

Appeal History:

Appealed to District Court on June 28, 1999
Affirmed by District Court on December 16, 1999 (McManus, J.)

In the United States Bankruptcy Court for the Northern District of Iowa

CEDAR RAPIDS MEATS INC.
Debtor(s).

Bankruptcy No. L90-00445-C
Chapter 7

ORDER RE APPLICATION FOR TRUSTEE'S FEES

On May 17, 1999, the above-captioned matter came on for hearing on Trustee's Final Report. Trustee appeared in person with Attorney Dan Childers. The U.S. Trustee's Office was represented by Assistant U.S. Trustees John Schmillen and Janet Reasoner. Evidence was presented after which the Court took the matter under advisement. The only objection to the Final Report was that filed by the U.S. Trustee regarding proposed Trustee's Fees. This is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A).

FINDINGS OF FACT

This case was filed as a voluntary Chapter 11 on March 14, 1990 and subsequently converted to a Chapter 7 on February 7, 1991. Attorney Michael Dunbar was appointed Chapter 7 Trustee on February 4, 1991. Mr. Dunbar testified that he was appointed as Trustee, even though he is a Waterloo Trustee, because of difficulty in finding a Cedar Rapids Trustee based on the nature of the case. Also, many Cedar Rapids attorneys who practice in the bankruptcy field were already involved in the case when it was a Chapter 11.

At the §341 meeting held March 12, 1991, it became apparent that this case had significant problems. Debtor, operating as Farmland Foods, was a large business which had completely ceased operations. Over 1,800 employees were terminated. There were wage issues as well as problems with the pension fund. The physical plant was largely abandoned. This posed security problems, problems with vandalism, and problems with being an attractive nuisance. There were environmental issues including a substantial amount of asbestos in the plant as well as pollution from industrial chemicals. The utilities had initially been turned off, posing a fire risk because many of the buildings, as well as the stock pens, were made of wood. There is no dispute that Trustee was required to expend a considerable amount of time in administering this case during the first several years.

The Chapter 7 Trustee filed his first fee application on April 30, 1991. The application states that Trustee administered assets with a value of \$3.5 million and disbursed assets of approximately \$2.3

million. Trustee's time records indicated a total of 127.36 hours expended. Wilson Foods, as well as the U.S. Trustee, objected to the fee application because of inadequate time records. A fee order was entered by was approved at the hourly rate of \$95 for the period from February 1, 1991 through June 30, 1991. Trustee requested of \$20,000 plus out-of-pocket expenses of \$996.96.

A second fee application was filed on June 15, 1992. Trustee requested compensation for 161.47 hours of service at 1992. Again, Judge Melloy emphasized the fact that this was an interim fee. He determined that a fee of \$125 per hour for the 161.47 hours of service rendered after Trustee's first fee application would be fair. Trustee was allowed a total award of \$20,183.75 plus reimbursement for expenses of \$4,594.75. Judge Melloy allowed one-half of the fees to be paid at that time but allowed the entire amount of out-of-pocket expenses to be reimbursed immediately. Payment of the 50 percent holdback was approved by Judge Edmonds on April 8, 1993.

On October 18, 1994, the Chapter 7 Trustee filed an interim report. Among other matters, Trustee requested additional fees of \$98,818.09 and expenses of \$1,916.24. This request contained no itemization of time expended by Trustee during the relevant period. Hearing was held on December 7, 1994. Several matters were in dispute although the U.S. Trustee did not file a specific objection to the requested Trustee's fees. The matters in dispute were litigated and resolved. Thereafter, a general order was entered approving the remainder of the report which included the approval of Trustee's fees without specific reference to these fees. Therefore, as of October 1994, Trustee's interim compensation was approved and paid in the total amount of \$139,001.84 for fees and \$8,040.83 for expenses.

Trustee filed his Final Report and Proposed Distribution on February 1, 1999. Among other matters, Trustee requests approval of total Trustee's fees of \$156,593.53. As the sum of \$139,001.84 was previously approved and paid, Trustee is requesting an additional \$17,591.69. Attached to the Final Report was an itemization of time by Trustee which documented 358.87 hours commencing on February 1, 1991 and continuing to December 10, 1998.

