

**IN THE UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF ALABAMA  
NORTHERN DIVISION**

**IN RE:**  
**ALLEGRO LAW, LLC,**  
**Debtor.**

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**Chapter 7**  
**CASE NO: 10-30631**  
**Judge Sawyer**

**APPLICATION OF RECEIVER FOR COMPENSATION TO BE PAID AS AN  
ADMINISTRATIVE CLAIM, AUTHORIZATION TO INCLUDE CERTAIN EXPENSES  
AS ADMINISTRATIVE CLAIMS, AND, IF NECESSARY, FOR AUTHORITY TO  
EMPLOY KAUFMAN GILPIN MCKENZIE THOMAS WEISS, PC AS COUNSEL AND  
JACKSON THORNTON & COMPANY, PC AS ACCOUNTANT FOR THE RECEIVER  
NUNC PRO TUNC TO MARCH 12, 2010 OR ALTERNATIVELY TO MARCH 22, 2010**

LOUIS C. COLLEY, STATE COURT RECEIVER FOR ALLEGRO LAW, LLC, (the “Receiver”) files this application (the “Application”) for Application of Receiver for Compensation to Be Paid as an Administrative Claim, Authorization to Include Certain Expenses as Administrative Claims, And, If Necessary, for Authority to Employ Kaufman Gilpin McKenzie Thomas Weiss as Counsel and Jackson Thornton as Accountant for the Receiver *Nunc Pro Tunc* to March 12, 2010 or Alternatively to March 22, 2010. In support of this Application, the Receiver states as follows:

**JURISDICTION AND VENUE**

1. This Court has jurisdiction over the Application under 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2). The bases for the relief requested herein are §§ 105(a), 327(e), 543(c)(1-2), 543(d)(1), 503(b)(3)(E) and 503(b)(4) of Title 11 of the United States Code (the “Bankruptcy Code”).

2. Venue of these proceedings and the Application is proper in this District pursuant to 28 U.S.C. §§ 1408 and 1409.

## PRELIMINARY STATEMENT

3. Daniel G. Hamm (“Hamm”) was appointed as Trustee in Case No.10-30430-WRS for the chapter 7 bankruptcy estate of Keith Anderson Nelms, who is the sole member of Allegro Law, LLC (the “Debtor”).

4. Hamm filed a Chapter 7 petition for Allegro Law, LLC on March 12, 2010, in the United States Bankruptcy Court for the Middle District of Alabama, Northern Division, Case No.10-30631-WRS. Hamm was been appointed trustee of the Debtor upon the filing of the case and will hereafter be referred to as the “Trustee”.

5. On March 12, 2010, the Trustee on behalf of the Debtor’s bankruptcy estate, informed the Receiver that the chapter 7 bankruptcy had been filed and that its filing rendered the Receiver to be a superseded custodian of property of the Debtor’s bankruptcy estate. The Trustee requested that the Receiver turnover the receivership estate to him as the Trustee of the Debtor’s bankruptcy estate of the Debtor.

6. As of the date of the filing of the Debtor’s chapter 7 bankruptcy, the Receiver had incurred certain unpaid pre-petition compensation and expenses. The same are attached hereto as Exhibit “A” (as to the Receiver) and Exhibit “B” (as to accounting expenses of Jackson Thornton, as accountant for the Receiver (“Accountant”)) The Receiver hereby submits this application requesting that the court approve Receiver’s pre-petition compensation and expenses shown on Exhibits “A” and “B” and allow the same to be placed in line for payment by the Trustee as administrative expenses of the Debtor’s bankruptcy estate.

7. Upon and after being contacted, the Receiver incurred additional expenses and is due additional compensation for actions taken by the Receiver to preserve the estate and to turnover the

receivership property. The same are attached hereto as Exhibit “A” (as to the Receiver) and Exhibit “B” (as to his Accountant). The Receiver hereby submits this application further requesting that the court allow Receiver’s post-petition compensation and expenses shown on Exhibit “A” and “B” and order the same to be placed in line for payment by the Trustee as administrative expenses of the Debtor’s bankruptcy estate.

**FACTUAL BACKGROUND RELEVANT TO  
POST PETITION COMPENSATION AND EXPENSES**

8. The Debtor is a limited liability company organized and existing under the laws of the State of Alabama and having its principle place of business in Alabama. Company offices were located in Prattville, Alabama. The Debtor was founded on April 26, 2007 by Keith Anderson Nelms (“Nelms”) who operated the company until Ben A. Fuller, Circuit Judge of Autauga County, Alabama in the 19th Judicial Circuit of the State of Alabama appointed Colley as temporary receiver on July 8, 2009.

9. The State Court case is styled The State of Alabama and the Alabama Securities Commission, Plaintiffs, v. Allegro Law, LLC, Allegro Financial LLC, and Keith Anderson Nelms, Defendants CV-09-125-F. In the suit, Plaintiffs had alleged that Nelms was operating debt management business and a debt service business (the “Debtor’s Businesses”) illegally through the Debtor. In the suit, Plaintiffs sought to remove the Debtor’s Businesses from the control of both the Debtor and Nelms in order to protect the public and the current clients/customers (hereinafter the “Customers”) of Debtor’s Businesses from alleged illegal practices of the Debtor and Nelms.

10. In the July 8, 2009 order, the court made findings that the Debtor’s Businesses as operated by Nelms and the Debtor were illegal based on facts, including but not limited to the

following: (a) neither Nelms nor Debtor was licensed under the Sale of Checks provision of the laws of Alabama, (b) the Debtor obtained new Customers by using deceptive trade practices and by making false representations, (c) the Debtor, without explaining the consequences, advised new Customers to pay the Debtor and not to pay their credit card bills, (d) Nelms was diverting money out of the bill payment program to pay personal expenses of Nelms, (e) the Debtor had caused damage to every Customer who had ever enrolled in the program, and (d) though money damages could not adequately compensate the Customers and former customers who were victims of the Debtor, continued operation of Debtor's Businesses by a receiver would reduce the harm and possibly provide benefit to the Customers who were currently still participating in the Businesses.

11. During the temporary receivership, in accordance with the orders of Judge Fuller, the Receiver shut down any and all acceptance of new Customers into the Debtor's Businesses. The Receiver hired John Fendley ("Fendley"), Jackson Thornton & Company, PC to serve as the accountant for the Receiver and to account for the money of each of the Customers as it was received into the Debtor's Businesses, held by the Debtor's Businesses and disbursed out of the Debtor's Businesses.

12. In the appointment of the Receiver, the State Judge, at the insistence of the State of Alabama and the Alabama Securities Commission sought to continue the existing debt management business and debt settlement business in order to minimize the harm to the existing Customers who had become involved with the programs. Receiver was authorized to continued only such contracts of the Businesses as he deemed to be in the best interest of the Customers of the Businesses. The Receiver also sought ways through which he might (once he became permanent receiver), wind down all or parts of the Businesses if the winding down would benefit the Customers or minimize

the harm to the Customers.

13. Receiver, through the counsel of the Attorney General's Office of the State of Alabama who had represented the plaintiffs in the law suit, sought to make the receivership permanent. On February 11, 2010 a permanent order was issued by Judge Fuller ordering as follows:

a. The receivership was made "permanent."

b. Because the Defendants in the case had illegally profited from the Businesses, all fees, funds and monies received by the Defendants from the Businesses was disgorged and placed in possession of the Receiver to prevent continuation of the diversion of money for uses other than the payment of the obligations of the Customers.

c. All Defendants, including the Debtor, were permanently enjoined from withdrawing or accessing money in the Debtor's bank accounts and the bank accounts were placed under the direction and control of the Receiver for benefit of the Customers.

d. The Receiver was ordered to make decisions in the running the Debtor's Businesses for the benefit of the client/Customers in these words: "to continue to fulfill any existing client contracts and/or obligations if, in the opinion of the Permanent Receiver, to do so is in the best interest of the client."

14. In operating the Debtor's Businesses, the Receiver became acutely aware of the outrage and dissatisfaction which existed among the client groups and how disruptions in the operations caused harm to Customers which in turn would cause spikes in the complaints that the Receiver received by mail, phone, email, and blogs.

#### **POST FILING ACTIVITIES**

15. In the first contact with the Bankruptcy Court, the Receiver was notified by the Trustee

that Receiver was in possession of property of the bankruptcy estate of the Debtor as a custodian and that §§ 362, 543(a) and 543(b) of the Bankruptcy Code required compliance by Receiver. Receiver acknowledged the notice, requested to meet with the Trustee and contacted George W. Thomas, (“Thomas”) as bankruptcy counsel to represent the Receiver regarding his duties in relation to the state court receivership and the Bankruptcy Code. The Receiver also notified Judge Fuller and the Attorney General and the Security Commission who were the Plaintiffs in the Receivership case and all concerned voiced the opinion that the existing individual Customers were likely to be immediately and irreparably harmed if the debt settlement and debt management Debtor’s Businesses were shut down. The Receiver was concerned about how the bankruptcy filing would affect the Debtor’s Businesses and the Customers of Debtor’s Businesses.

16. The Receiver, Thomas and the Trustee met at the Receiver’s office on Monday, March 15, 2010. The Trustee stated that his duty was to gather and protect the bankruptcy estate and that any decision on continuation of the receivership was for the judge. The Receiver explained that the harm that Nelms and the Debtor had caused through the operation of Allegro prior to the receivership was being minimized and that the Customers could benefit through operation of the Debtors Businesses in the receivership. The Receiver emphasized to the Trustee that if the Debtor’s Businesses were shut down the Customers would be upset and would possibly suffer great harm which could not be reversed. There was a short discussion as to whether the legal interest of Allegro in the IOLTA accounts survived the receivership order. The Trustee restated that he had no latitude to change his position and that his duty was to seek turnover. It was clear that the parties had conflicting duties and could not agree. The Trustee acknowledged the right of the Receiver to request that he be excused from the turnover, but was clear that the Receiver must observe the stay while the

motion to excuse was being decided. The Receiver did not challenge the bankruptcy or the Trustee's authority or position, but explained to the Trustee that he believed, in good faith, that the receivership should be continued. Given the conflicting duties and positions of the Receiver and the Trustee, the parties discussed the options for proceeding without jeopardizing or harming the position of the any of the parties in interest.

17. A recap of the meeting is set out in the Trustee's letter on the following day:

“This letter follows our recent conversation at which time you and I met with Mr. Louis Colley, the receiver for Allegro Law, LLC. The meeting was precipitated by the recent filing of the Allegro Law, LLC., bankruptcy and the related case of Allegro Financial Services, LLC.

“During the meeting we discussed what may or may not be property of the Bankruptcy estate and the disruption and irreparable harm that will be caused to approximately 8,000 former clients of a debt management program should the monies and accounts of Allegro Law, LLC., be immediately surrendered to the Trustee. It is my understanding that you and Mr. Colley plan to file, within days, a motion asking that the receiver be excused from the turnover order citing various grounds. While I do not necessarily agree with the grounds asserted, I understand your right to do same.

“We all seem to agree that the bankruptcy stay pursuant to 11 USC 362 and 543 is in place and prevent disbursements from these accounts. As represented to us yesterday by Mr. Colley there have been no disbursements since the bankruptcy filings on March 12, 2010. In fact during our meeting, Mr. Colley had in his possession several checks that had been prepared to settle former Customers' debts. He stated that he plans to hold these and other checks until the matter had been resolved. I am certainly of the impression that Mr. Colley will continue to honor the stay and not make any disbursements from these accounts until the Bankruptcy Court makes a decision with respect to the proper distribution of the monies in the accounts. Within a day or so I plan to file a complaint for turnover of the subject property, and I presume you will at the same time be asking that Mr. Colley be excused from compliance with same.

“Should my understanding with respect to the agreement (that there will be no disbursements from any of the Allegro Law or Allegro Financial Services, LLC accounts) be incorrect please notify me immediately.”

18. Following the meeting on March 15, 2010, the Receiver decided that the facts required

him to request an excuse from compliance. He acknowledged during the meeting with the Trustee that, while waiting for a decision on the request, he must operate the receivership in a way that would protect the Trustee and the Receiver should it later be determined that the Receiver was not excused from turnover. His choice to request an excuse from compliance preserved the possibility of continuing the Debtor's Businesses, in whole or in part, should the court determine that portions of the money were not property of the estate or that such continuation would better serve the creditors of the bankruptcy estate. The alternative of immediate turnover would have terminated the Debtor's Businesses. The Receiver's cooperation protected the bankruptcy estate's rights to a complete turnover if the Trustee prevailed at the court hearing on the motion to excuse.

19. The Receiver asked Thomas to file (as soon as possible) a motion requesting that the Receiver be excused and to request an expedited hearing so that, if the excuse were granted, the disruption to the Receivership would be minimized and so that, if the request were denied, turnover could occur as the earliest possible date. The Receiver, Thomas and Fendley worked to develop the information relevant to the issues material to the motion of the Receiver.

20. The motion to excuse was filed on Thursday, March 18, 2010. An expedited hearing was held on March 19, 2010. It was confirmed in open court that, though the receivership was still in effect, no disbursements were occurring and that the stay was in effect and being observed. After argument of counsel, the court took the matter under advisement and asked the parties to return on Monday, March 22, 2010. On Monday, March 22, 2010, the court announced that an evidentiary hearing should be held in order to determine whether the interest of creditors would be better served by excusing the receiver from compliance with the stay and turnover duties of a custodian. The evidentiary hearing was set for March 29, 2010. The time records attached (Exhibit A as to the

Receiver; Exhibit B as to his Accountant and Exhibit C-Part 1 as to Thomas) include post filing time for the preparation of the motion to excuse and for the participation in the hearing are attached hereto for the Receiver, Thomas, and Fendley.

21. During the period from March 22, 2010 until March 29, 2010, the superseded receivership continued during preparation for the evidentiary hearing. The Receiver, Thomas and Fendley worked to develop the evidence for presentation at the evidentiary hearing and to respond to the Request for Production made by the Trustee. Time records for the preparation for the evidentiary hearing are attached (Exhibit A as to the Receiver; Exhibit B as to his Accountant and Exhibit C-Part 2 as to Thomas).

22. On March 29, 2010, immediately following the ruling which denied the motion to excuse the Receiver and Thomas conferred with the Trustee regarding logistical issues involved in the turnover, including coordinating the shut down of incoming payments and discussing the best way to make the transition occur with regard to web site issues, phone number issues, computer file access and mail forwarding. The Receiver has continued to meet with the Trustee without counsel to facilitate and accomplish turnover and to work on the issue of refunding post petition payments of Customers.

