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No. 14-103

IN THE

Supreme Court of the United States

BAKER BOTTS L.L.P. and JORDAN, HYDEN, WOMBLE, CULBRETH & HOLZER, P.C.,

Petitioners,

—v.—

ASARCO LLC,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICI CURIAE* PROFESSORS RICHARD AARON, JAGDEEP S. BHANDARI, SUSAN BLOCK-LIEB, ROBERT D'AGOSTINO, GEORGE W. KUNEY, LAWRENCE PONOROFF, AND KEITH SHARFMAN IN SUPPORT OF RESPONDENT

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PAGE(S)

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Oxford English Dictionary, http://www.oxforddictionaries.com /us/definition/american_english/ necessary 16

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INTEREST OF *AMICI CURIAE*[1]

The *Amici Curiae* are law professors who have devoted their careers to the study and teaching of bankruptcy law.[2] They respectfully submit this *pro bono* brief in support of respondent, and urge the Court to rule that section 330(a)(1) of the Bankruptcy Code (the "Code") does not authorize a bankruptcy court to award compensation to an attorney for a trustee or debtor in possession (herein, a "trustee")[3] for the time devoted to litigating its fee application so as to defeat objections to the application.

The *amici* are keenly interested in this appeal for two reasons. *First,* the question posed by this appeal transcends the allowability of fees for a

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[1] Pursuant to Rule 37 of the Rules of this Court, the *amici* file this brief with the written consent of both parties, which are on file with the Clerk. No person or entity including the *amici* or their counsel made a monetary contribution for the preparation or submission of this brief.

[2] The *amici* are the following law professors who teach at the law schools indicated next to their names: Richard Aaron, University of Utah, S.J. Quinney College of Law; Jagdeep S. Bhandari, Florida Coastal College of Law; Susan Block-Lieb, Fordham University School of Law; Robert D'Agostino, John Marshall School of Law; George W. Kuney, University of Tennessee College of Law; Lawrence Ponoroff, University of Arizona James E. Rogers College of Law; and Keith Sharfman, St. John's University School of Law.

[3] By virtue of section 1107 of the Bankruptcy Code, a debtor in possession in a chapter 11 case has substantially all of the rights and powers of a bankruptcy trustee. In this brief, the term "trustee" includes a debtor in possession as well as a trustee serving in a case under the Code.

trustee's attorney because section 330(a)(1)[4] governs compensation awards for all professional persons who serve trustees. *Second,* if such fees were allowed, they would constitute administrative priority claims in bankruptcy cases. As such, they would adversely affect the recovery of other creditors, and impede confirmation of plans of reorganization under chapter 9 and chapter 11 of the Code.

The *amici* represent no institution, group, or association. Their sole purpose in filing this brief is to offer what assistance they can to this Court as it considers and decides this important bankruptcy law issue.

SUMMARY OF ARGUMENT

The *amici* urge the Court to affirm the decision of the Fifth Circuit Court of Appeals disallowing the award made under section 330(a)(1) by the bankruptcy court for the time spent by petitioners in the defense of their fee applications. Petitioners were employed as the attorneys for the chapter 11 debtor in possession, and, pursuant to section 1107, served in the capacity of a bankruptcy trustee. The *amici* contend that the Circuit Court correctly held that the Code does not provide for a trustee's attorney to recover fees for defending its fee application, which is solely for the attorney's own benefit, does not serve the trustee, and cannot benefit the debtor estate.

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[4] All references in this brief to numbered sections are to the Bankruptcy Code, as now in effect (i.e. title 11 of the United States Code), unless the context indicates otherwise.

Most fundamentally, section 330(a)(1) only allows compensation for "necessary services" rendered by "a professional person employed under section 327" by the trustee, and it plainly does not permit a trustee to employ an attorney to pursue litigation to defeat objections to its own fee application. This is because section 327(a) only permits a trustee to employ an attorney "to represent or assist the trustee in carrying out the trustee's duties under this title [i.e., title 11]." By defending its fee application, the trustee's attorney does not "represent or assist the trustee;" it is only representing or assisting itself. Nor does such defense involve "carrying out the trustee's duties." Those duties, which are enumerated in sections 704 and 1106(a) of the Code, nowhere extend to the defense of a trustee's attorney's disputed fee application. Because section 327(a) does not permit the trustee to retain an attorney to defend the attorney's own fee application, compensation cannot be allowed under section 330(a)(1) for such defense.

Secondly, section 330(a)(4)(A)(ii)(I) expressly precludes allowing compensation for "services that were not . . . reasonably likely to benefit the debtor estate." Litigating on one's own behalf to defeat an objection to one's own claim for a fee from the estate is not a service that could benefit the estate, thus precluding compensation under section 330(a)(1) for the time spent in litigating objections to one's own fee application.

Thirdly, section 327(a) only authorizes a trustee to employ persons who "do not hold or represent an interest adverse to the estate." Yet the prosecution of a fee application against the estate is necessarily adverse to the estate, which must pay the

fees that are awarded; it is essentially a suit by the attorney on its own claim against the estate. Because section 327(a) bars a trustee from employing an attorney to prosecute its own adverse claim against the estate, section 330(a)(1) forbids an award to the attorney for litigating its fee claim against the estate.

Although the plain meaning of sections 327(a) and 330(a)(1) is sufficient to decide this appeal in favor of respondent, if the Court were to look beyond their plain meaning, the *amici* offer several reasons for concluding that Congress did not intend those provisions to allow compensation for litigating a fee application against the estate.

First, section 330(a) was enacted in 1978, barely three years after this Court's ruling in *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240, 247 (1975), which re-affirmed the long standing American Rule that litigants bear their own litigation costs, absent an agreement to the contrary or bad faith or vexatious litigation, which are exceptions not involved in this appeal.[5] Congress must be deemed to have been aware of this Court's ruling in *Alyeska* and the ancient American Rule when it enacted section 330(a). It should not be presumed to have rejected the American Rule for bankruptcy cases, absent express statutory language or a clear indication that it intended to do so. Congress thus presum-

[5] There was no finding below, and petitioners do not assert, that the objections to their fee applications involved bad faith or vexatious litigation, or that the bankruptcy court's orders approving their retention authorized compensation for defending their fee applications if objections were filed.

ably intended that the American Rule, under which an attorney does not recover its cost for suing a client for a fee, would apply to the collection of fees in bankruptcy cases as well.

