UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Northern Division

In re:	)
	) Bankr. Case No. 94-10105
TIMOTHY J. KAPPENMAN,	)
Social Security No. 503-74-7654	) Chapter 7
	)
and	) MEMORANDUM OF DECISION RE:
	) PROPOSED INTERIM DISTRIBUTION
DEBBIE L. KAPPENMAN,	)
Social Security No. 504-88-6853	)
	)
Debtors.	)

The matter before the Court is the Motion for Interim Distribution filed on November 21, 1994 by Trustee William J. Pfeiffer and the objections thereto. This is a core proceeding under 28 U.S.C. § 157(b)(2). This Memorandum and subsequent Order shall constitute findings and conclusions under F.R.Bankr.P. 7052. As set forth more fully below, the Court concludes that the Trustee's interim distribution should be approved as proposed.

I.

Debtors filed a Chapter 7 petition on July 8, 1994. On August 8, 1994, Ford Motor Credit Company (Ford Credit) filed a motion for modification of the automatic stay. It claimed a perfected security interest in the following farm equipment:

Ford bi-directional tractor, model 9030
loader and bucket, with grapple, model 2360
Wiskek spring reset disc, model 642
Lahman's 16x28 stackmover
Ficklin gravity box and gear, model 4500

Ford Credit stated the balance due on the date of filing on the contract covering the bi-directional tractor and the loader and bucket with grapple was $28,842.36 plus accruing interest of 10.5 percent. The balance at filing on the contract covering the disc,

stackmover, and gravity box was $21,540.49 plus accruing interest of 9.9 percent. Ford Credit wanted relief from the stay because it claimed the property was declining in value and because it had not been offered adequate protection. The motion was noticed for hearing on September 20, 1994.

Trustee Pfeiffer responded to Ford Credit's motion on September 1, 1994. He argued Ford Credit's interest was not in jeopardy because the total debt due was $51,132.00 while the value of the property was $58,000.00. As adequate protection, Trustee Pfeiffer offered to seek court authorization immediately to sell the property with the proceeds, less sale costs, paid to creditors.

A hearing on Ford Credit's stay motion was held September 20, 1994. Trustee Pfeiffer, Debtors, and Ford Credit filed a stipulation for a continuance of Ford Credit's stay motion pending the Trustee's sale of real and personal property. The stipulation provided:

> 4. That the Trustee and Ford Credit's attorney discussed a proposed Trustee's sale of Ford Credit's collateral, and in conjunction with other personal property of the Debtor and Ford Credit agreed to permit the Trustee to proceed with such sale on certain terms and conditions;
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> 5. That the Trustee has been unable to obtain the voluntary cooperation of other secured creditors in the sale and, accordingly, is prepared to promptly file a motion with the Bankruptcy Court to authorize a comprehensive sale of the Debtors' personal property by the Trustee, including the collateral of Ford Motor Credit Company and other secured creditors.

The stipulation was approved by Order entered September 21, 1994.

On September 28, 1994, Trustee Pfeiffer filed a Motion to Sell Real and Personal Property Free and Clear of Liens and a Motion to Shorten Notice. The Motion to Sell sought court approval of a sale of all farm chattels and vehicles on October 22, 1994 by auction at the farmstead. The Motion provided that:

> 8. On the sale of farm chattels and personal property of the debtors sold at public auction, the trustee will deduct from the proceeds of sale prior to distribution to creditors such sums as are necessary to pay federal income taxes on the gain, if any, and costs of administration including, but not limited to, normal and reasonable administrative fees, costs and expenses, trustee compensation, trustee expenses, attorney fees and accountant fees, auctioneering fees, clerking fees and other expenses of sale.

Administrative expenses were estimated to total $15,700.00, while the trustee's commissions, trustee's expenses, and attorney and accountant fees were estimated to be $7,300.00. All were to be "paid out of the proceeds of sale before final distribution."

The Motion specifically acknowledged the liens of Ford Credit and stated, "Where there is equity on any contract [with Ford Credit], all expenses will be paid first from equity; where there is no equity, expenses will be prorated." In his Motion, the Trustee represented that Ford Credit had a secured claim, subject to dispute, of $51,132.00, and that he estimated Ford Credit would receive $49,000.00 on its claim from the auction.

The Motion also stated that Case Credit Corporation had a secured claim on an IH 1586 tractor with a balance due of $13,955.78 and on a Case 1835N Uniloader with a balance due of $6,512.49. The Trustee proposed to treat Case Credit's secured

claims just as he had Ford Credit's.

