

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

FILED

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DISTRICT OF SOUTH CAROLINA

IN RE:)
)
Elgin's Paint & Body Shop, Inc.,)
)
Debtor.)
_____)

Case No. 99-01982-
Chapter 7

**ORDER AUTHORIZING PAYMENT OF
THE TRUSTEE'S COMPENSATION, FEES AND EXPENSES**

THIS MATTER comes before the Court on the Trustee's Motion for Compensation, Fees, and Expenses filed on January 18, 2000 (the "Motion") and supplemented by memorandum filed on February 24, 2000 (the "Supplemental Memorandum"). In the Motion, pursuant to 11 U.S.C. §§ 326, 327, 328, and 330 of the Bankruptcy Code,¹ the Trustee seeks payment for compensation, fees and expenses incurred during the bankruptcy proceeding. This Court grants the request for compensation, fees and expenses of the Trustee and his professionals. The Trustee also seeks an Order authorizing him to turnover all remaining assets of the Estate to the Clerk of Court for Richland County (the "Richland County Clerk"). This Court denies the Trustee's request regarding the turnover of estate assets to the Richland County Clerk, and Orders that the Trustee hold the remaining assets for thirty (30) days after the entry of this Order. At that time, the Trustee shall turnover all remaining assets in his possession to Elgin's Paint & Body Shop, Inc. ("Debtor") through its officer Donnie Elgin, Sr., unless the Trustee is served with a State Court Order directing him to deposit the assets with the State Court.

In response to the Motion, three pleadings were filed. First, Grace Kelly ("Kelly") filed an objection to the Trustee's compensation, fees and expenses ("Kelly's Objection"). Kelly's Objection

¹ Further references to the Bankruptcy Code shall be by section number only.

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is a page in length, cites no statutory authority or case precedent in support of the objection, and is couched in general statements. At the hearing, Kelly asserts that the Court is without authority to grant the requested payment from the corporate assets because the bankruptcy filing has been determined to be *ultra vires*. In addition, Kelly asserts that Donnie Elgin, Sr. (“Elgin”), the individual, should pay the Trustee’s compensation, fees and expenses as a sanction for his actions in filing the bankruptcy case. Second, Paul Kauffman (“Kauffman”) filed a response (“Kauffman’s Response”). Kauffman does not object to the Trustee’s compensation but he also requests payment for his attorneys fees and costs incurred during the bankruptcy proceeding from the funds held by the Trustee. Third, Elgin filed an objection (“Elgin’s Objection”); however, like Kauffman, Elgin does not object to the Trustee’s compensation, fees and expenses. Instead, Elgin objects to the Trustee’s request to turnover Debtor’s remaining assets to the Clerk of Court for Richland County. Elgin asserts that the proper party to receive the assets is Elgin as president of the corporate Debtor. Lastly, in response to Kauffman’s Response, Elgin objected to Kauffman’s request for attorneys fees and costs.

At the hearing on the Motion, counsel for all parties was present. After considering the arguments of counsel, the legal authorities cited by counsel, and the evidence, the Court: (1) grants the Trustee’s request for compensation, fees and expenses; (2) denies the Trustee’s request to turnover the remaining assets to the Richland County Clerk of Court and Orders that the Trustee hold the remaining assets for thirty (30) days after the entry of this Order, and at that time, the Trustee shall turnover all remaining assets in his possession to Debtor, unless the Trustee is served with a State Court Order directing the deposit of assets with the Clerk of the State Court; (3) overrules Kelly’s objection, and denies Kelly’s request that this Court sanction Elgin for all fees and costs; and

(4) denies Kauffman's request for attorneys fees and costs. In so holding, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACTS

1. On March 5, 1999, Debtor filed for relief under Chapter 7 of the United States Bankruptcy Code and Ralph C. McCullough was appointed Trustee ("Trustee") on March 8, 1999. The voluntary petition was signed by Elgin as President of Debtor.

2. Property of the bankruptcy estate included inventory, equipment, and vehicles used in the operation of Debtor's paint and body shop and accounts receivables and lease payments due Debtor. In order to pursue these assets, the Trustee sought the appointment of Finkel & Altman, LLC ("Finkel") as the attorney for the estate and Godley Auction Company ("Godley") as the estate's auctioneer. The employment of these professionals was authorized by Order of this Court on May 7, 1999.