Second, the Congressional history of section 330(a) shows that a primary purpose of that provision was to enable attorneys in bankruptcy cases to be compensated on essentially the same basis as attorneys in non-bankruptcy cases. Congress thus presumably intended that, just like attorneys in non-bankruptcy cases, attorneys for trustees would not be compensated for the time devoted to collect their fees.

Third, the allowance of compensation for defending a fee application could, as an administrative priority expense, adversely affect recoveries by other priority claimants, as well as the entire general creditor body. It could also make it more difficult to achieve, and in some cases prevent, confirmation of a plan of reorganization under chapter 9 or chapter 11 of the Code, because a requirement for confirming such a plan is that awards for compensation must be paid in cash in full. Moreover, adding fee defense costs to otherwise large fees would run counter to Congress' purpose in amending section 330 in 1994 to rein in large bankruptcy fees. Further, because a basic goal of the bankruptcy law is to maximize the estate for the benefit of all creditors, section 330(a)(1) should be read narrowly so as not to treat services as "necessary" for which it does not expressly provide.

Fourth, the addition of section 330(a)(6) to the Code in 1994 provides another reason why the defense of a fee application is not compensable,

namely the venerable canon of construction *expressio unius est exclusio alterius*. By providing in section 330(a)(6) for compensation for preparing a fee application, but not for its defense, Congress excluded compensation for litigating its defense. During the two-year legislative process culminating in the 1994 amendments, Congress addressed the compensability of professional services. In its wisdom, Congress determined not to enact a provision allowing compensation for litigating objections to the application, although, as the *amici* note herein, a request had been made to a congressional committee early in the legislative process to amend section 330 to provide for both.

In sum, sections 327(a) and 330(a)(1) must be read according to their plain meaning or, if the Court looks beyond their plain meaning, they should be construed as not allowing an award of compensation to a trustee's attorney for the time devoted to defending its disputed fee application.

ARGUMENT

POINT I

UNDER THE PLAIN MEANING OF SECTIONS 327(a) AND 330(a)(1), COMPENSATION CANNOT BE AWARDED TO A TRUSTEE'S ATTORNEY FOR LITIGATION AIMED AT DEFEATING OBJECTIONS TO ITS OWN FEE APPLICATION

A. Under Their Plain Meaning, Sections 327(a) and 330(a)(1) Limit Awards for Professional Services in Bankruptcy Cases, Precluding Compensation For Litigating a Fee Application

Section 330(a)(1) is the provision that governs the entitlement of a professional person to an award of compensation from the estate for services to the trustee. Section 330(a)(1), which refers to section 327, incorporates section 327(a)'s limitations on employment of professional persons by a trustee. The operative language of section 330(a)(1) is: " . . . the court may award to . . . a professional person employed under section 327 . . ." Those provisions must be read together in order to determine whether a particular service may be compensated. *See Lamie v. United States Trustee,* 540 U.S. 526, 537 (2004) (herein "*Lamie*") (sections 327 and 330(a) should be "taken together"); *Erlenbaugh v. United States,* 409 U.S. 239, 244 (1972) ("individual sections of a single statute should be construed together").

A professional person employed by a trustee may be compensated under section 330(a)(1) *only* for a service authorized under section 327(a). As

stated by this Court in *Lamie,* 540 U.S. at 538, "[a]dhering to conventional doctrines of statutory interpretation, we hold that § 330(a)(1) does not authorize compensation awards to debtor's attorneys from estate funds, unless they are employed as authorized by § 327." *See, e.g., In re Wireless Technologies, Inc.*, 449 B.R. 228, 236 (Bankr. M.D. Pa. 2011) (herein "*Wireless*") (denied compensation to an attorney employed under section 327(a) for preparing another attorney's fee application, as "beyond the scope of the appointment"); *In re Ben Franklin Retail Store, Inc.,* 227 B.R. 268, 271 (Bankr. N.D. Ill. 1998) (herein "*Ben Franklin*") (denying fees for contesting the election of a trustee, because such services were not necessary to carry out the trustee's statutory duties).

Section 327(a) imposes two threshold limitations on professional services for which compensation may be awarded under section 330(a)(1). *First*, section 327(a) authorizes a trustee to employ an attorney only if the attorney does not "hold or represent an interest adverse to the estate." Under this limitation, an award cannot be made for services designed to defeat objections to a fee application of a trustee's attorney. This is because such services assert an adverse claim against the estate, which, if sustained, would reduce the funds of the estate, contrary to the duty of a trustee to maximize the assets of the estate. *Second*, section 327(a) carefully delineates the authority of a trustee to employ an attorney, and permits retention only "to represent or assist the trustee in carrying out the trustee's duties under this title [11]." This limitation precludes an award for services designed to defeat objections to a trustee's attorney's fee application. This is because a trustee

obviously does not have a statutory duty to try to defeat objections to its own attorney's fee application seeking payment from the estate. Despite the crucial significance of section 327(a) to the question now before this Court, the petitioners mention section 327(a) only once in their brief, which does not set forth any discussion of that critically important provision. *See* Pet. Op. Br. at 6.

In addition, even if a trustee's attorney were able to hurdle the bar imposed by section 327(a), petitioners have also failed to satisfy section 330(a)(1)'s express requirement that services must be "necessary" in order to be compensable. Because the effort by a trustee's attorney to defeat objections to its fee application can only deplete the estate, such services were not "necessary" for the trustee to receive. Moreover, such an award to petitioners for such services is prohibited by section 330(a)(4), which precludes an allowance of compensation for services that "were not reasonably likely to benefit the debtor's estate." *See* Point I.E.2 *infra*.

Congress wrote these provisions in clear and unambiguous words. To read these provisions as allowing fees for the trustee's attorney's litigation effort to get paid would essentially rewrite their plain text.