**RECEIVER'S COMPENSATION AND EXPENSES AS ADMINISTRATIVE CLAIMS  
UNDER SUPERSEDED CUSTODIAN PROVISIONS**

23. The Bankruptcy Code provides in Section 543(a) directs a custodian to make no disbursement from or take any action in the administration of the property of the debtor's bankruptcy estate under his possession, custody or control except such action as is necessary to preserve such property. Subsection (b) requires turnover and accounting of the property of the debtor's bankruptcy estate under his possession, custody or control. Subsection (c) provides as follows:

“(c) The court, after notice and a hearing, shall—

(1) protect all entities to which a custodian has become obligated with respect to such property or proceeds, product, offspring, rents, or profits of such property;

(2) provide for the payment of reasonable compensation for services rendered and costs and expenses incurred by such custodian; and

(3) surcharge such custodian, other than an assignee for the benefit of the debtor’s creditors that was appointed or took possession more than 120 days before the date of the filing of the petition, for any improper or excessive disbursement, other than a disbursement that has been made in accordance with applicable law or that has been approved, after notice and a hearing, by a court of competent jurisdiction before the commencement of the case under this title.”

24. Receiver application for compensation and expenses rests on the plain statutory language on Section 543 of the Code. Case law regarding the compensation of custodians and their professionals is rather sparse and somewhat confusing. All of the cases turn on facts which are different from the case at hand because there does not appear to be any reported case involving a the denial a receiver motion to excuse turnover an operating business to a Chapter 7 Trustee. All of the reported cases in which motions to excuse are pursued by custodians operating businesses involve Chapter 11 bankruptcy filings. None of there reported cases is persuasive that a custodian operating a debtor’s businesses who moves to excuse turnover to a Chapter 7 Trustee should be denied compensation and payment of expense for resisting turnover or opposing the bankruptcy.

25. Section 543 requires a superseded custodian to take no action other than to preserve the assets under his control. The Receiver’s motion was an effort to preserve the Debtor’s Businesses which were under his control. There may be debate on whether the Debtor’s Businesses operated by the Receiver were an assets or liabilities of Debtor’s bankruptcy estate. Receiver considered the Debtor’s Businesses to be assets. If the Debtor’s Businesses were assets, those assets needed to be

preserved by the Receiver. The Receiver had spent the past 7 months maximizing the value of the Debtor's Businesses to the Customers. Receiver firmly believed that the Debtor's Businesses had value and were assets to the Customers of Debtor's Businesses and to the creditors of the Debtor. The Receiver, who had just become "permanent", was exploring ways to shut down portions of the Debtor's Businesses and that were not "beneficial" to Customers while streamlining other portions of Debtor's Businesses to make them more beneficial to the Customers and to the creditors of the Debtor by increasing the benefit and lowering the costs of Debtor's Businesses .

26. The motion to excuse was necessary to preserve the Debtor's Businesses. Turning the assets of the Debtor's Businesses over to the Chapter 7 Trustee would discontinue any and all portions of the Debtor's Businesses. The accumulated money would survive, but any value of the Debtor's Businesses as an asset or as a going concern would be lost. Based on the facts, the Receiver had the choice of (a) attempting to preserve the Debtor's Businesses or (b) failing to take available actions necessary to preserve Debtor's Businesses. The decision on whether to request excuse from turnover effectively was a decision on the custodian's part on whether to follow his duty under the Code to preserve the assets of the debtor's estate or failing to take such action.

27. The statute and the reported cases indicate that the expenses of the custodian must be reasonable and must provide benefit to the estate. In the case at hand, the Receiver's actions meet those requirements. There are cases that state that the expenses cannot be paid out of the bankruptcy estate as administrative expenses if the expenses were incurred in opposing the bankruptcy. The Receiver in this case did not oppose the bankruptcy by asking to be excused from turnover. The Code itself allows the superceded receiver to request that he be excused. The Posadas case is cited for several different propositions, but its holding is based on the fact that the receiver who

successfully obtains an excuse and turns nothing over to the estate cannot be compensated out of the other assets of the estate. (Note that in such case the Receivership was continued and the Debtor's Businesses assets never came into the Bankruptcy estate. To the contrary, the Allegro Receiver was not excused and the assets of the Debtor's Businesses have been turned over to the Bankruptcy Estate.) In the Allegro case, the question is not whether the assets benefit the estate, but whether the motion to excuse and resulting evidentiary hearing benefitted the estate.

28. As stated above the case law is sparse and, in most cases, a Chapter 11 debtor in possession is attempting to pull the Debtor's Businesses into the Chapter 11 and reorganize the debtor. In most of the cases the issue is where the debtor in possession or the Receiver, will provide better management. Another issue in the reported cases is whether, upon turnover, there will be successful reorganization managed by the debtor in possession. The expected outcome for creditors is compared by projecting the management expected upon turnover to the management expected from a continuation of the receivership. In this instance, the issues are obviously different. The comparison in this case involves the effect on creditors of termination and liquidation of the Debtor's Businesses versus continuation of the Debtor's Businesses in the receivership.

29. As stated above, the reported cases shed little light on the application of the statutory standards which apply to the facts of this case. These standards are reasonableness and benefit to the estate. Reasonableness would relate to the amount of the compensation and expenses. The Receiver asserts that bills for his compensation and for his expenses are reasonable. The second standard would appear to have come from legislative history and should be met in this case as a practical matter. That is, the Receiver's action must have benefitted the estate.

30. First, the Receiver motion benefitted the estate because it raised the the decision making

on the question of whether the Debtor's Businesses should be shut down or continued to the appropriate level . Had the Receiver not asked to be excused, the Debtor's Businesses would have been shut down without a further thought or any opportunity to consider the impact on the creditors of the estate.

31. The Trustee had filed the Chapter 7 out of duty under the Code to bring assets of the Debtor into the bankruptcy estate. Under the Code, the duty of the Trustee existed whether or not it was his judgment that the Debtor's Businesses should be shut down. The Receiver was the first person in the process who had to decide whether the Debtor's Businesses benefitted the creditors. The state court had ordered him to operate and he felt operating was benefitting the Customers. The question which was to be resolved under the Code presented different factors from the factors under state law. That is, the question of whether the interest of the creditors would be better served by a continuation of the receivership. This question required additional and different considerations from the objectives tasked to the Receiver by the state court order. The Receiver believed that the vast number of the creditors (the active Customers) would benefit from continuation of the Receivership. He could certainly be open to "second guessing" regardless of what he thought, but the only way to have the decision made at the proper level was for him to ask to be excused. Therefore, Receiver asked for the court to look at the situation and make the decision. Through the Receiver's motion the Trustee and the Receiver were enabled to advocate their positions and allow the court to decide the issue in the best interest of the creditors of the bankruptcy estate.

32. Little, if any, time was wasted, and no assets jeopardized during the period between filing and hearing. The Receiver had authority under the state court order to hire counsel, which he immediately did. The motion was prepared and submitted. This submission was an important and

vital part of the turnover process. Given the fact that the Receiver believed in good faith that the continuation of the Debtor's Businesses best served all of the creditors, his duties to the state court and his duties as a superseded receiver under the Code prevented him from choosing to shut down the Debtor's Businesses. The receiver has to preserve assets. The Code provides the Receiver with his only option when he believes that the excuse will best serve the creditors and that option is to request a chance to prove himself correct. Though the facts presented by the Receiver were not persuasive at the hearing, the effort served the estate by providing a full hearing on whether to shut down the Debtor's Businesses by putting the assets into a Chapter 7 liquidation. As a result there is a record showing that the decision to shut down the Debtor's Businesses was made after hearing as provided by the Code.

33. Based on the foregoing, Receiver argues that asking to be excused was beneficial to the turnover process and to the bankruptcy estate. The initial court hearing convinced the court that an evidentiary hearing was warranted, and the evidentiary hearing was the next step in the process under the Code.

34. Losing parties should not always be penalized for losing. A superseded custodian is treated specially by the code in order to allow the court to treat the custodian and his professionals equitably. The court can excuse them or deny their motion to be excused. In the course of the hearing the court was in a position to judge the motivations of the parties.

35. The work of the Receiver, his accountant and his attorney are presented to the court for payment based on the fact that the services were reasonably necessary to preserve the Debtor's Businesses which constituted the property of the estate. If the Receiver had not asked to be excused, the court would not have had the opportunity to determine that the continuation of such Debtor's

Businesses would have better served the creditors. The Debtor's Businesses would have been terminated and the Receiver displaced by his own inaction, rather than by the action of the court. That is, the Receiver had no choice other than (a) to terminate the Debtor's Businesses reducing the assets of the estate by any value of the Debtor's Businesses as a going concern or (b) to request that Receiver be excused.

36. In this case, the request of the Receiver to be excused should not be labeled "opposing the bankruptcy" or "resisting turnover", but viewed as an effort to determine whether creditors of the Debtor would be better served by preserving operational aspects of the Debtor's Businesses by continuing to operate the Debtor's Businesses as going concerns in the receivership. During the receivership, the Receiver had made every effort and had taken every precaution which he could identify to protect the Debtor's Business while running them in a manner quite differently from the manner for which Nelms had been so heavily criticized.

37. The Receiver may not have been perfect in his decision making, but any lack of perfection was certainly not due to a lack of effort. The Debtor's Businesses had operated under his management paying only such fees as allowed by Judge Fuller's orders. The bank accounts of the Debtor had grown substantially from the beginning date of the receivership until the filing of Debtor's bankruptcy and, unavoidably, after the filing of the bankruptcy. This post petition increase in the accounts was not an intended consequence of the Receiver and could hardly be argued alone to satisfy the "benefit to the estate" requirement.

38. To the contrary, the true benefit to the estate from the Receiver's motion to excuse was to provide a procedure in which the issue of whether to shut down the Debtor's Businesses or continue the Debtor's Businesses could be decided at the proper level after the case for both

positions was presented on the record in an evidentiary hearing before the court.

39. In the case *In re SENERGY PROPERTIES, INC.*, Debtor, 130 B.R. 700 (attached as Exhibit “D”) the court addresses payment of expense as follows at page 5 of the opinion:

“However, 11 U.S.C. § 503(b)(3)(E) expressly authorizes compensation for the prepetition services of a custodian or receiver superseded under 11 U.S.C. § 543 and is an exception to the general rule with respect to the allowance of compensation for exclusively postpetition activities as an administrative expense. *In re Hearth & Hinge, Inc.*, 28 B.R. 595, 597 (Bankr.S.D.Ohio 1983).

“Unlike the requirement in subsection (D) under § 503(b)(3), subsection (E), which governs superseded custodians, does not require that the services of the custodian made “a substantial contribution” in the Chapter 11 case. Moreover, the costs and expenses of a prepetition custodian or receiver superseded under 11 U.S.C. § 543 include the expense of counsel fees incurred by the custodian or receiver, for which prior court approval is not expressed as a prerequisite for allowances. *In re Kenval Marketing Corp.*, 84 B.R. 32, 33-34 (Bankr.E.D.Pa.1988). Since this court did not appoint the receiver, this court would not be in a position to approve the receiver's retention of counsel to act on his behalf. The absence of a state court order authorizing the receiver to retain counsel is not fatal to an award for legal services because 11 U.S.C. § 503(b)(3)(E) does not state that the actual, necessary legal expenses of the superseded custodian or receiver must have been incurred with the prior approval of the state court which appointed the custodian or receiver. The amount of such legal expenses must be determined by this court in accordance with the standard expressed in 11 U.S.C. § 503(b)(4), namely, reasonable compensation “based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title, and reimbursement for actual, necessary expenses incurred by such attorney....”

#### **ALTERNATIVE RELIEF**

40. In the case *In re 245 Associates, LLC*, Debtor, 188 B.R. 743, (the “245 Case”), attached as Exhibit E, the court, at the initial hearing on the Receiver’s motion to excuse, decided to “continue” the receivership until an evidentiary hearing could be held. The Receiver in the Allegro

case has strongly argued and re-asserts that a superseded receiver remains a “superseded receiver” from the date of filing of the bankruptcy until turnover is complete, unless excused. If the receiver is excused, his professionals would need to be approved by the court. In the 245 Case, the court rules that a receiver who is continued by the court pending an evidentiary hearing must have authority and approval of the court to hire professionals before the professionals perform work for which payment can be made from the assets of the bankruptcy estate. In the opinion of Receiver, the 245 Case is incorrect on this point. That is, the decision to have an evidentiary hearing does not change the status of the receiver.

41. The receiver should remain a superseded custodian pending the ruling after the evidentiary hearing. Under the “per se” rule the court in the 245 Case requires the application for payment of professional expenses to require proof on the “disinterestedness” of the professional that the application is filed after the service was performed due to excusable neglect in order to allow *nunc pro tunc* relief. In the 245 Case, the court only allows payment from the date of the date that the decision was made to have the evidentiary hearing. The rationale for limiting the *nunc pro tunc* effect to that decision was that the receiver and counsel had failed to file the motion for relief in a timely fashion and had failed to ask for an expedited hearing.

42. Should the court in the case at bar agree with the ruling in the 245 Case and require approval by the court of employment *nunc pro tunc* of Thomas and Fendley is necessary to allow their payment as an administrative expense, the Receiver requests such approval and in support of such request presents evidence of (a) the disinterestedness of Thomas (see affidavit of Thomas) and (b) excusable neglect in not making such request beforehand. As to the excusable neglect there is a two pronged test: the first prong of the test would require either exigent circumstances or a

complex and/or unsettled area of the law. The second prong would require a showing of no prejudice to the estate.

43. The Receiver meets both prongs of the test. First, the area of the law is certainly unclear. There are not very many cases and none similar to the case at bar. The time frame was certainly exigent and the receiver moved quickly to place the issue before the court and request an expedited hearing. Based on these facts, should the court determine that approval of the hiring of Thomas and Fendley is necessary, the Receiver requests that the court approve such hiring *nunc pro tunc* to March 12, 2010.

44. If the court determines (as the court in the 245 Case did) that the Receiver's hiring cannot be approved *nunc pro tunc* further back than the date of the decision to have an evidentiary hearing, Receiver requests that the professional's hiring be approved and payment authorized back to March 19 and that payment of the professionals before March 19 be approved as a necessary expense of the superseded receiver.

45. As to the second prong, the Receiver has been careful not to prejudice to estate in any way including his timeliness in filing of the motion to excuse and the expedited hearing request. The Receiver cooperated with the Trustee to protect the estate from harm and certainly did not prejudice the estate's case.

46. The disinterestedness issues are different for Thomas and Fendley. Thomas had never served the Receiver in any capacity. Fendley had been Receiver's accountant prior to the bankruptcy. Thomas' affidavit is attached and Fendley has already been requested to be hired by the Trustee.

#### SUMMARY

47. In summary and notwithstanding the immediately foregoing section regarding alternative

relief, the Receiver requests that the court approve compensation and expenses under the provisions of 11 U.S.C. § 503(b)(3)(E). There is no need to go through the process approval of professionals because the Receiver was at all times a superseded custodian seeking to preserve the assets of the estate. The actions of the Receiver, Thomas and Fendley were necessary and reasonable and therefore their bills should be placed in line for payment as administrative expenses of the estate under 11 U.S.C. § 503(b)(3)(E). It is obvious that in this matter, extensive time and effort was put forth on both sides. It is further evident that the estate to be turned over is substantial. The effort to excuse had the mechanical effect of increasing the size of the estate which was ultimately available to turnover. Though this effect is not the reason for the efforts, it did in fact occur. The true benefit to the estate is that when the Customers ask why the Debtor's Businesses were shut down by the court, there is a record showing that after careful consideration the court determined that the interests of the creditors (including those Customers were better served).

