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In the United States Bankruptcy Court  
for the  
Southern District of Georgia  
Brunswick Division

In the matter of: )  
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CONCRETE PRODUCTS, INC. ) Chapter 11 Case  
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 ) Number 88-20540  
Debtor )

**MEMORANDUM AND ORDER ON TRUSTEE'S  
APPLICATION FOR FINAL COMPENSATION, REIMBURSEMENT  
OF EXPENSES, AND ATTORNEY'S FEES**

James D. Walker, Jr., previously Chapter 11 Trustee in the above-captioned case, filed an amended application seeking recovery of Trustee's commissions and professional fees as attorney for the Trustee on October 23, 1991. Hearings were conducted on December 4, 1991, in Brunswick, on January 3, 1992, in Savannah, and concluded on January 8, 1992, in Brunswick. After consideration of the evidence, taking judicial notice of previous proceedings in this case, together with consideration of all applicable authorities, I make the following Findings of Fact and Conclusions of Law.

History of the Case

Concrete Products, Inc. ("Concrete Products"), filed its Chapter 11 petition on October 3, 1988. Mr. B. E. Bledsoe served as Debtor's president and chief executive officer at the time the case was filed.

On January 20, 1989, an adversary proceeding was filed against the Directors of Concrete Products, et al. seeking an injunction against the Board to prevent Mr. Bledsoe's termination as president and chief executive officer. The adversary complaint was based in part on the terms of a written employment contract. In a previous order dated January 27, 1989, I concluded based on the available evidence that termination of Mr. Bledsoe would seriously threaten Concrete Products' chances for reorganization. I preliminarily enjoined his termination determining that Bledsoe and the Board were jointly responsible for the duties of the debtor-in-possession. *See William Minter, et al. v. Directors of Concrete Products, et al. (Matter of Concrete Products, Inc.)*, 110 B.R. 997 (Bankr. S.D.Ga. 1989). In that Order I reserved the right to appoint a Trustee without further notice.

Despite the January order on March 9, Plaintiffs in the aforementioned adversary filed a request for injunction, motion for contempt and appointment of Trustee alleging that one or more of the directors interfered with Mr. Bledsoe's execution of his duties and president and chief executive officer and that such interference amounted to contempt of court. However, the court was subsequently informed that relations between Bledsoe and the Board had improved and that the January order did not need to be clarified to determine the responsibilities of the Debtor and the Board.

Subsequent hearings were held on April 13, 1989, on other matters in the case including Debtor's Motion for Extension of Time for Filing its Plan and Disclosure Statement and a Motion to Convert

the case filed by the United States Trustee. At that hearing it became apparent that my prior order needed clarification.

On April 26, 1989, I amended my previous order in the adversary case to define the scope of power of the Board of Directors and Mr. Bledsoe. However, on May 1, 1989, the Plaintiffs filed a Motion for Reconsideration of the Amended Order alleging that the Board was "committed to the liquidation of the Debtor without regard to the impact upon creditors" and that it had decided to discontinue the manufacture of certain products despite outstanding contracts for the products in the amount of \$437,000.00. The Plaintiffs further alleged that Bledsoe had recently obtained a large favorable order for some of these products which was expected to be profitable. Bledsoe in fact had filed a Disclosure Statement and Plan on April 24, 1989, and contended that the shutdown would irreparably harm any effort to reorganize.

Upon consideration of the Motion for Reconsideration and for an Emergency Hearing, I conducted a hearing by telephone conference on May 4, 1989, with all parties represented. The Board argued that the company should be immediately liquidated and represented that a plan to accomplish liquidation would be submitted. Bledsoe contended that the Board, which had failed to file a Plan, should not be permitted to sabotage the Bledsoe plan by forcing a shutdown in operations. In my order of May 5, 1989, I concluded that the tension between the Board and Mr. Bledsoe worked to no one's benefit. The parties repeatedly presented to this Court issues that involved principally business judgments. I determined that this Court's role should not involve corporate governance and that, pending consideration of competing plans of Bledsoe and the Board, an "independent assessment of how the corporation should be operated is essential." I determined that I had no other alternative than to order appointment of a trustee. Minter, supra, #89-2001 (May 5, 1989). The United States Trustee thereafter selected James D. Walker, Jr., who was approved for that appointment by order entered May 5, 1989. By Order dated June 1, 1989, Walker was appointed to serve as attorney for the Trustee as well.

On June 22, 1989, a Motion to Remove Trustee was filed by Carley Zell and denied by order entered August 29, 1989. On July 9, 1989, a Motion was filed to set aside the temporary restraining order preventing Bledsoe's termination. I ruled that the Motion was moot as the Trustee was operating the business and was vested with the right to make a decision on the issue of Bledsoe's employment.

Among the initial duties, but by no means the sole duty, of Mr. Walker as Trustee was the duty to improve the record keeping and accounting system of the Debtor to determine if the business should be continued or liquidated. On February 20, 1990, a continued hearing was held on the United States Trustee's Motion to Convert. Following a lengthy hearing I denied the Motion by an order dated February 27, 1990 (Document #187). I concluded that on a cash basis<sup>1</sup> the company's losses were marginal during the first nine months of the Trustee's stewardship. Since this was in stark contrast to the huge losses suffered in 1988 I concluded that there were not sufficient grounds for conversion under Section 1112(b) at that time. At that point in time both the Trustee and the Board had opposed conversion. I denied the Motion to Convert and ordered the Trustee to file a Disclosure Statement and Plan by March 15, 1990, or to file a statement explaining why he would not do so and making recommendations for dismissal or conversion. The Trustee filed a Disclosure Statement on March 15, 1990, and amended it to make minor corrections on March 27, 1990. On June 19, 1990, the Trustee filed further amendments to the Disclosure Statement (Documents #200, 201, 232). After a hearing on the Disclosure Statement held July 2, 1990, and consideration of the objections to the statement, I directed the Trustee to file additional amendments to the Disclosure Statement not later than July 16, 1990, which the Trustee filed July 10, 1989 (Document #242).

To this point the Board had not filed a liquidation plan as it had previously represented in May 1989 it would do. I therefore ordered the Board to do so, if it desired, not later than July 30, 1990, so that the two competing plans could be assessed by creditors and a final decision whether to continue business or liquidate could be made. On August 1, 1990, Mr. Harold Zell, Chairman of the Board of Directors of Debtor, filed a Disclosure Statement and Plan (Documents #244, 245). It was withdrawn on August 17, 1990.

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<sup>1</sup> This Court recognizes only too well the limitations inherent in reaching conclusions about the viability of a business on a cash rather than accrual basis. However, due to the inability of the company's more sophisticated accounting system to function this, in fact, is the only basis on which reporting was available.

On July 26, 1990, a Motion was filed by Harold Zell to remove the Trustee. A hearing was held on the Motion on October 11, 1990, at which time Zell alleged that the Trustee had showed favoritism to Bledsoe. Zell cited deficiencies in the Disclosure Statement which did not accurately represent Bledsoe's claims against Concrete Products and alleged an unreasonably favorable employment contract in favor of Bledsoe. In my order entered November 2, 1990, I stated that I could not find any misconduct by the Trustee. I also found the employment contract to be part of a reasonable reorganization plan and could not find any evidence of favoritism toward Bledsoe. Therefore, I concluded that the Movant failed to show favoritism or negligence which would support the Trustee's removal "for cause." I also concluded that an action for damages was inappropriate as the Trustee had absolute immunity to the extent that this Court ruled on the Trustee's various actions. I therefore denied the Motion to Remove the Trustee.

However, between the filing of the Motion to Remove the Trustee and the hearing, the company's operations had sustained large losses. As a result of these losses the Trustee had notified the Court by letter dated August 27, 1990, (Exhibit D-9) that he intended to cease production and liquidate the business. I therefore concluded that the purpose for the Trustee's services no longer existed as the Board was to reassume management and begin liquidation proceedings. As a result, the Trustee was excused from any further responsibilities in the case (Document #340).

Walker's first interim application for fees was filed over a year after his initial appointment on May 14, 1990, and amended on December 10, 1990. It was scheduled for a hearing in Brunswick on January 9, 1991. Following opening statements of counsel at that hearing I conducted a lengthy settlement conference with the parties and at that point there seemed a reasonable likelihood that a resolution might be reached which was satisfactory to all parties. As a result no further proceedings were scheduled for several months while negotiations proceeded. Apparently these negotiations broke down in the late summer or in the fall of 1991. On October 23, 1991, the Trustee amended his interim application to include additional services rendered following the date of the first application and thus rendered it a final application. The hearing to consider said application was sent by notice of this Court dated October 30, 1991, which provided that objections to the Trustee's application would be considered on December 4, 1991. On November 25, 1991, a response to the Trustee's application was jointly filed by three unsecured creditors objecting to the amounts sought.<sup>2</sup> On November 26, 1991, the Debtor filed a Motion to Surcharge the Trustee and a Objection to the Trustee's application. On the same date Debtor amended its previous objections to the Trustee's attorney's fee application. On November 27, 1991, the United States Trustee filed responses asserting no objection to either the Trustee's compensation or the attorney's fee application.

#### Contentions of the Parties

Walker seeks an award of compensation for some 505 hours time devoted for services rendered as an attorney for the estate at a rate of \$100.00 per hour, 4 hours at a rate of \$50.00 per hour for paralegal services, and \$6,753.66 in expenses advanced for a total of \$57,453.66. In his capacity as Trustee, he makes application for compensation in accordance with the maximum statutory compensation allowable under 11 U.S.C. Section 326(a) in the amount of \$71,497.07. Walker contends that the services rendered to the estate for which compensation is sought as attorney were reasonable and necessary, that sufficient documentation of the duties performed has been maintained and that a *prima facie* case for compensation is established. He further urges the Court to award separate compensation in some amount less than the statutory maximum for services which he rendered as Trustee.

The Debtor urges the Court in its pleadings or by oral argument to reduce or eliminate the compensation award for a number of reasons. First, Debtor shows that the Trustee, in his initial application filed May 14, 1990, sought compensation for approximately 73 hours of services which were deleted from his amended application filed December 10, 1991. Debtor contends that as a result of review by the United States Trustee Walker eliminated those 73 hours of work devoted to the case which were more properly characterized

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<sup>2</sup> This objection was not prosecuted at the hearing and therefore it is not separately addressed in this Order. However, the content of the objections are very similar to those raised by the Debtor and are therefore encompassed within my ruling.

as a Trustee function than an attorney function. Nevertheless, in the amended application Walker sought an increased rate of compensation of \$115.00 per hour and asserts that the inclusion of Trustee duties in the initial application followed by their elimination, together with an increase in the proposed hourly rate, constitute fraud on the part of the Trustee justifying the denial of all attorney's fees. Second, Debtor contends that Walker as Trustee and Walker as attorney for the Trustee had an inherent conflict of interest in that the Trustee's obligation in administering the estate was to attempt to minimize the administrative costs including professional fees whereas Walker as attorney had an interest in maximizing his professional compensation. This conflict is alleged to have resulted in the Trustee allocating much of his work to attorney's time in order to receive higher compensation than the non-attorney trustee would. Third, Debtor contends that Walker negligently or fraudulently continued to operate the business of Concrete Products from the time of his appointment in May of 1989 through August of 1990, that his motivation in doing so was solely that of personal gain, that he disregarded financial information which would have led an ordinary, reasonable businessperson to conclude that the company should be liquidated and that the result of that negligent or fraudulent decision to continue business resulted in losses sustained in 1990 in excess of the trustee commissions. Fourth, Debtor contends that Walker negligently allowed the Debtor's group health insurance to lapse under circumstances which made Debtor a self-insurer for certain employees claims and that exposure should be offset against his compensation.

