

**Department of Justice**  
**Executive Office for United States Trustees**

**Final Agency Action**  
**Case No. 01-0001**

**Review of the Decision of the**  
**United States Trustee for [Redacted]**  
**Regarding [Redacted]**

[Redacted] (“the trustee”), a member of the chapter 7 panel for the United States Bankruptcy Court for the [redacted] since May 8, 1988, seeks review under 28 C.F.R. § 58.6 of a decision by the United States Trustee to not reappoint him to the panel of trustees upon the expiration of his current one-year term. I affirm the United States Trustee’s decision based upon the record before me.<sup>1</sup>

**Course of this Proceeding**

The United States Trustee commenced a regularly scheduled annual Trustee Performance Review (“Performance Review”) of the trustee for the period of July 1, 1999 to June 30, 2000. The annual Performance Review is designed to review a trustee’s competency, adherence to fiduciary standards, and commitment to pursue assets for the benefit of creditors. See 1998 Handbook for Chapter 7 Trustees at 2-3. On November 30, 2000, a Performance Review was issued to the trustee with a Notice of Non-Renewal of Appointment (“Notice”), which concluded that the trustee’s case administration practices and administrative functions were unacceptable and that the trustee failed to exercise proper fiduciary and professional standards. Based upon these conclusions, and the trustee’s failure to adequately address deficiencies in prior performance reviews and on other correspondence and reports, the United States Trustee notified the trustee of his decision not to reappoint the trustee upon the expiration of the latter’s term.

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<sup>1</sup>The record includes the United States Trustee’s Notice of Non-Renewal of Appointment dated November 30, 2000 (“Notice”), which contained the United States Trustee System Trustee Performance Review for the annual evaluation period of July 1, 1999 to June 30, 2000; the trustee’s Request for Review received on December 20, 2000 (“Request for Review”); the United States Trustee’s Response dated December 27, 2000 and received on January 3, 2001 (“UST Response”); all exhibits thereto attached or incorporated by reference; and additional documents requested by the trustee pursuant to 28 C.F.R. § 58.6(f) and provided by the United States Trustee (“Documents Pursuant to Request”).

The trustee timely filed his Request for Review with the Director of the Executive Office for United States Trustees. By separate letter dated December 17, 2000, the trustee requested additional documents in the possession of the United States Trustee to be transmitted to the Director for inclusion in the record pursuant to 28 C.F.R. § 58.6(f). On January 3, 2001, the United States Trustee timely submitted his UST Response with exhibits and included a separate binder titled “Documents Pursuant to Request,” containing additional documents requested by the trustee.

As a preliminary matter, the trustee states by letter dated January 17, 2001, that he has received no documentation to indicate that the United States Trustee has provided the additional documents that he requested pursuant to 29 C.F.R. § 58.6(f). The Documents Pursuant to Request were timely received and included in the record.

### **Standard of Review**

In conducting this review, the Director must consider two factors:

- (1) Did the United States Trustee’s decision constitute an appropriate exercise of discretion; and,
- (2) Was the United States Trustee’s decision supported by the record.

See 28 C.F.R. § 58.6(i) (specifying the scope of the Director’s review).

### **Analysis**

#### **I. THE DUTIES OF THE UNITED STATES TRUSTEE AND CASE TRUSTEE**

United States Trustees supervise panel trustees, 28 U.S.C. § 586(a)(1), and appoint them to individual chapter 7 cases. 11 U.S.C. § 701. United States Trustees carefully “monitor the performance of panel members . . . in order to determine whether they should be continued in or removed from panel membership.” H.R. Rep. No. 95-595, 95th Cong., 1<sup>st</sup> Sess. 102 (1977). Under the law, “[t]he United States trustee is permitted to conduct his own investigation . . . to exercise effective supervision and make an effective evaluation of the performance of the private trustees on the panel.” Id. at 110.

Trustees are fiduciaries with wide-ranging responsibilities to effectuate the goals of the particular chapter under which a bankruptcy case is filed. Because they are fiduciaries, trustees are held to very high standards of honesty and loyalty. See generally Woods v. City National Bank & Trust Co., 312 U.S. 262, 278 (1941); Mosser v. Darrow, 341 U.S. 267 (1951). See also Meinhard v. Salmon, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928) (Cardozo, C.J.).

