

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

**Final Agency Action
Case No. 07-0001**

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

[], a chapter 7 panel trustee ("trustee"), seeks review of a decision by the United States Trustee for Region [] not to renew the trustee's appointment to the Western District of [] panel of chapter 7 trustees. Based upon the record before me, I modify the United States Trustee's decision and, in lieu of non-renewal, the trustee shall be suspended from the active chapter 7 case rotation for 180 days from the date hereof.

I. Course of this Proceeding

Since [], the trustee has served as a member of the panel of chapter 7 trustees for the Western District of []. On April 9, 2007, the United States Trustee issued a notice ("notice") informing the trustee that he would not be reappointed to the panel after his current appointment expired on April 30, 2007.^{1/} The notice set forth the following grounds for the United States Trustee's decision:

1. The trustee's decision to file a pleading in *In re* [], in which the trustee proposed to sell the debtors' non-exempt equity in their residence in exchange for monthly payments to the trustee of \$492.99, notwithstanding his previous written statement to the court that the debtors had negative monthly income (Notice at 1);
2. The trustee's delay in pursuing formal action to recover assets in the [] case following two unauthorized postpetition refinancings by the debtors of their residence (*Id.* at 2);
3. The trustee's delay in administering eight other cases identified by the United States Trustee, in which the trustee allegedly failed to take timely action after the identification of assets (*Id.*);
4. The trustee's failure to timely respond to requests for information from the Office of the United States Trustee in connection with the proposed sale of equity in the

^{1/} Under the terms of the notice, the effect of the United States Trustee's decision has been stayed pending the trustee's timely request for administrative review. See 28 C.F.R. § 58.6(c).

[] case (*Id.*), in connection with a civil enforcement action commenced by the United States Trustee against the [] debtors (*Id.* at 3), and in seven other specified cases (*Id.*); and

5. The “inappropriately dismissive attitude” exhibited by the trustee in connection with a prior suspension proceeding in 2005 (*Id.*).

By letter dated April 27, 2007 (“trustee response”), the trustee requested that I review the United States Trustee’s decision. On May 11, 2007, the United States Trustee issued a reply to the trustee response (“UST reply”). In addition, after both the trustee and the United States Trustee were invited to submit additional materials on certain issues not fully addressed in the trustee response and the UST reply, the trustee filed a supplemental response dated June 1, 2007 (“trustee supplemental response”) and the United States Trustee filed a supplemental response dated June 11, 2007 (“UST supplemental reply”). Accordingly, this review is based on a record consisting of the notice, the trustee response, the UST reply, the trustee supplemental response, the UST supplemental response, and their respective exhibits.

II. Standard of Review

In conducting this review, I 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).

I may “adopt, modify or reject the United States Trustee’s decision to suspend or terminate the assignment of future cases to the trustee.” *Id.*

28 C.F.R. § 58.6(a) sets forth a list of 14 nonexhaustive factors that may be considered by the United States Trustee in suspending or terminating the assignment of a panel trustee. For purposes of the present review, the following grounds for suspension or termination are relevant to the allegations contained in the notice:

- (1) Failure to safeguard or to account for estate funds and assets;
- (2) Failure to perform duties in a timely and consistently satisfactory manner;
- ...
- (4) Failure to cooperate and to comply with orders, instructions and policies of the court, the bankruptcy clerk or the United States Trustee;
- ...

- (6) Failure to display the proper temperament in dealing with judges, clerks, attorneys, creditors, debtors, the United States Trustee and the general public.

III. Analysis

A. Duties of the United States Trustee and Panel Trustee

United States Trustees supervise chapter 7 panel trustees, 28 U.S.C. § 586(a)(1), and appoint them to specific 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, at 102 (1977). “The United States trustee is permitted to conduct his own investigation . . . to exercise effective supervision and make effective evaluation of the performance of the private trustees on the panel.” *Id.* at 110.

Panel trustees are fiduciaries with wide-ranging responsibilities to effectuate the goals of chapter 7 of the Bankruptcy Code. As fiduciaries, trustees are held to high standards of conduct. *See generally Mosser v. Darrow*, 341 U.S. 267 (1951); *Woods v. City National Bank & Trust Co.*, 312 U.S. 262, 278 (1941). *See also Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928) (Cardozo, C.J.).

The goals of the United States Trustee Program include protecting the public interest by ensuring efficiency in the administration of cases and by protecting the integrity of the bankruptcy system. *See* United States Trustee Program’s Mission Statement.^{2/} In striving to fulfill these goals, United States Trustees are entitled to expect, and indeed should demand, that the trustees under their supervision perform their duties at the high standards that are required of fiduciaries. In furtherance of these goals, United States Trustees and their staffs should notify trustees at the earliest opportunity of any inadequacies in their performance so that any such deficiencies can be resolved promptly.

It is against these high standards that the United States Trustee’s decision to remove the trustee from active chapter 7 case rotation must be assessed.

^{2/} The United States Trustee Program’s Mission Statement provides as follows:

The United States Trustee Program acts in the public interest to promote the efficiency and to protect and preserve the integrity of the bankruptcy system. It works to secure the just, speedy, and economical resolution of bankruptcy cases; monitors the conduct of parties and takes action to ensure compliance with applicable laws and procedures; identifies and investigates bankruptcy fraud and abuse; and oversees administrative functions in bankruptcy cases.

B. Prior Performance Review and Proceedings Involving the Trustee

The record reflects that the most recent formal performance review of the trustee was conducted by the Office of the United States Trustee in late 2005. (Trustee Reply Exhibit 16). That review, which covered the period July 1, 2003, through June 30, 2005, rated the trustee's performance as "Adequate" for all performance review factors except "Banking" and "Response to Audits," for which the trustee received a rating of "Inadequate" in each. The deficiencies for these factors related to the trustee's failure to perform timely bank reconciliations.