3. Pursuant to his fiduciary duties, the Trustee immediately sought the possession of the assets. In support of his Motion, the Trustee submitted the Supplemental Memorandum that fully documents the services performed by the Trustee and the reasons for these services. The facts and supporting documents presented in the Trustee's Supplemental Memorandum were not contested by any party.

4. On or about March 19, 1999, Godley began collecting the equipment and vehicles. Godley informed the Trustee that it could not locate one of the scheduled assets, a 1994 Ford Explorer ("Explorer"). The Trustee was informed that the Explorer was in the possession of Debtor's former secretary, Kelly, who was represented by attorney, S. Jahue Moore ("Moore").

5. On or about March 29, 1999, Finkel on behalf of the Trustee sent a letter to Moore advising him of Debtor's bankruptcy filing and requesting the turnover of Debtor's Explorer. The Trustee received no response from Kelly.

6. Over the following weeks, Elgin provided the Trustee with pre-petition documents evidencing unusual banking entries which appeared to have been made by Kelly. The Trustee's review of the bank records revealed that checks written from Debtor's bank account did not correspond to Debtor's check ledger. Included in the Supplemental Memorandum were copies of the checks.

7. After receiving no response from Kelly and in light of new information regarding Debtor's bank accounts, the Trustee sought the examination of Kelly pursuant to Bankruptcy Rule 2004. The Order authorizing the examination was entered on May 8, 1999. On or about May 20, 1999, Finkel sent a letter to Moore in an attempt to schedule a mutually convenient date for Kelly's Rule 2004 exam. The Trustee's counsel proposed three (3) alternate dates.

8. After attempts to schedule the Rule 2004 exam, Elgin informed the Trustee that Kelly held the original certificate of title to a 1965 Chevrolet Chevelle (the "Chevelle") that was in the possession of Godley. Pursuant to a notice of sale, the Chevelle was to be sold at the scheduled auction on May 29, 1999. On or about May 28, 1999, Finkel contacted Moore to obtain the title from Kelly and was told by Moore that the Chevelle was owned by Kelly and was not property of the bankruptcy estate. Kelly made no other allegations as to any other assets, nor did she assert that Debtor's bankruptcy filing was improper. Based on Kelly's asserted ownership of the 1965 Chevrolet Chevelle, it was removed from the auction.

9. Also on or about May 28, 1999, Finkel sent a second letter to Moore requesting the turnover of the Explorer. Neither Finkel nor the Trustee received a response to the aforementioned letters and requests.

10. On April 29, 1999, the Trustee noticed the sale of Debtor's equipment, inventory and vehicles. No objection was ever filed by Kelly or any other party to the Trustee's Notice of Sale.. On May 29, 1999, Debtor's equipment, inventory and vehicles were sold at public auction. The Trustee received a total of \$89,805.00 for these items. By this time, the Trustee had collected all lease payments leaving only a disputed account receivable to be liquidated.

11. The Trustee instructed his accountant, David R. Fischbein, who was appointed by an Order of this Court on April 23, 1999, to examine the financial records of Debtor. During this review of the bank records it was discovered that Debtor's banking records for the year prior to the bankruptcy filing were missing. The Trustee then began to seek these missing bank records.

12. In early August 1999, counsel for the Trustee again contacted Moore's office in an attempt to schedule Kelly's Rule 2004 exam. At that time, Moore asked Finkel if it would accept service for the Trustee of an Adversary Complaint which was filed by Kelly on July 23, 1999.

13. On August 5, 1999, Finkel was served with the Adversary Complaint, Adversary Proceeding No. 99-80264-W, wherein Kelly objected to Debtor's discharge and requested that the Court dismiss the bankruptcy because it was improperly filed.

14. Receipt of the Adversary Complaint on August 5, 1999, was the first time the Trustee or his counsel received notice that Kelly disputed the authority of Debtor's bankruptcy filing. Prior to this Complaint, Kelly had failed to respond to any of the Trustee's requests regarding assets of the estate, failed to mutually agree to a date for a Rule 2004 exam, and had not asserted any claims or objections regarding Debtor's bankruptcy filing. Neither prior to or at that time had Kelly filed a motion to dismiss the case.

