UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA

In re:	)	Bankr. No. 13-10118
	)	Chapter 11
NORTHERN BEEF PACKERS	)	
LIMITED PARTNERSHIP	)	DECISION RE: SCOTT OLSON DIGGING,
Tax ID/EIN 26-2530200	)	INC.'S APPLICATION FOR COSTS UNDER
	)	11 U.S.C. § 506(b) AND S.D.C.L. § 44-9-42
Debtor.	)	

The matter before the Court is Scott Olson Digging, Inc.'s Application for Compensation and/or Reimbursement for Attorney's Fees, Costs, and Expenses, Pursuant to [S.D.C.L. §] 44-9-42 and 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 Scott Olson Digging, Inc. $17,700.76 for post-petition interest but nothing for attorney fees.

I.

Scott Olson Digging, Inc. ("SOD") is one of Debtor Northern Beef Packers Limited Partnership's secured creditors. It filed a proof of claim, no. 69-1, for $2,114,975.49 based on a pre-petition mechanic's lien it held against Debtor's real property. In addition, SOD requested accruing interest at 10% pursuant to S.D.C.L. §§ 44-9-6.1 and 54-3-5.1. SOD also claimed an entitlement to "costs, disbursements, and such attorney's fees and other expenses [that] the court [may find] to be warranted and necessary," under S.D.C.L. §§ 44-9-40, 44-9-41, and 44-9-42, but it did not itemize that request. Attached to SOD's proof of claim was a copy of its answer and counterclaim in a 2008 state court action that had been initiated by

Debtor and one of its affiliates against SOD. In its counterclaim, SOD had sought, *inter alia*, foreclosure of its mechanic's lien. The state court matter remained unresolved for several years and eventually was stayed when Debtor filed its chapter 11 petition in 2013.

During the administration of Debtor's chapter 11 case, SOD was named one of numerous defendants in *SDIF Limited Partnership 6 v. Northern Beef Packers Ltd. Pt'ship, et al.* (*In re Northern Beef Packers Ltd. Pt'ship*), Adv. No. 13-1016. The plaintiffs, who were also among Debtor's secured creditors, commenced the adversary proceeding so the priority of various creditors' encumbrances on Debtor's real property could be sorted out[1] and the amount of some creditors' claims, including SOD's, could be determined. Well into the adversary proceeding, SOD made its first specific request for costs referencing 11 U.S.C. § 506(b) and asked to be allowed to itemize that request later (adv. doc. 305).

Following a four-day trial, by an amended decision entered September 22, 2014, the Court concluded Debtor owed SOD the principal sum of $205,104.07 for SOD's secured pre-petition claim (adv. doc. 328). After further pleadings and a hearing, the Court determined SOD was entitled to pre-petition interest of $109,014.22 (adv. doc. 348). SOD then filed an application for its requested pre-petition attorney fees under S.D.C.L. § 44-9-42 and its requested post-petition costs, including attorney fees and

[1]In their complaint, the plaintiffs acknowledged any mechanic's lien held by SOD would have priority over the mortgages held by them and by White Oak Global Advisors, LLC.

interest, under 11 U.S.C. § 506(b) (bankr. doc. 990).

In its application, SOD sought a total of $502,739.89 for attorney fees, sales tax on the attorney fees, and expenses incurred by the attorneys. The fees were for four different attorneys or law firms who had represented SOD pre-petition,[2] two of which, Gerry & Kulm Ask, Prof. LLC and Wilkinson & Wilkinson, continued their services post-petition.

In its application, SOD also sought post-petition interest: $17,700.76 from the petition date through the May 2014 trial and another $10,620.46 from the end of the trial through the date of its application, for a total of $28,321.22. SOD used a 10% interest rate in the application, though it did not identify the source of that rate. In subsequent briefs, SOD cited S.D.C.L. §§ 44-9-6.1, 54-3-5.1, and 54-3-16 for the

[2]Some of SOD's attorneys switched clients during the past several years. Woods, Fuller, Shultz & Smith represented SOD for a while against Debtor Northern Beef before Northern Beef filed bankruptcy; the firm now serves as counsel for White Oak Global Advisors, LLC and New Angus, LLC, which purchased Debtor Northern Beef's principal asset. Patrick T. Dougherty represented SOD in SOD's own chapter 11 bankruptcy case, *In re Scott Olson Digging, Inc.*, Bankr. No. 11-40680 (D.S.D.); he now serves as counsel for the Official Committee of Unsecured Creditors in Debtor Northern Beef's case.

requested rate.

Debtor filed a timely objection to SOD's application (bankr. doc. 1017).[3] It contended SOD's request for fees under § 44-9-42 did not pass the threshold test of whether any fee award to SOD was warranted and necessary. It also argued the sum sought was unreasonable in light of SOD's lack of a good faith willingness to substantiate its claim or resolve the dispute without litigation and in light of the principal sum SOD was ultimately awarded by the Court. Debtor also argued post-petition interest on SOD's claim under § 506(b) should be allowed only at the more reasonable federal rate, not the rate established by South Dakota law.

