UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA

In re:	)	Bankr. No. 20-50019
	)	Chapter 12
MICHAEL MALCOLM COOPER	)	
dba Cooper Ranch	)	DECISION RE: PIONEER
SSN/ITIN xxx-xx-7129	)	BANK & TRUST'S APPLICATION
	)	UNDER 11 U.S.C. § 506(b)
Debtor.	)	

The matter before the Court is Pioneer Bank & Trust's Application for Attorneys' Fees, Costs, and Expenses Pursuant to 11 U.S.C. [§] 506(b). This is a core proceeding under 28 U.S.C. § 157(b)(2). The Court enters these findings and conclusions pursuant to Fed.Rs.Bankr.P. 7052 and 9014(c). For the reasons discussed below, the Court will allow Pioneer Bank & Trust $95,097.31 as part of its secured claim pursuant to 11 U.S.C. § 506(b).

I.

Michael Malcolm Cooper ("Debtor") filed a chapter 12 petition on February 13, 2020. Debtor immediately sought authority to use $66,094.30 of Pioneer Bank & Trust's ("Bank") cash collateral. Bank retained attorneys at Woods, Fuller, Shultz & Smith P.C. ("Law Firm") and objected to the motion, stating it wanted the cash collateral funds placed in a debtor in possession account with it. Bank also requested appropriate insurance on its collateral and a right of inspection and stated any cash collateral for rent should be limited to the "School Section." The parties entered into stipulations regarding both Debtor's preliminary and final cash collateral requests. Each was approved by the Court, and total cash collateral authority of $81,484.30 was given. A hearing on the cash collateral motion was not held.

On February 24, 2020, Debtor filed a motion to assume a lease of land from the Commissioner of School and Public Lands. Bank objected, arguing Debtor did not have

a reasonable likelihood of an effective reorganization. Bank also contended it had not had time to review Debtor's just-filed schedules and statements. Bank further argued Debtor could not demonstrate assuming this lease was a sound business decision. Debtor replied to Bank's objection and reiterated how assuming the lease satisfied the business judgment test. A hearing was held on March 12, 2020, at which time the Court set a continued hearing to give Bank time to review the lease. Bank withdrew its objection before the continued hearing was held, and an order granting Debtor's motion to assume the lease was entered.

Following one extension of the filing deadline, Debtor filed his schedules and statements on March 5, 2020. Among his scheduled creditors, he included Bank as a creditor holding a claim of $876,157.98 that was secured by real and personal property valued at $2,432,439.62. On March 27, 2020, Bank timely filed two fully secured claims totaling $916,566.14. In its proofs of claim, Bank acknowledged it was fully secured, but it left blank those portions of the proof of claim form where the creditor is directed to describe and value its collateral.

Debtor filed a plan on May 13, 2020. It addressed three loans Debtor had with Bank and set forth proposed plan treatment. The Court set the initial telephonic confirmation hearing for June 25, 2020.

On May 22, 2020, Bank objected to Debtor's claimed homestead exemption, stating the mortgages Debtor had given Bank pre-petition included homestead exemption waivers. In his response, Debtor acknowledged Bank held a mortgage that included a homestead exemption waiver. The Court entered the parties' agreed order. No hearing on the matter was held.

Bank objected to Debtor's plan on June 9, 2020. Bank said the plan failed to acknowledge it was entitled to post-petition interest and reasonable attorney fees and costs. Bank also wanted the plan to clarify the payments to it were "net" of any trustee fees. Bank further contended the plan did not comply with 11 U.S.C. § 1225(a)(5) because the value of Debtor's payments to Bank as of the effective date of the plan was less than the allowed amount of Bank's claim. Bank also argued the plan was not feasible and made several feasibility-related objections.

On June 15, 2020, Debtor filed a motion seeking authority to use an additional $42,230.00 of Bank's cash collateral for operating expenses in July and August 2020. Bank objected, arguing the equity in Debtor's real property was too illiquid to constitute adequate protection. It also argued Debtor did not have a reasonable chance of a successful reorganization. The parties submitted an agreed order in which Debtor was authorized to use the $42,230.00 in cash collateral. The Court entered the agreed order on July 2, 2020. No hearing on the motion was held.

At the initial confirmation hearing held on June 25, 2020, the Court set a discovery deadline of September 4, 2020. The Court also set a continued confirmation hearing for September 10, 2020.