15. On August 23, 1999, the Trustee filed an Answer to the Complaint. On September 1, 1999, the Trustee took the deposition of Elgin. Portions of the deposition were included in the Supplemental Memorandum. Again, establishing the good faith investigation and actions of the Trustee and his counsel, Elgin testified, in part, that:

- a. Kelly voluntarily transferred her interest in Debtor as evidenced by a note dated August 11, 1998;
- b. Kelly and Paul Kauffman ("Kauffman") received checks from Debtor that were unauthorized;
- c. Kelly destroyed books and records of Debtor; and
- d. Kelly and Kauffman had possession of assets of Debtor's estate. The Supplemental Memorandum also included copies of certain title documents regarding the transfer of a 1998 Harley Davidson Motorcycle to Kauffman.

16. The Trustee acted upon Elgin's sworn testimony and the documents provided to the Trustee regarding the allegations set forth above. Kelly was ordered to submit to a Rule 2004 examination but failed to cooperate with the Trustee. Having the set of facts presented to him by Elgin, the Trustee, on September 14, 1999, filed an Amended Answer to the Complaint asserting counterclaims against Kelly and a Third-Party Complaint against Kauffman for the turnover of assets under §542, conversion, avoidance of fraudulent transfer pursuant to §547, and piercing the corporate veil against Kelly.

17. Also, on September 1, 1999, the Trustee noticed the Application for Settlement and Compromise of an account receivable between Elgin and Debtor wherein the Trustee agreed to accept \$9,570.00 from Elgin in satisfaction of the amount due. Kelly filed an objection to the Trustee's Application asserting that Elgin owed significantly more money than was indicated in the Application and requested a full accounting.

18. The Court set a hearing on Kelly's objection for October 12, 1999. At the request of counsel for the Trustee, the hearing was continued until October 26, 1999. The continued hearing

was held on October 26, 1999, at which time counsel for the Trustee and counsel for Kelly appeared. Since attorney Moore was not available for this hearing, the attorney present for Kelly requested an additional continuance so that attorney Moore could appear on behalf of Kelly to argue the objection. The Court granted Kelly's request for a continuance and set a hearing for November 9, 1999.

19. At the October 26, 1999 hearing, the Court questioned counsel for Kelly regarding the Adversary Complaint which sought the denial of discharge and a dismissal of the bankruptcy proceeding. At this hearing, it was agreed by all parties that Debtor, a corporation, was not entitled to a discharge in a Chapter 7 case. The Court suggested that it would be in the best interest of all parties to hold a hearing solely on the issue of dismissal of the bankruptcy case before going to the merits of the Trustee's counter-claims and Third-Party Complaint. At the conclusion of the October 26, 1999 hearing, it was agreed by all parties that Kelly would file a Motion to Dismiss in order to isolate that issue for hearing by this Court. Nevertheless, no such separate Motion to Dismiss was ever filed.

20. At the hearing on November 9, 1999, Moore was not present but instead sent an attorney from his office to request a continuance of the hearing. Additionally, the Court was informed that a Motion to Dismiss had not been filed by Kelly as previously agreed. The Court did not grant the requested continuance and the hearing on the Application for Settlement was held. The Court approved the settlement and compromise as proposed by the Trustee.

21. In order to facilitate a resolution as to the issues raised in the Adversary Complaint, the Court, with the consent of the parties, set a hearing on the Adversary Proceeding only as to the merits of the dismissal of the bankruptcy proceeding.

22. On December 7, 1999, this Court held a hearing on Kelly's Complaint to dismiss the case. After receiving testimony and arguments of counsel, the Court held by Order entered January 31, 2000 that Debtor's bankruptcy filing was *ultra vires*. In the same Order, the Court reserved

jurisdiction to consider the application of the funds received from the liquidation of the bankruptcy estate.

23. On January 18, 2000, the Trustee filed his application for compensation, fees and expenses incurred prior to the dismissal of this case. The Trustee asserts that the fees should be paid from the funds realized by the Trustee during his administration of the case.

24. This Court finds that the Trustee, with the assistance of certain professionals, has acted to perform his fiduciary duty. Furthermore, he has acted in the best interest of the estate, including the interests of Elgin and Kelly as creditors or equity holders, in pursuing assets and claims of the estate while relying on Debtor's filings with the Court, sworn testimony, and Debtor's financial books, records and documents of title.