None of the specific deficiencies listed in the present notice were identified as deficiencies in the 2005 performance review. Instead, under the heading of "Case Progress," the 2005 performance review gave the trustee a rating of "Adequate" for his "efforts to expeditiously close cases"; "effectiveness and efficiency in collecting and liquidating estate assets"; "effectiveness and efficiency in collecting receivables, preference actions, and other claims"; and "justification for administration of old cases." (*Id.*) The trustee also received a rating of "Adequate" for timely and appropriately responding to United States Trustee requests. (*Id.*)

The United States Trustee issued a notice of suspension to the trustee on December 17, 2005, based on the bank reconciliation-related deficiencies identified in the 2005 performance review. (Notice at 3). Although the trustee initially appealed that suspension to the Director, the trustee subsequently agreed to a suspension until March 10, 2006. (Trustee Response at 10). On February 24, 2006, the trustee sent a written statement to the Office of the United States Trustee outlining the procedures he intended to follow in order to comply with the United States Trustee's reporting and bank reconciliation requirements. (Trustee Response Exhibit 9).

On February 22, 2007, the United States Trustee sent the trustee a letter and a memorandum informing him that he would be reappointed for only a shortened period terminating on April 30, 2007, due to "serious issues" regarding the trustee's performance. (*Id.* Exhibit 15). The performance deficiencies listed by the United States Trustee were identical to those later included in the notice, except that the February 22, 2007, memorandum did not discuss delays in the administration of cases other than [redacted] which would later be included as item three of the notice).

On March 14, 2007, United States Trustee staff requested a meeting with the trustee to discuss the status of certain asset cases that had been under administration for 18 months or longer. (Notice at 2). Eight of these cases were later cited in the notice as examples of improper or untimely case administration by the trustee. However, as discussed below, the trustee took action to complete the administration of many of these cases shortly after the United States Trustee first questioned his handling of them.

C. Grounds for the United States Trustee's Non-Renewal of Appointment

1. Failure to perform duties in a timely and satisfactory manner -- proposed sale in the [redacted] case.

On August 3, 2005, [redacted] and [redacted] filed a joint voluntary chapter 7 bankruptcy petition in the United States Bankruptcy Court for the Western District of [redacted] (UST Reply Exhibit 4). The trustee was appointed to serve as the chapter 7 trustee of their estate.

[redacted] schedules listed a residence with a value of \$153,000, subject to a \$100,000 first mortgage. [redacted] also claimed a homestead exemption of \$40,000 in the equity of their home. (*Id.*) The trustee, however, concluded that the true value of [redacted] home was approximately \$175,000, and that a sale of the residence would result in a distribution to creditors even after deducting the amount of the lien, the homestead exemption, and the costs of sale. (Trustee Response at 1). Thus, on January 18, 2006, the trustee notified the attorney for the [redacted] that he intended to list [redacted] residence for sale. (*Id.* Exhibit 1). In an apparent response to this development, [redacted] then attempted to convert their chapter 7 case to chapter 13. (UST Reply Exhibit 3).

On March 20, 2006, the trustee filed an objection to [redacted] conversion motion. (UST Reply Exhibit 3). In part, that objection noted that [redacted] initial Schedules I and J revealed a monthly cash shortfall of \$206.44 and, therefore, it "does not appear that the Debtors [can] propose a Plan without substantial additional income, which they have not shown an ability to obtain." (*Id.*)

While the conversion motion was pending, [redacted] then-attorney approached the trustee with a proposal under which [redacted] would purchase the non-exempt equity in their residence from the estate for \$25,500, to be paid in monthly installments of \$450 at an interest rate of 6 percent. As calculated by [redacted] former attorney, this debt would require "a little beyond five years" to pay off. In addition, [redacted] agreed to secure their obligation to the estate with a second deed of trust against their real property. (Trustee Response Exhibit 2).

The trustee characterizes the foregoing terms as "what would have been the Chapter 13 plan payments plus interest and a security interest – the maximum which he could find a legal basis for." (Trustee Response at 4). The trustee further states that he was "surprised" that the [redacted] agreed to his demand without attempting to negotiate down the principal amount of their obligation to the estate. (*Id.*)

In the May 10, 2006, letter confirming their agreement, [redacted] former attorney requested permission for [redacted] to refinance their home for "\$125,000.00 to \$130,000.00"—an amount the attorney insisted would leave enough equity to fully secure the trustee's subordinate lien. (Trustee Response Exhibit 2). The trustee did not respond to this letter for more than a month. Finally, on June 13, 2006, the trustee wrote back to [redacted] former attorney stating that he was "troubled" by the request to refinance, since "the Bank could

foreclose in the event of a default and the estate would be wiped out.” In addition, the trustee questioned why [redacted] were not pursuing a full refinancing that would enable them to pay cash for their obligation to the estate. (*Id.* Exhibit 3).

As the trustee would later discover, [redacted] did not wait for his response before acting. On May 26, 2006, just over two weeks after their attorney approached the trustee seeking permission to refinance and 18 days before the trustee responded to their proposal, [redacted] refinanced the mortgage on their home, netting more than \$20,000 cash. Neither the trustee nor the court were informed of this development. (Trustee Response at 6). As a result, the trustee continued to pursue ratification of the agreement reflected in the May 10 correspondence. On June 13, 2006, the trustee filed a motion in the bankruptcy court seeking approval of the estate’s sale of equity to [redacted] (Trustee Response Exhibit 5) and, on June 19, 2006, [redacted] executed a promissory note and security agreement in favor of the trustee. (Trustee Response Exhibit 4). The United States Trustee did not immediately file an objection to the sale motion, but requested that the trustee provide the United States Trustee with certain financial data substantiating the trustee’s decision to enter into the settlement. Because this information was not provided to the United States Trustee prior to the originally-scheduled hearing date, the United States Trustee requested and obtained a continuance of the hearing on the sale motion on or about July 18, 2006. (UST Reply Exhibit 22).