The U.S. Trustee's Office filed a comment to the Final Report on February 1, 1999. The U.S. Trustee challenged the fees sought as excessive under 11 U.S.C. §326(a) and requested a hearing to determine the reasonableness of the fees. A preliminary hearing was held after which Trustee Dunbar supplemented his fee application, reporting 666.87 hours as the total amount of time spent by Trustee in his duties from February 1, 1991 through May 17, 1999. This supplemental application was filed May 14, 1999. Trustee testified at the hearing that the 666.87 hours reflected a conservative accounting of the amount of time he spent on this case. In Trustee's opinion, he has spent more than 1,000 hours in his official duties as trustee in this case.

Trustee testified that he has been a Chapter 7 Trustee since 1978. He has handled a total case load of between 200 and 300 cases per year for the twenty years that he has been a Trustee. He testified that there were many cases in which he performed substantial work and received little or no remuneration. Periodically, such as in this case, there are cases in which he has administered substantial assets and sought a substantial fee. He testified that this was the first case in which he was requested to keep time records. This was ordered by Judge Melloy when Trustee submitted the first fee application in 1991.

As a private attorney, Trustee testified, he keeps thorough time records. On contingent fee cases, however, he ordinarily has a percentage contract and does not keep complete time records. Trustee testified that his hourly rate in 1991 and 1992 was approximately \$95 per hour. This is a consistent with Trustee's application filed on February 15, 1991 seeking employment of himself as an attorney

for the estate, in which Trustee stated that his fee rate was \$95 per hour for work performed as an attorney. He testified that his current rate is between \$95 and \$125 per hour.

In addition to the work personally performed by Trustee in administering this case, he had the benefit of counsel for Trustee. When the case was converted from a Chapter 11 to a Chapter 7, the law firm of Mackall, Crounse, and Moore was allowed to complete some work which was in progress at the time of conversion. Additionally, during the course of the Chapter 7 administration, Trustee employed the law firm of Lindquist and Vennum. Toward the end of the administration, Attorney Ted Stone did work as attorney for Trustee.

During the course of administration, Trustee distributed fees of \$141,811.03 to attorneys for Trustee. In his Final Report, Trustee stated that during the course of administration, he collected assets totaling \$5,213,784.28. Trustee reports disbursements of \$4,818,119.18 with a remaining balance as of the time of the Final Report of \$395,665.10.

BURDEN OF PROOF

The burden of proof with regard to a fee application is upon the party requesting compensation. In re Bond's Lucky Foods, Inc., 76 B.R. 664, 666 (Bankr. E.D. Ark. 1986). Here, the burden is upon Trustee to establish entitlement to all fees including reimbursement for costs as well as expenses. In re Grimes, 115 B.R. 639, 642 (Bankr. D.S.D. 1990).

TRUSTEE COMPENSATION

Trustee takes the position that it is inappropriate for the Court to apply the "lodestar" analysis in determining the amount of an award of trustee's fees. Trustee states in his brief that: "It is submitted that the proper approach to trustee compensation is not a lodestar approach. The statutory award should be the usual award because of the absolute cap of §326." Trustee's Brief of June 1, 1999 at page 8. He argues that Chapter 7 trustees should be awarded the statutory maximum under §326 in all cases unless to award such a maximum fee would result in a windfall or if, for some reason, the quality of the trustee's work is inadequate. Trustee states that because of the "difficulty, uncertainty, potential liability, massive time commitment, and results obtained", he should be awarded the maximum compensation permitted by §326. Under such an analysis, §330 has virtually no impact on trustee compensation. For reasons set out hereafter, it is the conclusion of this Court that Trustee's position is not defensible.

The Code and Rules provide for Chapter 7 Trustee compensation pursuant to the provisions of 11 U.S.C. §§326 and 330 as well as Rule 2016 of the Rules of Bankruptcy Procedure. "Under §330(a)(1), a court may award a trustee 'reasonable compensation' subject to the limitations set forth in §326(a)." In re H & S Motor Freight, Inc., 23 F.3d 1431, 1432 (8th Cir. 1994). The correct version of the Code to apply is that in effect at the time Debtor filed its petition, which, in this case, was March 14, 1990. Id.; In re Kula, 213 B.R. 729, 736 (B.A.P. 8th Cir. 1997) (applying pre-1994 version of §330 to case filed prior to October 24, 1994).

The applicable version of §326(a) states:

In a case under chapter 7 or 11, the court may allow reasonable compensation under section 330 of this title of the trustee for the trustee's services, payable after the trustee renders such services, not to exceed fifteen percent of the first \$1,000 or less, six percent on any amount in excess of \$1,000 but not in excess of \$3,000, and three percent on any

amount in excess of \$3,000, 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.

