

ORDERED PUBLISHED

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

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6 In re:) BAP No. HI-10-1468-PaDJu
7 HOKULANI SQUARE, INC.,)
8) Bk. No. 07-00504
9 Debtor.)
10 _____)
11 UNITED STATES TRUSTEE,)
12 Appellant,)
13 v.) **O P I N I O N**
14 BRADLEY R. TAMM, Chapter 7 Trustee,)
15 Appellee.)
_____)

16
17 Argued and submitted on September 22, 2011
by video conference

18 Filed - November 8, 2011

19 Appeal from the United States Bankruptcy Court
20 for the District of Hawaii

21 Hon. Robert J. Faris, U.S. Bankruptcy Judge, Presiding.

22 _____
23 Appearances: Curtis B. Ching appeared for appellant U.S.
24 Trustee. Bradley R. Tamm appeared pro se.

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26 Before: PAPPAS, DUNN and JURY, Bankruptcy Judges.
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1 PAPPAS, Bankruptcy Judge:

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3 The United States Trustee ("the UST") appeals the order of
4 the bankruptcy court approving the application for final
5 compensation and expenses of chapter 7¹ trustee Bradley B. Tamm
6 ("Tamm"). In particular, the UST argues that, in calculating the
7 maximum compensation that could be allowed under § 326(a) for
8 Tamm's services in the bankruptcy case, the bankruptcy court erred
9 when it included the amount of the credit bid made by secured
10 creditors in connection with Tamm's sale of real property. We
11 agree with the UST, and therefore REVERSE and REMAND.

12

FACTS

13 Hokulani Square, Inc. ("Debtor") filed a petition for relief
14 under chapter 11 on May 10, 2007. Debtor's principal asset was a
15 nineteen-unit condominium project (the "Property"). From the
16 beginning of this bankruptcy case, it was clear that the Property
17 was fully encumbered by mortgages held by secured creditors
18 Investors Funding Corporation and Walter and Sylvia Chang
19 (together, the "Secured Creditors").

20 After two years of alleged mismanagement of its business in
21 the chapter 11 case by the Debtor, on March 30, 2009, the Secured
22 Creditors filed a motion to convert the bankruptcy case to chapter
23 7, or for the appointment of a chapter 11 trustee. Although the
24 bankruptcy court initially granted the motion and converted the

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26 ¹ Unless otherwise indicated, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.
28 Section numbers less than 100 refer to the Bankruptcy Act, 11
U.S.C. § 1 et seq. (repealed 1978). All "Rule" references are to
the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

1 case to chapter 7, the UST was unable to entice any of the local
2 chapter 7 panel trustees to serve in the case. As a result, the
3 bankruptcy court vacated the conversion order and, instead,
4 directed appointment of a chapter 11 trustee. Tamm was appointed
5 chapter 11 trustee.

6 Tamm promptly determined that there was no reasonable
7 likelihood of rehabilitating the Debtor's financial affairs under
8 chapter 11 and, on May 26, 2009, moved to again convert the case
9 to chapter 7. The bankruptcy court immediately granted Tamm's
10 request and converted the case. Tamm was then appointed by the
11 UST to serve as chapter 7 trustee.

12 Tamm experienced considerable pressure to dispose of the
13 Property. Apparently, a "Condominium Public Report" issued by the
14 Hawaii State Department of Commerce and Consumer Affairs, the
15 conditions of which would govern any sale of the Property, was
16 scheduled to expire on August 15, 2009, and Tamm had determined
17 that any attempt to extend the authorized sale date would result
18 in a substantial expense to the bankruptcy estate. Tamm therefore
19 entered negotiations with the Secured Creditors to sell the
20 Property to them. A deal was struck whereby the Secured Creditors
21 agreed to purchase the Property by submitting a credit bid
22 totaling \$1,500,000, as authorized by § 363(k).² However, the

23
24 ² Section 363(k) provides:

25 Use, sale, or lease of property

26 (k) At a sale under subsection (b) of this section of property
27 that is subject to a lien that secures an allowed claim, unless
28 the court for cause orders otherwise the holder of such claim may
bid at such sale, and, if the holder of such claim purchases such
property, such holder may offset such claim against the purchase
(continued...)

1 Secured Creditors agreed with Tamm's request that their credit bid
2 would be subject to an opportunity for others to submit higher
3 bids for the Property.

4 Tamm filed a motion in the bankruptcy court on July 10, 2009,
5 to approve the sale of the Property, free and clear of liens or
6 other interests, pursuant to §§ 363(f) and (m). The bankruptcy
7 court conducted a hearing on Tamm's motion on August 3, 2009.
8 No higher bids were submitted under the process set forth in
9 Tamm's motion.³ The bankruptcy court therefore entered an order
10 the same day approving the sale of the Property to the Secured
11 Creditors, or their designees, for \$1,500,000, with the purchase
12 price to be paid by the credit bids of the Secured Creditors. The
13 sale was closed on August 18, 2009. As Tamm had agreed with the
14 Secured Creditors, title to the Property was conveyed at closing
15 to their nominees, SJB Kalihi One, LLC, SJB Kalihi Two, LLC, and
16 MSP, LLC (the "Purchasing Entities"). Per the escrow
17 instructions, the sale was effected by offsetting a credit against
18 amounts owed on the existing mortgages to the Secured Creditors
19 against the sale price. Report of Sale at dkt. no. 501.

20 Tamm completed administration of the bankruptcy estate and
21 submitted his Final Report on July 1, 2010. In the Final Report,
22 Tamm represented that he had made, or would make from funds on

23
24 ²(...continued)
price of such property.

25
26 ³ The balance owed to the Secured Creditors was at least
27 \$2.2 million. Presumably, if an overbid was submitted and if they
28 chose to do so, the Secured Creditors could have simply upped
their credit bid. Considering the history of difficulties in
marketing the Property, it seems highly unlikely that, under these
sale terms, the Property would have been acquired by any party
other than the Secured Creditors.

