

OCT 10 1994

UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF NORTH CAROLINA

J. BARON GROSHON  
By: [Signature]  
Deputy Clerk

In Re:

FRED S. KAHN COMPANY,

Debtor.

Case No. 91-50483  
Chapter 7

JUDGEMENT ENTERED ON OCT 1, 8 1994

**ORDER GRANTING IN PART AND DENYING IN PART  
MOTION TO RECONSIDER AND AMENDING ORDER**

THIS MATTER came before the Court upon the Motion for Reconsideration of Order on Motion For Final Determination of Distribution of Funds and Request for Hearing filed herein by the United States Trustee for Region 8 and upon the Memorandum of U.S. Trustee in Support of said Motion; it appearing to the Court upon review of the Motion and Memorandum in Support, and the pleadings in the case, as follows:

1. The Order on Motion for Final Determination of Distribution of Funds ("Order") should be amended to reflect that the case was converted pursuant to an Agreed Order among the Debtor, the Internal Revenue Service, Barclays American and Union Planters National Bank providing for conversion to Chapter 7 upon the Debtor's failure to comply with the terms of the Agreed Order. The Court's earlier order incorrectly provided that the U.S. Trustee was the moving party. This fact is not material to the Court's decision.

2. There appearing no new or additional facts or contentions of law in the U.S. Trustee's Motion or Memorandum in Support, and the matter having been fully briefed heretofore and arguments of counsel heard at the original hearing, oral argument would not aid the decisional process and the remainder of the Motion for Reconsideration is therefore denied.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the U.S. Trustee's Motion to Reconsider is GRANTED in part and DENIED in part, that the request for hearing contained therein is DENIED, and that an Amended Memorandum of Decision shall issue in accordance with this Order.

This the 10th day of October, 1994.

[Signature]  
J. Craig Whitley  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF NORTH CAROLINA

**FILED**  
U.S. BANKRUPTCY COURT  
WESTERN DISTRICT OF N C

OCT 10 1994

In Re: )  
FRED S. KAHN COMPANY, )  
Debtor. )

Case No. 91-50483  
Chapter 7 J. BARON GROSHON  
By: CRD  
Deputy Clerk

JUDGEMENT ENTERED ON OCT 1, 8 1994

**AMENDED MEMORANDUM OF DECISION ON MOTION FOR  
FINAL DETERMINATION OF DISTRIBUTION OF FUNDS**

THIS MEMORANDUM OF DECISION amends and replaces the Order on Motion for Final Determination of Distribution of Funds entered herein on September 7, 1994.

THIS MATTER came before the Court on August 24, 1994 upon the Chapter 7 Trustee's Motion for Final Determination of Distribution of Funds and the Response thereto filed by the United States Trustee for Region VIII ("U.S. Trustee"). The salient facts are not in dispute.

This case was originally filed on March 6, 1990 as a Chapter 11 reorganization in the Middle District of Tennessee. Fred S. Kahn Company (hereinafter "Debtor") operated its business as a debtor-in-possession under Chapter 11 until April 17, 1991. On that date, the case was converted to Chapter 7 pursuant to an Agreed Order among the Debtor, the Internal Revenue Service, Barclays American and Union Planters National Bank providing for conversion to Chapter 7 upon the Debtor's failure to comply with the terms of the Agreed Order. On April 30, 1994, venue of this case was changed to this District. This was at the request of the U.S. Trustee. This Court then appointed Robert H. Gourley

(hereinafter "Chapter 7 Trustee") Chapter 7 Trustee to administer the Debtor's remaining assets. At the time, the cash assets in the estate were only about \$3,000.

The Chapter 7 Trustee proceeded to liquidate the Debtor's remaining estate and eventually accumulated some \$13,000.00, at a cost of some \$11,000.00 in accrued, unpaid Chapter 7 administrative expenses. When the case was ready to close, the Chapter 7 Trustee filed first a Final Report and then an Amended Final Report and Account of Trustee, proposing his distribution of the funds in the estate, which would pay the Chapter 7 costs and a small portion of Chapter 11 expenses. No objections were then filed; however, immediately after the hearing on the Amended Final Report, the U.S. Trustee advised the Chapter 7 Trustee that he objected to this proposed distribution. The Chapter 7 Trustee then filed the current Motion seeking instruction as to the distribution of funds in the estate.

This dispute revolves around the Chapter 7 Trustee's proposed treatment of Chapter 11 quarterly fees payable to the U.S. Trustee. These fees accrued, but were not paid, during the Chapter 11 case in Tennessee. The Middle District of Tennessee is a U.S. Trustee District; the Western District of North Carolina is a Bankruptcy Administrator District. In U.S. Trustee districts, under 28 U.S.C. § 1930, a debtor-in-possession must pay quarterly fees to the U.S. Trustee, based upon the company's quarterly disbursements to creditors. These are due and payable in the month following the end of each quarter. No analog to

these fees exists in Bankruptcy Administrator districts, and the existence of, and the operation of this fee arrangement is not well known to practitioners and trustees in this District.