On August 8, 2006, the trustee informed the office of the United States Trustee of [redacted] [redacted] May 26, 2006, refinance. (Notice at 1). It is unclear from the record how or on what specific date the trustee first learned of the refinance. In response, on August 10, 2006, the United States Trustee filed a complaint to revoke [redacted] discharge. (UST Reply Exhibit 26).

In early August 2006, the trustee withdrew his motion to sell [redacted] their non-exempt equity based on his discovery of their unauthorized refinance. [redacted] then filed a second motion to convert their case to chapter 13. On August 14, 2006, the trustee objected to the second conversion motion. As in his previous objection, the trustee objected in part based on his contention that [redacted] lacked sufficient income to fund a chapter 13 plan. (UST Reply Exhibit 6). At some later date (the circumstances of which are unclear from the record), [redacted] abandoned or withdrew this second conversion motion. As a result, the bankruptcy court was never required to rule on either the trustee’s equity sale motion or on [redacted] successive conversion motions.

On September 20, 2006, [redacted] engaged in a second unauthorized refinance of their property, resulting in a net cash payout of approximately \$28,158, which [redacted] then used to purchase a truck. This second refinance was evidently discovered in October by the office of the United States Trustee, which notified the trustee of the second refinance in an email dated October 25, 2006. (Trustee Response Exhibit 6).

On October 16, 2006, shortly before he learned of the second refinance, the trustee filed a series of motions against [redacted] seeking turnover of the proceeds from the first refinance and seeking an order denying [redacted] homestead exemption. (UST Reply Exhibits 9, 10). After discovery of the second refinance, the motion was apparently treated as seeking turnover of the

proceeds from both refinances. On November 14, 2006, the bankruptcy court ordered [redacted] to turnover the truck purchased from the second refinancing, along with approximately \$4,000 in cash proceeds, apparently from the first refinance. (UST Reply Exhibit 11). The trustee has also commenced an avoidance action against New Century Financial, the lender with whom [redacted] carried out their second refinance, which remains pending.

With respect to the trustee's decision to file the June 13, 2006, motion seeking approval of his agreement to sell [redacted] the equity in their home, the United States Trustee's initial notice states:

In [redacted], you filed a motion in which you proposed to sell to the debtors the equity in their residence for \$25,000.00. Under your proposal, the debtors were to make monthly payments of \$492.99 to the estate over a five year period. You filed the motion notwithstanding your previous written statement to the Court that the debtors had negative monthly income of \$206.44.

(Notice at 1).

I note that, if the notice is read in isolation, there is some uncertainty as to the exact scope of the United States Trustee's criticisms. In particular, it is unclear whether the United States Trustee alleged that the trustee performed unsatisfactorily because the settlement was unreasonable on its own merits, or because the trustee contradicted his earlier statements to the court, or both. The United States Trustee's subsequent reply, however, argues that the trustee's performance was deficient on both grounds. (UST Reply 2).^{3/}

In his response, the trustee attributes the United States' Trustee's criticisms of his actions in [redacted] to a "philosophical difference" over whether chapter 7 trustees should enter into "creative" settlement proposals that would require the administration of assets over several years. (Trustee Response at 3, 5). The trustee contends that nothing in the Bankruptcy Code or the United States Trustee's Handbook for Chapter 7 Trustees ("Handbook") precludes him from pursuing such a strategy. (*Id.* at 4).

The trustee also defends the proposed equity sale as being in the best interest of creditors. In an analysis that appears to reflect the state of events as of early May 2006 (that is, before [redacted] carried out their first unauthorized refinance), the trustee asserts that this proposal would have resulted in a better outcome to creditors than a hypothetical chapter 13 plan. Specifically,

^{3/} My review is limited to the grounds for non-renewal cited by the United States Trustee in the initial notice. Because the notice failed to unambiguously state that the non-renewal of the trustee's appointment was based on the substantive merits of the [redacted] proposal, I do not give this factor any weight in considering the overall propriety of the United States Trustee's decision. Nevertheless, I note that a full discussion of the issues raised by the trustee and the United States Trustee regarding the merits of the proposed [redacted] settlement will provide guidance to the parties and aid in an understanding of related arguments that the United States Trustee has properly raised.

the trustee calculates that a chapter 13 plan would have paid creditors only \$12,500, without interest, a figure that assumes that [redacted] would have paid only the minimum necessary to satisfy the "liquidation test" of Bankruptcy Code section 1325(a)(4). By contrast, the trustee's proposal called for [redacted] to contribute \$25,000 with interest. (*Id.* at 3). In addition, the trustee notes that because [redacted] obligations to the chapter 7 estate would have been secured by a voluntary lien, the estate would have been entitled to payment ahead of [redacted] homestead exemption. (*Id.* at 4).

The trustee acknowledges that the proposed equity sale required [redacted] to generate substantially more disposable income than was reflected on their bankruptcy schedules. (*Id.*) The trustee characterizes this, however, as a problem for [redacted] not the estate, noting that "it is the role of [redacted] attorney to give them proper advise [sic], not the Trustee." (*Id.*) The trustee does not directly respond to the United States Trustee's assertions that his pleadings before the bankruptcy court were "misleading" or "disingenuous."

Having reviewed the record and considered the foregoing arguments, I find that the United States Trustee has not demonstrated a sufficient factual basis for her determination that the trustee displayed a lack of judgment in agreeing to the proposed [redacted] equity sale. In addition, while I am troubled by the trustee's failure to explain the seeming inconsistency between his settlement motion and his objections to conversion, I conclude that these pleadings were not materially misleading.