1 hand, a total of \$2,720,000 in disbursements to creditors in the
2 bankruptcy case. Of course, that amount included the credit bid
3 made by the Secured Creditors for the purchase of the Property,
4 which Tamm entered in the Final Report as an offset against the
5 Secured Creditors' claims secured by the Property.

6 In his request for compensation and expenses accompanying the
7 Final Report, Tamm requested \$109,293 in compensation for his
8 services, the maximum he alleged was available to him under the
9 "caps" established in § 326(a).⁴ Again, this calculation was
10 based upon the \$2,720,000 Tamm alleged he was "disbursing" to
11 creditors, which in turn included the Secured Creditors' credit
12 bid at the sale.

13 The UST objected to Tamm's fee application. The UST's sole
14 objection was that, because the amount that Tamm alleged he had
15 disbursed improperly included the \$1,500,000 credit bid for the
16 sale of the Property, Tamm's compensation request exceeded the
17 maximum allowed for a trustee under § 326(a). In its objection,
18 the UST argued that the Secured Creditors' credit bid was not
19 "moneys disbursed" for purposes of § 326(a) in calculating the
20

21 ⁴ Section 326(a) provides:

22 Limitation on compensation of trustee

23 (a) In a case under chapter 7 or 11, the court may allow
24 reasonable compensation under section 330 of this title of
25 the trustee for the trustee's services, payable after the
26 trustee renders such services, not to exceed 25 percent on
27 the first \$ 5,000 or less, 10 percent on any amount in excess
28 of \$ 5,000 but not in excess of \$ 50,000, 5 percent on any
amount in excess of \$ 50,000 but not in excess of \$
1,000,000, and reasonable compensation not to exceed 3
percent of such moneys in excess of \$ 1,000,000, upon all
moneys disbursed or turned over in the case by the trustee to
parties in interest, excluding the debtor, but including
holders of secured claims.

1 trustee's maximum compensation.⁵

2 In Tamm's response to the UST's objection, he discussed what
3 he believed was the extraordinary complexity of the bankruptcy
4 case, detailed his many efforts in administering the case, and
5 suggested that the results he had obtained had exceeded the
6 expectations of either the UST or the bankruptcy court. On the
7 legal issue raised by the UST's objection to his fee request, Tamm
8 argued that Ninth Circuit case law allowed him to include the
9 amount of the Secured Creditors' credit bid in the sale of the
10 Property in computing his maximum compensation.

11 At the hearing on Tamm's Final Report and request for
12 compensation, the bankruptcy court began by repeating the
13 conclusions expressed in a pre-hearing tentative ruling: "My view
14 is that the Ninth Circuit would hold that credit bids should be
15 treated as moneys disbursed [for purposes of § 326(a)]. And my
16 main reason for coming to that conclusion is it makes the
17 substance consistent with the form." After acknowledging that
18 Tamm had done a creditable job in a difficult case, the UST
19 nevertheless argued that the Bankruptcy Code and case law simply
20 did not allow credit bids to be included in computing a trustee's
21 compensation. Tamm, of course, disagreed.

22 After hearing the parties' arguments, the bankruptcy court
23 approved the full amount requested by Tamm in his fee application.
24 In doing so, however, the court acknowledged that the case law on
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26
27 ⁵ Section 330(a)(1)(A) provides that, "subject to [§ 326 and
28 other provisions], the court may award a trustee . . . reasonable
compensation for actual, necessary services rendered by the
trustee" The UST did not argue that the amount requested
by Tamm for compensation was unreasonable.

1 including credit bids in calculating chapter 7 trustee
2 compensation was unsettled: "The clearest authority goes against
3 me. It's from outside the circuit. I think that the Court of
4 Appeals for this circuit would probably stick with [the Ninth
5 Circuit cases decided under the Bankruptcy Act], but maybe we'll
6 see." Tr. Hr'g 16:14-17, November 10, 2010.

7 The bankruptcy court entered an order approving Tamm's Final
8 Report and application for compensation on November 12, 2010. The
9 UST filed a timely notice of appeal.

10 JURISDICTION

11 The bankruptcy court had jurisdiction under 28 U.S.C. § 1334
12 and 157(b) (2) (A). The Panel has jurisdiction under 28 U.S.C.
13 § 158.

14 ISSUE

15 Did the bankruptcy court err in including the amount of the
16 credit bid as "moneys disbursed" under § 326(a) in calculating the
17 maximum allowed for chapter 7 trustee compensation?

18 STANDARD OF REVIEW

19 We review the bankruptcy court's construction of the
20 Bankruptcy Code de novo. Educ. Credit Mgmt. Corp. v. Mason (In re
21 Mason), 464 F.3d 878, 881 (9th Cir. 2008); W. States Glass Corp.
22 v. Barris (In re Bay Area Glass, Inc.), 454 B.R. 86, 88 (9th Cir.
23 BAP 2011).

24 DISCUSSION

25 I.

26 The parties agree that the outcome of this dispute is
27 controlled by the construction of § 326(a). However, there is a
28 marked difference in how they frame the precise issue for decision

1 by the Panel. The UST casts the issue on appeal as:

2 When a secured creditor purchases its collateral from
3 the estate, it may "credit bid" and offset the liability
4 under the sales agreement against its secured claim
5 under § 363(k). The question presented is whether the
6 amount offset from a sales price because of a credit bid
7 constitutes "money disbursed" by a chapter 7 trustee to
8 a secured creditor under § 326(a).

9 UST Op. Br. at 1. In contrast, according to Tamm,

10 [t]he proper issue is whether, when a bankruptcy trustee
11 sells estate property to a third party free and clear of
12 liens, the amounts of the liens constitute "moneys disbursed"
13 for purposes of calculating the trustee's fees pursuant to
14 § 326(a). In particular, Tamm notes that he "did not sell
15 the Estate Property to the Secured Creditors."