#### FINDINGS OF FACT

Concrete Products had been forced to file Chapter 11 after a period of several years in which it had sustained heavy losses from operations. The last audited statements of the company covered the year ending January 3, 1988 (calendar year 1987) and showed an operating loss of \$228,663.00 (Exhibit D-3, page 3), and for the year ending December 28, 1986, a loss of \$382,254.00 (Exhibit D-3, page 3). Net sales for each year were nearly \$6 million. No audited financial information is available for any period after January 3, 1988. This Chapter 11 case was filed October 3, 1988. On January 10, 1989, a newly elected board of directors met and passed a motion to authorize Harold Zell as chairman of the board to engage certified public accountants to perform an audit (Exhibit D-1). On January 13, 1989, the Board met again and Zell reported on the bids and time estimates received. DeLoach and Company had presented the lowest bid but no action was taken on their proposal (Exhibit D-1). On February 7, 1989, the Board met again. Buddy Knight, the in-house certified public accountant reported pre-tax losses of \$1,878,055.00 (unaudited) for 1988. DeLoach and Company was, in fact, retained by Zell to review the condition of the company's books and records some time in April, 1989. (Testimony of Bill Wainwright). Wainwright, a certified public accountant practicing in that firm, reviewed the most recent audited returns and examined the company's general ledger. He found the records to be in disarray. The books were out of balance by hundreds of thousands of dollars. He reported to Mr. Zell after one day on the premises that he could compile financial reports from the company's books and records, but that the only reliable way to assess the company's condition would be after a complete audit. He advised Zell in April, 1989, that an audit would be impractical, if not impossible to complete. In any event it would be too costly. Zell terminated his services upon receiving this information. At the hearing Wainwright testified that to do a complete audit would have been "immeasurably expensive" and could easily cost \$100,000.00.

When Walker was appointed Trustee in May, 1989, he was faced with the same problems concerning reliability of financial reports that the Board had been unable, due to lack of funds, to correct. Based on his initial meetings with Bledsoe and the Board he made a tentative decision to continue operations. This decision was based in part on the existence of outstanding orders for the company's products, the damages that would flow from the company's breach of its contracts to fulfill previous orders which had been accepted and the concern that a shutdown in the company's operations would irreparably damage its reputation in the industry should it attempt to resume operations at a later time. While the decision was based on the company's then current financial information, the Trustee determined that the computer system employed by the Debtor was unreliable. The Trustee received authority from the Court to hire Sammy Turner as an accountant to work with him and the management of the company in bringing financial information current and verifying the reliability of the company's internal reports. He concluded that the cash, the accounts receivable, and the accounts payable information generated were reasonably accurate. However, neither Turner nor Walker were satisfied that the company's internal accounting system was accurately reflecting the costs of goods sold. Accordingly, Turner constructed an alternative analysis of these costs to aid the Trustee in analyzing the

business' future.

Walker always believed that the decision to remain in production or shutdown was a continuing process requiring continual review as would be true of any business. Through Turner's efforts the Debtor began posting its internal accounting records on a current basis. Based on Turner's analysis Walker concluded within sixty days of his appointment that the monthly cash reports filed with the United States Trustee going forward from May 1989 were reasonably reliable. These reports reveal gain (loss) month-by-month following the Trustee's appointment as follows:

<u>1989</u>	<u>Month</u>	<u>Profit (Loss)</u>	<u>Cumulative</u>
	May	\$29,572.00	\$ 29,572.00
	June	\$45,048.00	\$ 74,620.00
	July	(43,559.00)	\$ 31,061.00
	August	\$ 1,045.00	\$ 32,106.00
	September	\$18,699.00	\$ 50,805.00
	October	(18,047.00)	\$ 32,758.00
	November	( 3,365.00)	\$ 29,393.00
	December	\$16,110.00	\$ 45,503.00
<u>1990</u>	January	(81,831.00)	( 36,328.00)
	February	\$26,763.00	( 9,565.00)
	March	(29,284.00)	( 38,849.00)
	April	(42,719.00)	( 81,568.00 )
	May	(10,538.00)	( 92,106.00)
	June	\$ 880.00	( 91,226.00)
	July	( 9,456.00)	(100,682.00)
	August	(67,891.00)	(168,573.00)

The Debtor's reports filed with the United States Trustee reveal cumulative cash losses of \$211,295.00 from the date of filing through April, 1989. The Trustee was appointed in May, 1989. From that point through the end of the year the company showed a cash profit of \$45,503.00 and through February, 1990, the cumulative cash loss was \$9,565.00.

After Walker filed his Disclosure Statement and Plan on March 15th the month end report showed a loss of \$29,284.00, far worse than in 1989. In April, 1990, the loss was \$42,719.00 but this was better than the April, 1989, loss of \$137,362.00 and was not unexpected due to the season of the year. However, for May through July of 1989 the company made a cash profit of \$31,061.00. For May through July of 1990 the company sustained net losses of \$19,114.00. Since the company had to be profitable during these months to break even for the year, Walker concluded that he would liquidate, inasmuch as cash profits earned in 1989 clearly would not be repeated.

Foster Shepard testified as an expert for Debtor. His experience is analyzing businesses for possible acquisition by clients. While his experience varies and appears to be concentrated in service businesses, he has experience with manufacturing firms. He believes that he could have reached a preliminary decision about the viability of Concrete Products within thirty to forty-five days had he been appointed Trustee. He would have analyzed the business from the viewpoint of a potential purchaser. He did not render an opinion as to what conclusion he would have reached as of a date certain.

Harold Zell testified and the Board minutes reveal that the Board decided not to resume production of Permadeck (one of its major product lines) on April 24, 1989. The Board authorized Zell to

discontinue "any other operation at his discretion." (Exhibit D-2). Zell concluded that the company should be closed based upon high costs, a 15-20% reject rate on its product, deferred plant maintenance, prior losses, and inaccurate accounting records. Zell had been a director since October, 1988, and had endeavored for over six months to assess the financial records, but found the figures "bad." He had "no confidence" in Knight, the in-house certified public accountant. Zell concluded that the business had been operating without good records for at least two years and as of April, 1989, Wainwright told him that without the inordinate expense of an audit, which the company could no longer afford, no better information could be generated. Neither the Board nor the Trustee ever had sufficient funds to perform such an audit.

Likewise, Sammy Turner, the accountant for the Trustee, found the company's books to be in "disarray" with no reconciliation of bank statements for six months and "obvious inaccuracies" in the company reports. Turner was pessimistic about the company's future due to the condition of its records. He tried but was unable to correct their computer system even with Buddy Knight's assistance. Accordingly, he constructed a figure for cost of goods sold which he believed was more reliable than the internal records and was satisfied that Walker could rely on the resulting analysis. However, by late Spring of 1990 he thought the "handwriting was on the wall" that Concrete Products would not survive.

In December, 1990, Wainwright was rehired by the Debtor to prepare certain tax returns for 1988, 1989 and 1990. Wainwright prepared federal returns for 1989 and 1990 which showed taxable losses of \$1,041,486.00 and \$241,112.00 respectively. These losses included non-cash items such as depreciation of \$219,300.00 in 1989 and \$197,367.00 in 1990 which would reduce the losses on a cash basis. Wainwright cautioned, however, that the unaudited nature of the company's records rendered the conclusions unreliable, although taken from the best information available. Wainwright was unable to state when during 1989 or 1990 the losses occurred.

Weighing all the evidence, I find that neither the Board nor Walker was able to correct the disarray of the company's financial records, largely due to the prohibitive cost of an audit. However, the Trustee was able to construct a record-keeping system which was sufficient to keep track of cash flow. Ultimately those records revealed that the company must be liquidated. Despite much testimony and argument about the extent of losses sustained there was no competent evidence produced by Debtor as to when in 1989 the taxable losses were sustained, nor any competent evidence that for 1990, excluding non-cash items such as depreciation, any substantial loss was sustained.

As to the question of uninsured medical expenses allegedly occasioned by the Trustee's negligence, the uncontradicted evidence is that Walker was informed that the company's group health coverage was canceled, sometime in 1990, retroactively to November 1989. There remains a dispute over whether the cancellation was proper. Walker was informed by Bledsoe that the claims existing during the lapse period created by the retroactive cancellation were lower than the premiums for the same period and that substitute coverage had been obtained that would cover all employees as to all claims. Subsequently, however, the policy was issued which excluded certain pre-existing conditions from coverage, exposing the company to liability to its employees from whom health insurance deductions were being taken. William E. Ricks, Sr., has been allowed a claim of \$20,693.43 for uninsured medicals which resulted and the company has claims against the insurers or their agents for the failure to cover these claims. The application of the attorney for the Trustee reveals that no fee is sought for advising the Trustee as to the legal ramifications of this policy change.

Walker did not keep contemporaneous records of time devoted to business activities as Trustee, including his continuing analysis of whether to continue production. In contrast, as attorney for the Trustee, Walker maintained time records which were made part of the application. At the Court's request he subdivided the work performed as attorney into broad categories. These are generally described as the Georgia Ports Authority transaction, the Terry, Mississippi, transaction, the BFTZ transaction, Disclosure Statement/Plan matters, and adversary proceeding litigation including the collection of accounts receivable and recovery of avoidable preferences. The time devoted to the various categories are approximately as follows:

Georgia Port Authority	47.0 Hours
Terry, Mississippi	16.5 Hours
BFTZ	35.4 Hours

Trustee Disclosure Statement/Plan	66.4 Hours
Zell Disclosure State/Plan	12.2 Hours
Adversary Proceedings/ Preferences	208.0 Hours
Other Matters	115.0 Hours

### Legal Framework of an Award

11 U.S.C. Section 327(a) and (d) provide in relevant part:

(a) Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

(d) The court may authorize the trustee to act as attorney or accountant for the estate if such authorization is in the best interest of the estate.

11 U.S.C. Section 330(a) provides in relevant 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--

- (1) 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 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
- (2) reimbursement for actual, necessary expenses.

"If a trustee has special professional qualifications, it is not required that such expertise be placed at the disposal of the estate. Thus, if an attorney is made trustee for an estate, it is not contemplated that such trustee will render legal services to the estate. The Code, however, specifically permits the Court to authorize the trustee to act in the additional capacity as his own attorney if such authorization is in the best interest of the estate." 2 Collier on Bankruptcy ¶330.04 at 330-17 (15th Ed. 1991).

11 U.S.C. Section 326(a) provides a limit on compensation for trustees who are permitted an award of reasonable compensation for actual, necessary services rendered by such trustee under 11 U.S.C.

Section 330(a)(1), subject to that limit. However, the trustee is never entitled to maximum compensation as a matter of right. Collier ¶326.01 at 326-6.

"When the Trustee has rendered legal services beneficial to the estate, he is entitled to reasonable compensation for such services under section 330(a) outside of the limitations set by section 326 on his compensation for services rendered as trustee." Collier ¶330.04 at 330-19.

