

IN THE IOWA DISTRICT COURT FOR LINN COUNTY

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IN THE MATTER OF THE  
LTB 2002 IRREVOCABLE TRUST U/D/O  
DECEMBER 20, 2002 F/B/O LORIANN  
BUSSE; LTB 2002 IRREVOCABLE TRUST  
U/D/O DECEMBER 20, 2002 F/B/O  
ALEXANDRA RENEE CARPENTIER; LTB  
2002 IRREVOCABLE TRUST U/D/O  
DECEMBER 20, 2002 F/B/O DEVAN  
MICHELE CARPENTIER; and LTB 2002  
IRREVOCABLE TRUST U/D/O DECEMBER  
20, 2002 F/B/O MARIE-JOSEE CARPENTIER

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PROBATE NO. TRPR039102

RULING AND ORDER ON PETITION FOR  
REVIEW OF INCREASED TRUSTEE FEE

On this 23rd day of January, 2018, Petitioner's Petition for Review of Increased Trustee Fee comes before the Court for consideration. The parties stipulated that the Court should decide the issues herein presented based on the written filings and that no trial was necessary. The Court agreed that this was an appropriate procedure because the facts are largely undisputed and the Court is quite familiar with the trusts at issue due to the previous trials held between the same parties. The Court has considered Petitioner's Brief in Support of Review of Increased Trustee Fee, the Trustee's Brief in Response to Petitioner's Brief in Support of Review of Increased Trustee's Fee and Petitioner's Reply, along with the supporting documents and appendix submitted by each party. The Court, being fully advised in the premises, issues the following Ruling and Order.

The crux of the dispute between the parties boils down to two main issues. The first issue is, has the Trustee, Jeff

Busse, waived his right to collect a reasonable trustee fee going forward by failing to seek a trustee fee previously. The second issue is, if the Petitioner's waiver argument fails, whether a reasonable trustee fee for Jeff is the fairly standard sliding scale percentage of assets under management approach advocated by Jeff and his expert or is a reasonable fee an hourly rate for the Trustee's actual time spent managing the trust as advocated by Petitioners and Petitioner's expert.

Factual Background

Jeff is the Trustee of seven Grantor Trusts created by his father Lavern Busse for the benefit of Lavern's daughter LoriAnn and Lavern's six granddaughters, three of whom are Jeff's daughters, and three of whom are his sister's, Lisa Carpentier's, daughters. The Grantor Trusts were created on December 20, 2002, and have, at all times, been managed by Jeff as Trustee. LoriAnn's Grantor Trust was created with 1/3 of the assets Lavern allocated to the trusts, and each granddaughter's trust received 1/9 of the assets.

After a family dispute developed regarding a number of Busse family entities, including the administration of Lori Ann and Lisa's daughters' Grantor Trusts, Petitioners filed a lawsuit against Jeff and Lavern in LACV083022 on April 29, 2015. On February 26, 2016, Jeff sent a notice to LoriAnn and Lisa's daughters alerting them that he would begin charging an annual

trustee fee of \$12,500 for Lisa's daughters' trusts (and \$31,000 for LoriAnn's trust) effective as of April 1, 2016.

Jeff is only seeking a fee from LoriAnn's and Lisa's daughters' Grantor Trusts; he is not seeking a fee from his own daughters' Grantor Trusts. Plaintiffs filed a Petition in this matter seeking Court review of the trustee fee on March 16, 2016. The Grantor Trust formation document does not set a precise fee that Jeff may collect as Trustee; instead it provides that "The Trustee shall be entitled to reasonable compensation for acting hereunder."

The dispute concerning the trustee fee arose during the pendency of a lawsuit brought by Petitioners against the trustee for, among other things, breach of fiduciary duty. See *Busse v. Busse*, No. LACV083022 (Linn County). On May 22, 2017, following a jury trial in which the trustee prevailed on all counts against him, the Court issued Findings of Fact, Conclusions of Law and Judgment Entry on those issues tried to the bench. The 85 page Ruling detailed the context of the dispute, the history and purpose of the Grantor Trusts; the trustee's skill and experience; the amount, character and the growth of the Grantor Trusts assets; the degree of difficulty, responsibility and risk assumed in administering the Trusts; and the quality of the trustee's performance. The Court will not restate those Findings here.