By Order entered September 28, 1994, the Court set October 4, 1994 as the last date for filing objections to the Trustee's Motion to Sell. No responses to the Trustee's Motion to Sell were filed timely. The Motion was granted by Order entered October 5, 1994. The Order provided that

> all liens and encumbrances will attach to the proceeds of sale in the same priority as against the property sold. That the trustee shall withhold from any distribution of proceeds such sums as are necessary to pay IRS taxes on the sale, if any, trustee compensation, trustee expenses and overhead, attorney fees, accountant fees, auctioneering fees, clerking fees and auctioneering expenses in an amount to be later approved by the court before distribution is made to the auctioneer.

The Order further provided:

> 3. That Ford Motor Credit Co. has a first mortgage purchase money security interest in the [disc, stackmover, and gravity box and gear]; that the above three items were purchased all together by the debtors on one contract and the auctioneer is instructed that Ford Motor Credit Company has bid the amount of the outstanding balance due on these items which is the sum $21,540.49, and if the auctioneer cannot get that amount, or more, for these items, the auctioneer will sell them to Ford Motor Credit Company for the said amount of $21,540.49, and neither the trustee nor the auctioneer shall deduct costs, fees or any other expenses from the sale of those items to Ford Motor Credit.

A similar provision covered the bi-directional tractor secured to Ford Credit and the uniloader secured to Case Credit. The auctioneer had to obtain a bid in excess of Ford Credit's bid of $28,842.36 on the bi-directional tractor or Ford Credit would not incur any costs of sale on that item. The auctioneer had to obtain a bid in excess of Case Credit's bid of $6,550.00 on the uniloader or Case Credit would not incur any costs of sale on that item. No

party sought reconsideration or amendment of the sale Order.

On November 21, 1994, Trustee Pfeiffer filed a Motion for Interim Distribution. The Motion sought authority to pay Auctioneer Charles J. Fischer $10,863.30 for services and advertising and Trustee Pfeiffer $3,351.21 for his 3% commission. The Motion also set forth payments to secured creditors. All the items secured to Ford Credit or Case Credit sold for more than the amount due on the contracts. From the proceeds of the secured items sold, the Trustee first deducted prorated auction expenses and trustee compensation. Ford Credit came up $2,112,89 short on its first contract covering the disc, stackmover, and gravity box and gear but was paid in full for the bi-directional tractor with loader and bucket. Case Credit came up $947.34 short on the contract covering the IH 1586 tractor and $528.01 short on the other contract covering the uniloader. The Motion was noticed for objections.

Case Credit objected to the interim distribution on November 28, 1994.[1] It claimed it had an agreement with Trustee Pfeiffer whereby it would receive not less than $6,550.00 for the uniloader or the item would be returned. A letter dated September 30, 1994 from Trustee Pfeiffer to a representative of Case Credit was attached. The letter stated:

> [I]f the property is sold, the costs of sale will be prorated, but if a secured creditor bids in the property

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[1] The objection was not filed properly by an attorney for the Case Credit. *See* 28 U.S.C. § 1654; F.R.Bankr.P. 9010(a); *Carr Enterprises, Inc. v. U.S.*, 698 F.2d 952 (8th Cir. 1983).

> for the amount of the debt, there will be no sale expense. So if you bid in the [uniloader] for $6,550.00, which is the payoff with interest to October 26, 1994, the date of the sale, and no one makes a higher bid, Case Credit will be deemed the high bidder and the property will go to Case Credit without deduction for any sale expense.

The same is true with regard to the IH 1585 tractor. Ford Credit objected to the proposed interim distribution on December 12, 1994. It claimed the Trustee's proposed distribution was contrary to terms set forth in a letter from Ford Credit's counsel to Trustee Pfeiffer dated October 3, 1994. The letter, written in response to the Trustee's sale motion, stated Ford Credit would object to the motion unless "there were certain understandings in regard to the mechanics of the sale. . . ." The letter then set forth the attorney's understanding of his agreement with Trustee Pfeiffer:

> 1) Ford Credit will be permitted to bid in at the sale the amount of its payoff on its collateral (including post-filing interest and the small amount of attorneys' fees it has incurred in the bankruptcy action which will be apportioned between the two contracts pro-rata);
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> 2) Ford Credit will be permitted to bid in absentia, with the auctioneer being responsible for announcing Ford Credit's "one-time" bid which will, in effect, be an opening bid setting a floor for bidding on the equipment;
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> 3) That the Ford tractor, loader and bucket would be sold as one lot (as it is included in one contract between [Debtors] and Ford Credit) while the Wiskek spring reset disc, Lahman's stackmover and Ficklin gravity box and gear would be sold as a second lot (insofar as this equipment is all within a single Ford Credit contract with the debtor). In this regard, we discussed that the payoff to Ford Credit as of the date of filing on the tractor/loader and bucket was $28,842.36 but that the potential value of the equipment is $40,000.00 and that it was logical to sell the tractor and its attachments in one lot. In regard to the other

> contract, the balance owed Ford Credit as of the date of filing was $21,540.49 and the projected value of this equipment is only $17,000.00 to $18,000.00 and, accordingly, whether it was sold individually or as a lot, this equipment is not likely to pay off the balance owed Ford Credit on the contract. Because Ford Credit is cross-collateralized in regard to the three items, it is not feasible to split this up into individual lots and have Ford Credit bid on the equipment separately. Selling this by the two described lots will avoid the necessity of my filing an objection to the form of your proposed Motion.
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> Should Ford Credit be a successful bidder on one or both of the above described lots, it will incur no costs or expenses (either Trustee's fees or auctioneer's fees). If the amount bid by some third party exceeds Ford Credit bids on the collateral, the reasonable sales expenses will be pro-rated among all of the equipment sold at the auction and Ford Credit will receive prompt payment.