B. Under the Plain Meaning of Section 327(a), A Trustee's Attorney Does Not, By Defending Its Own Fee Application, "Represent or Assist The Trustee In Carrying Out The Trustee's Duties Under This Title [11]"

Section 327(a) permits the trustee to employ a professional only to "represent or assist" the trustee in carrying out its statutory duties under the Code. The trustee's duties are listed in sections 704 and 1106 of the Code. Section 704(a)(5) calls upon a trustee to "object to the allowance of any claim that is improper." The Code, however, does not impose any duty on the trustee to uphold a contested fee application because the estate's funds would be diminished by a successful effort to defeat objections to the application, and a trustee thus cannot employ an attorney to do so. In attempting to defeat objections to its fee application, a trustee's attorney does not "represent" or "assist" the trustee "in carrying out the trustee's duties under this title." In doing so, the attorney only represents itself to achieve a goal that is contrary to the duty of a trustee to maximize the estate. *See Commodity Futures Trading Comm'n v. Weintraub,* 471 U.S. 343, 352 (1985) (herein "*Weintraub*") ("The trustee . . . has the duty to maximize the value of the estate."); *Bank of America Nat. Trust and Sav. Assn. v. 203 North LaSalle St. Partnership,* 526 U.S. 434, 453 (1999) (herein "*203 North LaSalle*") (a "recognized polic[y] underlying Chapter 11 [is] maximizing property available to satisfy creditors."); *In re Luongo,* 259 F.3d 323, 340 n.3 (5th Cir. 2001) ("The trustee's duty is to maximize the estate for the purposes of distribution to the creditors."). *See*

also Wireless, 449 B.R. at 235 (denied compensation for services that would not benefit the estate, and "would only be of value to [the debtor's principal] himself."). Moreover, as the United States concedes in its *amicus* brief, the work of a trustee's attorney, even in successfully defending its fee application, does not itself constitute "'services rendered' for which the attorney should receive 'reasonable compensation' under section 330(a)(1)(A)." *See* United States' *amicus* brief at 31-32.

If petitioners had employed an attorney to handle the defense of their fee applications, their attorney would have been representing the petitioners, not the trustee. Had petitioners employed an attorney for that purpose, court approval of such employment under section 327(a) would not have been required, and neither the petitioners nor their retained attorney would have had a right to recover from the estate for the retained attorney's services. Petitioners' services in defending their own fee applications are likewise not compensable from the estate, and the time devoted by them to defending their applications did not become compensable because they defended their applications *pro se*.

The briefs filed by petitioners and their *amici* seeking a reversal fail to recognize that sections 327(a) and 330(a)(1) should be "taken together," as stated by *Lamie*, 540 U.S. at 537. Those briefs ignore the threshold limitations of section 327(a) on attorney compensation under section 330(a)(1), merely offering one perfunctory citation of section 327(a) as requiring court approval for retention of an attorney, without any mention of its preclusive

effect on the allowability of defense fees. *See* Pet. Op. Br. at 6.

The words of section 327(a) simply do not include authorization for any services other than those specified in that provision, particularly in the absence of the word "including" following the services it specifically sets forth. *See* section 102(3) (stating "'includes' and 'including' are not limiting" in the Code). The plain text of section 327(a) should not be expanded by adding a provision to authorize legal services that could diminish the size of the estate.

C. Section 327(a)'s Plain Text Prohibits a Trustee From Employing an Attorney Who "Hold[s] or Represent[s] an Interest Adverse to the Estate"

In common parlance, to hold "an interest adverse to the estate" means to possess a position against the estate. In the bankruptcy context, "an interest adverse to the estate" is something that would deplete estate assets. Seeking to defeat an objection to a fee application is against the interests of the estate because it serves to deplete estate assets, and thus asserts "an interest adverse to the estate," as furthering the attorney's claim against the estate. Section 101(5)(A) defines a "claim" as a "right to payment." By litigating to defeat an objection to its own fee claim, the attorney asserts its own economic interests, not the interest of the estate. Therefore, defense fees cannot be compensated.

The Ninth Circuit Court of Appeals in *In re AFI Holding, Inc.*, 530 F.3d 832, 845 (9th Cir. 2008), stated that *In re Roberts,* 46 B.R. 815, 826-27

(Bankr. D.Utah 1985), *aff'd in part and rev'd in part on other grounds,* 75 B.R. 402 (D.Utah 1987), set forth "[a] generally accepted definition of 'adverse interest.'" Under that definition, something that would deplete estate assets constitutes an "interest adverse to the estate." As stated in *In re Roberts*, to "hold an interest adverse to the estate" means:

> (1) to possess or assert any economic interest that would tend to lessen the value of the bankruptcy estate or that would create either an actual or potential dispute in which the estate is a rival claimant; or (2) to possess a predisposition under circumstances that render such a bias against the estate.

46 B.R. at 826-27. *See also Rome v. Braunstein*, 19 F.3d 54, 58 n.1 (1st Cir. 1994) (citing *In re Roberts* as providing a "pragmatic" description of "adverse interest.").

As the estate's representative, the trustee "owes a fiduciary duty to debtor and creditors alike to act fairly and protect their interests." *In re WHET, Inc.,* 750 F.2d 149, 149 (1st Cir. 1984). A trustee's duty of loyalty also extends to the trustee's professionals. *See Mosser v. Darrow,* 341 U.S. 267, 271-72 (1951); *see also Bank Brussels Lambert v. Coan,* 176 F.3d 610, 621 (2d Cir. 1999). Pursuant to its fiduciary status, "[t]he trustee must exclude all self-interest, as well as the interest of a third party, in his administration of the trust solely for the benefit of the beneficiary." G. Bogert, *The Law Of Trusts and Trustees* §543. A trustee's attorney, as an employee of the trustee, must comply with the preclusion of self interest

imposed by the law of trusts, as held by *Mosser v. Darrow*, 341 U.S. at 271-272. Litigation of a trustee's disputed fee application by the trustee's attorney is the assertion of a self-interested "interest adverse to the estate," within the meaning of section 327(a), for which compensation thus may not be awarded under section 330(a)(1). Indeed, the United States Trustee, in its brief filed in the district court in this case, recognized that these principles are inherent in section 330, stating: "[t]he better-reasoned view is that such an award [for fees for prosecuting a fee application] is generally precluded by the plain text of the Bankruptcy Code, which (subject to exceptions not relevant here) prohibits professionals from receiving compensation from the estate for work that is adverse to the interests of the estate." *See* United States Trustee's district court brief at 22.