"Section 330 abandons the peculiar notion of conservation of the estate and economy of administration. These were the pivotal concepts in assessing the quantum of compensation allowable under the Bankruptcy Act. To the extent that prior case law is inconsistent it no longer retains vitality. The importance of the economy principle was that it substantially modified the business standards which are ordinarily used to measure compensation . . . Section 330, however, reflects a different concern. If the notion of strict economy were allowed to stand attorneys and others who could earn more substantial compensation in other fields would leave the bankruptcy arena. Bankruptcy specialists, who enable the system to operate efficiently, would be driven elsewhere, and the administration of bankruptcy cases might be left to less competent individuals. Inevitably, it would be the creditors who would have to absorb the costs of improper and inefficient administration. Thus, the Code adopts the position that compensation should not be below a level allowed for comparable services other than in a case under the Code. Nevertheless the compensation must not exceed the bounds of reasonableness." Collier ¶330.05 at 330-61.

"Under section 328(b), the court is required to differentiate between the various services performed by the trustee and to award to such trustee only one allowance of compensation for each service. The legislative history of section 328(b) makes clear that the court must distinguish a trustee's services rendered in the performance of his duties as a trustee from his services rendered as counsel for the trustee in order to avoid compensating him twice for the same services." Collier §330.04 at 330-17 and 18.

"[A]n attorney-trustee petitioner for payment carries the responsibility of carefully discriminating between those services strictly legal in nature and those which inhere in the office of the trustee. The two offices, attorney and trustee, when mutually occupied are symbiotic; each enhances the performance of the other. The beneficial end result is efficiency and enlargement of the estate. The very quality, however, which makes the attorney particularly qualified to act as trustee, unfortunately beclouds the matter of compensation. It requires the trustee to delineate to the extent that conscience and recollection permit, which services were performed in which capacity." In re Red Cross Hospital Assoc. Inc., 18 B.R. 593, 594 (Bankr. W.D.Ky. 1982).

Because their compensation derives from section 330, trustees have been required to comply with the same procedural rules as other professionals in the submission of fee applications. One City Centre Assoc., 111 B.R. 872 (Bankr. E.D.Cal. 1990). In In re Rosen, 95 B.R. 11 (Bankr. N.D.N.Y. 1988), the Court stated that an evaluation of the trustee's services and an award of compensation could not be accurately made without time records. However, in the absence of time records the court can "reasonably award a trustee a commission based on its review of the nature of the case and its familiarity with the Trustee's performance . . ." In re Rouch, 110 B.R. 467 (E.D.Cal. 1990); See In re Rosen, 95 B.R. at 12.

As to the question of whether the attorney can be compensated for the time devoted to preparation of the fee application see In re Newcorp Energy Corp., Inc., 764 F.2d 655 (9th Cir. 1985) which held "it is both inconsistent with the express policy of the Bankruptcy Reform Act and fundamentally inequitable to impose substantial requirements on bankruptcy counsel as prerequisites to their obtaining compensation while simultaneously denying compensation for the efforts necessary to comply with those requirements. The preparation and presentation of the detailed fee applications required by the bankruptcy court necessarily involve substantial investments of time and effort from both counsel and their staffs. To require counsel to devote considerable time to the preparation of fee applications but to demand that they absorb the substantial costs associated therewith would be to ignore the direct mandate of section 330(a) that reasonable compensation be provided for all 'actual, necessary' services rendered by bankruptcy counsel." See Rose Pass Mines, Inc., v. Howard, 615 F.2d 1088 (5th Cir. 1980); In re Braswell Motor Freight Lines, Inc., 630 F.2d 348 (5th Cir. 1980) which is binding in the 11th Circuit. Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981).

In establishing "reasonable compensation" under Section 330 the decision of Norman v. The Housing Authority of the City of Montgomery, 836 F.2d 1292 (11th Cir. 1988) is controlling. In that decision the Eleventh Circuit concluded that controlling precedent of the United States Supreme Court compelled the Court to approach the setting of attorney's fees differently than had previously been the case under the authority of Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974). Under Johnson the twelve factors derived from the ABA Code of Professional Responsibility of 1980 in determining an appropriate fee for an attorney to charge which had previously been applied as the law in the Eleventh Circuit was supplanted by the lodestar analysis set forth in Hensley v. Eckerhart, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). As the Eleventh Circuit concluded "the lodestar as calculated in Hensley presumptively includes all of the twelve factors . . . adopted in Johnson . . . except on rare occasions the factor of results obtained and perhaps enhancement for a contingency." Id. at 1299.

In Norman the lodestar was defined as the number of hours reasonably devoted to the task multiplied by a reasonable hourly rate. The Court made it clear that the Johnson factors may be considered in setting the reasonable hourly rate which it defined as being "the prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skills, experience, and reputation." Id. at 1299. In determining the number of reasonable hours expended the Court ruled that excessive, redundant or otherwise unnecessary hours should be excluded from determining the compensable hours and that time must be deducted for prosecution of discrete and unsuccessful claims.

Having established a lodestar amount in this manner the Court thereafter approved adjustments based on results obtained but concluded that since the lodestar rate was arrived at by determining a rate for comparable and highly skilled counsel, an upward adjustment should be made only if results are "exceptional." The Court also approved adjustment in the award to compensate for the time value of money since the award is normally made many months or years after the services are performed. As a result the Court approved the awarding of compensation at current rates rather than at historical rates. The Court made it clear that when claims for fees seem excessive or are supported by inadequate fee applications the Court, sitting as an expert, may draw on its own knowledge and experience concerning reasonable and proper fees and form an independent judgment with or without the aid of witnesses as to value. Under Norman an evidentiary hearing is not necessary every time there is a dispute over a fee and the Court has wide discretion in exercising its judgment. In re Beverly Mfg. Corp., 841 F.2d 365 (11th Cir. 1988). However, that judgment must be supported by more than conclusory statements but needs to be articulated in a manner to allow meaningful review. Id. at 1304. Following the Norman decision which was rendered in a civil rights case, subsequent decisions have applied the Norman analysis in bankruptcy cases. *See* In re Columbian Coffee Co., Inc., 88 B.R. 409 (Bankr. S.D.Fla. 1988); In re Wells, 87 B.R. 732 (Bankr. N.D.Ga. 1988). *See generally* In re First Colonial Corp. of America, 544 F.2d 1291, 1299 (5th Cir. 1977).

Sworn testimony that attorney activities actually took the time claimed is evidence of considerable weight on the issue of hours reasonably expended in a bankruptcy case, and therefore, it must appear that the time claimed is obviously and convincingly excessive under the circumstances in order to reduce an award. In cases where the court believes a matter was handled improperly, the court may decrease the hourly rate to the market rate charged for lawyers of less skill and experience. Perkins v. Mobile Housing Bd., 847 F.2d 735, 737 (11th Cir. 1988).

I conclude that a reasonable hourly rate in this District for attorneys of Mr. Walker's skill, experience and reputation is \$100.00. This Court has a continuing duty to regulate and award fees not only to Trustees and attorneys for Trustees but to Debtors counsel, counsel for creditors' committees and others in this District. In numerous prior decisions this Court, speaking through the Honorable John S. Dalis and the undersigned, have approved rates as high as \$125.00 per hour for debtor's counsel representing Chapter 11 debtors. To this point there has been no decision of this Court setting a rate higher than \$100.00 for counsel to a trustee. The apparent discrepancy in the allowable rates has been questioned in the context of cases wherein attorneys for trustees have sought a higher hourly rate. While the reason for denial of the higher rate may not have been clearly articulated in the past I hereby rule that the lower hourly rate for counsel acting as attorneys' for trustees is justified, not because there is a lesser degree of skill, diligence, or ability required of these attorneys; rather, it is based on the realization, as recognized in the Norman case, that lawyers representing entities on an ongoing basis may charge lower hourly rates than would be charged for similar representation in a single case. Id. at 1300.

Trustees who serve in this District are well aware of the established and time honored practice of permitting attorneys who serve as Trustee to seek Court approval of their employment as attorney to the Trustee. As previously noted this is the general practice rather than the exception in this and most, if not all other, districts in this country. It is a practice contemplated and approved by the Code. 11 U.S.C. §327(d). It is reasonable, therefore, to consider that factor in setting a lodestar rate for such individuals, as approved by the Norman court. In recognition of their opportunity for regular representation of trustees it is reasonable for the lodestar rate otherwise applicable to be reduced. The reality of reduced hourly rates further justifies the employment of attorneys to act as their own counsel as being "in the best interest of the estate." During the pendency of this case, applications for compensation were filed before Judge Dalis and myself in other cases seeking an adjustment in the lodestar for representation of trustees by their attorneys and each of us in separate unpublished opinions ruled that \$100.00 would remain the lodestar rate. I know of nothing to suggest that such a rate does not continue to be the appropriate rate for representation of the Trustee in this case. Therefore, I conclude that the reasonable hourly rate to be applied in establishing a lodestar fee in this case is \$100.00 per hour.

In determining the reasonableness of the number of hours for which compensation is sought, this Court has carefully reviewed the fee application of the attorney for the Trustee. On its face it is in order. It sets forth, in detail, by dates and with specific entries the amount of time which the attorney for the Trustee devoted to well-defined, specific tasks. Mr. Walker was sworn as a witness and testified as to his method of record keeping. He kept his time records on a contemporaneous basis from the inception of his employment. He recorded his time for all services which he believed were legal in nature. He omitted recording his time spent on Trustee duties. His total hours spent on Trustee duties are unknown but certainly substantial. He testified that these contemporaneous records are a true and accurate reflection of the actual time and effort he devoted as an attorney to work on behalf of the Debtor. If anything, he devoted more work to the case than recorded because, for instance, he elected not to record time for telephone calls of shorter duration than .3 hours because he felt it was more costly to account for and seek recovery for that time than was economically justifiable. Therefore, numerous tasks which he performed of shorter duration were omitted. As to all matters recorded he testified that the time entries were contemporaneous and are an accurate reflection of the time actually devoted to the task. He testified that all services were reasonably necessary for the prosecution of the interests of the estate.

As previously stated the total time represented by the amended application amounts to 505 hours. Walker testified to his method of accounting out-of-pocket expenses for postage, travel, lodging, meals, and copy charges which total \$6,753.66. At \$100.00 an hour the application seeks compensation and reimbursement of expenses in the amount of \$57,453.66. I conclude based on Mr. Walker's testimony, the record in the case as set forth above, and my opportunity to observe his work first hand throughout the pendency of this case that a sufficient *prima facie* showing has been made that 505 hours were reasonably necessary and were in fact devoted to the prosecution of the estate's interest in this case. Therefore, subject to this Court's independent review of the reasonableness of individual entries, their characterization as legal services, and the objections raised, he has made out a *prima facie* case for compensation and reimbursement in said amount.

