UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
ROOM 211
FEDERAL BUILDING AND U.S. POST OFFICE
225 SOUTH PIERRE STREET
PIERRE, SOUTH DAKOTA 57501-2463

IRVIN N. HOYT
BANKRUPTCY JUDGE

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August 10, 2009

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Subject: *In re Tri-State Ethanol LLC*
Chapter 7, Bankr. No. 03-10194

Dear Counsel:

The matter before the Court is Trustee John S. Lovald's Motion to Compel First Dakota to Answer Interrogatories (doc. 2730) and First Dakota National Bank's Resistence (doc. 2732). This is a core proceeding under 28 U.S.C. § 157(b)(2). This letter decision and accompanying order shall constitute the Court's findings and conclusions under Fed.Rs.Bankr.P. 7052 and 9014(c). As set forth below, the trustee's motion will be granted.

Summary. Trustee John S. Lovald is seeking discovery regarding First Dakota National Bank's ("Bank") Section 506(b) Motion for Allowance of Attorneys' Fees, Service Tax and Costs of Oversecured Creditor (doc. 2665). He presented ten interrogatories to Bank. Nine requested additional details and summary information regarding fees sought related to Bank's different § 506(b) motions and related appeals. The tenth asked Bank to explain why Attorney Michael F. Marlow needed to be included in communications between Attorney Scott M. Perrenoud and Wayne Williamson, a Bank officer, regarding bankruptcy issues arising after Bank received over $9 million dollars in principal and interest from the bankruptcy estate. Bank objected to the interrogatories, saying, as to the first nine, its fee itemization provided sufficient information and

saying, as to the tenth, the interrogatory was vague, overly broad, unduly burdensome, and would take considerable time and review to answer. Bank also then provided a general answer to the tenth question, and espoused the trustee himself had employed multiple attorneys.

Trustee Lovald filed a Motion to Compel First Dakota to Answer Interrogatories (doc. 2730). In his motion, Trustee Lovald says Bank needs to answer the interrogatories because Bank's attorneys' itemizations do not adequately identify the legal services rendered. In particular, Trustee Lovald says Bank's attorneys described numerous services as "506(b)" but failed to specify which § 506(b) motion the particular service related.[1] He says he cannot decipher this information from the attorneys' itemizations himself because only the attorneys have the ability to further identify the services rendered.[2]

In its resistance (doc. 2732), Bank, relying on Fed.R.Bankr.P. 7033 and Fed.R.Civ.P. 33(d), says Trustee Lovald can, as easily as it, massage the fee itemizations, reorganize them by the particular § 506(b) motion and related appeals, and create another category for non § 506(b) services and calculate totals for each. While Bank acknowledges it has the burden of proof on its § 506(b) request for attorneys' fees, it says it does not need to present the voluminous records requested by the trustee in order to meet that burden.

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[1] The Court found five principal motions filed by Bank under § 506(b): two motions for payment of legal fees (docs. 1304 and 2665); two motions to be paid a pre-payment charge (docs. 1457 and 2062); and a claim for additional interest due to an erroneous proof of claim (doc. 2554). The Bank has also filed several related motions and two related appeals.

[2] It was not clear from the Motion to Compel whether Trustee Lovald was also asking the Court to compel Bank to answer the tenth interrogatory, in part because Bank did provide a general answer. To the extent Trustee Lovald was not satisfied with the answer given and believed the tenth interrogatory was included within his Motion to Compel, it appears Trustee Lovald will need to depose Bank's two attorneys to get additional information.

Discussion.[3] As provided by Fed.R.Civ.P. 26(b)(1), "[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party...." Discovery may include interrogatories, Fed.R.Civ.P. 33(a), to which the respondent may provide an answer or specify the business records from which the answer may be derived. Fed.R.Civ.P. 33(d).

If the respondent objects to the interrogatory, under Fed.R.Civ.P. 37(a), a party may request an order compelling the respondent to answer. Before making the motion, he must first confer in good faith with the party failing to make the discovery and make an effort to obtain it without court action. Fed.R.Civ.P. 37(a)(1). Trustee Lovald stated in his motion to compel that he conferred with Bank's counsel in an attempt to resolve the issues, to no avail, and Bank's counsel has not disputed the same.

