filing them with the Court under Bankr. D.S.D. R. 2016-2(a). The case trustee may electronically file the nonattorney estate professional's fee application and then, applying her or his unique insight regarding the work performed

Thus, inasmuch as other courts do not appear to share this concern, the Court will not press the issue.

⁷ Section 586(a)(3)(A) provides:

(a) Each United States trustee . . . shall—

. . .

(3) supervise the administration of cases and trustees in cases under chapter 7, 11 (including subchapter V of chapter 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[.]

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by the professional, file an objection to the fee application when warranted. This ensures the Court, as is provided by 11 U.S.C. § 330(a), may then fully perform its duty to consider the application and each objection, receive any evidence offered, and award the appropriate fees.

The Court will separately enter its standard docket text order approving the administrative expenses requested in Trustee Pierce's final report and proposed distribution.

Sincerely,

A handwritten signature in blue ink, appearing to read "Charles L. Nail, Jr.", is centered on the page.

Charles L. Nail, Jr.
Bankruptcy Judge

CLN:sb

cc: Laura L. Kulm Ask, attorney for Debtors
Trustee Forrest C. Allred
case file (docket original; serve parties in interest not electronically served)

NOTICE OF ENTRY
Under Fed.R.Bankr.P. 9022(a)

This order/judgment was entered
on the date shown above.

Frederick M. Entwistle
Clerk, U.S. Bankruptcy Court
District of South Dakota