#### **DISCLOSURE CONCERNING CONFLICTS OF INTEREST OF THOMAS**

48. To the best of the Debtor's knowledge, information and belief, and based upon the declaration of George W. Thomas, Esq. ("Thomas Declaration") filed previously with this Court, Kaufman Gilpin McKenzie Thomas Weiss, PC does not represent any interest adverse to Debtor's estate or its creditors in connection with the Chapter 11 Case.

49. Moreover, to the best of the Debtor's knowledge, information and belief, and based upon the Thomas Declaration, the partners, counsel and associates of Kaufman Gilpin McKenzie Thomas Weiss, PC nor any of its attorneys have any connection with the Debtor, the Receiver, the estate of the receivership or the debtor, any other party in interest, the Bankruptcy Administrator, or any person employed in the office of the Bankruptcy Administrator, except as disclosed in the Thomas

Declaration.

50. In addition, Kaufman Gilpin McKenzie Thomas Weiss, PC has conducted a conflict check, through its client database, regarding its connections with potential parties-in-interest including: (i) the Debtor; (ii) affiliates or subsidiaries of the Debtor; (iii) unsecured creditors of the Debtor; and (iv) the Receiver as well and (v) creditors of the Debtor. A search conducted through Kaufman Gilpin McKenzie Thomas Weiss, PC's client database is designed to reveal any representation of, or potential conflict with, the entity searched or any known subsidiary or affiliate. In addition to the database search, Kaufman Gilpin McKenzie Thomas Weiss, PC inquired individually of each partner and associate by circulating a list of potential parties in interest to each individual attorney.

51. Neither Kaufman Gilpin McKenzie Thomas Weiss, PC nor any attorney of the Firm is an insider of the Debtor or the Receiver. In addition, neither Kaufman Gilpin McKenzie Thomas Weiss, PC nor any attorney at the Firm holds directly any claim, or debt against the Debtor or an equity security of the Debtor or the Receiver.

52. Kaufman Gilpin McKenzie Thomas Weiss, PC is not and has not been, within 2 years of the date of the filing of the Debtor's petition, had any connection to any securities of the of the Debtor or Receiver, or been the attorney for such any investment banker in connection with the offer, sale or issuance of a security of the Debtor or Receiver.

53. No member of Kaufman Gilpin McKenzie Thomas Weiss, PC has been, within 2 years from the date of the filing of the Debtor's petition, a director, officer or employee of the Debtor or Receiver or of an investment banker of the Debtor or Receiver as specified in subparagraph (B) or (C) of 11 U.S.C. § 101(14).

54. Kaufman Gilpin McKenzie Thomas Weiss, PC does not have an interest materially adverse to the interest of the Debtor's estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the Debtor, Receiver or an investment banker as specified in subparagraph (B) or (C) of 11 U.S.C. § 101(14), or for any other reason.

55. Kaufman Gilpin McKenzie Thomas Weiss, PC does not currently represent any party other than the Receiver in connection with the Chapter 7 Case.

56. Kaufman Gilpin McKenzie Thomas Weiss, PC, to the best of the Debtor's knowledge and information, Kaufman Gilpin neither holds nor represents any interest adverse to the Debtor, its creditors or other parties in interest in the Chapter 7 Case, except as otherwise set forth herein.

57. No member of Kaufman Gilpin McKenzie Thomas Weiss, PC is related to any United States District Judge or United States Bankruptcy Judge in the Northern District of Alabama or to the United States Bankruptcy Administrator for such district or any employee in the office thereof.

58. To the best of the Debtor's knowledge, neither Kaufman Gilpin McKenzie Thomas Weiss, PC nor any attorney at the Firm is or was a creditor, an equity security holder or an insider of the Debtor or Receiver in the past two years.

59. Subject to the foregoing, Kaufman Gilpin McKenzie Thomas Weiss, PC represents or has represented, and may represent in the future, those creditors of the Debtor listed in the Thomas Declaration, if any. On information and belief, each of the foregoing entities regularly engages numerous different law firms. With respect to each entity, Kaufman Gilpin McKenzie Thomas Weiss, PC has been engaged for specific transactions or litigation, none of which relates to the Debtor or the Debtor's bankruptcy case. Kaufman Gilpin McKenzie Thomas Weiss, PC has not,

does not and will not represent the forgoing entities or any of their respective affiliates with respect to matters related to the Debtor or the Debtor's bankruptcy case. Except as disclosed in the Thomas Declaration, to the best of my knowledge, Kaufman Gilpin McKenzie Thomas Weiss, PC does not represent any other creditors of the Debtor or any other interest adverse to the Debtor's estate.

60. To the best of the Debtor's knowledge, Kaufman Gilpin McKenzie Thomas Weiss, PC has no connection with the Debtor, its creditors, or any other parties in interest, or its respective attorneys and accountants, except as otherwise set out Thomas Declaration.

61. The Debtor is informed and believes that Kaufman Gilpin McKenzie Thomas Weiss, PC currently represents no interest adverse to the Debtor or its estate in the matters upon which it is engaged and is a disinterested party as defined in Section 101(14) of the Bankruptcy Code.

62. Based upon information available to the Debtor, the Debtor believes that Kaufman Gilpin McKenzie Thomas Weiss, PC is a "disinterested person" within the meaning of the Bankruptcy Code.

### **SERVICES TO BE RENDERED**

\_\_\_\_\_ 63. The Receiver has selected Kaufman Gilpin McKenzie Thomas Weiss, PC to serve as counsel to the Receiver and to perform, as requested, the services described herein. The Receiver believes that Kaufman Gilpin McKenzie Thomas Weiss, PC possesses extensive knowledge in the areas of law relevant to these cases, and that Kaufman Gilpin McKenzie Thomas Weiss, PC is well qualified to represent the Debtor as counsel in connection with the Chapter 7 case. In selecting its counsel, the Receiver sought counsel with experience in bankruptcy and receiverships as they arise generally and in chapter 7 cases and other debt restructuring scenarios. Kaufman Gilpin McKenzie Thomas Weiss, PC has represented parties in numerous chapter 7 cases. In addition, Kaufman Gilpin

McKenzie Thomas Weiss, PC has a broad-based practice, including expertise in the areas of bankruptcy and restructuring, corporate and commercial law, litigation, securities and property, as well as other areas that may be significant in these cases.

64. The Debtor has selected Kaufman Gilpin McKenzie Thomas Weiss, PC because Kaufman Gilpin McKenzie Thomas Weiss, PC's attorneys have considerable experience in matters of this character and are qualified to specially represent the Receiver in this matter.

65. The professional services Kaufman Gilpin McKenzie Thomas Weiss, PC will render include the following:

- a. To give the Receiver legal advice regarding turnover and the automatic stay;
- b. To give the Receiver legal advice regarding a motion for excuse under Section 543 of the Code and the duties of the Receiver pending any decision on the motion;
- c. To perform other legal services related to the request to be excused under Section 543 of the Code and to facilitate the cooperation of the Receiver and the Trustee; real estate and corporate issues required by the Debtor in connection with Debtor's chapter 11 case.

66. In the opinion of the Receiver, employing Kaufman Gilpin McKenzie Thomas Weiss, PC for these purposes is in the best interest of the Receiver and the creditors of the Debtor's estate.

67. Debtor desires to employ Kaufman Gilpin McKenzie Thomas Weiss, PC at Kaufman Gilpin McKenzie Thomas Weiss, PC's regular hourly rates, as set forth in the Thomas Declaration, and to reimburse Kaufman Gilpin McKenzie Thomas Weiss, PC for its actual and necessary out of pocket expenses incurred in connection with the Debtor's case, subject to the approval of the Court upon proper application for compensation. Receiver believes that the hourly rates set forth in the Declaration are fair and reasonable and are commensurate with the hourly rates Kaufman Gilpin

McKenzie Thomas Weiss, PC customarily bills to its non-bankruptcy clients. The Debtor understands that hourly rates of partners at Kaufman Gilpin McKenzie Thomas Weiss, PC range from \$225 to \$275, hourly rates of Kaufman Gilpin McKenzie Thomas Weiss, PC associates range from \$150 to \$225, and hourly rates of legal assistants range from \$100 to \$150. These rates are subject to adjustment from time to time in the ordinary course of Kaufman Gilpin McKenzie Thomas Weiss, PC's business.

68. The Receiver believes that the foregoing compensation arrangement is fair and reasonable.

#### **RELIEF REQUESTED**

69. Based upon all of the foregoing, the Receiver believes that the employment of Kaufman Gilpin as counsel in connection with the Chapter 7 case would be appropriate and in the best interest of the Debtor's estate and its creditors.

70. The Receiver requests that Kaufman Gilpin McKenzie Thomas Weiss, PC 's retention as counsel in connection with the Chapter 7 case be approved *nunc pro tunc* to March 12, 2010, (the date the Debtor filed a petition for relief under Chapter 11 of the United States Bankruptcy Code) or in the alternative to March 19, 2010 (the date that the court heard the initial arguments on the motion to excuse).

#### **NOTICE AND NO PRIOR RELIEF**

\_\_\_\_ 71. Notice of this Motion has been provided to: (i) the Office of the Bankruptcy Administrator for the Middle District of Alabama, (ii) the Trustee, (iii) the counsel for the Trustee. In light of the nature of the relief requested, the Debtor submits that no further notice is necessary.

72. No previous request for the employment of Kaufman Gilpin McKenzie Thomas Weiss,

PC as counsel to the Receiver has been made to this Court or to any other court.

\_\_\_\_\_ **WHEREFORE, PREMISES CONSIDERED**, the Debtor respectfully requests the Court to enter an order authorizing the Receiver in its motion to be excused to employ the law firm of Kaufman Gilpin McKenzie Thomas Weiss, PC and Fendley of Jackson Thornton & Company, PC as counsel and accountant to the Receiver *nunc pro tunc* to March 12, 2010, or in the alternative to March 22, 2010, and granting such other, further and different relief as may be just and proper.

Submitted this the 3<sup>rd</sup> day of May, 2010 .

/s/ \_\_\_\_\_ George W. Thomas \_\_\_\_\_

George W. Thomas  
Attorney for Receiver,  
Louis C. Colley.  
**OF COUNSEL**  
**KAUFMAN GILPIN MCKENZIE**  
**THOMAS WEISS, PC**  
2660 EastChase Lane  
P.O. Box 4540 (36104)  
Montgomery, AL 36117  
Telephone: (334) 244-1111  
Facsimile: (334) 244-1969

**CERTIFICATE OF SERVICE**

I hereby certify that I have served the above and foregoing via electronic mail using the CM/ECF system or via the United States Postal Service, first class mail in postage prepaid envelopes, on this the 3<sup>rd</sup> day of May, 2010 to, the Trustee, Attorney for the Trustee, the Bankruptcy Administrator, the Attorney for the Bankruptcy Administrator , and all other parties that have appeared and requested Notice.

/s/ George W. Thomas

Of Counsel

# Exhibit "A"

**Law Office of Cleveland & Colley, P.C.**

744 East Main Street  
Post Office Box 680689  
Prattville, AL 36068  
law.office@clevelandcolley.com

## Invoice

Invoice submitted to:

Allegro Law Receivership

Invoice date 4/29/2010

In reference to: SOA & Alabama Securities Commission vs. Allegro Law et al

<b>Previous balance</b>	<b>\$0.00</b>
Payments and other transactions	\$0.00
Total fees	\$23,407.00
Total expenses	\$0.00
Interest	\$0.00
Finance charge	\$0.00
<b>Total new charges</b>	<b>\$23,407.00</b>
	\$0.00
<b>Balance Due</b>	<b>\$23,407.00</b>

Please detach this section and return it with your payment to ensure that your account is properly credited.

Allegro Law Receivership

Client ID: LCC-Hourly

4/29/2010

Check # \_\_\_\_\_

SOA & Alabama Securities Commission vs. Allegro Law et al

Payment amount \$ \_\_\_\_\_

atty-LCC

Professional Services

		<u>Hours</u>
3/1/2010	AL Review of phone messages; keeping tally on phone messages; open mail; copy mail; prepare mail for scanning by Jackson Thornton; reviews emails; tallies emails; responds to emails.	5.50
	LC Review and respond to client correspondence; Respond to Attorney General and Consumer Protection letters; Phone call with John Fendley; Letter from Lewis Hickman; Letter to Lewis Hickman; Court appearance regarding Sterling Place vs. Allegro Law	6.00
3/2/2010	LC Review and Respond to Client Correspondences; Review Accounting and Settlement Documents	2.00
3/3/2010	AL Review of phone messages; keeping tally on phone messages; open mail; copy mail; prepare mail for scanning by Jackson Thornton; reviews emails; tallies emails; responds to emails.	5.70
	LC Review and respond to client correspondence; Review, approve and return settlements; Review and Respond to Attorney General Correspondence; Review Accounting Information on Management Cases	2.00
3/4/2010	AL Review of phone messages; keeping tally on phone messages; open mail; copy mail; prepare mail for scanning by Jackson Thornton; reviews emails; tallies emails; responds to emails.	5.50
	LC Phone Conference with Jane Brannan regarding bankruptcy; Letter to Lewis Hickman; Letter from Chase attorneys; E-mails from Chase attorneys; Review Chase court Order; phone call with Sterling attorneys; Review and respond to client correspondence; Review and respond to attorney and state agency correspondence; Review, approve and return settlements; Review accounting information	4.00
3/5/2010	AL Review of phone messages; keeping tally on phone messages; open mail; copy mail; prepare mail for scanning by Jackson Thornton; reviews emails; tallies emails; responds to emails.	4.30
	LC Review and respond to attorney correspondence; Review and respond to client correspondence; Review and respond to AmeriCorp correspondence; Review accounting information; Review, approve	4.00

	<u>Hours</u>
and return settlements; Review correspondence and pleadings in Chase vs. AmeriCorp, et al. case	
3/8/2010 RW Letter to various state agencies	0.70
AL Review of phone messages; keeping tally on phone messages; open mail; copy mail; prepare mail for scanning by Jackson Thornton; reviews emails; tallies emails; responds to emails.	5.60
LC Review and respond to client correspondence; Review and respond to various state agency correspondence; Collect, review and provide information requested by Minnesota Attorney General; Letter from counsel regarding Chase lawsuit; Conference with Jim Williams and John Fendley; Letter to Jim Williams and John Fendley; Letter to Tim McCollum	5.00
3/9/2010 RW Letter to various attorneys	0.40
AL Review of phone messages; keeping tally on phone messages; open mail; copy mail; prepare mail for scanning by Jackson Thornton; reviews emails; tallies emails; responds to emails.	5.20
LC Review and respond to client correspondence; Review and respond to Attorney General correspondence; Sort, review, organize and respond to various state agency complaints; Preparation of mass mailing to clients; Phone conference with Evans Bailey; Letter to Vanessa Vinicombe; Review accounting information	5.00
3/10/2010 RW Letter to various state agencies and individuals	0.60
AL Review of phone messages; keeping tally on phone messages; open mail; copy mail; prepare mail for scanning by Jackson Thornton; reviews emails; tallies emails; responds to emails.	5.00
LC Review and respond to client correspondence; Review and respond to Attorney General correspondence; Sort, review, organize and respond to various state agency complaints; Preparation of mass mailing to clients; letter to Vanessa Vinicombe; Review accounting information	4.00