SOD filed a reply to Debtor's objection (bankr. doc. 1033). It argued Debtor did not have standing to object because Debtor did not have a personal stake or pecuniary interest in the funds that would be used to pay SOD, those funds having already been placed in an escrow account authorized by the Court in early 2014 in which only White Oak Global Advisors, LLC ("White Oak") and SOD have an interest (bankr. docs. 735-2 and 770). SOD also challenged Debtor's contention that the amount of the mechanic's lien SOD originally sought and the results obtained when the matter went to trial are relevant and also challenged some case law cited by Debtor. SOD further argued § 506 does not apply to its request for post-petition interest. It seemingly argued that since Debtor did not have an interest in the escrow funds, the claim

[3]The United States Trustee also timely filed an objection to SOD's application, but later withdrew his objection (bankr. docs. 1009 and 1014).

allowance provision of § 506(b) did not apply, and any interest dispute was only between SOD and White Oak, which had purchased Debtor's packing plant in a post-petition sale.

In an apparent response to SOD's contention Debtor did not have standing to object, White Oak and New Angus, LLC joined Debtor's objection (bankr. doc. 1034). White Oak and New Angus, LLC relied on Fed.Rs.Bankr.P. 7017(a)(3) and 9014(c) in seeking recognition of their joinder.

A telephonic hearing was held February 5, 2015 with counsel for SOD, Debtor, and White Oak and New Angus, LLC. Citing 11 U.S.C. § 1109(b), the Court ruled Debtor had standing to object. *See also* 11 U.S.C. § 1107(a); *Peoples v. Radloff* (*In re Peoples*), 764 F.3d 817 (8th Cir. 2014) (standing to object is not the same as standing to appeal). The Court then asked SOD how it wished to proceed, inquiring whether it wanted to stand on the present record and the Court's knowledge of Debtor's main case and the related adversary proceeding, make additional argument, or present evidence. SOD declined the opportunity for an evidentiary hearing and instead requested leave to file another document in support of its application. The Court set deadlines related to that request (bankr. doc. 1036).

SOD timely filed a post-hearing brief (bankr. doc. 1039).[4] SOD cited, among other cases, *City of Sioux Falls v. Kelley*, 513 N.W.2d 97, 111 (S.D. 1994), for the

[4]SOD entitled its document "Supplemental Response to Debtor's Objection to Scott Olson Digging, Inc.'s Right to: (A) Interest; and (B) Attorney's Fees and Expenses."

factors to consider in determining a reasonable fee under state law, *In re Schriock Constr., Inc.*, 104 F.3d 200, 201 (8th Cir. 1997), and *In re McCormick*, 523 B.R. 151, 154 (B.A.P. 8th Cir. 2014), for the four elements a creditor must establish to recover costs under § 506(b), and *In re Kroh Bros. Dev. Co.*, 105 B.R. 515, 521 (Bankr. W.D. Mo. 1989), for the factors to consider when determining whether the attorney fees sought under § 506(b) are reasonable. In large part, SOD argued its fees were reasonable when considered in light of what Debtor's attorneys had charged regarding the same matter,[5] and it argued the goings on in Debtor's bankruptcy case required SOD's counsel to be constantly vigilant to protect SOD's mechanic's lien.

Debtor filed a reply (bankr. doc. 1045). Therein, Debtor focused on its principal argument: "SOD is not entitled to any fees because substantially all of the fees are attributable to SOD's own conduct in asserting a mechanic's lien in an amount over ten times greater than the amount of its allowable claim." Debtor also argued SOD, not Debtor, had precipitated the extended litigation between the two parties.

II.
Attorney Fees

When fees and costs are sought under § 506(b), the claim holder has the burden to establish the entitlement by showing it is oversecured in excess of the fees and costs sought, an agreement or state statute provides for the fees or costs, and

[5]In this "brief," SOD stated White Oak agreed to pay Debtor's attorneys $150,000.00 to litigate Adv. No. 13-1016. If that is so, Debtor's counsel needs to file a Supplemental Disclosure of Compensation pursuant to 11 U.S.C. § 329(a), Fed.R.Bankr.P. 2016(b), and Bankr. D.S.D. R. 2016-1(b) and Appendix 2L.

the fees and costs sought are reasonable. *Garden v. Central Nebraska Housing Corp.*, 719 F.3d 899, 905 (8th Cir. 2013). There is no dispute SOD is oversecured.

As set forth in its application, SOD looks to S.D.C.L. § 44-9-42 as the key statutory provision authorizing it to receive attorney fees as part of its claim.[6] This statute provides:

> The court shall have authority in its discretion to allow such attorney's fees and receiver's fees and other expenses as to it may seem warranted and necessary according to the circumstances of each case, and *except as otherwise specifically provided in this chapter*.