D. The Factors in Section 330(a)(3) For Determining the Reasonableness of Compensation Do Not Confer a Right to Compensation

Petitioners, and their *amici*, mistakenly conflate the factors for determining the *reasonableness* of compensation with the threshold question of *entitlement* to compensation in the first place. For example, petitioners assert that successfully defending a fee application is both "necessary to the administration of" and "beneficial toward the completion of" a bankruptcy "case," and is thus compensable. *See* Pet. Op. Br. at 25, 33, and 53. However, being "necessary to the administration" and "beneficial toward completion of" a bankruptcy "case" are simply two of the statutory factors in section 330(a)(3)(C) for "determining the amount

of reasonable compensation to be awarded to [a] professional person" under section 330(a)(1). The section 330(a)(3) factors do *not* create a right to compensation. Rather, applying section 330(a)(3)'s factors presupposes that the professional has been retained under section 327(a) and thus qualifies for compensation to begin with; those factors merely determine the reasonable *amount* of compensation. In the absence of retention under section 327(a) to render the service in question, the factors for determining reasonableness of compensation simply never come into play. That result is clear from section 330(a)(1), which specifically permits compensation only to professional persons "employed under sections 327 or 1103." Case law also recognizes that result. *See Lamie*, 540 U.S. at 537 (compensation not authorized under section 330(a)(1) in absence of retention under section 327(a)); *In re Singson,* 41 F.3d 316, 320 (7th Cir. 1994) (payment disallowed for work done outside of scope of retention, and also denying request for retroactive expansion of scope of retention); *Wireless*, 449 B.R. at 236 (denied compensation for work "beyond the scope" of employment); *Ben Franklin*, 227 B.R. at 271 (same).

Accordingly, petitioners' argument that rendering services allegedly necessary to the administration of the case and beneficial towards its completion entitles one to compensation under section 330(a)(1) utterly misses the pre-requisite need for retention under section 327(a) to render the services in question. As shown above, petitioners were not, and as a matter of law could not have been, retained under section 327(a) for defending their own fee applications. Nor is there anything harsh or unfair about denying compensa-

tion even if petitioners' services were, *arguendo,* necessary to administration of, or beneficial to completing, the case. This is because *every* creditor's attorney who prosecutes a claim contributes to administering the estate by helping to liquidate a claim, and *all* estates benefit from having the claims against them liquidated. Yet such attorneys are not paid for those services.

E. To Be Compensable, An Attorney's Services Must, As Required By Section 330(a), Be Both "Necessary" and "Reasonably Likely To Benefit The Debtor's Estate," But Petitioners' Services Were Neither

1. Petitioners' Defense Of Their Fee Application Was Not "Necessary" For The Trustee

This Court has long relied on dictionaries for the plain meaning of words not defined by statute. *See Schwab v. Reilly*, 560 U.S. 770, 783 (2010) (the Court "look[s] to dictionaries . . . to determine the meaning of words the Code does not define"). The word "necessary" is defined to mean "required" in Webster's Third New International Dictionary 2075 (3d ed. 1961), and as "[r]equired to be done, achieved, or present; needed; essential" in *Oxford English Dictionary*, available at http://www.oxforddictionaries.com/us/definition/american_english/necessary. *See also, Merriam-Webster's Dictionary*, available at http://www.merriam-webster.com/dictionary/necessary (defining "necessary" as "so important that you must do it or have it," which is to say it is "absolutely needed.").

What is "necessary" (that is "required") under section 330(a)(1) is best understood in light of the services that section 327(a) deems to be needed by a trustee, *i.e.* only those by which the professional person "represents or assists the trustee in carrying out the trustee's duties under this title." *See Lamie*, 540 U.S. at 537 (sections 327 and 330 must be read together). In view of section 327(a)'s limitations on the services for which a trustee may employ an attorney, it is clear that services are not necessary if they do not assist the trustee in carrying out its statutory duties. The services for defending one's own fee application are not needed by the trustee to carry out any of its statutory duties, but are needed only by its attorney. Consequently, an attorney's services aimed at defeating an objection to its own fee application are not "necessary" within section 330(a)(1)'s plain meaning.

Further, when determining whether a service is "necessary," the courts look to whether the services were needed to be performed in order to properly represent the client. *See In re Wildman*, 72 B.R. 700, 731 (Bankr. N.D.Ill. 1987) ("Whether an expense is necessary is conditional on whether the item for which the expense was incurred was reasonably needed to accomplish proper representation of the client, here the Trustee."); *Matter of Perez Hernandez*, 73 B.R. 329, 331 (Bankr. D.P.R. 1987). In the instant case, there is no connection between properly representing the trustee and petitioners' defense of their own fee applications.

Accordingly, petitioners may not be compensated for defending their fee application.

2. Section 330(a)(4)(A)(ii)(I) Precludes Compensation for an Attorney's Effort to Defeat Objections to its Fee Application, as such Services Are Unlikely to Benefit the Estate

Section 330(a)(4)(A)(ii)(I) precludes making an award for services not "reasonably likely to benefit the debtor's estate." *See, e.g., Grant v. George Schumann Tire & Battery Co.,* 908 F.2d 874, 883 (11th Cir. 1990). This notion has deep roots in this Court's jurisprudence.

Long ago, in *Randolph & Randolph v. Scruggs*, 190 U.S. 533 (1903) (per Holmes, J.) (herein, "*Randolph*"), this Court established the principle that in a bankruptcy case compensation for legal services is not allowable on an administrative priority basis unless the attorney's services were "beneficial to the estate." *Id.* at 539.

In *Randolph*, an assignment for the benefit of creditors made by a debtor pursuant to state law was superseded by a subsequent involuntary bankruptcy filing under the Bankruptcy Act of 1898. A pre-bankruptcy assignment contract between the debtor-assignor and the assignee provided for the payment of fees of the assignee's attorney. The assignee's attorneys filed a claim against the bankruptcy estate for various services, including the assertion of litigation in the bankruptcy case seeking to prevent an adjudication of the debtor as a bankrupt, which, if successful, would have required the bankruptcy case to be dismissed under a provision of the then applicable Bankruptcy Act. The Court denied the assignee's claim for compensation for those services, stating:

> We are not prepared to go further than to allow compensation for services which were beneficial to the estate . . . [N]o ground appears for allowing the item for services in resisting an adjudication of bankruptcy.