25. The Trustee and his professionals openly and actively pursued the assets and claims of the Estate, with Kelly's knowledge and without objection from Kelly for almost six (6) months before Kelly ever objected to the filing of the bankruptcy.

CONCLUSIONS OF LAW

The only objection to the Trustee's fees, expenses and compensation is from Kelly. She objects to the Trustee's Application on the grounds that the Court is without authority to approve the requested payment since the bankruptcy filing has been determined to be *ultra vires*. This Court overrules this objection because (a) this Court has the authority to retain jurisdiction after the dismissal of the bankruptcy case for the purpose of awarding administrative claims, and (b) Kelly should be estopped from objecting the Trustee's fees, expenses and compensation because Kelly's own delay in seeking to have this bankruptcy case dismissed caused these fees and expenses to be incurred.

This Court's Jurisdiction

A bankruptcy court has the authority after dismissal of a bankruptcy proceeding to retain jurisdiction for the purpose of paying administrative expenses. *See e.g., St. Angelo v. Victoria Farms, Inc.* 38 F.3d 1525, 1533 (9th Cir. 1994) (concluding that a Court may properly award fees even after the dismissal of a bankruptcy case); *In the Matter of U.S.A. Motel Corp.* 521 F.2d 117, 119 (9th Cir. 1975) (holding that dismissal of a bankruptcy case will not necessarily bar an award of compensation to the Trustee and the Trustee's attorney); *Smith v. Central Trust Co.*, 139 F.2d 733, 740 (4th Cir. 1944); *In re Sinker*, 113 B.R. 34, 36 (D. Kan. 1990) (holding that Chapter 11 debtor's redemption rights in nonexempt real property constituted part of the bankruptcy estate that could be sold by trustee to pay administrative expenses, because "it is not unfair to require the payment of administrative expenses for Chapter 11 debtors who have sought the protection of the bankruptcy court but who have failed to consummate a plan"); *In re Georgetown Apartments*, 468 F. Supp. 844, 854 (M.D.Fla. 1979) ("Once the case was dismissed, the Bankruptcy Court properly retained control of the funds on hand held by the debtor in possession. The Court intended to pay the administrative cost on the proceedings out of this fund."). Prior to dismissing the case, this Court specifically reserved jurisdiction to consider the application of the funds received from the liquidation of the bankruptcy estate.

In *Smith v. Central Trust Co.*, 139 F.2d 733 (4th Cir. 1944), a voluntary Chapter X petition was dismissed because Debtor was an insurance company ineligible for relief under the Bankruptcy Code and also because statutory bad faith was present. The Trustee and his attorneys applied for compensation out of the estate for their pre-dismissal services. It was argued that the court could not make such allowance when it did not have jurisdiction to entertain the original petition. However, the Fourth Circuit held that even in the absence of jurisdiction the court has the power to allow compensation for services rendered during the post-filing pendency period of the debtor's petition. *Id.* at 735. The court cited the case of *In re 4136 Wilcox Bldg. Corp.*, 100 F.2d 588 (7th Cir.

1938) in which it was held that upon the dismissal of a bankruptcy case for lack of jurisdiction, the court still had power to compensate attorneys for services rendered in relation to the bankruptcy proceedings out of funds from the bankruptcy estate. The court noted that the decision in *In re 4136 Wilcox* was based upon the established rule that “when the jurisdiction of a court of bankruptcy is challenged . . . the court has jurisdiction at least to decide the controversy . . . and therefore the court has the power to make allowances for expenses incurred and services rendered to the estate during the pendency of the controversy.” *Id.* at 736. The court noted that:

Controversies will inevitably arise with regard to the application of the Act to particular debtors, and while these controversies are in the process of solution by the courts protracted periods of time will elapse during which the assets of the estate must be preserved and cared for under the supervision of the court and its officers. It seems reasonable to conclude that the power to care for the assets in the meantime and to make payment of the expenses involved is incidental to the admitted jurisdiction to decide the questions in dispute.