S.D.C.L. § 44-9-42 (emphasis added). By the italicized clause in § 44-9-42, two other provisions in chapter 44-9 are brought into consideration:

> Judgment shall be given in favor of each lien holder for the amount demanded and proved by him, with costs and disbursements to be fixed by the court at the trial, and such amount shall not be included in the lien of any other party.

S.D.C.L. § 44-9-40.

> The clerk of the courts shall tax the same costs as are allowed in

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[6]Debtor does not contest 11 U.S.C. § 506(b) allows SOD, as a fully secured creditor, to include costs, including pre- and post-petition attorney fees, as part of its secured claim if SOD would be allowed those costs under state law, assuming reasonableness. The Court thus need not, for this decision at least, dive into the interesting but still murky waters regarding the relationship between 11 U.S.C. §§ 502 and 506(b). *See, e.g.*, *Wells Fargo Bank, N.A. v. 804 Congress, L.L.C.* (*In re 804 Congress, L.L.C.*), 756 F.3d 368, 378-80 (5th Cir. 2014); *SNTL Corp. v. Centre Ins. Co.* (*In re SNTL Corp.*), 571 F.3d 826, 838-43 (9th Cir. 2009); *Ogle v. Fidelity & Deposit Co. of Maryland*, No. 6:08-cv-894 (GLS), 2009 WL 87598 (N.D.N.Y. Jan. 12, 2009); *In re Holden*, 491 B.R. 728 (Bankr. E.D.N.C. 2013). *See also Tri-State Financial, LLC v. First Dakota Nat. Bank*, 538 F.3d 920 (8th Cir. 2008). There is also no dispute SOD bears the burden of proof under § 506(b). *White v. Coors Distributing Co.* (*In re White*), 260 B.R. 870, 880 (B.A.P. 8th Cir. 2001).

> foreclosures of real estate mortgages.
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> The lien claimant shall be entitled to tax as costs, in addition to all other costs allowed by law, the sum of five dollars for the preparation of the lien statement and account for filing with the register of deeds.

S.D.C.L. § 44-9-41. The language of §§ 44-9-40 and 44-9-41 has been essentially unchanged since 1909, though their codification has changed. *See* S.D.R.C. 1919, §§ 1640 and 1655. Statutory history on § 44-9-42 is more limited, though it has not changed since 1939, when the text of it and § 44-9-40 were both in the same statute. S.D.C. 1939, § 39.0721.

Section 44-9-42 also brings in another statute from chapter 44-9, which in turn brings in much of title 15:

> All provisions of Title 15 shall be applicable to foreclosure actions under [chapter 44-9], except where a different intention plainly appears from the provisions of this chapter.

S.D.C.L. § 44-9-33; *Larson Concrete Co. v. Stroschein*, 353 N.W.2d 354, 357-58 (S.D. 1984).[7]

Title 15 includes a handful of statutes relating to attorney fees.[8] Under S.D.C.L. § 15-6-54(d), the party seeking disbursements "bears the responsibility of documenting, itemizing, and justifying the necessary expenditures." *DeHaven v. Hall*,

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[7]While provisions of Title 15 have changed over the years, § 44-9-33's reference to Title 15 remains. Title 15 underwent a substantial reorganization in 1992.

[8]Section 15-6-54(d) of the South Dakota code sets forth some procedural guidance when attorney fees and costs are sought in a state court action.

753 N.W.2d 429, 445 (S.D. 2008). The party seeking to recover attorney fees must present an adequately-documented application so the court has sufficient information to determine a reasonable fee award, as well as show the hourly rate charged is reasonable. *In re South Dakota Microsoft Antitrust Litigation*, 707 N.W.2d 85, 100-02 (S.D. 2005). The party seeking the fees also has the burden to show the hourly rate charged is reasonable, *i.e.*, demonstrate the hourly rate sought is typical for attorneys in the area for the given type of work. *Id*. at 102-03. Further, S.D.C.L. § 15-17-38 provides, in pertinent part, "[A]ttorneys' fees may be taxed as disbursements if allowed by specific statute[,]" while S.D.C.L. § 15-17-52 provides, "The court may limit the taxation of disbursements in the interests of justice[,]"[9] and S.D.C.L. § 15-17-53 provides, "The court may reduce or disallow a taxation of disbursements that would be oppressive or work a hardship." Under the "interests of justice" standard, the presiding court is given "broad discretion" to partially or completely limit an attorney fee award to a prevailing party, *Hewitt v. Felderman*, 841 N.W.2d 258, 266, 266 n.10 (S.D. 2013), for example, where each party won some issues and lost others, *Culhane v. Michels*, 615 N.W.2d 580, 590 (S.D. 2000).

