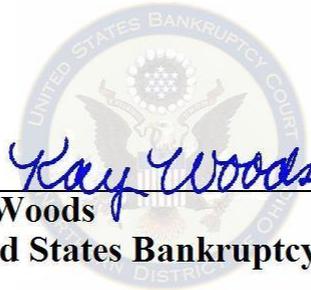


IT IS SO ORDERED.



**Dated: June 08, 2010
11:53:31 AM**

**Kay Woods
United States Bankruptcy Judge**

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO**

IN RE: PKAM, LLC, Debtor.	* * * * * * * *	 CASE NUMBER 08-40401 CHAPTER 11 HONORABLE KAY WOODS
--	--------------------------------------	--

**MEMORANDUM OPINION REGARDING CHAPTER 11 TRUSTEE'S
REQUEST FOR APPROVAL OF COMPENSATION**

This cause is before the Court on Chapter 11 Trustee's Request for Approval of Compensation ("Compensation Request") (Doc. # 205) filed on April 23, 2010, by Andrew W. Suhar, Chapter 11 Trustee for Debtor PKAM, LLC. Pursuant to the Compensation Request, the Trustee requests approval of fees in the total amount of \$65,176.76. No entity filed an objection to the Compensation Request. The Court held a hearing on the Compensation Request on June 2, 2010, at which the Trustee appeared. After hearing the representations of the Trustee, the Court took the matter under advisement. The Court now

issues this Memorandum Opinion regarding the Compensation Request.

This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and the general order of reference (General Order No. 84) entered in this district pursuant to 28 U.S.C. § 157(a). Venue in this Court is proper pursuant to 28 U.S.C. §§ 1391(b), 1408, and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

I. FACTUAL BACKGROUND

Debtor filed a voluntary petition pursuant to chapter 11 of Title 11 on February 18, 2008. Debtor held one primary asset - a commercial building, which was leased to multiple tenants and which had numerous problems, including that it did not have an adequate fire alarm system. The lack of the fire alarm system had: (i) resulted in Debtor being required to provide a pre-petition mandatory "fire watch" 24 hours per day, seven days per week; and (ii) caused some of the tenants to vacate Debtor's facility.

Mr. Suhar was appointed Chapter 11 Trustee on April 3, 2008. Since his appointment, the Trustee (i) operated Debtor's commercial facility located in Warren, Ohio ("Real Estate"), pursuant to which he collected rents and accounts receivable; and (ii) subsequently sold the Real Estate for \$715,000.00 pursuant to this Court's order dated June 30, 2009 (Doc. # 164). In addition to the proceeds from the sale of the Real Estate, the Trustee administered other assets totaling \$682,558.78 (Comp. Req., Ex. A).

On June 5, 2009, the Trustee filed Trustee's Amended Motion for an Order: (A) Authorizing Sale of Real Estate Other than in the

Ordinary Course of Business; (B) Assuming and Assigning Lease with the Louis Stokes-Cleveland Veterans Affairs Medical Center; and (C) Approving Compromise and Settlement with Fairview Commercial Lending, Inc. or, in the Alternative, for an Order Authorizing Abandonment of the Real Estate ("Motion to Sell") (Doc. # 146). The Motion to Sell sought authority to sell the Real Estate to Fairview Commercial Lending, Inc. ("Fairview") (which held the first mortgage on the Real Estate and to whom Debtor owed \$2.4 million) for a total purchase price of \$700,000.00, which was comprised of: (i) a credit bid of \$600,000.00; (ii) assignment of Fairview's (a) super priority administrative claim in the amount of \$100,000.00 ("Super Priority Claim"),¹ and (b) interests in each and every other asset of Debtor's estate by virtue of its alleged security agreement; (iii) waiver by Fairview of its deficiency claim against Debtor's estate; and (iv) Fairview's agreement to be responsible for all utilities effective June 1, 2009 (prior to closing of the sale transaction). The Motion to Sell stated that the Real Estate had been extensively marketed and that Fairview's offer was the highest and best offer for the Real Estate. The Trustee represented that the bankruptcy estate had received two other offers to purchase the Real Estate in the amounts of \$450,000.00 and \$500,000.00, respectively, which demonstrated the market value for the Real Estate.

¹ The Trustee incurred post-petition debt in the amount of \$100,000.00 from Fairview for which Fairview was provided a super priority administrative claim in like amount.