On July 2, 2020, Debtor sought court authority, on reduced notice, to sell 240 acres of agricultural land. The proposed sale was to a private buyer, with Bank to receive the net proceeds after sale costs. Bank objected because Debtor proposed to pay the loans associated with its junior mortgage first, instead of those associated with its senior mortgage, which had obtained seniority through a subordination agreement. Bank also wanted a replacement lien in the sale proceeds as adequate

protection. A telephonic hearing on the sale motion was held on July 23, 2020. The Court granted the sale motion on the condition Bank's senior mortgage would be paid first.

On August 28, 2020, Debtor sought approval of a new cash collateral agreement with Bank. Under it, Bank agreed Debtor could use $36,400.00 of its cash collateral during September and October 2020 for certain operating expenses. The agreement included several adequate protection terms, including a replacement lien in all farm products. No objection to the agreement was filed, and the Court approved it on September 4, 2020.

On November 10, 2020, Debtor filed a modified plan and served it and a notice of hearing on November 11, 2020. On November 12, 2020, Bank moved to dismiss the case, alleging there was delay that was prejudicial to creditors, Debtor had failed to file a modified plan within the extension of time authorized by the Court, and there was a continuing loss to or diminution of the bankruptcy estate without a reasonable likelihood of rehabilitation. Debtor timely responded.

On November 13, 2020, Debtor sought approval of a new cash collateral agreement with Bank. Under it, Bank agreed Debtor could use $41,650.00 of its cash collateral during November and December 2020 for certain operating expenses. The agreement included several adequate protection terms, including a replacement lien in all farm products. No objection to the agreement was filed, and the Court approved it on November 23, 2020.

The initial confirmation hearing on Debtor's modified plan and the initial hearing on Bank's motion to dismiss were held on December 17, 2020. The Court continued

both matters to January 7, 2021 to allow Debtor time to resolve the objections to his modified plan.

On December 17, 2020, Debtor noticed for objections another agreement he made with Bank for the use of $11,780.00 in cash collateral for January and February 2021. No objection to the agreement was filed, and the Court approved it by order entered on December 29, 2020.

On January 7, 2021, Debtor withdrew his modified plan. At the continued hearing on Bank's motion to dismiss held on January 7, 2021, the Court ordered that a continued hearing on it be held at the same time as the initial confirmation hearing on Debtor's yet-to-be-filed new modified plan. The Court also stated Bank could request a continued hearing sooner if Debtor did not propose a new modified plan within a reasonable time. Bank did request a continued hearing on its motion to dismiss on February 17, 2021, and the Court set the continued hearing for February 25, 2021. Debtor then filed his new modified plan on February 19, 2021, and the Court set the confirmation hearing on it for March 25, 2021. At the February 25, 2021 continued hearing on Bank's motion to dismiss, the Court granted Bank's motion to continue the matter to March 25, 2021.

Three objections to Debtor's new modified plan were filed. In its objection, Bank contended only that the modified plan was not feasible. Bank also noted it was still negotiating with Debtor and stated "significant pro[gr]ess is being made."

On March 5, 2021, Debtor noticed for objections another agreement he made with Bank for the use of $17,740.00 in cash collateral for March 2021. No objection to the agreement was timely filed, and the Court approved it by order entered on

March 12, 2021.

At the confirmation hearing held on March 25, 2021, the parties reported all objections were resolved. The Court ordered confirmation on those terms and directed Debtor to submit a Plan as Confirmed. Also that day, Bank withdrew its motion to dismiss at the continued hearing on it. Debtor promptly filed a Plan as Confirmed, and the confirmation order was entered on March 25, 2021.

Regarding the treatment of Bank's claims, the Plan as Confirmed provided *inter alia* Debtor would sell "a sufficient number of acres of land to realize $380,000.00[,]" and pay down Bank's claim by $361,159.00. The Plan as Confirmed further provided Bank would be allowed its costs under 11 U.S.C. § 506(b) after the Court approved them. The Plan as Confirmed also included a negotiated default provision for Bank.

On December 3, 2021, consistent with the Plan as Confirmed, Debtor filed a motion to sell certain real estate at auction, with the proceeds to go to Bank. The motion contemplated a sale closing on or before December 30, 2021. No objection to the motion was filed, and it was approved by order entered on December 9, 2021. Debtor filed a report of sale on January 10, 2022. In the report, Debtor stated the subject property, which totaled 320 acres, sold for $832,000.00 and Bank received $780,651.80 in proceeds, which was higher than the $361,159.00 the Plan as Confirmed stated Bank would receive. The Court contacted counsel for the affected parties and Trustee Dale A. Wein requesting an explanation. Debtor's attorney responded:

> The land brought substantially more than anticipated and the proceeds were paid over to the first lienholder. Any additional interest at the plan rate on the remaining balance to April 1, 2022 is to be paid, and then the remaining principal balance is to be re-amortized. Interest, fees, and

costs are to be approved by the court prior to re-amortization.