## II. THE STATED REASONS SUPPORT TERMINATION OF THE TRUSTEE

In support of his decision not to reappoint the trustee, the United States Trustee listed in the Notice certain deficiencies from the Performance Review, including examples of the trustee's unacceptable case administration practices, failure to meet proper fiduciary or professional standards, and unacceptable administrative functions.

### A. The Performance Review deficiencies relied upon to support termination

The United States Trustee relied upon sixteen deficiencies from the Performance Review:

1. Failing to follow United States Trustee Policy not to administer over-encumbered properties which have no value to the estate, despite the United States Trustee's admonition to cease the practice.
2. Failing to secure court authorization to sell a chapter 13 debtor's one-half interest in real estate.
3. Improperly paying exemptions to debtors and a junior lien holder.
4. Improperly paying a claim to the State of [redacted], in violation of the priority status.
5. Failing to file an adversary proceeding within the statute of limitations period to avoid a judicial lien.
6. Failing to serve parties in interest at their known correct address or at all.
7. Failing to attach referenced documentation to the court-filed pleadings and the served copies of pleadings. (The omitted documentation would have revealed questionable information to the parties in interest.)
8. Using his position as trustee for additional personal gain over and above that contemplated in the Bankruptcy Code by contracting with and paying his own real estate title company from bankruptcy estates.
9. Failing to provide appropriate safeguards to prevent deposit of estate funds in the trustee's law firm's bank account.
10. Employing and requesting compensation for himself as attorney for trustee for functions normally performed by a trustee without the need for an attorney.
11. Filing pleadings which omit or mischaracterize relevant information needed for an informed decision by interested parties or the United States Trustee.

12. Making offensive remarks in Bankruptcy Court to other professionals.
13. Submitting high numbers of late no-asset or interim reports.
14. Failing to provide the United States Trustee with requested information.
15. Failing to notify the United States Trustee of an estate account in excess of \$100,000.
16. Failing to timely respond to the OIG Audit Report.

Notice 1-2; Performance Review passim. After reviewing the record as a whole, I conclude that it supports the decision of the United States Trustee. In particular, items 1, 3, 8, and 11 represent serious failings that justify the United States Trustee's action.<sup>2</sup>

1. *Failure to follow United States Trustee Policy not to administer over-encumbered properties which have no value to the estate, despite the United States Trustee's admonition to cease the practice.*

During the performance review period, the United States Trustee identified a number of cases in which the trustee administered fully secured property in which there was no possibility of benefit for unsecured creditors, in direct violation of the following United States Trustee policy:

A trustee should only sell assets that will generate sufficient proceeds to ensure a distribution to unsecured creditors, priority or general. In evaluating whether an asset has equity, the trustee must determine whether there are valid liens against the asset and whether the value of the asset exceeds the liens. The trustee may also consider whether the cost of administration or tax consequences of any sale would significantly erode or exhaust the estate's equity interest in the asset. If the sale of an asset would result in little or no equity for the estate for the benefit of unsecured creditors, the trustee should abandon the asset.

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<sup>2</sup>Because I have concluded that these four items support the decision not to reappoint the trustee to the panel at the expiration of his term, I need not address items 2, 4, 5, 6, 7, 9, 10, 12, 13, 14, 15, and 16.

A trustee should abandon any estate property that is burdensome or of inconsequential value to the estate. Property should be abandoned when the total amount to be realized would not result in a meaningful distribution to creditors or would rebound primarily to the benefit of the trustee and professionals.

1998 Handbook 8-2, 8-16. See 11 U.S.C. § 544(a). Abandonment enables the secured creditor to protect its security interest by exercising its rights under applicable state law and maximizes the distribution available for unsecured creditors.<sup>3</sup> While a trustee may sell fully secured property in limited circumstances, this practice should always be viewed as the exception rather than the rule. See In re Tobin, 202 B.R. 339, 341 (Bankr. D.R.I. 1996). A trustee should sell a debtor's property when "the sale proceeds will fully compensate secured lien holders and produce some equity for the benefit of the bankrupt's estate." In re Williamson, 94 B.R. 958, 963 (Bankr. S.D. Ohio 1988) quoting Matter of Riverside Investment Partnership, 674 F.2d 634, 640 (7<sup>th</sup> Cir. 1982). By contrast, the sale of fully secured property that nets no distribution to unsecured creditors, raises concern that the trustee may be acting primarily in his own financial interest rather than in the interest of the estate. In re Lambert Implement Co., Inc., 44 B.R. 860 (Bankr. W.D. Ky. 1984).