## CONCLUSIONS OF LAW

### I. Attorney's Fees

#### A. Reasonable Compensation for Actual Necessary Services under 11 U.S.C. Section 330.

##### 1. Georgia Port Authority

The Trustee contends that services rendered during this phase of the case were necessary, desirable and required the services of an attorney. At the time of his appointment Debtor and the Georgia Ports Authority had come close to finalizing an agreement but no contract had been entered into. The transaction essentially consisted of the agreement by the Debtor to sell the real estate it owned to the Georgia Ports Authority, together with an agreement by the Georgia Ports Authority to lease back the land to the Debtor in order for it to continue operations. Barnett Bank, as holder of a first mortgage covering the real estate, was

involved in the negotiations inasmuch as it claimed entitlement of all of the proceeds of the sale. In view of the fact that its debt exceeded the amount that the Debtor believed it could obtain for the property and the amount that the Georgia Ports Authority was willing to pay, a deal could not be concluded without the agreement of Barnett Bank. As part of its negotiations, Barnett Bank argued that it was entitled to adequate protection payments during the period of time after September, 1989, and prior to closing in order to compensate it for accruing interest. Moreover it was discovered that hazardous materials had been stored on the site over the years and Debtor had an obligation to comply with applicable federal environmental laws prior to sale. The property was ultimately sold for 1.25 million dollars to the Georgia Ports Authority and all the net proceeds went to Barnett Bank as first mortgage holder.

The Board contends that the Trustee and the attorney for the Trustee lost a potential \$100,000.00 recovery to the estate because there had been a prior agreement on the part of the Board and the Ports Authority, to convey the property for 1.35 million dollars subject to Bankruptcy Court approval. However, that sale had included not only the real estate but personal property owned by the Debtor and contemplated that Barnett Bank would receive all proceeds. The Trustee, however, discovered that Barnett Bank had no security interest in the personal property and upon his objection to Barnett Bank receiving all proceeds was unable to obtain Barnett Bank's agreement to close. For this reason the Trustee had to renegotiate the transaction with the Georgia Ports Authority. He was finally successful in negotiating a contract at a reduced price of 1.25 million dollars with the Debtor retaining the personal property for sale at a later time. Barnett Bank also demanded adequate protection payments which the attorney for the Trustee negotiated to a lower figure. Following the successful negotiation of the terms of the contract the attorney for the Trustee then filed an application with the Court and prosecuted that application at a hearing which resulted in the entry of an Order Approving the Sale on September 14, 1989 (Document #144).<sup>3</sup>

The attorney for the Trustee seeks 46.7 hours in attorney time and .3 hours of paralegal time for services rendered to the Trustee for this aspect of the case. I find, generally speaking, that the duties performed by the Trustee with respect to the Georgia Ports Authority transaction required the services of an attorney and were of benefit to the estate. The property was a serious financial drain on Debtor and in the absence of agreement by Barnett Bank or Georgia Ports Authority, Debtor, upon foreclosure or sale, would have lost the right to possession of the premises. Because of the title questions, bankruptcy issues, environmental problems, and necessity of court approval, no lay trustee could have handled this aspect of the case without an attorney. Nor is the expenditure of 46 hours on this aspect of the case and a potential fee of approximately \$5,000.00 for this work unreasonable for a million dollar transaction involving multiple parties and legal issues.

## 2. Terry, Mississippi

The Debtor owned a manufacturing plant and real estate in Terry, Mississippi. Prior to the Trustee's appointment the Board had negotiated a sale of that property and the Trustee concedes that a deal was "in place" at the time of his appointment. However, as correctly noted by the Trustee the transaction still required Court approval to be consummated. The attorney for the Trustee, Mr. Walker, prosecuted that recommendation over the objection of Mr. Bledsoe and was supported by the Board. After a contested hearing this Court approved the sale of the Terry, Mississippi, facility for the sum of \$165,000.00 by Order dated September 25, 1989 (Document #145).

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<sup>3</sup> At the first hearing on this application the Board produced a deed which purported to show that the Trustee had wrongfully conveyed unencumbered real estate to the Georgia Ports Authority and had permitted Barnett Bank to obtain those proceeds. This, of course, was in stark contrast to the Trustee's position that he would not permit such a transaction with respect to personal property. The Court was unable to determine at the initial hearing from the property description whether all the land transferred by the Debtor to the Georgia Ports Authority was or was not subject to the Deed to Secure Debt in favor of Barnett Bank and instructed counsel for the Board to produce additional evidence, if any could be obtained, which would suggest that this contention - which was aggressively asserted by counsel for the Board - was, in fact, true. No evidence was subsequently introduced on this subject. Counsel for the Board notified the Court and the Trustee following the first hearing and prior to the commencement of the second hearing that it had been determined that by a separate conveyance Barnett Bank did have a valid mortgage over all of the property conveyed and therefore was entitled to all of the proceeds as contended by the Trustee.

The attorney for the Trustee seeks 16.5 hours for services rendered for this aspect of the case. I find, generally speaking, that the duties performed by the Trustee with respect to the Terry, Mississippi, transaction required the services of an attorney, were of benefit to the estate, and are reasonable in amount given the magnitude of the transaction and the necessity of gaining court approval over the objections of Bledsoe.

### 3. BFTZ

The Trustee seeks 35.1 hours of attorney's time and .3 hours of paralegal time for services rendered in connection with the Brunswick Foreign Trade Zone. Debtor owned 55% of the stock in the Brunswick Foreign Trade Zone which owned an industrial site in Glynn County, Georgia. By virtue of an agreement between the Debtor and a minority shareholder, Burch Williams, the Debtor and Mr. Williams had an obligation to share numerous costs associated with this project including debt service on the land, insurance, taxes, security, and other matters. Debtor was unable, and for a significant period of time had been unable, to carry its portion of these costs. For a time Mr. Williams had paid his share and had advanced the remainder of the costs to prevent BFTZ from defaulting on its obligations to its mortgageholder. Ultimately, however, Mr. Williams had ceased making payments and BFTZ defaulted. Debtor was unable at any time to advance the funds to cure this default and Williams filed a Motion for Relief from the Automatic Stay in order to cause Debtor to forfeit its stock in BFTZ. The Court denied Williams' Motion by separate orders on April 3, 1989, and April 26, 1989 (Documents #45 and 57).

Thereafter, in order to forestall the eventual loss of this asset, the Trustee sought to sell the BFTZ stock to Mr. Williams in exchange for \$100,000.00 coupled with an option to repurchase 20% of the stock for three years. After lengthy hearings on June 30th and July 12, 1989, the Court sustained the objections of several parties including Zell and rejected that application. Following subsequent negotiations the Trustee succeeded in gaining Court approval on September 15, 1989, of a transaction wherein he received \$150,000.00 for all of the stock in the BFTZ (Document #143). The Trustee argued then and conceded in this hearing that he believed that the potential longterm value of the BFTZ stock might be substantial. However, in view of the continuing obligation to make debt service payments and the contractual right Burch Williams had under the shareholder's agreement to terminate the Debtor's interest as a result of its default, he concluded it was necessary to liquidate this asset.

I find, generally speaking, that the duties performed by the Trustee with respect to the BFTZ transaction required the services of an attorney, were of benefit to the estate, and are reasonable in amount. While a non-attorney may be fully capable of performing certain tasks in connection with this transaction, including the conduct of negotiations, it would have been dangerous at best for a non-lawyer to engage in extensive negotiations with other parties who were represented by able counsel. Certainly it was mandatory that an attorney file the applications, prosecute the two contested hearings and properly document the transfer after Court approval. In view of the necessity of his services, the magnitude of the transaction and the adversary nature of the process of gaining Court approval I find 35 hours of attorney's time to be extremely reasonable.

### 4. Disclosure Statement/Plan

By the end of 1989 the Trustee reviewed the financial information available to him and decided that the cash components of the internal financial reports together with Sammy Turner's analysis of the true cost of goods sold were reasonably reliable. These reports were the basis on which I concluded in my February 27, 1990, order that on a cash basis the company had lost approximately \$26,000.00 for the May 1989 through January 1990, period. The Order recognizes that Debtor had not made any debt service payments and it also recognized that non-cash entries such as depreciation were not included in the calculation. However, with what was believed to be the most profitable part of the business cycle looming I found no reason to convert the case and ordered the Trustee to file a plan by March 15th or to file a statement as to why he would not recommend continuation of the business.

Apparently, coming in the aftermath of my ruling that the case should not be converted and because there was no reason which became known to the Trustee following the February hearing prior to the

March 15th deadline indicating that the company should be liquidated, the Trustee circulated a proposed Disclosure Statement to interested parties and solicited comments, suggestions or objections on an informal basis. No such comments, suggestions or objections were received from Zell or the Board by the Trustee. However, based on the input of others the Trustee drafted a Disclosure Statement, filed it on March 15th, and thereafter filed an amendment correcting certain technical and other minor errors on March 27th. It was further amended on June 19, 1990 (Document #232).

At a hearing to consider the Disclosure Statement held on July 2, 1990, the Trustee recommended approval of the amended Disclosure Statement. However, as a result of objections raised by the Board and other parties the Court ordered additional amendments to the Trustee's Disclosure Statement and ordered the Board to file its liquidation plan, if it intended to do so, not later than the end of July. Approximately seven weeks later the Trustee communicated to the Court his decision, reached in early August, to withdraw his Disclosure Statement and Plan. He was challenged to disclose what had changed in the intervening weeks to cause such a drastic turnabout in his recommendation. He testified, and I do find, that as of the date of the hearing on the Disclosure Statement the Trustee had financial information available to him showing the company's operations through May of 1990. Thereafter, when the June and July results were made known to him early in August and it became clear that the serious losses for the early part of the year would not be offset by summer profits he reassessed his previous decision to continue operations and determined that the company should be liquidated.

It was argued by the Board that the amount of time spent in preparation of the Disclosure Statement and Plan was excessive under the theory that the Disclosure Statement could be prepared by a non-lawyer and simply put into "legalese" by a lawyer in a very short period of time. I conclude, however, that the expertise needed to draft a legally sufficient Disclosure Statement and Plan requires not only that the attorney be actively involved in all aspects of the information gathering and presentation, but indeed requires the services of an attorney with specialized experience, knowledge and training in bankruptcy. As a general proposition, therefore, I reject the argument that the amount of time devoted to the Disclosure Statement by Walker as attorney for the Trustee is excessive because a large portion of the work could have been done by a non-lawyer. In view of the Trustee's effort to solicit comments from all interested parties prior to submission of his Disclosure Statement, the adversary nature of the hearings, and the effort required to supplement, correct or clarify the Disclosure Statement by amendment, I find that the 66 hours devoted to his own plan is not unreasonable. However, the 12 hours devoted to opposing the Zell Disclosure Statement may not command the same degree of necessity and is addressed below with the objections to compensation.

##### 5. Adversary Proceedings/Preferences

The attorney for the Trustee filed four adversary proceedings to recover large accounts receivable due to the Debtor and approximately thirty preference actions to recover payments made to certain creditors of the Debtor allegedly within the avoidable preference period of 11 U.S.C. Section 547. As of the date of the hearing these actions had resulted in a recovery which was never precisely quantified but which was conceded to be in excess of \$50,000.00 in hand or in enforceable settlement agreements. The attorney for the Trustee has accounted for 208 hours of time devoted to these proceedings, many of which are still pending and are estimated to have an ultimate value to the estate of substantially more than the \$50,000.00 already received. It should be beyond question that time devoted to the investigation, preparation, filing and prosecution of a lawsuit requires legal expertise and therefore as a general rule there will be no disallowance of the money sought for this aspect of the work performed by the attorney for the Trustee, particularly in view of the results already obtained.