16 Tamm Br. at 1.

17 As can be seen, presumably for strategic reasons, Tamm
18 attempts to distinguish the sale of the Property that occurred in
19 this bankruptcy case from the usual transaction wherein a secured
20 creditor employs a credit bid under § 363(k) to purchase its
21 collateral at a trustee's sale. In this case, Tamm points to the
22 facts and insists that the Property was actually sold to non-
23 creditor third parties. In doing so, Tamm attempts to align his
24 position with the facts presented to the Ninth Circuit in Sw.
25 Media, Inc. v. Rau, 708 F.2d 419 (9th Cir. 1983), considered in
26 detail below.

27 We disagree with Tamm's characterization of the sale. No
28 doubt, the sale closing documents show that the Property was
conveyed to the Purchasing Entities, and not to the Secured
Creditors. However, as Tamm conceded at oral argument, as
authorized in Tamm's sale motion, the Purchasing Entities were the
designees of the Secured Creditors to receive title to the
Property. Indeed, it appears that the Purchasing Entities had not

1 even been legally formed until after Tamm's sale motion was
2 submitted to the bankruptcy court.⁶ In that motion, Tamm had
3 represented to the bankruptcy court that "[a]ny potential designee
4 by the Secured Creditors has also been disclosed to the Trustee
5 and the Trustee has been assured that they will be third parties
6 not related to the Debtor and not insiders of the Debtor." Tamm's
7 Br. at 2 (emphasis added). This representation is found in a
8 portion of Tamm's motion subtitled, "The Secured Creditors are
9 Good Faith Purchasers and are Entitled to the Protections of 11
10 U.S.C. § 363(m)." Tamm did not in the sale motion, or at any time
11 thereafter in the bankruptcy case, refer to the Purchasing
12 Entities as "third parties."

13 More importantly, after the sale Tamm referred to the Secured
14 Creditors as the purchasers of the Property via their credit bid.
15 In particular, barely one month after the sale was approved by the
16 bankruptcy court, on September 29, 2009, Tamm and all three of the
17 Secured Creditors executed and filed a Settlement Agreement in the
18 case in which the Secured Creditors agreed with Tamm to dismiss
19 their pending adversary proceedings against the bankruptcy estate
20 related to the Property, and instead to assert their rights
21 through the claims process. In the parties' settlement agreement,
22 they recite that "On August 14, 2009, pursuant to an order filed
23 in the Case, the Secured Creditors acquired by credit bid the
24 Estate's then remaining interest in the [] Property." Settlement
25 Agreement, Paragraph J, at dkt. no. 510.

26
27 ⁶ In response to questions from the Panel at oral argument,
28 Tamm was unaware whether the Purchasing Entities were created or
controlled by the Secured Creditors.

1 determining reasonable compensation, it has no discretion to award
2 an amount exceeding § 326(a)'s cap, based on equitable or any
3 other grounds. As the Ninth Circuit has explained, "Congress, not
4 the judiciary, must make any necessary changes in the system of
5 trustee compensation created by the Bankruptcy Code." Boldt v.
6 U.S. Tr. (In re Jenkins), 130 F.3d 1335, 1341 (9th Cir. 1997); see
7 also Gill v. von Wittenberg (In re Fin. Corp. of Am.), 114 B.R.
8 221, 224 (9th Cir. BAP 1990) ("The maximum fee set by § 326(a) has
9 no correlation with fair value for services."), aff'd and adopted
10 sub nom. Tiffany v. Gill (In re Fin. Corp. of Am.), 946 F.2d 689,
11 690 (9th Cir. 1991). Any judicial attempt to relax the § 326(a)
12 caps based on notions of fairness or equity would undermine
13 Congress's intent to cap trustee fees under section 326(a). In re
14 Jenkins, 130 F.3d at 1341.

15 In this case, the bankruptcy court properly rejected Tamm's
16 arguments that "the equities" should be considered in determining
17 his compensation:

18 The only real question is what the words "moneys
19 disbursed" mean in [§ 326(a)], and I think the meaning
20 of the words money disbursed is the same if the Trustee
21 did a good job or did a terrible job, or if it was a
22 hard case or an easy case. That's why I say the
23 circumstance[s] aren't relevant.

24 Tr. Hr'g 15:14-18. We agree with the bankruptcy court and the UST
25 that the only issue in this dispute is whether the Secured
26 Creditors' credit bids constitute "moneys disbursed" for purposes
27 of § 326(a).

28 III.

Although the bankruptcy court's focus was the proper one, we
disagree with its interpretation of § 326(a), which it summarized

1 at the hearing:

2 It seems to me that money comes in lots of different
3 forms and disbursements can be made in lots of different
4 ways. And here we have what I think is disbursement of
5 money in the form of credit being given against a
6 secured obligation. I mean money can be disbursed by
7 handing a pile of cash to somebody, by handing a check
8 to somebody, by making electronic transfer, and can also
9 be made by essentially bookkeeping entries, and that's
10 basically what a credit bid is. So to me a credit bid
11 is money disbursed.

12 Tr. Hr'g 15:19-16:2.⁷ For the several reasons discussed below, we
13 are constrained to reverse the bankruptcy court's decision.

14 A.

15 Of course, construing the Code begins with the plain meaning
16 of its language. United States v. Ron Pair Enters., 489 U.S. 235,
17 241 (1989). "Courts properly assume, absent sufficient indication
18 to the contrary, that Congress intends the words in its enactments
19 to carry 'their ordinary, contemporary, common meaning.'" Pioneer
20 Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership, 507 U.S.
21 380, 388 (1993) (quoting Perrin v. United States, 444 U.S. 37, 42
22 (1979)).

23 Where a term is defined within the statute, that definition
24 controls its interpretation. Colautti v. Franklin, 439 U.S. 379,
25 392 (1979). But, in this case, the Bankruptcy Code does not
26 define either "money" or "moneys disbursed." In the absence of a
27 statutory definition, "we construe a statutory term in accordance
28

25 ⁷ If the bankruptcy court's characterization were correct,
26 it would seem that the credit bid was more properly viewed as part
27 of the consideration received by the trustee for the sale of the
28 Property, rather than something the trustee disbursed to the
Secured Creditors. Since we conclude below that a credit bid is
not "moneys disbursed," this a matter of no consequence in this
appeal.