The United States Trustee found that in the trustee's applications for retention, motions, notices, and reports regarding the sale of real property, the trustee had a pattern of misstating or omitting certain information, including sale prices, equity values, mortgage balances, costs of sale, and costs of administration, which impeded the efforts of interested parties and the United States Trustee to make informed decisions. The following example illustrates the trustee's pattern of inadequate disclosures and practice of selling over-encumbered real estate that would net no benefit to the estate. In [P], Case No. [redacted], the debtors filed a chapter 7 petition on November 11, 1997 and the meeting of creditors was held on December 8, 1997. Exhibit [P 1]. On December 11, 1997, the trustee filed an application to retain himself as attorney for trustee to sell real property that he represented was valued at \$75,900, with \$20,700 in equity after deducting liens of \$45,200 and the debtors' exemption of \$10,000. Exhibit 3. The next day, on December 12, the trustee prepared a purchase contract with a sale price of \$69,900. On December 19, 1997, the trustee filed a motion to sell real estate free and clear of liens for \$69,900, subject to a mortgage in the amount of \$46,147.88. He acknowledged in the same motion that the "price has been reduced to . . . \$70,000 at time of filing." Exhibit 6. The closing statement attached to the motion indicated that after deducting the mortgage and costs of the sale, the trustee would receive \$17,573.65. Id. On February 4, 1998, the trustee filed a Trustee's Report of Sale indicating that the amount realized was further reduced to \$7,622.41. Request for Review 11; Exhibit [P 4].

On October 8, 1999, the trustee filed a "Final Report and Account of Trustee Application for Compensation and Reimbursement of Expenses, Claims Analysis, and Abandonments," seeking \$6,363.81 in trustee compensation and expenses and showing an additional \$1,069 in attorney for trustee fees. Exhibit [P 5]. The United States Trustee filed an objection to the trustee's section

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<sup>3</sup>A secured creditor also has the right to seek a lifting of the automatic stay, 11 U.S.C. § 362, and then employ its state law remedies to realize its security interest.

326 compensation and his application for compensation as attorney for the trustee. Exhibit 7; Exhibit [P 1].

The United States Trustee asserted that every figure on the trustee's application for employment was incorrect, which inflated the apparent equity, and that the trustee did not disclose the other costs of the sale that would decrease any amount to creditors. Performance Review 10; Exhibits 3- 4. Further, the United States Trustee determined that when all of the expenses were calculated (including \$10,800 for debtors' exemption, \$6,505 in trustee compensation calculated per section 326, and accrued attorney's fees of \$351), there would be no residual funds available for unsecured creditors, but, rather, a shortfall of \$83. *Id.* Exhibit 4. None of this information was readily apparent in the pleadings the trustee filed prior to the sale. *See* Exhibits 5-6.

In response, the trustee states that he relied on the debtors' disclosure at the creditor's meeting that their real estate was under contract for \$75,900 and their mortgage was \$44,936. He states that only after he agreed to complete the sale did he find that the purchase price was only \$69,900 and the mortgage was \$46,147.88. Request for Review at 10-11. Further, he states that no one objected to the Trustee's Motion to Sell and that the Trustee's Report of Sale indicated that the amount realized was \$7,622.41. *Id.* at 11; Exhibit [P 4]. After the United States Trustee objected to the trustee's compensation, the trustee agreed to a reduction of his fees and revised the Final Report to reflect a distribution to unsecured creditors. Request for Review 11; Exhibits [P 1, 16]. The case was closed on August 17, 2000.

As of December 11, 1997, when he filed his application to employ himself, or by December 12, when he prepared the purchase contract, the trustee knew or should have known that the sale would not produce any benefit to the unsecured creditors, but would instead only benefit the lien holders, debtors (by payment of exemption), and administrative claimants. Rather than rely on the debtors' representations, he should have made an independent inquiry to determine the sale price and amount of the mortgage. Moreover, the application to employ and the motion to sell both misstate or omit the relevant facts, including other expenses and costs of administration, to enable parties or the United States Trustee to reach an informed decision. It was not until October 1999, when the United States Trustee's office reviewed the trustee's Final Report and Account, that the United States Trustee became aware of the problems in this case.