Over 90 years ago, the South Dakota Supreme Court concluded a mechanic's lien claimant who had brought a lien foreclosure action was the *only* party who could recover costs, including attorney fees, under § 44-9-40, formerly S.D.R.C. 1919,

[9]Section 15-17-38 also states the court may limit the taxation of disbursements "in the interests of justice," but that qualifier is appended only to the award of attorney fees in various domestic disputes.

§ 1655.[10] *Peter Mintener Lumber Co. v. Janisch*, 181 N.W. 914, 916 (S.D. 1921).[11] Thus, the legal issue presented is whether a mechanic's lien claimant who commences a lien foreclosure action is still the only party who may recover attorney fees under chapter 44-9, or did the South Dakota legislature's addition of § 44-9-42 broaden or otherwise modify the application of § 44-9-40. If § 44-9-40 must still be narrowly applied, the second legal issue presented is whether SOD's counterclaim in the state court action or its counterclaim and crossclaim in Adv. No. 13-1016 constitute a commencement of a lien foreclosure action.

After reviewing the relevant provisions of S.D.C.L. title 15 and chapter 44-9 and the limited case law citing §§ 44-9-40 and 44-9-42 and their statutory predecessors, the Court concludes § 44-9-40, as interpreted by *Peter Mintener Lumber Co.*, must still be narrowly applied. Foremost, the Court was unable to find any South Dakota Supreme Court decision after *Peter Mintener Lumber Co.* and after the addition of § 44-9-42 or its predecessor, S.D.C. 1939, § 39.0721, that specifically discussed § 44-9-40, or its predecessor, S.D.C. 1939, § 39.0718, and concluded fees may be

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[10]The only change in S.D.C.L. § 44-9-40 since 1919 is from "lienholder" to "lien holder."

[11]The South Dakota Supreme Court reached a similar result in *Larson Concrete Co. v. Stroschein*, 353 N.W.2d 354, 357-58 (S.D. 1984), when it concluded a prevailing defendant-lienee in a mechanic's lien foreclosure action could recover only the limited attorney fees allowed by S.D.C.L. § 15-17-8, which was only $25.00, not court-determined attorney fees under S.D.C.L. § 44-9-42. The court construed those statutes with other provisions of title 15 and chapter 44-9 and found none to be ambiguous.

awarded under § 44-9-40 to any party other than a mechanic's lien claimant who commences a lien foreclosure action.[12] Moreover, the South Dakota Supreme Court recently affirmed statutory "authority to assess attorney fees may not be implied, but must rest upon a clear legislative grant of power." *Rupert v. City of Rapid City*, 827 N.W.2d 55, 67 (S.D. 2013) (quoting *In re Estate of O'Keefe*, 583 N.W.2d 138, 142 (S.D. 1998)).

In *Rupert*, the South Dakota Supreme Court concluded South Dakota law provided for an award of attorney fees in condemnation actions, but not in inverse condemnation actions. *Rupert*, 827 N.W.2d at 67-68. The court reasoned it was logical for the state legislature to expressly not make S.D.C.L. § 21-35-23 applicable to inverse condemnation actions, where it also found the general purpose of § 21-35-23 is "to encourage fair offers from a condemnor; if the final offer is found to be unfair based upon a comparison with a jury's verdict, the condemnor will also have to pay attorneys' fees and expert witness fees." *State ex rel. Dep't of Transp. v. Clark*, 798 N.W.2d 160, 165 (S.D. 2011), *quoted in Rupert,* 827 N.W.2d at 68-69. The Supreme Court concluded:

> [W]e reaffirm our prior rulings establishing that attorney fees may not be awarded pursuant to a statute unless the statute expressly authorizes the award of attorney fees in such circumstances. Although we note that condemnation and inverse condemnation share some similarities, we will not apply the terms interchangeably for purposes of awarding attorney

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[12]By not receiving attorney fees under §§ 44-9-40 and 44-9-42, SOD is treated the same as other lien holders who are part of the foreclosure but did not initiate it. *Peter Mintener Lumber Co.*, 181 N.W. at 916.

> fees under [S.D.C.L. §] 21-35-23 without express authority from the Legislature. As a result, because [S.D.C.L. §] 21-35-23 does not expressly authorize an award of attorney fees in inverse condemnation cases, the trial court did not err in denying the Ruperts' request for attorney fees.

Rupert, 827 N.W.2d at 69.

While the legislators' intent in limiting attorney fees in mechanic's lien foreclosures to a prevailing plaintiff-mechanic's lien holder may not be as apparent as the policy the Supreme Court identified for the legislative limitation in condemnation actions, the result here must be the same. This Court must strictly apply the attorney fee provisions of S.D.C.L. chapter 44-9, and in particular § 44-9-40, as interpreted by the South Dakota Supreme Court in *Peter Mintener Lumber Co.,* as providing only the lien holder bringing a foreclosure action may recover attorney fees and other costs under chapter 44-9.