Hereafter in this Order the Court will examine on an item-by-item basis other objections raised as to the reasonableness of time devoted to specific work or the necessity of an attorney performing certain work which will include the time categorized as "miscellaneous." However, as to the time devoted by the attorney for the Trustee to the foregoing categories of work I find that each of them legitimately implicate the need for the employment of an attorney to assist the Trustee. Without question, had Mr. Walker, in his capacity as Trustee, selected independent counsel to represent his interest in any or all of the foregoing matters there would have been countless hours of duplicated effort which this Court would have been called upon to assess. Certainly there would have been endless hours of consultation between Mr. Walker as Trustee and his

independent counsel. There would be many meetings, conferences, court appearances, and negotiating sessions at which time presence of both individuals would have been highly desirable if not absolutely necessary. There is no doubt that the duplication of effort which was avoided in this case is consistent with the salutary practice in virtually all cases pending in this District in which the Trustee serves as his own attorney as permitted by Section 327(d). This Court has the benefit of presiding over hundreds of cases in which this practice has been employed and has no doubt, in the abstract or as applied to this case, that the employment of a Trustee otherwise qualified to serve as attorney for an estate achieves a net savings to the estate. Certainly there is nothing to suggest that those savings were not realized in this case.

B. Objections to Compensation

1. The contention that the Application of the Attorney for the Trustee should be denied in total as fraudulent.

The Debtor alleges fraud because Walker initially filed an application for compensation which included 73 hours of services which, after consultation with the United States Trustee, he deleted from his amended application, in response to the United States Trustee's objection that those services were more appropriately assigned to his function as Trustee than attorney. The Debtor asserts that the fraud is evidenced by his elimination of those 73 hours and an upward adjustment in the hourly rate resulting in a potential fee award essentially as great despite elimination of those 73 hours of work. To the contrary, I find from Mr. Walker's testimony that he spent countless hours working on behalf of the estate performing functions which he clearly believed were Trustee functions. He omitted those services from his first and all subsequent applications. In addition he has devoted over 500 hours of time to work he clearly believes to be an attorney function.

Somewhere in the continuum it is self-evident that the characterization of a function as being more appropriately charged to Trustee work than attorney work becomes quite difficult. The Trustee, in an effort to expedite the handling of his application, in order to eliminate the potential objection of the United States Trustee and in an effort to achieve a savings to the estate, voluntarily agreed to reduce his attorney's fee application by the 73 hours that were in issue. However, as he is permitted to do under the Norman decision, he sought approval of a higher hourly rate in his later application since the lodestar rate had remained at \$100.00 per hour for several years and because an adjustment was being sought by counsel for trustee in other cases. Ultimately, this Court refused to increase the lodestar rate for counsel for the trustee and in recognition of that decision the Trustee's final application for compensation was reduced to the \$100.00 level. This Court's rationale for leaving the lodestar at \$100.00 is set forth elsewhere in this Order but I can find nothing fraudulent in the Trustee's good faith request that the hourly rate be adjusted nor anything insidious in his calculating his fee at a proposed higher rate based on the anticipation that this Court would adjust the lodestar rate as a result of other pending litigation.

The Debtor has cited the case of In re Evangeline Refining Co., 890 F.2d 1312 (5th Cir. 1989) and In re Futuronics Corp., 655 F.2d 463 (2nd Cir. 1981) as authority for the proposition that the filing of a false or fraudulent fee application by an attorney is adequate ground for denying all compensation. This Court would certainly apply such a rule of law in the appropriate case, but on the facts it is not called for in the case before me. In Evangeline the fee award was remanded for further proceedings to determine whether the fee should be reduced or denied in the entirety. Evidence in that case of fraud included findings that the attorney had billed more than 24 hours in a single day, had billed the estates in separate Chapter 11 cases for 10 to 11.25 hours per day for every calendar day from May through July of 1984 and had billed 439 hours of time for an attorney in his firm who testified that he had only worked 41.25 hours on the case. In Futuronics fees were denied when the firm seeking compensation was shown to have concealed in its application to be employed that there was a secret fee-sharing agreement between debtor's counsel and another firm. The firm had previously submitted an application which revealed the fee-sharing arrangement and which was rejected on that ground. Because the second application omitted reference to that agreement, in violation of a predecessor to Bankruptcy Rule 2016(b), the Court held that it would be an abuse of discretion to award any fee.

The facts in this case are far different. If the attorney for the Trustee sought compensation

for services which were never performed or if the attorney for the Trustee could be demonstrated to have intentionally distorted the hours for which he seeks compensation or fraudulently described Trustee work in such a way as to make it appear to be legal services, or in some manner perpetrated a fraud on this Court I would have no hesitation in substantially reducing or denying such compensation. However, in this case I conclude based on all the evidence that the attorney for the Trustee, in recognition of the uncertainty of litigation over the appropriateness of characterizing certain services rendered as trustee or attorney time, voluntarily elected not to seek compensation for some 73 hours of work and instead seeks compensation for those services as Trustee. Neither that act, nor his effort to seek compensation at a higher hourly rate in the anticipation that this Court's lodestar rate would be increased because of the long period of time in which it had been static at \$100.00 per hour is fraudulent. All such acts were well documented, clearly disclosed, open to inspection by all parties and subject to the final review of this Court. This objection is without merit.

2. The contention that Walker as attorney and Walker as Trustee have a conflict of interest and that Walker as Trustee negligently or fraudulently continued to operate the business to maximize his compensation resulting in substantial losses to the estate.

These contentions also apply to the question of Trustee's compensation since the allegation is that Walker, as Trustee, had incentive based on his dual status to prolong the pendency of this case and that the company suffered unnecessary losses as a result. I find the objection to be unsupported by the evidence. To the extent that the company remained in business for an extended period of time following the Trustee's appointment, of course, it would appear on first examination that the Trustee and attorney for the Trustee may have profited. However, as to attorney's fees I conclude that virtually all of the services rendered by the attorney for the Trustee while the business was operating are functions which necessarily would have been required were the business involved in a liquidation. For example, the real estate, the stock, the equipment, the inventory and the personal property all would necessarily have been liquidated and adversary proceedings and preference actions would have been necessitated to recover monies for the estate.

Only the time devoted to Disclosure Statement and Plan matters might arguably have been reduced if the Trustee had recommended conversion to Chapter 7. However, this Court in its February 27, 1990, order denied the Motion of the United States Trustee to convert the case. That Order was not appealed. It expressly or impliedly approved the Trustee's actions in keeping the business open to that point. It directed the Trustee to file a Disclosure Statement and Plan no later than March 15, 1990, if he intended to propose a plan. He proposed a plan on March 15th when the known cumulative losses of this company which had lost millions pre-petition amounted to only \$9,565.00 (on a cash basis) subsequent to his appointment. While the known losses on July 2nd when the Disclosure Statement hearing was conducted had risen to a cumulative \$92,106.00, the company had been expected to perform better in the summer and the loss for April, 1990 (\$42,719.00) was far less than for April, 1989 (\$137,362.00). The May 1990 loss was a clear point of concern but those results had only been known for two weeks prior to July 2nd. On this state of facts, the effort made by the Trustee to present a plan to creditors for their decision was reasonable, and the time devoted by the attorney for the trustee was likewise reasonable and necessary.

I have previously ruled that the Trustee is clothed with absolute immunity for his acts taken with Court approval. See Boullion v. McClanahan, 639 F.2d 213 (5th Cir. 1981). A bankruptcy trustee acting under the authority of the bankruptcy judge has derived immunity. Id. at 214. See Wickstrom v. Ebert, 585 F.Supp. 924, 934 (E.D. Wis. 1984) (Judicial immunity not only protects judges against suit from acts done within their jurisdiction, but also spreads outward to shield public servants, including bankruptcy trustees); In re Tucker Freight Lines, Inc., 62 B.R. 213, 217 (Bankr. W.D.Mich. 1986) (A trustee in bankruptcy has immunity if his actions are within the scope of the authority conferred upon him by statute or the court). As to matters not protected by court approval, a bankruptcy trustee may be liable for wrongful conduct or negligence and his fee may be surcharged. As to the attorney, his fee may be reduced or denied for poor quality work, but the court cannot make an affirmative award of damages. Red Carpet Corp. of Panama City Beach v. Miller, 708 F.2d 1576, 1578 (11th Cir. 1983). See also In re Red Carpet Corp. of Panama City Beach, 902 F.2d 883 (11th Cir. 1990). Other courts have held that personal liability can be imposed for negligent acts by a trustee, at least where discretionary judgments are not involved. E.g., In re Gorski, 766 F.2d 723, 727 (2nd Cir. 1985); In re Cochise College Park, Inc., 703 F.2d 1339, 1357 (9th Cir. 1983). Uniformly, courts have held that bankruptcy trustees are subject to personal liability for willful and deliberate violations of their

fiduciary duties. See Gorski, 766 F.2d at 727; Cochise College Park, 703 F.2d at 1357; Ford Motor Credit v. Weaver, 680 F.2d 451, 461 (6th Cir. 1982); Sherr v. Winkler, 552 F.2d 1367, 1375 (10th Cir. 1977).

In Mosser v. Darrow, 341 U.S. 267, 71 S.Ct. 680, 95 L.Ed. 927 (1951), the seminal case on trustee's liability, the United States Supreme Court held a reorganization trustee personally liable for expressly agreeing with two employees of the debtor that they could trade in securities of the debtor's subsidiaries. Mosser, 341 U.S. at 268-75, 71 S.Ct. at 680-84. The employees reaped profits from the securities trading. According to the Supreme Court, the trustee was liable not for "failure to detect defalcations, in which case negligence might be required to surcharge the trustee" but for the deliberate suggestion and agreement that the employees acquire an interest adverse to the estate. Id. at 272, 71 S.Ct. at 682. In Mosser, the trustee was not negligent; he intentionally and actively took part in creating an interest adverse to the estate. The court stated in *dictum* that under other circumstances courts are likely to protect trustees against liability for "disinterested mistakes in business judgment." Id. at 274-75, 71 S.Ct. at 683. Such mistakes in business judgment are quite different from the case of a negligent trustee who sells encumbered property, distributes the proceeds, but fails to provide for a valid lienholder who becomes divested of his security. See In re Prindible, 115 F.2d 21 (3rd Cir. 1940) (A bankruptcy trustee who sells encumbered property, distributes the proceeds to administrative claims, including his own commissions, and divests a lienholder should be surcharged for any improvident payments).

Relying on Mosser, the Tenth Circuit established three separate standards of liability, depending upon the nature of the wrongdoing. According to the court a bankruptcy trustee is (a) not liable in any manner for mistakes in judgment where discretion is allowed, (b) liable personally only for acts determined to be willful and deliberate in violation of his duties, and (c) liable, in his official capacity for acts of negligence. Sherr v. Winkler, 552 F.2d 1367 (10th Cir. 1977). Although the distinction drawn between (b) and (c) has been disregarded by subsequent courts, there appears to be no dispute that for mistakes of judgment, where a trustee has been given discretion, liability should not be imposed absent fraud or intentional wrongdoing.<sup>4</sup> I am persuaded that no

contrary rule has been adopted by Red Carpet, *supra*. There the type of act to which the negligence standard applies was not specified but appears to relate to the proper accounting for assets administered, not to business judgments made in good faith. Accordingly, I conclude that under existing authority a bankruptcy trustee is not liable for mistakes in judgment where discretion is allowed, and is not liable where his actions are taken with approval of a court order or in compliance with a court order. Specifically, in the operation of a business, a trustee "is not an insurer for successful management and for mere mistake of judgment or disappointed hopes he will ordinarily not be held liable." Collier ¶721.05[2] at 721-12.

