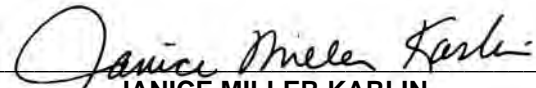




**SO ORDERED.**

**SIGNED this 03 day of November, 2005.**

  
JANICE MILLER KARLIN  
UNITED STATES BANKRUPTCY JUDGE

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**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF KANSAS**

**IN RE:**

**CHERYL DIANNE MYERS,**

**Debtor.**

**Case No. 04-41322**

**Chapter 11**

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**CHERYL DIANNE MYERS,**

**Plaintiff,**

**Adversary No. 05-7011**

vs.

**FIRST NATIONAL BANK OF CENTRALIA, et al.,**

**Defendants.**

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**CHERYL DIANNE MYERS,**

**Plaintiff,**

**Adversary No. 05-7038**

**Chapter 11**

vs.

**FIRST NATIONAL BANK OF CENTRALIA,**

**Defendant.**

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## **ORDER DENYING MOTION TO CORRECT FILING FEE APPLICATION**

This matter is before the Court on the Motion to Correct Filing Fee Application filed by Debtor, Cheryl Myers.<sup>1</sup> Debtor has five pending appeals before the Bankruptcy Appellate Panel for the Tenth Circuit Court of Appeals (BAP), all of which arise, in whole or in part, from the Chapter 11 proceeding filed in this Court. As of October 26, 2005, she had paid the filing and docketing fee in three of those five appeals, and had received a Notice from the BAP that the other two cases were going to be dismissed for failure to pay the requisite fees. On October 27, 2005, she paid one of the two missing \$255 filing fees, which she specifically directed the clerk apply to BAP Case 05-083, which is the appeal from the main case.<sup>2</sup> She has thus now paid the filing fee in four of the five cases, and with this motion seeks to have this court “reallocate” the filing fee presently applied to one appeal (BAP 05-084) to another (BAP 05-085). A history of these filings is in order.

The first appeal is BAP Case 05-038, which arises out of the order issued in the main case granting relief from stay to First National Bank of Centralia. She paid the filing fee for this appeal on or about May 23, 2005. The second case, BAP Case 05-075, arises out of this Court’s order in the main case granting relief from stay to Michael Myers to effectuate the property settlement entered by the Shawnee County District Court. She paid the filing fee for this appeal on or about August 12, 2005. The third appeal is BAP Case 05-083, which is an appeal in the main case from an order dismissing her Chapter 11 bankruptcy; no filing fee was paid when the appeal was filed,

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<sup>1</sup>Doc. 266 in 04-41322, Doc. 22 in AP 05-7011 and Doc. 15 in AP 05-7038.

<sup>2</sup>The fee that Debtor specifically requested be applied to the main case has been applied there. *See* docket entry made October 28, 2005 in Case No. 04-41322 entitled “Receipt Number 00465879, Fee Amount \$255.00 (RE: related document(s)255 Notice of Appeal, filed by Debtor Cheryl Dianne Myers) (trc, ) (Entered: 10/28/2005).” Debtor was given a copy of that receipt when she paid the fee.

but Debtor has just recently paid the fee for this appeal.<sup>3</sup> The fourth appeal is BAP Case 05-084, which is an appeal from the dismissal of Adversary Proceeding 05-7011. She paid the filing fee for this appeal on or about September 1, 2005, and it is this fee, on this case, that is the subject of this motion. The last is BAP Case 05-085, which is an appeal from the dismissal of Adversary Proceeding 05-7038. No filing fee has been paid on this appeal.

The three appeals, 05-083, 05-084 and 05-085, were all filed at one time, in one “consolidated” pleading, then separately docketed by the clerk in each of those three cases (main and two adversary proceedings). The BAP properly treated them as three separate appeals, and issued a notice that the appeals without filing fees (BAP 05-083 and 05-085) would be dismissed if the fees were not forthwith paid. Debtor then sought waiver of the filing fees in those two appeals, based on her Motion to Consolidate Appeals, which resulted in the BAP’s October 6, 2005 Order Companioning Appeals. That Order specifically noted the appeals were “COMPANIONED for briefing purposes ONLY.” (Emphasis in original)

Debtor filed a Motion to Extend Time to Cure Filing Fee Deficiency with the BAP, which the BAP construed as a request for waiver of the filing and docketing fees in BAP 05-083 and 05-085. The BAP denied the request for a waiver, finding it “does not have the authority to waive those fees. 28 U.S.C. § 1930(b), (c).” The BAP then ordered Debtor to pay the missing filing fees or the appeals would be dismissed within fifteen (15) days of October 12, 2005, which would have been October 27, 2005.

On that deadline, October 27, 2005, Debtor filed this Motion in this Court, in essence asking for this Court to take the filing fee that had originally been applied as the filing fee for the appeal

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<sup>3</sup>*Id.*

that ultimately was numbered 05-084, and “allocate” it to the appeal in Adversary Proceeding 05-7038 (BAP 05-085). Presumably, with this motion, Debtor has now decided to abandon the appeal of BAP 05-084, which would then have to be dismissed for lack of a filing fee. Debtor states that she “presumed the filing fee simultaneously tendered [with her consolidated notice of appeal on September 1, 2005] would be applied to the main Chapter 11 case.” She further argues that because the “Chapter 11 is the lead case and the BAP Panel agrees that is the lead case, the clerk of the bankruptcy court should have allocated the filing fee paid on September 1, 2005 in the amount of \$255.00 to the lead case.”<sup>4</sup> This Court is advised that the BAP awaits this Court’s decision on this motion before proceeding.