The second issue–whether SOD may nonetheless be considered a foreclosing mechanic's lien holder under chapter 44-9 where SOD did not originate the legal proceedings with Debtor but sought foreclosure of its mechanic's lien through a counterclaim (state court) and later a crossclaim (adversary proceeding in Debtor's bankruptcy case)–at first appears more difficult, in part because S.D.C.L. § 44-9-24 provides a mechanic's lien holder may enforce its lien by a timely complaint *or* answer. *See also* S.D.C.L. § 44-9-31 (lien holder to attach bill of particulars with his complaint *or* answer). However, the language of both § 44-9-24 and § 44-9-31 existed in South Dakota's mechanic's lien code when *Peter Mintener Lumber Co.* was decided. *See*

S.D.R.C. 1919, §§ 1653[13] and 1654. Finally, though § 44-9-42 was added after *Peter Mintener Lumber Co.* was decided, nothing in § 44-9-42 indicates it broadened the application of § 44-9-40, especially where the last clause of § 44-9-42 provides, "except as otherwise specifically provided in this chapter." Thus, when considered with § 44-9-40–as it must be–*Kolda v. City of Yankton*, 852 N.W.2d 425, 430 (S.D. 2014),[14] § 44-9-42 at most appears to have refined what attorney fees a court has discretionary authority to award: those attorney fees that are "warranted and necessary." Accordingly, this Court must defer to the South Dakota Supreme Court's interpretation narrowly applying § 44-9-40, and conclude since SOD was not the lien holder who brought either the state court action or the adversary proceeding, South Dakota law does not permit this Court to award SOD attorney fees under S.D.C.L. chapter 44-9.

Even if the Court could set aside the challenging legal issues regarding SOD's ability to recover attorney fees under §§ 44-9-40 and 44-9-42, the Court would still be unable to conclude an award of attorney fees to SOD is warranted and necessary under state law's § 44-9-42 or reasonable as required by the bankruptcy code's

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[13]In the Revised Code of 1919, the sentence that is now § 44-9-24 began with a "but," *i.e.,* "But no lien shall be enforced in any case...." The language is otherwise the same.

[14]"[S]tatutes must be construed according to their intent, [and] the intent must be determined from the statute as a whole, as well as enactments relating to the same subject." *Trumm v. Cleaver*, 841 N.W.2d 22, 25 (S.D. 2013), *quoted in Kolda*, 852 N.W.2d at 430. The court in *Kolda* considered together two different state statutes that regulated a city manager's removal. *Kolda*, 852 N.W.2d at 430.

§ 506(b).[15] The necessary record is deficient.

When attorney fees are sought under South Dakota law, the court has to consider "several parameters which affect the value of legal services," which are gleaned from the Model Rules of Professional Conduct. *City of Sioux Falls v. Kelley*, 513 N.W.2d at 111, *cited in Wald, Inc. v. Stanley*, 706 N.W.2d 626, 630 (S.D. 2005). These parameters include:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
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> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
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> (3) the fee customarily charged in the locality for similar legal services;
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> (4) the amount involved and the results obtained;
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> (5) the time limitations imposed by the client or by the circumstances;
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> (6) the nature and length of the professional relationship with the client;

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[15]Before statutory amendments in 1992, S.D.C.L. § 15-17-7 governed attorney fee awards in domestic relations actions. Interpretive case law oft times referenced awarding fees that were "warranted and necessary," though only "warranted" was specifically stated in the statute. *See, e.g., Schwandt v. Schwandt*, 471 N.W.2d 176, 178 (S.D. 1991). Four considerations made then by a court when determining the *necessity* of awarding attorney fees as part of a domestic relations action are still made today, where attorney fees are sought under S.D.C.L. § 15-17-38: (1) the property owned by each party; (2) their relative incomes; (3) whether the parties' property comprises fixed or liquid assets; and (4) whether either party's actions unreasonably increased the time spent on the case. *Compare, e.g., Kier v. Kier,* 454 N.W.2d 544, 547-48 (S.D. 1990)*, with Schieffer v. Schieffer*, 826 N.W.2d 627, 644 (S.D. 2013). The Court was unable to find any reported decision regarding attorney fees in a mechanic's lien foreclosure action in South Dakota where a similar comparison of each party's financial wherewithal was made, so none is made here.

> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
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> (8) whether the fee is fixed or contingent.

City of Sioux Falls v. Kelley, 513 N.W.2d at 111. The court may also compare the reasonableness of the fees and costs sought to the amount in dispute, *see Wald, Inc.*, 706 N.W.2d at 631, compare the actual recovery to the fees sought, *Crisman v. Determan Chiropractic, Inc.*, 687 N.W.2d 507, 515 (S.D. 2004), *cited in Wald, Inc.*, 706 N.W.2d at 630-31, and consider whether the party took consistent legal positions, engaged in any unnecessary discovery, prepared and presented its case efficiently and economically or whether the attorney provided services not directly related to the matter at hand, *Duffield Const., Inc. v. Baldwin*, 679 N.W.2d 477, 483 (S.D. 2004).[16] No single factor is determinative; they all must be considered. *Crisman*, 687 N.W.2d at 514. Further, the phrase "warranted and necessary" in § 44-9-42 does not limit instances where a court may award fees or prescribe that it be applied punitively against the nonprevailing party, but instead directs the court to consider the several factors set forth above. *Wald, Inc.*, 706 N.W.2d at 630-31.