190 U.S. at 539.

Throughout the pre-Code years, the courts applied *Randolph*'s "benefit to the estate" principle. *In re Schumaker Const., Inc.*, 346 F.2d 353, 355 (7th Cir. 1965); *Matter of Sapphire Steamship Lines, Inc.,* 509 F.2d 1242, 1245 (2d Cir. 1975). Thereafter, *Randolph*'s principle was carried into the Code when it was enacted in 1978, and its principle was subsequently reconfirmed and emphasized by the 1994 amendments adding section 330(a)(4)(A)(ii)(I) to the Code, by which Congress specifically precluded making an award for services that were not "reasonably likely to benefit the debtor's estate."

As recognized by the courts, Congress' enactment of that 1994 amendment made explicit *Randolph*'s fundamental principle precluding an award for services that could not benefit the estate. *See, e.g.*, *Maxwell v. KPMG, LLP,* 520 F.3d 713, 718 (7th Cir. 2008); *In re World Indus. Ctr., Ltd.,* 992 F.2d 1220, at *1, 1993 WL 133984 (9th Cir. 1993); *In re Ward,* 894 F.2d 771, 777 (5th Cir. 1990); *In re Reed,* 890 F.2d 104, 105 (8th Cir. 1989); *Matter of Consol. Bancshares, Inc.,* 785 F.2d 1249, 1253 (5th Cir. 1986) ("[A] creditor's attorney must ordinarily look to its own client for payment, unless the creditor's attorney . . . *conferred a significant and demonstrable benefit* to the debtor's estate and the creditors.") (emphasis

in original) (internal citation omitted); *In re Lederman Enterprises, Inc.*, 997 F.2d 1321, 1323 (10th Cir. 1993) ("An element of whether the services were 'necessary' is whether they benefitted the bankruptcy estate."); *In re Pro-Snax Distributors, Inc.*, 157 F.3d 414, 426 (5th Cir. 1995) (denied an allowance for "case administration" for failing to demonstrate "an identifiable, tangible, and material benefit to the estate").

Where a trustee's attorney acts contrary to the trustee's interest and its duty to maximize estate assets, such action clearly is not "likely to benefit the estate." *Toibb v. Radloff,* 501 U.S. 157, 163 (1991) (stating "that Chapter 11 also embodies the general Code policy of maximizing the value of the bankruptcy estate"); *Weintraub,* 471 U.S. at 352 (the trustee has the "duty to maximize the value of the estate"); *203 North LaSalle,* 526 U.S. at 453 (one of the "recognized policies underlying chapter 11" is "maximizing property available to satisfy creditors"). "Benefit" and "necessity" are sometimes mistakenly conflated. *See In re Lederman Enterprises, Inc.,* 997 F.2d at 1323 ("An element of whether the services were 'necessary' is whether they benefited the bankruptcy estate.") See Point I.D *supra* for an analysis of the separateness of "necessity" and "benefit." But, even assuming *arguendo* that "benefit" and "necessity" are separate concepts, it is clear that, contrary to petitioners' contention, services that diminish the estate do not "benefit" it, and hence are not compensable.

Based on the holding in *Randolph,* the courts' application of the "benefit to the estate" doctrine in later decisions, and its codification in section 330(a)(4)(A)(ii)(I), fees for the efforts of a trustee's

attorney to defeat objections to its fee application must be denied for lack of a reasonable likelihood of benefitting the estate.

The *amici* urge that the plain meaning of sections 327(a) and 330(a)(1) require the Court to deny compensation for a trustee's attorney's defense of its own fee application.

POINT II

BEYOND THE PLAIN MEANING OF SECTIONS 327(a) AND 330(a)(1), IT IS EVIDENT THAT CONGRESS DID NOT INTEND SUCH PROVISIONS TO PERMIT COMPENSATION TO A TRUSTEE'S ATTORNEY FOR DEFENDING ITS OWN FEE APPLICATION

A. The American Rule, Which Applies in Bankruptcy Cases, Precludes an Award of Compensation Under Section 330(a)(1) For Defense of a Fee Application

For nearly two centuries, this Court has upheld the American Rule, which states that litigants bear their own litigation costs. *Stewart v. Sonneborn,* 98 U.S. (8 Otto) 187, 197 (1878); *Flanders v. Tweed,* 82 U.S. (15 Wall) 450, 452-53 (1873); *Oelrichs v. Spain,* 82 U.S. (15 Wall) 211, 230-31 (1872); *Day v. Woodworth,* 54 U.S. (13 How.) 363, 372-73 (1851); *Arcambel v. Wiseman,* 3 U.S. (3 Dall.) 306 (1796).

Section 330 was enacted scarcely three years after this Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240

(1975) (herein "*Alyeska*"), which re-affirmed the two century-old American Rule: "In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser." *Id.* at 247. *See also Hardt v. Reliance Standard Life Ins. Co.,* 560 U.S. 242, 252-53 (2010) (providing that the American Rule is the "'basic point of reference' when considering the award of attorney's fees"). In utilizing the word "ordinarily," the Court left room for the five well-established exceptions to the American Rule, none of which are claimed by petitioners to apply in this case. *See Travelers Cas. and Sec. Co. of America v. Pacific Gas and Elec. Co.,* 549 U.S. 443, 448-49 (2007) (herein "*Travelers Casualty*") (allocation by contract); *Key Tronic Corp. v. United States,* 511 U.S. 809, 814-15 (1994) (explicit statutory authorization); *F.D. Rich Co., Inc. v. United States ex rel. Industrial Lumber Co., Inc.,* 417 U.S. 116, 129 (1974) (acting in "bad faith, vexatiously, wantonly, or for oppressive reasons"); *Hall v. Cole,* 412 U.S. 1, 5 (1973) ("common fund" exception); *Fleischmann Distilling Corp. v. Mayer Brewing Co.,* 386 U.S. 714, 718 (1967) ("willful disobedience of a court order"). *See also In re St. Rita's Assoc. Private Placement, LLC,* 260 B.R. 650, 652 (Bankr. W.D.N.Y. 2001) (herein "*St. Rita's*") (left the door open to allow defense fees "where sanctions are appropriate" for the filing of inappropriate objections); *In re Teraforce Technology Corp.*, 347 B.R. 838, 866-67 (Bankr. N.D. Tex. 2006) (herein "*Teraforce*") (same).