As a preliminary matter, the clerk’s decision where to apply the \$255 filing fee was made on September 1, 2005, and thus would not and could not have been influenced by the BAP’s October 6, 2005 decision that the appeal out of the main case would be the lead appeal. That said, the District of Kansas bankruptcy clerk who discussed this matter with Debtor when she brought the paperwork and fee to the intake counter clearly recalls that Debtor was very specific about where to apply the \$255 filing fee. She specifically pointed to Adversary Proceeding 05-7011, which ultimately became BAP 05-084, and as a result, the clerk electronically retrieved that case on the computer positioned on the intake counter and then electronically docketed the receipt of the \$255 filing fee within that case number. After she docketed the receipt of the fee, and the Notice of Appeal, in Case No. 05-7011, a receipt was then printed directly from a machine attached to the computer that prints the receipt in triplicate (using white, yellow and pink paper).

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<sup>4</sup>Doc. 266 at ¶9, pp. 3-4.

Attached to this decision as Exhibit A is the copy of the pink receipt, which copy was retained by the clerk. It clearly shows that the \$255 fee was applied to Case No. 05-7011 (BAP 05-084). The clerk who assisted Debtor at the counter remembers that Debtor waited for the receipt and received the “original” white copy. Had the clerk made a mistake, Debtor had the opportunity to immediately correct that error by reviewing the receipt, which clearly displays the case number to which the money was applied. Instead, Debtor waited until she was unsuccessful in her attempt to have three appeals consolidated (with only one filing fee required) before she has raised this issue.

### **Analysis**

The Tenth Circuit Court of Appeals has recently had the opportunity to review a very similar issue to the one presented here in the case of *In re Armstrong*.<sup>5</sup> In that case, the pro se debtor paid one filing fee at a time when he had four pending appeals. Because debtor Armstrong had not indicated to which appeal the fee should apply, the bankruptcy clerk opted to apply the fee to the oldest pending appeal. Armstrong later objected. In upholding the clerk’s decision, the Tenth Circuit held that at least when an appellant fails to specify against which pending appeal a fee should be applied, the clerk is given discretion and authority “to manage its docket” when there is no abuse of discretion.<sup>6</sup>

Here, Debtor was very specific in her instructions to the clerk as to which appeal the filing fee was to apply. She expressly directed the clerk to apply it to Case No. 05-7011 (BAP 05-084). It is only now, in hindsight, knowing that the BAP cannot permit her “consolidation,” that she apparently has decided that she will allow the appeal in BAP 05-084 to be dismissed. The decision

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<sup>5</sup>101 Fed. Appx. 766 (10<sup>th</sup> Cir. 2004).

<sup>6</sup>*Id.* at 768.

of the clerk to apply the fee to the appeal specifically directed by Debtor was appropriate, and in no way an abuse of discretion. If Debtor made a mistake in directing that application, she had the opportunity to correct her error the moment she received the attached receipt, which clearly shows to which appeal the fee was docketed.

The Court also holds that even if the Debtor had not directed the clerk to apply the filing fee toward Case No. 05-7011 (BAP 05-084)—and instead was silent, as Debtor now claims when she says she “presumed” the fee would be applied to the main case, the result would be same under *Armstrong*. As noted above, the Tenth Circuit held that at least when an appellant fails to specify against which pending appeal a fee should be applied, the clerk is given discretion and authority “to manage its docket” when there is no abuse of discretion.<sup>7</sup> The Debtor has not shown any abuse of discretion in regard to the clerk’s docketing of this matter.

Accordingly, as a factual matter, because Debtor specifically directed the application of the fee, the Court will not now “reallocate” the fee to a different appeal. As a matter of policy, the Court also declines to “reallocate” the fee. If the Court allowed that procedure, it would essentially permit a non-prevailing party to file numerous timely appeals, pay less than all the required fees, and then await the order from the appellate court that the case would soon be dismissed unless the fees were paid. In doing so, a debtor would gain several weeks or months to decide what appeals to perfect, instead of doing so within the ten days allowed by the rule.

Here, Debtor has managed to gain almost two months to make her decision whether she really wishes to prosecute an appeal, which in essence defeats Rule 8002 of the Federal Rules of Appellate Procedure. Rule 8002 requires a notice of appeal to be filed within ten days of the date

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<sup>7</sup>*Id.* at 768.

of the entry of the judgment or order appealed from, and Debtor's actions have allowed her to receive over six times that number of days to make her actual decision about which appeals to perfect. The procedure Debtor has employed has also resulted in slowing down the appellate process by several weeks, at a minimum, which this Court should not, and cannot, countenance.

**IT IS, THEREFORE, ORDERED** that Debtor's Motion to Correct Filing Fee Allocation is denied. The filing fee that Debtor directed be applied to Adversary Proceeding 05-7011, now known as BAP 05-084, shall remain with that appeal.

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UNITED STATES  
BANKRUPTCY COURT-KAN

Topeka Division

# 00465647 - OH  
September 1, 2005 0

Code	Case #	Qty	Amount
APPEAL	05-7011		255.00 CH
Debtor - MYERS			

TOTALS 255.00

FROM: CHERYL MYERS  
PO BOX 4712  
TOPEKA, KS 66604  
CASHIER'S CHECK

EXHIBIT A