With respect to transactions that require a chapter 7 trustee to accept payments over a period of years, the Handbook provides that:

Generally, the trustee should avoid sales of estate assets involving buyer payments which will extend beyond one year. However, there may be instances, such as the need for periodic payments which do not delay case closing, when it is in the best interest of the estate to sell an estate asset in this manner. When the purchase price will be paid in installments, the trustee also should obtain and perfect a security interest in the estate assets sold and take other suitable precautions to protect the estate against default.

Handbook for Chapter 7 Trustees (January 1, 2005) at 8-21 (emphasis added).

Although long-term payment plans such as that proposed in [redacted] case are strongly disfavored under the Handbook, such plans may be permissible in limited circumstances, provided that appropriate precautions are taken to minimize the prejudice to creditors and protect the estate from risk of default. While he does not cite directly to the Handbook, the trustee appears to argue that [redacted] was such a case. I find this to be an extremely close question, but based on the limited record before me cannot conclude that the trustee's settlement decision necessarily demonstrates a failure of judgment.

In defending the settlement as being in the best interests of creditors, the trustee argues at great length that his settlement would have provided creditors with more money under more favorable terms than a chapter 13 plan. (Trustee Response at 3-4). I agree with the United States Trustee that this line of analysis is unhelpful. As the trustee himself pointed out in his oppositions to [redacted] conversion motions, [redacted] attempt to convert their case to chapter 13 was doomed to failure, given their inability or unwillingness to demonstrate a source of income sufficient to pay a chapter 13 plan. As a result, the question of what payments creditors would have received under a chapter 13 plan is of little relevance to the question of whether the actual settlement accepted by the trustee was reasonable.

Instead, a proper analysis of the settlement should have compared the estate's recovery under the settlement with the estate's recovery in the event of no settlement – that is, if the trustee simply sold [redacted] home, paid cash to [redacted] on account of their homestead exemption, and distributed the balance to creditors of the estate. Although the trustee does not address this scenario directly, many of the factors he discusses in connection with chapter 13 are equally pertinent to a discussion of an immediate sale in chapter 7. In particular, the trustee notes that a principal effect of the settlement would have been to give the estate a junior lien on [redacted] [redacted] home, which would have been entitled to payment ahead of the homestead in the event of a liquidation. (*Id.* at 4). The trustee correctly points out that, in a liquidation without a settlement, a sale of the property might easily result in little or no proceeds for creditors because the bulk of the equity would be consumed by the homestead exemption and the costs of sale. (*Id.* at 1). Although [redacted] clearly would have had difficulty in meeting their payment obligations to the trustee based on their reported negative monthly income, the estate was protected in the event of default by a junior security interest, which was entitled to payment ahead of [redacted] homestead. (*Id.* at 4). The trustee, thus, appears to argue that even if [redacted] entered into the proposed sale agreement and immediately defaulted, their creditors would have arguably been better off than if the trustee had simply sold the property without entering into the agreement.

While I find that the trustee had a reasonable basis for believing that the settlement was in the best interest of creditors, for the reasons discussed above, I am troubled by the trustee's failure to directly discuss the risk that requiring [redacted] to make the payments proposed under the plan might have led to a default not only under the settlement, but also under their first mortgage. Even taking the estate's possible security interest and equity cushion into consideration, such a foreclosure would have resulted in the extinction of the trustee's lien, yet the trustee fails to address these adverse consequences for the estate. I note, however, that the United States Trustee does not expressly raise this risk as grounds for her determination that the trustee displayed a lack of judgment.

In conclusion, even though I find that the trustee's negotiation of [redacted] sale was questionable in many respects, the record does not support the conclusion that his judgment was necessarily deficient.

I further find that the record does not support the United States Trustee's assertion that the trustee misled the bankruptcy court in connection with his settlement motion and objections to [redacted] chapter 13 conversion motion. In his objections to conversion, the trustee recited

that “[s]ince [redacted] current income is less than the current expenses, it does not appear that the debtors are able to propose a feasible plan.” (UST Response Exhibit 6). This statement accurately reflects the debtors’ schedules and the confirmation requirements of section 1325(a) of the Bankruptcy Code. Even if the trustee subjectively believed that [redacted] could generate additional income not disclosed on their schedules sufficient to make a chapter 13 plan feasible, it would have been [redacted] burden to demonstrate this and, as the trustee correctly pointed out, they failed to do so.

A closer question is whether the trustee misrepresented [redacted] circumstances in connection with his settlement motion. That pleading recited the terms of the settlement, described the likely outcome under chapter 7 if the settlement was not consummated, and concluded with the trustee’s statement that the proposal would result in a larger distribution to unsecured creditors than they would receive in a chapter 13 case. (UST Reply Exhibit 5).

Neither the trustee nor the United States Trustee squarely addresses the issue of whether the bankruptcy court should have been advised of [redacted] risk of default, and the parties also do not discuss the relevance (if any) that [redacted] risk of default would have had on the court’s approval of the motion. The trustee does not address or explain this omission.

I agree that the trustee’s pleadings should have addressed the apparent inconsistency between his two arguments with greater candor, and that the trustee’s failure to do so may have placed his credibility at risk. At the same time, however, I note that the bankruptcy court never ruled or heard argument on the settlement motion, and the bankruptcy court may well have been fully aware of the trustee’s earlier statements. Consequently, nothing in the record supports an inference that the bankruptcy court was actually misled by the trustee’s pleadings.

2. Failure to perform duties in a timely and satisfactory manner -- recovery of assets in [redacted] case.

The trustee disclosed [redacted] first refinance of their home to the office of the United States Trustee on August 8, 2006. (Notice at 1). On September 7, 2006, a United States Trustee employee emailed the trustee to report that he had learned from [redacted] attorney that [redacted] would not go forward with their second conversion motion. United States Trustee staff requested that the trustee send him copies of any correspondence relating to [redacted] “settlement/refinance matter,” and also inquired whether the trustee was going to file a motion for turnover of the refinance proceeds. (UST Reply Exhibit 7).