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[16]The Court was unable to find any attorney fee decision related to a mechanic's lien foreclosure in which the South Dakota Supreme Court countenanced a comparison of the attorney fees sought to the attorney fees incurred by the opposing party. *See, e.g., Eagle Ridge Estates Homeowners Ass'n, Inc. v. Anderson*, 827 N.W.2d 859, 868 (S.D. 2013) (where entitlement to fees arose under an agreement between the parties, the Supreme Court found the trial court did not abuse its discretion in awarding certain fees where the trial court considered, among other factors, whether the results obtained were proportionate to the amount at issue and also whether the prevailing party's attorney fees were proportionate to the opposing party's attorney fees).

There was some record on a handful of the *City of Sioux Falls v. Kelley* factors. The record shows SOD's initial claim in state court was $2,114,975.49, plus interest and allowed costs. The record also shows the results SOD has obtained to date: $205,104.07 in principal and $109,014.22 in pre-petition interest. The disparity is obvious, with SOD losing as many, if not more, issues than it won in the litigation.

As to the experience, reputation, and ability of the lawyers performing the services, SOD's pre- and post-petition attorneys, excluding the attorneys from Wilkinson & Wilkinson and some nonbankruptcy associates at the other firms, are well known to the court on *bankruptcy law* matters and have varying reputations and skills. SOD informed the Court Wilkinson & Wilkinson was retained at an hourly rate, and that appears to be true of its other attorneys as well. The record, however, did not allow the Court to compare SOD's attorneys' hourly rates with the customary rates charged for similar civil matters–this Court only having knowledge of current hourly rates for bankruptcy-related matters.[17] SOD offered no evidence regarding the time and labor required for similar civil matters versus the time and labor its several attorneys actually spent. SOD offered no record on the novelty or difficulty of the

[17]With its application, SOD filed an affidavit from one attorney from each firm it had employed. Each affidavit was similar and contained a generic statement that "[t]he hourly rates of compensation for those attorneys and paraprofessionals performing services for [this firm] are comparable to rates charged by other practitioners having the same amount of experience, expertise, and standing for similar services in this jurisdiction[,]" but the affidavits did not set forth each particular attorney's experience in the relevant fields of practice or establish the paraprofessionals were certified. *See In re Yankton College*, 101 B.R. 151, 159 (Bankr. D.S.D. 1989).

legal and factual questions presented. Further unknown was whether the construction-related aspects of the case took special legal expertise. SOD did not establish whether its case precluded its attorneys from other work.

The record shows SOD sought $2,114,975.49, plus interest and allowed costs, and incurred $502,739.89 in attorney fees, sales tax on the attorney fees, and expenses incurred by the attorneys. Without a record regarding the reason for SOD's multiple attorneys, including two firms after Debtor filed bankruptcy, and what precipitated the protracted nature of the litigation, and without knowing whether SOD and Debtor both maintained consistent legal positions, the two figures could not be adequately compared, one of the factors found in *Wald, Inc.*, 706 N.W.2d at 631.

Finally, the record permitted the Court to assess, to a limited extent, whether SOD prepared and presented its case efficiently and economically, a factor from *Duffield Const., Inc.,* 679 N.W.2d at 483. SOD's attorneys' itemization of services attached to its application indicated discovery prior to Debtor's bankruptcy was inexplicably very protracted and there was some testimony at trial that at least one survey was slow to be exchanged. The parties, however, did not appear to engage in excessive *post-petition* discovery. The record indicates SOD's "truck count" method of calculating what it believed Debtor owed it originated some time after SOD billed Debtor, some time after SOD filed its mechanic's lien statement, and some time after SOD filed its state court pleading, since none of these documents reference a trunk count for billings by SOD to Debtor. However, when SOD actually first

advanced the truck count method to Debtor is unknown and whether SOD consistently advanced that billing method thereafter is also unknown.[18] SOD's attorneys did come to trial prepared for each witness. The trial was significantly lengthened, however, by SOD's presentation of multiple witnesses who offered nearly identical accounts regarding loads of dirt they hauled and their personal assessments of the depth of the pits from which the dirt was taken. The pre-trial preparation and trial were also protracted by SOD's unflagging challenge of the expertise and credibility of one of Debtor's witnesses. As noted above, the available record also did not allow the Court to assess whether SOD's fees for preparing and presenting its case at trial were increased by inconsistent positions or other actions taken pre-trial by Debtor or Debtor's attorneys. The parties' respective arguments on this factor remained just that: argument, not evidence.