The transaction in [P] is more troubling because it occurred several months after the United States Trustee objected to a similar no-equity sale by the trustee in [O], Case No. [redacted], on August 22, 1997. UST Response 2; Exhibits A-H. On November 23, 1998, the United States Trustee also objected to the trustee's section 326 compensation and application for compensation as attorney for the trustee in the [O] case. Exhibits A, [O 1]. In response, the trustee agreed to reduce his compensation, and an amended agreed order was entered on March 3, 1999. The [O] case was closed in September 1999. Exhibit A. Thus, the trustee was on notice when he administered the [P] case that it is the policy of the United States Trustee that fully encumbered property should not be administered, and yet he continued to violate the policy with impunity.

Another example of the trustee's inadequate disclosures and administration of fully secured real property in which there was no possibility of benefit for unsecured creditors is evident in [G], Case No. [redacted]. The debtors filed a chapter 7 case on December 18, 1996, listing real estate they valued at \$104,000 subject to a first mortgage of \$70,728, plus interest since March 1996, and a second mortgage of \$3,681. Exhibit [G 1-2]. On January 29, 1997, the trustee filed an application to retain himself as attorney for the trustee, indicating his intent to sell the property and using the scheduled values of the property and the first mortgage to suggest that equity existed in the property. Exhibit 51. The application did not disclose that this "equity" would be reduced by approximately \$26,000 in costs, including debtors' exemption, realtor fees, trustee compensation, and other costs of administration. See Id; Exhibit 53.

Less than two weeks later, on February 6, 1997, the first mortgage holder filed for relief from stay, claiming a balance due of \$76,660.25 plus interest from February 3, 1997, at 9.50% per annum. Exhibit 52. The trustee filed an objection to relief from stay asserting there was \$23,271 in equity and potential benefit to the estate. Exhibit 54. The objection understated the amount of the mortgage and ignored substantial unavoidable expenses known to the trustee. The only potential beneficiaries from the sale of the asset were the secured creditor, the debtor (by payment of exemption), and the professionals including the trustee.

Subsequently, on July 28, 1997, the trustee's motion to compromise and sell the property for \$102,900, understated the mortgage balance at \$83,000 and omitted the fact that administrative expenses would exceed the proceeds from the sale. The motion also stated that the debtors agreed to compromise their exemption to \$3,200. See Exhibit [G 3]. On September 17, 1997, the trustee filed a Report of Sale that indicated a net amount realized of \$4,388.51, after deducting \$92,337 for expenses of sale plus \$6,174 for a realtor's commission. Exhibit [G 5]. On June 1, 1999, the trustee filed his Final Report and Account requesting \$8,489.12 in compensation and expenses. Exhibit [G 6]. By letter dated July 21, 1999, the United States Trustee asked the trustee to voluntarily reduce his fees because the sale did not benefit unsecured creditors but only benefitted the secured creditor, debtors, and professionals. Documents Pursuant to Request, [G], 7/21/99 letter. Ultimately, there were insufficient funds to fully pay administrative expenses even after the debtors apparently agreed to take almost a \$7,000 reduction in the \$10,000 exemption to which they were entitled.<sup>4</sup> Notice 14-15; Request for Review 9-10; Exhibit [G 3]. The case was closed December 10, 1999.

The trustee responded that the costs increased due to delays in the sale because of disputes with secured creditors and states that he is uncertain why the United States Trustee is concerned with the reduction in the debtor's homestead exemption. The trustee's response does not address the underlying concern that he knew or should have known at least by February 6, 1997, when the first mortgage holder filed a motion for relief from stay, that there would be insufficient funds to pay administrative expenses. Documents Pursuant to Request, [G], 7/21/99 letter. Moreover, the United States Trustee is correct to be concerned about a reduction of the debtors' homestead

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<sup>4</sup> Under [redacted] law each individual debtor is entitled to a \$5,000 homestead exemption. [Redacted] Rev. Code § [redacted]. [Redacted] residents must use the state statutory exemptions rather than the federal exemptions found in the Bankruptcy Code. [Redacted].

exemption payment in this case. The Bankruptcy Code provides for exemptions to debtors and affords these exemptions priority over administrative expenses. It is entirely appropriate for the United States Trustee to ensure adherence to both the letter and spirit of this important entitlement, particularly when it is being compromised to pay for professional fees in the context of a non-beneficial sale. UST Response 3; See 11 U.S.C. § 522.