As the Trustee's continuing decisions in the management of the company were discretionary and called for business judgment, I find that he is not liable for any alleged errors in judgment. Furthermore, many of the Trustee's decisions were approved by orders of this court, which provides the Trustee with immunity. For example, my order of February 27, 1990, denied the United States Trustee's Motion to Convert, in effect approving the Trustee's continuing operation of the business to that point. I also ordered the Trustee to file a Disclosure Statement and Plan by March 15, 1990, or to file a statement explaining his decision not to do so. The Trustee's subsequent actions were proper and in response to my orders. As indicated earlier, the Trustee ultimately based his decision to close the business on reports for the summer months which were not available until late July or early August. Such a decision, a continuing decision according to the Trustee, involved discretionary judgment within the scope of the Trustee's authority conferred by my previous orders. I can find no fraud, intentional misconduct or negligence on the part of the Trustee or the attorney for the Trustee which would warrant imposition of personal liability. All business judgments were made in good faith based on available information, protected by Court order and without any evidence of misconduct.

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<sup>4</sup> See also In re Cochise College Park, Inc., 703 F.2d 1339 (9th Cir. 1983). In Cochise, the Ninth Circuit ruled that a trustee would not be liable for a mistake in judgment where discretion is allowed but would be personally liable for intentional and negligent violations of his duties. Cochise, 703 F.2d at 1357.

Additionally, Debtors allege that the Trustee acted fraudulently in the performance of his duties. Fraud is a very serious charge which has been repeatedly, and based on all the evidence, loosely applied to the actions of the Trustee. Fraud is defined in Black's Law Dictionary as

An intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. A false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury. Any kind of artifice employed by one person to deceive another . . . .

I find upon a review of the entire record of this hearing, and taking judicial notice of the actions of the Trustee as shown by competent evidence in prior hearings, that the Trustee acted in good faith and in a reasonable manner with respect to his decision to propose a reorganization plan. The Trustee was appointed to run this troubled business after internal management conflicts were brought to the Court's attention. The Trustee was vested with the discretion to continue operations and propose a reorganization plan or to close the business. Certainly each of the decisions he was called upon to make was difficult and was made based on the best information available to him at the time. This is particularly important to note in a case such as this which has been pending for over three years. The information available to the Trustee, the Debtor, and to others today differs from the information available at the time. I find nothing other than the benefit of hindsight with which to question his decision to continue the business until August, 1990. Certainly there is no evidence of fraud and the objection of the Debtor on the grounds of negligence and fraud is overruled.

### 3. Pre-Appointment Services Rendered

James D. Walker, Jr., was approved for his appointment as Trustee by an Order of this Court dated May 5, 1989. By Order dated June 1, 1989, Walker was appointed to serve as attorney for the Trustee. Debtor argues that Walker is not entitled to compensation for legal services performed prior to his appointment as attorney for the Trustee on June 1, 1989.

On the date of his appointment as Trustee Walker was obligated to immediately begin work on the case to determine what action should be taken and begin making decisions for the company. When he decided that regular services of an attorney would be needed, the Trustee filed the appropriate request and a proposed order for Court approval of his appointment as attorney for the Trustee. This request and proposed order was filed with the Court on May 17, 1989, and approved on June 1, 1989, less than one month after he was appointed as Trustee. Given the amount of time it takes for an application and order to be prepared, to be filed, and to finally reach this Court for approval, I conclude that the attorney for the Trustee timely filed his application for appointment and should not be uncompensated for legal work performed in the interim period.

Walker was selected by the United States Trustee to serve as Trustee for Concrete Products, Inc. The United States Trustee recognized Walker's bankruptcy skill and experience in making the recommendation. Additionally, this Court approved Walker as Trustee. As Mr. Walker has practiced regularly before this Court, I am familiar with his legal skill, experience and reputation and have appointed him attorney for the Trustee in numerous cases. It is clear that Mr. Walker's appointment would have been approved by an appropriate order if the application and order had reached the Court's attention earlier than June 1, 1989. The record does not reflect that the failure to present the application at an earlier date was the result of inadvertence or neglect by Mr. Walker, this office, or the clerk's office. In the absence of an indication of neglect by the attorney for the Trustee and as Mr. Walker was qualified to be employed as attorney for the Trustee at all times when his services were rendered, there is no reason to prejudice him by disallowing part of his claim for services.

The cases which allow retroactive appointment and approval of attorney's fees which I have

adopted as the rule in this Court recognize that this Court has at all times the right and the duty to regulate the identity and compensation of professionals who render services to a debtor. Matter of Morgan, Chapter 11 Case No. 89-40074, slip op. (Bankr. S.D.Ga. Aug. 11, 1989) [citing Matter of Arkansas Co., Inc., 798 F.2d 645 (3rd Cir. 1986); Fanelli v. Hensley (Matter of Triangle Chemicals, Inc.), 697 F.2d 1280 (5th Cir. 1983); Cohen v. United States (Matter of Laurent Watch Co., Inc.), 539 F.2d 1231 (9th Cir. 1976); Stolkin v. Nachman, 472 F.2d 222 (7th Cir. 1973).] See Matter of Savannah Turf Farm, Inc., Chapter 7 Case No. 88-40570, slip. op. (Bankr. S.D.Ga. July 6, 1990).

Of course if an attorney fails to obtain court approval and is later shown to be disqualified from representation for cause shown, that attorney may be wholly uncompensated for any services rendered. In the absence of court approval in advance, any attorney is performing services at his or her own risk with respect to compensation. However, in the discretion of the court, retroactive compensation may be allowed where an application for approval as attorney is timely filed and would have been approved by the Court at an earlier date. The Debtor's objection to allowance of fees for services rendered before the appointment of the attorney for the Trustee is overruled.

#### 4. The item-by-item objection.

Having found that the attorney for the Trustee has made a *prima facie* case in support of his application in the full amount shown based on the lodestar rate and the reasonableness and necessity of the time devoted to the various tasks, and having overruled the Debtor's general objections thereto I have an independent duty to assess each of the services performed by the attorney for the Trustee on an item-by-item basis to determine whether those services are sufficiently documented, reasonable in amount, and whether they are, in fact, attorney functions rather than trustee functions.

The Debtor filed specific objections to various line items (Exhibit D-10) and I have reviewed the Trustee's application and those objections in detail. The United States Trustee has likewise reviewed the time records of the attorney for the Trustee utilizing the services of the Assistant United States Trustee and the two attorneys serving on the staff of the United States Trustee for the Southern District of Georgia and has filed a statement indicating no objection to the sufficiency of the documentation, or the amount or the nature of the services for which compensation is sought (Documents #462 and 463). The vast majority of the Debtor's objections to specific items raised the question of whether the services were Trustee or administrative functions as opposed to those requiring legal expertise. These serve to better illustrate Debtor's original general objection on similar grounds which was filed in January 1991 (See Document #378, paragraphs 5 and 6). Most of the other objections assert that the amount of time for which compensation is sought was excessive.

The delineation of services between Trustee time and attorney time can best be determined by defining the scope of the practice of law in the State of Georgia.

O.C.G.A. Section 15-19-50 defines the practice of law in this state as:

- (1) Representing litigants in court and preparing pleadings and other papers incident to any action or special proceedings in any court or other judicial body;
- (2) Conveyancing;
- (3) The preparation of legal instruments of all kinds whereby a legal right is secured;
- (4) The rendering of opinions as to the validity or invalidity of titles to real or personal property;
- (5) The giving of any legal advice; and

- (6) Any action taken for others in any matter connected with the law.

Black's Law Dictionary defines "practice of law" as:

The rendition of services requiring the knowledge and application of legal principles and technique to serve the interests of another with his consent . . . It is not limited to appearing in court, or advising and assisting in the conduct of litigation, but embraces the preparation of pleadings, and other papers incident to actions and special proceedings, conveyancing, the preparation of legal instruments of all kinds, and the giving of all legal advice to clients. It embraces all advice to clients and all actions taken for them in matters connected with the law . . . .

This Court cannot and will not countenance the performance of legal services by non-lawyers. Persons not licensed as attorneys at law are prohibited from practicing law within the State of Georgia. Georgia law, O.C.G.A. Section 15-19-51 prohibits and defines the unauthorized practice of law and reads in relevant part:

- (a) It shall be unlawful for any person other than a duly licensed attorney at law:
- (4) To render or furnish legal services or advice;
- (6) To render legal services of any kind in actions or proceedings of any nature;

The unauthorized practice of law is punishable as a misdemeanor under the criminal provisions of the Official Code of Georgia. O.C.G.A. §15-19-56.

When an individual who happens to be a lawyer serves as a trustee and performs services which would require a non-lawyer trustee, in view of the scope of the practice of law and strong public policy against unauthorized practice, to engage an attorney I conclude that the lawyer/trustee is entitled to be compensated at the rate applicable for legal services for that work. It is well-established that an attorney/trustee is not required to place his legal expertise at the disposal of the estate without compensation. Collier ¶330.04 at 330-17.

Giving due consideration to the definition in this state of what constitutes practice of law and having reviewed the line item objection to various services which are challenged as representing Trustee or administrative functions or which are argued to represent an excessive expenditure of time I conclude that 8.9 hours for which compensation is sought is insufficiently documented as requiring the services of an attorney as follows:

<u>Date</u>	<u>Hours</u>
May 18, 1989	.5
May 31, 1989	.8
June 8, 1989	1.8
June 27, 1989	.3
July 7, 1989	.7
July 14, 1989	.4
August 10, 1989	.3
August 14, 1989	.2
August 22, 1989	.3

September 20, 1989	.5
October 16, 1989	.3
January 4, 1990	.9
January 8, 1990	.3
January 11, 1990	.4
March 27, 1990	.3
August 24, 1990	.6
November 7, 1990	.3

With respect to the other entries to which objection was made there was no evidence to contradict the testimony of the attorney for the Trustee that in his opinion each of the services for which he was seeking recovery as attorney, in fact, required legal expertise, experience, or training other than the conclusory testimony of Mr. Zell who testified that he, as a non-lawyer businessman, would have performed many of those functions rather than calling upon an attorney had he been in control of the Debtor.

That testimony, together with my independent duty to review fee applications, has caused me to closely examine the documentation of services rendered and with the exception of those set forth above I find that all of them were sufficiently well documented as to justify the utilization of the services of an attorney. In many, many instances, the telephone or written communication for which compensation is being sought was between Mr. Walker and one or more attorneys representing adverse parties. While the mere fact that communication may occur with an attorney for an opposing party is not *per se* conclusive as to whether the service necessarily involved the expertise of an attorney, I do conclude that it is relevant to consider whether this Court should require that trustees deal with attorneys for other parties without benefit of counsel. The fact that creditors retained attorneys to perform certain tasks suggests that the nature of the work was beyond the capability of even capable business persons or that creditors realized it was more efficient to assign a task to the attorney rather than having both the creditor's representative and its attorney involved. Certainly the debtor is entitled in protecting its interest to the services of an attorney when opposing parties do so. Moreover, most of the entries clearly relate to projects undertaken by the Trustee which required some degree of legal analysis, draftsmanship, advocacy or consultation. For these reasons I conclude that all the remaining challenged entries for services rendered are sufficiently documented and demonstrate sufficient need for legal expertise to justify being compensated at the lodestar rate established for the attorney for the Trustee.