When these several factors are considered in light of the record offered, the Court is left with more questions than answers and without a sufficient factual foundation on which to award fees. But for the legal hurdles discussed above, SOD might be entitled to some fees, but what those allowable fees might be cannot be gleaned from this record. The Court could 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

[18]As Debtor complained, SOD's documentary support for its unpaid claim was problematic from the get-go.

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). Moreover, if it were to do otherwise, the Court would be shouldering SOD's burden and be left to find, essentially unaided, the necessary foundational needles in a haystack of documents and argument. *Caban Hernandez v. Philip Morris USA, Inc.*, 486 F.3d 1, 8 (1st Cir. 2007) (discussing failure of opponent to summary judgment motion to abide by local rule regarding citations to the record).

For similar reasons, SOD's attorney fee request would also not pass the reasonableness requirement of 11 U.S.C. § 506(b): The record is insufficient.

> "Reasonable" fees under § 506(b) are [ ] those necessary to the collection and protection of a creditor's claim. *In re Reposa*, 94 B.R. 257, 261 (Bankr. D.R.I. 1988). They may include seeking adequate protection and participation in the bankruptcy proceeding until the collateral is sold, a plan is confirmed or the case is converted or dismissed. *Matter of Nicfur-Cruz Realty Corp.*, 50 B.R. 162, 167-68 (Bankr. S.D.N.Y. 1985). It is inherently unreasonable, however, to seek reimbursement for fees "that are not cost-justified either by the economics of the situation or necessary to preservation of the creditor's interest in light of the legal issues involved." [*Nicfur-Cruz Realty Corp.*,] 50 B.R. at 169.
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> The court in [*In re Wonder Corp. of America*, 72 B.R. 580, 591 (Bankr. D. Conn. 1987),] set forth a number of factors that a court may consider in determining the reasonableness of fees under § 506(b). Those factors are: (1) whether the legal services are authorized by the loan agreement [and now also by state statute]; (2) whether the legal services are necessary to promote the client's interest; (3) whether the legal services are permitted under applicable law, including the Bankruptcy Code; (4) whether the legal services are compatible with bankruptcy policy as derived from relevant provisions of the Bankruptcy Code and the judicial decisions which construe it; (5) whether the time spent is appropriate to

> the complexity of the task; (6) whether the hourly rate is appropriate under applicable bankruptcy standards; (7) whether the task has been assigned to the fewest and least possible senior attorneys able to render the service in a competent and efficient manner; (8) whether the fee should be adjusted to reflect duplicative services rendered by attorneys representing other parties with a common interest in the case; and (9) whether the fee should be adjusted to reflect the court's observation of the nature of the case and the manner of its administration. *Wonder Corp.*, 72 B.R. at 588-8[9].

Kroh Bros. Dev. Co., 105 B.R. at 521, *cited with approval in In re Gregg*, ___ B.R. ___, 2014 WL 7932749, at *7 (Bankr. D.S.C. Dec. 19, 2014).

There is no dispute the legal services set forth in SOD's application were actually rendered at the hourly rates specified. There is no indication the services were incompatible with bankruptcy policy or judicial decisions that construe it. SOD offered no record, however, on whether all the services were necessary to protect its interests, whether the time spent was appropriate to the complexity of the task, whether the hourly rates were consistent with such rates in state court, whether the fewest and least senior attorneys possible worked on the matter in a competent and efficient manner, or whether any duplicative or unnecessary services were redacted prior to submission of the application. Again, most problematic, there was no record explaining SOD's string of attorneys or its retention of two firms after Debtor filed bankruptcy and no record establishing whether SOD and Debtor both maintained consistent legal positions throughout the duration of their dispute. Thus, the record did not permit the Court to assess whether an adjustment to the fees was appropriate in light of the nature of the proceeding and how it was administered. Accordingly,

without this foundational record, reasonable fees could not be ascertained.

Finally, regardless of whether SOD's application is considered under §§ 44-9-40 and 44-9-42 or under § 506(b), two of its attorneys' itemizations of services were deficient.[19] *See DeHaven*, 753 N.W.2d at 443-46; *Kroh Bros. Dev. Co.*, 105 B.R. at 522. Nearly all Attorney Thomas M. Tobin's itemizations of services rendered and over 30% of Wilkinson & Wilkinson's itemizations were not sufficiently specific to allow the Court to determine the nature of the services rendered, whether the particular service was necessary, and whether the time actually spent and the charge for the service were reasonable.[20]

III.
Post-petition Interest

When a claim against a bankruptcy estate is fully secured, the claim holder is allowed "interest on such claim" under 11 U.S.C. § 506(b). While the "fees, costs, or charges" also allowed a fully secured creditor under § 506(b) must be "provided for under the agreement or State statute under which such claim arose" and must be "reasonable," § 506(b) does not similarly define or limit the allowed interest. *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989).