The Court advised the parties Debtor would need to file a motion to modify his confirmed plan since the confirmed plan did not contemplate Bank receiving more than $361,159.00 from the real property sale proceeds. Counsel for Debtor acknowledged Debtor would file a motion to modify his confirmed plan and indicated that would be done after Bank provided "detailed calculations" and "the fee application"–presumably Bank's application for an allowance of its attorney fees and other costs contemplated by § 506(b).

Bank soon filed its § 506(b) application. Therein, Bank requested an allowance of $91,777.25 for Law Firm's compensation, $5,960.08 for sales tax on Law Firm's compensation, and $334.26 for Law Firm's expenses, for a total of $98,071.59. Bank also sought an additional $4,824.59 for "costs and charges paid directly by the Bank," which included $624.38 for copies of numerous bank statements, some canceled checks, related research by Bank, and postage, $319.50 for an owners and encumbrancers report from a title company, $58.00 for recording fees at the Secretary of State's office, $288.19 for mileage for cattle inspections on five different occasions over twenty-one months, and $3,534.52 for compensation of an expert it hired and that expert's expenses. Bank also sought $4,207.76 for additional post-petition interest. That brought Bank's requested total allowances under § 506(b) to $107,103.94.

Debtor objected to Bank's § 506(b) application, arguing the attorney fees and

costs sought were not reasonable.[1] Debtor did not specifically identify which legal fees were not reasonable; instead he generally argued attorney fees should not be allowed that were not reasonably necessary or "where action is taken because of an attorney's excessive caution or overzealous advocacy[.]" Debtor also argued because he had acknowledged Bank was oversecured and thus entitled to attorney fees, no fees should be allowed to defend Bank's secured status but only to ensure Debtor satisfied the requirements for the confirmation of a plan. Debtor also wanted the Court to deem the direct costs sought by Bank to be overhead, and he wanted the costs related to an expert Bank consulted disallowed since an expert was never needed by Bank to testify or contest confirmation.

Debtor and Bank attempted to resolve the matter but were unable to do so. The parties submitted briefs, and the Court took the matter under advisement.

II.

Section 506(b) of the bankruptcy code provides a fully secured creditor may, if the underlying credit agreement with the debtor so provides, recover fees, costs, and other charges that are reasonable as part of its secured claim. The creditor bears the burden of proving: (1) the value of its collateral exceeds the amount of its claim and the fees and costs sought; (2) there is a written agreement with the debtor or nonbankruptcy law that permits the creditor to recover the interest, attorney fees, and other costs sought; and (3) the amount sought is reasonable. *McCormick v. Starion Financial* (*In re McCormick*), 894 F.3d 953, 957 (8th Cir. 2018), *citing White v. Coors*

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[1] Another party objected to Bank's application under § 506(b); that objection was overruled at the first hearing on the application held on March 17, 2022.

Distributing Co. (*In re White)*, 260 B.R. 870, 880 (B.A.P. 8th Cir. 2001).[2]

> A bankruptcy court's role in determining reasonableness under 11 U.S.C. § 506(b) is critical to "policing the urge of an oversecured creditor to release the full force and fury of its advocates against a debtor's efforts to reorganize." *In re Latshaw Drilling, LLC*, 481 B.R. at 799.
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> Reasonable is defined as what is "fair, proper, or moderate under the circumstances; sensible." *Black's Law Dictionary*, (10th ed. 2014). Courts apply a variety of factors to assess reasonableness under 11 U.S.C. § 506(b) including: the complexity of the case; the hourly rates charged and the rates in the locality; whether the services were necessary to protect the client's interest; whether attorneys were able to efficiently and competently provide the required services; whether billing judgment was exercised to avoid duplicate or unnecessary services; the results obtained; and the amounts charged in similar cases. *See In re Latshaw Drilling*, 481 B.R. at 799; *In re Kroh Bros. Dev. Co.*, 105 B.R. 515, 521 (Bankr. W.D. Mo. 1989); *In re Wonder Corp. of America*, 72 B.R. 580, 588-89 (Bankr. D. Conn. 1987))[.] A court may also rely on its observations of the proceedings and how a case has been administered in evaluating the reasonableness of fees requested under § 506(b). *See In re Kroh Bros. Dev. Co.*, 105 B.R. at 521; *In re Wonder Corp. of America*, 72 B.R. at 589.
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> Courts have broad discretion in reaching a conclusion that fulfills the purpose of the reasonableness element found in 11 U.S.C. § 506(b) which is: "to prevent creditors from 'fail[ing] to exercise restraint in the attorneys' fees and expenses they incur, perhaps exhibiting excessive caution, overzealous advocacy and hyperactive legal efforts[.]'" *In re Wanechek*, 349 B.R. 836, 843 (Bankr. E.D. Wash. 2006) (quoting *In re Gwyn*, 150 B.R. 150, 155 (Bankr. M.D.N.C. 1993)); *see also In re Woods Auto Gallery*, 379 B.R. 875, 885 (Bankr. W.D. Mo. 2007).