11 U.S.C. §326(a) (1989). Based on the Final Report, total receipts for disbursement in this case were \$5,213,784.28. The §326(a) percentage calculation results in a maximum trustee fee of \$156,593.

While §326 sets the maximum compensation of trustees, the method of compensation is controlled by §330 which states in applicable part:

(a) After notice to any parties in interest and to the United States Trustee and a hearing, and subject to sections 326, 328, and 329 of this title, the court may award to a trustee, to an examiner, to a professional person employed under section 327 or 1103 of this title, or to the debtor's attorney -

(A) reasonable compensation for actual, necessary services rendered by such trustee, examiner, professional person, or attorney, as the case may be, and by any paraprofessional persons employed by any such trustee, professional person, or attorney, as the case may be, based on the nature, the extent, and the value of such services, the time spent on such services, and the cost of comparable services other than in a case under this title; and

(B) reimbursement for actual, necessary expenses.

11 U.S.C. §330 (1989).

In addition, the Rules of Bankruptcy Procedure set forth the requirements of what an application for compensation must contain.

An entity seeking interim or final compensation for services, or reimbursement of necessary expenses, from the estate shall file with the court an application setting forth a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested.

Fed.R.Bankr.Proc. 2016(a).

The foregoing provisions of the Code and Rules must be read together to determine how a Chapter 7 trustee is compensated. This relationship was specifically addressed by Congress when the Code was revised in the 1978 Act:

Section 326. Limitation on Compensation of Trustee

This section is derived in part from §48(c) of the Bankruptcy Act. It must be emphasized that this section does not authorize compensation of trustees. This section simply fixes the maximum compensation of a trustee. Proposed 11 U.S.C. § 330 authorizes and fixes the standard of compensation. Under §48(c) of current law, the maximum limits have tended to become minimums in many cases. This section is not intended to be so interpreted. The limits in this section, together with the limitations found in §330, are to be applied as outer limits, and not as grants or entitlements to the maximum fees specified.

H.R. Rep. No. 595, 95th Cong., 1st Sess. 327 (1977).

Congress intended that an interrelationship exist between §326 and §330, requiring the conclusion that Trustee's exclusive reliance on §326 is misplaced. The percentage allowances set out in 11 U.S.C. §326 constitute a cap on compensation and not a mandate. In re Roco Corp., 64 B.R. 499, 502 (D.R.I. 1986); In re Lemley, No. Y82-03341, slip op. at 8 (Bankr. N.D. Iowa June 22, 1989). From the legislative history, it is clear that §326 is applicable in determining trustee fees only to the extent that it sets the maximum compensation which may be allowed.

The legislative history dictates that the maximum compensation is not to be the compensation provided in every case. What is to be provided on a case-by-case basis is a "reasonable compensation". In order to determine "reasonable compensation," courts must look to §330. If any doubt remains as to the intent of Congress, it is satisfied by reading the first sentence of §330 which states in relevant part that: "[T]he court may award to a trustee . . . reasonable compensation for actual, necessary services rendered by such trustee." 11 U.S.C. §330(a)(1). This establishes that fees for Chapter 7 trustees are to be determined in the same manner as they are for the other individuals listed in §330(a).

REASONABLE COMPENSATION

As defined in §330, compensation awarded under this section is based on reasonableness. The Eighth Circuit has defined "reasonable" compensation in In re Apex Oil Co., 960 F.2d 728 (8th Cir. 1992). This Circuit adopted the lodestar

method of determining compensation in which the number of hours reasonably expended is multiplied by a reasonable hourly rate. The Court held that the lodestar amount would ordinarily reflect and include issues such as: "(1) the novelty and complexity of the issues, (2) the special skill and experience of counsel, (3) the quality of representation, and (4) the results obtained." Apex Oil, 960 F.2d at 732. Since these factors are considered an integral part of the lodestar method, they normally could not serve as an independent basis for increasing the fee award above the lodestar amount.

The Court acknowledged that the U.S. Supreme Court has held that upward adjustment of the lodestar figure is permissible in rare and exceptional cases. The Circuit Court stated: "We find that the lodestar approach, including the possibility of adjustments in rare and exceptional circumstances, is an appropriate method to use in calculating reasonable compensation under §330." Apex Oil, 960 F.2d at 732. In determining the circumstances under which upward compensation may be awarded, the Court held:

Because the lodestar amount may already compensate the applicant for exceptionally good services and results, however, the fee applicant must do more than establish outstanding service and results. The applicant also must establish that the quality of service rendered and the results obtained were superior to what one reasonably should expect in light of the hourly rates charged and the number of hours expended.