On or about September 20, 2006, [redacted] conducted a second unauthorized refinance of their home, spending the bulk of the proceeds on a new truck. Like the previous refinance, this refinance was not immediately disclosed to the United States Trustee, the trustee, or the bankruptcy court. (Trustee Reply Exhibit 6).

On October 16, 2006, the United States Trustee employee again wrote to the trustee, stating that he had not received any documents in response to the September 7, 2006, email. The United States Trustee staff member repeated his question about what motions, if any, the trustee

intended to file against [redacted] and added that a source had disclosed “that the debtors still have some of the money.” (UST Reply Exhibit 8). On October 16, 2006, the trustee filed motions seeking denial of [redacted] homestead exemption (UST Reply Exhibit 9) and for turnover of funds and an accounting. (UST Reply Exhibit 10).

The United States Trustee notes that more than two months elapsed between the trustee’s discovery of [redacted] first refinance and his filing of a turnover motion against [redacted] (UST Reply at 4). The United States Trustee alleges that this delay “evidences a lack of sound business and professional judgment” because the trustee “should have known that debtors who refinance their residence without Court authorization and without your knowledge while negotiating the sale of equity require heightened scrutiny and immediate action.” (Notice at 2). In addition, the United States Trustee suggests that, had the trustee acted more promptly, [redacted] might have been dissuaded from attempting their second refinance. (UST Reply at 4).

The trustee offers several explanations for his failure to take action between the discovery of the first refinance on or about August 8, 2006, and the filing of his motions on October 16, 2006. First, the trustee states that when he learned of the first refinance (which had occurred two months earlier), he “asked the source of the information where the money was from the refinance; he was told that it was gone.” (Trustee Response at 6). In addition, the trustee states that “30 years of experience had taught the trustee that actions taken by the debtors months before he found out about them would mean that the funds were long gone.” (*Id.* at 8). The trustee further states that although he was considering a lawsuit against the lender to void the deed of trust, “there were significant legal issues to be resolved before the adversary proceeding could be filed.” (*Id.*). Finally, the trustee stated that a motion to revoke the homestead exemption would likely be problematic because the time for objecting to exemptions had passed. (*Id.*). The trustee does not explain why he did not pursue a revocation of [redacted] discharge.

Chapter 8, Section F, of the Handbook provides that:

When assets in which there is equity are in the possession or control of the debtor or third parties, the trustee should seek to gain control of those assets as soon as possible. . . . In most cases, the trustee should put requests for turnover in writing, designating a time limit for compliance.

If the initial requests do not produce results, the trustee should seek a court ruling requiring the debtor or third party to give up possession to the trustee. . . . *If there is a danger that the assets are wasting in the hands of the debtor or third party, the trustee should request a hearing forthwith or a temporary restraining order.*

Handbook 8-10 (emphasis added).

I find that the record supports the United States Trustee’s determination that the trustee displayed a lack of diligence and business judgment by delaying over two months before taking action against [redacted] with regard to their first unauthorized refinancing. The effect of the refinance was to strip non-exempt equity from [redacted] home that otherwise would have been

distributed to creditors of the estate. As a result, it was imperative that the trustee act as quickly as possible to prevent those funds from being dissipated by [redacted]. In addition, as the United States Trustee correctly observes, the dishonesty exhibited by [redacted] in connection with their first refinance should have further prompted the trustee to take quick, decisive action to protect the estate.

[redacted] Given the time-sensitive nature of any action to recover the refinance proceeds from [redacted] the trustee's delay of more than two months before seeking relief placed the estate at an unacceptable risk of loss. Moreover, I find the trustee's explanations for his inaction to be incomplete and unpersuasive. In effect, the trustee appears to argue that he delayed filing a turnover motion because any effort to recover funds for the estate would have been futile. However, the trustee does not identify his source for the statement that the approximately \$20,000 in refinance proceeds were "gone," and he does not explain how, if at all, he attempted to verify this statement. The trustee does not explain to whom these funds were transferred and whether such transfers might have been avoided. Even if much of this money had been spent by [redacted] moreover, there remained the possibility that the estate could have recovered some of those funds by tracing property purchased by [redacted] to the refinance funds.^{4/} In addition, no explanation is given for the trustee's apparent decision not to seek relief against the lender that participated in the first [redacted] refinance, other than a generalized statement that an adversary proceeding against the lender would have raised "significant legal issues." Finally, although the trustee suggests that there were legal obstacles to pursuing a homestead-revocation motion against [redacted] the trustee did eventually file a motion to revoke the homestead exemption on October 16, 2006. Nevertheless, he does not explain why uncertainty over the homestead issue justified his delay in seeking other relief against [redacted] and their lender.

3. Failure to perform duties in a timely and satisfactory manner and case progress in other cases.

In addition to [redacted] the notice identified eight additional chapter 7 cases in which the United States Trustee alleges that the trustee failed to take adequate action to recover assets. These cases were apparently identified during a review of the trustee's files conducted in early 2007 and were the subject of a meeting between the trustee and United States Trustee staff on March 28, 2007. (Notice at 2; Trustee Response at 9). In his response, the trustee did not discuss the particular circumstances of any of these cases, but instead suggested that the cases listed by the United States Trustee were being described "out of context" and noted that "[i]t would be interesting to see what [United States Trustee staff] would find if they went through the files of all of the other Trustees with the same level of detail." (Trustee Response at 10). In response, the United States Trustee submitted more detailed information on each of the cases identified in the notice. (UST Reply at 5-8). In order to give the trustee an opportunity to respond to the more detailed allegations set forth in the United States Trustee reply, and to give the United States Trustee an opportunity to respond to the trustee's apparent allegation of

^{4/} In fact, following the second refinance, the trustee successfully pursued this strategy and obtained a court order requiring [redacted] to turn over to the estate a truck that they had purchased with funds from the second refinance.

unequal treatment, additional submissions were requested and received on these issues from each party.