Allegro Law Receivership

		<u>Hours</u>
3/11/2010	AL Review of phone messages; keeping tally on phone messages; open mail; copy mail; prepare mail for scanning by Jackson Thornton; reviews emails; tallies emails; responds to emails.	4.60
	LC Review and respond to client correspondence; Review and respond to Attorney General and Consumer Protection complaints; Review, approve and return settlements; Review accounting information and accounting correspondence	3.00
3/12/2010	AL Review of phone messages; keeping tally on phone messages; open mail; copy mail; prepare mail for scanning by Jackson Thornton; reviews emails; tallies emails; responds to emails.	5.00
	RW Letter to various state agencies	0.40
	LC Review and respond to client correspondence; Review and Respond to Attorney General and Consumer Protection Complaints; Review, Approve and Return Settlements; Review Accounting Information and Accounting Correspondence; Phone Conference with John Fendley in regards to Accounting; Phone Conference with Vanessa in regards to Settlements; Review Bankruptcy Order; Phone Conference with River Bank and Trust	5.00
3/16/2010	LC Conference in Montgomery with Securities Commission and Attorney General's Office regarding Bankruptcy	3.00
3/18/2010	LC Conference with Hamm Regarding Bankruptcy	0.50
	LC Review and Sort Financial Information	2.00
3/19/2010	LC Attend Bankruptcy Hearing in Montgomery; Conference with Chase Attorneys RE: Pending New York Lawsuits	6.00
3/22/2010	LC Review Accounting and Legal Information for Production to Bankruptcy Court Evidentiary Hearing	4.00

Allegro Law Receivership

	<u>Hours</u>
3/23/2010 LC Review Accounting and Legal Information for Production to Bankruptcy Court Evidentiary Hearing	5.00
3/24/2010 LC Review Accounting and Legal Information for Production to Bankruptcy Court Evidentiary Hearing	5.00
3/25/2010 LC Review Accounting and Legal Information for Production to Bankruptcy Court Evidentiary Hearing	1.00
3/26/2010 LC Review Accounting and Legal Information for Production to Bankruptcy Court Evidentiary Hearing	4.00
3/27/2010 LC Review Accounting and Legal Information for Production to Bankruptcy Court Evidentiary Hearing	6.00
3/29/2010 LC Court Appearance-Bankruptcy Evidentiary Hearing in Montgomery	8.00
4/5/2010 LC Phone Conference with Hamm concerning Website Update; Preparation of Letter to Hamm in reference to Receiver Statement on Website and update Website and Phone Message; Sort Mail with Production to Hamm; Phone Conference with Hamm (2) regarding Vanco; Phone Conference with River Bank and Trust Regarding Funds	2.00
4/6/2010 LC Phone Conference with Hamm regarding Vanco and Bank Transfers; Review of Letter to Hamm Regarding Transfers	0.50
4/7/2010 LC Conference with Trustee and Bank Officials at River Bank and Trust regarding Transferring Funds; Accompany Trustee to Post Office for Postal Transfer; Sort Mail; Review Financial Information for Accounting	3.00
4/8/2010 BL Opening Mail	2.50
LC Review Letter from Trustee Regarding Transfer of Accounts; Review of Letter from Trustee Regarding Mail and Documents; Review of Letter from River Bank and Trust; Phone Conference with River Bank (2); Preparation of Letter to River Bank and Trust; Preparation of	1.50

			<u>Hours</u>
	Letter to Trustee		
4/9/2010	BL Opening Mail		3.00
4/12/2010	BL Opening Mail		4.00
4/13/2010	RW Letter to Daniel Hamm; Preparation of Preliminary Inventory		0.40
	BL Opening Mail		2.00
	LC Organize Mail and Documentation of Allegro Law, LLC for Production to Hamm		2.00
4/14/2010	RW Letter to Daniel Hamm; Revisions to Inventory		0.40
	BL opening mail		1.00
	LC Conference with Hamm		1.00
4/15/2010	BL Opening Mail		1.00
4/16/2010	BL Opening Mail		1.00
4/19/2010	LC Phone Conference with Vanco; Review of Letter from Vanco; Review Vanco Agreements		0.50
4/20/2010	LC Letter from Hamm (2); Letter to Hamm reference to website		0.50
4/22/2010	LC Phone Conference with Lewis McGowin of Sterling Bank		0.30
4/27/2010	LC Review and Sort Continuing Faxes from Allegro Law, LLC Clients		0.50
			<u>Amount</u>
For professional services rendered			\$23,407.00

**Balance due**

Amount

\$23,407.00

STAFF TIME SUMMARY

Attorney:

Louis C. Colley (LC)      96.30 hours X \$200.00 per hour      \$19,260.00

Support Staff:

Robin Windham (RW)  
Amanda Lewis (AL)  
Bridget Lawrence (BL)

63.80 hours X \$65.00 per hour      \$ 4,147.00

***TOTAL***      ***\$23,407.00***

Law Office of Cleveland & Colley, P.C.  
744 East Main Street  
Post Office Box 680689  
Prattville, AL 36068  
law.office@clevelandcolley.com

# Invoice

Invoice submitted to:

Allegro Law Receivership  
Expenses

Invoice date 4/29/2010

In reference to: Allegro Law Expense Bill

Previous balance	\$0.00
Payments and other transactions	\$0.00
Total fees	\$0.00
Total expenses	\$1,258.87
Interest	\$0.00
Finance charge	\$0.00
Total new charges	\$1,258.87
Balance Due	\$1,258.87

Please detach this section and return it with your payment to ensure that your account is properly credited.

Allegro Law Receivership

Client ID: LCC-Expenses

4/29/2010

Check # \_\_\_\_\_

Allegro Law Expense Bill

Payment amount \$ \_\_\_\_\_

Allegro Law Receivership

Additional Charges

	<u>Qty/Price</u>	<u>Amount</u>
3/3/2010 Black and White Copies-5	1 \$2.50	\$2.50
Postage-2.20	1 \$2.20	\$2.20
Black and White Copies-5	1 \$2.50	\$2.50
Postage-.44	1 \$0.44	\$0.44
Fax-Send and/or Receive-4	1 \$4.00	\$4.00
Fax-Send and/or Receive-7	1 \$7.00	\$7.00
3/4/2010 Federal Express Fee-Check No. 11192	1 \$26.39	\$26.39
Black and White Copies-1	1 \$0.50	\$0.50
Postage-.44	1 \$0.44	\$0.44
Black and White Copies-2	1 \$1.00	\$1.00
Fax-Send and/or Receive-4	1 \$4.00	\$4.00
Federal Express Fee-Check No. 11188	1 \$26.39	\$26.39
3/5/2010 Black and White Copies-37	1 \$18.50	\$18.50
3/8/2010 Black and White Copies-16	1 \$8.00	\$8.00
Black and White Copies-22	1 \$11.00	\$11.00
Fax-Send and/or Receive-1	1 \$1.00	\$1.00

Allegro Law Receivership

	<u>Qty/Price</u>	<u>Amount</u>
3/9/2010 Black and White Copies-1	1 \$0.50	\$0.50
Postage-.44	1 \$0.44	\$0.44
Fax-Send and/or Receive-1	1 \$1.00	\$1.00
Black and White Copies-2	1 \$1.00	\$1.00
Postage-.44	1 \$0.44	\$0.44
Black and White Copies-2	1 \$1.00	\$1.00
Federal Express Fee-Check No. 11210	1 \$26.39	\$26.39
3/10/2010 Black and White Copies-64	1 \$32.00	\$32.00
Fax-Send and/or Receive-6	1 \$6.00	\$6.00
3/11/2010 Black and White Copies-5	1 \$2.50	\$2.50
Postage-1.76	1 \$1.76	\$1.76
Fax-Send and/or Receive-6	1 \$6.00	\$6.00
Federal Express Fee-Check No. 11239	1 \$26.39	\$26.39
3/12/2010 Black and White Copies-1	1 \$0.50	\$0.50
Postage-.44	1 \$0.44	\$0.44
Black and White Copies-1	1 \$0.50	\$0.50

Allegro Law Receivership

	<u>Qty/Price</u>	<u>Amount</u>
3/12/2010 Postage-.44	1 \$0.44	\$0.44
Black and White Copies-23	1 \$11.50	\$11.50
Black and White Copies-2	1 \$1.00	\$1.00
Fax-Send and/or Receive-2	1 \$2.00	\$2.00
3/15/2010 Black and White Copies-1	1 \$0.50	\$0.50
Postage-.44	1 \$0.44	\$0.44
Black and White Copies-25	1 \$12.50	\$12.50
Fax-Send and/or Receive-7	1 \$7.00	\$7.00
3/16/2010 Fax-Send and/or Receive-5	1 \$5.00	\$5.00
Fax-Send and/or Receive-68	1 \$68.00	\$68.00
3/18/2010 Black and White Copies-30	1 \$15.00	\$15.00
3/22/2010 City of Montgomery-Check No. 11255	1 \$10.00	\$10.00
3/24/2010 Black and White Copies-276	1 \$138.00	\$138.00
4/2/2010 Fax-Send and/or Receive-31	1 \$31.00	\$31.00
4/5/2010 Fax-Send and/or Receive-4	1 \$4.00	\$4.00
Fax-Send and/or Receive-12	1 \$12.00	\$12.00

Allegro Law Receivership

	<u>Qty/Price</u>	<u>Amount</u>
4/6/2010 Fax-Send and/or Receive-9	1 \$6.00	\$6.00
Fax-Send and/or Receive-4	1 \$4.00	\$4.00
4/7/2010 Fax-Send and/or Receive-12	1 \$12.00	\$12.00
4/8/2010 Fax-Send and/or Receive-7	1 \$7.00	\$7.00
4/9/2010 Fax-Send and/or Receive-9	1 \$9.00	\$9.00
4/12/2010 Fax-Send and/or Receive-4	1 \$4.00	\$4.00
4/13/2010 Fax-Send and/or Receive-9	1 \$9.00	\$9.00
4/14/2010 Fax-Send and/or Receive-21	1 \$21.00	\$21.00
Black and White Copies-3	1 \$1.50	\$1.50
Postage-1.32	1 \$1.32	\$1.32
Fax-Send and/or Receive-12	1 \$12.00	\$12.00
Black and White Copies-9	1 \$4.50	\$4.50
4/15/2010 Fax-Send and/or Receive-3	1 \$3.00	\$3.00
4/16/2010 Fax-Send and/or Receive-26	1 \$26.00	\$26.00
4/19/2010 Fax-Send and/or Receive-10	1 \$10.00	\$10.00
4/21/2010 Fax-Send and/or Receive-3	1 \$3.00	\$3.00

Allegro Law Receivership

	<u>Qty/Price</u>	<u>Amount</u>
4/27/2010 Fax-Send and/or Receive-19	1 \$19.00	\$19.00
4/29/2010 Verizon-Check No. 11208	1 \$128.08	\$128.08
City of Montgomery-Check No. 11277	1 \$10.00	\$10.00
AT&T Phone Service-February and March	2 \$52.95	\$105.90
AT&T Long Distance Service-January	1 \$144.63	\$144.63
AT&T Long Distance Service-February	1 \$176.84	\$176.84
Total additional charges		<hr/> \$1,258.87
<b>Balance due</b>		<hr/> <b>\$1,258.87</b> <hr/>

Exhibit "B"



JACKSON THORNTON  
A PROFESSIONAL CORPORATION  
P.O. BOX 96, 200 COMMERCE STREET  
MONTGOMERY, ALABAMA 36101-0096  
T 334 834 7660 F 334 240 3690  
www.jacksonthornton.com

INVOICE

Louis Colley - as Receiver for Allegro Law LLC  
Cleveland & Colley, P.C.  
744 East Main Street  
Prattville AL 36067

Invoice #: 142862  
Date: 4/22/2010  
Date Due: 5/22/2010  
Client ID: 38718

Please return top portion with remittance.

Amount enclosed \$ \_\_\_\_\_

Accounting, consulting, and other services rendered to Louis Colley as Receiver for Allegro Law, LLC from March 1, 2010 through April 15, 2010, including the following: 17,837.00

Maintenance of accounting records, banking relationships, and daily processes of continuing operations of Allegro Law LLC through March 19, 2010.

Daily processing and approval of Debt Management and Debt Settlement deposits and disbursements through March 19, 2010.

Daily testing of client transactions originating with Americorp in Long Island, New York through regular mail, email, on-line bank access, and direct internet access to Americorp records through March 19, 2010.

Daily posting and on-going maintenance of accounting books and records for the Allegro Law LLC Receivership. Includes bank reconciliations, balance sheet, income statement, detail general ledger, consumer complaints, and miscellaneous other summary information through March 19, 2010.

Reconciliation of bank accounts, customer escrow balances, and credit card company debt amounts to source records and Americorp records through March 19, 2010.

Daily review, scanning, and uploading to Americorp FTP site of all mail and other client documents through March 19, 2010.

Numerous calls and conferences with Louis Colley, George Thomas, attorney general, and state securities representatives regarding bankruptcy proceedings and preparation for hearings.

Attendance at bankruptcy hearings, including testimony.

Conference with Chase Bank attorneys regarding receivership matters.

A summary of the time and expense incurred to date is attached hereto.

Current Amount Due: \$17,837.00

JACKSON THORNTON  
A PROFESSIONAL CORPORATION



A finance charge of 1.5% per month will be charged on the amount of fees not paid within 30 days of invoice date. This is an annual percentage rate of 18%.