Apex Oil, 960 F.2d at 732.

Apex Oil was decided in 1992 and applied the same version of §330 as is applicable in this case. See 960 F.2d at 731. Congress subsequently amended §§326 and 330 in 1994, applicable to cases filed on or after October 24, 1994. The 1994 amendments include factors to be considered by the court in determining a reasonable fee. Courts have recognized that the 1994 amendment of §330(a)(3) adopted

the lodestar analysis, codifying existing case law. In re Holder, 207 B.R. 574, 583 (Bankr. M.D. Tenn. 1997). Even if the 1994 amendments were applicable in this case, the analysis remains the same and the Apex Oil factors continue to apply to fee determinations under §330(a). The Circuit Court has recently reaffirmed the applicability of the lodestar computation for attorney's fees as set out in Apex Oil in a case arising in the context of Title VII. Forshee v. Waterloo Indus., Inc., F.3d , 1999 WL 333415, at *3 (8th Cir. May 27, 1999).

Trustee argues that the lodestar approach utilized within the framework of §330 is inappropriate in this case. He feels that the maximum fee allowable under §326 should be the ordinary compensation awarded unless it would cause a windfall to Trustee or if such compensation would be inappropriate because of poor quality work. Trustee argues that Congress intended that Chapter 7 trustee compensation be treated differently than other compensation under §330. He claims that the proper method is to use a percentage of the fund method of compensation within the general framework of §326. Trustee analogizes this type of case to a contingent fee case. In fact, he uses the term "contingent" repeatedly in his testimony and argument. He argues that every Chapter 7 case is a contingent case and, if a trustee does not generate assets and turn them into cash, there is no compensation. From this analysis, he reaches the result that compensation should be the maximum allowable under §326. This Court must conclude for reasons described hereafter that any "contingency", if appropriate, is already included in the lodestar analysis. However, there is compelling authority that the approach argued by Trustee is not allowable as a lodestar factor, and, in fact, it is inappropriate to consider enhancement based on contingency in any context. City of Burlington v. Dague, 505 U.S. 557, 566-67 (1992); In re Kula, 213 B.R. 729, 739 n.6 (B.A.P. 8th Cir. 1997).

Under Trustee's theory, time records become secondary and are to be used primarily to show the results of Trustee's work and determine reasonableness. He claims other factors should be considered in the determination of reasonableness including difficulty of the case. In this regard, Trustee asserts that he achieved an exceptional result and should be awarded the maximum fees authorized under §326. However, the conclusions reached by Trustee are not the law of this Circuit. The methodology sought by Trustee is inconsistent with the language of the Bankruptcy Code, the legislative history of Congress, and also with the Eighth Circuit's method of computing compensation under Apex Oil. This Court must use the methodology defined in Apex Oil. In so doing, the Court must first determine the appropriate number of hours subject to compensation. Secondly, the Court must determine an appropriate hourly rate. Finally, the Court must determine whether the quality of services provided was of such a "rare and exceptional" nature as to justify a fee enhancement.

HOURS

The first step requires the Court to determine the appropriate number of hours to attribute to Trustee. The record establishes that Trustee submitted his first fee application in June of 1991 without an itemized statement of hours. Judge Melloy, at that time, directed that Trustee keep time records in this case. Based upon that directive, Trustee submitted time records upon which a total of 115.48 hours was ultimately approved for the period from February 1, 1991 through June 30, 1991. The second fee application included time spent between May 1, 1991 and June 3, 1992. Trustee submitted an itemized time statement. Judge Melloy approved 161.47 hours. The third request for compensation submitted with the interim report did not contain an itemization of time.

Trustee included a final itemization of time with his Final Report filed February 1, 1999. In that report, Trustee submitted time records for 358.87 total hours from February 1, 1991 through December 10, 1998. When the U.S. Trustee's Office objected to the final fee application, Trustee

submitted an amended time record in which 666.87 hours is represented to the Court as documented time in this case from February 1, 1991 to May 17, 1999. Mr. Dunbar testified at the hearing on fees that while he did not document additional hours, he feels he spent substantially more than 1,000 hours in work on this case.

The burden is upon Trustee to establish the appropriate number of hours. Because of the position Trustee takes on the applicability of the lodestar method, he does not feel that complete documentation of time is a requirement. In his brief, Trustee states that: "The purpose of Trustee recording his activities and time is to advise the Court of the nature and extent of the activities undertaken. It is not intended to be used as the only basis for compensation." However, application of the lodestar method requires accurate time records and the burden is upon Trustee to establish time expended. Trustee submits deficient time records at his peril. In re Smuggler's Beach Properties, Inc., 149 B.R. 740, 743 (Bankr. D. Mass. 1993).