In re Fansteel, Inc., Bankr. No. 16-01823, 2017 WL 1929489, at *2-3 (Bankr. S.D. Iowa May 9, 2017).

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[2] The Court does not utilize the more expansive list of factors set forth in *In re Northern Beef Packers Limited Partnership*, Bankr. No. 13-10118, 2015 WL 2236185, at *7-8 (Bankr. D.S.D. Apr. 10, 2015), where the creditor was relying on state law for its requested fee allowance and the factors were gleaned from attendant state case law.

III.

The parties agree the value of Bank's collateral exceeds the amount of its claim. Debtor has not disputed Bank has a written agreement with Debtor that permits Bank to recover the interest, attorney fees, and other costs sought. Thus, the only factor to be considered under Debtor's objection to Bank's application is whether Bank has sought reasonable attorney fees and other costs under § 506(b).

Looking first at the requested costs other than attorney fees, Debtor has not challenged the $4,207.76 Bank has sought for post-petition, pre-confirmation interest between March 1, 2021 and March 25, 2021. It will be allowed.

As to the $1,290.07 in reimbursement Bank seeks for bank statements, postage, the owners and encumbrancers report, the UCC filing fees, and mileage for inspections, Debtor argues these costs should be considered part of Bank's overhead. Bank set forth its basis for the charges. And there is nothing in the record to suggest these costs are normally considered part of a lending institution's overhead. Accordingly, these costs will be allowed.

The only cost the Court finds Bank has not justified on the record as reasonable relates to the employment of Bill Smoot as a feasibility and farm expert for Bank. There is nothing in the record demonstrating the necessity of Mr. Smoot's services: There was no showing Debtor's farm/ranch operation was unusual or his financial troubles were out of the ordinary. Law Firm's lead counsel has unparalleled expertise as a creditors' attorney in chapter 12 cases. Bank's own agents were actively involved in the case and were able to provide Law Firm their historical analysis of Debtor's financial information and federal income tax returns. An evidentiary

confirmation hearing was never set. An evidentiary hearing on any other contested matter was never set. In sum, there is an insufficient record supporting the need for Bank's expert. As noted in an earlier case before this Court:

> The Court [may] not simply award less fees because of the deficient record; it would have first needed an adequate record to award *any* fees. *In re Cole*, 205 B.R. 382, 384 (Bankr. E.D. Tex. 1997) ("When an issue is in doubt because of the proof provided and the Court would be required to speculate, the party upon whom the burden of proof ultimately rests must lose.") (discussing burdens regarding an objection to exemptions).

In re N. Beef Packers Ltd. P'ship, Bankr. No. 13-10118, 2015 WL 2236185, at *10 (Bankr. D.S.D. Apr. 10, 2015). Bank seemingly argues it should be entitled to an expert since Debtor was. However, the purpose served by Debtor's expert differs in that his goal was Debtor's financial rehabilitation, not merely litigation support, which was the purpose for Bank's expert. The expert's disallowed compensation and attendant expenses total $4,824.59.

Compensation and related sales tax for Law Firm's dealings with Bank's expert will also be excluded. This deduction totals $6,988.21.[3]

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[3] Law Firm's time associated with Bank's expert were: RWD - .75 on February 27, 2020; RWD - .50 on February 28, 2020; RWD - .50 on March 4, 2020; RWD - .20 on March 9, 2020; RWD - .25 on March 24, 2020; RWD - 1.25 on March 25, 2020; RWD - 1.25 on April 6, 2020; RWD - .25 on April 10, 2020; RWD - .45 on April 24, 2020; RRD - .05 on April 30, 2020; RWD - .25 on May 14, 2020; RWD - .50 on May 26, 2020; RWD - .50 on May 27, 2020; RWD - .25 on May 29, 2020; RWD - 1.25 on June 3, 2020; RWD - .75 on June 8, 2020; RWD - .75 on June 9, 2020; RWD - .25 on June 10, 2020; RWD - .50 on June 15, 2020; RWD - .50 on June 24, 2020; RWD - .50 on June 30, 2020; RWD - .50 on July 14, 2020; RWD - 1.25 on July 15, 2020; RWD - .50 on July 20, 2020; JJF - .30 on July 21, 2020; RWD - .50 on July 27, 2020; RWD - .25 on July 28, 2020; RWD - .25 on July 30, 2020; RWD - .75 on August 3, 2020; RWD - .25 on August 17, 2020; JJF - .30 on August 18, 2020; RWD - .25 on August 19, 2020; RWD - .12 on August 26, 2020; RWD - .50 on August 27, 2020; RWD - .25 on September 4, 2020; RWD - .75 on September 9,