1 with its ordinary or natural meaning.” FDIC v. Meyer, 510 U.S.
2 471, 476 (1994). A court “may follow the common practice of
3 consulting dictionaries to determine how the terms were defined at
4 the time the statute was adopted.” Stanford v. MemberWorks, Inc.,
5 625 F.3d 550, 559 (9th Cir. 2010); see also Ransom v. FIA Card
6 Servs., N.A., 131 S.Ct. 716, 724 (2010) (consulting, in a recent
7 bankruptcy case, both Webster’s Third New International Dictionary
8 (“Webster’s”) and the Oxford English Dictionary (“OED”) for the
9 ordinary meaning of “applicable.”).

10 The OED defines money: “[a]ny generally accepted medium of
11 exchange which enables a society to trade goods without the need
12 for barter; any objects or tokens regarded as a store of value and
13 used as a medium of exchange. a. Coins and banknotes collectively
14 as a medium of exchange.” (3d ed. online, 2002). Webster’s
15 defines it as “something generally accepted as a medium of
16 exchange, measure of value or a means of payment.” Webster’s 1458
17 (2002). Black’s Law Dictionary states that money is “[t]he medium
18 of exchange authorized or adopted by a government as part of its
19 currency.” Black’s Law Dictionary 1096 (9th ed. 2009). As can be
20 seen, the common element in all these definitions is the notion
21 that money is a “medium of exchange.”⁸

22 That phrase, in turn, has an ordinary and plain meaning in
23 the principal dictionaries. A medium of exchange is “something
24

25 ⁸ Although the Uniform Commercial Code is not a dictionary,
26 it provides a similar definition of the terms for its purposes:
27 “‘Money’ means a medium of exchange currently authorized or
28 adopted by a domestic or foreign government. The term includes a
monetary unit of account established by an intergovernmental
organization or by agreement between two or more countries.”
U.C.C. § 1-201(24) (2011).

1 commonly accepted in exchange for goods and services and
2 recognized as representing a standard of value." Webster's 1403
3 (2002). The OED delves deeper, noting that a medium of exchange
4 is "anything commonly agreed as a token of value and used in
5 transactions in a trading system; esp. freely circulating units of
6 money, as banknotes, coins, which fulfill this role; currency."
7 OED (Online, 3d ed., 2001).⁹

8 The term "disbursement" also has an accepted dictionary
9 definition. It means to "pay out or expend money." OED (Online,
10 3d ed. 2002); accord, Webster's 644 (2002); Black's Law Dictionary
11 1096 (9th ed. 2009) (to "disburse" is "[t]he act of paying out
12 money[.]").

13 Thus, according to the dictionaries, money is a medium of
14 exchange "commonly accepted in exchange for goods and services" or
15 "used in transactions in a trading system." A disbursement occurs

17 ⁹ The Supreme Court's description of "medium of exchange" in
18 Legal Tender Cases, 79 U.S. 457 (1870), reflects the traditional
19 view that "money" is defined as a medium of exchange and must be
20 cash, currency or its equivalent. "All writers upon political
21 economy agree that money is the universal standard of value, and
22 the measure of exchange, foreign and domestic . . . all admit
23 that a commodity to serve as a standard of value and a medium of
24 exchange must be easily divisible into small portions; that it
25 must admit of being kept for an indefinite period without
26 deteriorating; that it must possess great value in small bulk, and
27 be capable of being easily transported from place to place[.]"
28 Id. at 604-05. And although the Nineteenth Century Supreme Court
could not have envisioned modern forms of currency and electronic
accounting systems, the general principle remains intact: to be a
medium of exchange, money has to be divisible, stable as a
reference of value, and transportable (physically or
electronically). See In re Oakley, 344 F.3d 709, 714 (7th Cir.
2003) ("[M]oney in whatever form – whether cash or an invisible, a
disembodied, financial asset – is a medium of exchange rather than
a useful good (with the irrelevant exception of money that has
become a collector's item)"). Obviously, a secured creditor's
credit bid made at a trustee's sale possesses none of the
characteristics of a medium of exchange.

1 when money is paid out.

2 In our view, the Secured Creditors' credit bid submitted to
3 Tamm in connection with the bankruptcy sale in this case falls
4 outside the common dictionary meaning of "moneys disbursed." Tamm
5 has not shown how a credit bid is commonly accepted as a medium of
6 exchange for the purchase and sale of goods or services, nor that
7 a credit bid is commonly used in transactions in a trading system.
8 Fairly understood, in this context, a secured creditor's credit
9 bid is strictly a creature of the Bankruptcy Code, having a single
10 application, as an offset against the purchase price for property
11 of a bankruptcy estate being sold by a trustee under § 363(k). By
12 no reasonable interpretation can a credit bid be commonly accepted
13 as a medium of exchange.

14 As explained by the dictionaries, in employing the term
15 "moneys disbursed" in connection with capping trustee
16 compensation, § 326(a) refers to the payment by a trustee to
17 creditors of some form of a medium of exchange that is commonly
18 accepted in exchanges and commercial transactions – in other
19 words, cash, currency or its equivalent. In this context, we
20 believe the ordinary and natural meaning of "moneys disbursed"
21 would not include the Secured Creditors' credit bid.

22 B.

23 Although the Ninth Circuit has not directly addressed the
24 meaning of "moneys disbursed" in § 326(a), our construction of the
25 Code here is consistent with the only two decisions by courts of
26 appeals to have considered this issue. See Staiano v. Cain (In re
27 Lan Assocs. XI, LP), 192 F.3d 109, 118 (3d Cir. 1999); U.S. Tr. v.
28 Pritchard (In re England), 153 F.3d 232, 235 (5th Cir. 1998).