Over time the seven Grantor Trusts have acquired a somewhat different mix of assets, but they share a sufficient overlap of assets such that the trust assets may be commonly administered for the most part. For instance, the granddaughters', but not LoriAnn's, Grantor Trusts are all partners in a common Busse "Grantor Trust Partnership." The Grantor Trusts own interests in the Busse Grantor Trust Partnership which manages a stock portfolio for the benefit of all Grantor Trusts. The Grantor Trust Partnership is invested in index funds, where the fund manager selects the fund's investments. Therefore, Jeff does not select the specific investments of the Grantor Trust Partnership.

The Grantor Trusts all own stock in the family real-estate holding company Busse Investments ("BI"). Prior to the family dispute, Jeff held control over a majority vote of BI shares and served as manager of BI. Part of the family dispute that developed involved transfers of BI voting stock from the Grantor Trusts, such that LoriAnn and Lisa obtained control of BI. LoriAnn and Lisa terminated Jeff from his employment at BI on October 19, 2015. Jeff does not receive compensation from his role managing other Busse Family entities, excluding his role as the manager of Busse Investments, for which he received compensation prior to his termination.

After trial in matter LACV083022, the Court ordered the transfer of certain BI stock held individually by LoriAnn and Lisa's daughters, such that Jeff once again had majority control of BI. After the parties worked through potential methods of transferring the stock, this was effectuated by July 31, 2017.

The Grantor Trusts also have loans that require administration. The Grantor Trusts also have cash that is invested at various financial institutions to obtain the best interest rates available.

Jeff seeks \$68,500 per year as a fee for the four Grantor Trusts at issue (LoriAnn's and Lisa's three daughters'), based on a percentage of the Grantor Trust's assets. Jeff's fee request was calculated by his expert, Mr. Nelson, based on the amount of the trusts' assets such that for the first million in assets a fee at the rate of 1% was charged, for the next two million in assets a fee of 0.8%, then for the next two million in assets a fee of 0.6% and anything over five million a fee of 0.5%, and then adding an additional premium.

By any measure, the return on assets under management by Jeff as the Trustee has been extraordinary. The Trustee generated a nearly twenty-fold return on money gifted the beneficiaries in trust from 2002 to 2017. The three \$88,889 sums Jeff received in trust for his nieces in 2002 grew to a value of \$1,640,002 shortly before Petitioners initiated these

proceedings in 2016. The \$266,667 received in trust for his sister LoriAnn reached a value of \$4,610,860 by that same time.

Jeff seeks as fees \$12,500 annually for each of the trusts he administers for his nieces and \$31,000 annually for the higher-valued trust for the sister LoriAnn.

Petitioners assert that, if the Court does not find Jeff waived his right to take a fee going forward, Jeff should receive an hourly rate fee which they believe should be in the range of \$20/hour to \$100/hour. Based on their expert's review of Jeff's deposition testimony, Petitioners assert that Jeff spends no more than 112 hours per year administering the trusts and he should be paid an hourly rate for that amount of time per year.

### **CONCLUSIONS OF LAW**

"[T]rustees ordinarily are entitled to compensation for their services unless peculiar circumstances deprive them of that right." See *Matter of Gabeline*, 288 N.W.2d 341, 343 (Iowa 1980). For instance, even when the terms of the trust do not specify the trustee's compensation, the trustee is entitled to a fee that is reasonable under the circumstances. See Iowa Code § 633A.4109(1) (2017). Conversely, when the terms of the trust provide for a trustee fee, the trustee is entitled to the prescribed compensation. See *id.* § 633A.4109(2). Additionally, the Court can only alter the trustee's compensation prescribed

by the terms of the trust in the following instances: "(a) If the duties of the trustee are substantially different from those contemplated when the trust was created. (b) If the compensation specified by the terms of the trust would be inequitable, or unreasonably low or high. (c) In extraordinary circumstances calling for equitable relief." Iowa Code § 633A.4109(2)(a)-(c).

In this case, the Grantor Trust Instrument provides that the Trustee is to receive reasonable compensation. See Pet. App. 014. Thus, both section 633A.4109 and the Grantor Trust Instrument provide that Jeff is entitled to reasonable compensation. However, Petitioners allege that Jeff has waived his right to the Trustee fee through his past conduct.