In all, I find, as did the United States Trustee, that the trustee's sales of over-encumbered real estate in these matters constituted grounds for the trustee's non-renewal of appointment.

2. *Improperly paying exemptions to debtors and a junior lien holder.*

During the review period, the United States Trustee identified a case, [H], Case No. [redacted], where the trustee did not disclose that he was settling a lawsuit in conjunction with the sale of over-encumbered real property, and then paid an exemption to the debtors who were not entitled to be paid. Debtors are allowed an exemption if there is equity in the property in excess of valid pre-petition consensual liens. In re Gregory, 229 B.R. 168, 170 (Bankr. N.D. Ohio 1999). A trustee should object to a claimed exemption if doing so would benefit the estate. Thus, when an improperly claimed exemption would remove assets from the estate that should be available for payment of creditor claims, the trustee should object. 1998 Handbook 8-2.

The debtors in [H] filed a chapter 7 case on July 16, 1996, listing as assets real property valued at \$80,000 subject to a lien of \$109,000, and a pending lawsuit of unknown value filed against their homebuilder/mortgagee. Exhibits [H 1-2]; Request for Review 3. In March 1997, the builder filed a Motion for Relief from Stay and the trustee objected. [H 1]. On May 5, 1997, the trustee filed a Motion to Compromise and Sell Property Free and Clear of Liens and Notice that did not mention that the sale involved a settlement of the lawsuit. Exhibits [H 1, 3-4]. This motion proposed to sell the real property to the builder, which held a lien in the amount of \$110,000, for a sale price of \$18,500. The motion also stated that the trustee would pay the debtors \$10,000 as their exemption and hold the remaining \$8,500. The debtors objected and the trustee filed a motion to strike the debtors' objection. On June 26, 1997, all the parties entered an agreed order to sell the property to the builder. Exhibits [H 1, 6-7]. The trustee's Report of Sale shows a sale price of \$18,500 with a net amount realized of \$7,843.71, after deducting \$10,000 for debtors exemption and \$656.29 for expenses of sale. Exhibit [H 8].

Two years later, on July 2, 1999, the trustee filed an application for compensation as counsel for trustee, requesting \$7,334.50 in attorney's fees. Exhibits [H 1, 10]. On July 30, 1999, the trustee filed a Final Report and Account and Application for Compensation and Reimbursement requesting \$1,904.52 in administrative fees with a proposed distribution of zero to unsecured creditors. Exhibits [H 1, 11]. Upon the objection of the United States Trustee to the trustee's application for attorney's fees, the court entered an order on October 7, 1999, denying the trustee's compensation and attorney's fees in full and requiring him to submit an amended report of distribution. Exhibit [H 1, 12-13]. The case was closed on May 1, 2000. Exhibit [H 1].



At the hearing on the objection of the United States Trustee, the court denied the trustee's compensation and attorney's fees in full. In its decision, the court noted that:

[T]he motion to compromise and sell real estate in this case was ambiguous at best, and more possibly misleading. . . . This Court cannot see how the homestead exemption was appropriate in this case, nor can this Court see how it should have been allowed and been approved at any stage, if the facts had been revealed by the appropriate disclosure. . . and everything in these pleadings, I think, [is] misleading and confusing.

Exhibit 10-A; Performance Review 11.

In response, the trustee asserts that the United States Trustee failed to object to the sale when it occurred in 1997, and waited until two years later to raise an objection to the trustee's administration of the estate. As the court noted, the trustee's pleadings were misleading; neither the trustee's Motion nor his Notice to Compromise and Sell Property Free and Clear of Liens made any mention of the lawsuit or settlement. Exhibits 10-A, [H 3-4]. The trustee's Report of Sale also made no reference to a lawsuit or settlement. Exhibits 10-A, [H 8]. It was not until July 1999, when the trustee filed his Final Report and Account and his separate Application for Allowance of Compensation as Counsel for Trustee, that the United States Trustee could determine that the transaction involved something other than just a sale of real estate. The lack of disclosure in this case is troubling, but even more so is the trustee's lack of candor in his explanation and refusal to accept responsibility for his actions.