1 The Lan Assocs. decision is closely on point with the facts
2 of this case. The fee applicant was the trustee, appointed in a
3 chapter 11 case, who continued to serve after the case was
4 converted to chapter 7. He appealed a district court order
5 reversing a bankruptcy court award of his fees. In calculating
6 the trustee's maximum fee under § 326(a), the bankruptcy court had
7 included the amount of a credit bid made by a mortgagee, pursuant
8 to § 363(k), in a sale to the secured creditor to purchase its
9 collateral. The district court reversed the fee award, stating
10 that "the value of a credit bid portion of a § 363(b) sale is not
11 'moneys disbursed or turned over . . . to a party in interest,'
12 and cannot be used to calculate the maximum allowable amount of
13 trustee compensation." U.S. Tr. v. Cain (In re Lan Assocs. XI,
14 LP), 237 B.R. 49, 56 (D.N.J. 1998).

15 The Third Circuit affirmed the district court's conclusion
16 that the credit bid must be excluded in computing the trustee's
17 compensation. In re Lan Assocs. XI, LP, 192 F.3d at 109. The
18 court quoted legislative history to § 326(a):

19 It should be noted that the base on which the maximum
20 fee is computed includes moneys turned over to secured
21 creditors, to cover the situation where the trustee
22 liquidates property subject to a lien and distributes
23 the proceeds. It does not cover cases in which the
24 trustee simply turns over the property to the secured
25 creditor, nor where the trustee abandons the property
26 and the secured creditor is permitted to foreclose.

27 S. Rep. No. 95-989, 95th Cong. 2d Sess. 37-38 (1978); H.R. Rep.
28 No. 95-595, 95th Cong., 1st Sess 327 (1977), reprinted 1978
U.S.C.C.A.N. 5963, 6283-84 (emphasis added). Id. at 116-17. The
court observed that, as shown by the legislative history to
§ 326(a), the primary duty imposed by § 704(a)(1) on a chapter 7

1 trustee is to reduce property to money, such that "Congress
2 intended to distinguish between the concepts of property and
3 money. . . . The emphasis on 'moneys,' rather than property or
4 value, accords with the drafter's understanding that 'the
5 trustee's principal duty is to collect and reduce to money
6 property of the estate for which he serves.'" Id. at 117 (quoting
7 H.R. Rep. No. 95-595, at 379 (1977), reprinted in 1978
8 U.S.C.C.A.N. 5963, 6335). Based on its analysis, the Third
9 Circuit concluded that Congress intended moneys disbursed in
10 § 326(a) to be construed in its narrow sense, as "something
11 generally accepted as a medium of exchange," consistent with the
12 definition given in Webster's. In re Lan Assocs. XI, LP, 192 F.3d
13 at 119.

14 In addition to courts within the Third Circuit, other courts
15 have recently chosen to follow the reasoning in Lan Assocs. See
16 In re Am. Canadian Invests., Inc., 353 B.R. 853, 856 (Bankr. E.D.
17 Va. 2006) (relying on Lan Assocs., the bankruptcy court concluded
18 that "it is quite clear that Congress intended for 'moneys
19 disbursed' to mean actual money, not property, turned over by the
20 trustee to secured creditors."); In re Circle Invests., Inc., 2008
21 WL 910062 *3 (Bankr. S.D. Tex. 2008) (citing Lan Assocs. for its
22 conclusion that "a trustee's compensation must be based only on
23 moneys actually disbursed or turned over to parties in interest,
24 not on constructive disbursements").

25 In the other circuit-level case, In re England, the Fifth
26 Circuit reversed a district court's order that had, in turn,
27 reversed the bankruptcy court's order reducing a trustee's
28 compensation because the trustee had included a credit bid

1 transaction in the fee computation. The court decided that the
2 bankruptcy court's ruling was correct and that only moneys
3 disbursed, not other property, could be included in calculating
4 trustee's fees. However, in contrast to the Third Circuit's
5 discussion of the legal issue, the Fifth Circuit avoided
6 legislative history and instead relied on the plain meaning of the
7 Code provision as evidenced in the dictionary definitions:

8 Because the Bankruptcy Code does not define "moneys" (or
9 "money"), we must rely upon the word's common everyday
10 meaning, which does not include property. See WEBSTER'S
11 THIRD NEW INTERNATIONAL DICTIONARY 1458 (Philip Babcock Gove
12 ed., 1963) (defining "money" as "something generally
13 accepted as a medium of exchange, a measure of value, or
14 a means of payment"); BLACK'S LAW DICTIONARY 1005 (6th ed.
15 1990) (defining "money" as "coins and paper currency
16 used as circulating medium of exchange, and does not
17 embrace notes, bonds, evidences of debt, or other
18 personal or real estate"). The plain language of
19 § 326(a) indicates that the statute caps a trustee's
20 compensation based upon only the moneys disbursed,
21 without any allowance for the property disbursed.

22 In re England, 153 F.3d at 235.

23 In sum, our plain meaning analysis of moneys disbursed is
24 consistent with the only two published circuit-level decisions
25 analyzing the phrase.

26 C.

27 In addition to the plain meaning given to a term in
28 dictionaries, the Supreme Court counsels that the meaning assigned
to terms in the Bankruptcy Code should also reflect the statutory
context, including the use of the subject term elsewhere in the
Bankruptcy Code or related laws. Ransom, 131 S.Ct. at 724. Our
research shows that the word "money" as used in other provisions
of the Bankruptcy Code, and in other related statutes, almost
always refers to cash, currency or its equivalent.

1 Significantly, in § 704(a)(1), one of the fundamental duties
2 of a chapter 7 trustee is to "collect and reduce to money the
3 property of the estate." As can be seen, in this provision,
4 Congress clearly creates a distinction between "money" and other
5 kinds of property.¹⁰ We know of no decisions construing this
6 statute other than as a reference to cash, currency or its
7 equivalent.