**I. Whether the Trustee Fee was waived**

A trustee can waive their right to receive compensation even when the terms of a trust instrument provide that the trustee is to receive a Trustee fee. See *Lyons ex. Rel. Lawing v. Holder*, 163 P.3d 343, 343 (Kan. Ct. App. 2007). A waiver is defined as "the voluntary or intentional relinquishment of a known right." *Scheetz v. IMT Ins. Co. (Mut.)*, 324 N.W.2d 302, 304 (Iowa 1982) (quoting *Travelers Indemnity Co. v. Fields*, 317 N.W.2d 176, 186 (Iowa 1982)) (internal quotations omitted). "The essential elements of a waiver are the existence of a right, knowledge, actual or constructive, and an intention to relinquish such right." See *id.* (citing *Perkins v. City Nat'l*

*Bank of Clinton*, 114 N.W.2d 45, 52 (1962)). A “[w]aiver can be shown by affirmative acts of a party or can be inferred from conduct that supports the conclusion waiver was intended.” *Id.* (citing *Cont’l. Cas. Co. v. G. R. Kinney Co.*, 140 N.W.2d 129, 130 (Iowa 1966)); see also Restatement (Second) of Trusts § 242, cmt. j (Am. Law Inst. 1957) (stating a waiver requires a manifestation of intent to waive compensation, or a change of position by the beneficiary in reliance on the trustee’s failure to withhold compensation); Restatement (Third) of Trusts § 38 cmt. g (Am. Law Inst. 2003) (stating a waiver may be inferred from conduct in some circumstances). It is undisputed that Jeff knew he could receive reasonable compensation under the Grantor Trust Instrument, yet he did not seek a fee for fourteen years. The question becomes whether it was Jeff’s intention, by this past conduct, to relinquish future compensation.

When acts and conduct are relied upon as proof of a waiver, “the intention of the party charged to waive his rights must clearly appear.” *Cont’l Cas. Co.*, 140 N.W.2d at 130. The Petitioners rely heavily on *McCormick v. McCormick*, 536 N.E.2d 419, 434-35 (Ill. Ct. App. 1988), as authority to argue that a trustee not taking a trustee fee for prior years can be held to have waived their right to compensation. However, unlike the trustee in *McCormick*, Jeff is not seeking to recover trustee fee for previous years. Rather, he simply notified the Petitioners

that he would be enforcing his right to compensation going forward. Further, *McCormick* is easily distinguishable on its facts because there, the trustee had sent the beneficiary a letter he would not charge for his services. Here Jeff is only seeking future trustee fees, and did not take any affirmative steps to disclaim his right under the Grantor Trust Instrument to receive future compensation.

A waiver to past compensation does not waive compensation that accrues thereafter. See Restatement (Second) of Trusts § 242 cmt. j (recognizing that a trustee may forgo compensation voluntarily, but the trustee "is entitled, however, to compensation with respect to income thereafter accruing"); see also *Scheetz*, 324 N.W.2d at 304, n.2 (distinguishing waivers as to past and future obligations). The Petitioners can only show that Jeff made a choice to forgo compensation in each year prior to 2016. They are unable to demonstrate that Jeff clearly intended to relinquish his right to future compensation and there are no facts presented to indicate that Petitioners changed their position in reliance on a belief that Jeff would always waive his fees. The assets under management here are complex. Petitioners have no right to expect these assets to be managed for free going forward.

Jeff's decision to forgo compensation in the past does not rise to the level that would allow this Court to be able infer

that by this conduct he intended to waive future compensation. The Court finds that Jeff did not waive his right to receive reasonable compensation as provided under the statute and Grantor Trust.

In concluding that Jeff has not waived his right to seek a reasonable fee going forward, the Court has considered Petitioners' argument that Jeff's request for a fee is little more than retribution for lost income he suffered after he was fired as an employee of BI by LoriAnn and Lisa in October of 2015. Certainly the timing of Jeff's notice on February 26, 2016, that he intended to start collecting a fee at least implies that his motive was retribution or an effort to replace lost income. However, it can equally be said that, after managing the family businesses and entities in an extraordinarily successful manner for many years, many of which entities were managed for no compensation whatsoever, and being sued by his sisters for his efforts, he reasonably came to realize the risks attendant in managing assets for his family members. Further, any desire to donate his services to LoriAnn and Lisa's children's Trusts for the sake of family relationships was undoubtedly lost. The fact that he donated his time previously is no basis on which the Court can conclude he should be required to donate his time going forward.

