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UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF NEW YORK

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In re

HAMPTON JANITORIAL SERVICES, INC.

Case No. 91-13194 K

Debtor

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In this case, Lee Charles LaMendola, Esq. was attorney for the Chapter 11 Debtor-in-Possession. He received \$250.00 as a retainer (and \$500 for filing fees) before the petition was filed, towards an agreed initial fee of \$3500. Thus the balance due upon the agreed fee was \$3250. That \$3250, as well as an additional \$50 in reimbursement of a filing fee, was paid to Mr. LaMendola after the filing of the petition. Mr. LaMendola failed to make suitable application for Court approval of that payment.

Many months later the case was converted to Chapter 7, and Trustee Mark Wallach, Esq. discovered the post-petition payment. He communicated with Mr. LaMendola, demanding return of the \$3300 and suggesting that Mr. LaMendola thereafter make application for approval of fees.

Mr. LaMendola has not returned the \$3300 but made application for allowance of fees and expenses in the amount of \$9437.50.

At hearing Mr. LaMendola reassured the Court that his receipt of post-petition monies without approval was inadvertent and unintentional. Since hearing and in light of his having

learned that Mr. Wallach has only \$3275.46 currently in this estate to pay all other administrative expenses, Mr. LaMendola has voluntarily reduced his request for fees and disbursements to the amount received -- \$4050.00.

The U.S. Trustee and Mr. Wallach ask the Court to consider, inter alia, the fact that Mr. LaMendola lacked authority for his receipt of post-petition payments, in fixing reasonable compensation for Mr. LaMendola.

It is clear that this Court has discretion in some instances to deny fees in toto. "An attorney seeking a fee in a bankruptcy matter does have a fiduciary obligation to the court. ... There is no doubt of the inherent power of a bankruptcy judge to deny fees and disbursements where various breaches of fiduciary obligations occur." *Matter of Arlan's Dept. Stores, Inc.*, 615 F.2d 925 (2nd Cir. 1979), at 941, 943.

That remedy has been applied in this District where counsel's receipt of fees without notice or approval of the Court, "aggravated" his failure to have sought timely approval of his employment by the Debtor-in-Possession. *In re Amherst Mister Anthony's Ltd.*, 63 B.R. 292 (W.D.N.Y. 1986). (Here Mr. LaMendola did, apparently, receive appropriate approval of employment.)

The Court finds that Mr. LaMendola's failure to return the post-petition receipts to Mr. Wallach pending a resolution of this matter has "aggravated" his failure to obtain prior approval of those payments, but the Court is not prepared to rule on Mr.

LaMendola's current request, either in his favor or not.

The Court will not further consider Mr. LaMendola's fee application until he disgorges the post-petition payments he received and until the Trustee files a Final Report so that the Court may determine whether the amounts received improperly by Mr. LaMendola permitted him to receive a greater percentage of what he was owed by the Debtor than other post-petition creditors of the Debtor are going to receive.

Mr. LaMendola's fee application is denied until he pays to the Trustee the sum of \$3,300 and the Trustee has filed a Final Report and Account. Mr. LaMendola may then (by motion on notice to the Trustee and U.S. Trustee) renew his fee application.

SO ORDERED.

Dated: Buffalo, New York  
September 9, 1993

  
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U.S. B.J.