As noted in Rule 26(b)(1), a party is entitled to discovery information that is relevant to a party's claim. Clearly, how much time Bank spent on its § 506(b) motions and the attendant expenses is relevant. If supplied with more precise information regarding services rendered as to each § 506(b) motion, Trustee Lovald may be in a better position to question the reasonableness of the fees. *See Cody v. CIGNA Healthcare of St. Louis, Inc.*, 139 F.3d 595, 597 n.5 (8th Cir. 1998). Moreover, in its response to the motion to compel, Bank has not disputed the information requested by Trustee Lovald is relevant. *See Connor Pension Corp. Defined Benefit Plan v. Goodnight Cattle Co.*, 2009 WL 454251, at *3 (N.D. Iowa 2009)(party resisting production of requested information bears burden to establish lack of relevancy)(*citing St. Paul Reinsurance Co. v. Commercial Financial Corp.*, 198 F.R.D. 508, 511 (N.D. Iowa 2000)). Thus, the record establishes the information requested is relevant.

The next issue is whether Bank has sufficiently answered the first nine interrogatories by giving Trustee Lovald business records under Fed.R.Bankr.P. 33(d). Bank's response to the interrogatories failed, as required by Rule 33(d), to specify by "category and location" in its attorneys' business records, where

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[3] Since the imposition of sanctions is not yet before the Court, a hearing on the motion to compel was not required. *Lowe v. Veliz (In re Texas Bumper Exchange, Inc.)*, 333 B.R. 135, 138-39 (Bankr. W.D. Tex. 2005).

Bank *knows* the information requested by the trustee may be found.[4] *In re G-I Holdings, Inc.*, 218 F.R.D. 428, 438-39 (D.N.J. 2003)(emphasis added). Moreover, the burden for Trustee Lovald to ferret out the information from the records provided is not substantially the same for him as for Bank because not all the time entries are sufficiently specific as to what particular legal services were rendered. In other words, it does not appear the business records offered contain all the information the trustee has requested, and to the extent they do, the Bank can glean it much more readily than Trustee Lovald. Therefore, the Bank has not complied with the business records option under Rule 33(d), and Trustee Lovald is entitled to an order compelling Bank to answer the interrogatories.

Just granting the trustee's motion may not, however, be sufficiently illuminating. In its response to the trustee's motion to compel, Bank said:

> First Dakota has enlightened the Court as to the work undertaken by providing its detailed billing records. First Dakota does not need and will not use the detailed compilations sought by the Trustee in order to support its 506(b) motion, and the Trustee should be required to bear the time and expense to make those detailed compilations....

To the contrary, Bank is advised its present motion and attendant attorneys' fee itemizations, standing alone, have not enlightened the Court and sufficiently established Bank's right to payment from the estate under § 506(b). *See Tri-State Financial, LLC v. First Dakota National Bank*, 538 F.3d 920, 924 (8th Cir. 2008).

To recover attorneys' fees as an allowed cost under 11 U.S.C. § 506(b, the secured creditor

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[4] In its Answer to Trustee Lovald's interrogatories (doc. 2729) and its resistance to Trustee Lovald's Motion to Compel (doc. 2732), both of which referenced Rule 33(d), it was unclear whether Bank has given Trustee Lovald some billing records in addition to the fee itemization filed with the Court (doc. 2735). Regardless, Bank did not provide Trustee Lovald, as required by Rule 33(d), any guidance where the requested information could be found in the records provided.

> must establish that: (1) it is oversecured in excess of the fees requested; (2) the fees are reasonable; and (3) the agreement giving rise to the claim provides for attorneys' fees. *First W. Bank & Trust v. Drewes (In re Schriock Constr., Inc.)*, 104 F.3d 200, 201 (8th Cir.1997).

White v. Coors Distributing Co. (In re White), 260 B.R. 870, 880 (B.A.P. 8th Cir. 2001). The Court has not heard anyone dispute that elements (1) and (3) have been met. What is at issue is the reasonableness of the attorneys' fees sought by Bank. To determine that, the Court must consider two components: whether the creditor's *actions* were reasonable and prudent in conjunction with protecting the creditor's rights in the collateral, and if so, whether the *itemized fees* related to those actions were reasonable. *Id.* (cites therein); *see McGehee v. Cox (In re Griffin)*, 310 B.R. 610, 617 (B.A.P. 8th Cir. 2004)(fees awarded under § 506(b) may be disallowed if not related to the protection of the creditor's secured claim). In determining whether the fees are reasonable, the Court applies the lodestar formula, which encompasses whether the attorneys' rates and hours expended were reasonable given the attorneys' expertise and the complexity of the case presented. *White*, 260 B.R. at 880. The secured creditor bears the burden of proof. *Id.*