**II. Whether the Trustee Fee Sought is Reasonable**

The Court now turns to determining whether the fee that Jeff seeks is reasonable. Jeff, as Trustee, is entitled to receive reasonable compensation under the terms of the Grantor Trusts and the Iowa Code. See Iowa Code § 633A.4109(2). However, the parties dispute what qualifies as reasonable compensation, and how it should be calculated. Although the Grantor Trust Instrument and Iowa Code do not define reasonable compensation, Iowa common law gives the Court broad discretion to determine reasonable compensation. See *In re Woltersdorf*, 124 N.W.2d 510, 511 (Iowa 1963); *In re Estate of Gaeta*, No. 13-1719, 2014 WL 5862037, at \*6 (Iowa Ct. App. Nov. 13, 2014) (citing *Bass v. Bass*, 196 N.W.2d 433, 435 (Iowa 1972)). The factors considered in determining whether compensation is reasonable include "local custom, trustee's skill and experience, time devoted to trust duties, amount and character of trust property, degree of difficulty, responsibility, and risk assumed in administering the trust, including making discretionary distributions, nature and costs of services rendered by others, and quality of the trustee's performance." *Gaeta*, No. 13-1719, 2014 WL 5862037, at \*6 (citing Restatement (Third) of Trusts § 38 cmt. c(1)); see also *In re Weitzel*, No. 09-1660, 2010 WL 2757212, at \*3 (Iowa Ct. App. July 14, 2010).

Before turning to the opinions of the parties' experts, the Court notes that the sliding scale fees Jeff proposes to charge is comfortably within what the Court has routinely approved for trusts under the Court's supervision and in line with trustee's fees the Court is familiar with from private practice and personal experience. Thus, setting aside the opinions of the parties' experts, the Court concludes the fees Jeff proposes to charge are consistent with local custom and practice, at least as that practice relates to institutional trustees.

In setting what Jeff proposes as a reasonable fee, Jeff deferred to the opinion of Michael Nelson, who heads trust services and investment management as Senior Vice President of Iowa Savings Bank. Jeff requested Mr. Nelson's expert opinion regarding what is a "reasonable compensation" for a trustee of the four Grantor Trusts. His opinion was drawn from his experience, including setting fees at Iowa Savings Bank. Mr. Nelson is a former Chair and present Council Member of the Probate, Property and Trust Section of the Iowa State Bar Association. He is a co-founder and officer and director of the Iowa Academy of Trust and Estate Counsel. Mr. Nelson has extensive experience with Iowa trusts throughout his career. From a review of his credentials, the Court finds him well qualified.

Mr. Nelson examined the Grantor Trust Instrument, reviewed financial statements and interviewed the trustee. Mr. Nelson also reviewed the substantial increase in value of the Grantor Trusts assets from their formation through the end of 2015. He also took into consideration that "each of the four trusts . . . . are substantially similar," and recognized that "the total trust fees for the four trusts combined is appropriately less than it would be if the respective asset holdings were not similar."

As noted above, Mr. Nelson opined that the reasonable standard annual trustee fee was computed in part as a percentage of trust assets. His opinion is that the percentage fee used should be inversely proportional to the value of the assets up to a limit - 1% on the first \$1 million of assets, 0.8% on the next \$2 million, 0.6% on the next \$2 million, and 0.5% on the remaining amount in excess of \$5 million. He applied a discount for time saved for duplicative work by considering the balances of the four Grantor Trusts together in order to calculate a reasonable standard annual trust fee. This resulted in approximately \$20,000 less in combined fees for the four Grantor Trusts than what would have resulted by treating them as separate pools of assets.

The Court also accepts as persuasive Mr. Nelson's testimony that "trusting holding material amounts of closely held

securities and interests are generally charged a higher level because they require more work and carry substantially more work to the trustee." A number of the assets under management by the Trusts in question are closely held securities and are complex investment and estate planning instruments. The Court also finds persuasive Mr. Nelson's opinion that the risk to the Trustee in managing closely held securities and interests are substantially higher. There is clearly a history of litigation between these parties and it may well be difficult to find a trustee to serve for an affordable fee. There is likely considerable risk assumed by Jeff as the trustee going forward.