Moreover, the trustee fails to give any justification for paying the debtors a \$10,000 exemption out of proceeds from a sale of over-encumbered real property. See 11 U.S.C. § 544(f)(2)(A). By using the sale of the real property to settle the lawsuit for \$18,500, the trustee's actions benefitted the secured creditor, by giving it title to the real property without the need of relief from stay and foreclosure proceedings, and benefitted the debtors, by paying them a \$10,000 exemption to which they were not entitled. The trustee sought the balance of the funds for attorney's fees and trustee compensation. Because of his lack of disclosure and inappropriate payment of the exemption, it was appropriate for the court to deny the trustee's compensation in full in this case. In all, I find that the record in [H] supports the United States Trustee's decision.

During the review period, the United States Trustee also found in [W], Case No. [redacted], yet another instance in which the trustee sold a piece of fully encumbered real estate. Despite this fact, the trustee paid a \$5,000 homestead exemption to the debtor, who was not entitled to receive it because the real property was fully encumbered. Performance Review 11-12; Exhibit 11, 17, 25, 28. The trustee also made a distribution to the State of [Redacted], which was a junior lien holder that had no entitlement to be paid. Id.; Exhibits 18-28. The trustee admits the errors in paying the debtor a \$5,000 exemption, and in paying the State of [Redacted], the junior lien holder, when the money should have gone to the I.R.S. Request for Review 9. But he further states that he resolved the tax lien errors by obtaining a court order. Id. I find that the United States Trustee is justified in his concern that the trustee lacks understanding of basic concepts of priority with respect to secured claims and exemptions. Performance Review 12.

3. *Using the position as trustee for additional personal gain over and above that contemplated in the Bankruptcy Code by contracting with and paying his own real estate title company from bankruptcy estates.*

In the cases of [W], Case No.[redacted], and [C], Case No.[redacted], the United States Trustee determined that the trustee had inappropriately used his own title company in connection with sales of real estate in bankruptcy cases.<sup>5</sup> Notice 2; Performance Review 12-14, 31; UST Response 3; Exhibits 17, 25, 28, 47. The trustee not only used his own title company, but he appears to have charged attorney fees for performing the same services as his title company, after having already paid the title company for these services. See Exhibits 17-18, 25, 47, 49-50.

In response, the trustee admits that he has been using [Redacted] Title Agency occasionally in the sale of bankruptcy real estate for years. However, he states that the United States Trustee has received notice of this use in the above cases and did not object until last year. Request for Review 19-20; Exhibits [W 1-5].

The United States Trustee is correct in observing that the trustee's use of his personal title company is inappropriate and is inconsistent with the duty of loyalty. The trustee should act in the interests of creditors and not his title company. Subsection 327(a) and (d) of the Bankruptcy Code provide:

(a) Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustees' duties under this title.

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(d) The court may authorize the trustee to act as attorney or accountant for the estate if such authorization is in the best interest of the estate.

Courts have interpreted the above provisions, read together, as precluding a trustee from employing himself in any capacity other than attorney or accountant. See e.g. In re Mandell, 203 B.R. 345 (Bankr. S.D. Fla. 1996). In a case where a chapter 11 trustee sought to hire his own real estate firm, the Second Circuit relied on the common law of trusts in holding that a bankruptcy trustee may not hire his own firm in a non-lawyer or non-accountant capacity. In re Palm Coast, Matanza Shores Ltd. Partnership, 101 F.3d 253 (2<sup>nd</sup> Cir 1996). A trustee has a duty of loyalty to the beneficiaries of the trust and is not permitted to place himself in a position where it would

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<sup>5</sup> The United States Trustee learned from the [Redacted] Department of Insurance that [Redacted] is licensed as an agent for [Redacted]. [Redacted] Title Agency is apparently a sole proprietorship owned and operated by the trustee. Exhibit 25 at p.6.

benefit him to violate his duty to the beneficiaries. *Id.* “Equity tolerates in bankruptcy trustees no interest adverse to the trust. This is not because such interests are always corrupt but because they are always corrupting.” *Id.* quoting *Mosser v. Darrow*, 341 U.S. 267, 271 (1951).