Because Congress does not write on a clean slate when it legislates, it is deemed to have written section 330(a) with an eye towards *Alyeska* and the American Rule. *See Emil v. Hanley*, 318

U.S. 515, 521 (1948) (when Congress wrote a new bankruptcy act to replace the earlier one, "it was not writing on a clean slate."); *Mississippi ex rel. Hood v. AU Optronics Corp.,* 134 S.Ct. 736, 742 (2013) ("[W]e presume that 'Congress is aware of existing law when it passes legislation.'") citing (*Hall v. United States,* 132 S. Ct. 1882, 1889 (2012)). It is thus presumed that Congress intended to carry the American Rule into section 330(a)(1), and that the American Rule would illuminate the meaning of that provision.

Extensive case law supports the conclusion that the American Rule applies in bankruptcy cases, just as it does in non-bankruptcy cases. This Court, as well as numerous courts of appeals, has concluded that the American Rule applies in bankruptcy proceedings. *See Travelers Casualty,* 549 U.S. at 448 (applying the American Rule in a bankruptcy case, and applying its contractual exception not applicable to the present case); *In re Burns,* 3 Fed. Appx. 689, 690 (10th Cir. 2001) ("The 'American Rule,' . . . applies in federal litigation, including bankruptcy proceedings . . ."); *In re Sheridan,* 105 F.3d 1164, 1166 (7th Cir. 1997); *In re Acequia,* 34 F.3d 800, 819 (9th Cir. 1994); *In re Fox,* 725 F.2d 661, 662 (11th Cir. 1984); *St. Rita's*, 260 B.R. at 652; *Teraforce*, 347 B.R. at 866-67.

In their main brief, petitioners, disregarding the well established precedent recognizing the applicability of the American Rule to bankruptcy cases, erroneously relied on *Aleyska*'s note 33 as supporting their contention that "reasonable compensation" under section 330(a)(1) must include fee defense fees. That note 33, however, provides no

such support for them. Petitioner's brief asserted that this Court, in *Alyeska*'s note 33, cited 11 U.S.C. § 104(a)(1) [designated as section 64(a)(1) by the Bankruptcy Act of 1898] "as an example of an explicit statutory fee allowance that overcame the American Rule." Pet. Op. Br. 40. However, section 64(a)(1) of the former Act did not contain any provision that mentioned compensation for a trustee's attorney for defending its fee application. In any event, former section 64(a) has been superseded by section 330(a).

B. The Legislative History of 11 U.S.C. § 330(a) Shows That Congress Did Not Intend To Allow Compensation for Fee Defense

The legislative history of section 330(a), which was first enacted in 1978, indicates that a prime purpose was to increase the compensation of attorneys employed by trustees, by placing them in parity with that of attorneys in non-bankruptcy cases. *See In re Busy Beaver Bldg. Ctrs., Inc.,* 19 F.3d 833, 848 (3rd Cir. 1994); *In re Apex Oil Co.,* 960 F.2d 728, 733 (8th Cir. 1992); H.R. Rep. 95-595 at 330 (1977).

In 1994, Congress added section 330(a)(3)(F) to the Code, making explicit that courts must, in determining what constitutes a reasonable amount of compensation, consider the compensation earned by attorneys in non-bankruptcy cases. However, a primary concern of Congress in 1994 was to deal with the exorbitant fees allowed by the bankruptcy courts. *See* Point II.C.1 *infra*. Thus, the comparability provision should be narrowly read as *not* allowing fees for litigation of a

fee application by a trustee's attorney, just as attorneys in non-bankruptcy cases do not recover the cost for suing a client for a fee, absent the client's agreement to pay the cost of collection or vexatious or bad faith litigation.

As aptly stated in *St. Rita's* in denying defense fees to a chapter 11 debtor's attorney:

> Outside the field of bankruptcy, when clients refuse to pay a disputed bill, attorneys must choose either to 'write-off' the liability or to commence litigation for collection. In that litigation, the 'American rule' applies. Each side generally assumes the cost of its own legal counsel. Because skilled practitioners outside bankruptcy would customarily receive no compensation for the additional time spent on litigating a fee dispute, no further compensation is payable to [the chapter 11 debtor's attorney] in the present instance.

260 B.R. at 652. *See also Wireless*, 449 B.R. at 237 (stating that in the market, "attorneys generally do not receive compensation for litigating the collection of their fees"); *see also In re The Vogue*, 92 B.R. 717, 724 (Bankr. E.D.Mich. 1988) ("[B]y requesting compensation for the time necessary to prepare its bill and to litigate it, the applicant is seeking not to be treated as all other attorneys in non-bankruptcy practice, but to be paid something in excess thereof."); *Teraforce*, 347 B.R. at 866-67 (denied defense fees to attorney for a creditors committee, adopting the American Rule's denial of fees in non-bankruptcy cases).

Congress clearly did not intend section 330(a) to

provide higher compensation for bankruptcy attorneys than the "customary compensation" received by attorneys in non-bankruptcy cases, which does not include the costs of collection.

C. The Legislative History of Section 330(a)(6) Evinces Congressional Intent To Deny Compensation for Defending a Fee Application

While the foregoing analysis would logically preclude an award of compensation for preparation of a fee application as well as for its defense, Congress' inclusion of section 330(a)(6) specifically dealt with the preparation stage by permitting an award of compensation for "preparation of a fee application." Congress, however, did not enact a provision to allow an award of compensation for the defense of the application.

1. Legislative History

The legislative history surrounding the enactment of section 330(a)(6) in 1994 supports the conclusion that Congress did not intend to allow compensation for defending a fee application. On March 24, 1992, a subcommittee of the Senate Judiciary Committee held a hearing concerning "Certain Problems with Evaluating and Monitoring the Fees Charged by Professionals Against Estates in Bankruptcy." This hearing was the prelude to the 1994 amendments to section 330, which were introduced by Senator Howard Metzenbaum, who chaired the 1992 hearing and was the sponsor of those amendments, including section 330(a)(6). *See* 140 Cong. Rec. S. 4741 (daily ed. April 21, 1994).