Petitioners' expert, Jay Michael Deege, determined that reasonable compensation for Jeff would be an hourly rate based on the number of hours that Jeff spent managing the Grantor Trusts. Based on Jeff's deposition testimony, Petitioners assert Jeff spends 112 hours a year administering all of the Grantor Trusts. Mr. Deege then uses this amount of time and calculates a reasonable fee for Jeff based on a range of potential hourly fees from \$20 an hour to \$100 an hour. Mr. Deege's report provides three calculations of a reasonable fee: one at \$20 an hour (\$2,480), one at \$50 per hour (\$6,200) and one at \$100 per hour (\$12,400).

Petitioners do not dispute that it is customary for an institutional trustee or trust department trustee to receive a

fee based on a percentage of the trust assets. However, Petitioners assert that this is only customary and appropriate for corporate trustees, such as banks and financial institutions, because they provide a greater benefit to the beneficiaries than an individual trustee. In support of their argument, the Petitioners cite to *Gaeta* an Iowa Court of Appeals case that held (under the very different facts of that case) that an individual trustee should be compensated at an hourly rate. One of the reasons behind the Court's decision in *Gaeta* was that the fact that the trustee admitted that he did not possess any specialized skill and lacked experience in administering trusts.

The Court agrees that typically, a corporate trustee would have more skill and experience in administering a trust than a lay person. However, the Court finds that general statement is not at all applicable to the facts of this case. Jeff has a Masters in Business Administration. For many years he has devoted a great deal of time to exploring many sophisticated wealth creation, wealth transfer, tax saving and estate planning tools. He has researched, planned and implemented along with his father, Larvern, many extraordinary transactions which have been incredibly beneficial to the Busse family. Based on the Court's familiarity with Jeff's testimony at trial, the Court concludes that he is at least as sophisticated as a typical

trust officer. Certainly, Jeff did this with the advice of accountants and attorneys but at trial in LACV 083022 it was clear he was easily conversant in the intimate details of sophisticated estate planning tools such as the Intentionally Defective Grantor Trusts and forming entities such as MMB, creating an asset that could be heavily discounted and transferred at 35 cents on the dollar. See *Busse v. Busse*, LACV 083022, Findings of Fact, Conclusions of Law and Judgment Entry. The Court previously found that transaction generated a total return for the Grantor Trusts that was "actually quite extraordinary" as it held the potential return of more than 100 percent for the Grantor Trusts. Jeff clearly has specialized skill and experience which are shown through his exceptional performance as Trustee.

The Petitioners also assert that the amount of compensation that Jeff seeks is unreasonable when compared to the number of hours he spends administering the Grantor Trusts. Deege reviewed Jeff's deposition and determined that he only spends 112 hours annually managing the Grantor Trusts. However, this total only takes into consideration the administrative activities that Jeff was asked about by the Petitioners during his deposition. If Deege interviewed Jeff he would have learned that Jeff's work also consists of assigning value for accounting, tax preparation, annual trust accounting to beneficiaries, and

annual valuation of illiquid investments held by the Grantor Trust. Jeffrey Busse Decl. ¶ 4. Furthermore, Deege's total does not assign any time for activities relating to research, planning, explaining the transactions and strategies to the Petitioners, or the time associated with executing the financial transactions. Jeffrey Busse Decl. ¶¶ 5-6. Based on the amount of unaccounted activities the Court concludes that 112 hours per year is not an accurate estimate of the amount of time spent by Jeff annually. Moreover, it is highly unlikely that Jeff could generate this kind of return for the Grantor Trusts had he only spent a little over a hundred hours per year. The Court finds the deposition that Degee relied on for his calculation does not provide an accurate picture of the total time Jeff spends on activities related to the Grantor Trusts.

Trustees can be compensated on a percentage of the trust corpus even when they do not itemize their hours or activities. See *Woltersdorf*, 124 N.W.2d at 511; *Weitzel*, No. 09-1660, 2010 WL 2757212, at \*2-\*3. In *Woltersdorf*, the Iowa Supreme Court found that when the trust's assets had increased three-fold that the trustee was entitled to a percentage of the trust—despite the fact that the trustee had not itemize their hours or activities—because whatever needed to be done by the trustee when they were in control was clearly done. See *Woltersdorf*, 124 N.W.2d at 511. *Woltersdorf* is similar to the present situation.