Based on the foregoing submissions, the record reflects the following with respect to each of the additional cases identified by the United States Trustee.

(i)

[REDACTED]

The debtors, who filed a chapter 7 petition in March 2003, were possible beneficiaries under a prepetition class action lawsuit. The trustee states that he notified the class action attorneys of the bankruptcy case and requested that any settlement proceeds be paid to the estate. (Trustee Supplemental Response at 6). Despite these instructions, in late 2005, the class action disbursing agent made a direct payment to the debtors of \$22,583.73, an amount that was approximately \$3,000 in excess of their exemption. (UST Reply at 5). The trustee contacted the debtors' attorney in January 2007 requesting information on the settlement payments, but did not receive a response. (*Id.*). The debtors' attorney subsequently received authorization to withdraw from the case and neither the attorney, nor the law firm directed to provide information in the attorney's stead, responded to the trustee's inquiries regarding the settlement. (Trustee Supplemental Response at 6). The trustee did not take formal action to pursue the settlement funds for more than a year, a delay that the trustee attributed to uncertainty over who, if anyone, was representing the debtors following the withdrawal of their attorney, which had occurred after the trustee made his initial demand for the funds. (*Id.*). The trustee eventually filed a motion for turnover of the non-exempt settlement funds on April 7, 2007, shortly after the United States Trustee's request for information regarding [REDACTED] case. (UST Reply at 5). The trustee states that the debtors have proposed (or will shortly propose) a plan for the repayment of the non-exempt \$3,000. (Trustee Supplemental Response at 7). However, the United States Trustee notes that the debtors responded to the trustee's turnover motion by asserting that they no longer have the ability to immediately pay back the funds, and that the trustee's delay has prejudiced creditors and placed the estate's collection of non-exempt funds at risk. (UST Supplemental Reply at 3).

(ii)

[REDACTED]

The debtor filed a bankruptcy petition on July 15, 2005. In August 2005, the trustee became aware of a possible preferential transfer cause of action against Wells Fargo Bank. (Trustee Supplemental Response at 7). The trustee did not send a demand letter to Wells Fargo until November 20, 2005, and did not file an adversary complaint against Wells Fargo until April 17, 2007, after the United States Trustee raised concerns about progress in the case. (*Id.*). The trustee reports that he has received a settlement offer for \$6,600, an amount that he claims is in excess of what the estate would have received on a motion for summary judgment. (*Id.* at 8). The trustee also notes that "[t]his case was prioritized as being something which had to be handled; however, the solvent creditor and the clear evidence allowed it to be given a lower priority than other cases." (*Id.* at 7).

(iii)

[REDACTED]

The debtor filed a bankruptcy petition on May 26, 2005. The debtor scheduled a class action claim against Boeing for employment discrimination, and claimed \$10,000 of any award in the class action as exempt. (Trustee Supplemental Response at 8). The trustee states that he estimated that the debtor was unlikely to obtain an award in excess of her exemption, and so he decided to "wait and see" the results of the class action. (*Id.*). Initial distributions under the class action were made beginning in late 2005 and, in January 2006, the trustee attempted to contact the debtor's attorney for information about the amount of her award, but did not receive a response. (*Id.*). More than a year later, on March 19, 2007, the trustee filed a "Motion to Require Debtor to Take Certain Actions." (UST Reply at 6). The trustee states that he has subsequently been advised that the debtor's award was \$2,700, and that the court has entered an agreed order compelling the debtor to disclose evidence of the amount of her award. (Trustee Supplemental Response at 8).

(iv)

[REDACTED]

In this case, the trustee and the debtors have been engaged in protracted litigation over the estate's interest in certain stock appreciation rights payable to one of the debtors over a period of years. (Trustee Supplemental Response at 9). The United States Trustee alleges that, although the bankruptcy court issued an order confirming the trustee's right to certain payments on November 10, 2004, the trustee did not file a demand letter with respect to the funds until February 27, 2007, and did not file a motion for turnover until March 19, 2007. (UST Reply at 6). The trustee attributes this delay to a delay in the disbursement of funds to the debtor, as well as an ongoing dispute over the calculation of the amounts due to the trustee under the terms of the bankruptcy court's orders. (Trustee Supplemental Response at 9).

(v)

[REDACTED]

In this case, the trustee sent a demand letter to Bank of America regarding an allegedly preferential transfer on January 18, 2006, but did not seek to retain counsel to file an adversary proceeding until February 2, 2007. (UST Reply at 6). The trustee responds that this case, like [REDACTED] (item ii above), was prioritized because of the solvency of the defendant. In addition, the trustee notes that an adversary was subsequently filed to set aside the transfer. (Trustee Supplemental Response at 10).

(vi)

[REDACTED]

The debtors filed for bankruptcy relief on October 13, 2005, and scheduled a personal injury claim for \$15,000. Between the petition date and March 17, 2007, the trustee sent at least five letters to the debtors and/or their counsel requesting information on the value of the personal injury claim. On April 17, 2007, the trustee received a response to his requests for information and concluded, based on that response, that the recovery in the

personal injury action would be “significantly less” than the amount of the debtors’ exemption in the claim. As a result, the trustee filed a Report of No Distribution. (Trustee Supplemental Response at 12).

(vii) [REDACTED]

The debtors filed for bankruptcy relief on May 6, 2005, shortly after granting [REDACTED] [REDACTED] employer a second mortgage to repay funds that he had embezzled from the employer. The trustee commenced an adversary proceeding to avoid the second mortgage as a preferential transfer and to recover \$10,000 on March 27, 2007. (UST Reply at 7). The trustee does not explain the reasons for the delay. In addition, while the trustee states that he has received a settlement offer, the details of which are not disclosed, he notes that the avoidance of the second mortgage is unlikely to benefit the estate due to the low amount of equity the debtors are believed to have in their property. (*Id.*).