High on the agenda of the 1992 hearing was

concern for the excessive attorney's fees received in bankruptcy cases. *See Hearing Before the Subcomm. on Courts and Administrative Practice of the S. Comm. on the Judiciary*, 102nd Cong. 102-1099 (March 24, 1992). In opening that hearing, Senator Metzenbaum stated: "Our bankruptcy system is not doing enough to protect a bankrupt company from those who would bleed its financial life by charging exorbitant fees." *Id.* at 3. Later in this hearing, the American Bankruptcy Institute urged the Subcommittee to recommend an amendment to section 330 that would authorize awards to trustee's attorneys and others employed under section 327 for *both* fee preparation and defense of a fee application, urging: "Reasonable time spent preparing and prosecuting fee applications should be expressly compensable." *Id.* at 190. Congress thereafter enacted section 330(a)(6) making preparation of a fee application compensable, but did not authorize awarding compensation for the defense of an application. *See Wireless*, 449 B.R. at 236-37 (observing that Congress rejected the American Bankruptcy Institute's request to make defense fees compensable).

2. A Pre-1994 Split In The Case Law Was Resolved By Congress Against Allowing Compensation For Defending A Fee Application

Prior to 1994, some courts allowed fees for preparation of a fee application, but not for the defense of an application. *See, e.g.*, *In re DN Assoc.,* 165 B.R. 344 (Bankr. D.Me. 1994); *In re Jessee,* 77 B.R. 59 (Bankr. W.D.Va. 1987). *Others* allowed fees for both application preparation and defense. *See, e.g.*, *In re Nucorp Energy, Inc.,* 764

F.2d 655 (9th Cir. 1985); *In re CF & I Fabricators of Utah, Inc.,* 131 B.R. 474 (Bankr. D.Utah 1991); *In re Wildman,* 72 B.R. 700 (Bankr. N.D.Ill. 1987); *In re Bible Deliverance Evangelistic Church,* 39 B.R. 768 (Bankr. E.D.Pa. 1984). *Still others* did not allow either application preparation or defense fees. *See, e.g.*, *In re Courson,* 138 B.R. 928 (Bankr. N.D.Iowa 1992); *In re The Vogue,* 92 B.R. 717 (Bankr. E.D.Mich. 1988); *In re McClanahan,* 137 B.R. 73 (Bankr. M.D.Fla. 1992); *In re Alan I.W. Frank Corp.,* 71 B.R. 585 (Bankr. E.D.Pa. 1987); *In re Wilson Foods Corp.,* 36 B.R. 317 (Bankr. W.D.Okla. 1984); *In re Four Star Terminals, Inc.,* 42 B.R. 419 (Bankr. D. Alaska 1984); *In re The Liberal Market, Inc.,* 24 B.R. 653 (Bankr. S.D.Ohio 1982).

Congress resolved the dispute in the case law by making preparation of a fee application compensable, and by declining to authorize an award for the time devoted to litigating the defense of the application. In enacting section 330(a)(6) in 1994, Congress acknowledged the lack of judicial uniformity regarding the compensability for preparing a fee application and for the defense of a disputed application. *See* 140 Cong. Rec. H. 10,769 (daily ed. October 4, 1994) (recognizing the need to "foster greater uniformity in the application for and processing and approval of fee applications"). When enacting section 330(a)(6), Congress was deemed to know of this division of authority on this issue. *See Merck & Co., Inc. v. Reynolds,* 559 U.S. 633, 648 (2010) ("[W]hen Congress enacts statutes, it is aware of relevant judicial precedent."); *Goodyear Atomic Corp. v. Miller,* 486 U.S. 174, 184-85 (1988); *United States v. Male Juvenile,* 280 F.3d 1008, 1016 (9th Cir. 2002); *United States*

v. Alvarez-Hernandez, 478 F.3d 1060, 1065 (9th Cir. 2007). Congress chose not to make the defense of a fee application compensable.

Permitting attorneys to be compensated for defending their fees, as petitioners seek to do, would impermissibly enlarge section 330(a)(6). *See Iselin v. United States,* 270 U.S. 245, 251 (1926) ("What the government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function."); *Lamie,* 540 U.S. at 538 (reading an "absent word" into a statute "result[s] 'not [in] a construction of [the] statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope.'"). Moreover, Congress does not alter existing law vaguely. *Whitman v. American Trucking Ass'ns, Inc.,* 531 U.S. 457, 468 (2001) ("Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not . . . hide elephants in mouseholes."). If Congress had intended to allow compensation for both preparation and defense of a fee application, it would have said so clearly and explicitly.

3. *Expressio unius est exclusio alterius*

The established canon of construction "*expressio unius est exclusio alterius*" provides an additional reason why the defense of a fee application is not compensable. That canon means that when Congress includes one specific item in a statute, it excludes other similar items not enumerated.

Holland v. Florida, 560 U.S. 631, 648 (2010) ("[T]o include one item . . . is to exclude other similar items."). By Congress explicitly providing for compensation for *preparation* of an application, especially in light of its knowledge of a split of authority on the fee defense issue, Congress clearly excluded compensation for *fee defense*. *See O'Melveny & Myers v. FDIC,* 512 U.S. 79, 86 (1994); *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit,* 507 U.S. 163, 168 (1993); *Andrus v. Glover Const. Co.,* 446 U.S. 608, 616-17 (1980).

D. Section 330(a) Should Be Construed as Not Authorizing Compensation for Defending a Fee Application Because It Would Reduce the Funds Available for Paying Priority and Other Claims, and Could Stand in the Way of Confirming a Plan of Reorganization

Congress determined that because certain claims in a bankruptcy case either benefit the estate or have an important public purpose, they should have priority of distribution of estate assets over many other claims in the case. By virtue of section 507(a)(2), Congress determined that claims for compensation allowed under section 330(a)(1), which are accorded administrative expense status under section 503(b)(2), are entitled to priority of distribution from estate assets, along with a host of other claims accorded priority by section 507.

However, Congress determined that priority treatment for awards of compensation for a professional's services warrant priority treatment only

for services that the trustee *needs*, and prohibited such treatment for services that were "not reasonably likely to benefit the debtor's estate." *See* sections 330(a)(1)(A) and 330(a)(4)(A)(ii)(I). Congress understood that absent either necessity or a benefit to the estate, it would be unfair to all of the other priority claimants, as well as the general unsecured creditors, to treat the claims for professional compensation better than those of the general unsecured creditors.