Jeff did not record his hours spent managing the trusts; however, he did increase the Grantor Trusts' assets nearly twenty times while he was in control as Trustee. An hourly trustee fee overlooks the value that Jeff, as Trustee, provides to the Grantor Trusts. Even though the Court does not know the exact number of hours Jeff spends administering the Grantor Trusts, when analyzing the growth of the Grantor Trusts' assets it is clear that he put in the necessary time to ensure that the Grantor Trusts' assets would increase. See *id.*

The Petitioners allege that *Woltersdorf* is inapplicable because the Grantor Trusts consist of substantially similar assets. To support their position the Petitioners again cite to *Gaeta*. In *Gaeta*, the Iowa Court of Appeals found a trustee was not entitled to a percentage based fee because over half the trust's assets were comprised of stock from Louis Gaeta Inc., and thus, little time was required to manage the trust. See *Gaeta*, No. 13-1719, 2014 WL 5862037, at \*6. Although the Grantor Trusts consist of similar assets, none of the assets are over fifty percent. See Pet. App. 036, 077-078. Additionally, the assets that do overlap between the Grantor Trusts were already taken into account by Nelson at the time of his calculation, and he provided a discount for time saved for duplicative work by considering the balances for the four Grantor Trusts together. See Pet'rs' App. 035, 084-087. Therefore, the present case is

distinguishable from *Gaeta* in that a discount has already been applied, and Jeff manages a wider variety of complex assets.

Trusts consisting of complex assets, closely held securities and interests, are generally charged at a higher rate because they require more work. See Pet. App. 035. One of the reasons behind Jeff's success as Trustee is his familiarity with the Grantor Trusts' assets. He created most of the closely held interests, and "he [is] able to discuss easily and with authority the details of the trusts, assets within the trusts, and operating consideration." Pet. App. 035. It is undisputed that it would be more challenging for a corporate trustee to manage the same closely held securities and interest as they lack the familiarity possessed by Jeff. The Court agrees with Nelson's opinion that it would be difficult to find a trustee willing to serve with these types of assets for a fee less than the amount that Jeff seeks.

While the closely held assets create unique advantages for growth they also create a high risk to the trustee personally, as seen by the recent litigation. See *Busse*, No. LACV083022, 2017 WL 2672517. A trustee is interested in maximizing the return for the beneficiaries, but must also balance that against the amount of risk involved. Nelson Depo. 20:1-20:11; see also Jeffrey Busse Decl. ¶¶ 5-7 Deege's hourly rate fails to take into consideration the personal risk associated with being the

Trustee. Nelson testified that when a trust has a history of litigation that corporate trustees will seek higher fees because of the additional risk assumed. See Nelson Depo. 22:11-23:5. The Petitioners assert that a corporate trustee would have been more objective than Jeff in handling the family disputes, and thus, litigation would not have been as likely. However, the Court finds this argument unpersuasive as the Petitioners were the ones who initiated the suit against Jeff for breach of fiduciary duty—which a jury unanimously rejected.

IT IS ORDERED, ADJUDGED AND DECREED that:

A. Petitioners' Petition For Review of Increased Trustee Fee is dismissed at Petitioners' cost.

B. The Court approves as reasonable the annual trustee fee proposed by Jeffrey Busse as set forth in Exhibit A to the Petition, effective as of April 1, 2016, to wit:

LTB 2002 Irrevocable Trust FBO LoriAnn Busse-\$31,000  
LTB 2002 Irrevocable Trust FBO Alexandra Carpentier-\$12,500  
LTB 2002 Irrevocable Trust FBO Devan Carpentier - \$12,500  
LTB 2002 Irrevocable Trust FBO Marie-Josée Carpentier - \$12,500

C. The trusts are released from the Court's jurisdiction.



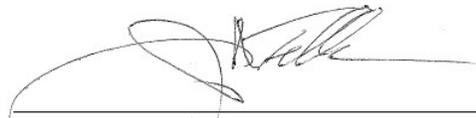


State of Iowa Courts

**Type:** OTHER ORDER

**Case Number**      **Case Title**  
TRPR039102      LTB 2002 IRREVOCABLE TRUST

So Ordered



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John Telleen, District Court Judge,  
Seventh Judicial District of Iowa