Various parties filed responses and objections to the Motion to Sell. Fairview filed a Response to the Motion to Sell (Doc. # 149), which explained its secured position and which "assented" to the Trustee's Motion to Sell. The State of Ohio filed a limited objection (Doc. # 152) to the Motion to Sell to the extent the Trustee sought to assign Fairview's Super Priority Claim to the Committee of Unsecured Creditors ("Committee") rather than being assigned to the Trustee for the benefit of the bankruptcy estate to pay administrative expenses and claims in the order of priority. The Committee filed an objection (Doc. # 153) to the Motion to Sell, which urged the Court to grant the alternative relief of abandonment of the Real Estate. In addition, a letter objection (Doc. # 161) to the Motion to Sell was filed by Mark Pappas, who represented that he might be one of the two viable offers referred to by the Trustee in the Motion to Sell.

After a hearing on June 16, 2009, the Court granted the Motion to Sell, as modified on the record, which was followed by an agreed order ("Agreed Order") authorizing the sale to Fairview and other relief (Doc. # 164). The Agreed Order authorized the sale of the Real Estate to Fairview for the following consideration:

- (i) Fairview's credit bid in the amount of \$600,000.00;
- (ii) assignment of Fairview's Super Priority Claim, with such funds being earmarked for the benefit of general unsecured claims after payment of all administrative expense claims;
- (iii) Fairview's cash payment of \$15,000.00, with such funds being earmarked for the

payment of general unsecured claims after payment of all administrative expense claims; (iv) waiver by Fairview of any and all claims, including its deficiency claim, against the bankruptcy estate; (v) assumption by Fairview of all obligations for utility service effective June 1, 2009; (vi) assumption and assignment by the Trustee of the VA Lease; and (vii) assignment by Fairview of its collateral interest in the proceeds of all adversary proceedings. The Trustee has valued the total consideration for this sale in the amount of \$715,000.00. (Comp. Req., ¶ 2.)

In addition to selling the Real Estate, the Trustee administered all assets of this chapter 11 case, which included 13 associated adversary proceedings, mostly to collect accounts receivable. The Trustee represents that he has collected rents, accounts receivable, and other assets in the total amount of \$682,558.78. (*Id.*, ¶ 3.)

Based upon total receipts of \$1,397,558.78, the Trustee requests compensation in the amount of \$65,176.76 ("Fee"). The Trustee requests approval of the Fee and payment thereof from the \$145,069.50 he currently holds in the estate.

II. LEGAL ANALYSIS

The Compensation Request relies on the statutory authority of 11 U.S.C. §§ 326 and 330, as well as Federal Rule of Bankruptcy Procedure 2016. The Court has no quarrel with the Trustee's mathematical calculation of the requested Fee, which is based on the maximum percentage recoveries in 11 U.S.C. § 326.

Section 330, which provides for compensation of officers, including trustees, 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 trustee . . . --

(A) reasonable compensation for actual, necessary services rendered by the trustee . . . ; and

(B) reimbursement for actual, necessary expenses.

(2) The court may, on its own motion or on the motion of the United States Trustee, the United States Trustee for the District or Region, the trustee for the estate, or any other party in interest, award compensation that is less than the amount of compensation that is requested.

11 U.S.C. § 330(a)(1)-(2) (LexisNexis 2010).

Although § 330 provides for a trustee to receive "reasonable compensation for actual, necessary services rendered by the trustee," the amount of such reasonable compensation is capped in § 326, as follows:

(a) 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.

11 U.S.C. § 326(a) (LexisNexis 2010). Because § 326 specifies that the amount of a trustee's compensation is to be based "upon all moneys disbursed or turned over in the case by the trustee to parties in interest," the question for this Court is whether to

include the amount of Fairview's credit bid in calculating the Fee.

Although the Trustee did not cite to any case authority in the Compensation Request, at the hearing, he cited *In re Blair*, 313 B.R. 865 (Bankr. E.D. Cal. 2004), *aff'd*, 329 B.R. 358 (B.A.P. 9th Cir. 2005), in support of including the credit bid to calculate the Fee. The *Blair* case, however, does not address the issue presently before this Court, which is a construction of what constitutes "moneys" disbursed by the Trustee. The issue in *Blair* was whether money disbursed by an escrow agent to secured creditors after the trustee sold certain properties could be included in the chapter 7 trustee's fee. The *Blair* court found that the trustee had obtained court approval to sell the assets, as well as approval to utilize the escrow agent. Accordingly, the court determined that the moneys disbursed by the trustee's agent should be included in calculating the trustee's fee.