Trustee submitted time records for the period between February 1 and June 30, 1991 documenting 115.48 hours. In the most recent amended request for compensation, the total hours for that time period has increased to 177.16 hours. Likewise, Trustee initially documented 161.47 hours between the first application for compensation and June 3, 1992, the second application. Trustee's amended request for compensation now lists 191.38 hours for that time period. Oddly, both the first and second applications for compensation include time spent between May 1, 1991 and June 30, 1991. The first application covers the period ending June 30, 1991; the second application covers the period beginning May 1, 1991. Thus, Trustee requested compensation for that two-month period twice.

Trustee documented 358.87 total hours when he submitted his final report. This was subsequently expanded to the present 666.87 hours in the amended request for compensation. Trustee now indicates that there are hours which are undocumented which would bring the total to in excess of 1,000 hours.

Because of these fluctuations in the number of hours documented, the Court's confidence in the accuracy of Trustee's time records is undermined. Certainly, allowing the total number of hours submitted in the amount of 666.87 hours is generous in light of the manner in which the time records were kept and submitted to the Court. There is no justification for awarding compensation in excess of this number of hours based merely upon an oral representation of work completed. Estimates of time expended are not compensable. In re Whitney, 27 B.R. 352, 354 (Bankr. D. Me. 1983). As one court has stated: "Where a trustee fails to keep concise records of time, he necessarily bears the risk that his services may be undercompensated. A proper assumption in such circumstances is that he actually worked the lowest number of estimated hours." In re One City Centre Assoc., 111 B.R. 872, 881 (Bankr. E.D. Cal. 1990).

Rule 2016 requires accurate time records. Trustee was on notice since the inception of this case that accurate time records were necessary for an award of compensation. Suffice it to state that since the U.S. Trustee has not directly challenged the documented number of hours most recently submitted by Trustee, the Court will accept 666.87 hours as the total number of hours Trustee actually expended in work related to this case.

Even though the total number of hours reported are accepted as the total hours expended, there are entries between March 16, 1999 and May 17, 1999 which relate directly to research and presentation of Trustee's fee applications to the Court. The total time utilized in this endeavor is somewhat in excess of 11 hours. It is the feeling of this Court that these hours are not compensable and must be deducted from the total. In re Courson, 138 B.R. 928, 936 (Bankr. N.D. Iowa 1992). Deducting this

number of hours from the total hours leaves a total of 655.87 hours upon which to base the lodestar formula.

HOURLY RATE

Trustee testified that in his capacity as an attorney he charges between \$95 and \$125 per hour for legal work. Mr. Dunbar was acting in the capacity of a Trustee in this case and it is as a Trustee that he seeks compensation. A trustee who also happens to be an attorney is not necessarily entitled to the same rate that he charges in his legal practice. Instead, this should be the maximum allowable rate and Trustee's fees on an hourly basis should not exceed that charged in his capacity as a licensed attorney.

Reasonable hourly rates are "the prevailing market rates in the relevant community". Blum v. Stenson, 465 U.S. 886, 895 (1984). In his initial billing, Mr. Dunbar submitted his time record at a rate of \$95 per hour which was approved by Judge Melloy. The second application was approved at the rate of \$125 per hour. The U.S. Trustee does not specifically object that the rate of \$125 per hour is unreasonable. It is the conclusion of this Court that Trustee should be compensated at the rate of \$95 per hour for the time involved up to the time of the first fee application, or June 30, 1991, and \$125 per hour thereafter.

ENHANCEMENT FACTORS

Trustee asserts that this was a difficult case. He testified at some length concerning the various matters which were involved in this case. This was undoubtedly a large case involving a substantial commitment of time by Trustee. There were issues which are not present in all Chapter 7 cases. These matters unquestionably posed problems for Trustee. Trustee argues that because of his efforts, funds were generated which would not have been otherwise created.

However, the Court feels that two matters should be considered. First, the responsibility inherent in the position of trustee is the same in every case. The Code mandates that every trustee must vigorously carry out his or her duties to maximize the Chapter 7 estate. In this context, the work performed by Trustee in this case is no more and no less than the Code requires. Secondly, this Circuit has indicated that the lodestar method absorbs these issues. The court has stated: "Because this lodestar amount presumably reflects (1) the novelty and complexity of the issues, (2) the special skill and experience of counsel, (3) the quality of representation, and (4) the results obtained, these factors normally cannot serve as independent bases for increasing the fee award above the lodestar amount." Apex Oil, 960 F.2d at 731-32. Thus, work within the ordinary range of competence of a diligent trustee is compensated within the lodestar method.