How much time was spent on a *particular* § 506(b) motion or other necessary post-petition matters by Bank and its counsel and what specific legal tasks were performed related to each action are not readily apparent from Bank's present § 506(b) motion and the attendant fee itemization, especially where some entries are cryptic in nature and where an appeal of one of Bank's § 506(b) motions may have overlapped time spent preparing and litigating another. Moreover, there is nothing in Bank's motion or fee itemization to explain the necessity of two experienced attorneys working on some matters simultaneously and why recovery of its entitlements under § 506(b) stretched over several years following payment of its original claim for principal and interest. All that information falls within Bank's province and is necessary to establish its *actions* were reasonable and that the attorneys' *fees* related to those action were also reasonable. *Id.*; *Vantage Investments, Inc. v. Loc Nguyen Corp. (In re Vantage Investments,*

Inc.), 385 B.R. 670, 694-95 (Bankr. W.D. Mo. 2008).[5] Thus, it may be more helpful to the Court if Bank makes its own compilations and summaries in light of its burden under § 506(b).[6]

An order granting Trustee Lovald's Motion to Compel First Dakota to Answer Interrogatories will be entered. Bank will be given 30 days to answer the interrogatories. Since those 30 days

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[5] As noted in *Vantage Investments*, 385 B.R. at 694-95,

> [t]he creditor bears the burden of proof on each of these various elements. [*In re*] *Harvey*, 2004 WL 1146628 at *3 [(Bankr. W.D. Mo. May 19, 2004)]; *White*, 260 B.R. at 880; [*In re*] *Cushard*, 235 B.R. [902,] 906 [(Bankr. W.D. Mo. 1999)]; [*In re Kroh Brothers Development Co.*,], 105 B.R. [515,] 520 [(Bankr. W.D. Mo. 1989)]. An applicant must provide supporting documentation that describes the nature of the services in sufficient detail to permit the court to determine that they are authorized by the agreement, necessary and reasonable. *Harvey*, 2004 WL 1146628 at *3; [*In re*] *Spidel*, 207 B.R.[882,] 887[(Bankr. W.D. Mo. 1997)]. Accordingly, whenever the "itemization of work performed is not sufficiently specific to identify the services rendered, the charges for those services will be disallowed." *Kroh*, 105 B.R. at 522 quoting *In the Matter of Interstate Stores, Inc.*, 437 F.Supp. 14, 16 (S.D.N.Y.1977). The court may also disallow or reduce entries it finds are duplicative or unnecessary. *Spidel*, 207 B.R. at 887. Overall, the court has broad discretion in determining the amount of fees to be allowed. [*In re*] *Thomas*, 186 B.R. [470,] 477 [(Bankr. W.D. Mo. 1995)]; *Kroh*, 105 B.R. at 520.

As aptly stated by Bankruptcy Judge Robert J. Kressel, "the touchstone of any [§ 506(b)] analysis is a determination of what a creditor would spend if the creditor was paying the attorney's fees and costs rather than having the ability to pass those fees and costs on to the debtor." *In re Smoots*, 230 B.R. 140, 144 (Bankr. D. Minn. 1996).

[6] If Bank makes its own compilation or summaries or decides to offer testimony in support of its motion, it should share that information with Trustee Lovald before the hearing. If Trustee Lovald is satisfied, it may prevent duplicative work.

will take the matter beyond the scheduled hearing date of August 25, 2009, the Court will also grant Trustee Lovald's Motion to Enlarge Discovery Deadline (doc. 2738) and give the parties until September 15, 2009 to complete discovery. The August 25, 2009 hearing on Bank's Section 506(b) Motion for Allowance of Attorneys' Fees, Service Tax and Costs of Oversecured Creditor (doc. 2665) will be rescheduled to September 23, 2009 in Sioux Falls.

Sincerely,

Irvin N. Hoyt
Bankruptcy Judge

INH:sh

cc: case file (docket original; serve parties in interest)

On the above date, a copy of this document was mailed or faxed to the parties shown on the Notice of Electronic Filing as not having received electronic notice and Debtor(s), if Debtor(s) did not receive electronic notice.

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

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