In a case with facts similar to the instant case, another bankruptcy court in the Northern District of Ohio determined that a credit bid could not be included in calculating a trustee's fee. In *In re The Landing, Inc.*, 142 B.R. 169 (Bankr. N.D. Ohio 1992), the chapter 11 trustee was extensively involved in the day to day management of two campgrounds over a three-year period. The trustee sold the campgrounds to a new entity for \$4.5 million, but the actual cash disbursed in connection with the sale amounted to \$300,000.00 because the properties were sold subject to liens of various creditors, who received new promissory notes. Judge James

Williams analyzed the issue and held:

The central question is what constitutes "moneys disbursed or turned over in the case by the trustee . . ." (sic) The Trustee urges that this wording be interpreted to include the amount or value of the liens encumbering the Landing and Ponderosa properties and which were assumed by the buyers. Three percent of this \$ 4,500,000.00 figure would be \$ 135,000.00, which the Trustee divides between the Debtors at \$ 45,000.00 for the Landing and \$ 90,000.00 for Ponderosa. Geico would include only the \$ 300,000.00 in cash distributed under the plans, resulting in a three percent commission of \$ 9,000.00.

The trustee focuses on whether he should be entitled to the maximum amount under the statutory limit, but provides no support for his conclusion that the entire \$ 4,500,000.00 is the basis for such calculation. The court has found some authority for the proposition that "moneys disbursed" need not be actual cash. In *In re Greenley Energy Holdings of Pa., Inc.*, 102 [B.R. 400] (E.D. Pa. 1989), the district court included in the commission base \$ 28,000,000.00 in guaranteed contracts entered into by the trustee, at a reduction to present value. The court in *In re Stanley*, 120 [B.R.] 409 (Bankr. E.D. Tex. 1990) held that the dollar value of lien assumption by secured creditors was includable in the trustee's commission, but only because there was substantial equity in the transferred property.

Other courts have strictly construed § 326(a), holding that the commission calculation must be made only on actual money which passed through the trustee's hands to creditors. See *In re New England Fish Co.*, 34 [B.R.] 899 (Bankr. W.D. Wash. 1983); *In re Indoor-Outdoor Dining, Inc.*, 77 [B.R.] 952 (Bankr. S.D. Fla. 1987); *In re Barnett*, 133 [B.R.] 487 (Bankr. N.D. Iowa 1991). . . . In view of these cases, as well as the general judicial trend towards strict construction of statutory language embodied in *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235 (1989), this court concludes that only the \$ 300,000.00 in cash actually disbursed by the trustee can be used to calculate his final commission, which at three percent produces a sum of \$ 9,000.00.

Id. at 171. The bankruptcy court reached this conclusion despite recognizing that the trustee had reached a favorable result in the

cases "under what were at times very difficult circumstances." *Id.* at 172. The court found that to award a greater fee would be to legislate a result different from that provided by Congress.

Similar facts are also found in *United States Trustee v. Messer (In re Pink Cadillac Assocs.)*, 1997 U.S. Dist. LEXIS 4382 (S.D.N.Y. 1997), where the chapter 11 trustee sold property in exchange for a \$1.5 million credit bid. The trustee filed a final report that (i) indicated no funds directly came into possession of the trustee; (ii) provided no disbursements were made in the matter; and (iii) requested \$20,000.00 compensation for the trustee's services, pursuant to an agreement between the trustee and the mortgagee. In response to an objection from the United States Trustee that the fee exceeded the maximum amount allowable under § 326(a), the trustee contended that the fee was well below the allowable amount if the credit bid was included in the calculation. The bankruptcy court approved the requested compensation, finding that to do otherwise would elevate form over substance. The bankruptcy court held, "Whether one views this as a distribution in cash or kind, the entitlement to a commission as high as \$68,000 appears to be appropriate." *Id.* at *5 (quoting transcript).

The district court reversed the bankruptcy court award, stating: "The plain meaning of 'moneys disbursed or turned over' does not cover the credit-bid transaction here, because the Trustee turned over only property, not money. Since the credit-bid alone covered the purchase price of the Property, the estate received no

money proceeds to disburse.” *Id.* at *6. “Numerous cases since the 1978 Act have interpreted ‘moneys’ literally, and have required money, not value or property, to be disbursed by the trustee.” *Id.* at *8.

The district court acknowledged a “few courts” had found that a trustee makes a “constructive disbursement” even where no money is disbursed. *Id.* at *10. The court reasoned:

Those rationales are not persuasive here. That the Trustee could have structured the transaction to have the money pass through his hands does not matter here, because he did not. Nor is it clear how he would have done so, which makes it impossible to assess his suggestion that the result would have been no different. Even if there were no practical difference, that would not necessarily mean that the transaction here, where no moneys were disbursed, should be treated the same as one where money is actually disbursed.