Id. The court also noted that the Act imposed duties on the trustee to assist in the investigation and securing of information regarding the debtor. *Id.* at 739. The court stated that:

We think that it is within the discretion of the Court . . . to authorize the trustee to participate in any efforts that may be necessary to safeguard the trustee’s status and to retain the proceeding in the federal court and for this purpose to secure the services of attorneys.

Like the Act, the Bankruptcy Code requires the Trustee to investigate the financial affairs of the debtor and collect and reduce to money property of the estate. §704. Section 704 states, in part, that:

The trustee shall –

- (1) collect and reduce to money the property of the estate for which such trustee serves, and close such estate as *expeditiously* as is compatible with the best interest of the parties in interest; and
- (4) investigate the financial affairs of the debtor.

§704 (emphasis added).

In the present case, the Trustee acted appropriately in liquidating the assets of Debtor's estate. Kelly was aware that Debtor was in a Chapter 7 liquidation proceeding and that the Trustee was seeking assets of the estate in her possession. However, it was approximately six months after receiving notice of the bankruptcy filing that Kelly first disputed the validity of Debtor's bankruptcy filing. By that time, the Trustee had liquidated the majority of the assets for the estate. It is important to note that Kelly appears at best to be an equity holder of Debtor and would only be entitled to assets after payments to creditors. Here, the Trustee has discharged his duties by appropriately securing the assets, and liquidating them in an efficient and timely manner for the best interest of all creditors.

Just as the Fourth Circuit recognized in *Smith*, the Trustee in this case is justified in securing the services of his attorneys to safeguard the assets of the estate by objecting to the dismissal of the case. The Trustee and his professionals were justified in objecting to Kelly's Complaint to dismiss the case. Kelly failed to respond to any of the Trustee's demands for turnover of assets and failed to agree to a mutual date for her Rule 2004 exam. All of the documents and sworn testimony the Trustee had before him supported a claim against Kelly and Kauffman.

The Court has considered the fees requested by the Trustee in light of the factors set out by the Fourth Circuit in *Harman v. Levin*, 772 F.2d 1150 (4th Cir. 1985). Applying these factors to the fees requested, the Court finds that the fees and expenses incurred by the Trustee and his professionals are reasonable and were necessary services for the proper administration of the bankruptcy estate.²

Kelly is Estopped

In the case of *LBH Associates Limited Partnership*, 109 B.R. 157 (Bankr. Md. 1989), the Court was dealing with creditor's objection to the debtor's attorney's fees. The court held,

² Finkel & Altman, LLC has agreed with The Office of the United States Trustee to a reduction in its fees of \$142.50.

[The Creditor] became the debtor's nemesis, availing itself of every opportunity to erect obstacles in the debtor's progress toward confirmation of a plan. Even after confirmation was granted, [the Creditor] has continued to pursue litigation with a vengeance, both in this Court and on appeal in the district court. Counsel for the debtor describes the litigation between the debtor and [the Creditor] as "intense and bitter." To this the Court adds that it was also dogged and perverse. ... Having spent a fortune trying to litigate this debtor to death, [the Creditor] now speaks piously of conserving the assets of the estate. ... Under these circumstances, [the Creditor] is estopped from objecting to the size of a fee which its own conduct has materially increased. This is a court of equity and [the Creditor] does not appear before it with clean hands.

109 B.R. at 158.

In this case, while this Court agreed with Kelly that Elgin's act of filing this bankruptcy was *ultra vires*, Kelly does not come before this Court with clean hands. Kelly did not cooperate with the Trustee. At no time prior to the filing of the Adversary Complaint did Kelly expressly object to Debtor's Chapter 7 bankruptcy filing. The record is clear that Kelly received notice of Debtor's filing within approximately 30 days of its filing. Kelly was well aware of the Trustee's attempt to recover assets in her possession for the bankruptcy estate. However, only after a majority of the assets were liquidated and the case was near completion did Kelly assert the filing was improper. Without objecting, Kelly impliedly consented to the proceeding. *See e.g., In re Alaska Plywood Corporation*, 166 F. Supp. 423 (D. N.J. 1958) (allowing the trustee a priority for his fees, in part, because the secured creditor did not expressly object to the reorganization proceeding).