<u>Employee</u>	<u>Hours</u>	<u>Rate</u>	<u>Amount</u>
John Fendley	\$ 75.60	\$ 200.00	\$ 15,120.00
Charlann Jones	5.30	145.00	768.50
Irene Swisher	15.30	85.00	1,300.50
Amanda Collins	1.30	110.00	143.00
Jim Zuelzke	6.20	50.00	310.00
Total amount for services			<u>17,642.00</u>
Out-of-pocket expenses incurred:			
Parking fees			\$ 15.00
Mileage			<u>180.00</u>
Total expenses			<u>195.00</u>
Total amount due			<u>\$ 17,837.00</u>

# STATEMENT

Federal ID No. 63-0847927

**PRIVILEGED & CONFIDENTIAL**

*Exhibit C, part 1*

Mr. Louis Colley  
PO Box 680689  
Prattville, AL 36068-0689

Account No. 7386.4001  
Statement Date: 05/03/2010  
Statement No. 41172  
Page No. 1

Amount Enclosed \$ \_\_\_\_\_

(Tear at Perforation)

RE: Receiver for Allegro Motion

**PLEASE RETURN TOP PORTION WITH PAYMENT**

03/15/2010	GWT	Study state court pleadings, 2.5, Research abstention issues .5, telephone conference with Colley .3, review Collier on issues 1, review code provision regarding recusal .5	4.80	1,320.00
03/16/2010	GWT	Meet with Colley and Hamm at Colley's office 1.0, meet with Colley and call John Fendley, 1.0; receive and review Hamm's letter .5, research code provisions on Excuse .75, Property of the estate 1.75 and assignment for the benefit of creditors .5, begin writing motion 1.5; telephone conference with Colley .3	7.30	2,007.50
03/17/2010	JAH	New bankruptcy deal with GWT; Office conference with GWT	0.20	42.00
	GWT	Continue writing motion 1.5, meet with Joe Borg, Jane Brannen and Consumer Protection attorneys from the Alabama Bureau of Consumer Protection 1.5, telephone conference with Jane Brannen .2; telephone conference with Colley .2; research motion issues on state law grounds .75, study state law court order, .65, revise arguments based on 541 language .4, study Fendley's bank account structure 1.2, finish first draft of motion, 2.8	9.20	2,530.00
03/18/2010	GWT	review and revise motion .5, study potential		

To ensure proper credit, please include statement no. and statement date on remittance checks. Thank you.

		exhibits .75 ; discuss with Colley and Fendley as to use of Exhibits .5 assemble Exhibits 1.15, revise and finalize motion to include exhibits, .8, file motion 1	4.70	1,292.50
03/19/2010	GWT	Meeting prior to hearing with Colley, Fendley, and state attorneys 1, Hearing in Federal Bankruptcy Court 1.5, follow up to hearing in conference with Colley 1.2	3.70	1,017.50
03/20/2010	GWT	Attempt to develop settlement options which would bring the receiver into bankruptcy ; email to Colley, email to Olen	2.50	687.50
03/21/2010	GWT	Develop argument for hearing 1.2, study exhibits to motion .5, work on property argument .3, review code sections .3	2.30	632.50
03/22/2010	GWT	Hearing to receive decision in which Court announces need to have evidentiary hearing, .8;	0.80	220.00
		CURRENT SERVICES RENDERED	35.50	9,749.50

RECAPITULATION

<u>TIMEKEEPER</u>	<u>HOURS</u>	<u>HOURLY RATE</u>	<u>TOTAL</u>
GEORGE W. THOMAS	35.30	\$275.00	\$9,707.50
JOHN A HOWARD, JR.	0.20	210.00	42.00

DOCUMENT IMAGING	196.30
On-Line Research	150.00
TOTAL EXPENSES	346.30
TOTAL CURRENT WORK	10,095.80
BALANCE DUE	<u>\$10,095.80</u>

# STATEMENT

Federal ID No. 63-0847927

PRIVILEGED & CONFIDENTIAL

*Exhibit C, part 2*

Mr. Louis Colley  
PO Box 680689  
Prattville, AL 36068-0689

Account No. 7386.4002  
Statement Date: 05/03/2010  
Statement No. 41173  
Page No. 1

Amount Enclosed \$ \_\_\_\_\_

(Tear at Perforation)

RE: Evidentiary Hearing

PLEASE RETURN TOP PORTION WITH PAYMENT

03/22/2010	GWT	Revise arguments based on Court's comments after hearing of Motion .5, research viability of property argument 1.5, study brief of trustee regarding property arguments, 1.8; research law on evidence required to prove excusal is in the best interest of creditors 1.5, study cases 1.5	6.80	1,870.00
03/23/2010	GWT	Prepare for evidentiary hearing by drafting outline including all necessary proofs and facts necessary to prove 1.75, develop known issues 1.6, develop proofs 1.5, develop benefits 1.5, develop costs 1.75, research legal authorities 2.7, receive and review request for production 2, forward to Colley .5	9.10	2,502.50
03/24/2010	GWT	compare authorities .8, develop appropriate test for our facts .5, modify proofs to fit our facts and the case law 1.5., receive list of names of people in the program who are in the area 1, attempt to contact .75, conversation with Foster .25, request information from Americorp on debt management and debt settlement clients .3, receive FTP site information .5, request set up of FTP access, .4; request Riverbank information 1, research FDIC rules for non interest bearing		

To ensure proper credit, please include statement no. and statement date on remittance checks. Thank you.

		accounts and for IOLTA accounts 1.7	8.70	2,392.50
03/25/2010	GWT	telephone conference with with Brannen including discussion of Olen's brief and implications of property argument on our case, discuss Borg's testimony .75, scripting of Borg's questions 1, telephone conference with Borg .5, work on exemption from license issue .75, work on IOLTA issue .5, work on end game analysis for Colley testimony .5, review customer status 1, review dropped customer status .3, receive assurance that money is traceable to each customer .5, transfer all FTP files to firm folders and maintain in pdf format with labels back to RFP question #s 2.9	8.70	2,392.50
03/26/2010	GWT	Meet with Louis Colley to recover and review responses to discovery requests from FTP 2.25 ; and to confer with Colley and answer all questions not provided by FTP .75 ; deliver discovery requests in pdf to Steve and Dan 3.5, receive and review bar charts on benefits to clients 1.0 ; receive and discovery review Fendley's analysis of fee splits between Allegro and Americorp, .9	8.40	2,310.00
03/27/2010	GWT	review of discovery items 1-14 provided to trustee 1.5 ; Preparation of witness questions for Colley and Fendley .75 ; telephone conference with Kim Foster .5 ; review of evidentiary exhibits 1.5 ; write opening argument .75; write closing argument .5, email to Olen; review trial tips from Judge Sawyer .5 ; study code provision .5, receive and respond to emails on #21, .5	7.00	1,925.00
03/28/2010	GWT	review of discovery items 15-24 provided to trustee 1.75 ; email to Colley .5 ; mark exhibits .75 ; draft exhibit list .75; telephone conference with Colley .25 ; meeting with John Fendley to review exhibits to be introduced into evidence 1.75	5.80	1,595.00
03/29/2010	GWT	Preparation for questions and cross examination of witness Kim Foster .4 ; and Karen Pugh .25; , Evidentiary Hearing 7.25	7.90	2,172.50
		CURRENT SERVICES RENDERED	62.40	17,160.00

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RECAPITULATION

<u>TIMEKEEPER</u>	<u>HOURS</u>	<u>HOURLY RATE</u>	<u>TOTAL</u>
GEORGE W. THOMAS	62.40	\$275.00	\$17,160.00

DOCUMENT IMAGING			5.25
On-Line Research			<u>60.00</u>
TOTAL EXPENSES			65.25
TOTAL CURRENT WORK			17,225.25
BALANCE DUE			<u>\$17,225.25</u>

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(Cite as: 130 B.R. 700)

**C**

United States Bankruptcy Court,  
S.D. New York.

In re SENERGY PROPERTIES, INC., Debtor.  
**Bankruptcy No. 91 B 20718.**

Aug. 23, 1991.

Receiver appointed in state court foreclosure action to act with respect to Chapter 11 debtor's real estate filed motion seeking compensation for himself and his attorneys, together with costs and expenses. The Bankruptcy Court, Howard Schwartzberg, J., held that: (1) fact that debtor disputed claim of mortgagee and validity of mortgage did not mean that state court receiver should not be compensated, and (2) receiver could receive compensation for legal expenses, even though neither state court nor Bankruptcy Court had authorized employment of counsel.

So ordered.

West Headnotes

[1] **Bankruptcy 51** ↪ 3151

51 Bankruptcy

51IX Administration

51IX(E) Compensation of Officers and Others

51IX(E)1 In General

51k3151 k. In General. Most Cited

Cases

Receiver appointed in state court mortgage foreclosure action is "custodian" who may receive payment of reasonable compensation for services rendered and costs and expenses incurred. Bankr.Code, 11 U.S.C.A. §§ 101(11)(C), 543(c)(2).

[2] **Bankruptcy 51** ↪ 2871

51 Bankruptcy

51VII Claims

51VII(C) Administrative Claims

51k2871 k. Administrative Expenses in General. Most Cited Cases

Reimbursement for custodian must be treated as first priority administrative expense. Bankr.Code, 11 U.S.C.A. § 503(b)(3)(E).

[3] **Receivers 323** ↪ 112

323 Receivers

323IV Management and Disposition of Property

323IV(B) Supervision and Instructions of Court

323k111 Instructions or Authority to Receiver to Act

323k112 k. Subject-Matter. Most Cited

Cases

Under New York law, implied authorization for receiver to retain counsel, as reflected in state court order of appointment, would not suffice to support receiver's retention of counsel, where state court order expressly provided that receiver shall comply with statutory provisions stating that receiver shall have no power to employ counsel unless expressly so authorized by order of court. N.Y.McKinney's CPLR 6401(b).

[4] **Bankruptcy 51** ↪ 3151

51 Bankruptcy

51IX Administration

51IX(E) Compensation of Officers and Others

51IX(E)1 In General

51k3151 k. In General. Most Cited

Cases

Compensation for receiver appointed in state court mortgage foreclosure action and his counsel must be determined by bankruptcy court in accordance with standards established under Bankruptcy Code and not by conditions imposed under state law.

[5] **Bankruptcy 51** ↪ 2871

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 (Cite as: 130 B.R. 700)

51 Bankruptcy  
 51VII Claims  
 51VII(C) Administrative Claims  
 51k2871 k. Administrative Expenses in  
 General. Most Cited Cases  
 Generally, administrative expenses are payable  
 only if they are subsequent to filing of debtor's peti-  
 tion. Bankr.Code, 11 U.S.C.A. § 503.

[6] Bankruptcy 51 ↪2871

51 Bankruptcy  
 51VII Claims  
 51VII(C) Administrative Claims  
 51k2871 k. Administrative Expenses in  
 General. Most Cited Cases  
 Provision authorizing compensation for prepetition  
 services of custodian or receiver superseded under  
 Bankruptcy Code is exception to general rule with  
 respect to allowance of compensation for exclus-  
 ively postpetition activities as an administrative ex-  
 pense. Bankr.Code, 11 U.S.C.A. §§ 503(b)(3)(E),  
 543.

[7] Bankruptcy 51 ↪2877

51 Bankruptcy  
 51VII Claims  
 51VII(C) Administrative Claims  
 51k2877 k. Professional Services; Attor-  
 ney Fees. Most Cited Cases  
 Costs and expenses of prepetition custodian or re-  
 ceiver superseded under Bankruptcy Code include  
 expense of counsel fees incurred by custodian or  
 receiver, for which prior court approval is not ex-  
 pressed as prerequisite for allowances. Bankr.Code,  
 11 U.S.C.A. §§ 503(b)(3)(E), 543.

[8] Bankruptcy 51 ↪3172.1

51 Bankruptcy  
 51IX Administration  
 51IX(E) Compensation of Officers and Oth-  
 ers  
 51IX(E)3 Attorneys  
 51k3172 Necessity of Appointment or

Approval  
 51k3172.1 k. In General. Most  
 Cited Cases  
 (Formerly 51k3172)  
 Absence of state court order authorizing receiver  
 appointed by state court to retain counsel is not  
 fatal to bankruptcy court's award for legal services.  
 Bankr.Code, 11 U.S.C.A. § 503(b)(3)(E).

[9] Bankruptcy 51 ↪3192


51 Bankruptcy  
 51IX Administration  
 51IX(E) Compensation of Officers and Oth-  
 ers  
 51IX(E)3 Attorneys  
 51k3191 Amount  
 51k3192 k. In General. Most Cited  
 Cases  
 Amount of legal expenses to be awarded for attor-  
 neys for receiver appointed by state court must be  
 determined by bankruptcy court in accordance with  
 statutory standard of reasonable compensation  
 based on time, nature, extent, and value of such ser-  
 vices, and costs of comparable services other than  
 in bankruptcy case, and reimbursement for actual,  
 necessary expenses incurred by such counsel.  
 Bankr.Code, 11 U.S.C.A. § 503(b)(4).

[10] Bankruptcy 51 ↪3151

51 Bankruptcy  
 51IX Administration  
 51IX(E) Compensation of Officers and Oth-  
 ers  
 51IX(E)1 In General  
 51k3151 k. In General. Most Cited  
 Cases  
 Fact that Chapter 11 debtor disputed claim of mort-  
 gagee and validity of mortgage which was subject  
 of state court foreclosure action did not mean that  
 state court receiver should not be compensated by  
 bankruptcy court, where receiver had been validly  
 appointed by order of state court, and there had  
 been no determination that mortgage was invalid or  
 that foreclosure proceeding was not properly com-


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menced in state court. Bankr.Code, 11 U.S.C.A. §§ 503(b)(3)(E), 543(c)(2).


[11] Bankruptcy 51 3170

51 Bankruptcy  
51IX Administration  
51IX(E) Compensation of Officers and Others  
51IX(E)3 Attorneys  
51k3170 k. In General. Most Cited Cases

Fact that state court order appointing receiver in mortgage foreclosure action did not expressly authorize receiver to retain counsel was not conclusive in determining whether bankruptcy court should award compensation for counsel, where legal services and counsel were contemplated under state court order. Bankr.Code, 11 U.S.C.A. §§ 503(b)(4), 543(b)(2), (c)(2).


[12] Bankruptcy 51 2877

51 Bankruptcy  
51VII Claims  
51VII(C) Administrative Claims  
51k2877 k. Professional Services; Attorney Fees. Most Cited Cases  
Fact that bankruptcy counsel for receiver appointed in state court mortgage foreclosure action was not authorized by bankruptcy court to receive compensation for legal services for receiver did not preclude bankruptcy court from awarding such compensation. Bankr.Code, 11 U.S.C.A. §§ 503(b)(3)(E), 543(c)(2).

[13] Bankruptcy 51 3151


51 Bankruptcy  
51IX Administration  
51IX(E) Compensation of Officers and Others  
51IX(E)1 In General  
51k3151 k. In General. Most Cited Cases  
Receiver appointed in New York state court mort-

gage foreclosure action was entitled to be compensated in sum of \$1,100 for his services, together with out-of-pocket costs of \$364. Bankr.Code, 11 U.S.C.A. §§ 503(b)(3)(E), 543(c)(2); N.Y.McKinney's CPLR 8004.

[14] Bankruptcy 51 3192

51 Bankruptcy  
51IX Administration  
51IX(E) Compensation of Officers and Others  
51IX(E)3 Attorneys  
51k3191 Amount  
51k3192 k. In General. Most Cited Cases

Legal expenses incurred by counsel for receiver appointed in New York state court foreclosure action in sum of \$4,141.66 were fair and reasonable and would be allowed. Bankr.Code, 11 U.S.C.A. §§ 503(b)(3)(E), (b)(4), 543(c)(2).