Based on terms stated in the October 3, 1994 letter, Ford Credit claimed that it had not agreed that the Trustee could deduct his commission from the proceeds. Ford Credit also argued the Trustee had failed to bid in its attorneys' fees of $1,102.60 as they had agreed, and therefore, that sum should be paid from the net auction proceeds of $1,521.30. In closing, Ford Credit asked the Court to find that $1,102.60 were its reasonable attorneys' fees and costs allowed under 11 U.S.C. § 506(b).

A hearing on the Trustee's proposed interim distribution and the two objections[2] to it was held December 20, 1994. Appearances included Trustee Pfeiffer, Attorney Monte R. Walz for Ford Credit, Attorney Carlyle E. Richards for Eureka State Bank, and Mr. Bill

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[2] The United States Trustee filed a response in support of the proposed interim distribution.

Weber, a representative for Case Credit.[3] The objectors' oral arguments mirrored their written objections. Trustee Pfeiffer stated he never agreed to pay Ford Credit's attorneys fees in the manner recited by Ford Credit in its objection. Eureka State Bank spoke in support of the Trustee's proposed distribution.

II.

Ford Credit is correct that a fully secured creditor is entitled to reasonable attorneys' fees and costs. 11 U.S.C. § 506(b). Unlike administrative expenses under § 503, fees and costs under § 506(b) are determined as part of the creditor's secured claim. 11 U.S.C. § 506(b); F.R.Bankr.P. 3012. Here, however, the parties did not resort to a formal motion to determine the values of the secured creditors' claims. Instead the secured creditors and Trustee Pfeiffer thought they had reached agreements on how the secured property was to be sold and how the proceeds would be distributed.

The only record regarding the sale terms, however, is the sale Order entered October 5, 1994. It is that Order which now controls. The Order was correctly served on parties in interest (as defined by Local Bankr. R. 306 and which included those who had filed notices of appearance)[4]. No party timely advised the Court

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[3] All appearances were by telephone. The Court was unable to travel to Aberdeen for the scheduled hearing due to poor weather.

[4] Unfortunately, Case Credit was not represented by an attorney and no notice of appearance was filed on its behalf.

that the Order was in error.[5]

The proposed distribution complies with the sale Order by recognizing Ford Credit's and Case Credit's secured claims and the minimum bids made by each.[6] The sale Order did not specifically mention any additional attorneys' fees and costs for Ford Credit under § 506(b). However, the Order did provide that Ford Credit and Case Credit would pay sale expenses *and* the Trustee's commission pro rata if bids in excess of the stated secured claims were received. The high bids for these items, on a per contract basis, exceeded the amounts due. Therefore, sale costs and the Trustee's commission were deducted properly as provided by the sale Order.

If the sale Order contained terms contrary to the parties' agreements with Trustee Pfeiffer, those problems should have been brought promptly to the Court's attention by a motion to amend or a motion to reconsider. Since that was not done, the sale proceeds must be distributed in compliance with the sale Order. To change

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[5] Attorney Walz also received a copy of the Court's hearing minutes of November 21, 1994 that stated Ford Credit's motion for relief from the stay had been resolved by the sale Order. The Court was not advised that the disposition set forth in the minutes were incorrect.

[6] The sale Order said the balance due on Ford Credit's first contract was $21,540.49 while the proposed distribution said the amount due was $21,968.00. The sale Order said the balance due on Ford Credit's second contract was $28,842.36 while the proposed distribution said the amount due was $28,991.72. According to Ford Credit's response to the proposed distribution, the higher figures in the proposed distribution reflect additional interest to the October 26, 1994 sale day. Both the sale Order and the proposed distribution state the balance due Case Credit on its contract covering the uni-loader tractor was $6,550.00.

the sale terms or alter the distribution method now would be unfair to other creditors and the Trustee who relied on the sale Order.

Trustee Pfeiffer may submit a proposed order approving the interim distribution as set forth in his Motion proposed and a proposed order for payment of sale costs.

Dated this ____ day of March, 1994.

BY THE COURT:

_____
Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:

PATRICIA MERRITT, CLERK

By _____
Deputy Clerk

(SEAL)