As to the requested reimbursement for the remainder of Law Firm's compensation for services, Debtor did not specifically challenge Law Firm's attorneys' hourly rates or present evidence contravening Attorney Clair Gerry's statements in his affidavit that Bank presented. Debtor also did not identify any duplicative services among Law Firm's professional staff. And with one exception, Debtor did not argue any of the services for which compensation was sought were not professional. That one exception is $193.83 in compensation and sales tax for 1.4 hours of typing on March 13, 2020, which Bank agrees should be disallowed.

Law Firm's expenses are reasonable. The Court will allow reimbursement for those expenses.

Though the attorney fees sought by Bank are high, the record does not support a further reduction. The case progressed slowly; Debtor proposed three different plans over ten months, with a seven-month gap between the first two plans. Debtor needed cash collateral authority six different times, for a total authority of $231,284.30. There were side issues related to Debtor's divorce and the probate of Debtor's mother's estate. It is true Law Firm spent substantial time preparing Bank's § 506(b) application, but the result was professional and thorough without being excessive.[4]

2020; RWD - 1.00 on October 1, 2020; RWD - .25 on October 5, 2020; RWD - .10 on October 7, 2020; and RWD - .25 on October 8, 2020. The total disallowed compensation for RWD's time is 19.12 hours at $335.00 = $6,405.20. The total disallowed compensation for JJF's time is .60 hours at $250.00 = $150.00. The total disallowed time for RRD is .05 hours at $130.00 = $6.50. Added together, the disallowed compensation is $6,561.70. The disallowed attendant sales tax is $426.51.

[4] The Court's one criticism is not all the expenses could be easily matched by date with the corresponding legal service. The record does not warrant a deduction, however, since Debtor did not make any specific objections to Law Firm's expenses

The record certainly shows Bank stayed on top of the case and all matters raised therein, but the record does not show Law Firm's attention to the case was overzealous or harassing. In the end–several months after confirmation–Bank received the value of its pre-petition claim. As Bank noted, that result was better than contemplated by the earlier plans Debtor proposed or the actual Plan as Confirmed. This unexpected but fortuitous outcome, however, does not mean Law Firm's earlier services for Bank were unreasonable when considered under the circumstances that existed when the services were rendered.

An order will be entered allowing Bank's attorney fees and other costs of $95,097.31 under § 506(b).

Dated: August 17, 2022.

BY THE COURT:

Charles L. Nail, Jr.
Bankruptcy Judge

NOTICE OF ENTRY
Under Fed.R.Bankr.P. 9022(a)

This order/judgment was entered on the date shown above.

Frederick M. Entwistle
Clerk, U.S. Bankruptcy Court
District of South Dakota

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and the total reimbursement for expenses sought by Law Firm is moderate.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA

In re:	)	Bankr. No. 20-50019
	)	Chapter 12
MICHAEL MALCOLM COOPER	)	
dba Cooper Ranch	)	ORDER ALLOWING CERTAIN
SSN/ITIN xxx-xx-7129	)	COSTS UNDER 11 U.S.C. § 506(b)
	)	
Debtor.	)	

In recognition of and compliance with the decision entered this day; and for cause shown; now, therefore,

IT IS HEREBY ORDERED Pioneer Bank & Trust's Application for Attorneys' Fees, Costs, and Expenses Pursuant to 11 U.S.C. [§] 506(b) (doc. 263) is granted to the extent set forth in the decision, and it is allowed $95,097.31 as part of its secured claim.

So ordered: August 17, 2022.

BY THE COURT:

Charles L. Nail, Jr.
Bankruptcy Judge

NOTICE OF ENTRY
Under Fed.R.Bankr.P. 9022(a)

This order/judgment was entered on the date shown above.

Frederick M. Entwistle
Clerk, U.S. Bankruptcy Court
District of South Dakota