(viii) [REDACTED]

On July 21, 2004, the trustee obtained a \$25,150 judgment against the mother of one of the debtors to recover a preferential transfer. The mother’s appeal was dismissed on September 2, 2005. However, the trustee did not file an application for a writ of garnishment until March 27, 2007. (UST Reply at 7). In response, the trustee appears to suggest that his delay in seeking garnishment is strategic, as the court may not allow the trustee to garnish the mother’s source of income, but may allow him to garnish funds that have accumulated in her account. (*Id.*). In addition, the trustee notes that the mother has filed an objection to the writ of garnishment.

The trustee objects on several grounds to the United States Trustee’s consideration of these eight cases as a basis for his non-renewal. The trustee notes that these eight cases were not included in a memorandum sent to the trustee by the United States Trustee on February 22, 2007, which outlined various issues concerning the trustee’s performance. (Trustee Response at 9-10). The trustee also contends that the list of cases identified by the United States Trustee lacks context because it does not reflect that “numerous” other cases were being administered in a timely manner by the trustee. (*Id.* at 10). In addition, the trustee argues that many of the delays in these cases were caused by external circumstances, including a spike in chapter 7 filings in October 2005, and a computer conversion that the office of the United States Trustee required the trustee to implement at an unspecified date in 2006. (*Id.*). Finally, the trustee notes that “[i]t would be interesting to see what [United States Trustee staff] would find if they went through the files of all of the other Trustees with the same level of detail.”

I find that the record as a whole supports the United States Trustee’s determination that the trustee has not pursued assets or administered cases in a timely manner. In particular, I note that in at least one case identified by the United States Trustee [REDACTED], the trustee’s lack of diligence in pursuing claims against the debtors appears to have resulted in actual prejudice to the estate. In other cases, I find that the trustee’s explanations for his delay in administration are

incomplete. Thus, while the proceedings in [] and [] are undoubtedly contentious, the trustee's explanations fail to justify his extended delay in filing basic pleadings against those debtors. I also note that in the [] and [] cases, the trustee appears to have justified his delay solely on the fact that a particular adversary defendant was solvent. Although this may be an important factor in evaluating the risk of collection, it does not by itself excuse the trustee's delay and the prejudice that such delay causes to creditors of the estate. Finally, while it is true that certain other cases were later proved to be no-asset cases, this fact alone does not justify the trustee's delay in pursuing possible assets.

I further find the trustee's explanations of external causes for his untimely administration of these cases to be unpersuasive. Although the sudden surge in bankruptcy filings in 2005 and the transition to a new computer system in 2006 may have created additional work for the trustee, he does not explain why these events would have continued to delay his administration of cases as late as 2007.^{5/}

In addition, I find no basis for the trustee's suggestion that the eight additional cases were improperly included in the notice. As the United States Trustee correctly points out, there are no time limits on the United States Trustee's duty to ensure that a panel trustee has complied with his or her responsibilities. (UST Supplemental Reply at 2). In addition, I find that the trustee has been given an adequate opportunity to explain the facts and circumstances of these cases through his response and supplemental response to the notice.

I also find nothing in the record to indicate that the trustee is being subjected to different standards than other trustees. On the contrary, the Handbook expressly provides that all trustees are subject to periodic reviews of their case progress by the office of the United States Trustee. See Handbook 9-25. Because the United States Trustee's review revealed deficiencies in the administration of certain of these cases, it was the United States Trustee's duty to take corrective action, just as she would have been similarly so bound had these deficiencies appeared in a review of any other trustee.

Finally, even though the trustee does not raise this point in his defense, I note that in each of these eight cases, the trustee took prompt action to cure his deficiencies in case administration shortly after the United States Trustee expressed her concerns about these cases in March 2007. Therefore, the trustee appears to have acted properly to rehabilitate his performance in areas identified by the United States Trustee.

^{5/} In addition, it should be noted that the trustee was under suspension and not being assigned new cases for approximately the first several months of 2006. Thus, any increase in his workload caused by the events of late 2005 and early 2006 would presumably have been counterbalanced to some extent by the reduction in his workload caused by the suspension.

4. Failure to cooperate and respond to requests by OUST staff for information and documents.

The United States Trustee identifies several communications in [redacted] case in which the trustee either failed to timely reply or did not reply at all to the United States Trustee's requests for information. (Notice at 3, 4). These communications include:

- (i) On June 16, 2006, United States Trustee staff sent an email to the trustee requesting appraisals, communications, comparable sales data, and mortgage data relating to the proposed sale of [redacted] equity. (UST Reply Exhibit 21). The trustee provided information partially responsive to this request on July 25, 2006, following two additional emails from United States Trustee staff requesting a response to the June 16, 2006, email. (*Id.* at Exhibits 21-25).
- (ii) On September 7, 2006, after the United States Trustee commenced an adversary proceeding to deny [redacted] discharge, United States Trustee staff emailed the trustee requesting copies of all communications and documents exchanged between the trustee and the first attorney for [redacted] in connection with the sale negotiations. (*Id.* Exhibit 27). The trustee did not respond to this email. The trustee also did not respond to followup emails requesting the same information on September 13, 2006 (*Id.* Exhibit 28), October 16, 2006 (*Id.* Exhibit 29), and October 19, 2006 (*Id.* Exhibit 30).

The United States Trustee also submitted an email to the trustee dated October 17, 2006, which forwarded numerous complaints by United States Trustee staff about the trustee's lack of responsiveness in matters unrelated to [redacted] case. (*Id.* Exhibit 31).

Although the trustee concedes that “[c]ommunications in this case are not what they should have been,” he offers no explanation for his repeated failure to respond to the United States Trustee's requests for information, other than to suggest that United States Trustee staff should have attempted to communicate with him by telephone rather than by email after their initial inquires were left unanswered. (Trustee Response at 8-9). In addition, the trustee notes that communication issues were not addressed in his November 28, 2005, audit report. (*Id.*).