Nor is it necessarily a technicality that no cash money was disbursed here. No money was disbursed because the Mortgagee’s lien was large enough that its credit-bid alone paid for the Property. In a similar situation, courts have found that a trustee may not count as “moneys disbursed or turned over” the proceeds of a sale of property that is fully encumbered or that has only slight equity, because the proper course is to abandon or turn over such property. . . . Those holdings recognize that selling property subject to a lien worth more than the property may be no better for the estate than abandoning or turning over the property to the lienholder, which, as the legislative history quoted earlier makes clear, does not count as “moneys disbursed.”

Id. at *11 - *13 (internal citations omitted).

In the instant case, the Trustee recognized the alternative to selling the Real Estate was abandonment, which is in line with the district court’s reasoning in *In re Pink Cadillac*. Based on the reasoning of the above-cited cases, this Court is persuaded that

Fairview's credit bid cannot be included in the Trustee's calculation of the Fee because it does not constitute "moneys disbursed or turned over," as set forth in § 326(a). As a consequence, without inclusion of Fairview's credit bid, the Fee requested exceeds the maximum trustee fee allowable by § 326.

The Court is mindful that the Trustee expended a great deal of effort to administer property in this case. The Trustee's efforts, although relevant in determining the "reasonableness" of his compensation under § 330, are not a factor in calculating the maximum fee under § 326.

That the Trustee's services were substantial and reasonable is not a consideration under the language of section 326(a), which establishes "moneys disbursed or turned over" as the sole measure from which the trustee's maximum compensation is computed, even though "the result may be that there are times that the trustee provides greater benefit to the estate than that for which he may be compensated." *In re Barnett*, 133 [B.R.] 487, 490 (Bankr. N.D. Iowa 1991).

In re Pink Cadillac, 1997 U.S. Dist. LEXIS 4382 at *13 - *14.

As a consequence, this Court will grant the Compensation Request, in part. The Court finds that Fairview's credit bid of \$600,000.00 cannot be used to calculate the Trustee's fee. As a result, the total "moneys disbursed" by the Trustee is reduced from \$1,397,558.78 to \$797,558.78; the maximum allowable fee on this total, based upon the percentages in § 326(a), is \$43,127.94.² Accordingly, the Court grants the Compensation Request in the

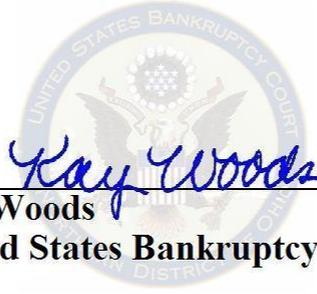
² This calculation is based on: 25% of the first \$5,000.00 = \$1,250.00; plus 10% of the next \$45,000.00 = \$4,500.00; plus 5% of the balance of \$747,558.78 = \$37,377.94, which totals \$43,127.94.

reduced amount of \$43,127.94.

An appropriate order will follow.

#

IT IS SO ORDERED.



**Dated: June 08, 2010
11:53:31 AM**

**Kay Woods
United States Bankruptcy Judge**

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO**

IN RE:	*	
	*	
	*	CASE NUMBER 08-40401
	*	
PKAM, LLC,	*	CHAPTER 11
	*	
Debtor.	*	HONORABLE KAY WOODS
	*	

**ORDER GRANTING, IN PART, TRUSTEE'S REQUEST
FOR APPROVAL OF COMPENSATION**

This cause is before the Court on Chapter 11 Trustee's Request for Approval of Compensation ("Compensation Request") (Doc. # 205) filed on April 23, 2010, by Andrew W. Suhar, Chapter 11 Trustee for Debtor PKAM, LLC. Pursuant to the Compensation Request, the Trustee requests approval of fees in the total amount of \$65,176.76. The Court held a hearing on the Compensation Request on June 2, 2010, at which the Trustee appeared.

For the reasons set forth in this Court's Memorandum Opinion

Regarding Chapter 11 Trustee's Request for Approval of Compensation entered on this date, the Court hereby finds that, pursuant to 11 U.S.C. §§ 326 and 330, the maximum allowable fee on moneys disbursed by the Trustee is \$43,127.94. As a consequence, the Court grants Trustee's Compensation Request in the reduced amount of \$43,127.94.

#