##### 5. Travel Time

Numerous other objections relate to compensation for travel time, particularly travel time and attendance at closings when it is argued the Trustee could have attended and not required the services of an attorney. In view of the complexity of the negotiations or legal proceedings which predated the closings and the highly adversary nature of virtually all proceedings in this case it would be unwarranted for me to conclude that the attorney for the Trustee should have been excused from attending and participating in the closings. In any event, Mr. Walker in his capacity as Trustee, would have been a necessary participant at the closings and I find that it is unreasonable to deny attorney compensation to Walker for his attendance at and services rendered in connection with these closings. At the risk of unnecessary repetition, this is not a case where both the Trustee and independent counsel for the Trustee attended a closing and both are seeking compensation for services rendered. Clearly either the Trustee or attorney for the Trustee needed to attend the closings, and since Mr. Walker brought legal expertise to the closings when he attended and since I find that legal expertise to be reasonably necessary in order to protect the interest of the estate, I find that the time devoted to attending closings is fully compensable as is the necessary travel time and expenses associated therewith.

Likewise, certain travel time and investigative work by Mr. Walker and his law partner, Mary Colley Way, in reviewing corporate books and records and interviewing Debtor's employees preliminary to the filing of preference actions and other adversary proceedings, has been challenged as administrative in nature. To the contrary I conclude that the examination and analysis of such records and investigation of other relevant evidence in order to make a determination as to whether grounds exist for the filing of adversary

proceedings is obviously a function which demands the involvement of experienced counsel. The objection that those categories of work are administrative or trustee functions is totally without merit.

The Debtor's objection to certain travel time, however, raises a more fundamental question. In this application, the attorney for the Trustee seeks compensation for approximately 75 hours of travel time. Walker lives and maintains his office in Augusta. This fact was known at the outset of his appointment, and his appointment by the United States Trustee necessarily contemplated that certain travel expenses would be incurred. I agree with the Debtor, however, that an allocation of travel time is in order since Walker served in a dual role. Clearly when he worked on Concrete Products matters he would function part of the time as trustee and part of the time as attorney. I am approving his attorney fee application to the extent that legal services were necessary and reasonable in amount. However, some time on each of his out-of-town trips must have been devoted to trustee functions. The precise amount cannot be known because as previously noted he did not keep time records for these services. In the absence of records to support an allocation of his time which would assist in allocating his expenses, I will simply require that the travel time be divided equally. Thus 37.5 hours of time will be reduced from the attorney's fees award and considered as part of the Trustee compensation application. Since out-of-pocket expenses are reimbursable to either the attorney or the Trustee under Section 330(a)(2) (subject to the limits of §326), expenses of mileage, meals and lodging need not be split.

#### 6. Adequate Protection for Barnett Bank

Debtor objected to compensation for time devoted by Walker in negotiating and in preparing a motion for adequate protection on behalf of Barnett Bank. The uncontradicted evidence is that Barnett Bank demanded adequate protection payments as it was entitled to do under 11 U.S.C. Section 362 because Debtor was not making debt service payments to the Bank on the real estate which it owned and was in the process of selling to the Georgia Ports Authority. The Trustee engaged in lengthy negotiations with the Bank to deal with this issue as well as other issues surrounding the sale to the Georgia Ports Authority. In connection with those negotiations the Trustee was successful in gaining concessions from Barnett Bank as to the amount of adequate protection payments it would require in order to forestall its filing a motion for relief from stay. Apparently as additional inducement to the Bank, the Trustee offered to prepare the pleadings to bring that matter before the Court for a hearing and because I find that the Trustee succeeded in obtaining a reduction in the amount of adequate protection payments which was being demanded I find those services to have benefitted the estate and to be compensable in the amount sought.

#### 7. The Zell Disclosure Statement

The Debtor has also objected to the time devoted by the attorney for the Trustee in reviewing and responding to the Disclosure Statement and Plan filed on behalf of Mr. Zell as Chairman of the Board of Debtor. This amounted to approximately 12.2 hours time. While I have previously concluded that the effort of the attorney for the Trustee in formulating and promoting a Disclosure Statement to be legal work that was reasonably necessary to carrying out the Trustee's function, I have not been presented with evidence to suggest why the Trustee's effort to defeat the competing plan should be compensable in this case. It is not specifically mandated by 11 U.S.C. Section 1106.

While the Trustee believed that creditors should have the right to cast ballots in favor of continuation of the business if they believed the chances of recovery were ultimately better than in a liquidation, I know of nothing which would suggest that the Trustee had a duty to interpose objections to the competing plan proposed by Mr. Zell. The Court, in fact, had suggested on more than one occasion to all interested parties that those who believed that continuation of the business was not in the best interest of creditors could best bring that matter before the Court by the filing of a competing plan of reorganization. Immediately following my decision in February of 1990 that the case should not be converted it was represented that the Board would file a liquidation plan but that was not accomplished for a period of approximately five months, during which time the Board aggressively opposed the Trustee's effort to have a Disclosure Statement approved which would permit creditors to vote on a plan for the continuation of the debtor in business. Ultimately a Disclosure Statement and Plan was filed on behalf of the Board to which the

Trustee reacted. While the case was hotly disputed by the parties, I have no basis on the evidence before me to conclude that the Trustee's efforts to oppose the Board's liquidation plan were of benefit to the estate or were reasonable and necessary to the prosecution of his other duties. Accordingly, I will disallow the 12.2 hours sought for his services in this regard.

8. The Insurance Coverage Question

In the amendment to Debtor's objection to attorney compensation filed November 26, 1991, it is alleged that Walker failed to properly advise the Debtor concerning possible exposure to employees health insurance claims during the gap period caused when substitute coverage for a retroactively canceled policy was issued without covering pre-existing conditions. As a result of the gap in coverage this Court, on July 12, 1991, ordered allowance of a claim in favor of William E. Ricks, Sr., in the amount of \$20,693.43. The objection is supported by the affidavit of Marvin Pipkin, attorney for the Debtor, which sets forth numerous facts and concludes by asserting that Walker failed to meet the applicable standard of care required of attorneys. The evidence at the hearing was uncontradicted, however, the information supplied to Walker at the time was that a new policy was being issued that would cover all employees claims without exception. That fact negates the opinion as to negligent behavior rendered by Pipkin. Because Bledsoe reported that an insurance agent was binding coverage and that all employees would be covered for all claims the Trustee reasonably concluded that it was not necessary to expend time as attorney researching the company's exposure and, in fact, he does not seek recovery for any time devoted to such work. The subsequent failure to issue policies as promised which exposed the company to losses to Ricks and perhaps others also gives rise to a claim by the company against the agent or policy issuer, but no negligence by the attorney is demonstrated. He rendered no service as attorney and the Trustee's decision not to seek counsel was reasonable under the facts known to him when the decision was made. This objection therefore is overruled.

Finally, I have reviewed the documentation of expenses for travel, meals and lodging, telephone, copy charges, and so forth and find that they are sufficiently documented and reasonable in amount as to be allowed in full.

Accordingly, the attorney for the Trustee is awarded compensation as follows:

505.0 hours			
- 8.9 hours	Trustee time		
-12.2 hours	Zell Disclosure Statement		
	and Plan time		
<u>-37.5 hours</u>	Travel time allocation		
446.4 hours	X \$100.00 per hour	=	\$44,640.00
Expenses			<u>\$ 6,753.66</u>
Total			\$51,393.66

**II. Trustee Compensation**

The statutory authority which governs the award of attorney compensation also constitutes the basis for awarding trustee compensation. In re Stoecker, 118 B.R. 596 (Bankr. N.D. Ill. 1990). 11 U.S.C. Section 330(a)(1) and (2) establishes that trustees (like attorneys) are entitled to "reasonable compensation" and "reimbursement for actual, necessary expenses." This compensation is subject to the percentage limits set by 11 U.S.C. Section 326. Based upon the Trustee's disbursements in this case, the maximum compensation and expense reimbursement which Walker could recover as Trustee is \$71,497.07. No issue has been raised as to the amount of funds disbursed.

On November 26, 1991, the Debtor filed a Motion to Surcharge the Trustee and Objection to Application to Trustee's Commissions. That objection asserts that the Trustee (1) failed to "obtain or . . . attempt to obtain" the objective financial data that would enable him to decide whether to continue the debtor in business and as a result (2) caused losses to the estate "well in excess of the amount claimed as trustee commissions" which amounts would be established by "competent evidence" which would also establish that the losses would have been avoided if the Trustee had performed in a non-negligent fashion.

As to the first objection, the record is clear that the Trustee did all that could reasonably have been done to "obtain objective financial data." He hired an accountant to analyze the records. He insisted that the in-house bookkeeping system be maintained current and that bank reconciliations be current. He directed the accountant to attempt to discredit the cash reports that were generated and to formulate a more reliable analysis of costs of goods sold. He consulted regularly with the accountant to monitor the results. He timely filed financial reports with the United States Trustee. He consulted with management of the company about the potential for future business. He made himself available to all creditors and parties in interest to receive their comments. He opposed, as did the Board, the United States Trustee's motion to convert in February 1990 and this Court denied that motion. However, he never succeeded in obtaining an audit of the company's books. He has been frequently excoriated by counsel to the Board for that failure, many times since April of 1989. Now the Court has learned that the Board was told in April, 1989, that an audit was essentially impossible. Walker was therefore unable to do what the Board previously failed to do. However, he did not fail to obtain or attempt to obtain objective financial data as alleged. His financial information was not audited and was not perfect but it was the best available under the circumstances. The allegation borders on the absurd and the repeated contention in this case that the Trustee needed to obtain an audit when the impossibility of that objective was well-known to Debtor is reprehensible.

As to the second allegation, this Court was presented with no "competent evidence" that the Trustee negligently operated the business and that during his tenure losses exceeded the commissions he seeks to recover.

In 1989, for the period following his appointment (May - December) the only evidence as to profit or loss are the figures supplied to the United States Trustee which show a cash profit of \$45,503.00 for the period. Mr. Wainwright testified that the taxable loss of the company for 1989 was \$1,041,486.00. This included non-cash deductions for depreciation of \$219,300.00 and a deduction for interest expense of \$230,016.00 which was incurred, but not actually paid. On a cash basis therefore Wainwright established a loss of \$592,170.00 for the entire year of 1989. He admitted very forthrightly, however, that he had no idea and would be unable to determine in what months those losses occurred. He also testified that the returns were prepared from the company's compilation, without audit, and that he cannot certify their accuracy. On these facts, Debtor has utterly failed to present any "competent evidence" of the loss sustained between May and December 1989. For 1990 Wainwright testified that the taxable loss is \$241,112.00. Depreciation deducted was \$197,367.00 leaving a cash loss of \$43,745.00 for the year, again based on unaudited figures and again, not allocated to the months the Trustee operated the business. This is the extent of Debtor's evidence as to the extent of losses in 1990 and is wholly insufficient to sustain its Motion to Surcharge.