I find that the record supports the United States Trustee's determination that the trustee has failed to cooperate with the office of the United States Trustee. Both the Handbook and the Bankruptcy Code obligate the trustee to provide information concerning the administration of estates to parties in interest, including the United States Trustee. *See* 11 U.S.C. § 704(a); Handbook 6-7. By repeatedly ignoring the United States Trustee's requests for information, the trustee has not complied with this duty. Moreover, because these requests related to significant litigation that the United States Trustee intended to pursue against [redacted] I find that the record supports the United States Trustee's determination that the trustee's failure to cooperate placed the success of that litigation in jeopardy.

In addition, I find the trustee's explanations of his failure to communicate with United States Trustee staff to be inadequate. Even if the trustee prefers to communicate by phone, there is no justification for his failure to respond to United States Trustee requests that are sent to him by email. Finally, the mere fact that no communication-related deficiencies were revealed in the trustee's 2005 audit does not prevent the United States Trustee from seeking to remedy serious failures of communication that have occurred since 2005.

5. Inappropriate response to prior audit finding.

On December 7, 2005, the trustee was suspended from the active chapter 7 case rotation following an audit that revealed deficiencies with the trustee's reconciliation of estate bank accounts. The trustee appealed that decision, and in his December 23, 2005, request for review, the trustee referred to the audit findings as "hype," and argued that the requirements of the Handbook were not mandatory. (UST Reply Exhibit 33). The United States Trustee argues that the trustee's comment reflects an inappropriate attitude towards his fiduciary responsibilities and is "part of the pattern of poor case administration by the trustee." The United States Trustee does not, however, cite any of the deficiencies that were at issue in the 2005 suspension as a basis for its present decision to not renew the trustee.

Under these circumstances, the trustee's conduct in a prior disciplinary proceeding does not justify the imposition of additional adverse action in this proceeding. The trustee has already served a suspension based on the 2005 audit, and there is no allegation that any of the deficiencies that were the subject of that proceeding have continued. I further note that in his February 24, 2006, letter to the office of the United States Trustee, the trustee acknowledged the mandatory nature of the Handbook provisions. (Trustee Response Exhibit 9).

D. The record supports the United States Trustee's decision to discipline the trustee, but suspension rather than non-renewal is warranted.

For the reasons discussed above, I find that the record supports the United States Trustee's determination that the trustee has failed to perform his duties in a timely and consistently satisfactory manner, and also supports the United States Trustee's determination that the trustee has failed to cooperate and to comply with orders, instructions, and policies of the United States Trustee. Therefore, under 28 C.F.R. § 56.6(a)(2) and (4), the United States Trustee properly exercised her discretion to terminate or suspend the trustee. The only remaining issue, then, is whether the United States Trustee's decision to terminate rather than suspend the trustee was appropriate.

The decision of what discipline to impose is committed to the discretion of the United States Trustee. Although 28 C.F.R. § 56.6 does not set forth any mechanical test to be applied in determining whether suspension or termination is appropriate, some of the factors that are relevant to this determination include: (1) the severity of the trustee's deficiencies and the harm that has resulted; (2) whether the deficiencies resulted from intentional misconduct; (3) whether allowing the trustee to return to a position of trust would pose an unacceptable risk to the public; (4) whether the trustee's deficiency arises from a single incident or a consistent pattern of

deficient conduct; (5) the existence of past reprimands or proceedings involving the same conduct; and (6) the trustee's willingness to make good faith efforts to correct the deficiencies.

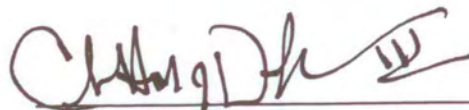
In this case, I find that many of these factors mitigate the trustee's deficiencies and weigh heavily in favor of a suspension in case appointments, rather than a termination of his appointment. Although the deficiencies in the trustee's performance are troubling, I find that the trustee should be given an opportunity for rehabilitation. First, while many of the trustee's actions might easily have led to larger losses, the record indicates that the trustee's errors of judgment have, for the most part, not led to lasting damage and have either been corrected or are in the process of being corrected. Second, the trustee's deficiencies do not appear to arise from intentional misconduct or bad faith. Third, although the trustee has been disciplined for unrelated matters in the recent past, this appears to be the first suspension or termination proceeding involving the trustee that has related specifically to his communications with the United States Trustee and his ability to diligently administer cases. Conversely, a factor weighing in favor of termination is the fact that neither the trustee's communication problems nor his lack of diligence appear to arise from isolated incidents, but form a pattern of unacceptable conduct that appears to have been repeated in multiple cases.

Accordingly, I modify the United States Trustee's decision and find that the trustee should be suspended from the active chapter 7 rotation for 180 days from the date of this decision. I find that under the circumstances stated in the record, such time period should be sufficient for the trustee to remedy his communication failures with United States Trustee staff and to act diligently to administer assets in those cases for which he has been put on notice. During such period, the United States Trustee shall continue to monitor the trustee's behavior in those cases to which he is currently assigned. In addition, nothing in this decision should be construed as limiting the United States Trustee's obligation pursuant to 28 C.F.R. § 58.6 to review the trustee's performance and to seek further corrective action in the event the deficiencies identified above are not satisfactorily corrected, and nothing in this decision shall limit the United States Trustee's ability to commence further corrective action during the pendency of this suspension.

The foregoing corrective action is intended to remedy and prevent the deficiencies that led to the trustee's suspension. It should produce the desired result of improved administrative performance by the trustee. I encourage the trustee to use the suspension period to reestablish his credibility with the United States Trustee and to demonstrate his commitment to substantially improving his practices and procedures.

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

Dated: August 8, 2007



Clifford J. White III

Director

Executive Office for United States Trustees