8 In the case law, the courts have used the terms "money" and
9 "cash" as synonymous in applying § 704(a)(1). See Gordon v. Hines
10 (In re Hines), 147 F.3d 1185, 1189 (9th Cir. 1998) ("Section
11 704(1) directs a Chapter 7 trustee to collect and reduce to money
12 the property of the estate There is no requirement that in
13 acting pursuant to that statutory directive the trustee must
14 obtain court approval before reducing the estate property to
15 cash."); In re Murdock Mach. & Eng'g Co., 990 F.2d 567, 571 (7th
16 Cir. 1993) (describing the trustee's primary responsibility under
17 § 704(a)(1) to "obtain, reduce to cash, and distribute all of the
18 estate's assets"); Hyman v. Plotkin (In re Hyman), 967 F.2d 1316,
19 1320 (9th Cir. 1992) (noting that "[a trustee's] obligation under
20 11 U.S.C. § 704(1) [is] to act in 'the best interest of parties in
21 interest' in reducing estate property to cash."); Zupansic v.
22 Hyman (In re Zupansic), 259 B.R. 388, 390 (M.D. Fla. 2001) ("[A]

23
24 ¹⁰ The legislative history to § 704 indicates that, in
25 imposing the duty on the trustee to reduce property to money,
26 Congress intended to distinguish between the concepts of property
27 and money. See U.S. Tr. v. Messer (In re Pink Cadillac Assocs.),
28 1997 WL 164282 at *3 (S.D.N.Y. Apr. 8, 1997) ("The emphasis on
'moneys,' in § 704 rather than property or value, accords with the
drafter's understanding that 'the trustee's principal duty is to
collect and reduce to money property of the estate for which he
serves.'" (quoting H.R. Rep. No. 95-595, at 379 (1977), reprinted
in 1978 U.S.C.C.A.N. 5963, 6335).

1 trustee has a duty to attempt to collect and reduce the property
2 to cash for the benefit of creditors, consistent with the
3 trustee's duties pursuant to 11 U.S.C. § 704(1)."); In re
4 Shepherd, 12 B.R. 151, 153 (E.D. Pa. 1981) ("The trustee's
5 obligation is to collect the assets, reduce them to cash, and
6 distribute the cash pro rata among unsecured creditors."); In re
7 Plunkett, 60 B.R. 290, 292 (Bankr. S.D.N.Y. 1986) ("It is the
8 Trustee's duty to collect the estate and reduce it to cash for the
9 purpose of paying dividends to creditors. Code §§ 704 and 726.");
10 In re Di Gate Ready-Mix Corp., 55 B.R. 116, 117 (Bankr. E.D.N.Y.
11 1985) ("11 U.S.C. § 704(1) requires that the trustee of a
12 bankruptcy estate collect and reduce to cash the property of the
13 estate."); In re Ferris, 30 B.R. 746, 749 (Bankr. N.D. Ohio 1983)
14 (Trustee's primary duty is to "reduce to cash" assets.); In re
15 Carpenter, 23 B.R. 318, 319 (Bankr. D.N.J. 1982) (same); In re
16 Wilson, 4 B.R. 605, 606 (Bankr. E.D. Wash. 1980) (same).

17 There are other examples in the Bankruptcy Code where
18 Congress has used the term "money" as a manifest reference to
19 cash, currency or the equivalent. For example, § 345(a) commands
20 a trustee to deposit and invest "money of the estate" so as to
21 achieve "the maximum reasonable net return on such money." By
22 its terms, money in § 345(a) can only be interpreted as cash or
23 currency, because only money as cash or currency can be deposited
24 or invested. Moreover, a trustee may be liable to the estate when
25 he or she does not invest or deposit moneys in interest-bearing
26 accounts or use funds for an income-producing investment. U.S.
27 Tr. v. Columbia Gas Sys. (In re Columbia Gas Sys.), 33 F.3d 294,
28 301 (3d Cir. 1994); see also In re Moon, 258 B.R. 828 (Bankr. N.D.

1 Fla. 2001) (trustee liable for difference between interest that
2 could have been earned from certificates of deposit and interest
3 actually earned in money-market account).

4 Other textual clues to the Code's meaning of "money" abound.
5 Section 347(b) distinguishes money from securities and "other
6 property" in the distribution of unclaimed property. Section
7 748(a) instructs that a trustee "reduce to money" any securities
8 held as property of an estate. In a commodity broker liquidation
9 under § 766(f), the trustee "shall reduce to money . . . all
10 securities and other property . . . held as property of the
11 estate." And while not part of the Bankruptcy Code, 28 U.S.C.
12 § 1930(a)(6), the statute governing the amount of quarterly fees
13 payable to the U.S. Trustee in chapter 11 cases, bases that
14 computation on the cash (dollar) amounts of "disbursements" made
15 by the debtor or trustee.

16 Based upon how the terms money and disbursement are used in
17 the Code and related statutes, we do not think Congress intended
18 that "moneys disbursed" in § 326(a) would include the Secured
19 Creditors' credit bid.

20 D.

21 Of course, the plain meaning of a Code provision will not
22 control if such a construction yields an absurd result. Lamie v.
23 U.S. Tr., 540 U.S. 526, 534 (2004). On the other hand, even if
24 the plain meaning of terms employed in the Code by Congress
25 fosters harsh results, "courts may not soften the import of
26 Congress's chosen words." Id. at 538.

27 Apparently, the bankruptcy court was concerned that the UST's
28 construction of § 326(a) could lead to absurd results. In

1 explaining its interpretation of the Code, the court worried that:
2 "If credit bids weren't treated as moneys disbursed, then Trustees
3 would simply insist that potential credit bidders hand them a
4 check. . . and the Trustee would then hand it right back to the
5 creditor." Rather than "force people to go through that little
6 ritual," the court ruled that it was appropriate to "make the
7 substance consistent with the form." Tr. Hr'g 3:7-9. While the
8 bankruptcy court's observations about the shortcomings of
9 Congress' approach in calculating maximum trustee compensation
10 might have merit, excluding a secured creditor's credit bids at
11 bankruptcy sales from the meaning of "moneys disbursed" in
12 § 326(a) is not absurd.