Even taking judicial notice of the reports Walker filed with the United States Trustee, which Debtor overlooked, I find the allegations unsupported. These reports show a cash loss for January 1990 through July 1990 of \$146,185.00. The August losses occurred after the Trustee's decision early that month to "wind up" operations in an orderly fashion and cease operations. Such shutdown losses would have occurred in the final month of operation, whenever it happened, and are not chargeable to the Trustee. However, even though these reports provide better evidence than that relied upon by Debtor of losses in excess of the commissions sought, Debtor failed to produce evidence of negligence by Walker. Foster Shepard never stated what decision a reasonably prudent businessperson would have made at any point in time about continuing the business. He merely testified that he could have made a preliminary decision in a period of thirty to forty-five days. Charles Fagan, the in-house bookkeeper, testified that Sammy Turner told him that he (Turner) was going to advise Walker to convert the case to a Chapter 7. Turner never testified to that fact but did testify that as of May 1990 he told Walker the company's future "looked bad" and that it needed to be shutdown. It is not clear, however, whether Turner advised an immediate cessation and Walker's testimony is uncontradicted that Turner never so advised him before August 1990. There simply is no evidence of a negligent act by Walker, and to infer negligence merely because the company lost money, which it had been

regularly doing for several years, would be unsupportable. In any event, according to the United States Trustee reports the company lost only \$8,576.00 in June and July (after the earliest possible date of Turner's advice and before shutdown expenses).

I conclude from the entire record that negligence has not been established. However, even if negligence was established, Debtor could not prevail because it has not proven willful misconduct or fraud in keeping the business open. The Trustee operating a business is not an insurer for successful management and is not liable for mistaken judgment. Collier, ¶721.05[2] at 721-12. See discussion beginning at page 38. The second objection is likewise overruled.

However, in setting the Trustee's commission on the percentage fees of Section 326 represent the maximum. What is to be awarded is "reasonable compensation" under Section 330. The Trustee argues that all the criteria set forth in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974) for setting compensation are applicable to trustee fees under In re First Colonial Corp., 544 F.2d 1291 (5th Cir. 1977) citing Stoecker, supra., at 602. However, since the Stoecker court is not bound by Norman and this Court is, I conclude that the same standard should apply to Trustee compensation as applies to attorney's fee awards.

Under Norman I must determine a lodestar fee based on the number of hours spent by the Trustee multiplied by a reasonable hourly rate. I find that compensation to Walker as Trustee should be calculated on the basis of \$60,000.00 per annum. There was no testimony to establish the rate of compensation for an executive-level manager for a business such as Concrete Products. However, the record of the case reveals that Bledsoe was paid \$60,000.00 per year plus benefits. Moreover, George Ruehling was hired by the Board to act as general manager in early 1989 at a salary of \$55,000.00 plus benefits. I therefore conclude that the Trustee (a part-time employee) should be compensated at a rate of \$60,000.00 per year without benefits. Inasmuch as the Trustee devoted only part-time services I rule that his compensation should be calculated hourly at a rate of \$30.00 [ $\$60,000.00 \div (40 \text{ hours} \times 50 \text{ work weeks} = 2000) = \$30.00$ ].

With respect to the number of hours devoted to his duties as Trustee the record is incomplete. Walker testified that he kept no record of his time. His procedure, as previously noted, was to make a contemporaneous determination as to whether a particular service was legal or trustee in nature. Only those that he felt were legal in nature were recorded. All services that he felt were trustee duties were omitted. He deleted 73 hours of possible Trustee time from his attorney fee application. I have ruled that 8.9 additional hours should be reclassified as trustee duties and that 37.5 hours of travel time should be allocated to the Trustee. These total 119.4 hours. Clearly the Trustee has devoted far more hours to his duties than that and seeks compensation for all services rendered but I have no evidence on which to base a higher lodestar award.

The statutory maximum of \$71,497.07 is the only measure of the worth of those services submitted to the Court, and the Trustee has submitted authority for the proposition that a Trustee is not required to keep time records. Thus, he argues that the Court in its discretion can award compensation based on other Johnson factors such as novelty and difficulty of questions, skill required to perform services, preclusion of employment, results obtained and undesirability of the case. The Rosen case on which the Trustee relies, however, holds that the Court "obviously" cannot award maximum compensation. In re Rosen, 95 B.R. at 12. It did not, however, totally disallow trustee compensation but awarded \$5,000.00 based on a review of the case and the Court's familiarity with the trustee's performance.

Clearly, the award of a fee is discretionary. Norman, 836 F.2d at 1304; Matter of U. S. Golf Corp., 639 F.2d 1197, 1201 (5th Cir. 1981); In re Beverly Mfg. Corp., 841 F.2d 365, 369 (11th Cir. 1988). Nevertheless in making an award I am bound by Norman to articulate reasons for the award sufficient to permit review of the decision. I find that cases approving trustee fee applications without time records are inapplicable to a case such as this one. In many hundreds of cases, this Court has and will award trustee compensation without an exact accounting of time. These cases are for the most part consumer or very small business Chapter 7 cases where the estate and the fees are very small. The Court, drawing on its own experience and from presiding over the case is more than capable of determining that a trustee fee, based on the statutory percentage has been fully earned. However, this is not such a case. At filing the Debtor listed assets of \$5,167,928.60 and liabilities of \$2,324,083.08. It had gross sales in the year prior to filing of nearly

\$6 million. From the reports filed with the United States Trustee it appears that sales exceeded \$1.9 million for calendar year 1989. Gross sales from the 1989 tax return were \$1,266,953.00 and for 1990 were \$910,454.00 (Exhibits D-16 and D-19).

The Trustee has disbursed \$2,377,235.82. Of this amount \$1.25 million was paid to Barnett Bank as part of the Georgia Ports Authority transaction for which Walker as attorney is also being compensated. \$165,000.00 originated from the sale of assets in Terry, Mississippi and \$150,000.00 originated in the sale of BFTZ stock, both of which involved attorney's fees for Walker. I have for the most part approved his attorney's fees, finding them *inter alia* to be reasonable in amount in view of the magnitude and complexity of these same transactions. Other monies were recovered as a result of accounts receivable or preference litigation and Walker as attorney has likewise been compensated for those services. I hold that the application of a percentage fee to the funds disbursed as a result of transactions where substantial attorney's fees are also being awarded is inappropriate, absent detailed records on which an assessment of the non-attorney time devoted by the Trustee can be made.

In short, the case is too large and complex and the percentage fee too substantial to be awarded without a better record of the magnitude of services that are being compensated. I conclude in a case such as this that the requirements of Section 330 that reasonable compensation be awarded for "actual, necessary services rendered by such trustee" necessitates separate trustee time records. In their absence, the totality of compensation sought for the Georgia Ports Authority transaction, for example, cannot be calculated or determined to be reasonable.

The very quality, however, which makes the attorney particularly qualified to act as trustee, unfortunately beclouds the matter of compensation. It requires the trustee to delineate, to the extent that conscience and recollection permit, which services were performed in which capacity.

In re Red Cross Hospital Assoc. Inc., 18 B.R. 593, 594 (Bankr. W.D. Ky. 1982);

Because their compensation derives from section 330, trustees have been required to comply with the same procedural rules as other professionals in the submission of fee applications.

In re One City Centre Assoc., 111 B.R. 872 (Bankr. E.D. Cal. 1990). See Matter of Santoro Excavating, Inc., 56 B.R. 546 (Bankr. S.D.N.Y. 1986); In re Bar-B-Que Management Assoc., Inc., 82 B.R. 152 (Bankr. M.D.Fla. 1988).

The burden of proving the reasonableness of a fee request rests at all times with the applicant. Norman, *supra*; Beverly, *supra*. I find that Walker has failed to establish the amount of time devoted to trustee duties beyond 119.4 hours. At a rate of \$30.00 per hour I therefore set the lodestar fee under Norman at \$3,582.00. Certainly if there were a factual basis to determine how many hours were actually spent, a much larger award would be in order.

Norman specifically authorizes adjustments for results obtained if "exceptional" and reductions for prosecution of unsuccessful claims. The performance of the company certainly was not so exceptional as to authorize enhancement of the fee. I have previously ruled that there is no evidence to support the objection to trustee's fees based on Walker's responsibility for losses sustained while he operated the business as not proximately caused by any fraud or negligence on his part. Therefore, there should be no fee reduction. While the Trustee failed to turn the business around and keep it in operation he is not a guarantor of business success. His failure to make the company prosper mirrors the failure of many who preceded him. Moreover, I have no competent evidence to assess the diminution of the estate, if any, which creditors suffered while the business operated.

In addition to the evidence of losses previously discussed, Debtor asserted at the hearing that there will be no payment to unsecured creditors after satisfaction of administrative and priority claims, and that the Trustee in his Disclosure Statement had estimated that a 30% unsecured dividend would be paid

upon liquidation.<sup>5</sup> However, the only testimony in support of that assertion was that of Harold Zell. While he stated that he currently expects there to be no unsecured dividend, he did not have all the figures available to him to support that conclusion. Indeed he testified that Debtor has collected \$185,000.00 from receivables with another \$80,000.00 on the books (after writing off \$238,000.00 of doubtful accounts in November 1990). From sale of inventory and equipment \$205,000.00 has been recovered. At least \$50,000.00 and perhaps as much as \$100,000.00 has been recovered from preference actions. Another \$300,000.00 was turned over by the Trustee after he was relieved and the Woodbine Plant, worth approximately \$50,000.00, is yet to be sold. This totals between \$820,000.00 and \$920,000.00 in assets. Tax liabilities as filed amount to approximately \$300,000.00 but may be negotiable downward. Post-petition payables with apparent administrative expense priority total \$250,000.00. Other administrative costs are estimated at \$75,000.00 but will be impacted by Court rulings. Estimated certified public accountant fees of \$15,000.00 to DeLoach and Company were not included. Total priority claims he testified to were \$640,000.00 leaving between \$180,000.00 and 280,000.00 for possible distribution. While there are possible administrative expenses for professionals and certain other unliquidated claims pending I am unable to conclude that the dividend now anticipated differs substantially from that which would have been realized in March or July of 1990.

Although I find that none of the grounds asserted by the Debtor for denial of the Trustee's fees to be sustainable, I emphasize that the Trustee is being penalized in terms of his fee as a result of my finding that his application supports compensation for only 119.4 hours of work. In view of what is most assuredly a large loss of potential Trustee's fees I find that an additional reduction would be unwarranted even if Debtor's evidence were more conclusive.

#### ORDER

Based on the Foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that the Trustee, James D. Walker, Jr., is awarded \$3,582.00 for services rendered as Trustee, and James D. Walker, Jr., as attorney for the Trustee is awarded \$44,640.00 as attorney's fees and \$6,753.66 as expense reimbursement.

s/s Lamar W. Davis, Jr.

Lamar W. Davis, Jr.

United States Bankruptcy Judge

Dated at Savannah, Georgia

This 7th day of February, 1992.

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<sup>5</sup> Ironically, the Trustee's estimates in his Disclosure Statement were attacked at the time by Debtor as unduly optimistic.