[15] Bankruptcy 51 3192

51 Bankruptcy  
51IX Administration  
51IX(E) Compensation of Officers and Others  
51IX(E)3 Attorneys  
51k3191 Amount  
51k3192 k. In General. Most Cited Cases

Legal expenses incurred by bankruptcy counsel for receiver appointed in state court mortgage foreclosure action in amount of \$2,135 were fair and reasonable and would be allowed. Bankr.Code, 11 U.S.C.A. §§ 503(b)(3)(E), (b)(4), 543(c)(2).

\*702 Druckman and Raphan, New York City, for Brian A. Raphan, et al.

Denise L. Savage, Croton-on-Hudson, N.Y., for Brian A. Raphan, et al.

James A. Cartelli, White Plains, N.Y., for debtor.

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 (Cite as: 130 B.R. 700)

HEARING ON MOTION FOR AN ORDER DIRECTING DEBTOR AND/OR CADO CAPITAL CORP. TO COMPENSATE BRIAN A. RAPHAN, DRUCKMAN AND RAPHAN, ESQS. AND DENISE L. SAVAGE, ESQ.

HOWARD SCHWARTZBERG, Bankruptcy Judge.

Brian A. Raphan, who was appointed by the New York Supreme Court, Westchester County, on August 22, 1990 to act as receiver with respect to the Chapter 11 debtor's real estate in Bronx County, New York, seeks compensation for himself and his attorneys, together with costs and expenses in connection with their services.

The debtor in possession opposes the application on various grounds. The debtor disputes that it owes anything to the mortgagee, Cado Capital Co. ("Cado Capital"), which caused the appointment of the receiver in state court. The debtor disputes that the mortgagee is entitled to collect rents from the mortgaged property with respect to which the receiver was appointed. The debtor also disputes the validity of the mortgage covering the property for which the receiver was appointed. Additionally, the debtor objects to any award for legal fees incurred by the receiver's attorneys on the ground that the receiver was not expressly authorized by the state court to retain attorneys.

#### *Factual Background*

On May 14, 1991, the debtor filed with this court a petition for reorganizational relief under Chapter 11 of the Bankruptcy Code and was continued in management and possession of its property and business in accordance with 11 U.S.C. §§ 1107 and 1108.

The debtor owns two pieces of property. One parcel is in Mount Vernon, New York, and is the home of the debtor's two principals; the other parcel is an income producing building in Bronx, New York, which was purchased from the principals of the mortgagee, Cado Capital. In February of 1990, Cado Capital commenced a mortgage foreclosure

action against the debtor in the New York Supreme Court, Westchester County for the sum of \$28,000.00. This action was the subject of substantial litigation. During the mortgage foreclosure proceedings, the state court entered an order on August 23, 1990, appointing Brian A. Raphan as receiver of the debtor's building on East 215th Street, Bronx, New York.

\*703 After his appointment and qualification, the receiver collected rents from the building in question, made disbursements to maintain the premises, commenced actions against tenants for nonpayment of rent, commenced dispossess proceedings against delinquent tenants and generally dealt with tenants and others in connection with problems pertaining to the maintenance and operation of the Bronx building.

In order to initiate and prosecute the legal proceedings required in connection with rent and eviction problems, the receiver retained the services of the law firm of Druckman and Raphan, Esqs., in which the receiver is a partner. Additionally, upon learning that the debtor filed a Chapter 11 case in the Bankruptcy Court, the receiver and his law firm retained the services of a bankruptcy specialist, Denise L. Savage, Esq., to perform services in connection with the receiver's turnover of the property of the estate to the debtor in possession in accordance with 11 U.S.C. § 543, including the preparation of an application for compensation pursuant to 11 U.S.C. § 543(c)(2).

There is no serious dispute as to the quality or amount claimed for the services performed by the receiver and his attorneys. Based on the amounts collected and disbursed, the receiver seeks compensation for his services based on the formula expressed in section 8004 of the New York Civil Practice Law and Rules, N.Y.Civ.Prac.L. & R. 8004 (McKinney 1981), together with properly incurred costs of \$364.00. Druckman and Raphan, Esqs. seek legal fees for their services to the receiver in the sum of \$4,141.66. Denise L. Savage, Esq. has applied for an award of \$2,135.00 for her legal

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(Cite as: 130 B.R. 700)

services for the receiver, plus disbursements of \$40.00.

#### DISCUSSION

[1][2] A receiver appointed in a state court mortgage foreclosure action is a "custodian" within the meaning of that term, as expressed in 11 U.S.C. § 101(11)(C). *In re Gomes*, 19 B.R. 9 (Bankr.D.R.I.1982); *In re Left Guard of Madison, Inc.*, 11 B.R. 238 (Bankr.W.D.Wis.1981). Accordingly, a custodian may receive payment of reasonable compensation for services rendered and costs and expenses incurred pursuant to 11 U.S.C. § 543(c)(2). Moreover, 11 U.S.C. § 503(b)(3)(E) requires such reimbursement be treated as a first priority administrative expense.

The debtor objects to counsel fees claimed by the receiver's attorneys because counsel was not appointed by this court pursuant to 11 U.S.C. §§ 329 and 330. The debtor reasons that it should have been given prior notice of any proposed order authorizing counsel to appear for the debtor. The state court order which appointed the receiver is not clear as to whether or not the receiver was authorized to retain counsel. The order states that the receiver was granted "the usual powers and directions...." The order also provides that the receiver was

authorized to institute and carry on all legal proceedings necessary for the protection of said premises, or to recover possession of the whole or any part thereof, and to institute and prosecute suits for the collection of rents now due or hereafter to become due, and summary proceedings for the removal of any tenant or tenants or other persons therefrom....

Manifestly, legal services must be performed on behalf of the receiver in order to carry out the legal proceedings authorized in the order.

[3] Under New York law, the implied authorization for the receiver to retain counsel, as reflected in the

state court order of appointment, would not suffice to support the receiver's retention of counsel. The state court order expressly states that "the Receiver shall comply with Sections 6401-6404 CPLR...." Section 6401(b) of the New York Civil Practice Law and Rules specifically states in relevant part as follows:

A receiver shall have no power to employ counsel unless expressly so authorized by order of court. (emphasis added).

N.Y.Civ.Prac.L. & R. 6401(b) (McKinney 1980). In *\*704Marine Midland Realty Credit Corp. v. Drake Evergreen Park Inc.*, 91 Misc.2d 569, 398 N.Y.S.2d 241 (Sup.Ct.Oswego Co.1977), the court refused to allow compensation for counsel fees where a receiver failed to obtain an order of the state court to employ counsel, even though all the parties concerned agreed to an allowance for counsel fees.

[4][5][6][7] Nevertheless, compensation for the receiver and his counsel must be determined by this court in accordance with the standards established under the Bankruptcy Code and not by conditions imposed under state law. *See In re 1020 Warburton Avenue Realty Corp.*, 127 B.R. 333, 336 (Bankr.S.D.N.Y.1991) (the Supremacy Clause in Art. 1, § 8, cl. 4 regarding bankruptcy proceedings prevails over state statutes relating to inconsistent state procedural matters). Generally, administrative expenses under 11 U.S.C. § 503 are payable only if they are subsequent to the filing of the debtor's bankruptcy petition. *Trustees of Amalgamated Insurance Fund v. McFarlin's, Inc.*, 789 F.2d 98, 101 (2d Cir.1986); *In re Balport Construction Co., Inc.*, 123 B.R. 174, 178 (Bankr.S.D.N.Y.1991). However, 11 U.S.C. § 503(b)(3)(E) expressly authorizes compensation for the prepetition services of a custodian or receiver superseded under 11 U.S.C. § 543 and is an exception to the general rule with respect to the allowance of compensation for exclusively postpetition activities as an administrative expense. *In re Hearth & Hinge, Inc.*, 28 B.R. 595, 597 (Bankr.S.D. Ohio 1983). Unlike the requirement in subsection (D) under § 503(b)(3), sub-

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section (E), which governs superseded custodians, does not require that the services of the custodian made "a substantial contribution" in the Chapter 11 case. Moreover, the costs and expenses of a prepetition custodian or receiver superseded under 11 U.S.C. § 543 include the expense of counsel fees incurred by the custodian or receiver, for which prior court approval is not expressed as a prerequisite for allowances. *In re Kenval Marketing Corp.*, 84 B.R. 32, 33-34 (Bankr.E.D.Pa.1988).

[8][9] Since this court did not appoint the receiver, this court would not be in a position to approve the receiver's retention of counsel to act on his behalf. The absence of a state court order authorizing the receiver to retain counsel is not fatal to an award for legal services because 11 U.S.C. § 503(b)(3)(E) does not state that the actual, necessary legal expenses of the superseded custodian or receiver must have been incurred with the prior approval of the state court which appointed the custodian or receiver. The amount of such legal expenses must be determined by this court in accordance with the standard expressed in 11 U.S.C. § 503(b)(4), namely, reasonable compensation "based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title, and reimbursement for actual, necessary expenses incurred by such attorney...."

[10] The fact that the debtor disputes the claim of the mortgagee, Cado Capital, and the validity of the mortgage which was the subject of the state court foreclosure action does not mean that the state court receiver should not be compensated. The receiver was validly appointed by an order of the New York Supreme Court, performed his services and properly incurred expenses in the performance of his duties. There has been no determination that the mortgage is invalid or that the mortgage foreclosure proceeding was not properly commenced in the state court. Accordingly, the receiver is entitled to be compensated in accordance with 11 U.S.C. §§ 543(c)(2) and 503(b)(3)(E).

[11][12] That the order appointing the receiver did

not expressly authorize the receiver to retain counsel is not conclusive for purposes of compensation under the Bankruptcy Code. The order authorized the receiver in no uncertain terms to commence "all legal proceedings necessary for the protection of said premises," including "suits for the collection of rents" and "summary proceedings for the removal of any tenant" for nonpayment of rent. Manifestly, legal services and counsel were contemplated under the order. The receiver acted in accordance with the terms of the order and retained counsel for these purposes.\*705 Additionally, 11 U.S.C. § 543(b)(2) directs the superseded custodian to file an accounting for property and rent that came under the custodian's control. After being superseded, the custodian is entitled to apply to the bankruptcy court pursuant to 11 U.S.C. § 543(c)(2) for reasonable compensation for services rendered and costs and expenses incurred, including legal fees reasonably incurred in connection with the custodian's services. Reasonable compensation for legal services for a superseded custodian is determined in accordance with standards prescribed under the Bankruptcy Code, and "based on the time, nature, the extent and the value of such services, and the cost of comparable services other than in a case under [the Bankruptcy Code]." 11 U.S.C. § 503(b)(4). Moreover, the Bankruptcy Code contemplates that additional legal services will be incurred in preparing the custodian's application for payment in accordance with the standards required under the Code. Hence, instead of having his counsel who were knowledgeable in landlord-tenant law prepare his application for payment, the receiver retained Denise L. Savage, Esq. for this purpose because she specializes in bankruptcy matters. She billed for her bankruptcy services at the same rate as co-counsel Druckman and Raphan, Esqs., but presumably Ms. Savage expended less time in performing her services because of her expertise in bankruptcy proceedings. The debtor's objection that Ms. Savage was not authorized by this court to receive compensation for legal services for the receiver is unpersuasive because neither the receiver nor his counsel were appointed by this court. The receiver

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 (Cite as: 130 B.R. 700)

is entitled to compensation for properly incurred expenses notwithstanding that there was no previous authorization by this court because 11 U.S.C. §§ 543(c)(2) and 503(b)(3)(E) do not require such prior authorization.

[13][14][15] In light of the foregoing, and considering the amount of funds **received** and distributed by the state court-appointed **receiver**, Brian A. Raphan is entitled to be compensated in the sum of \$1,100.00 for his services, together with out-of-pocket costs of \$364.00. The legal expenses which he incurred, as reflected in the application of Druckman & Raphan, Esqs. in the sum of \$4,141.66 and Denise L. Savage, Esq. in the sum of \$2,135.00 and \$40.00 out-of-pocket costs, are allowed as fair and reasonable compensation for their services.

Bkrtey.S.D.N.Y.,1991.  
 In re Snergy Properties, Inc.  
 130 B.R. 700

END OF DOCUMENT

#### CONCLUSIONS OF LAW

1. This court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 157(a). This is a core proceeding in accordance with 28 U.S.C. § 157(b)(2)(A) and (B).

2. The state court **receiver**, Brian A. Raphan, is entitled to compensation as a first priority administrative expense in accordance with 11 U.S.C. §§ 543(c)(2) and 503(b)(3)(E) in the sum of \$1,100.00, together with out-of-pocket costs of \$364.00.

3. The state court **receiver** is entitled to be compensated for his legal expenses in accordance with 11 U.S.C. §§ 543(c)(2) and 503(b)(3)(E) in the amount of \$4,141.66 for the services of Druckman & Raphan, Esqs. and \$2,135.00 for the services of Denise L. Savage, together with costs of \$40.00, which legal expenses are fair and reasonable and satisfy the requirements delineated under 11 U.S.C. § 503(b)(4).

SETTLE ORDER in accordance with the foregoing, which shall authorize the receiver to turn over the premises in question and the property of the estate to the debtor in accordance with 11 U.S.C. § 543.

Exhibit "E"

4 of 4 DOCUMENTS

Caution  
As of: Apr 30, 2010

**In re 245 ASSOCIATES, LLC, Debtor.**

**Chapter 11, Case No. 95-B-41698 (SMB)**

**UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT  
OF NEW YORK**

*188 B.R. 743; 1995 Bankr. LEXIS 1616; Bankr. L. Rep. (CCH) P76,822; 34 Collier  
Bankr. Cas. 2d (MB) 866*

**November 6, 1995, Decided  
November 6, 1995, FILED, DOCKETED**

**SUBSEQUENT HISTORY:**     [\*\*1] As Amended  
November 8, 1995.

**COUNSEL:** ROSENMAN & COLIN, LLP, Attorneys  
for Debtor, New York, New York, David J. Mark, Esq.,  
Of Counsel.

SEIDEN, STEMPEL & BENNETT, Attorneys for  
Steven Klein, New York, New York, Richard L. Claman,  
Esq., Of Counsel.

BACKENROTH & GROSSMAN, LLP, Attorneys for  
245 Seventh Avenue Associates, LLC, New York, New  
York, Robert E. Grossman, Esq., Mark A. Frankel, Esq.,  
Of Counsel.