13 While the UST's interpretation of § 326(a) will significantly
14 reduce Tamm's compensation in this case, he would still presumably
15 receive approximately \$70,000 for his services. And as noted
16 above, "absurdity" does not necessarily result from a harsh
17 outcome. Lamie, 540 U.S. at 538; Nixon v. Mo. Mun. League, 541
18 U.S. 125, 141 (2004) (Scalia, J., concurring) ("The avoidance of
19 unhappy consequences is not an adequate basis for interpreting a
20 text.").

21 As in this case, in adopting a "moneys disbursed" standard
22 for capping trustee fees in § 326(a), Congress perhaps concluded
23 that it was inappropriate to compensate trustees for selling
24 estate property to the secured creditors holding liens on that
25 property, where no cash changes hands, and the results of the
26 transaction provide no quantifiable return to the estate or
27 additional disbursements to unsecured creditors. Indeed, the
28 effect of adopting Tamm's interpretation of § 326(a) here is to

1 compensate him for selling the Property to the Secured Creditors
2 for no net return to the estate, with the payment of his enhanced
3 fees from monies that would otherwise be distributed to unsecured
4 creditors.¹¹ While the means Congress selected of implementing its
5 policy, under these facts, may seem harsh to Tamm, or even flawed
6 to the bankruptcy court, it cannot be said that excluding credit
7 bids from the formula for calculating trustee fees is absurd.

8 IV.

9 Tamm insists that the Ninth Circuit's decisions in York Int'l
10 Building, Inc. v. Chaney (In re York), 527 F.2d 1061 (9th Cir.
11 1976), and Sw. Media, Inc. v. Rau, 708 F.2d 419 (9th Cir. 1983),
12 compel us to include the amount of the Secured Creditors' credit
13 bids as "moneys disbursed" under § 326(a). The UST is equally
14 vociferous that those decisions are neither precedential, nor
15 particularly relevant, in resolving this appeal.

16 As noted above, the bankruptcy court did not suggest that
17 these two Ninth Circuit decisions were binding precedent. Indeed,
18 the bankruptcy court noted that York and Rau were decided "under
19 the [Bankruptcy] Act and arguably distinguishable and perhaps not
20 as thoroughly reasoned as one would hope." Tr. Hr'g 3:10-15. On
21 the other hand, the court acknowledged that the only two circuit-

23 ¹¹ Of course, had another bidder appeared at the trustee's
24 sale and purchased the Property for cash, thereby generating even
25 a small net return to the estate, Tamm could have included the
26 amounts paid to the Secured Creditors out of the closing to
27 satisfy their liens in computing his maximum compensation, because
28 § 326(a) expressly contemplates that result. If such a sale
resulted in increased compensation to Tamm out of proportion to
the amount of the net return to the estate, the bankruptcy court,
in the exercise of its discretion, could instead award Tamm a
reasonable amount under § 330(a).

1 level decisions construing § 326(a), Lan Assocs. and England
2 (discussed supra), are “the clearest authority that goes against
3 me.” Tr. Hr’g 16:14. Nevertheless, the bankruptcy court looked
4 to the Ninth Circuit’s decisions interpreting former law for an
5 indication of where this issue “would come out” if it were to
6 decide the question on appeal. Tr. Hr’g 3:14.

7 Obviously, we agree with the bankruptcy court that York and
8 Sw Media are not binding precedent in this case. However, we
9 respectfully disagree with the court that the two decisions are
10 even persuasive in predicting the Ninth Circuit’s views concerning
11 this issue. Instead, we find the decisions are clearly
12 distinguishable.

13 While both of the cited cases were decided under the former
14 Bankruptcy Act, not the modern Bankruptcy Code, we acknowledge the
15 a longstanding principle of construction of bankruptcy statutes
16 that “we will not read the Bankruptcy Code to erode past
17 bankruptcy practice absent a clear indication that Congress
18 intended such a departure.” Pa. Pub. Welfare Dep’t v. Davenport,
19 495 U.S. 552, 563 (1990). However, in adopting § 326(a), Congress
20 did clearly depart from the Bankruptcy Act’s method of calculating
21 trustee compensation. In addition, neither York nor Rau dealt with
22 whether credit bids should be included in “moneys disbursed” by
23 the trustee for purposes of computing maximum fees, the issue in
24 this appeal.

25 In York, the Ninth Circuit reviewed the amount of reasonable
26 compensation payable for a trustee’s services in a chapter X case
27 under the Bankruptcy Act. York, 527 F.2d at 1069. In that case,
28 the trustee in reorganization, Mr. Chaney, sold the debtor’s

1 property, and the sale was approved by the district court. Id. at
2 1074. But Chaney's compensation as trustee of the sale was not
3 the focus of the disputes. Instead, the court's principal concern
4 was the reasonableness of the compensation Chaney was seeking for
5 services rendered while wearing his three other hats: At the time
6 of the property sale, he was also functioning as manager of the
7 building, owner of the company providing janitorial services to
8 the building, and the broker who arranged the sale and was seeking
9 a broker's commission.

10 In its discussion of Chaney's compensation as trustee, in a
11 footnote, the Ninth Circuit allowed as a disbursement a
12 purchaser's assumption of the existing mortgages on the property.¹²
13 Tamm seizes on this footnote as proof that, "[T]he Ninth Circuit
14 made a decision that a purchaser's assumption of an existing
15 mortgage is a disbursement and therefore 'the total sales price of
16 the property' should be included in the total disbursements. . . .
17 The Ninth Circuit clearly and unequivocally held that in a sale
18 subject to an existing mortgage, the value of the mortgage is
19 included in the trustee's total disbursements." Tamm's Br. at 10.