Additionally, Kelly's actions contributed to the delay of the dismissal issue coming before the Court. The Adversary Complaint brought by Kelly was unartfully drafted and confusing. Multiple continuances were requested and the attorneys for Kelly failed to file any motion including a Motion to Dismiss to accelerate the determination of the merits of the dismissal even as agreed to by counsel. The Trustee has incurred additional fees and costs to participate and defend the matters raised in this manner by Kelly. It is in light of this history that the Court views Kelly's objection to the Trustee's application. Under these circumstances Kelly is estopped and barred by laches from

objecting to the Trustee's request for compensation, fees and expenses which her own conduct has materially increased and on which the Trustee had a right to rely. This is a court of equity, and Kelly does not appear before this Court in regards to this Motion with clean hands.

Kelly also asserts that if the Court awards payment of the Trustee's fees that the payment of the fees should be rendered against Elgin. The Bankruptcy Code provides that compensation and expenses of a trustee and his professionals should be paid as a priority claim out of the bankruptcy estate. §§ 507 and 726. It does not provide that the Bankruptcy Court should render judgment for such compensation against the bankrupt or any person whom the court believes equitably should bear such expense. *See In re John Vivane & Son, Inc.*, 150 F. Supp. 23, 27 (S.D.N.Y. 1957). The Court may allow the Trustee's fee to be charged against another party where the party has engaged in some act that caused loss or damage to the estate due to illegal acts against the estate, which conduct would be considered contemptuous. *Id.* Here, there has been no evidence that Elgin has engaged in any acts that would rise to such a level of contempt.

After paying the compensation, fees and costs, there shall remain funds on hand, as well as the 1965 Chevelle, and Debtor's books and records. The Court is aware of pre-petition State Court proceedings regarding issues of Debtor and its shareholders and between Elgin and Kelly personally. The Trustee requested permission to deposit the funds in his possession with the Clerk in the State Court proceedings. However, § 349 provides: "the dismissal of a case ... revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case." Therefore, the Court shall direct the Trustee to turnover to Debtor, through its President, Donnie Elgin, Sr., all assets in his possession after payment of compensation, fees and expenses within thirty (30) days after the entry of this Order. The Trustee shall turnover these remaining assets unless the Trustee is served with a State Court Order that directs him to deposit them with the Clerk of the State Court.

Finally, Kauffman requests that his attorneys fees and expenses be paid from funds in the hands of the Trustee. Kauffman provides this Court with no authority which convinces this Court to order such an award. After a review of the facts and arguments of counsel, this Court does not find cause to award the fees and expenses requested by Kauffman. It is therefore,

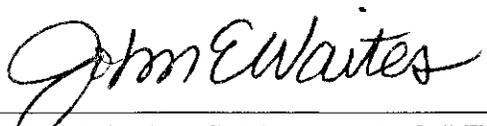
ORDERED, that the Trustee is authorized to pay, at this time, from the funds on hand the following compensation, fees and expenses:

- | | | | |
|----|--|----|-----------|
| a. | Ralph C. McCullough, II, Trustee's compensation pursuant to 11 U.S.C. §326 | \$ | 8,570.76 |
| b. | Ralph C. McCullough, II, Trustee's expenses | \$ | 244.25 |
| c. | Finkel & Altman, LLC, Legal fees | \$ | 14,570.00 |
| d. | Finkel & Altman, LLC, expenses | \$ | 47.53 |
| e. | Godley Auction Company, storage expenses | \$ | 831.00 |
| f. | David R. Fischbein, accountant fees and expenses | \$ | 968.00 |

IT IS FURTHER ORDERED, that thirty (30) days after the entry of this Order the Trustee shall turnover all remaining assets in his possession to Debtor, payable to Donnie Elgin, Sr., as President of the Debtor, unless the Trustee is served with a State Court Order that directs him to deposit them with the Clerk of the State Court.

IT IS FURTHER ORDERED, that Paul Kauffman's request for attorneys fees and expenses is hereby denied.

IT IS SO ORDERED.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina
March 9, 2000.

CERTIFICATE OF MAILING

The undersigned, deputy clerk of the United States Bankruptcy Court for the District of South Carolina hereby certifies that a copy of the document on which this stamp appears was mailed on the date listed below to:

MAR 13 2000

DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE

JUDY G. SMITH

Deputy Clerk

w/ judgment
RCM
USTR
Elgin
Bradley
Kauffman
Mendoza
Vernon