What interest rate should apply post-petition to a fully secured claim under § 506(b) is an evolving area of law in non-reorganization cases. *Compare, e.g.,*

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[19]*See also supra* note 17.

[20]In fact, all the firms' itemizations were occasionally deficient, especially regarding the nature and purpose of telephone calls and e-mails.

11 U.S.C. § 1123(d) (amount necessary to cure a default through a plan is determined by the underlying agreement and applicable nonbankruptcy law). Many courts presumptively apply the rate set forth in the parties' agreement or applicable nonbankruptcy law. *White v. Coors Distributing Co.* (*In re White*), 260 B.R. 870, 879 (B.A.P. 8th Cir. 2001); *In re Value Recreation, Inc.*, 228 B.R. 692, 696 (Bankr. D. Minn. 1999) (citing *Prudential Ins. Co. of America v. Monnier* (*In re Monnier Bros.*), 755 F.2d 1336, 1338 (8th Cir. 1985)). *See In re Bryant*, 439 B.R. 724, 739-40 and 740 n.16 (Bankr. E.D. Ark. 2010). Others apply the rate set forth in the parties' agreement or applicable nonbankruptcy law *unless* the court finds equity dictates a different rate. *The Prudential Ins. Co. of America v. SW Boston Hotel Venture, LLC* (*In re SW Boston Hotel Venture, LLC*), 748 F.3d 393, 413-14 (1st Cir. 2014) (court may analyze rate using federal equitable principles); *Northeast Indus. Dev. Corp. v. ParkStone Capital Partners, LLC* (*In re Northeast Indus. Dev. Corp.*), 513 B.R. 825, 845 (Bankr. S.D.N.Y. 2014) (court may consider whether there has been creditor misconduct, the agreed or statutory rate would harm unsecured creditors, or the agreed or statutory rate would impair the debtor's fresh start).

Even assuming equitable considerations may be made, the Court finds no reason in this case not to apply the 10% rate provided by state law. *See In re Payless Cashways, Inc.*, 287 B.R. 482, 489 (Bankr. W.D. Mo. 2002).[21] The statutory rate,

[21]Even absent state law awarding interest to SOD as a mechanic's lien holder, SOD would still be entitled to interest on its oversecured claim pursuant to § 506(b). Accordingly, unlike with attorney fees and costs, the Court need not consider whether

though certainly well above market rate, reflects what SOD would have received had Debtor's bankruptcy not intervened to halt the state court action. *Travelers Cas. & Sur. Co. v. Pacific Gas*, 549 U.S. 443, 450-52 (2007) (an interest in bankruptcy should be analyzed under the nonbankruptcy law that created it unless some federal interest requires a different result). Further, the record regarding this application, as the Court previously noted in its amended claim decision (adv. doc. 328), is insufficient for the Court to conclude there has been creditor misconduct.

The last issue is the date to which post-petition interest should run. In a chapter 11 case, post-petition interest continues until the claim is paid or the effective date of the plan. *Rake v. Wade*, 508 U.S. 464, 468 (1993). However, as has been known almost from the beginning, there will not be a confirmed plan in this chapter 11 case. The active parties have also repeatedly advised the Court Debtor will seek conversion to chapter 7. Funds to pay SOD's claim were placed in escrow after the closing on the sale of Debtor's real property, thus ensuring SOD would be paid. Further, all the litigation since the May 2014 trial has been occasioned largely by SOD, including an unexpected kerfuffle in determining SOD's allowed pre-petition interest and a second delay while SOD prepared and filed its application for attorney fees and other costs. Finally, despite the Court's request in its amended claim decision (adv. doc. 328), SOD did not offer in its application or supporting documents any guiding law from this circuit that indicates what interest cut-off date should be used.

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under state law SOD may recover interest only if it were the plaintiff commencing a foreclosure action to receive interest on its claim.

Accordingly, under these atypical circumstances, the Court will allow post-petition interest on SOD's allowed secured claim through the conclusion of the claim trial in Adv. No. 13-1016, which was May 30, 2014. *Cf. Consumers Realty & Development Co. v. Goetze* (*In re Consumers Realty & Development Co.*), 238 B.R. 418 (B.A.P. 8th Cir. 1999) (bankruptcy court's disallowance, on equitable grounds, of interest on claim held by certain creditor involved in debtor's two successive chapter 11 cases upheld). As calculated by SOD, that interest is $17,700.76 (bankr. doc. 990).

When SOD's allowed post-petition interest of $17,700.76 is added to its allowed principal claim of $205,104.07 (adv. doc. 328) and its allowed pre-petition interest of $109,014.22 (adv. doc. 348), SOD's total allowed secured claim is $331,819.05. An order will be entered setting forth SOD's total allowed secured claim. The order will be reflected in the final judgment entered in Adv. No. 13-1016.

Dated: April 10, 2015.

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