20 The footnote Tamm champions provides neither clear nor
21 unequivocal support for his position and, indeed, does not even
22 constitute a holding in the decision. More precisely, the Ninth
23 Circuit acknowledged in York that under chapter X, the fee caps in
24 § 76 of the Act simply do not apply: "§ 48 of the Bankruptcy Act
25 (11 U.S.C. § 76) dealing with the compensation of trustees in
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28 ¹² "For the purposes of calculating the trustee's fee under
this section, we treat the assumption of the existing mortgages as
a disbursement." In re York, 527 F.2d at 1074 n.12.

1 ordinary bankruptcy, is expressly made inapplicable to fees
2 allowed in Chapter X proceedings by 11 U.S.C. § 641[.]”¹³ In re
3 York, 527 F.2d at 1073. Section 641 (repealed), applicable in
4 chapter X cases, required only that the bankruptcy court make a
5 determination of the reasonableness of the trustee’s compensation,
6 with no fee caps imposed, nor any requirement that compensation be
7 based on moneys disbursed. In other words, the Ninth Circuit’s
8 inclusion in York of the value of the assumed mortgage in its
9 determination of reasonable trustee compensation was not
10 inconsistent with chapter X. However, the decision does not speak
11 to whether the same result should apply under § 326(a), a statute
12 that allows bankruptcy courts no discretion in determining maximum
13 trustee compensation.

14 Rau, decided in 1983, is also a Bankruptcy Act case.
15 Southwest Media, Inc. had filed a chapter XI case, and Albert Rau
16 was appointed receiver and, later, trustee. Southwest Media
17 operated a radio station and had purchased from KBUZ, Inc. two
18 broadcasting licenses and broadcasting equipment for \$1,200,000,
19 paying \$200,000 down and issuing a promissory note for the \$1
20 million balance. Rau sold all assets of the corporation for
21 \$1,500,000, which included assumption of KBUZ’s lien. Rau, 708
22 F.2d at 421. Later, when Rau sought compensation as trustee of
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25 ¹³ Section 76 of the Bankruptcy Act set a cap on compensation
26 of trustees other than trustees in Chapter X, based on a sliding
27 scale of moneys disbursed. Thus, pursuant to § 641 (repealed),
28 there was no fee cap imposed by the Bankruptcy Act on trustees of
Chapter X cases, such as In re York. There was only a
reasonableness requirement, and the bankruptcy court was free to
compensate a trustee with any fee that the court found reasonable.
If a court wished to include a mortgage in the fee calculation for
a Chapter X trustee, it was free to do so.

1 about \$66,000, the debtor and other creditors challenged his
2 inclusion of the full sale price, including the value of the
3 liens, in calculating his compensation. Id. at 422.

4 The important issue before the Rau court was whether the term
5 "moneys disbursed" in calculating trustee compensation was limited
6 to the "net equity value" realized by the estate, or whether that
7 term included the amount of the lien assumed by the purchaser as
8 part of the property sale. In resolving this question, the court
9 in Rau opined that, "When assets of the estate are sold free and
10 clear of liens held by secured creditors, the entire sale price,
11 including the amount used to pay off the liens, is counted for
12 purposes of establishing the trustee's fee base." Rau, 708 F.2d
13 at 423.

14 Again, Rau is not precedential here. Whether a credit bid
15 should be included in calculation of trustee fees was not argued
16 before the Ninth Circuit, nor was it determined with the full and
17 careful consideration of the court. As with York, any discussion
18 of this issue is dictum.¹⁴ And finally, as Tamm acknowledges in
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21 ¹⁴ Tamm also cites an unpublished BAP decision to support his
22 argument that York and Rau are precedential. Blair v. Stratton
23 (In re Blair), 2005 WL 2009303 (9th Cir. BAP June 20, 2005).
24 Specifically, Tamm quotes from the Panel's memorandum decision as
follows: "The Ninth Circuit adopted the constructive disbursement
doctrine in York Int'l Bldg., Inc. v. Chaney, 527 F.2d 1061, 1074
n.12 (9th Cir. 1975) (treating assumption of existing mortgage as a
disbursement)).

25 Blair is no help to Tamm. Blair was an unpublished decision,
26 containing an express warning that the panel did not intend it to
27 be precedential. See also (then) 9th Cir. BAP Local R. 8013-1.
28 In addition, in Blair the Panel was reviewing a bankruptcy court
decision involving a "constructive disbursement" by the trustee,
in the form of a cash disbursement made from the sale proceeds by
an escrow agent acting on instructions from the trustee. The
Blair panel never ruled that York and Rau controlled the outcome
of the current issue before this Panel.

1 his brief, it is not clear whether, under the facts stated, the
2 entire sale price in Rau might have been paid in a cash
3 disbursement. If it was, Rau is of little value as support for
4 Tamm's position.

5 We conclude that York and Rau are neither binding, nor
6 particularly relevant, in deciding the current appeal.

7 **CONCLUSION**

8 We believe the plain meaning of the term "moneys disbursed"
9 in § 326(a) as used in calculating the cap on chapter 7 trustee
10 compensation cannot include the Secured Creditors' credit bids in
11 this case. Such a construction is not absurd; under facts such as
12 these, it allows sales by trustees of estate property to secured
13 creditors where no cash is received by the trustee, but does not
14 allow compensation to the trustee based on such sales, where there
15 is no net return to the estate.

16 We think that the plain meaning of "moneys disbursed," the
17 use by Congress of these terms in other parts of the Code, the
18 statutory context of the Code, and the legislative history
19 instruct that we reject Tamm's interpretation of § 326(a).

20 Finally, we disagree with Tamm, and the bankruptcy court,
21 that the decisions of the Ninth Circuit construing the Bankruptcy
22 Act support the notion that the Secured Creditors' credit bids be
23 included in computing his fees.

24 Because we conclude that "moneys disbursed" in § 326(a) does
25 not include the Secured Creditors' credit bids in calculating
26 Tamm's maximum compensation as trustee in this case, we REVERSE
27 the bankruptcy court's order awarding Tamm compensation, and
28 REMAND this matter to the bankruptcy court with instructions to

1 recalculate the amount of his compensation consistent with this
2 decision.

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