Over the five quarters during which the Debtor operated in Chapter 11, some \$7,200.00 of quarterly fees were accrued. None of these fees were collected by the U.S. Trustee office during the time the case was in Tennessee. When the case converted and was moved to this District, the U.S. Trustee filed a proof of claim with this Court, but did nothing more to apprise anyone of these fees. No effort was made to advise the Chapter 7 Trustee in North Carolina of these fees. The Chapter 7 Trustee was unaware of this claim until the end of the case when he made his claims review preparatory to proposing his distribution.<sup>1</sup> In his Final Report and Amended Final Report, the Chapter 7 Trustee had proposed to treat the U.S. Trustee fees pro rata with other Chapter 11 administrative expenses. The U.S. Trustee objected to this treatment, asserting that the Chapter 11 quarterly fees are entitled to first priority and co-equal with Chapter 7 administrative expenses. The U.S. Trustee contends, notwithstanding the fact that these fees arose during, and as a result of the Debtor-in-Possession's Chapter 11 case, that these are not administrative expenses under Section 507(a) and are not subordinated to

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<sup>1</sup> The customary practice in this district is for Chapter 7 Trustees to conduct their claims review at the close of the case, and not at the bar date. Until the assets are liquidated and it is known whether a distribution will be possible below Chapter 7 expenses, reviewing claims simply adds to the costs of administration, and has to be repeated again when the claim objections and the final report are prepared.

Chapter 7 administrative claims by Section 726(b). That Section subordinates Chapter 11 administrative expenses to Chapter 7 administrative expenses. In support thereof, the U.S. Trustee cites the case of In re Juhl Enterprises, Inc., 921 F.2d 800 (8th Cir. 1990), a 2-1 split decision of the Eighth Circuit so holding, although on different facts. This Court disagrees with the majority opinion in Juhl and generally agrees with the dissent in that case. In the absence of a specific statute giving priority to such fees, these are but one more cost of conducting the Chapter 11 case, which should be subordinate to Chapter 7 expenses under Section 726(b). In re Juhl, 921 F.2d at 804, citing In re Wetmore, 117 Bankr. 201 (Bankr. W.D. Pa. 1990); 3 Collier on Bankruptcy 507.04[1]. To hold otherwise, as the Bankruptcy Judge in Wetmore observed, would be adverse to the statutory scheme which elevates Chapter 7 administrative expense priority to so that the Debtor's estate may be wound-up:

It may be undesirable, distasteful and embarrassing to have allowed a debtor to accrue Chapter 11 expenses which cannot be paid in full, but, after conversion to Chapter 7, the first priority must go to the costs of winding-up. Otherwise, the necessary chore of winding-up might not be accomplished.

Wetmore, 117 B.R. at 202.

While a hypertechnical reading of these statutes could yield the result the U.S. Trustee urges, that result is at variance with the statutory scheme and would not lead to a practical result in these cases. This court is obligated to construe the bankruptcy statutes so that individual provisions do not do violence to other provisions of the Bankruptcy Code. In re

Howard, 972 F.2d 639 (5th Cir. 1992), citing United Savings Assoc. v. Timbers of Inwood Forest, 484 U.S. 365, 370-72, 108 S.Ct. 626, 630, 98 L.Ed.2d 740 (1988).

Moreover, adopting the U.S. Trustee's position would not achieve the result for which the statute is designed -- funding the U.S. Trustee system. For had the Chapter 7 Trustee been informed at the outset of his appointment of these fees, he likely would have moved the Court for superpriority status of his Chapter 7 administrative expenses, or, alternatively, sought a voluntary subordination of these fees from the U.S. Trustee. That failing, it is doubtful that he would have attempted to administer this estate, there being small chance that he could recover enough assets to cover both his costs plus these fees. The end result would be that the Chapter 7 costs would have been paid and a small dividend paid to Chapter 11 fees, which is precisely what the Chapter 7 Trustee now proposes. If the matter had been raised at the outset and the U.S. Trustee's position adopted, the case would not have been administered and the quarterly fees would be left unpaid.

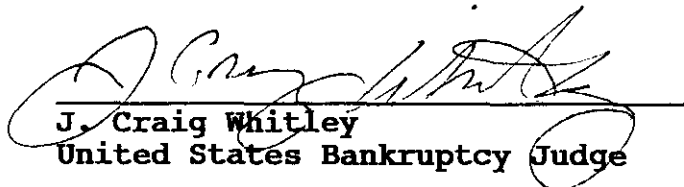
Also, Bankruptcy statutes must be construed in harmony with general equitable principles. In re Tigr Restaurant, Inc. v. Rouse S.I. Shopping Center, 79 Bankr. 954, 956 (E.D.N.Y. 1987), citing Securities and Exchange Commission v. United States Realty & Improvement Co., 310 U.S. 434, 60 S.Ct. 1044, 84 L.Ed. 1293 (1940). It would be inequitable to allow the U.S. Trustee fees to effectively tax the Chapter 7 administrative expense claims,

given these facts. The U.S. Trustee failed to collect these fees for over a year while the Debtor was operating in his district in Chapter 11. This was the time when these fees became due, when the Debtor was under the U.S. Trustee's purview, and when the Debtor's ability to pay these fees was at its best (The Debtor apparently disbursed over \$1,185,782 to Chapter 11 administrative expenses during the Chapter 11 case). When the Debtor's reorganization "failed," the U.S. Trustee requested conversion and transfer to this district for liquidation. The U.S. Trustee did not advise the Chapter 7 Trustee of the existence of these fees or his priority claim at that time.

Having failed to collect the fees himself, and having asked that the case be handled in this district, the U.S Trustee now wishes to force the Chapter 7 Trustee who had to do the work to share what little money he was able to raise and thereby go unpaid for a substantial portion of his work. This is not equitable.

The Trustee's Amended Final Report is therefore **APPROVED** and the Objection of the U.S. Trustee is **DENIED**.

This the 17th day of October, 1994.

  
J. Craig Whitley  
United States Bankruptcy Judge