A fee enhancement is only warranted for "exceptionally good service and results". Id. This Circuit has reaffirmed this standard in Forshee. In fact, it constitutes an abuse of discretion to award enhanced fees without such a finding. Forshee, 1999 WL 333415, at *3. Here, assets in excess of \$5.2 million were administered. Of that amount, \$3.7 million was distributed to secured creditors. The remainder was consumed by administration expenses and no distribution was made to general unsecured creditors. One court has held that if unsecured creditors do not receive a dividend, an enhanced fee is unwarranted. "Where general unsecured creditors will not receive a dividend from a debtor's estate, a fee enhancement is unjustified, even where the applicant's services rendered were exceptional in nature." In re Wright Air Lines, Inc., 147 B.R. 20, 22 (Bankr. N.D. Ohio 1992).

Trustee observes, with some justification, that there were environmental issues and other matters in this case regarding which Trustee's services greatly benefitted not only the secured creditors but the

community at large. Regardless, this Court must conclude that the high standard required for a fee enhancement has not been met in this case. While Trustee performed substantial services on behalf of the estate, he is being compensated at the rate of an attorney and not at a lower rate. The matters performed by Trustee were within the range of those which courts would ordinarily expect of a well-qualified trustee and do not rise to the extraordinary level required for a fee enhancement. Therefore, the Court concludes that no fee enhancement is authorized.

CONCLUSIONS

The Chapter 7 Trustee seeks total compensation of \$156,593.53 in this case based upon the maximum percentage allowable under §326. Trustee has documented 666.87 hours of work performed in this case of which the Court finds that 655.87 hours are compensable. If the Court were to approve the total fee sought by Trustee, this fee would be based upon an effective hourly rate of \$238. Trustee testified that his maximum hourly rate at this time is \$125 per hour for work performed as an attorney. While the Court feels that an award in this case equal to Trustee's ordinary hourly rate as an attorney is appropriate, upward deviation from that rate is permissible only in rare and exceptional cases. It would constitute an abuse of discretion to approve Trustee's fee based upon an hourly rate of \$238 per hour.

It is permissible to enhance the fee in rare and exceptional cases. While Trustee administered a case more complex than many in this District, only secured creditors and administrative claimants received compensation. General unsecured creditors received nothing. The standard for fee enhancement is exceptionally high. Applying that standard to determine whether an upward adjustment is warranted, this Court must conclude that Trustee has failed to meet the substantial burden warranting such an enhancement.

Trustee is, therefore, entitled to be compensated for a total of 655.87 hours. The first 115.48 hours are compensable at the rate awarded by Judge Melloy of \$95 per hour. This totals \$10,970.60. The remaining 540.19 hours are compensable at a rate of \$125 per hour for a total of \$67,523.75. The total compensable amount pursuant to §330(a), therefore, is \$78,494.35. Trustee has previously had interim expenses approved in the amount of \$8,040.83. He seeks no additional expenses in the Final Report. The amount of expenses are not in dispute and the expenses in that amount are approved.

The unfortunate aspect in this controversy is that the Trustee had fees already approved substantially in excess of those approved in this ruling. As discussed, however, it would be an abuse of discretion to make any type of adjustment based solely on such a consideration. Additionally, interim fees are not subject to concepts of res judicata or issue preclusion and are always subject to final review and modification while the case is pending. In re Lockwood Corp., 216 B.R. 628, 637 n.4 (Bankr. D. Neb. 1997). Interim awards granted pursuant to §331 are subject to disgorgement. Id. at 637; In re Anolik, 207 B.R. 34, 37-38 (Bankr. D. Mass. 1997) (stating ordering disgorgement of interim fees is a discretionary matter). This Court, therefore, concludes that no option is available other than directing the return of the excess compensation awarded to Trustee in this case to the estate.

WHEREFORE, Trustee is awarded final Trustee's fees in the amount of \$78,494.35.

FURTHER, Trustee's final application for expense reimbursement is approved in the amount of \$8,040.83.

FURTHER, as interim compensation exceeds the amount of compensation previously awarded herein, Trustee is ordered to return the excess to the estate.

SO ORDERED this 17th day of June, 1999.

Paul J. Kilburg
U.S. Bankruptcy Judge