In [W] and [C], the trustee profited from the fees he paid to his own title company from the bankruptcy estates. Moreover, the trustee’s fee applications represent that he has received no other compensation “in any capacity whatsoever in connection with this case.” Exhibits 18, 49-50. The use of his title company was inadequately disclosed, having been relegated to an attachment to a report of sale as a line item, “[Redacted] Title Agency,” on the closing statement. Performance Review 31; Exhibits 17, 47. The same pattern appears in the [H] case. *See also* Exhibit [H 8]. While a careful review of the closing statements could alert one to a possible connection (because the street address listed for [Redacted] Title Agency is the same as the trustee’s law firm), I find the underlying lack of candor troubling. I also find that the trustee’s practice of paying his own title company from the bankruptcy estates violates fiduciary standards and supports the United States Trustee’s decision. In these circumstances, it also raises questions as to whether the trustee’s decision to administer fully secured property was motivated by his personal financial interests over those of the estates. *See In re Lambert Implement Co., Inc.*, 44 B.R. 860 (Bankr. W.D. Ky. 1984).

4. *Filing pleadings which omit or mischaracterize relevant information needed for an informed decision by interested parties or the United States Trustee.*

Another common thread in the [P], [G], and [H] cases, discussed above, is a consistent lack of the full and unambiguous disclosure which is essential to the integrity of the bankruptcy system. The trustee complains that the United States Trustee waited until he filed his Final Report and Account, which has been up to two years after the sale of the real property, to object to the administration of his cases. However, it has been difficult or impossible for the United States Trustee to discern from the trustee’s notices, motions, and other pleadings what is taking place in the cases. The applications for retention, motions, notices, and reports regarding the sale of real property have misstated or omitted sale prices, equity values, mortgage balances, costs of sale, and costs of administration, which is information necessary for interested parties and the United States Trustee to make informed decisions. Consequently, the United States Trustee’s office must expend an inordinate amount of time and resources in reviewing and analyzing the trustee’s actions. The trustee’s pattern and practices over the last several years raise serious concerns about the adequacy of his disclosures, accountability, judgment, and adherence to fiduciary standards dictated by the Bankruptcy Code and United States Trustee. These practices therefore support the decision not to reappoint him.

5. *Summary*

The record in this matter amply supports the United States Trustee’s decision not to reappoint the trustee. The trustee fails to recognize the impropriety of administering over-encumbered real estate that produces no benefit to unsecured creditors, improperly paying debtors’ homestead exemptions, using his position as trustee for additional personal gain by paying his own real estate title company from bankruptcy estates, and filing pleadings which omit or mischaracterize relevant information needed for an informed decision by interested parties or the United States Trustee. He also fails to fully disclose all relevant facts to the court approving the sales.

The trustee suggests that an appropriate response would be to reappoint him with a suspension period, with additional review by the office of the United States Trustee. However, the United States Trustee's office has already expended an inordinate amount of time and effort reviewing the trustee's deficient practices and bringing these problems to the attention of the trustee and the court. As the official who appoints and supervises fiduciary trustees to administer chapter 7 bankruptcy cases, the United States Trustee is entitled to have confidence that those he appoints can and will properly perform their duties in accordance with the Bankruptcy Code, United States Trustee policy, and fiduciary principles. The United States Trustee can properly decline to reappoint a trustee who has refused to adhere to these standards.

### **Conclusion**

The decision not to reappoint this trustee was an appropriate exercise of the United States Trustee's discretion and is supported by the record. Accordingly, based upon my review of the record, including the written submissions of the United States Trustee and the trustee, I affirm the United States Trustee's decision not to renew the trustee's appointment to the panel of individuals available for appointment as trustee in chapter 7 cases in the United States Bankruptcy Court for the [Redacted].

The foregoing conclusions and decisions constitute final agency action in this matter.

Dated: February 2, 2001

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Martha L. Davis  
Acting Director  
Executive Office for United States Trustees