**JUDGES:** STUART M. BERNSTEIN, United States  
Bankruptcy Judge

**OPINION BY:** STUART M. BERNSTEIN

**OPINION**

[\*746] **MEMORANDUM DECISION AND ORDER  
DENYING RECEIVER'S APPLICATION FOR  
AUTHORIZATION TO RETAIN COUNSEL**

**STUART M. BERNSTEIN**

**United States Bankruptcy Judge**

The Applicant, Steven Klein, is the state court-appointed receiver of the debtor's real property whom we briefly continued in possession under 11 U.S.C. § 543(d)(1). The law firm of Seiden, Stempel & Bennett (the "Firm") represented him in connection with the receivership, but Klein delayed in asking for bankruptcy court approval of that retention. He now seeks to cure this omission by asking for approval of the retention *nunc pro tunc* to an earlier date.

Klein's application presents two issues: (1) must the receiver, [\*\*2] continued in possession by the bankruptcy court, obtain its authorization to retain an attorney, and if he must, (2) can the court authorize the retention *nunc pro tunc*. For the reasons that follow, we conclude that Klein required a prior court order to retain counsel, but he can cure his prior failure through a *nunc pro tunc* retention order. The current application, however, suffers several deficiencies which he must cure. We grant him leave to file a new application, but because we have already confirmed a plan and Klein's legal fees and expenses will be administrative [\*747] claims, he must submit his revised application within fifteen days of this order.

**FACTS**

On April 18, 1995, 245 Seventh Avenue Associates, LLC ("Associates") commenced this case by filing an involuntary chapter 7 petition against the debtor. The debtor thereafter converted the case to a chapter 11, and the Court entered an order for relief on May 22, 1995.

On the commencement date, Klein was acting as receiver of the debtor's sole asset--a building located at 245 Seventh Avenue--pursuant to a prior state court order entered in the foreclosure proceeding that the debtor's mortgagee, East New York Savings [\*\*3] Bank, had instituted. The bank subsequently assigned the note and mortgage to Associates who, apparently preferring the bankruptcy court forum, filed the involuntary case.

Following the commencement of the case, Klein failed to surrender possession or turn over any property to the debtor. Consequently, on June 9, 1995, the debtor moved for an order under 11 U.S.C. § 543<sup>1</sup> to compel Klein to turn over the debtor's property and file an accounting. Associates objected, and moved on June 19, 1995, *inter alia*, for an order under 11 U.S.C. § 543(d)(1) to continue the receivership and excuse compliance with the receiver's duty to turn over and account. After hearing the parties on June 21, 1995, the Court continued the receivership pending an evidentiary hearing scheduled to begin on July 25, 1995.

<sup>1</sup> Section 543 provides, in pertinent part, as follows:

(a) A custodian with knowledge of the commencement of a case under this title concerning the debtor may not make any disbursement from, or take any action in the administration of, property of the debtor, proceeds, product, offspring, rents, or profits of such property, or property of the estate, in the possession, custody, or control of such custodian, except such action as is necessary to preserve such property.

(b) A custodian shall -

(1) deliver to the trustee any property of the debtor held by or transferred to such custodian, or proceeds, product, offspring, rents, or profits of such property, that is in such custodian's possession, custody, or control on the date that

such custodian acquires knowledge of the commencement of the case; and

(2) file an accounting of any property of the debtor, or proceeds, product, offspring, rents, or profits of such property that, at any time, came into the possession, custody, or control of such custodian.

(c) The court, after notice and a hearing, shall -  
....

(2) provide for the payment of reasonable compensation for services rendered and costs and expenses incurred by such custodian. . . .

(d) After notice and hearing, the bankruptcy court

(1) may excuse compliance with subsection (a), (b), or (c) of this section if the interests of creditors and, if the debtor is not insolvent, of equity security holders would be better served by permitting a custodian to continue in possession, custody, or control of such property. . . .

[\*\*4] The Court commenced but did not complete the evidentiary proceeding on that day, and adjourned it to August 14, 1995. On the adjourned date, the debtor and Associates announced a consensual protocol for dealing with the reorganization and the termination of the receivership. The parties memorialized their agreement in a September 6, 1995 stipulation, which provided, *inter alia*, that Klein should turn over the estate's property to the debtor, and file his accounting.

In the meantime, on or about August 23, 1995, Klein

submitted an application to retain the Firm as his attorneys, *nunc pro tunc* to May 22, 1995.<sup>2</sup> The Firm had represented Klein in connection with the receivership, and had appeared on his behalf in the bankruptcy court. The proposed scope of the retention included landlord-tenant and related matters but was broad enough to reach virtually any matter affecting the receivership. The debtor objected to the *nunc pro tunc* aspect of the proposed retention.

2 Klein contends that he took this action as the result of a suggestion that we made at a July 16, 1995 hearing. July 16 fell on a Sunday, and Klein probably means July 19 at which time we heard the debtor's motion to prevent Klein from terminating certain tenancies.

#### [\*\*5] DISCUSSION

##### A. Effect of Bankruptcy on Receiverships

The issues require that we first parse the rules governing the receiver's [\*748] duties once bankruptcy ensues, and his corresponding right to recover his attorney's fees and expenses. State court receivers are "custodians" within the meaning of the Bankruptcy Code. *11 U.S.C. § 101(11)(A)*; accord *In re Snergy Properties, Inc.*, 130 Bankr. 700, 703 (Bankr. S.D.N.Y. 1991); *In re Posadas Assocs.*, 127 Bankr. 278, 280 n.6 (Bankr. D.N.M. 1991). Ordinarily, the commencement of the case "supersedes" the custodianship. Once the receiver becomes aware of the filing of the petition, including an involuntary petition,<sup>3</sup> he cannot make any further disbursements or take any action except to do what is necessary to preserve the property, *11 U.S.C. § 543(a)*; he must deliver to the trustee any property of the debtor, *11 U.S.C. § 543(b)(1)*; and he must file an accounting, *11 U.S.C. § 543(b)(2)*; *Fed. R. Bankr. P. 6002(a)*.

3 The filing of a petition--whether voluntary or involuntary--commences a case under the Bankruptcy Code. See *11 U.S.C. § 301* (voluntary petition); § 302(a) (joint petition); § 303(b) (involuntary petition)

[\*\*6] Several Bankruptcy Code provisions authorize the Court to compensate and reimburse the superseded custodian for certain prepetition and post-petition services. *Section 503(b)(3)(E)*<sup>4</sup> grants the superseded receiver an administrative claim for his actual, necessary costs and expenses, and for his compensation, and *section 503(b)(4)*<sup>5</sup> covers the reasonable compensation payable to the superseded custodian's attorney or accountant. *Section 503(b)(3)(E)* (and hence, *section 504(b)(4)*) does not distinguish

between pre-petition and post-petition services, but its legislative history explains that it is confined to the former, codifying the common law rule that accorded a priority to the services rendered by a pre-petition custodian to the extent those services actually benefitted the estate. 124 Cong. Rec. H 11,094-95 (daily ed. Sept. 28, 1978) (remarks of Rep. Edwards); 124 Cong. Rec. S 17,411 (daily ed. Oct. 6, 1978) (remarks of Sen. DeConcini); see, e.g., *In re American Motor Club, Inc.*, 125 Bankr. 79, 81-82 (Bankr. E.D.N.Y. 1991); *In re Kenval Mktg. Corp.*, 84 Bankr. 32, 35 (Bankr. E.D. Pa. 1988); *In re Jensen-Farley Pictures, Inc.*, 47 Bankr. 557, 589 (Bankr. D. Utah 1985); *In [\*\*7] re North Port Dev. Co.*, 36 Bankr. 19, 21 (Bankr. E.D. Mo. 1983). But see *In re Posadas*, 127 Bankr. at 281 (holding that *sections 503(b)(3)(E)* and *503(b)(4)* also grant administrative status to the "winding up" costs and expenses allowable under *section 543(c)(2)*).

4 *Section 503(b)(3)(E)* provides an administrative priority for the following:

(3) the actual, necessary expenses, other than compensation and reimbursement specified in paragraph (4) of this subsection, incurred by--

....

(E) a custodian superseded under *section 543* of this title, and compensation for the services of such custodian. . . .

5 *Section 503(b)(4)* creates an administrative claim for the following:

reasonable compensation for professional services rendered by an attorney or an accountant of an entity whose expense is allowable under paragraph (3) of this subsection, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title, and reimbursement for actual, necessary expenses incurred by such attorney or accountant. . . .

[\*\*8] Section 543(c)(2) deals with certain of the receiver's post-petition services. It directs the court to "provide for the payment of reasonable compensation for services rendered and costs and expenses incurred by such custodian," but this subsection is limited to the "winding up" duties imposed under sections 543(a) and (b). *In re Posadas Assocs.*, 127 Bankr. at 281-82; *In re Kenval Mktg. Corp.*, 84 Bankr. at 34 n.2. Accordingly, the superseded receiver need not obtain a retention order for the lawyer that assists him in performing these duties. See, e.g., *In re Snergy Properties, Inc.*, 130 Bankr. at 704-05; *In re Posadas Assocs.*, 127 Bankr. at 281-82.

While the commencement of the case ordinarily supersedes the receivership, there is an exception to this rule. After notice and hearing, the court may continue the receivership, and relieve the receiver from the duty to comply with the turnover and accounting requirements of section 543(b), if this better serves the interests of the creditors (and the solvent debtor's equity [\*749] security holders). 11 U.S.C. § 543(d)(1). Section 543(d)(1) is a modified abstention provision that reinforces the policies set forth in 11 U.S.C. § 305. [\*\*9] *Dill v. Dime Sav. Bank, FSB (In re Dill)*, 163 Bankr. 221, 225 (E.D.N.Y. 1994); *In re Constable Plaza Assocs., L.P.*, 125 Bankr. 98, 103 (Bankr. S.D.N.Y. 1991); *In re Pine Lake Village Apartment Co.*, 17 Bankr. 829, 833 (Bankr. S.D.N.Y. 1982). The bankruptcy case, however, continues while the receiver remains in possession, and the debtor's property remains subject to the bankruptcy court's jurisdiction<sup>6</sup>. Thus, despite the continuation of the receivership, the debtor and, if exclusivity has ended, any party in interest can file a plan.

6 The commencement of the bankruptcy case vests the district court with exclusive jurisdiction over property of the debtor and the estate. 28 U.S.C. § 1334(e). By order dated July 10, 1984, the district court referred its bankruptcy jurisdiction to the bankruptcy court pursuant to 28 U.S.C. § 157(a).

Unlike the superseded receiver, where the receiver is continued, the Bankruptcy Code does not expressly provide for the reimbursement and compensation of the receiver [\*\*10] or his attorneys. *In re Posadas Assocs.*, 127 Bankr. at 280-81.<sup>7</sup> Nevertheless, continuation of the receivership surely implies that the receiver can recover his compensation, reimbursement for expenses and payment of his legal fees from the estate. The first question then is whether the continued receiver, like the trustee or the debtor-in-possession, must obtain a bankruptcy court order approving the retention of his attorney as a condition to the estate having to bear his

legal fees.

7 Although one might read section 543(c)(2) to encompass the expenses and fees of the continued receiver, the *Posadas* court rejected this interpretation. 127 Bankr. at 281. In addition, the construction of section 543 does not support it. Subsection (d)(1) authorizes the court to keep the receiver in possession and excuse compliance with subsections (a), (b) or (c). If section 543(c)(2) were meant to provide the basis for paying the continued receiver's legal fees and expenses, subsection (d)(1) would not have authorized the bankruptcy court to continue the receivership and also dispense with subsection (c)(2).

#### [\*\*11] B. Retention of Professionals Under the Bankruptcy Code

The Bankruptcy Code provides that the trustee and the official creditors' committee may employ a professional, including an attorney, with the bankruptcy court's approval. 11 U.S.C. §§ 327(a), 1103(a). Further, the bankruptcy court cannot award interim or final compensation unless it has authorized the attorney's employment under sections 327 or 1103. The bankruptcy court must, therefore, formally approve an attorney's retention prior to the time that the attorney renders services compensable by the estate. *In re Robotics Resources R2, Inc.*, 117 Bankr. 61, 62 (Bankr. D. Conn. 1990); *In re Brown*, 40 Bankr. 728, 730 (Bankr. D. Conn. 1984); *In re Sapolin Paints Inc.*, 38 Bankr. 807, 817 (Bankr. E.D.N.Y. 1984).

In the Second Circuit, this represents a *per se* rule, and forbids allowing compensation to any professional for services rendered prior to the attorney's retention by an order of the bankruptcy court. See, e.g., *Futuronics Corp. v. Arutt, Nachamie & Benjamin (In re Futuronics Corp.)*, 655 F.2d 463, 469 (2d Cir. 1981), cert. denied, 455 U.S. 941, 102 S. Ct. 1435, 71 L. Ed. 2d 653 (1982); *Smith v. Winthrop, Stimson*, [\*\*12] *Putnam & Roberts (In re Sapphire Steamship Lines, Inc.)*, 509 F.2d 1242, 1245-46 (2d Cir. 1975); *In re Progress Lektro Shave Corp.*, 117 F.2d 602, 604 (2d Cir. 1941); *In re Rogers-Pyatt Shellac Co.*, 51 F.2d 988, 991 (2d Cir. 1931); *In re Robotics Resources R2, Inc.*, 117 Bankr. at 62; *In re French*, 111 Bankr. 391, 394 (Bankr. N.D.N.Y. 1989); *In re Northeast Dairy Coop. Fed'n, Inc.*, 74 Bankr. 149, 154 (Bankr. N.D.N.Y. 1987); *In re Brown*, 40 Bankr. at 731.

Two reasons justify the *per se* rule. First, it discourages volunteer services. *In re Eureka*

*Upholstering Co.*, 48 F.2d 95, 96 (2d Cir. 1931); *In re Northeast Dairy Coop. Fed'n, Inc.*, 74 Bankr. at 154; *In re Carolina Sales Corp.*, 45 Bankr. 750, 752 (Bankr. E.D.N.C. 1985); *In re Sapolin Paints Inc.*, 38 Bankr. at 817. Second, it enables the court to review attorneys' potentially disqualifying conflicts or relationships "unaffected by the emotional pressure which inevitably arises in [\*750] their favor after the services have been rendered." *In re Rogers-Pyatt Shellac Co.*, 51 F.2d 988, 992 (2d Cir. 1931); accord; *In re Northeast Dairy Coop. Fed'n, Inc.*, 74 Bankr. at 154. While the worry over an intermeddler [\*\*13] rendering voluntary services is an important one, we are confident that we can deal with the issue of unnecessary services when we consider the attorney's fee application. The prospect of an attorney, tainted by conflict, representing a fiduciary of the estate causes us greater concern, but it is one that the Bankruptcy Code and Rules directly address.

The Bankruptcy Code permits the trustee or the creditors' committee to retain an attorney only if the attorney neither holds nor represents an adverse interest. 11 U.S.C. §§ 327(a), 1103(b).<sup>8</sup> Bankruptcy Rule 2014 uncovers potential conflicts by requiring every application for professional retention to state, among other things, any connection that the professional has with the debtor, any creditor or other party in interest, their respective attorneys and accountants, the United States Trustee and anyone that the latter office employs. In addition, the professional must submit a sworn statement providing this same information. Thus, both the applicant (e.g., the debtor) and the professional (e.g., the attorney) must separately certify that no disqualifying connections exist.