Reading section 330(a)(1) as permitting compensation for defense of fee applications would controvert the purpose of the overall bankruptcy priority structure created by Congress, because to do so would unfairly shrink the funds of the estate available for distribution to priority as well as other claimants. *In re Flight Transp. Corp. Securities Litig.,* 874 F.2d 576, 581 (8th Cir. 1989) ("Administrative expenses under § 503(b) constitute priority claims which are paid directly out of the bankruptcy estate. Their allowance may diminish the recovery of creditors and other claimants."). In addition, because awards of compensation under section 330(a)(1) must be paid in cash in full in order to confirm a plan of reorganization under chapter 9 and chapter 11 or the Code, as provided by sections 943(b)(5) and section 1129(a)(9)(A), section 330(a)(1) should be narrowly read as not allowing compensation for defending a disputed fee application so as avoid delaying or even precluding plan confirmation.

For these reasons, administrative expense priority provisions, including awards for professional compensation, are narrowly construed. *See In re Dant & Russell, Inc.*, 853 F.2d 700, 706 (9th Cir.

1988) (stating that the word "necessary" is to be "construed narrowly so as to keep fees and administrative costs at a minimum") (internal citations omitted). Under that principle, section 330(a)(1) should be narrowly construed as not allowing administrative expense priority for a trustee's attorney's effort to defeat objections to its fee application. Moreover, courts narrowly construe priority claims, including administrative expense claims, in order to maximize the estate for the benefit or all creditors. *See In re Federated Dept. Stores, Inc.,* 270 F.3d 994, 1000 (6th Cir. 2001); *In re Colortex Indus., Inc.,* 19 F.3d 1371, 1377 (11th Cir. 1994); *In re Amarex,* 853 F.2d 1526, 1530 (10th Cir. 1988); *In re Bethlehem Steel Corp.,* 479 F.3d 167, 172 (2nd Cir. 2007); *In re United Trucking Service, Inc.,* 851 F.2d 159, 164 (6th Cir. 1988); *Trustees of Amalgamated Ins. Fund v. McFarlin's, Inc.,* 789 F.2d 98, 100 (2d Cir. 1986); *In re Flight Transp. Corp. Securities Litig.,* 874 F.2d at 581; *In re Finley, Kumble, Heine, Underberg, Manley, Meyerson and Casey*, 160 B.R. 882, 891 (Bankr. S.D.N.Y. 1991); *In re O.P.M. Leasing Svcs., Inc.,* 23 B.R. 104, 121 (Bankr. S.D.N.Y. 1982).

Section 330(a)(1), as a statutory priority provision, should thus be narrowly construed in order to maximize the estate for the benefit of the priority and the general creditors, and not to increase the difficulty to confirm a plan of reorganization under chapter 9 or chapter 11.

E. There Was No Pre-Code Practice of Allowing Fees for the Defense of Fee Applications

The "Bankruptcy Law Scholars'" *amicus* brief (the "BLS brief") asserts that there was a "pre-Code practice of allowing fees for defending fee applications," *see* BLS brief at 3, and that such asserted practice guides the interpretation of the Code. *See* BLS brief at 14-16. However, the pre-Code authorities it cites do not support its assertion, and actually call for the disallowance of defense fees by a bankruptcy court. The only court decision involving defense fees which the BLS brief relied upon to show that there was such a purported pre-Code practice, is *Matter of Arkansas Fuel Oil Corp.*, 234 F.Supp. 31 (D. Del. 1964), which *denied* an award for preparing and presenting a fee application both to the district court and the Securities and Exchange Commission ("SEC"). In so ruling, the court stated:

> A litigant should not be discouraged or penalized *for strenuously waging his cause* before any proper tribunal, if such action is not capricious or frivolous. I cannot see how it would be proper, absent capriciousness or frivolity on the part of [the party who objected to the fee application], to penalize it by awarding additional fees and allowances simply because it pursued one of the statutory avenues open to it.

Id. at 40 (emphasis added).

In *Arkansas Fuel*, the court relied on its earlier decision in *Matter of United Corp.*, 184 F. Supp. 502 (D. Del. 1960), which, in stating that "the litigation costs of obtaining a fee are not compensable," quoted the SEC's position in that case, i.e. that an allowance could not be made by a district court in a bankruptcy case under Chapter X of the former Bankruptcy Act:

> [A] fee claimant is *not* entitled to compensation for preparing and presenting his own request for an allowance to the tribunals which must *initially* pass upon them, i.e., this Commission and the District Court in Section 11(e) proceedings and *the District Court in Chapter X (11 U.S.C.A. 501, et seq.) proceedings*." (emphasis added).

184 F. Supp at 513, n. 35. *See also Matter of United Corp.*, 39 S.E.C. 391, 0059 WL 59228 at *5 (1959) (same). Moreover, contrary to the contention of the BLS brief, the SEC made it clear in *Matter of United Corp.* that there was a "general rule against allowances for presenting fee applications in reorganization proceedings referred to above." *Id.* at *7.[6]

The SEC's opinion in *Matter of United Corp.* also stated that, while compensation may not be allowed for preparing and presenting one's own fee request to the SEC and the district court as "the tribunals which must *initially* pass upon them," an allowance may be made "in connection

[6] It is noted that, to support its contention that defense fees were allowable, the BLS brief's note 34 cited two cases, neither of which allowed or even mentioned defense fees.

with the successful defense, *on appeal* by others, of an award made to the applicant by the fee tribunals," and that such allowance may be made "for the services required *to defend the initial allowance*." *Id.* at *5 (emphasis added). However, even if that principle were applicable in a case under the Code, it would not support an allowance by the bankruptcy court below as the tribunal "which must initially pass upon them," for services to obtain the initial allowance.

The BLS brief not only fails to support its assertion that there was a purported pre-Code practice for the courts of bankruptcy to allow fees for defending fee applications, but indeed demonstrates that there was no such practice. Indeed, the BLS brief actually shows that there was a pre-Code practice *not* to allow the courts of bankruptcy to award fee defense fees, and it is *that* practice that Congress presumably intended to be carried into the Code. *See Cohen v. de la Cruz,* 523 U.S. 213, 221 (1990) ("We, however, will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure.") (internal citations omitted); *Emil v. Hanley,* 318 U.S. at 521 (stating if Congress had intended to effect a major change in the bankruptcy law, "some clear and unambiguous indication of that purpose would appear.").

If the Court were to look beyond the plain meaning of sections 327(a) and 330(a)(1), the *amici* urge the Court to construe those provisions in accordance with Congress' evident intention not to authorize an award of fee defense fees to a trustee's attorney.

CONCLUSION

Based on the foregoing and on Respondent's Brief, the order appealed from should be affirmed.

Respectfully submitted,

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