8 In addition, section 327(a) requires that the trustee's professionals must be disinterested.

[\*\*14] Bankruptcy Rule 2014 is designed to expose any connections that the professional has with any parties in interest in the case, *In re Futuronics Corp.*, 655 F.2d at 469 (interpreting former Bankruptcy Rule 215), and to ensure that professionals "tender undivided loyalty and provide untainted advice and assistance in furtherance of their fiduciary responsibilities." *In re Leslie Fay Cos.*, 175 Bankr. 525, 532 (Bankr. S.D.N.Y. 1994) (quoting *Rome v. Braunstein*, 19 F.3d 54, 58 (1st Cir. 1994)). To ensure that this disclosure is made, applicants and their professionals must strictly comply with Rule 2014, and the failure to disclose all connections provides a basis to disallow fees and even disqualify the professional. *Rome v. Braunstein*, 19 F.3d at 59-60; *In re Arlan's Dep't Stores, Inc.*, 615 F.2d 925, 933 (2d Cir. 1979) (decided under former Bankruptcy Rule 215); *In re Leslie Fay Cos.*, 175 Bankr. at 533.

The two courts that have considered this issue have concluded that the receiver who remains in possession must follow the procedures set forth in section 327, and obtain a bankruptcy court order approving the attorney's retention. *In re Uno Broadcasting [\*\*15] Corp.*, 167 Bankr. 189, 201 (Bankr. D. Ariz. 1994); *In re Posadas Assocs.*, 127 Bankr. at 281. Once the bankruptcy court continues the receivership under section 543(d)(1), the receiver becomes the functional equivalent of a trustee, *In re Uno Broadcasting Corp.*, 167 Bankr. at 201, and owes a trustee's fiduciary duties to all creditors, and assuming solvency, to the debtor's equity security holders. *Id.*; *In re Posadas Assocs.*, 127 Bankr. at 281.

We agree with this reasoning. The creditors and equity security holders are entitled to the same safeguards that we demand from trustees. A receiver's attorney with divided loyalties, or worse, poses as great a danger to the creditors and the estate as does the trustee's attorney with the same disqualifying relationships. The continued receiver and his professional must, therefore, disclose all connections and relationships required under Bankruptcy Rule 2014 to ensure that he and his professionals can fulfill the fiduciary responsibilities that the law imposes.

### C. Nunc Pro Tunc Retention

The attorney who renders services without an order of retention has only one chance for compensation: *nunc pro tunc* retention. In this, [\*\*16] the attorney faces a difficult hurdle. *Nunc pro tunc* retention circumvents the *per se* rule. Consequently, "as a general rule, the Second Circuit prohibits *nunc pro tunc* retention orders," *In re Corbi*, 149 Bankr. 325, 333 (Bankr. E.D.N.Y. 1993); see *In re Rundlett*, 137 Bankr. 144, 146 (Bankr. S.D.N.Y. 1992), unless the attorney's belated disclosure does not reveal any disqualifying connection with the case, and the attorney demonstrates "excusable neglect" or "unavoidable [\*751] hardship." See *In re Rogers-Pyatt Shellac Co.*, 51 F.2d at 992; *In re Rundlett*, 137 Bankr. at 146; *In re Robotics Resources R2, Inc.*, 117 Bankr. at 62; *In re French*, 111 Bankr. at 394; *In re Northeast Dairy Coop. Fed'n, Inc.*, 74 Bankr. at 155; *In re Brown*, 40 Bankr. at 731.

In the past, the courts have applied these exceptions strictly, wary of any attempt to avoid the *per se* rule. Mere ordinary negligence did not suffice as "excusable neglect," *In re Brown*, 40 Bankr. at 732, and by the same token, neglect also rendered any "hardship" avoidable. See *In re Rogers-Pyatt Shellac Co.*, 51 F.2d at 992. Instead, the professional had to show that the failure to submit an earlier application [\*\*17] was due to circumstances beyond its control. *In re Resources R2 Inc.*, 117 Bankr. at 62; *In re French*, 111 Bankr. at 394;

*In re Northeast Dairy Coop. Fed'n, Inc.*, 74 Bankr. at 155; *In re Brown*, 40 Bankr. at 731-32. Under this test, courts refused to relieve professionals from the harsh results of the *per se* rule because they were ignorant of the retention requirements, *In re Northeast Dairy Coop. Fed'n, Inc.*, 74 Bankr. at 155; *In re Carolina Sales Corp.*, 45 Bankr. at 755; or even though they had openly participated in the case with the knowledge of the court, *In re Rundlett*, 137 Bankr. at 146; see *In re Eureka Upholstering Co.*, 48 F.2d at 95; or despite the fact that through their services, they had conferred substantial benefits on the estate. *In re Sapphire Steamship Lines, Inc.*, 509 F.2d at 1246.

The Supreme Court's decision in *Pioneer Investment Services Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380, 123 L. Ed. 2d 74, 113 S. Ct. 1489 (1993), however, casts doubt on the results reached in these cases. In *Pioneer*, the Supreme Court construed the phrase "excusable neglect" as it is used in *Bankruptcy Rule 9006(b)(1)* and concerned the filing of late [\*18] claims. The Court expanded the definition of "excusable neglect" beyond the traditional formulation of "intervening circumstances beyond the party's control," and held that it also included "inadvertence, mistake, or carelessness." 113 S. Ct. at 1495.<sup>9</sup> Ultimately, the Court stated, the determination is an equitable one that takes account of all of the surrounding circumstances:

These include. . .the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

*Id.* at 1498.

9 The Court distinguished between inadvertence, mistakes and ignorance in construing rules--which do not usually constitute "excusable" neglect--and the same conduct under *Rule 6(b) of the Federal Rules of Civil Procedure*, dealing with the enlargement of time within which to perform certain acts, which does. 113 S. Ct. at 1496.

We recognize [\*19] that the extension of *Pioneer* to *nunc pro tunc* employment applications does not automatically follow. Different considerations underlie the requirements for timely retention applications and timely claims. Further, since *Pioneer*, the courts have split on whether its standard of "excusable neglect" applies to *nunc pro tunc* retention applications. Compare

*In re Singson*, 41 F.3d 316, 319-20 (7th Cir. 1994) (upholding the application of *Bankruptcy Rule 9006(b)(1)* and the *Pioneer* standard for "excusable neglect" to *nunc pro tunc* retention applications, but concluding that the applicant had failed to demonstrate "excusable neglect") and *In re Urban Broadcasting of St. Louis, Inc.*, 174 Bankr. 441, 448-49 (E.D. La. 1994) (upholding the bankruptcy court's adoption of *Pioneer's* standard for "excusable neglect") with *In re Franklin Sav. Corp.*, 181 Bankr. 88, 89 (Bankr. D. Kan. 1995) (*Pioneer* does not apply to the "extraordinary circumstances" standard governing *nunc pro tunc* retention applications) and *In re Berman*, 167 Bankr. 323, 324 (Bankr. D. Mass. 1994) (*Pioneer* and *Bankruptcy Rule 9006(b)(1)* do not apply to *nunc pro tunc* retention applications [\*20] which require a showing of "extraordinary circumstances").

On balance, however, we conclude that the *Pioneer* standard should apply to *nunc pro tunc* employment applications. Late applications and late claims are sufficiently analogous to support judging *nunc pro tunc* retention requests under the *Pioneer* criteria. [\*752] See *In re In re Singson*, 41 F.3d at 319-20 (*nunc pro tunc* applications are governed by *Bankruptcy Rule 9006(b)(1)*). More important, the courts in this circuit have adopted an "excusable neglect" standard rather than the "extraordinary circumstance" test discussed by the *Franklin Savings* and *Berman* courts that declined to extend *Pioneer*. As a result, we do not feel compelled to follow the prior decisions in this and other circuits which applied a different and more rigorous definition of "excusable neglect," and hold that we can authorize a *nunc pro tunc* application if a sufficient application is filed which does not reveal a disqualifying connection, and demonstrates "excusable neglect" under the *Pioneer* test.

## D. The Application to Retain the Firm

### 1. Compliance with Disclosure Requirements

The application to retain [\*21] the Firm is materially deficient, and must be redone. It states that to the best of Klein's knowledge, the Firm does not represent any interest adverse to Klein or the estate, and the Firm's employment would be in the best interests of the estate. The application fails, however, to disclose the Firm's connections, or affirmatively state that the Firm has no connections, with the debtor, the creditors or other parties in interest, their attorneys or accountants or the United States Trustee or any employees in that office, and we are not prepared to infer that no conflicts exist.

The Firm's supporting affidavit, sworn to on August

23, 1995, by Richard L. Claman, although slightly more revealing, still mirrors many of these deficiencies. Mr. Claman states that as far as he can ascertain, neither the Firm nor any of its members, counsel or associates have any connection with the debtor or any other party in interest (which we read to include creditors). He makes no statements regarding any connection with the attorneys and accountants representing these parties, the United States Trustee or any of the employees in that office, and once again, we will not infer that none exist.

The application [\*\*22] also ignores Local Bankruptcy Rule 39 which states:

An order fixing the terms and conditions of employment of a professional person pursuant to section 328 of the Code shall be made only on an application stating the specific facts showing the reasonableness of the terms and conditions, including the terms of any retainer, hourly fee, or contingent fee arrangement.

The Klein application and Claman affidavit, read together, merely say that Klein has agreed to compensate the Firm at its usual hourly rates, but not what those rates are. Further, the proposed retention order suggests that Klein intends to pay the Firm upon the submission of bills without further application to the Court. The Firm must, however, apply to the Court for approval of its fees and expenses before Klein can pay it anything.

## 2. "Excusable Neglect"

We suspect that Klein and the Firm may be able to cure these deficiencies. Consequently, and to avoid later litigation, we will consider whether Klein's failure to apply for retention at an earlier time was the result of "excusable neglect." In his undated Reply filed on October 17, 1995, Klein offers the following reasons: (1) citing *In re Snergy Properties, Inc.*, 130 Bankr. 700 (Bankr. S.D.N.Y. 1991), he thought that it was unnecessary to apply because his expenses and attorneys fees were administrative expenses; (2) he believed that he had properly retained counsel under his "state court" powers, and made the application only because the Court suggested that he do so at a July 16, 1995 [sic] hearing; and (3) additional motion practice seemed unnecessary because the duration of the receivership appeared indefinite and the issue was "collateral" to the main dispute between the debtor and Associates who were already engaged in litigation.

The reason for the delay in submitting the retention

application weighs in favor of finding "excusable neglect" in light of the unsettled nature of the law governing the receiver's compensation. At the outset, we contrast the present situation with that of a trustee or creditors' committee seeking a [\*753] *nunc pro tunc* order based upon a confusion regarding the law. The Bankruptcy Code unquestionably requires that they obtain prior court approval to retain an attorney, and a claim of ignorance or confusion would ring hollow.

In comparison, the retention requirement for the continued receiver's attorney [\*\*24] is confusing and unclear. There are few cases that address the requirement, the Bankruptcy Code does not expressly require it, and some provisions of the Bankruptcy Code arguably authorize the Court to compensate the continued receiver's attorneys without prior approval of their retention. Although *Snergy Properties, Inc.*--the case Klein relied on--dealt with a superseded receiver, the distinction may seem subtle to the non-bankruptcy practitioner and the rules governing receiver compensation are already sufficiently confusing.

In addition, Klein moved expeditiously to retain the Firm after we suggested that he do so. It is true that Klein waited over four weeks between our July 19 "suggestion" and his August 23, 1995. Nevertheless, Klein was drawn into the parties' litigation, participating with his lawyer's aid as a witness at the July 25, 1995 hearing, and submitted his application within nine days after the litigation was resolved consensually.

Most important, the debtor does not suffer any prejudice. *See In re Eagle Bus Mfg., Inc.*, 62 F.3d 730, 737 (5th Cir. 1995) ("Under *Pioneer*, the central inquiry is whether the debtor will be prejudiced."). We have already confirmed [\*\*25] the plan proposed by Associates which contemplates a sale of the property, and requires that Associates pay all of the priority and unsecured claims. Absent the unlikely event that the sale generates proceeds in excess of Associates' claim,<sup>10</sup> Associates will pay the other claims from its own funds.<sup>11</sup> Whether we allow or disallow Klein's and the Firm's fees and expenses, the debtor's principals will not receive any distribution on account of their interests, and there will be no property of the estate to vest in the debtor following confirmation. *See 11 U.S.C. § 1141(b)*.

<sup>10</sup> In the course of this case, we received evidence showing that Associates' claim exceeded, by a substantial amount, the value of the debtor's property that secured it.

<sup>11</sup> We confirmed the plan on the condition, imposed under *Fed. R. Bankr. P. 3020(a)*, that Associates deposit the amounts necessary to pay

these claims and cover the costs of sale.

We conclude, therefore, that Klein (and the Firm) have satisfied the "excusable [\*\*26] neglect" standard, although they must still satisfy the disclosure requirements under the federal and local bankruptcy rules. One final question, however, still remains: how far back can the retention relate. On this issue, we hold that the Firm's *nunc pro tunc* retention cannot relate back to the period before June 21, 1995, when we issued an oral direction to continue Klein in possession pending the outcome of the evidentiary hearing.

Prior to that date, Klein continued to possess and administer the debtor's property in violation of the law. We recognize that *Section 543* does not say when the receiver must turn over the property, *In re Watkins*, 63 *Bankr.* 46, 48 (*Bankr. D. Colo.* 1986), but the receiver must do so promptly. Once the receiver learns about the commencement of the case, he becomes a caretaker authorized to spend only to preserve the estate. If he does not turn over the property promptly and thwarts the debtor's right to control it, he prevents the debtor from administering its property for the benefit of the estate and with a view toward reorganization.

The responsibility for the failure to take prompt action should fall on Klein and the Firm, because Klein (or [\*\*27] Associates) could have taken steps to avoid it.

Had either filed a *timely* motion under *11 U.S.C. § 543(d)(1)* and sought an expedited hearing, Klein could have remained in possession pending the resolution of the motion. *In re Watkins*, 63 *Bankr.* at 48. Alternatively, Associates or Klein could have moved expeditiously by order to show cause, and asked for a temporary stay of the duty to comply with *section 543* pending a resolution of the motion. Instead, they did nothing, leaving Klein in a violation of the unambiguous requirements of *section 543(a)* and *(b)*. We decline to exercise our equitable powers to compensate [\*754] Klein or the Firm for the legal fees and expenses incurred during this period.

#### CONCLUSION

We deny the application to retain the Firm without prejudice, to the extent that Klein is granted leave to file a new application, within fifteen days of this order, which relates back no further than June 21, 1995.

SO ORDERED

Dated: New York, New York

November 6, 1995

STUART M. BERNSTEIN

United States Bankruptcy Judge